IN THE CIRCUIT COURT OF THE COUNTY OF SAINT LOUIS
STATE OF MISSOURI

CAROL FREEMAN,	)	
	)	
Plaintiff,	)	
	)	Cause No. 13SL-CC03222
v.	)	
	)	Division No. 3
CBL & ASSOC. PROPERTIES, INC., *et al.*,	)	
	)	
Defendants.	)	

MEMORANDUM, ORDER AND JUDGMENT

Now before the Court is "Apple Inc.'s Motion for Summary Judgment on Cross-Claim against West County Shoppingtown, LLC", filed on May 29, 2015. The Motion was called, heard, and taken under submission on September 25, 2015. Having considered the filings, the arguments of counsel, the pertinent authorities, and now being duly advised in the premises, the Court enters its order and judgment.

In this action, Plaintiff asserts she was injured on an escalator while visiting West County Mall to attend a tutorial being held by Apple, Inc., which is a tenant in the mall. She has sued the owner of the mall, the property management company, and Apple seeking compensation for her injuries. Apple, in turn, asserted a cross-claim against the mall's owner, West County Shoppingtown, LLC (hereinafter, the "Mall"), asserting in two counts that it has no liability to Plaintiff because she was injured in a "common area" as that term is defined in the lease between Apple and the Mall, and that consequently any duty allegedly breached in this case was the Mall's as landlord. Apple asserts that, also pursuant to the lease, it is entitled to an indemnification and a defense as well as attorney's' fees in this action. Apple alleges that Plaintiff was not injured through any fault or omission on its part and that it has on several

occasions demanded that the Mall indemnify it and provide a defense in this action. Plaintiff dismissed her counts against Apple on May 21, 2015.

On Apple's Motion, the parties have filed extensive briefs and lengthy statements of facts, in addition to lengthy disputation of those facts. However, the Court concludes that, for purposes of Apple's claims stated in its Motion, there are no material facts in dispute[1], and accordingly the only question for this Court to determine is whether Apple has established "a right to judgment flowing from" those facts. *U.S. Fid. & Guar. v. Drazic*, 877 S.W.2d 140, 142 (Mo.App. E.D. 1994).

Whether Apple is entitled to summary judgment turns upon the interpretation of the lease it has with the Mall. The interpretation of a "lease agreement is a question of law". *AB Realty One, LLC v. Miken Techs., Inc.*, 466 S.W.3d 722, 728 (Mo.App. E.D. 2015). Leases are interpreted "according to the rules of construction governing contracts." *Id.* at 729. The "cardinal rule in the interpretation of a contract is to ascertain the intention of the parties and to give effect to that intention." *Edgewater Health Care, Inc. v. Health Sys. Mgmt., Inc.*, 752 S.W.2d 860, 865

[1] While the parties attempted to "dispute" each other's "facts", there are several problems with these disputes or the "facts" as alleged themselves. The Court will not identify each and every defective fact statement or dispute, but rather will broadly outline the problems. For instance, many of the "facts" asserted by both parties are nothing more than legal conclusions. Legal "conclusions are not facts and, whether deemed admitted or not, cannot support the entry [or denial] of summary judgment." *Jordan v. Peet*, 409 S.W.3d 553, 560 (Mo.App. W.D. 2013); *Rycraw v. White Castle Sys., Inc.*, 28 S.W.3d 495, 498 (Mo.App. E.D. 2000) (For purposes of summary judgment, "[l]egal conclusions are not binding on [the opposing party] or the court."). In other instances, the Mall, in attempting to dispute facts as set forth by Apple, did not do so by reference to any "discovery, exhibits, or affidavits", and accordingly those facts are deemed admitted. *Autry Morlan Chevrolet Cadillac, Inc. v. RJF Agencies, Inc.*, 332 S.W.3d 184, 191 (Mo.App. E.D. 2010). Moreover, many of the facts set forth by the Mall in its additional statement constituted nothing more than the opinions of a lay witness as to what she believes Apple's legal duties ought to be. Only "evidence that is admissible at trial can be used to sustain or avoid summary judgment." *United Petroleum Serv., Inc. v. Piatchek*, 218 S.W.3d 477, 481 (Mo.App. E.D. 2007). Generally, lay witnesses are prohibited from rendering "an opinion as to the ultimate issue in a case", which is precisely what the Mall was attempting to do. *Mohr v. Mobley*, 938 S.W.2d 319, 322 (Mo.App. W.D. 1997). Finally, the Court notes that it is "[o]nly genuine disputes as to *material* facts that preclude summary judgment." *Central Trust & Inv. Co. v. Signalpoint Asset Mgmt., LLC*, 422 S.W.3d 312, 319 (Mo. 2014). For purposes of summary judgment, a "material fact" is "one from which the right to judgment flows." *Id.* Stated another way, a fact is "material" if it has "legal probative force and effect as to a controlling issue." *Olson v. Auto Owners Ins. Co.*, 700 S.W.2d 882, 885 (Mo.App. E.D. 1985). Many of the facts asserted by both parties were simply not material to the question presented by Apple's Motion, and had no "probative force" or "effect as to a controlling issue."

(Mo.App. E.D. 1988). Where "there is no ambiguity in the contract the intention of the parties is to be gathered from it and it alone, and it becomes the duty of the court and not the jury to state its clear meaning." *Id.* Moreover, it must be stressed that mere "disagreement about the interpretation of terms" in a contract by the parties does not transmute the interpretation into a "dispute of fact" but rather it remains a "question of law properly decided by the trial court." *Webbe v. Keel*, 369 S.W.3d 755, 756 (Mo.App. S.D. 2012). Whether the contract is ambiguous "is a question of law." *Edgewater Health Care*, 752 S.W.2d at 865. A contract is ambiguous "only when it is *reasonably* susceptible of different constructions." *Id.* (emphasis added).

Having thoroughly reviewed the lease, the Court concludes that it is not ambiguous, and is only reasonably susceptible to one interpretation. The lease provides that the Mall "agrees to indemnify and hold [Apple] harmless from and against all claims, liabilities, losses, damages, and expenses for injury to or death of any person...in or upon the Common Areas which result from claims by third parties relating to the Common Areas, except to the extent such claim is based upon an act or omission of Tenant, any subtenant, licensee, concessionaire, or assignee of Tenant... In case [Apple] shall, without fault, be made a party to any such litigation, then [the Mall] shall protect and hold Tenant harmless and shall pay all reasonable costs, expenses and attorneys' fees incurred or paid by [Apple] in connection with such litigation."

It is an undisputed material fact that Plaintiff was injured on an escalator, which is located in and part of the "common area" of the shopping mall as that term is defined by the lease. Both by the terms of the lease and by the common law of this State, the landlord, here the Mall, had the duty to maintain these facilities and keep them safe for invitees. *See Paster v. City of St. Louis*, 706 S.W.2d 517, 519 (Mo.App. E.D. 1986) (landlords of shopping centers have duty to keep common areas safe for invitees, regardless of whether tenant invites customers or the

landlord does). Thus, both the lease terms themselves and the common law impose duties to maintain the escalator in question and keep it reasonably safe for invitees upon the landlord and the landlord alone. The Mall has not cited to this Court any case law suggesting, based on the facts of this case, that the tenant Apple had any duty to this particular invitee, nor has the Court found any through its own independent research. The Court concludes that the Mall has not pleaded—nor can it plead—any facts suggesting that the Plaintiff herein was injured based on any "act or omission" of Apple, and the Court further concludes that Apple was joined in this lawsuit "without fault." Accordingly, the Mall was required to indemnify Apple and pay its litigation expenses, including attorneys' fees, and its failure to do so constitutes a breach of its contract with Apple.

The Mall has argued that Apple is not entitled to the full amount of attorneys' fees as demanded for the reason that attorney's fees incurred while seeking to enforce an indemnification provision are not themselves collectible, citing *inter alia Bagby v. Merrill Lynch Pierce Fenner & Smith*, 491 F.2d 192 (8th Cir. 1974). However, Section 27.22 of the lease provides that in any action instituted by either Apple or the Mall relating to the lease, the losing party "shall reimburse the prevailing party for the reasonable expenses of attorneys' fees and all costs and disbursements incurred therein." Our courts have held that when the terms of a contract permit recovery of attorneys' fees for the enforcement of any provision, then such fees incurred in enforcing an indemnity provision are recoverable. *RJF Int'l Corp. v. B.F. Goodrich Co.*, 880 S.W.2d 366, 372 (Mo.App. E.D. 1994). The Court concludes that the fees submitted by Apple are fair and reasonable considering all relevant factors. *Trout v. State*, 269 S.W.3d 484 (Mo.App. W.D. 2008).

The Court concludes that there are no material facts in dispute, and that Apple has demonstrated that it is entitled to judgment at a matter of law. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371 (Mo. 1993). Accordingly, the Court will enter judgment in favor of Apple and against the Mall on its count for breach of contract.

Apple has also moved for summary judgment on its second count against the Mall, for declaratory judgment. This count must be dismissed. The remedies available under the Declaratory Judgment Act and for breach of contract are "mutually exclusive." *Goldfinch Enterprises, Inc. v. Columbia W, L.P.*, 159 S.W.3d 866, 867 (Mo.App. W.D. 2005). This is so because declaratory judgment actions may be asserted only when the claimant lacks an "adequate remedy at law." *Cincinnati Cas. Co. v. GFS Balloons*, 168 S.W.3d 523, 525 (Mo.App. E.D. 2005). Where a claimant "alleges breach of duties and obligations under the terms of a contract and asks [a] court to declare those terms breached" he or she is claiming "nothing more than ... [a] breach of contract"; in other words, if a claimant does have a cause of action for a breach of contract then he or she has an adequate remedy at law, and therefore cannot also assert a cause of action for declaratory judgment.. *Id.* In its declaratory judgment count, Apple seeks nothing more than a declaration that the terms of the lease have been breached and a declaration that its interpretation is the correct one. Because Apple has an adequate remedy at law through its breach of contract cause of action, this count shall be dismissed.

Accordingly, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. Apple Inc.'s Motion for Summary Judgment on its Cross-Claim against West County Shoppingtown, LLC, is hereby GRANTED IN PART.
2. Judgment is hereby entered in favor of Apple, Inc., and against West County Shoppingtown, LLC d/b/a West County Center, on Count I of Cross-Claimant Apple

Inc.'s Cross-Claim against Defendant West County Shoppingtown d/b/a West County Center.

3. Apple, Inc., shall have and recover the sum of Fifty-Five Thousand Seven Hundred Ninety-Three Dollars and Forty-Four Cents ($55,793.44) as damages from West County Shoppingtown, LLC d/b/a/ West County Center on Count I.
4. Apple Inc.'s Motion for Summary Judgment on Cross-Claim against West County Shoppingtown, LLC d/b/a West County Center is DENIED in all other respects.
5. Apple Inc.'s Cross-Claim against Defendant West County Shoppingtown d/b/a West County Center in Count II is DISMISSED WITH PREJUDICE.

SO ORDERED this 4th day of January, 2016:

Sandra Farragut-Hemphill, Circuit Judge
Div. 3

cc: counsel of record