[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

---x

ATLANTIC WALK, LLC

Index No. 107928/06

Plaintiff,

DECISION/ORDER

-against-

JORDAN PARKING CORP. and CROWN PARKING CORPORATION,

Defendants.

---x

EDMEAD, J.S.C.

MEMORANDUM DECISION

Plaintiff Atlantic Walk, LLC ("plaintiff" or "Atlantic Walk") moves for an order: (1) pursuant to CPLR 3212(e) awarding Atlantic Walk partial summary judgment against defendant Jordan Parking Corp. ("Jordan") on the issue of liability on the first and second causes of action set forth in the Verified Complaint herein; (2) pursuant to CPLR 3212(e) awarding Atlantic Walk partial summary judgment against defendant Crown Parking Corporation ("Crown") on the issue of liability on the first and second causes of action set forth in the Verified Complaint herein; (3) severing the counterclaims asserted by defendant Jordan; and (4) setting this matter down for an inquest on the issue of the amount of damages incurred by Atlantic Walk.

Defendants Jordan and Crown (collectively "defendants") cross move for an order pursuant to CPLR 3212 granting summary judgment dismissing the plaintiff's complaint. Defendants argue that dismissal is warranted, *inter alia,* under Navigation Law § 181 because the plaintiff has not demonstrated that the defendants actually caused or contributed to the petroleum contamination of the Premises.

Plaintiff's Contentions

Atlantic Walk sues to recover damages incurred as a result of a discharge of petroleum products and other pollutants at parking lot premises in New York City, located at 415-23 Washington Street, New York, New York (the "Premises"). The Premises was demised to Crown by Atlantic Walk's predecessor, C.H.J. Realty Corp. ("CHJ"), under a net net lease dated December 15, 1995 (the "Lease"). Crown thereafter assigned the Lease to Jordan, but Crown remained liable under the Lease as the original tenant. Crown or its parent, affiliate or subsidiary had operated an open-air parking lot on the Premises for many years before Crown, as tenant, entered into the Lease with Atlantic Walk's predecessor, CHJ, as landlord.

Under the terms of the Lease, Jordan, as tenant, and Crown, as Jordan's predecessor tenant, unequivocally agreed, without reservation or condition, to be responsible for expenditures of any kind or nature, arising out of or relating to the use and occupancy of the Premises. The Lease provides that "Tenant having been in possession of the premises for many years, agrees to accept possession of the demised premises in whatever state or condition the same may be, 'as is' without any representations or warranties by the Landlord as to the condition thereof, latent or patent" (Lease, Article 35). The Lease also provides that "This being a net net lease, Tenant agrees that during the demised term, the Landlord shall not be called upon for any expenditures of any kind or nature under any circumstances whatsoever" (Lease, Article 33).

Atlantic Walk acquired the Premises and succeeded to the rights of the landlord under the Lease in December 2005, whereupon Atlantic Walk terminated the Lease in accordance with its terms, effective April 30, 2006. Paragraph Fifteen of the Lease provides that:

In the event of the sale by the Landlord of the demised premises, or the property

of which said premises are a part, the Landlord or the purchaser may terminate this lease on the thirtieth day of April in any year upon giving the Tenant notice of such termination prior to the first day of January in the same year.

On M ay 1, 2006, Atlantic Walk took possession of the Premises.

Prior to Atlantic Walk's acquisition of the Premises and in or about July 2005, an environmental consultant retained by Atlantic Walk's predecessor performed subsurface soil sampling and groundwater sampling at the Premises. On July 30, 2005, the contamination at the Premises was reported to the NYSDEC and assigned a spill number. According to the report of that survey, there was subsurface petroleum contamination at the Premises in concentrations exceeding the soil remediation action levels of the New York State Department of Environmental Conservation ("NYSDEC"), requiring immediate notification of NYSDEC and thereafter requiring costly investigations, excavations, remediations and other response actions.

Following Atlantic Walk's acquisition of the Premises in or about May 2006, and approximately one year after the NYSDEC assigned a spill number to the contamination at the Premises, NYSDEC ordered Atlantic Walk to commence remediation immediately or face the prospect of paying even higher costs if NYSDEC itself were to undertake the remediation to remove the contamination.

At or about this time, and during the course of excavating soil at the Premises to implement the aforesaid remediation plan, Atlantic Walk's contractors discovered two underground storage tanks at the Premises, which were apparently used to store gasoline. Atlantic Walk was previously unaware of the existence of said underground storage tanks, which were situated approximately six feet below the surface of the Premises, and were paved over by blacktop at some point before plaintiff acquired ownership of the Premises. Atlantic Walk duly

advised NYSDEC of its discovery of the underground storage tanks and was thereafter required by NYSDEC to remove said underground storage tanks.

Under the New York Navigation Law (the "Navigation Law"), which governs releases of petroleum products from underground storage tanks and other contamination such as existed at the Premises, Atlantic Walk, as the owner of the contaminated Premises, is strictly liable for the remediation of petroleum contamination thereon. As a result, Atlantic Walk had no choice but to spend months remediating the petroleum contamination and other contamination from the Premises, digging up and disposing of underground storage tanks, and incurring hundreds of thousands of dollars in costs. The remediation stalled Atlantic Walk's intended development of this valuable parcel and cost Atlantic Walk even more hundreds of thousands of dollars in additional and unexpected carrying charges on its construction loan.

As a matter of law, and based upon the provisions of the Lease, strict liability for these substantial expenditures and damages rests with defendant Jordan, the tenant in occupancy under the net net Lease when Atlantic Walk became the owner of the Premises, and also with defendant Crown, who assigned the Lease and its interests therein to Jordan, but failed to obtain a release of liability from the landlord at the time, CHJ.

The liability of Jordan and Crown is not dependent on fault, nor is it necessary for Atlantic Walk to prove that Jordan or Crown actually caused the pollution. Under the terms of the Lease, Atlantic Walk's strict liability as an owner was shifted to the tenant under the net net Lease, who had taken possession of the Premises in "as is " condition, including any latent or patent defects or conditions (Lease, Article 35), and who had expressly agreed that "the Landlord shall not be called upon for any expenditures of any kind or nature under any circumstances

whatsoever" (Lease, Article 33).

Defendants' Contentions

There is no dispute that the petroleum discharge was caused by leakage from underground storage tanks that were installed by CHJ, plaintiff's predecessor in title to the Premises, that unbeknownst to defendants, had previously used the Premises as a gasoline service station. The defendants never installed, operated or controlled the underground storage tanks, and therefore should not be held liable for remediation costs resulting from the petroleum discharge at the Premises. Neither Crown nor CHJ intended that the tenant under the Lease be responsible for environmental risks associated with the Premises.

Defendants have learned that CHJ elected to close the gasoline service station; however, in doing so, it utterly failed, and indeed blatantly violated applicable Federal Environmental Protection Agency regulations, as confirmed by plaintiff's environmental consultant in a letter dated May 12, 2006, by Francis I. Onaga to Rocco Basile, project manager of plaintiff at Atlantic Walk ("Basile").

When Crown entered into the Lease, the permitted use of the Premises under the terms of the Lease was "parking lot for the parking of motor vehicles." At the time Crown entered into the Lease, there was no indication or discernable evidence that the Property had been previously utilized as a gasoline service station that contained underground storage tanks. CHJ never advised defendants of the Premises' prior use as a gasoline service station or that underground storage tanks had been installed on the Premises.

Further, Crown never occupied the Premises. The term of the Lease commenced on September 1, 1997. By a certain Assignment and Assumption of Lease, dated February 1, 1996,

Crown assigned its right, title and interest under the Lease to Jordan. CHJ has always recognized Jordan as the tenant of the Premises pursuant to the terms of the Lease. Since Crown did not occupy or control the Premises, it cannot be deemed to be a discharger or have any responsibility for the petroleum discharge that occurred at the Premises.

Similarly, since Jordan did not cause the petroleum discharge that occurred at the Premises, it cannot be deemed to be discharger.

Defendants' understanding is that NYSDEC has determined that plaintiff is at fault for said discharge. In a Fact Sheet, dated June 2006, that was prepared by NYSDEC and disseminated to owners of real property near the Premises, NYSDEC expressly states that "[s]oil contamination has been detected at the site due to its previous usage as a retail gasoline station."

At no time have the defendants been advised by NYSDEC that they were being considered as the parties that were responsible for the discharge at the Premises.

The defendants deny that they are required to indemnify plaintiff for remediation costs associated with the discharge at the Premises. As demonstrated by the plain language of the Lease, Crown never agreed to indemnify plaintiff for any costs associated with the removal of underground storage tanks or the discharge of petroleum from said tanks.

Crown did not agree to indemnify the plaintiff for the simple reason that it was completely unaware that such storage tanks existed at the Premises. In order to cover up its blatant violation of applicable environmental laws and regulations, CHJ failed to disclose that the Premises had previously been used as a gasoline service station or that underground storage tanks had been installed on the Premises.

As of the execution of the Lease, Crown reasonably believed that the Premises had

always been used as a parking lot. For this reason, Crown never intended or agreed to reimburse the landlord for costs associated with discharges from the unknown underground storage tanks.

Plaintiff's Reply

There can be no dispute that, under the terms of the net net Lease, Jordan, as tenant and Crown, as Jordan's predecessor tenant, stood in the shoes of Atlantic Walk, as owner, and are therefore, strictly liable under the Navigation Law for all costs associated with the petroleum contamination discovered at the Premises. Further, there can be no dispute that an owner's strict liability under the Navigation Law can be shifted to a tenant under a net net lease.

Defendants disregard the incontrovertible fact that they have, for many years, operated an open-air parking lot at the Premises, a use which clearly furnishes ample opportunity for gasoline and oil leakage from cars parked at the Premises and for run-off from the Premises of any such petroleum product discharges. Defendants contentions that the contamination of the Premises was caused solely as a result of leakage from underground storage tanks and that they are blameless for the admitted contamination of the Premises are not only conclusory and unsubstantiated, but are at odds with the clear and unambiguous provisions of the Lease.

As a matter of law, defendants are strictly liable for the remediation costs at issue here and partial summary judgment as to such liability should issue herein. Defendants' cross motion for summary judgment dismissing Atlantic Walk's complaint, premised on mere speculation and unsubstantiated conclusions, should be dismissed.

According to the affidavit of Mostafa el Sehamy ("Sehamy"), the President and Senior Hydrogeologist of Hydro Tech, the petroleum and other contamination was not related solely to the presence of underground storage tanks, nor is it even relevant how the Premises became

contaminated. So long as there is contamination there, from whatever source and arising at whatever time, the owner is strictly liable under Section 181 of the Navigation Law, to remediate, and is responsible for any and all costs associated with that remediation.

Sehamy states that based upon his investigation and the data analyses, it is not possible to state with any reasonable degree of engineering certainty that the contamination at the Premises resulted solely and exclusively from the underground storage tanks or from any other specific source. One cannot rule out all possible causes of the petroleum contamination at the Premises, which contamination could likely have resulted from sources other that the underground storage tanks, including but not limited to run-off from cars and other vehicles parked at the parking lot, tank-filling overflows, urban fill, and other possible sources.

If, as defendants argue, their fault is at issue, which it should not be as a matter of law, then issues of fact exist that preclude summary judgment in defendants' favor.

Defendants cannot seriously expect the court to believe that Crown entered into the net net Lease in total ignorance as to the prior condition or use of the Premises. Even if Crown did engage in absolutely no due diligence whatsoever before it signed the Lease, that would be no defense to liability, because Crown took the Premises "as is" and subject to any apparent or latent defects and conditions (Lease, Article 35).

There is no determination from the NYSDEC as to Atlantic Walk causing the pollution contamination as defendants erroneously infer. In point of fact, the spill number assigned to the Premises (0505263) was assigned on July 30, 2005 when the spill was reported. Atlantic Walk did not purchase the property until December 2006.

Defendants' reliance on a May 15, 2006 letter from the NYSDEC, to Mr. Brasile, is

entirely misplaced. The purpose of that letter, as expressly stated therein, was "to obtain [Atlantic Walk's] commitment to clean up and remove the discharge of petroleum, which occurred at 415 Washington Street, Manhattan, New York." Atlantic Walk is the owner of the Premises and is, pursuant to the Navigation Law, responsible to clean up the discharge. Atlantic Walk certainly could not have caused the discharge because it was reported on July 29, 2005 before Atlantic Walk purchased the Premises, when Hydro Tech made an investigation and rendered its Report.

Finally in paragraph 44 of Martin Lipson's affidavit, he states without qualification that "[i]t is undisputed that the plaintiff terminated the Lease as of April 30, 2006." This unqualified admission precludes Jordan from claiming a wrongful eviction and from maintaining any of Jordan's six counterclaims, which are all premised on the assumption that Atlantic Walk did not properly terminate the Lease as of April 30, 2006, and that the Lease should have run to August 31, 2007, its stated expiration date.

Jordan cannot have it both ways. It cannot, on the one hand, argue that it has no liability under the terms of the net net Lease for remediation costs incurred by Atlantic Walk after Atlantic Walk reclaimed possession of the Premises in May 2006, and on the other hand argue that the Lease was ineffectively terminated and should have continued through August 31, 2007 in support of its counterclaims.

Defendants' Reply

The defendants have established that they are not liable to plaintiffs under the Navigation Law since they were not dischargers of petroleum. Plaintiff's moving papers, as well as those submitted by defendants in support of their cross-motion, demonstrate that the underground

storage tanks were installed prior to the execution of the Lease by a former owner of the property who utilized the property as a gasoline service station.

According to Mr. Lipson, Crown never agreed to indemnify plaintiff for any costs associated with the removal of underground storage tanks or the discharge of petroleum from said tanks.

Plaintiff's arguments claiming an issue of fact as to the cause of the petroleum leak, lack merit. Both the Basile affidavit and the Sehamy affidavit are inconsistent with the documentary evidence that has been presented by both the plaintiff and the defendants. In particular, both affidavits directly contradict a Phase II environmental report that was prepared by Hydro Tech Environmental Corp., dated July 29, 2005.

There is no issue that the underground storage tanks were directly associated with the prior use of the property as a gasoline station. Thus, plaintiff's environmental consultant confirmed that prior to the closure of the gasoline station, the prior owner failed to properly dispose of the underground storage tanks in compliance with Environmental Protection Agency regulations.

As to Jordan's wrongful eviction claims, they should not be dismissed just because Jordan denies liability for remediation costs.

Analysis

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR § 3212 [b]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002] [defendant not entitled to summary judgment where he failed to produce admissible evidence demonstrating that no triable issue of fact exists as to whether plaintiff would have been successful in the underlying negligence action]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212 [b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212 [b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his

or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 413 NYS2d 650 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912, 411 NYS2d 230 [1978]; *Mallad Const. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290, 344 NYS2d 925 [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347, 668 NYS2d 157 [1st Dept 1998]).

Navigation Law § 170 *et seq.*

The Navigation Law provides that "[a]ny person who has discharged petroleum shall be strictly liable, without regard to fault" for the costs of remediation (Navigation Law § 181[1]). Reading this provision together with Navigation Law § 172(8), which defines a "discharge" as "any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of petroleum into the waters of the state or onto lands from which it might flow or drain into said water...." (*see State of New York v Speonk Fuel,* 3 N.Y.3d 720, 723, 786 N.Y.S.2d 375, 819 N.E.2d 991 [2004] ; *State of New York v Green,* 96 N.Y.2d 403, 406-407, 729 N.Y.S.2d 420, 754 N.E.2d 179 [2001]; *White v Long,* 85 N.Y.2d 564, 568, 626 N.Y.S.2d 989, 650 N.E.2d 836 [1995]), the Court of Appeals has held that an owner of contaminated property who has control over activities occurring on the property and

reason to believe that petroleum products are stored there may be liable as a discharger (*see State of New York v Green,* 96 N.Y.2d 403, 407, 729 N.Y.S.2d 420, 754 N.E.2d 179 [2001]). Although liability may not be premised solely on ownership of contaminated property, "proof of fault or knowledge" is not required (*id.* at 407, 729 N.Y.S.2d 420, 754 N.E.2d 179). Nor is liability predicated on ownership of the tanks or petroleum system from which the spill issued (*see id.* at 405-406, 729 N.Y.S.2d 420, 754 N.E.2d 179). Rather, the question of whether an otherwise faultless owner is liable as a discharger turns on the owner's "capacity to take action to prevent an oil spill or to clean up contamination resulting from a spill" (*State of New York v Speonk Fuel,* 3 N.Y.3d 720, 724, 786 N.Y.S.2d 375, 819 N.E.2d 991 [2004]).

Thus, a landlord or subsequent purchaser or, as in the instant case, a net net lessee, who was not directly implicated in a discharge may nonetheless be held accountable for remediation costs because its contractual relationship with the party directly responsible for the spill conveys the requisite level of control over activities at the spill site to warrant the imposition of liability (*see id.* at 724, 786 N.Y.S.2d 375, 819 N.E.2d 991; *State of New York v Green, supra* at 407-408, 729 N.Y.S.2d 420, 754 N.E.2d 179). "[T]he owner of the legal title...can control the use of the property, and the activities which occur there, through the terms of the land contract. This degree of control is all that is required for liability" (*State of New York v Dennin,* 17 A.D.3d 744, 745, 792 N.Y.S.2d 682 [2005], *lv. dismissed* 5 N.Y.3d 824, 804 N.Y.S.2d 38, 837 N.E.2d 737 [2005] [citations omitted]).

Plaintiff argues that the Navigation Law does not prevent an owner from shifting the burden of strict liability to another party. The owner would still remain strictly liable for all costs of any required remediation, but would have a means of recouping those costs from the party to

whom the burden has been shifted. The most common means of shifting the owner's burden is by a net lease, similar to the Lease made between Crown and Atlantic Walk's predecessor with respect to the Premises.

Net Net Lease/Lessee

Leases that obligate the tenant to pay all or some operating expenses, including real estate taxes, maintenance, and repairs, are referred to as "net leases, net, net leases, or even net, net, net leases."[1]

When net leases first came into frequent use several decades ago, a distinction often was made between a net lease, a net-net lease, and a net-net-net lease. A net lease passed through to the tenant one type of operating expense--usually the real property taxes on the property (or if the tenant leased only a portion of the building, its pro rata share). A net-net lease passed along to the tenant two types of operating expenses--usually real estate taxes and maintenance and repair costs, while a net-net-net (or triple net) lease passed through to the tenant all the operating costs of the property. These distinctions are little used today. Net leases may vary in so many different ways that only by describing the terms of a particular lease can the degree of "netness" be determined.[2]

Net lease provisions are typically presumed to impose the responsibility for *all* expenses

---

[1] The Law of Real Estate Financing Database updated July 2007 Michael T. Madison, Jeffry R. Dwyer, and Steven W. Bender Chapter 8. Secondary Financing, Refinancing, and High-Ratio Financing II. High-Ratio Financing § 8:49. High-credit lease financing

[2] Real Estate Leasing Practice Manual Database updated April 2007 Alvin L. Arnold and Jeanne O'Neill Part II. Complete Leases Chapter 55. Net Leases § 55:1. Definition

arising from the property, including the costs of repairs of every nature, upon the tenant (*see, H.K.H. Co. v American Mtge. Ins. Co.*, 490 F.Supp. 1201, 1202, *affd.* 9th Cir., 685 F.2d 315; *Matter of D.H. Overmyer Co.*, 12 B.R. 777, 786 n. 23, *affd.* 30 B.R. 823).

In the instant case, Paragraph Twenty-ninth of the Lease provides as follows:

> Twenty--ninth- -It is the intent of the parties that this is a "net net" lease. The Tenant [Crown] shall and is obligated to pay and discharge all real estate taxes, assessments and payments, duties and impositions, usual and unusual, extraordinary as well as ordinary, whether unforeseen or unknown, included rent and occupancy taxes, any sales and utility taxes, as well as any other charges, or levies that may hereafter be imposed by any governmental authorities and which shall during the term hereby demised become due and payable or become a lien upon the demised premises or any part thereof, as well as any charges that might be imposed for the sidewalks or streets in front of the demised premises, by virtue of any present or future law, rule or regulation of any governmental agency. Tenant further agrees if any summonses are issued by the Environmental Control Board or any other city agency, it shall be Tenant's obligation to comply with and pay any fines imposed by such agencies during the demised term.

Further, Paragraph 33 of the Lease provides that:

> This being a net net lease, Tenant [Crown] agrees that during the demised term, the Landlord shall not be called upon for any expenditures of any kind or nature under any circumstances whatever.

Under the plain meaning of the terms of the net net Lease herein, defendants assumed all of the net net tenant's duties and obligations under the Lease. The defendants as tenant under a net net lease, stand in the shoes of the owner/plaintiff. Further, defendants herein agreed to bear all costs of whatever nature or description relating to the Premises so that the owner would be relieved from any expenditures whatsoever. As such, defendants are strictly liable as an owner for any petroleum or other contamination and associated costs at the Premises.

Although not controlling the case of *Star Nissan, Inc. v Frishwasser*, 253 AD2d 491, 677

NYS2d 145 (2d Dept 1998), is persuasive. In *Star Nissan,* the lease contained paragraphs strikingly similar to paragraph 29 and 33 of the Lease herein. The Second Department in *Star Nissan* found that:

> []the effect of this language was to shift all burdens associated with ownership of the premises, including the obligation to remediate underground contamination, as mandated by Navigation Law § 170 et. seq. to the tenant. When the cited language is considered in the context of the entire lease, the lease's burden-shifting intent is plainly manifested (*see, W.W.W. Assocs. v Giancontieri,* 77 NY2d 157).

"It is a court's task to enforce a clear and complete written agreement according to the plain meaning of its terms, without looking to extrinsic evidence to create ambiguities not present on the face of the document" (*150 Broadway N.Y. Assoc., L.P. v Bodner,* 14 AD3d 1, 6 [2004]). "A contract is ambiguous 'if the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings'" (*Feldman v National Westminster Bank,* 303 AD2d 271 [2003], *lv denied* 100 NY2d 505 [2003]). However, mere assertion by a party that contract language means something other than what is clear when read in conjunction with the whole contract is not enough to create an ambiguity sufficient to raise a triable issue of fact (*Ruttenberg v Davidge Data Sys. Corp.,* 215 AD2d 191, 193 [1995]).

This court concludes that from the provisions of the Lease herein, Jordan, as tenant, and Crown, as Jordan's predecessor tenant, are responsible as owner for remediation costs herein.

And, Atlantic Walk need not prove that Jordan or Crown knew about the environmental conditions at issue here; or that Jordan or Crown caused the environmental conditions at issue herein; or that Jordan or Crown ever actually occupied or did any business at the Premises.

While defendants argue that Article 33 of the Lease did not create an obligation to indemnify the landlord for environmental claims, including the removal of underground storage

tanks or the discharge of petroleum from said tanks, there is no such limitation in this all-inclusive provisions.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the application of plaintiff Atlantic Walk LLC, for an order pursuant to CPLR 3212(e) awarding Atlantic Walk partial summary judgment against defendant Jordan Parking Corp. on the issue of liability on the first and second causes of action set forth in the Verified Complaint herein is granted. It is further

ORDERED that the application of plaintiff Atlantic Walk LLC, for an order pursuant to CPLR 3212(e) awarding Atlantic Walk partial summary judgment against defendant Crown Parking Corporation on the issue of liability on the first and second causes of action set forth in the Verified Complaint herein is granted. It is further

ORDERED that the application of plaintiff Atlantic Walk LLC for an order severing the counterclaims asserted by defendant Jordan Parking Corp. is granted, and Counterclaim plaintiff Jordan Parking Corp. is directed to purchase an Index Number for the counterclaim action. It is further

ORDERED that this matter shall be set down for an inquest on the issue of the amount of damages incurred by Atlantic Walk for which defendants are liable. Counsel for plaintiff shall serve a copy of this order with notice of entry upon the Clerk of the Trial Support Office (Room 158), file of a note of issue and a statement of readiness and pay the proper fees, if any, for the assessment hereinabove directed. And, counsel and parties shall appear for said inquest at 60

Centre Street, New York, New York, Part 40, Room 242 on Monday, September 24, 2007 at 9:30 a.m. It is further

ORDERED that the court declines to consider plaintiff's request that the court search the record and summarily dismiss Jordan's six counterclaims based on a purported improper termination of the Lease and wrongful eviction. It is further

ORDERED that the cross-motion of defendants for an order pursuant to CPLR 3212 granting summary judgment dismissing the Complaint, is denied. It is further

ORDERED that counsel for plaintiff Atlantic Walk LLC shall serve a copy of this order with notice of entry within twenty days of entry on counsel for defendants.

This constitutes the decision and order of this court.

Dated: August 8, 2007

Carol Robinson Edmead, J.S.C.