SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

----------X

MICAH WHYTE,

Plaintiff,

-against-

ARNOLD HANTVERK IRREVOCABLE TRUST, NU-CLEAR DRIVE IN CLEANERS, INC., and RONAL CORP, d/b/a PATH LIQUORS, INC.,

Defendants.

----------X

ARNOLD HANTVERK IRREVOCABLE TRUST,

Third-Party Plaintiff,

-against-

RONAL CORP., d/b/a PATH LIQUORS, INC.,

Third-Party Defendant.

----------X

NU-CLEAR DRIVE IN CLEANERS, INC.,

Second Third Party Plaintiff,

-against-

RONAL CORP. d/b/a PATH LIQUORS, INC.,

Second Third-Party Defendant.

----------X

TRIAL/IAS PART 21

INDEX # 16634/09

Motion Seq. 1
Motion Date 7.15.11
Submit Date 8.29.11

The following papers were read on this motion:	Papers Numbered
Notice of Motion, Affidavits (Affirmations), Exhibits Annexed.....	1
Answering Affidavit	2,3,4,5
Reply Affidavit.....	6
Memoradum of Law	7

This motion by the defendant Arnold Hantverk Irrevocable Trust ("the Trust") for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint and all cross-claims against it or, in the alternative, an order pursuant to CPLR 3212 granting it summary judgment on its cross-claims against Nu-Clear Drive In Cleaners, Inc. ("Nu-Clear") and Ronal Corp. d/b/a/ Path Liquors, Inc. ("Ronal Corp.") is **granted** as provided herein.

The plaintiff in this action seeks to recover damages for personal injuries he allegedly sustained when he fell in a pothole on April 4, 2008 in the parking lot of premises at 1740 Grand Avenue in Baldwin . The premises were occupied by the defendants Nu-Clear and Royal as tenants pursuant to leases with the Trust as the property's owner. The plaintiff testified at his examination-before-trial that he did not see the hole before he fell. He described the hole as situated "just past the liquor store" "like in between" the liquor store and the dry cleaners and around six inches long and "more than a half a foot deep."

The parties' leases obligated Nu-Clear and Ronal as tenants to maintain and repair the parking lot. Indeed, their principals Paul Zagardo, President of Ronal and Seong Chi Shim, Manager of Nu-Clear admitted as much at their examinations-before-trial.

Paul Zagardo testified at his examination-before-trial that the hole was in front of both establishments. He testified that when he first saw the hole before the plaintiff's accident, it was

smaller than it was when the plaintiff fell. It had grown in size over the weeks. He further testified that after observing the pothole, he had intended to speak to someone from the dry cleaner about it and to have a contractor come take a look at it. He testified that he and "Sammy" from the dry cleaners, in fact, agreed to split the cost of the repair, as well as the repair of a few other potholes. Zagardo acknowledged that over the previous five years he took care of the parking lot and that the costs incurred were split with the dry cleaners. He admitted that he never even discussed parking lot problems with the landlord.

Seong Chi Shim, Manager of Best Dry Cleaners d/b/a Nu-Clear Cleaning, testified at his examination-before-trial that the liquor store owner knew him as "Sammy." He agreed with Zagardo that they shared responsibilities and costs of maintaining the parking lot.

Gary Hantverk testified at his examination-before-trial on behalf of the Trust that the tenants were equally responsible for maintaining the parking lot. He testified that while he would visit the premises three or four times a year to collect rent and taxes, he never noticed potholes in the parking lot prior to the plaintiff's fall. In any event, he testified that only once, five or ten years before the plaintiff's fall, did he pay for parking lot repairs as a favor to the tenant. In fact, he testified that he specifically and repeatedly admonished the tenants that the parking lot was their responsibility.

The leases provided that the owner would not be liable "for any injury or damage to persons . . . resulting from any cause of whatsoever nature, unless caused by or due to the negligence of owner or its agents, servants, or employees." Furthermore, Nu-Clear and Ronal both agreed in their leases to maintain liability insurance in favor of themselves and the Trust against claims for, *inter alia*, personal injury occurring in or upon the demised premises and to

"indemnify and save harmless [the Trust] against and from all liabilities, obligations, damages, penalties, claims, costs and expenses for which [the Trust] shall not be reimbursed by insurance, including reasonable attorney's fees, paid, suffered or incurred as a result of any breach by [it], [its] agent, contractor, employees, invitees, licensees of any covenant on condition of [the] lease, or the carelessness, negligence or improper conduct of [it], [its] agents, contractors, employees, invitees or licensees . . .." Under the leases, the Trust retained the right but not the obligation to enter Nu-Clear and Ronal's demised premises in any emergency and at other reasonable times to examine the premises and to make such repairs, replacements and improvements as it deems necessary and reasonably desirable following their failure to make repairs or perform any work which the tenants were obligated to perform under the lease for the purpose of complying with laws, regulations or other governmental directives.

Nu-Clear's lease obligated it "to maintain the entire demised premises, inclusive of the roof, in good condition and repair [and to be] responsible for complying with all municipal rules, regulations and ordinances pertaining to its occupancy of the premises and operation of its business." It also agreed "to maintain the area surrounding the exterior of the demised premises **including the parking lot** and curbs adjacent to the entire building by keeping such area clean and free of all debris (emphasis added)."

Ronal's lease obligated it "to maintain the entire demised premises in good condition and repair, keep the demised premises clean and in good order to the satisfaction of the landlord, at [its] own cost and expense, including but not limited to the building and the premises upon which same is located" and at its expense "[to] make all repairs and replacements **to [its] portion of the parking lot**, sidewalk and curbs adjacent thereto and [to] keep said parking lot, sidewalks

and curbs free from snow, ice dirt and rubbish (emphasis added)" at its own expense.

"On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Sheppard-Mobley v King, 10 AD3d 70, 74 (2d Dept. 2004), aff'd. as mod., 4 NY3d 627 (2005), citing Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." Sheppard-Mobley v King, supra, at p. 74; Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra. Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. Alvarez v Prospect Hosp., supra, at p. 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. See, Demishick v Community Housing Management Corp., 34 AD3d 518, 521 (2d Dept. 2006), citing Secof v Greens Condominium, 158 AD2d 591 (2d Dept. 1990).

" 'An out-of-possession landlord may not be held liable for injuries occurring on its premises unless it is contractually obligated to perform maintenance and repairs or it has retained control over the premises.' " Sciammarella v Manorville Postal Associates, 87 AD3d 530 (2nd Dept. 2011), quoting Salaices v Gar-Ben Associates, 82 AD3d 740, 741 (2nd Dept. 2011), citing Guzman v Haven Plaza Housing Development Fund Co., Inc. 69 NY2d 559 (1987). "Reservation of a right of entry may constitute sufficient retention of control to impose liability upon an out-of-possession owner or lessor for injuries caused by a dangerous condition, but only when 'a specific statutory violation exists and there is a significant structural or design defect.' "

Lowe-Barrett v City of New York, 28 AD3d 721, 722 (2nd Dept. 2006), quoting Stark v Port Authority of New York & New Jersey, 224 AD2d 681, 682 (2nd Dept. 1996); see also, Yadegar v International Food Market, 37 AD3d 595 (2nd Dept. 2007).

The Trust has demonstrated that it was an out-of-possession landlord who was not responsible for maintaining the parking lot. Yadegar v International Food Market, supra, citing Salgado v Ring, 21 AD3d 362, 363 (2nd Dept. 2005); Knipfing v V&J, Inc., 8 AD3d 628 629 (2nd Dept. 2004); Ahmad v City of New York, 298 AD2d 473, 474 (2nd Dept. 2002); see also, McElroy v Bernstein, 72 AD3d 757 (2nd Dept. 2010), lv den., 15 NY3D 304 (2010). It has also established both that there was not a statutory violation or a significant structural or design defect. Yadegar v International Food Market, supra, citing Lowe-Barrett v City of New York, supra; Stark v Port Authority of New York & New Jersey, supra; see also, Sanchez v Barnes & Noble, Inc., 59 AD3d 698, 699 (2nd Dept. 2009). The Trust has accordingly established its entitlement to summary judgment dismissing the complaint against it thereby shifting the burden to the plaintiff and co-defendants to establish the existence of a material issue of fact.

Nu-Clear's reliance on the Trust's responsibility under the lease to "maintain and repair the public portions of the building" fails. The parking lot is not the building. Furthermore, that provision is on a pre-printed form over which the typewritten rider which clearly obligates Nu-Clear to maintain the parking lot takes precedence. See, Honigsbaum's Inc. v Stuyvesant Plaza, Inc., 178 AD2d 702 (3rd Dept. 1991). Similarly, absent a defect at the time the lease was entered, the Trust cannot be held liable or the grounds that it failed to provide safe ingress and egress. Schlesinger v Rockefeller Center, Inc., 119 AD2d 462 (1st Dept. 1986).

Finally, while the plaintiff's testimony that he fell "just past the liquor store" "like in between" the two establishments arguably establishes that he fell in front of Nu-Clear, and Ronal's lease only obligates it to maintain its portion of the parking lot, that testimony has no effect on the Trust's potential liability as the out-of-possession landlord.

In view of the foregoing, the remainder of the Trust's application is **denied** as moot.

The complaint and all cross-claims against the Trust are **dismissed, with prejudice.**

The foregoing constitutes the decision and order of this court. All applications not specifically decided herein are denied.

Dated: October 18, 2011

ENTER:

HON. JEFFREY S. BROWN
J. S. C.

Attorney for Plaintiff
George A. Constantine, Esq.
PO Box 732
Westbury, NY 11590

Attorney for Nu-Clear
Kim Patterson & Sciarrino, PC
42-40 Bell Boulevard, Ste. 402
Bayside, NY 11361

Attorney for Ronal d/b/a Path Liquors
O'Connor O'Connor Hintz & Deveney
One Huntington Quadrangle, Ste. 3C01
Melville, NY 11747

Attorney for Hantverk Trust
Malapero & Prisco
295 Madison Avenue
New York, NY 10017