

PART 02

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

Case Disposed	<input type="checkbox"/>
Settle Order	<input type="checkbox"/>
Schedule Appearance	<input type="checkbox"/>

MARTINEZ, LUIS ALBERTO

Index No. 001767/2005

-against-

Hon. GEORGE SALERNO

VILLA TRINA FOOD CORP.

Justice.

The following papers numbered 1 to 8 Read on this motion, DISMISSAL
Noticed on October 05 2005 and duly submitted as No. _____ on the Motion Calendar of Oct. 5, 2005

	PAPERS NUMBERED	
<u>Notice of Motion</u> - Order to Show Cause - Exhibits and Affidavits Annexed	Δ	1-4
Answering Affidavit and Exhibits	π	5-6
Replying Affidavit and Exhibits	Δ	7-8
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this

*Motion is decided
in the annexed memorandum
decision and order.*

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

Dated: March 21, 2006

Hon. George Salerno
GEORGE SALERNO, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

-----X
LUIS ALBERTO MARTINEZ, JOSE GABRIEL
JUAREZ-SAUCEDO, and ANTONIO MARTINEZ,
Plaintiffs,

-against-

Index No.: 1767/2005

VILLA TRINA FOOD CORP., d/b/a C-TOWN
SUPERMARKET, a/k/a BILLY'S C-TOWN;
DON BAUTISTA FOOD INC., LDB PROEPRTIES, LP;
3220 MEAT & PRODUCE CORP., a/k/a C-TOWN
SUPERMARKET; RAVLAKA PROPERTIES, LLC;
and JOHN DOES 1 through 15.

Defendants.

-----X
HON. GEORGE D. SALERNO:

This Pre-Answer Motion by one Defendant, RAVLAKA PROPERTIES, LLC, (referred to herein as RAVLAKA), to dismiss the Plaintiffs' Complaint as against it, pursuant to CPLR 3211¹, is denied, because the moving papers are sorely deficient. Movant fails to annex a *legible* copy of the subject Lease – a crucial document, as discussed *infra*. In addition, the Affidavit of Defendant RAVLAKA, by its President, is vague and conclusory.

The only argument made by Movant, RAVLAKA, is that it is not liable to Plaintiffs because it is an out-of-possession owner; (and so that is the only issue before this Court at this time).

This is an action to recover for alleged personal injuries suffered by janitors working overnight inside a C-Town grocery store -- where all exit doors were locked and blocked. In relevant part, Plaintiffs allege that “the life-threatening practice of locking in nighttime workers is endemic to the grocery industry in New York City”; and that there were “no operational emergency exits available”. (See Plaintiffs' Am. Complaint, ¶¶ 28, 33, 40, 60, 73, 89). It is alleged that Defendant,

¹ Movant fails to identify which ground upon which it relies.

RAVLAKA, leased the subject premises to Defendant, 3220 MEAT & PRODUCE CORP, for use as a supermarket, commencing from September 1, 2003. Plaintiffs allege causes of action sounding in: false imprisonment, negligence, gross negligence, labor law violations, and intentional and negligent infliction of emotional distress. Plaintiff claims violations of particular sections of: the New York City Administrative Code; OSHA (Occupational Health and Safety Administration) regulations; as well as Labor Law §200 and §376; and Executive Law §370 *et seq.* (See Plaintiffs' Am. Complaint, ¶¶ 114, 123, 130-133).

Lease

Without a *legible* Lease, this Court cannot make a reasoned determination on the issue presented. In its rush to motion practice, Movant submitted an *illegible* faxed copy of the Lease, in which the print is blurry and tiny, and every page has full paragraphs that are blackened and obscured.

In particular, based upon the applicable law as discussed *infra*, what concerns the Court are the words in the important paragraph regarding "Repairs" (which is the heart of this matter). The first sentence in that paragraph is mysteriously blackened; the following can be deciphered: "**The Owner shall maintain [? illegible] ... building, both interior and exterior**". (See Lease, p. 5, Article 13, at Defendant's Exhibit "B").

Another relevant portion of the Lease (that does not support the granting of judgment in Defendant's favor as a matter of law) is the paragraph regarding "Access to Premises", which provides that:

"The Owner shall have the right but shall not be obligated to enter the demised premises in any emergency at any time, and, at other reasonable times, to examine the same and to make such repairs, replacements and improvements as Owner may deem necessary and reasonably desirable to any portion of the building or which the Owner may elect to perform in the premises following the Tenant's failure to make repairs or perform any

work which the Tenant is obligated to perform under this lease, or for the purpose of complying with laws, regulations and other direction of governmental authorities. ... **Owner shall have the right at any time ... to change the arrangement and/or location of public entrances, passageways, doors, doorways.**" [emphasis added] (See Lease, p. 8, Article 27).

Defendant's Affidavit

Plaintiff's allegations that the exit doors were locked, in violation of NY City Admin. Code § 27-371; and OSHA regulations: 29 CFR §1910.36 (d)(1), and §1910.37(a)(3); are relevant to the legal standards to be applied, (as discussed *infra*).

However, Defendant, in the Affidavit of its President, William Rodriguez, fails to address this issue head-on: he fails to discuss the design of the doors, who installed them, and whether the doors (including emergency, exit, and fire doors) conformed to any applicable law. Moreover, Defendant fails to quote to any specific section of the Lease to support its position. In his Affidavit, Mr. Rodriguez merely makes vague and conclusory statements, mostly about lack of control, but fails to address any of the specific facts alleged by Plaintiff. (See Affidavit of Mr. Rodriguez).

LEGAL STANDARDS

It is well-established that:

an out-of-possession landlord may not be held liable for a third party's injury on his or her premises unless the landlord has notice of the defect and has consented to be responsible for maintenance or repair (Manning v New York Tel. Co., 157 A.D.2d 264, 555 N.Y.S.2d 720; see also Velazquez v Tyler Graphics, Ltd., 214 AD2d 489, 625 N.Y.S.2d 537). **Constructive notice may be found, however, where, as here, the landlord expressly reserves a right under the terms of the lease to enter the premises for the purpose of inspection, maintenance and repair, and there is a specific statutory violation** (Guzman v Haven Plaza Hous. Dev. Fund Co., 69 NY2d 559, 516 N.Y.S.2d 451, 509 N.E.2d 51; see also, Velazquez v Tyler Graphics. Ltd., *supra*).

Lopez v. 1372 Shakespeare Ave. Hous. Dev. Fund Corp., 299 A.D.2d 230, 231-232 (1st Dept. 2002).

Furthermore, the Courts have repeatedly held that:

Under Administrative Code of the City of New York § 27-128, an "owner shall be responsible at all times for the safe maintenance of the building and its facilities." In light of this responsibility, **a landlord may be held liable for negligence with respect to the condition of property even after the transfer of possession and control to the tenant where the landlord "has a contractual right to reenter, inspect and make needed repairs at the tenant's expense and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision"** (Johnson v Urena Serv. Ctr., 227 AD2d 325, 326, lv denied 88 NY2d 814; see also, Guzman v Haven Plaza Hous. Dev. Fund Co., 69 NY2d 559; Tkach v Montefiore Hosp. for Chronic Diseases, 289 NY 387; Manning v New York Tel. Co., 157 AD2d 264). [emphasis added]

Nameny v. East New York Sav. Bank, 267 A.D.2d 108, 109 (1st Dept. 1999). The Nameny case involved a fall "on stairs, leading from the sidewalk to the basement" of commercial premises, which "were made of wood, were visibly deteriorated, were unable to support a minimum load of 200 pounds, and did not have an adequate handrail." The Court found that such defects – "unstable and deteriorated steps ... and the absence of an adequate handrail" – would be structural defects that were violative of certain Administrative Code Sections. See also, Kraus v. Caliche Realty Estates, 289 A.D.2d 9 (1st Dept. 2001).

The Court, in the Lopez case, supra, also utilized these standards in an action involving personal injuries sustained inside of a supermarket, where Plaintiff slipped and fell "while ascending a sloped exit/entrance ramp". Plaintiff contended that the slope of the ramp and the position of the handrail were in violation of the New York City Building Code; and the Court held that there were "issues of fact as to whether plaintiff's fall was caused by a defectively designed, nonconforming ramp and handrail". Thus, the Defendant out-of-possession

landlord was denied summary judgment, since it was deemed to have constructive notice of the applicable Building Code violations. Lopez v. 1372 Shakespeare Ave. Hous. Dev. Fund Corp., 299 A.D.2d 230, 231-232 (1st Dept. 2002).

Likewise, in a recent First Department case involving a fast-closing door which severed a Plaintiff's index finger, the out-of-possession owner was denied summary judgment. Helena v. 300 Park Avenue, 306 A.D.2d 170 (1st Dept. 2003). In the Helena case, Plaintiff was employed as a food-service provider for a company which ran the cafeteria for the Defendant Lessee. Plaintiff was injured while using the bathroom that was available to the kitchen staff; "the door had a pressure machine which automatically closed it. Plaintiff claims that when he attempted to exit the bathroom, the door closed so fast that it severed his index figure. Plaintiff testified that he made prior complaints regarding the defective speed of the door closing." Helena, p. 170. Therein, the Court held that:

The relative potential liability of owners and tenants is no longer dependent upon control of property (Putnam v Stout, 38 N.Y.2d 607, 616-618, 381 N.Y.S.2d 848, 345 N.E.2d 319 [1976]) but results from inspection and maintenance lease provisions as well as the parties' actual performance of their lease duties (Melendez v American Airlines, 290 A.D.2d 241, 242, 735 N.Y.S.2d 128 [2002]) in addition to certain common-law duties (see Zito v 241 Church St. Corp., 223 A.D.2d 353, 355, 636 N.Y.S.2d 40 [1996]). [emphasis added]

Helena v. 300 Park Ave., LLC, 306 A.D.2d 170, 171-172 (1st Dept. 2003).

Thus, the Court thoroughly examined the Lease, which provided that the out-of-possession owner had retained a right of re-entry, and had agreed to maintain the building. The Court stated that: "liability may be imposed if there is a showing of notice, actual or constructive. ... Plaintiff's evidence of an apparent defect existing for years created a question of fact as to this owner's potential liability". Helena, p. 171.

Where an out-of-possession owner retains “the rights to repair as well as rights to the exterior walls, including windows²”, he may be held liable to a Plaintiff who fell to the pavement through the window glass which shattered behind him when his buttocks brushed against the window. Pappalardo v. NY Health & Racquet Club, 279 A.D.2d 134, 141 (1st Dept. 2000). In Pappalardo, the Plaintiff had identified specific statutory violations of the Administrative Code, for example, involving impermissibly thin glass.

In another case involving allegations that doors were defectively designed, in that “when opened, they blocked access to the handrails”, the Court held that the Complaint should not have been dismissed against the Defendant out-of-possession owners:

where, as here, the injuries were caused by a defect in the premises created by an independent contractor when the owner of the premises who hired the contractor is under a duty to keep the premises safe (see, Hesch v Seavey, 188 AD2d 808, 591 N.Y.S.2d 546; Thomassen v J & K Diner, 152 AD2d 421, 424-425, 549 N.Y.S.2d 416, appeal dismissed 76 NY2d 771, 559 N.Y.S.2d 979, 559 N.E.2d 673). As owners of premises into which members of the public would be invited, the Zikakis had a nondelegable duty to provide the public with a reasonably safe premises **and a safe means of ingress and egress** (see, Thomassen v J & K Diner, supra; see also, Parsons v City of New York, AD2d [July 1, 1993] [which distinguished Thomassen but acknowledged this proposition]). **They are therefore vicariously liable for the negligent construction, if any, by Streeter, the independent contractor whom they hired.** Therefore, it was error for Supreme Court to dismiss plaintiffs' complaint against the Zikakis.

June v. Bill Zikakis Chevrolet, 199 A.D.2d 907, 908-909 (3d Dept. 1993). An out-of-possession landlord is liable for personal injuries caused by an unsafe

² In Pappalardo, the Lease, in relevant part, under the heading of “Repairs”, provided that: “The exterior walls of the Building, the portions of any window sills outside the window, the windows ... are not part of the premises demises by this Lease, and Landlord reserves all rights to such parts of the building.” Pappalardo, supra, p. 141.

condition existing on the premises: “ ‘where the lessor rents premises for a public use when he knows, or should have known, that they are in a dangerous condition’ at the time of the lease * * * (Brady v Cocozzo, 174 AD2d 814, 570 N.Y.S.2d 748 quoting Williams v Saratoga County Agric. Soc., 277 App Div 742, 744, 103 N.Y.S.2d 363 [citations omitted]). ” [emphasis added] June v. Bill Zikakis Chevrolet, 199 A.D.2d 907, 908-909 (3d Dept. 1993).

Movant fails to identify the ground in CPLR 3211 upon which it relies. Upon these defective papers, it would not prevail on any ground listed. It is noted that, for example, for the purposes of CPLR 3211(a)(7)“the pleading fails to state a cause of action”, it has been established that: “the allegations of the pleading are deemed to be true. More than that, the pleading will be deemed to allege whatever may be implied from its statements by reasonable intendment; the pleader is entitled to every favorable inference that might be drawn.” Siegel, NY Practice, §265 (4th Ed 2005).

In the event that this were deemed a summary judgment motion, it would, also, be denied as deficient, because Movant failed to include a copy of all of the pleadings; in particular, none of Defendants’ Answers are submitted. CPLR 3212 provides that “a motion for summary judgment **shall be supported by affidavit, by a copy of the pleadings, and by other available proof**”. [emphasis added]

“The pleadings are a requisite part of the record of a CPLR 3212 motion.” Krasner v. Transcontinental Equities, 64 A.D.2d 551 (1st Dept. 1978). The “failure to provide a copy of all of the pleadings with their summary judgment motion required summary denial of the motion.” [emphasis added] Welton v. Drobnicki, 298 A.D.2d 757 (3d Dept. 2002). By not including a “copy of the Answer with their moving papers, they [Movant] failed to satisfy their initial burden on the motion, thereby obviating any issue as to the sufficiency of the papers submitted in

opposition thereto.” Id.

Furthermore, it has been held that:

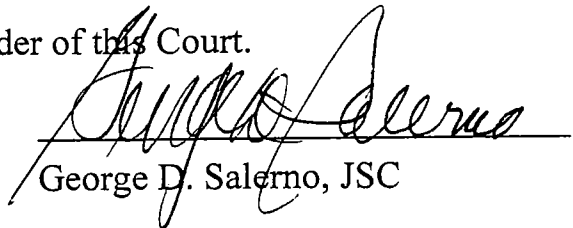
It is axiomatic that a summary judgment motion is properly denied as premature when the nonmoving party has not been given reasonable time and opportunity to conduct disclosure relative to pertinent evidence that is within the exclusive knowledge of the movant or a codefendant (see *Catena v Amsterdam Mem. Hosp.*, 6 AD3d 1037, 1038-1039, 776 N.Y.S.2d 607 [2004]). Here, plaintiffs surely are entitled to ascertain, through discovery, s [the owner’s] knowledge of the allegedly dangerous condition, as well as the degree of control that he asserted over the premises. [emphasis added]

Metichcchia v. Palmeri, 23 A.D.3d 894 (3d Dept. 2005).

Based upon the above principals, the instant motion is defective and premature. If Counsel choose to burden this court with motion practice, they are advised to submit thorough Affidavits supported by *legible* documentary evidence, and reasoned memorandum of law -- after the completion of relevant discovery.

This constitutes the decision and order of this Court.

Dated: March 21, 2006


George D. Salerno, JSC