SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS, PART 14
NASSAU COUNTY

RONALD ROVETO and JANICE ROVETO,

Plaintiff(s),

-against-

VHT ENTERPRISES, INC., LONG ISLAND SHOOTING CENTER INC., THE LONG ISLAND SHOOTING CENTER, VHT ENTERPRISES, INC. d/b/a THE LONG ISLAND SHOOTING CENTER and STEADY AIM FIRE, INC.,

Defendant(s).

ORIGINAL RETURN DATE:07/29/03
SUBMISSION DATE: 09/18/03
INDEX No.: 1310/02

MOTION SEQUENCE #2,3,4

The following papers read on this motion:

Notice of Motion.....	1,2
Cross-Motion.....	3
Answering Papers.....	4,5,6,7
Reply.....	8,9,10

Motion (motion sequence #2) by defendant Steady Aim Fire, Inc. ("Steady") for summary judgment pursuant to CPLR 3212 dismissing the complaint and all cross-claims against it as a matter of law is granted . The further request by Steady for an order finding defendant VHT Enterprises, Inc. d/b/a The Long Island Shooting Center ("VHT") liable for contractual and common law defense and indemnification, and further entitling it to premiums and attorney's fees and costs in the event that VHT failed to procure insurance, has been withdrawn (see Lynch affirmation in support of co-defendant's motion).

Motion (motion sequence #3) by VHT for summary judgment pursuant to CPLR 3212 dismissing the complaint and all cross-claims against it is denied.

Cross-motion (motion sequence #4) by plaintiffs for partial summary judgment pursuant to CPLR 3212 against defendant VHT on the issue of liability is denied. In the alternative, pursuant to CPLR 3212(g) the Court makes the following findings of fact:

(1) there was no natural light at the time of Ronald Roveto's fall; and

(2) VHT had constructive notice of the overgrown condition of the shrubs at the time of Ronald Roveto's fall.

On November 7, 2001, at approximately 6:10 PM, plaintiff Ronald Roveto lost his balance and fell in an alleyway on the side of a large building which leads to a small cottage on premises owned by Steady and leased by VHT. Roveto testified that his foot caught on shrubs that protruded into the alleyway, and that he was unable to see the shrubs because the alleyway was not illuminated. Once his foot got caught, he lost his balance and moved forward approximately 6 to 8 feet and fell over a parking barrier in the parking lot. At the time of the incident, plaintiff was attending the second class of a course on handgun safety that was being offered on the premises by an instructor unrelated to Steady or VHT. At the first class, which had taken place on October 25, 2003, plaintiff testified that the instructor had backed his car into the alleyway and had used his headlights to illuminate the alleyway for those attending the class.

The instructor, Mark Aspesi, submits an affidavit wherein he states that he visited the premises on the evening before the first class, observed the absence of lighting for the alleyway between the cottage and the main building, and communicated his concern to Stephen Vateckas, the president VHT. Aspesi states that Vateckas responded: "I know, we need to do something about that." (Aspesi affidavit annexed as exhibit Q to plaintiffs' cross-moving papers).

Robert Goldstein, another attendee of the handgun safety course, states that on November 7, 2001, he arrived at the premises prior to 6:00 PM . He entered the main building and informed an employee that other than the light coming from the portico above the entrance to the main building, there were no lights illuminating the front or side of the premises. Goldstein also testified that the photograph annexed as exhibit N to the cross-moving papers fairly and accurately depicts the condition of the circled shrubs as they looked at the time that the first class was given. (Goldstein affidavit annexed as exhibit P to the cross-moving papers).

At his deposition, Vateckas testified, that he was in his office at the main building when he was informed of plaintiff's fall. Approximately 5 to10 minutes later he went outside to see where plaintiff fell, and he was shown a cement parking barrier in the parking lot. He did not recall the lighting conditions at that time in the alleyway. His office had no windows and there are no windows in the main building. Vateckas further testified that he did not remember any complaints about the lighting in the alleyway prior to November 7, 2001, including any complaints by the instructor.

There is evidence that on the main building there are three high pressure sodium vapor lights that cast a yellow glow into the parking lot. These lights allegedly go on automatically with a light sensor. Vateckas testified that on November 7, 2003, he did not know what time the high pressure lights came on but that they were on when he was shown the parking barrier over which plaintiff ultimately fell (Vateckas transcript p 30-31). Vateckas did testify that the high pressure sodium lights do not provide any light into the alleyway (Vateckas transcript p 35). He testified generally that the cottage had a regular light fixture in the front of it, and that this outside light

together with the inside lights of the cottage, would have provided some light to the area (Vateckas, transcript p36), In opposition to plaintiffs' cross-motion, Vateckas again specifically recalls "the yellow glow cast by the sodium vapor lights when I was shown the place of the accident later that evening." (Vateckas affidavit annexed as exhibit A to the Pearsall Affirmation in opposition). Vateckas further categorically denies any conversation with the instructor regarding the lack of lighting, and he insists that Goldstein never complained to him about the lack of lighting.

On the issue of the shrubs, Vateckas testified that VHT did not have any contract with landscapers or gardeners for maintenance of the shrubs, and that "we would do it ourselves." (Vateckas transcript, p. 54-55). He did not remember if the photo identified by plaintiff and Goldstein accurately depicted the shrubs extending into the alleyway on November 7, 2001, nor did he know if at any time in the six months prior to plaintiff's fall that the shrubs did not extend into the alleyway. Further, Vateckas testified that he did not remember any pruning work done on the shrub extending into the alleyway at any time prior to November 7, 2001.

Addressing the motion by Steady first, it is well-settled that an out-of-possession owner is not liable for injuries that occur on the premises unless the owner retains control over the premises or is contractually obligated to repair or maintain the premises (*Phillips v Sinba Associates*, 296 AD2d 389, lv app den 99 NY2d 503; *Dalzell v McDonald's Corp.*, 220 AD2d 638, lv app den 88 NY2d 815). Here the lease at issue, annexed as exhibit G to the moving papers by Steady, became effective on September 1, 1995 and its termination date is August 31, 2007. VHT was the original lessee; the lease was assumed by Steady when it bought the premises. The lease provides for the lessee to make all repairs and expressly states that there are no services provided by the lessor (Lease par 4 and Rider par 65). It further provides for the lessee to maintain the premises, inside and outside, and required the lessee to keep in good repair all areaways, entrances and exits (Rider par 65 and 53). The property manager testified that the last time he visited the premises was in 1998 or 1999 (Handelsman transcript at 18).

Based on the foregoing this court finds as a matter of law that Steady neither retained control over the premises, nor was it contractually obligated to repair or maintain the premises. Under these circumstances, Steady is entitled to summary judgment dismissing the complaint and all cross-claims against it. The remainder of Steady's motion has been withdrawn.

Moving on to the motion by VHT and the cross-motion by plaintiffs, possession and control are the key tests for premises liability, because the person in possession and control of the premises is best able to identify and prevent any harm to others (see *Butler v Rafferty*, 100 NY2d 265, 270). Clearly VHT had possession and control of the premises at the time of plaintiff's fall. In addition to possession and control, a plaintiff in a trip-and-fall case must establish that the defendant either created the condition that caused the fall or had actual or constructive notice that such a hazardous condition existed and failed to remedy it within a reasonable time (*Nicklas v Tedlen Realty Corp.*, 305 AD2d 385; *Pugliese v D'Estrada*, 259 AD2d 743).

The defective condition at issue here in the combination of two elements: lack of lighting and overgrown shrubs at the end of the alleyway near the parking lot. Consequently plaintiffs must

show VHT's actual or constructive knowledge of both.

On the issue of the lighting, VHT does not dispute that there was no natural light at the time of plaintiff's fall, and plaintiff has presented evidence that although he arrived at dusk, by the time he left the cottage to return to the large building it was dark. On this record, plaintiffs are entitled to a finding that there was no natural light at the time of Ronald Roveto's fall.

Although Vateckas denies that Goldstein or the instructor informed him of the need for artificial lighting in the alleyway, his own deposition testimony confirms his actual knowledge that the sodium vapor lights do not provide any light into the alleyway (Vateckas transcript p 35), where plaintiff first caught his foot on the overgrown shrubs. It is unclear whether the light in the front of the cottage, and the inside lights, were on at the time of plaintiff's fall and whether these lights illuminated the end of the alleyway where plaintiff originally caught his foot. Thus the artificial lighting issue presents triable questions of fact for the jury, as to whether VHT knew or should have known that the existing artificial lighting was adequate given the use and design of the alleyway and the cottage (see *Peralta v Henriquez,* 100 NY2d 139).

As to the overgrown shrubs, there is no evidence of actual notice by VHT. Nevertheless the photo presented (see *Ferlito v Great South Bay Associates* , 140 AD2d 408), together with the Goldstein affidavit, are evidence that the overgrown shrubs existed for sufficient time that in the exercise of reasonable care VHT should have taken some action to remedy the overgrowth. The testimony by Vateckas as to his lack of memory fails to raise a triable issue of fact as to constructive notice of the overgrown shrubs. Consequently the court finds that VHT had constructive notice of the condition of the shrubs prior to plaintiff's accident.

Regarding the open and obvious danger of walking in a dark alleyway, this issue goes to plaintiff's comparative negligence which is a question for the jury (see *Cupo v Karfunkel*, __ AD2d __, __ NYS2d __, 2002 WL 32253748, 2003 N.Y.App.Div. LEXIS 11069).

Based on the foregoing VHT's motion for summary judgment and plaintiffs' cross-motion for partial summary judgment on the issue of liability must both be denied. In the interest of limiting the issues for trial the Court makes the following findings:

(1) there was no natural light at the time of Ronald Roveto's fall; and

(2) VHT had constructive notice of the overgrown condition of the shrubs at the time of Ronald Roveto's fall.

This decision constitutes the order of the court.

Dated: 12-02-03

ENTERED

DEC 08 2003

NASSAU COUNTY
COUNTY CLERK'S OFFICE

HON THOMAS P. PHELAN

J.S.C.