

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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NEXT MILLENNIUM REALTY, L.L.C. and
101 FROST STREET ASSOCIATES,

Plaintiffs,

-against-

**MEMORANDUM AND
ORDER**

CV 03-5985 (ARL)

ADCHEM CORP., LINCOLN PROCESSING CORP.,
NORTHERN STATE REALTY CORP., NORTHERN
STATE REALTY CO., and PUFAHL REALTY CORP.,

Defendants.

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ADCHEM CORP., LINCOLN PROCESSING CORP.,
NORTHERN STATE REALTY CORP., NORTHERN
STATE REALTY CO., and PUFAHL REALTY CORP.,

Third-Party Plaintiffs,

-against-

THE ESTATE OF JERRY SPIEGEL, and ALAN
EIDLER, PAMELA SPIEGEL SANDERS, and
LISE SPIEGELWILKS, as Executors of the
Estate of Jerry Spiegel,

Third-Party Defendants.

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LINDSAY, Magistrate Judge:

Plaintiffs Next Millennium Realty, L.L.C. and 101 Frost Street Associations

(“plaintiffs”), who are the current owners of 89 Frost Street, 101 Frost Street and 770 Main Street properties located in North Hempstead, New York (the “Frost Street Properties” or the “Site”), commenced this action against defendants Adchem Corp., Lincoln Processing Corp.(“Lincoln”), Northern State Realty Corp., Northern State Realty Co. (“NRS Co.”) and Pufahl Realty Corp. (“Pufahl Realty” or the “Tenant”) (collectively “defendants”) pursuant to the Comprehensive

Environmental Response Compensation and Liability Act, 42 U.S.C. §§ 9601 et seq. (“CERCLA”) for contribution for past and future environmental response costs under §§ 9607 and 9613(f)(3)(B) and a declaratory judgment under §§ 9607 and 9613(g)(2) holding defendants jointly and severally liable for future response costs to be incurred by plaintiffs. In addition, plaintiffs assert a nuisance claim pursuant to state law. The parties have consented to the undersigned’s jurisdiction pursuant to 28 U.S.C. § 636. Before the court are (1) plaintiffs’ motion for partial summary judgment pursuant to Federal Rule of Civil Procedure (“Rule”) 56; and (2) defendants’ cross-motion for partial summary judgment pursuant to Rule 56. The court finds the motions fully briefed and oral argument unnecessary. For the reasons set forth below, plaintiffs’ motion is denied, and defendants’ cross-motion is granted.

BACKGROUND

This case arises from the release of perchloroethylene (“PCE”) and other contaminants from a building located at 89 Frost Street in 1976 (the “89 Frost Street Site”). The following facts, drawn from the Complaint and the parties’ respective Local Civil Rule 56.1 (“Rule 56.1”) Statements of Facts, are undisputed, unless otherwise noted.

(1) Plaintiffs’ Remediation of the Site

The New York State Department of Environmental Conservation (“NYSDEC”) designated the Frost Street Properties as State Superfund Sites, including the 89 Frost Street Site. (Defs. 56.1 Counter Stmt. ¶ 1.) The Records of Decisions (“RODs”) for the Frost Street Properties identify PCE as a major contaminant of concern that has been released at the 89 Frost Street Site. (*Id.* at ¶¶ 2-3.) Plaintiffs entered into three Consent Orders with the NYSDEC agreeing to remediate the 89 Frost Street Site (“Consent Orders”). (*Id.* at ¶ 4.) Plaintiffs have

incurred costs remediating the 89 Frost Street Site pursuant to the Consent Order obligations.

(*Id.* at ¶ 5.)

(2) Lease Agreement for 89 Frost Street Site

On April 1, 1966, Jerry Spiegel (“Spiegel” or the “Landlord”), the then owner of the 89 Frost Street Site, entered into a lease with a purchase option with defendant Pufahl Realty, a real estate management company, for the 89 Frost Street Site (the “Lease Agreement” or the “Lease”). (*Id.* at ¶¶ 7-8.) The Lease was drafted using a standard “Blumberg Improved Gilacy Form Lease” with two addenda, and the lease was for a 20-year term, which was a standard term for an industrial tenant. (Defs. 56.1 Stmt. ¶¶ 56, 63-64; Pls. 56.1 Counter Stmt. ¶¶ 56, 63-64.) The Lease is a typical commercial lease reflecting the usual relationship between a landlord and a single industrial tenant.¹ (Defs. 56.1 Stmt. ¶ 57.) The Lease provided that in the event the Tenant remained in the premises at the expiration of the term of the lease, “such holding over shall not constitute a renewal or extension of the term but such holding over shall be construed as a tenancy from month to month.” (Maldonado Decl., dated January 28, 2014, Ex. 3 at ¶ 59.) The lease was a triple net lease, obligating Pufahl Realty to pay utility costs, insurance, assessments and taxes, except for inheritance, transfer or corporate franchise taxes. (*Id.* at ¶¶ 28, 30, 35; Pls. 56.1 Counter Stmt. ¶¶ 99-101.) At the end of the lease term, the Lease provided that Pufahl Realty return the leased premises to the landlord “in good order or condition, damages by the elements excepted, and reasonable wear and tear excepted.” (Pls. 56.1 Counter Stmt. ¶ 66.) During the Lease term, Spiegel had the authority to assign his interests under the Lease, to

¹Plaintiffs did not provide any facts or evidence to dispute that the Lease is “typical” but state that the characterization of the Lease as “typical” or “usual” by experts in this case is of no import. (Pls. 56.1 Counter Stmt. ¶ 57.)

mortgage the underlying property, or to alienate the 89 Frost Street site. (*Id.* at ¶ 73.)

Pursuant to the terms of the Lease Agreement, the Landlord agreed to construct a manufacturing facility on the 89 Frost Street Site that met the specifications approved by the Tenant.² (Defs. 56.1 Counter Stmt. ¶ 11.) In the event that Spiegel was unable to obtain a mortgage on the Property to finance the construction of the building within six weeks of the date of the Lease, the Landlord had the right to terminate the Lease. (Pls. 56.1 Counter Stmt. ¶ 76.) In addition, Spiegel had the right to terminate the Lease if Pufahl Realty did not agree to any new or altered terms of the Lease imposed by a mortgagee. (*Id.* at ¶ 77.) On May 24, 1966, Spiegel obtained a mortgage from the Prudential Insurance Company (“Prudential”), and as required under the Lease terms, Pufahl Realty entered into a “certificate and agreement” with the Landlord and Prudential, whereby certain terms of the Lease were altered for the benefit of Prudential (the “Mortgage”). (*Id.* at ¶ 78.) The Mortgage identified Spiegel as “the present owner in fee simple” of 89 Frost Street. (*Id.* at ¶ 79.)

The Lease provided that “any and all loans . . . made by the Tenant from any one of or more of the stockholders, officers and/or directors of said tenant, shall be subordinate to this lease . . . and all mortgages.”³ (*Id.* at ¶ 97.) Moreover, the Lease prohibited the tenant’s interest from constituting a lien and stated that it remained subordinate to Spiegel’s mortgage. (*Id.* at ¶ 98.)

Although Pufahl Realty could assign the Lease or sublease the premises, it could do so

²The parties dispute whether the building at the 89 Frost Street Site was constructed prior to the execution of the Lease Purchase Agreement. (*Id.* at ¶ 11; Pls. 56.1 Stmt. ¶ 11.)

³This provision was made self-executing and appointed Spiegel as Pufahl Realty’s “attorney in fact.” (*Id.*)

subject to the following conditions: (i) the Tenant remained liable under the original Lease for the entire term; (ii) any assignee assumed all Lease conditions; (iii) any assignment was recordable. (*Id.* at ¶¶ 104-05.) In addition, the Mortgage required that the Tenant assign the lease to its purchaser or successor in the event that all or substantially all of the Tenant's assets or business were sold or transferred. (*Id.* at ¶¶ 80, 106.)

During the first two Lease years, Spiegel was obligated to make all repairs to the building and all enumerated structural repairs thereafter, except those caused by the tenant.⁴ (*Id.* at ¶ 94.) Pufahl Realty was obligated to make all non-structural repairs commencing in the third year of the Lease; if the tenant failed to do so, Spiegel could enter the premises and perform repairs at the tenant's expense or declare a default. (*Id.* at ¶ 95.) The Lease also granted (i) Spiegel the right to enter the premises to make repairs; (ii) Spiegel and his agents the right to enter the premises at all reasonable hours for the purposes of inspection and making repairs; and (iii) nineteen years and three months into the lease term, the right to enter the premises to advertise the building for sale and rent and to show the Site to prospective purchasers or tenants. (*Id.* at ¶¶ 88-90.)

The Lease permitted the Tenant to "use and occupy the premises only for the lamination and coating of papers, textiles and fabrics and for general manufacturing purposes not in violation of" local zoning. (*Id.* at ¶ 59.) The Lease contained certain restrictions regarding the Tenant's occupancy of 89 Frost Street. For example, the Lease prohibited Pufahl Realty (i) from making alterations to the premises without the written consent of the Landlord; (ii) from

⁴Pufahl Realty was originally permitted to make repairs that the Landlord should have made but had failed to make, after giving fifteen days' written notice to Spiegel; however this provision was deleted by the Mortgage agreement. (*Id.* at ¶ 96.)

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