SHORT FORM ORDER

INDEX No. 15-611029
CAL. No. 17-01298OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

PRESENT:

Hon. DAVID T. REILLY
Justice of the Supreme Court

MOTION DATE 10-18-17 (001)
MOTION DATE 11-29-17 (002)
ADJ. DATE 10-24-18
Mot. Seq. # 001 - MD
002 - MotD

KELLY LINDEN and ETHAN LINDEN,

Plaintiffs,

- against -

BRIXMOR PROPERTY GROUP, CON-KEL LANDSCAPING INC., and UNISOURCE MANAGEMENT,

Defendants.

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Upon the following papers numbered 1 to 45 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 19, 25 - 34 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 20, 21 - 24, 35 - 37, 38 - 39 ; Replying Affidavits and supporting papers 40 - 41, 42 ; Other (all not considered) email 43, contract 44, insurance policy 45 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by the defendants Brixmor Property Group and Unisource Management for an Order pursuant to CPLR 3212 granting summary judgment dismissing the plaintiffs' complaint and all cross claims against them, and granting them conditional summary judgment on their cross claims against the defendant Con-Kel Landscaping Inc., is denied; and it is further

ORDERED that the motion (incorrectly designated a cross motion) by the defendant Con-Kel Landscaping Inc. for an Order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims against it is granted to the extent that the complaint against it, and the cross claims for contribution and common-law indemnification are dismissed, and is otherwise denied.

This is an action to recover damages for injuries allegedly sustained by the plaintiff Kelly Linden (the plaintiff) on January 10, 2014, when she slipped and fell on ice in the parking lot of the Hurricane Grill and Wings located at 630 Stewart Avenue, Garden City, New York (the restaurant). It is undisputed that the parking lot and restaurant are located within Stewart Plaza, which is owned by the defendant Brixmor Property Group (Brixmor), and that the defendant Unisource Management (Unisource) "managed the business processes" of Stewart Plaza for Brixmor. On or about October 10, 2013, Unisource entered into a contract with the defendant Con-Kel Landscaping Inc. (Con-Kel) in which Con-Kel agreed to provide snow removal services at Stewart Plaza.

The complaint sets forth a negligence cause of action on behalf of the plaintiff, and a derivative cause of action on behalf of her husband, the plaintiff Ethan Linden (Linden). In their bills of particulars, the plaintiffs allege among other things, that the defendants were negligent in the ownership, operation, management, maintenance, supervision, repair and control of the parking lot; in negligently removing snow and ice; in failing to apply salt and sand; and in causing a slippery condition to exist at the parking lot.

Unisource and Brixmor now move for summary judgment dismissing the complaint and all cross claims against them on the grounds that there was no snow or ice present in the parking lot at the time of the plaintiff's fall or, in the alternative, that there was a storm in progress. Unisource and Brixmor further argue that the plaintiffs should be sanctioned for spoliation of evidence, and that Con-Kel was responsible for determining what snow and ice removal services were necessary at the parking lot. Unisource also moves for conditional summary judgment against Con-Kel based upon its cross claim for contractual indemnification.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

However, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]; ***Rebecchi v Whitmore***, *supra*).

In support of their motion, Unisource and Brixmor submit, among other things, the pleadings, the transcripts of the depositions of the parties and a nonparty witness, a copy of the snow removal contract between Unisource and Con-Kel, and the affidavit and report of an expert witness. At her deposition, the plaintiff testified that she is employed by Travelers Insurance as a representative to assess no-fault claims, that she worked on the day of her accident, and that it was raining when she left for work that day. She stated that she left work at 4:45 p.m. to drive to the home of her friend, Marianna Perez (Perez), because they were planning to have dinner at the restaurant, that while she was driving there the roads were wet but there was no precipitation, that the weather was "gray and dark," and that she did not remember seeing any slush, sleet or snow on the ground. She indicated that, after visiting with Perez, the two left in separate cars to travel to the restaurant, that they arrived at approximately 7:00 p.m., and that as she pulled into the parking lot it was wet, as if it had rained. The plaintiff further testified that she and Perez parked together and walked towards the entrance to the restaurant, that she did not see any sleet, snow, or slush on the parking lot, and that she had walked approximately 15 feet when her feet "went out from under [her]." She stated that she jumped right up because she was embarrassed, that she looked down and saw ice, and that this was the first time she had seen ice anywhere that day. She indicated that Perez told her the next day that she had taken photographs of the location where she fell, that she never saw those photographs, that she told Perez to send the photographs to her husband, and that her husband received the photographs but now cannot locate them.

Nonparty witness Perez testified that she was previously employed at Travelers Insurance as a claims representative, that it was raining or hailing throughout the day in question, including when she left her current employment at 5:00 p.m. and arrived at the restaurant, and that she and the plaintiff parked and walked together through the parking lot to enter the restaurant that evening. She stated that she did not see any snow in the parking lot prior to the plaintiff's accident, that she was walking with the plaintiff and observed a thin sheet of ice, and that she told the plaintiff to be careful. She indicated that they walked through "patches of ice" that were "forming," that the plaintiff slipped on the forming patches of ice and lay there for two or three minutes, and that she helped the plaintiff get to her feet. Perez further testified that she took photographs of the area where the plaintiff fell, and of some individuals "getting ice melt and throwing it after [the plaintiff] had already fallen," and that she sent the photographs to the plaintiff by email and text message. She indicated that, when she and the plaintiff were in the restaurant after the plaintiff's fall, she was aware that two other patrons had fallen outside but did not know whether they had fallen after the plaintiff's fall.

At his deposition, Ethan Linden testified that he is employed as a claims supervisor with Lancer Insurance, that he learned of his wife's fall in a telephone conversation with Perez, and that he arrived at the restaurant between 7:00 and 7:30 p.m. that evening. He stated that the weather that day was cold and rainy, that there was no frozen precipitation, and that it was raining when he got out of his vehicle upon arriving at the restaurant. He indicated that he parked approximately 40 to 50 feet from the front entrance of the restaurant, that the parking lot was wet as he walked away from his vehicle but there was

ice in front of the entrance, and that he did not remember getting any photographs from Perez. He further testified that there was salt in the area of ice when he and his wife left the restaurant.

Nonparty witness John Fogarty (Fogarty) testified that he was employed by Brixmor until 2015 as property manager for a number of its properties, including Stewart Plaza, and that his duties included contracting for services at the properties, tenant relations, capital improvements and tenant installations. He stated that he previously visited Stewart Plaza approximately once a month, that he performed general inspections that did not include snow and ice removal, and that Unisource was under contract to provide cleaning and sweeping of the parking lot and sidewalks, seasonal landscaping and snow and ice removal. He indicated that Con-Kel won the bid to provide snow and ice removal in a contract with Unisource, and that a tenant would call Brixmor if they had a problem with snow and ice removal, that Brixmor would then call Unisource, which would call Con-Kel to remedy the issue.

At his deposition, Charles DiSchino (DiSchino) testified that he is employed as the vice-president and director of operations for Unisource, that his company is an "aggregated services provider" responsible for managing the business processes of clients at their properties, including Stewart Plaza, and that it manages the subcontractors who provide the necessary services to said properties. He stated that the most recent contract regarding this matter is dated October 10, 2013, that it provides that Con-Kel is "100% responsible" to monitor the weather and to respond and deal with any snow and ice according to the scope of work set forth therein. DiSchino indicated that he oversees Unisource's vendor manager, Josh Stahl, whose duties include inspecting Stewart Plaza once a month and submitting a report on a form designed by Brixmor, that the last inspection report is dated January 4, 2014, and that Unisource does not oversee the day to day operations of Stewart Plaza.

John Powers testified that he is the owner of Con-Kel, that the snow removal contract with Unisource dated October 10, 2013 (the contract) bears his initials, and that his company was on call "24/7" as the contract required Con-Kel to go to Stewart Plaza if it snowed or there were below freezing temperatures. He stated that weather conditions triggered whether Con-Kel would respond and go to the site, that he was not aware of any area of the parking lot where water pooled and turned to ice when the temperature fell below freezing, and that he would apply salt and sand with a spreader attached to a dump truck when required. He indicated that he never saw anyone but Con-Kel remove snow and ice from anywhere in Stewart Plaza, and that, if a service report for January 10, 2103 was filed, it was filled out by his secretary from information that he provided.

In his affidavit, Steven Roberts (Roberts) swears that he is certified by the American Meteorological Society as a certified consulting meteorologist, and that he has served as the director of meteorological operations at FleetWeather Group (CompuWeather) since 2002. He affirms that the opinions set forth in his report dated August 21, 2017 concerning precipitation and ground conditions at Stewart Plaza from December 15, 2013 to January 10, 2014 are rendered within a reasonable degree of meteorological certainty. In his report, Roberts notes that light snow, light freezing rain and/or sleet fell intermittently from approximately 6:30 a.m. to 9:10 a.m. and then fell frequently until approximately 11:30 a.m. to 12:00 p.m. on the day of the plaintiff's accident, that less than 0.1 inch of snow or ice fell that day, and that light rain or drizzle fell frequently from approximately 1:45 p.m. to 5:15 p.m. and from 7:10 p.m. to 9:50 p.m. He states that the temperature rose above freezing by 11:00 a.m. on that

day, and he opines that "no snow or ice cover was present on untreated, undisturbed, and exposed outdoor surfaces at [Stewart Plaza] ... and the temperature was near 37 F" at 7:00 p.m. that evening.

It is well settled that the opinion testimony of an expert "must be based on facts in the record or personally known to the witness" (*see* ***Hambsch v New York City Tr. Auth.***, 63 NY2d 723, 480 NYS2d 195 [1984], citing ***Cassano v Hagstrom***, 5 NY2d 643, 646, 187 NYS2d 1 [1959]; ***Shi Pei Fang v Heng Sang Realty Corp.***, 38 AD3d 520, 835 NYS2d 194 [2d Dept 2007]). An expert "may not reach a conclusion by assuming material facts not supported by the evidence, and may not guess or speculate in drawing a conclusion" (*see* ***Shi Pei Fang v Heng Sang Realty Corp.***, *supra*). Roberts asserts that his report is based upon certain data sites and resources which are not submitted with his report. Generally, an expert witness may testify that he or she relied upon inadmissible out-of-court materials to formulate an opinion if, among other things, there is evidence presented establishing its reliability (***Hambsch v New York City Tr. Auth.***, *supra*; ***Wagman v Bradshaw***, 292 AD2d 84, 739 NYS2d 421 [2d Dept 2002]). Assuming for the purposes of this motion that the aforesaid materials are reliable, Roberts' opinions as to the weather conditions during the day in question may be reliable. However, his expert opinion regarding the physical condition of the site consists primarily of theoretical allegations with no independent factual basis and it is therefore speculative, unsubstantiated and conclusory (*see* ***Mestric v Martinez Cleaning Co.***, 306 AD2d 449, 761 NYS2d 504 [2d Dept 2003]).

A defendant will be held liable for a slip and fall involving snow and ice on its property only when it created the dangerous condition that caused the accident or had actual or constructive notice thereof (***Gushin v Whispering Hills Condominium I***, 96 AD3d 721, 946 NYS2d 202 [2d Dept 2012]; ***Baines v G & D Ventures, Inc.***, 64 AD3d 528, 883 NYS2d 256 [2d Dept 2009]). To constitute constructive notice, the dangerous condition must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy it (***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Baines v G & D Ventures, Inc.***, *supra*). Although the plaintiffs will bear the burden at trial of establishing that Unisource and Brixmor had actual or constructive notice of the dangerous condition, on a motion for summary judgement, the defendant bears the burden of establishing lack of notice as a matter of law (***Carillo v P.M. Realty Group***, 16 AD3d 611, 793 NYS2d 69 [2d Dept 2005]; ***Totten v Cumberland Farms***, 57 AD3d 653, 871 NYS2d 179 [2d Dept 2008]). To meet its initial burden to show lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell (***Braudy v Best Buy Co., Inc.***, 63 AD3d 1092, 883 NYS2d 90 [2d Dept 2009]; ***Pryzywalny v New York City Transit Authority***, 69 AD3d 598, 892 NYS2d 181 [2d Dept 2010]). Here, Unisource and Brixmor have failed to offer any such evidence. Thus, they have failed to establish their prima facie entitlement to summary judgment on the ground that there was no ice present at the time of the plaintiff's fall.

In the alternative, Unisource and Brixmor contend that they have a viable "storm in progress" defense. The "storm in progress" defense is based on the principle that there is no liability for injuries related to falling or accumulated snow and ice until after the storm has ceased, in order to allow workers a reasonable period of time to clean the walkways (***Grau v Taxter Park Assocs.***, 283 AD2d 551, 724 NYS2d 497 [2d Dept 2001], *appeal denied* 96 NY2d 721, 733 NYS2d 373 [2001]). Where the evidence in the record is clear that the accident occurred while the storm was still in progress, defendants may

avail themselves of the rule as a matter of law (***Powell v MLG Hillside Assoc.***, 290 AD2d 345, 737 NYS2d 27 [1st Dept 2002]). The evidence submitted by Unisource and Brixmor indicates that light snow stopped falling no later than noon on the day in question. Thus, they have failed to establish that their storm in progress defense precludes a finding of liability on their part as a matter of law.

Unisource and Brixmor also argue that the plaintiffs should be precluded from offering any evidence concerning the alleged icy condition of the parking lot under the common-law doctrine of spoliation. They assert that the plaintiff and Linden, as experienced claims examiners, were well aware of the importance of the photographs sent to them by Perez, that said photographs were the best evidence of the condition of the parking lot that evening, and that the destruction of the photographs warrants a sanction. The determination of spoliation sanctions lies within the broad discretion of the Court (***Lentz v Nic's Gymnasium, Inc.***, 90 AD3d 618, 933 NYS2d 875 [2 Dept 2011]; ***Gotto v Eusebe-Carter***, 69 AD3d 566, 892 NYS2d 191 [2d Dept 2010]). Setting aside the fact that Unisource and Brixmor have failed to request the subject relief in their notice of motion (CPLR 2214 [a]), it is determined that a ruling as to the admissibility of evidence offered and the wisdom of delivering an adverse inference charge to the jury at trial should be made at the time of trial, when a determination as to the relevance of such evidence and such charge may be made in context (*see* ***Grant v Richard***, 222 AD2d 1014, 636 NYS2d 676 [4th Dept 1995]; ***Speed v Avis Rent-A-Car***, 172 AD2d 267, 568 NYS2d 90 [1st Dept 1991]). Accordingly, the application is denied, without prejudice to renewal at the time of trial.

Finally, Unisource contends that it is entitled to conditional summary judgment on its cross claim for contractual indemnification against Con-Kel. "A court may render a conditional judgment on the issue of indemnity pending determination of the primary action in order that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed provided that there are no issues of fact concerning the indemnitee's active negligence" (***George v Marshalls of MA, Inc.***, 61 AD3d 931, 932, 878 NYS2d 164 [2d Dept 2009]).

In paragraph 10, entitled "Subcontractor's Liability to Buyer," the snow removal contract between Unisource and Con-Kel provides, in pertinent part that:

> "To the fullest extent permitted by law, [Con-Kel] shall defend, indemnify, and hold harmless [Unisource] ... from and against any and all claims, demands, suits, proceedings, liabilities, judgments, awards, losses, damages, costs and expenses, including attorney fees, investigative fees and consulting fees, on account of bodily injury, sickness, disease or death sustained by any person or persons (other than [Unisource]), personal injury sustained by any, person or persons (other than [Unisource] ... directly or indirectly arising out of or resulting from or in any way connected with or related to the work or failure to perform the work by [Con-Kel] ... whether or not due or claimed to be due in whole or in part to the active, passive or concurrent negligence or fault of a party indemnified hereunder or any other person or persons and whether or not the performance of the work or failure to perform work shall be in accordance with or in violation of the provisions of this Agreement ..."

The right to contractual indemnification depends upon the specific language of the contract between the parties (*see* ***Kielty v AJS Constr. of L.I., Inc.***, 83 AD3d 1004, 922 NYS2d 467 [2d Dept 2011]; ***Bellefleur v Newark Beth Israel Med. Ctr.***, 66 AD3d 807, 888 NYS2d 81 [2d Dept 2009]). Thus, "[t]he promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances" (***LaRosa v Internap Network Servs. Corp.***, 83 AD3d 905, 921 NYS2d 294 [2d Dept 2011] quoting ***George v Marshalls of MA, Inc.***, 61 AD3d 925, 930, 878 NYS2d 143 [2d Dept 2009]). Here, the promise to indemnify is express and is consistent with the purpose of the agreement. However, as noted above, "a party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (***Cava Constr. Co., Inc. v Gealtec Remodeling Corp.***, 58 AD3d 660, 662, 871 NYS2d 654 [2d Dept 2009], citing General Obligations Law § 5-322.1; *see* ***McAllister v Constr. Consultants L.I., Inc.***, 83 AD3d 1013, 1014, 921 NYS2d 556 [2d Dept 2011]). Unisource has failed to establish that it is free from negligence herein. Unisource and Brixmor's sole contention as to their freedom from negligence is that the testimony herein establishes that snow and ice removal was exclusively the responsibility of Con-Kel. However, Fogarty's testimony that Unisource was under contract with Brixmor to provide services regarding the parking lot, and the failure of Unisource to submit said contract, precludes the granting of conditional summary judgment in favor of Unisource against Con-Kel.[1] The failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*; *see also* ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]). Accordingly, the motion by Unisource and Brixmor is denied.

Con-Kel now moves for summary judgment on the grounds that it owes no duty to the plaintiff "as there is no legal relationship nor contractual privity between them," and that it has a viable storm in progress defense. In support of its motion, Con-Kel submits, among other things, the pleadings, the transcript of the deposition of an employee, its contract with Unisource, a service report for January 10, 2014, and a certified copy of "local" climatological data.

At her deposition, Tracy Schmid (Schmid) testified that she assists Powers at Con-Kel, that her responsibilities include billing and accounts receivables, and that she did Con-Kel's billings for Stewart Plaza for approximately five years. She stated that Unisource is the management company for Brixmor, that Con-Kel provided snow removal pursuant to the contract with Unisource, and that Unisource would e-mail Con-Kel a blank service report form on the occurrence of a storm. She indicated that Powers would provide the information regarding the work performed at Stewart Plaza, that she would input that information into the service reports, and that the service reports were the method by which Con-Kel kept Unisource informed about all the work performed at Stewart Plaza. Schmid further testified that, if they did not receive an email from Unisource then no service report was generated, that she obtained the copy of the service report for January 10, 2014 from Unisource, and that the report indicates that Con-Kel de-

1. A copy of the subject contract submitted by Unisource and Brixmor after their motion was marked "submit" has not been considered in the determination of their motion (CPLR 2214). In addition, said document has not been authenticated and is inadmissible (CPLR 4518), and it has not been served on the other parties to this action (22 NYCRR § 202.5[a] and § 202.8[a]), nor electronically filed with the court (CPLR 2214 [c]).

iced "roads and lots" and all areas pursuant to the contract between 3:30 a.m. and 4:30 a.m. on January 10, 2014.

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; ***Fox v Marshall***, 88 AD3d 131, 928 NYS2d 317 [2d Dept 2011]; ***Engelhart v County of Orange***, 16 AD3d 369, 790 NYS2d 704 [2d Dept 2005]; ***Elliot v Long Island Home, LTD***, 12 AD3d 481, 784 NYS2d 615 [2d Dept 2004]). Once a defendant's duty is established, it is the function of a jury to determine whether and to what extent a particular duty was breached. However, it is for the courts to decide in the first instance whether any duty exists and, if so, the scope of such duty (***Church v Callanan Indus.***, 99 NY2d 104, 752 NYS2d 254 [2002]; ***Darby v Compagnie Natl. Air France***, 96 NY2d 343, 728 NYS2d 731 [2001]; ***Waters v New York City Hous. Auth.***, 69 NY2d 225, 513 NYS2d 356 [1987]).

Ordinarily, a contractual obligation, standing alone, will not give rise to tort liability in favor of a third-party (*see* ***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 746 NYS2d 120 [2002]; ***Eaves Brooks Costume Co. v Y.B.H. Realty Corp.***, 76 NY2d 220, 226, 557 NYS2d 286 [1990]). However, the Court of Appeals has identified three situations in which a party who enters into a contract may be held to have assumed a duty of care to non-contracting third persons. That is, tort liability for injuries to a third person may be imposed on a contractor under the following circumstances: (1) "where the contracting party, in failing to exercise reasonable care in the performance of its duties, 'launched a force or instrument of harm'" (***Espinal v Melville Snow Contrs.***, *supra*, quoting ***H.R. Moch Co. v Rensselaer Water Co.***, 247 NY 160, 168, 159 NE 896 [1928]), thereby creating an unreasonable risk of harm to others or increasing the existing risk (***Church v Callanan Indus.***, *supra*); (2) where a plaintiff suffered injury as a result of his or her reasonable reliance on the continued performance of the contracting party's obligations (*see* ***Eaves Brooks Costume Co. v Y.B.H. Realty Corp.***, *supra*); and (3) where the contracting party undertook a comprehensive and exclusive property maintenance obligation intended to displace the landowner's duty to safely maintain the property (*see* ***Palka v Servicemaster Mgt. Servs. Corp.***, 83 NY2d 579, 611 NYS2d 817 [1994]).

It is well settled that "[a] limited contractual undertaking to provide snow removal services generally does not render the contractor liable in tort for the personal injuries of third parties" (***Lubell v Stonegate at Ardsley Home Owners Assn., Inc.***, 79 AD3d 1102, 1103, 915 NYS2d 103 [2d Dept 2010], ***Wheaton v East End Commons Assoc., LLC***, 50 AD3d 675, 677, 854 NYS2d 528 [2d Dept 2008]). The terms of the Con-Kel's contract limited its snow removal obligations to accumulations of one inch or more. With accumulations less than one inch, the contract obligated Con-Kel to sweep and shovel all walkways and sidewalks and then treat the same, as well as the parking lots, drives, entrance ways, loading docks, access drives, street entrances, and miscellaneous areas, with an ice-control product. The contract also provided that Unisource was entitled to request additional services from Con-Kel related to snow removal, and to add, delete, or revise the scope of work required under the contract. Where, as here, the contract between an owner of property and a snow removal service provider makes the provider directly responsible to the property manager who had right to request additional services and oversees the maintenance of a property, it has been held that such a contractual undertaking is not the type of comprehensive and exclusive property maintenance obligation that would entirely displace a property

owner's duty to maintain the premises safely (***Lingenfelter v Delevan Terrace Assoc.***, 149 AD3d 152, 253 NYS3d 762 [4th Dept 2017]; *see also* ***Lattimore v First Mineola Co.***, 60 AD3d 639, 874 NYS2d 253 [2d Dept 2009]).

Here, Con-Kel has established its prima facie entitlement to judgment as a matter of law by coming forward with proof that the plaintiff was not a party to the contract between Unisource and Con-Kel, and therefore she was owed no duty of care (*see* ***Henriquez v Inserra Supermarkets, Inc.***, 89 AD3d 899, 933 NYS2d 304 [2d Dept 2011]; ***Lubell v Stonegate at Ardsley Home Owners Assn., Inc.***, *supra*; ***Foster v Herbert Slepoy Corp.***, 76 AD3d 210, 905 NYS2d 226 [2d Dept 2010]), that its conduct did not create or exacerbate a dangerous condition on the premises, and that plaintiff did not rely upon its performance of its snow removal obligations (*see* ***Schultz v Bridgeport & Port Jefferson Steamboat Co.***, 68 AD3d 970, 891 NYS2d 146 [2d Dept 2009]; ***Wheaton v East End Commons Assoc.***, *supra*; ***Castro v Maple Run Condominium Assn.***, 41 AD3d 412, 837 NYS2d 729 [2d Dept 2007]). In addition, the plaintiff's testimony establishes that she did not reasonably or detrimentally rely upon Con-Kel's performance of its contract.

In opposition to the motion, the plaintiffs fail to raise a triable issue of fact as to whether any of the exceptions apply so as to hold Con-Kel liable in tort to them (*see* ***Lubell v Stonegate at Ardsley Home Owners Assn., Inc.***, *supra*; ***Espinal v Melville Snow Contrs.***, *supra*). The plaintiff failed to submit any admissible evidence further addressing the detrimental reliance exception and has not presented any evidence that Con-Kel, by acting in accordance with its contract, "launched a force or instrument of harm which created or exacerbated the allegedly hazardous condition" (***Wheaton v East End Commons Assoc., LLC***, *supra*; *see* ***Foster v Herbert Slepoy Corp.***, *supra*). Accordingly, Con-Kel's motion for summary judgment dismissing the complaint against it is granted.

However, Con-Kel has failed to establish its entitlement to summary judgment dismissing all of the cross claims against it. In their answers, Unisource and Brixmor assert cross claims for contractual indemnification, common-law indemnification, and breach of contract for failure to provide insurance coverage. Con-Kel has failed to establish, among other things, that it was not obligated to obtain insurance coverage for the benefit of Unisource and Brixmor, or that it obtained such coverage. In addition, Con-Kel has failed to establish that it is entitled to summary judgment dismissing the cross claims seeking contractual indemnification. Con-Kel's sole contention regarding the issue is that, because it owed no duty to the plaintiff, it is entitled to summary judgment dismissing the complaint and all cross claims against it. However, the dismissal of the plaintiff's direct negligence claim against it does not preclude a finding that it is obligated to indemnify Unisource under the terms of their contract for failure to perform the snow removal services which it was hired to perform (***Mantilla v Riverdale Equities, Ltd.***, 134 AD3d 573, 21 NYS3d 260 [1st Dept 2015]). There are issues of fact regarding Con-Kel's performance under the subject contract, the duties owed by the parties regarding the maintenance of the parking lot at Stewart Plaza, and whether any party breached those duties.

However, Con-Kel established entitlement to judgment in its favor on Unisource's and Brixmor's claims for contribution and common-law indemnification by showing that the liability of its codefendants, if any, would be based on their failure to properly maintain Stewart Plaza and not on their

vicarious liability for its conduct (*see* ***U.S. Fire Insurance. Co. v Raia***, 121 AD3d 970, 996 NYS2d 286 [2d Dept 2014]; ***Reimold v Walden Terrace, Inc.***, 85 AD3d 1144, 926 NYS2d 153 [2d Dept 2011]).

Accordingly, Con-Kel's motion for summary judgment dismissing the complaint and all cross claims against it is granted to the extent that the complaint, and the cross claims against it for contribution and common-law indemnification are dismissed.

Dated: December 28, 2018

J.S.C.
HON. DAVID T. REILLY

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**