SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 29

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Anthony Pereira

Plaintiffs,

Index No. 161864/2013

-against-

JP Morgan Chase Bank, N.A., J.P. Morgan Chase & Co.,
All Counties Snow Removal Corp.
and New York Plumbing-Heating-Cooling Corp.

Defendants.

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JP Morgan Chase Bank, N.A., J.P. Morgan Chase & Co.,
All Counties Snow Removal Corp.

Plaintiffs,

-against-

Rigged Rite Inc.

Defendants.

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KALISH, J.:

Upon the foregoing submitted papers, JP Morgan Chase's motion for summary judgment against the Plaintiff dismissing the Plaintiff's underlying action and all cross–claims as against JP Morgan Chase, and for summary judgment on JP Morgan Chase's cross-claims against the Defendant All Counties is denied:

Relevant Background, Underlying Dispute and Deposition Testimonies

In the underlying personal injury action, the Plaintiff alleges in sum and substance that on or about January 27, 2011 at approximately 8:45pm he slipped on a patch of ice in a parking lot located on the premises of 7701-7705 31st Avenue East Elmhurst, New York. The Plaintiff alleges that said parking lot was owned by the Defendant JP Morgan Chase. The Plaintiff further alleges that the Defendant All Counties was tasked with clearing the snow from the subject parking lot. The Plaintiff alleges that his accident was caused by the Defendants' negligence in failing to have the parking lot properly maintained so as to clear the parking lot of snow and ice. The Plaintiff's first cause of action is against JP Morgan Chase for negligence.

The Defendant JP Morgan Chase now moves for summary judgment against the Plaintiff dismissing the Plaintiff's underlying action and all cross–claims as against JP Morgan, and for summary judgment on JP Morgan's cross-claims against All Counties on the basis of contractual and common-law indemnification. The Plaintiff and Defendant All Counties both oppose.

Parties contentions

In support of its motion for summary judgment against the Plaintiff, JP Morgan Chase argues that it did not cause or create the alleged dangerous condition, nor did it have notice of said allegedly dangerous condition. In support of its motion for summary judgment on its cross-claims against All Counties, JP Morgan Chase argues that pursuant to the Contract, it is entitled to defense and indemnification in the underlying action from All Counties. The Court will address each of these portions of JP Morgan's instant motion for summary judgment and the corresponding opposition presented by the Plaintiff and All Counties respectively.

JP Morgan Chase's motion for summary judgment dismissing the Plaintiff's underlying action

JP Morgan Chase argues that it had a contract with All Counties (the "Contract"), whereby All Counties was required to perform snow and ice removal on the subject parking lot without notice to JP Morgan Chase when temperatures were at, below, or above freezing. JP Morgan Chase further argues that the certified weather reports establish that precipitation ended at approximately 5:00 a.m. on the day of the Plaintiff's alleged accident and that temperatures were below, at or near freezing at the time of the accident. JP Morgan Chase argues that under said conditions, All Counties was required to sand and salt the parking lot without notice from JP Morgan Chase, because surfaces may have been icy and temperatures were at or below freezing.

JP Morgan Chase further argues that pursuant to the Contract, JP Morgan Chase did not retain any authority to inspect the work performed by All Counties. JP Morgan Chase further argues that it is clear from the deposition testimony that it relied upon All Counties to perform its duties under the Contract, and that under the Contract All Counties was responsible for snow, ice and slippery conditions at the JP Morgan Chase branch where the Plaintiff's accident allegedly occurred. JP Morgan Chase argues that All Counties and/or its subcontractor Rigged Right Inc. provided all of the snow removal equipment and materials needed to perform their duties. JP Morgan Chase further argues that there is nothing from the deposition testimony to suggest that it instructed All Counties or Rigged Right Inc. employees on how to perform their snow removal work.

JP Morgan Chase further argues that the Plaintiff's testimony was unclear as to how the alleged ice was created.

JP Morgan Chase's motion for summary judgment on its cross-claims against All Counties for contractual and common-law indemnification

In support of its motion for summary judgment on its cross-claims against All Counties, JP Morgan Chase argues that pursuant to the Contract, it is entitled to defense and indemnification in the underlying action from All Counties. JP Morgan Chase argues the pursuant to the Contract, All Counties was responsible for the snow and ice removal at the subject premises and All Counties agreed to defend and indemnify JP Morgan Chase for any injuries allegedly sustained by third parties arising from ice conditions.

Finally, JP Morgan Chase argues that All Counties breached its contractual obligation under the Contract to procure the requisite insurance.

Plaintiff's opposition to JP Morgan Chase's motion for summary judgment dismissing the underlying action

In opposition to JP Morgan Chase's motion for summary judgment dismissing the underlying action, Plaintiff argues that JP Morgan Chase has failed to establish prima facie that it did not have actual or constructive notice of the hazardous ice condition. Specifically, Plaintiff argues that JP Morgan Chase has failed to produce any evidence describing when the subject parking lot was last inspected and/or cleaned for snow and ice before the Plaintiff's accident. The Plaintiff further argues that JP Morgan Chase's references to general snow and ice removal practices as to the subject parking lot, absent any reference to the specific cleaning and/or inspection of the parking lot on the date of the accident, are insufficient to establish that JP Morgan Chase lacked constructive notice of the hazardous ice condition that caused the Plaintiff's accident.

The Plaintiff further argues that, even if JP Morgan Chase has established its prima facie case, the Plaintiff has established that there are issues of fact warranting a denial of JP Morgan Chase's motion for summary judgment. Specifically, the Plaintiff argues that his EBT testimony as to the dimensions of the ice patch, the photographic evidence depicting the ice patch, and the meteorologist's expert opinion that the ice patch originated during a snow storm that ended at 5:00am on the morning of the accident, are sufficient to create an issue of fact as to whether or not JP Morgan Chase had constructive notice of the ice patch and sufficient time to correct it prior to the Plaintiff's accident.

Both JP Morgan Chase and the Plaintiff have also submitted the weather reports for the time period in question. Said weather reports indicate in sum and substance that there was precipitation in the area from 7:47am on the day before the alleged accident (January 26, 2011) to 4:51am on the date of the alleged accident with approximately 17-18 inches of accumulated snow. The weather reports also show that the temperature remained below freezing until approximately 8:00am on the date of the accident, remained above freezing until 6:00pm, and fell below freezing until approximately 8:00pm. The reports further show that there was no precipitation from 5:00am to 8:00pm on the date of the accident.

All Counties' opposition to JP Morgan Chase's motion for summary judgment on its cross-claim against All Counties for contractual and common-law indemnification

In opposition to JP Morgan Chase's motion for summary judgment on its cross-claim against All Counties, All Counties argues that JP Morgan Chase is not entitled to contractual and/or common law indemnification absent a finding of negligence on the part of All Counties. All Counties does not dispute that it was contracted by JP Morgan Chase to provide snow and ice removal services as to the subject parking lot. However, All Counties argues that JP Morgan Chase is not entitled to contractual indemnification from All Counties as to the underlying action. All Counties argues in sum and substance that under the terms of the Contract, JP Morgan Chase's right to indemnification is contingent upon a finding that All Counties was negligent as to the underlying action.

All Counties argues that taken together, the discovered materials, JP Morgan Chase's submitted motion papers, and the Plaintiff's submitted papers are sufficient to establish that it stopped snowing at 5:00am on the date of the Plaintiff's accident. All Counties further argues that pursuant to the contract between JP Morgan Chase and All Counties, All Counties' snow removal operations would have been completed before the JP Morgan Chase branch (where the accident occurred) opened at 8:00am, and that there are no allegations that All Counties failed to perform snow removal services on the subject parking on date of the accident at some time prior to the accident. As such, All Counties argues that the basis of the Plaintiff's theory of negligence is that All Counties negligently performed its snow and ice removal (i.e. not removing to the alleged ice patch) and not that All Counties failed to perform any snow and ice removal on the date of the Plaintiff's accident. All Counties further argues that at the very least there are issues of fact as to whether or not All Counties negligently performed its snow/ice removal duties, sufficient to deny JP Morgan Chase's motion for summary judgment alleging contractual indemnification by All Counties. All Counties further argues that JP Morgan Chase is also not entitled to common law indemnification by All Counties since JP Morgan Chase has failed to establish prima facie that All Counties was negligent as to the alleged hazardous condition.

Finally, All Counties argues that JP Morgan Chase has failed to establish prima facie that All Counties breached its contractual obligation to procure the requisite insurance. Specifically, All Counties argues that JP Morgan Chase has failed to submit any evidence to support its claim that All Counties failed to acquire the requisite insurance. All Counties argues that it procured "Valiant Insurance Company policy no. CGL-VIC-0037316, which was effective as of the date of the alleged accident and had limits of $1million/$2 million. All Counties further states that it also obtained an excess policy from Nationwide Insurance Company (policy number XLO0018738).

In reply, JP Morgan Chase reiterates its argument for summary judgment against the Plaintiff that it has established prima face that it did not cause, create or have constructive notice of the ice patch that allegedly caused the underlying accident. JP Morgan Chase further reiterates its argument for summary judgment against All Counties that it is entitled to contractual indemnification by All Counties pursuant to the Contract between JP Morgan Chase and All Counties. JP Morgan Chase does not address All Counties argument that JP Morgan Chase failed to establish prima facie that All Counties breached its contractual obligation to procure the requisite insurance.

Oral Argument

The Parties appeared for oral argument before the Court on January 3, 2017. JP Morgan Chase reiterated its arguments for summary judgment dismissing the Plaintiff's cause of action. Specifically, JP Morgan Chase argued before the Court that it lacked actual or constructive notice of the alleged condition in the parking lot. JP Morgan Chase further argued that All Counties had plowed the parking lot and spread salt as of 8:00am on the date of the alleged accident. JP Morgan Chase further argued that pursuant to the Contract, All Counties was required to inspect the parking lot after they had competed plowing the parking lot, as part of their snow removal services. JP Morgan Chase further argued that there were no complaints as to the condition of the parking lot for the entirety of the day on which the accident allegedly occurred, and that the Plaintiff cannot establish that the alleged ice patch was visible.

The Plaintiff argued in opposition that JP Morgan Chase failed to submit any evidence in the form of an affidavit and/or testimony by someone with personal knowledge as to when the parking lot was last inspected prior to the accident. The Plaintiff further argued that based upon the Plaintiff's EBT testimony, there is at least an issue of fact on the question of notice. Plaintiff further argued that the photographic evidence and the opinion of the Plaintiff's expert meteorologist are sufficient to create an issue of fact as to whether or not the ice patch formed before All Counties finished plowing the parking

lot. As such, the Plaintiff argues that there are issues of fact as to whether JP Morgan Chase had constructive notice of the ice patch, which the Plaintiff argues was formed before All Counties completed plowing/salting the parking lot and continued to be there after All Counties had finished plowing/salting the parking lot.

In support of it's motion for summary judgment on its cross-claim against All Counties, JP Morgan Chase reiterated its argument that it is entitled to contractual indemnification from All Counties. JP Morgan Chase argued that based upon the language of the Contract between JP Morgan Chase and All Counties, if the ice patch was in the parking lot after All Counties had finished plowing on the morning of the accident, then All Counties was responsible for returning to the parking lot and remedying it. JP Morgan Chase further argued that pursuant to the Contract, JP Morgan Chase is entitled to contractual indemnification from All Counties as to any claims relating to snow removal on the subject property, regardless of whether or not All Counties was negligent, willful or reckless.

In opposition, All Counties argued that under the contract, All Counties' obligation to "return" to a parking lot (after it has already been plowed) without notice is only triggered in the event that there is snowfall of 2 inches or more. All Counties argued that they performed their snow plowing services on the morning of the accident, and that JP Morgan Chase did not contact All Counties later that day to tell All Counties to return and to remove any patches of ice from the parking lot. All Counties argued that there is nothing in the Contract that places an obligation upon All Counties to go back to every one of JP Morgan Chase's parking lots during the course of the day, absent notice by JP Morgan Chase, to check for ice patches after All Counties had already finished plowing said parking lots. All Counties further argues that the contract between JP Morgan Chase and All Counties includes two conflicting "indemnification clauses", one of which JP Morgan Chase argues requires All Counties to indemnify JP Morgan Chase for any ice removal claims, and a second "indemnification clause" that requires that JP

Morgan Chase to indemnify All Counties for all such claims.

Deposition Testimonies

Plaintiff Anthony Periera

On September 18, 2015, the Plaintiff Anthony Pereira appeared for deposition and testified that he was involved in an accident on January 27, 2011 at approximately 8:00pm in the Chase Bank parking lot at 7701 31st Avenue (Periera EBT at 23:2-15). Plaintiff testified that on the date of the accident he was employed as a district manager for United Building Maintenance (*Id.* at 14, 19:10-11). He further testified that prior to the accident he had been to this particular Chase Bank over a dozen times (*Id.* at 24:20-25). Plaintiff testified that on the date of the accident, the parking lot had an asphalt surface (*Id.* 26:19-21). He further described the parking lot as being level on the date of the accident (*Id.* 28:7-9).

Plaintiff testified that back in January of 2011, United Building Maintenance had a cleaner assigned to the Chase Bank at 7701 31st Avenue (*Id.* at 31:6-13). He further testified that cleaners only report for work after the bank's hours, and that the foreperson on-site in January of 2011 was Enrique Lopez (*Id.* at 32:3). Plaintiff further testified that it was not snowing on the date of the accident, but that it had snowed the night before (*Id.* at 34:12-15, 179:12-16). Plaintiff testified that on the morning of the accident that there were approximately two inches of snow on the ground (*Id.* at 35:3-8). He further testified that it was not snowing at the time of his accident.

Plaintiff further testified that United Building Maintenance did not have any responsibility for snow removal at the subject Chase Bank (*Id.* at 37:22-25). He further testified that he had observed snow removal take place at the subject Chase Bank on many occasions (*Id.* at 38:12-15).

Plaintiff testified that on the date of the accident he arrived at the subject Chase Bank on or about 6:00pm (*Id.* at 39:14-16). He further testified that on the date of the accident he parked his car in the subject parking lot and went inside the bank (*Id.* at 40:22- 41:3). Plaintiff testified that he did not recall

seeing any other cars in the parking lot when he arrived and that when he arrived it was light and cold outside (*Id.* at 41:9-18). The Plaintiff testified that he had no difficulty walking from his car to the bank (*Id.* at 44:15-17). Plaintiff testified that he saw snow piled up behind the bank (*Id.* at 45:21- 46:5).

Plaintiff testified that as he walked back to his car from the bank he did not observe any snow, salt or sand in the parking lot, and that it appeared to him that snow had been removed from the parking lot (*Id.* at 46:6-15). The Plaintiff further testified that the accident occurred after he had finished his "inspection" of the bank (*Id.* at 47: 16-22). Plaintiff testified that he walked the same route back to his car as he had used going from his car to the bank and that he had gotten into his car before the accident happened (*Id.* at 48:- 49:21).

Plaintiff testified that he got into his car at approximately 7:30pm and sat in his car waiting for Enrique Lopez, who arrived at approximately 8:00 p.m. (*Id.* at 49: 1-14). Plaintiff further testified that Enrique Lopez entered the Plaintiff's car and the two spoke for approximately five to ten minutes before the Plaintiff exited his car (*Id.* at 50: 1-17). The Plaintiff testified that he started walking to the rear of his car when he lost his footing on an ice patch and fell down onto his right knee (*Id.* at 51: 15-20. The Plaintiff testified that he had not seen the patch of ice at any time before he slipped upon it, and that he only noticed it after he fell (*Id.* at 52:24 -53:2; 57:9). Plaintiff described the ice patch as approximately one foot long, half a foot wide and half an inch thick (58: 9-12). He further testified that part of the ice patch was under his car, and that he saw ice in six to twelve other areas of the parking lot after his accident (*Id.* at 58: 13- 59:2). Plaintiff testified that he did not observe any of these other ice patches before his accident (*Id.* at 59: 1-15).

Plaintiff testified that prior to his accident he had never made any complaints about snow or ice in the Parking lot, nor was he aware of anyone else making any such complaints before the date of his accident (*Id.* at 68: 13-24).

Deposition of All Counties by Phillip Faicco

On October 16, 2015, Phillip Faicco appeared for deposition and testified that he is the CEO of All Counties (Faicco EBT at 7:15-20). Faicco testified that All Counties works in snow removal (*Id.* at 11:1-4). He further testified that All Counties owns snow removal equipment including trucks, plows and salters (*Id.* at 13:2-10). Faicco testified that All Counties had a service contact with JP Morgan Chase for approximately fourteen years (*Id.* at 20:11-16).

Faicco was shown a copy of the Contract between All Counties and JP Morgan Chase. He identified the signature of Lynne Lyons, the owner of All Counties (*Id.* at 21 - 22:6). Faicco testified that said service agreement was in effect in 2011 and that All Counties was doing snow removal work for JP Morgan Chase at that time (*Id.* at 22: 16-23). Faicco further testified that All Counties would mobilize its crews and contractors whenever an "event" involving moisture or precipitation occurred that was going to create a slippery condition (*Id.* at 23 -24:6).

Faicco testified that All Counties had a service, Weather Data, that would fax All Counties whenever their was moisture, icing and/or snow in the forecast (*Id.* at 24:19-24). He further testified that after receiving a fax from Weather Data, All Counties would determine based upon weather reports and information, if and when to "mobilize" for snow removal (*Id.* at 28:7-29:12). Faicco testified that its contractors were responsible for clearing the snow from the sidewalks, footpaths, ingress and egress of the JP Morgan Chase bank locations and that All Counties took care of the lots at said locations (*Id.* at 31:5-9). He further testified that Rigged Rite Inc. was one of All Counties' subcontractors (*Id.* at 31:16-21).

Deposition of Rigged Rite Inc. by Edmond Dowling

On October 16, 2015 Edmond Dowling appeared for deposition and testified that he is the president of Rigged Rite Inc. (*Id.* at 7:22-8:2). He further testified that on the date of the Plaintiff's alleged accident Rigged Write Inc. was contracted with All Counties for work at 7701 31st Ave in Queens (*Id.* at 8:22-25). Dowling testified that Rigged Rite Inc. only removed snow from sidewalks and pathways, not parking lots (*Id.* at 12:2-6). He further testified that Rigged Rite Inc. did not have any responsibility for snow removal in the subject parking lot and that Rigged Rite Inc. never did snow removal from said parking lot (*Id.* at 15:24 -16:7).

Deposition of JP Morgan Chase by Robert Walsh

On January 8, 2016, Robert Walsh appeared for deposition and testified that he was previously employed by the Defendant JP Morgan Chase from 2003 to 2013 (Walsh EBT at 9:8-13, 11:6-10). He further testified that he is currently employed as a facilities manager for Jones Lang LaSalle, a company that manages the subject JP Morgan Chase bank located 7701 31st Avenue (*Id.* at 13:15-15:5).[1] Walsh testified that he has been the facilities manager for the JP Morgan Chase branch located at 7701 31st Avenue for the last seven to eight years (*Id.* at 15: 6-11).

Walsh testified in sum and substance that his duties included making monthly visits to each of the JP Morgan Chase branches he was responsible for in order to check upon their physical condition, including the exterior of the buildings (*Id.* at 19:22 - 22:15). He further testified that his inspection included looking for hazards in the parking lot and checking the asphalt (*Id.* at 23:2-15). Walsh testified that JP Morgan Chase is responsible for the general maintenance and upkeep of the subject location (*Id.* at 35:1-7). He further testified that it was JP Morgan Chase's responsibility to keep the parking lot and

[1] Walsh testified in sum and substance that he previously worked directly for JP Morgan Chase in facility management, until JP Morgan Chase outsourced facility management to Jones Lang LaSalle. Walsh testified that he was then transferred to Jones Lang LaSalle, with the same general work responsibilities.

sidewalks clear at the subject location and that JP Morgan Chase could subcontract some or all of said obligations to other companies (*Id.* at 36:23 -37:11).

Walsh testified that in 2011, JP Morgan Chase contracted with All Counties to clean ice and snow from the building located at 7701 31st Avenue (*Id.* at 42:21 - 43:7). He further testified that All Counties would salt before snow conditions and during the snow conditions. He testified that All Counties would have two teams clearing the sidewalks and plowing the parking lots (*Id.* at 46:9 - 47:8). Walsh further testified that he would not supervise All Counties' work, but that there were occasions where he would be around during the snowstorms (*Id.* at 47:9 - 10). He further testified that All Counties would do clean-up work after a snowstorm ceased (*Id.* at 61:5 -7).

Analysis

Summary Judgment Standard

It is well established that "[t]he proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law" (*Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc.*, 96 AD3d 551, 553 (1st Dept 2012) [internal quotation marks and citation omitted]). "Thus, the Movants bear the burden to dispel any question of fact that would preclude summary judgment" (*id.*). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 (2003)). "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted)). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978); *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 (1st Dept 2002)).

A landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to third parties, the potential that any such injury would be of a serious nature and the burden of avoiding the risk. In order to recover damages, a party must establish that the landowner created or had actual or constructive notice of the hazardous condition which precipitated the injury and, further, by the rule that "[t]o constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [the owner's] employees to discovery and remedy it" (*See Pappalardo v. New York Health & Racquet Club*, 279 AD2d 134, 142 (1st Dept 2000) *citing O'Connor-Miele v. Barhite & Holzinger, Inc.*, 234 AD2d 106 (1st Dept 1996); *Piacquadio v. Recine Realty Corp.*, 84 NY2d 967 (NY 1994); *see also Smith v Costco Wholesale Corp.*, 50 AD3d 499 (1st Dept 2008)).

A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence for a length of time sufficient to discover and remedy it. Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof. (*See Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 (1st Dept 2008) (*internal citations omitted*); *Giantomaso v T. Weiss Realty Corp.*, 142 A.D.3d 950 (2nd Dept 2016); *Richardson v Brooklake Assoc., L.P.*, 131 A.D.3d 1153, 1154 (2nd Dept 2015); *Bravo v 564 Seneca Ave. Corp.*, 83 AD3d 633 (2nd Dept 2011); *Bloomfield v Jericho Union Free School Dist.*, 80 AD3d 637 (2nd Dept 2011); *Pryzywalny v. New York City Tr. Auth.*, 69 AD3d 598 (2nd Dept 2010)).

JP Morgan Chase is not shielded from negligence based solely upon the fact that it contracted with All Counties to provide snow removal from the subject parking lot

It is undisputed that JP Morgan Chase contracted with All Counties for All Counties to provide snow/ice removal services as to the subject parking lot. However, this fact in and of itself does not preclude JP Morgan Chase from potentially being held liable for the actions of All Counties.

In the instant action, there is no dispute that JP Morgan Chase owned the subject parking lot and kept it open for use by customers of the nearby branch and/or individuals working at the nearby branch. Therefore, JP Morgan Chase had an nondeligable duty to keep the parking lot safe (*See Pesante v Vertical Indus. Dev. Corp.*, 142 AD3d 656, 657 (2nd Dept 2016); *see also Backiel v. Citibank, N.A.*, 299 AD2d 504 (2nd Dept 2002)). As such, JP Morgan Chase may be held vicariously liable if All Counties' snow removal efforts caused or exacerbated a dangerous snow or ice condition in the subject parking lot (*See Simon v. Astoria Fed. Sav.*, 27 Misc. 3d 1206(A) (NY Sup Ct Kings Cnty 2010) *citing Olivieri v GM Realty Co., LLC*, 37 AD3d 569 (2nd Dept 2007); *Backiel v. Citibank, N.A.*, 299 AD2d 504 (2nd Dept 2002); *Stockdale v City of New York*, 294 A.D.2d 195 (1st Dept 2002); *see also Tamhane v. Citibank, N.A.*, 2008 NY Slip Op 32521(U) (NY Sup Ct NY Cnty 2008)).

JP Morgan Chase has failed to establish prima face entitlement to summary judgment dismissing the Plaintiff's negligence claims as against JP Morgan Chase

Upon review of the submitted papers and having conducted oral argument, the Court finds that the Defendant JP Morgan Chase has failed to establish prima facie entitlement for summary judgment dismissing the Plaintiff's action. Specifically, the Court finds that JP Morgan Chase has failed to establish as a matter of law that it lacked constructive notice of the ice patch that allegedly caused the Plaintiff's accident.

In order for JP Morgan Chase to establish prima facie that it lacked constructive notice of the alleged ice condition of the parking lot, it must proffer an affidavit or testimony based on personal knowledge as to when JP Morgan Chase and/or All Counties, acting on behalf of JP Morgan Chase, last inspected the subject parking lot or as to the subject parking lot's condition prior to the accident (*See Singh v Citibank, N.A.*, 136 A.D.3d 521 (1st Dept 2016); *Simpson v City of New York*, 126 AD3d 640 (1st Dept 2015); *Spector v. Cushman & Wakefield, Inc.*, 87 A.D.3d 422 (1st Dept 2011); *Lebron v. Napa Realty Corp.*, 65 AD3d 436 (1st Dept 2009); *Gairy v 3900 Harper Ave., LLC*, 146 AD3d 938 (2nd Dept 2017); *Giantomaso v T. Weiss Realty Corp.*, 142 A.D.3d 950 (2nd Dept 2016)). Further, "[m]ere reference to general cleaning practices, with no evidence regarding any specific cleaning or inspection of the area in question, is insufficient to establish a lack of constructive notice" (*Giantomaso v T. Weiss Realty Corp.*, 142 A.D.3d 950, 951 (2nd Dept 2016)).

In the instant action there is no dispute amongst the Parties that All Counties plowed the subject parking lot at around about 5:00am on the morning of the date of the accident. However, JP Morgan Chase has failed to submit with its moving papers any proof as to the condition of the parking lot between the time All Counties finished snow removal services on the morning of the accident and when the accident occurred at or around 8:45pm. JP Morgan Chase has failed to submit with its moving papers an affidavit by someone with personal knowledge sufficient to establish whether or not the

subject parking lot was inspected for snow and ice on the date of the alleged accident. Further, although the submitted depositions describe All Counties' general procedures for removing snow from parking lots, they do not include any specific indication as to whether or not the subject parking lot was inspected after All Counties completed plowing the lot and prior to the Plaintiff's accident. The only testimony as to the condition of the parking lot prior to the accident is that of the Plaintiff, who testified that it appeared that snow had been removed and that he did not see the ice patch prior to his fall. Said testimony is not sufficient to establish that JP Morgan Chase lacked constructive notice as to the condition of the parking lot at the location where the Plaintiff allegedly fell.

The EBT testimonies established, at most, that it had snowed during the night prior to the day of the Plaintiff's accident and that All Counties had performed snow removal on the parking lot at some point between 5:00am and 8:00am on the morning of the Plaintiffs' alleged accident. However, the Plaintiff's accident allegedly occurred at or around 8:45pm, and there is no indication from either the EBTs and/or JP Morgan Chase's submitted papers to establish whether or not the parking lot was inspected for snow and ice within that twelve (plus) hour period.

In the absence of any such testimony and/or affidavit, the Court finds that JP Morgan Chase has failed to establish prima facie that it lacked actual or constructive knowledge of the alleged ice patch. Further, as JP Morgan Chase has failed to establish it's prima facie entitlement to summary judgment on this point, the Court need not address the Plaintiff and/or All Counties' opposition on this point.

Finally, the Court finds that JP Morgan Chase has also failed to establish prima facie that All Counties did not cause or create the alleged ice patch, for which JP Morgan would be responsible to the Plaintiff. JP Morgan argues that the ice patch could have been caused by cars entering the lot at any time during the day of the alleged accident. Whether this is true or not is speculation, and at very least there are significant issues of fact as to when and how the alleged ice patch (to the extent it existed) was created.

As the Movants for summary judgment dismissing the Plaintiff's action, it is JP Morgan Chase's burden to establish prima facie that there are no issues of fact. As JP Morgan has failed to do so, the portion of its motion seeking summary judgment dismissing the Plaintiff's action is hereby denied.

JP Morgan Chase has failed to establish prima facie that they are entitled to indemnification by the All Counties based upon the Contract.

"The right to contractual indemnification depends upon the specific language of the contract" (*Trawally v City of New York*, 137 AD3d 492, 492-493 (1st Dept 2016) *citing Alfaro v 65 W. 13th Acquisition, LLC*, 74 AD3d 1255 (2nd Dept 2010)). Where a contract is unambiguous, "its interpretation is a matter of law and effect must be given to the intent of the parties as reflected by the express language of the agreement" (*Nat'l Granite Title Ins. Agency, Inc. v. CadleRock Props. Joint Venture, L.P.*, 5 AD3d 361 (2nd Dept 2004) *citing Riley v. S. Somers Dev. Corp.*, 222 AD2d 113 (2nd Dept 1996)). "Contracts which are clear and unambiguous should be enforced according to their plain meaning" (*Cellular Tel. Co. v 210 E. 86th St. Corp.*, 44 AD3d 77, 83 (1st Dept 2007) *citing South Rd. Assocs., LLC v. IBM*, 4 NY3d 272 (2005); *Greenfield v Philles Records*, 98 N.Y.2d 562 (2002); *W.W.W. Assocs. v. Giancontieri*, 77 NY2d 157 (1990)). "The 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" (*Tafolla v Aldrich Mgt. Co., LLC*, 136 AD3d 1019, 1020 (2nd Dept 2016) [internal citations omitted]).

Further, "'[a] contract that provides for indemnification will be enforced as long as the intent to assume such a role is 'sufficiently clear and unambiguous'. A court must also be careful not to interpret a contracted indemnification provision in a manner that would render it meaningless.' When the intent is clear, an indemnification agreement will be enforced" (*See Bradley v. Earl B. Feiden, Inc.*, 8 NY3d 265, 274-275 (2007) *citing Rodrigues v N & S Bldg. Contrs., Inc.*, 5 NY3d 427, 433 (2005); *Levine v Shell Oil Co.*, 28 NY2d 205 (NY1971)).

Section 11.1 - Indemnification of the Contract reads in relevant part as follows:

(a) Supplier will indemnify, defend (with counsel satisfactory to JPMC) and hold harmless JPMC and all of its direct and indirect officers, director, employees... from any and all losses, liabilities, damages... and threatened Losses due to, arising from or relating to third-party claims, demands, actions or threat of action... arising or relating to:

(i) Supplier's actual or alleged breach of any warranty set forth in this Agreement...

...

(iii) the negligent, willful or reckless acts or omissions of or by Supplier or any Supplier Personnel: or

(iv) death, personal injury, bodily injury or property damage caused by the Deliverable, Supplier or any Supplier Personnel ("JPMC Indemnification Claim")

(b) JPMC will indemnify, defendant and hold harmless Supplier. Its affiliates and each of their direct and indirect officers, directors employees, agents successors and assigns ("Supplier Indemnified Person")....

Upon review of the relevant sections of the indemnification provision of the Contract between JP Morgan Chase and All Counties and upon a reading of the Contract as a whole, the Court finds that JP Morgan Chase has failed to establish prima facie that it is entitled to indemnification from All Counties as to the underlying action. Specifically, the Court finds that it is unclear from the language of the Contract whether or not JP Morgan Chase is entitled to contractual indemnification from All Counties absent a finding that the underlying action arose from All Counties' alleged negligence.

For the reasons previously stated in the instant decision, the Court finds that JP Morgan Chase failed to establish prima facie that the underlying action did not arise from JP Morgan Chase's alleged negligence. As such, there are issues of fact as to whether or not JP Morgan Chase and/or All Counties were negligent as to the underlying action, which also creates an issue of fact as to whether or not JP Morgan Chase is entitled to indemnification from All Counties under the Contract.

JP Morgan Chase has failed to establish prima facie that it is entitled to common law indemnification by All Counties

Further, as there are issues of fact as to whether or not JP Morgan Chase and/or All Counties were negligent as to the underlying action, JP Morgan Chase has also failed to establish prima facie that it is entitled common law indemnification from All Counties (*See Coque v. Wildflower Estates Developers, Inc.*, 31 AD3d 484 (2nd Dept 2006) [to be entitled to common-law indemnification, Movants was required to demonstrate that no negligent act or omission on its part contributed to plaintiff's injuries and that its liability, therefore, is purely vicarious] *citing* NY CLS Gen Oblig § 5-322.1; *Itri Brick & Concrete Corp. v. Aetna Cas. & Sur. Co.*, 89 NY2d 786 (1997); *Priestly v. Montefiore Med. Ctr.*, 10 AD3d 493 (1st Dept 2004); *Carriere v Whiting Turner Contr.*, 299 AD2d 509 (2nd Dept 2002); *Reynolds v. County of Westchester*, 270 AD2d 473 (2nd Dept 2000); *Correia v. Professional Data Mgmt., Inc.*, 259 A.D.2d 60 (1st Dept 1999)).

As such, the Court finds that the JP Morgan Chase has failed to establish prima facie that it is entitled to either contractual or common-law indemnification from All Counties.

Finally, upon review of the submitted papers and having conducted oral argument, the Court finds that JP Morgan Chase has failed to establish prima facie that All Counties breached its contractual obligation to procure the requisite insurance.

Conclusion

Accordingly and for the reasons so stated, it is hereby

ORDERED that JP Morgan Chase's motion for summary judgment against the Plaintiff dismissing the Plaintiff's underlying action and all cross–claims as against JP Morgan, and for summary judgment on JP Morgan Chase's cross-claims against the Defendant All Counties Snow Removal Corp. ("All Counties") is denied in its entirety.

The foregoing constitutes the ORDER and DECISION of the Court.

Dated: March 24, 2017

ENTER:

JSC
HON. ROBERT D. KALISH
J.S.C.