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**SHORT FORM ORDER** **INDEX NO.: 12641/2015**

**SUPREME COURT - STATE OF NEW YORK**
**I.A.S. PART 38 - SUFFOLK COUNTY**



PRESENT:

**HON. WILLIAM G. FORD**
**JUSTICE OF THE SUPREME COURT**

**Motions Submit Date: 09/14/17**
**Motion Seq 001 MG**
**Motion Seq 002 MD**

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**KAREN KELLEHER,**

**Plaintiff,**

**-against-**

**BRIAD LODGING GROUP CENTRAL ISLIP, LLC. & RESIDENCE INN BY MARRIOTT, LLC.,**

**Defendants.**

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**BRIAD LODGING GROUP CENTRAL ISLIP, LLC. & RESIDENCE INN BY MARRIOTT, LLC.,**

**Third-Party Plaintiff,**

**-against-**

**C&I CONCRETE AND MASONRY, INC., d/b/a CI LANDSCAPES,**

**Third-Party Defendant.**

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**PLAINTIFF'S COUNSEL:**
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**DEFENDANT'S COUNSEL:**
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Concerning the pending motions, this Court considered the following papers:

1. Plaintiff's Notice of Motion & Affirmation in Support and supporting papers dated April 17, 2017;
2. Third-Party Defendant's Affirmation in Opposition & in Support of Cross-Motion to Dismiss and supporting papers dated September 13, 2017;
3. Defendant's Affirmation in Opposition to Cross-Motion to Dismiss & in Partial Support of Motion to Amend and supporting papers dated August 22, 2017;
4. Plaintiff's Reply Affirmation in Further Support & in Opposition to Cross-Motion dated August 21, 2017; it is

**ORDERED** that plaintiff's motion to amend the pleadings pursuant to CPLR 3025(b) and third-party defendant's motion to dismiss the third-party complaint and in opposition to the motion to amend are consolidated herein for purposes of this determination; and it is further

**ORDERED** plaintiff's motion seeking leave of this Court pursuant to CPLR 3025(b) to amend its pleadings to join the third-party defendant as a direct party defendant in its main action is **granted** for the following reasons; and it is further

**ORDERED** that third-party defendant's application, stylized as a cross-motion, opposing plaintiff's motion to amend the pleadings and affirmatively seeking dismissal of the third-party complaint premised on a defense based in documentary evidence is hereby **denied** as follows; and it is further

**ORDERED** that the proposed Amended Complaint annexed to plaintiff's moving papers is hereby deemed having been served on all parties and their counsel; and it is further

**ORDERED** that plaintiff serve a copy of this decision and order with notice of entry on all parties and their counsel by overnight mail on or before March 29, 2018.

This matter is a premises liability negligence action filed by plaintiff Karen Kelleher against defendants and premises owners Briad Lodging Group Central Islip, LLC. and Residence Inn by Marriott, LLC. ("direct defendants" or "defendants"). Plaintiff's suit arises from an claimed slip and fall on snowy or icy conditions at a premises located at 7 Courthouse Drive, Central Islip, Suffolk County, New York 11722 on February 23, 2015. Plaintiff sues defendants for the recovery of money damages for alleged serious personal injuries sustained from the incident or occurrence.

Plaintiff commenced the instant action filing a summons and complaint against defendants on July 9, 2015. Defendants joined issue by their answer to the complaint on February 23, 2015. Thereafter, defendants commenced third-party practice serving a third-party summons and complaint against third-party defendant C&I Concrete & Masonry, Inc., d/b/a CI Landscapes ("third-party defendant" or "snow removal contractor") on July 18, 2016 alleging breach of contract and negligence, and otherwise seeking contractual indemnification and/or contribution. The third-party defendant subsequently joined issue on the third-party pleadings serving an answer on October 16, 2016.

With joinder of issue and the commencement of pretrial discovery, this matter has proceeded to this Court's discovery compliance conference calendar and has been conferenced with the Court. Presently pending is plaintiff's motion to amend its pleadings and join the third-party defendant as a direct party defendant in the main action. Plaintiff primarily bases its application on the contractual nature of the third-party as defendants' snow removal contractor at the date and time of plaintiff's occurrence.

Third-party defendant opposes plaintiff's application, and separately cross-moves seeking to dismiss the third-party action on the grounds that while conceding a snow removal agreement was in place at the time of the incident, it argues that plaintiff was unaware of the comprehensiveness or scope of it and thus its request for amendment and permissive joinder is unavailing. Further, third-party defendant argues that defendants had a non-delegable duty to

keep the premises in a reasonably safe condition, and notwithstanding its agreement with third-party defendant as a snow removal contractor, the agreement again was not so comprehensive to allow it to be held liable for plaintiff's incident. Lastly, third-party argues that cannot be held liable, and thus proposed amendment should be denied, where it was not responsible for the instrumentality for plaintiff's harm.

## I. Dismissal Founded Upon Documentary Evidence

A motion pursuant to CPLR 3211(a)(1) to dismiss a complaint on the ground that a defense is founded on documentary evidence "may be appropriately granted only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (***Eisner v Cusumano Const., Inc.***, 132 AD3d 940, 941, 18 NYS3d 683, 685 [2d Dept 2015]). "The evidence submitted in support of such motion must be documentary or the motion must be denied" (***Cives Corp. v. George A. Fuller Co., Inc.***, 97 AD3d 713, 714, 948 NYS2d 658 [internal quotation marks omitted]; *see* ***Fontanetta v. John Doe 1***, 73 AD3d 78, 84, 898 NYS2d 569; *see also* David D. Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C 3211:10, at 21–23); ***Attias v. Costiera***, 120 AD3d 1281, 1282, 993 NYS2d 59, 61 [2d Dept. 2014]; ***Goodale v. Cent. Suffolk Hosp.***, 126 AD3d 671, 672, 5 NYS3d 465, 466 [2d Dept. 2015]).

Thus, "[t]o succeed on a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (***Summer v. Severance***, 85 AD3d 1011, 1012, 925 NYS2d 627, 628 [2d Dept 2011]). "In order for evidence submitted under a CPLR 3211(a)(1) motion to qualify as 'documentary evidence,' it must be 'unambiguous, authentic, and undeniable' " (***25-01 Newkirk Ave., LLC v. Everest Nat. Ins. Co.***, 127 AD3d 850, 851, 7 NYS3d 325, 326 [2d Dept 2015]).

The Second Department has found that a contract may constitute documentary evidence within meaning of the CPLR on such an application as third-party defendant's seeking dismissal (*see* ***Cochard-Robinson v Concepcion***, 60 AD3d 800, 802, 875 NYS2d 224, 225 [2d Dept 2209]). Curiously however, third-party defendant submits no attachments or exhibits in support of its cross-motion. Thus, on its face, the branch of the application which seeks dismissal of the third-party summons and complaint on a defense founded in documentary evidence conclusively refuting the allegations in the pleadings is **denied**.

## II. Leave to Amend the Pleadings

Generally speaking, in the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit (***Postiglione v Castro***, 119 AD3d 920, 922 [2d Dept 2014]; *see also* ***TD Bank, N.A. v 250 Jackson Ave., LLC***, 137 AD3d 1006, 1007–08 [2d Dept 2016][motion court should grant leave to amend where the proposed amendment is neither palpably insufficient nor patently devoid of merit, and the defendants would not be prejudiced by the proposed amendment]).

On a motion for leave to amend, "[t]he burden of establishing prejudice is on the party opposing the amendment." In this regard, the asserted prejudice must be more than "the mere

exposure of the [opponent] to greater liability" and must indicate that the opponent "has been hindered in the preparation of [its] case or has been prevented from taking some measure in support of [its] position" (***Garafola v Wing Inc.***, 139 AD3d 793, 794 [2d Dept 2016][internal citations omitted]).

Although plaintiff may delay in making the motion for leave to amend, mere lateness is not a barrier to the amendment-it must be lateness coupled with significant prejudice to the other side (***Ciminello v Sullivan***, 120 AD3d 1176, 1177 [2d Dept 2014]).

The legal sufficiency or merits of a proposed amendment to a pleading will not be examined unless the insufficiency or lack of merit is clear and free from doubt. Moreover, leave should be freely granted where, as here, a plaintiff seeks to amend a complaint merely to add a new theory of recovery, without alleging new or different transactions (***Sample v Levada***, 8 AD3d 465, 467–68 [2d Dept 2004]).

Where third-party defendant failed, defendants Briad and Marriott succeeded in supplying the Court with a copy of the snow removal agreement held with the third-party defendant. They explain that defendants and the third-party defendant entered into that agreement on October 29, 2014 covering the subject premises concerning "snow care services" by the third-party defendant as the snow removal contractor. Defendants further contend that the agreement was prepared by the third-party defendant and bore its letterhead.

Regarding the scope of services provided by third-party defendant to defendants, it provided that third-party defendant would:

> snow plow all accessible parking areas … within property, upon 2 inches of accumulation of snow … including salt/sand for roadways and calcium for walkways
>
> snow clearing operations … proceed on a consistent, consecutive basis until … work is complete

Lastly, although the subject of some dispute amongst the parties, concerning "Ice Control" the agreement provided either:

A. The Contractor shall at his sole discretion apply ice-melting products to the premises. In determining whether or not to apply ice melting agents, in any particular circumstance, the Contractor shall act reasonably, shall monitor the weather in the vicinity of the Premises and shall apply the standards of the custom of the snow and ice maintenance industry, or
B. The customer shall at its sole discretion determine if it wishes to have ice-melting products applied at the Premises. The customer may request that Ice Melting Products be applied by email … or by phone ….

Defendants have produced affidavit testimony sworn by Marriott's general manager Susan Fierros stating in sum and substance that her experience in dealing with the third-party was that its habit, custom or past practice was to follow "Ice Melting Option A," despite that option not having been formally elected by the parties in executing the agreement.

This Court notes that plaintiff's application presents a proposed amendment that given prevailing law is not palpably deficient as third-party suggests. The Appellate Division has previously determined that a motion court properly denies a motion seeking dismissal by a snow removal contractor where "[t]he terms of the oral snow removal contract are in dispute and it is unclear whether the contract was meant to be comprehensive and exclusive; and remaining questions remains concerning contribution and indemnification amongst the parties (***Rapone v Di-Gara Realty Corp.***, 22 AD3d 654, 656, 802 NYS2d 721, 722 [2d Dept 2005]). Moreover, the law also holds that while generally, an independent contractor will not be held liable for the injuries of noncontracting third-party, two exceptions to this general rule are applicable such as "where the contracting party, in failing to exercise reasonable care in the performance of his duties, launche[s] a force or instrument of harm" and "where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (***Lawson v OneSource Facility Servs.***, 51 AD3d 983, 984, 859 NYS2d 249, 250 [2d Dept 2008]).

Here, plaintiff's proposed Amended Complaint seeks to plead both exceptions. Furthermore, given the parties dispute as to the operation of the snow removal agreement, it is clear that third-party's reliance on it to conclusively refute the third-party pleadings' allegations and plaintiff's proposed amendment is misplaced. Sufficient material and triable questions of fact predominate here that would benefit from pretrial discovery which this Court previously expected the parties to produce. Defendants have emphasized that to date third-party has propounded no discovery requests nor produced any responsive documentation or produced any witnesses for examinations before trial.

Given all of the above, third-party defendant's cross-motion for dismissal is **denied**. Plaintiff's motion to amend the pleadings to join third-party defendant as a direct party defendant is **granted**.

The foregoing constitutes the decision and order of this Court.

Dated: March 7, 2018
Riverhead, New York

**WILLIAM G. FORD, J.S.C.**

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**