| **Corporan v Primavera Props., LP** |
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| 2018 NY Slip Op 32392(U) |
| September 25, 2018 |
| Supreme Court, New York County |
| Docket Number: 451997/2017 |
| Judge: Gerald Lebovits |
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**NEW YORK STATE SUPREME COURT**
**NEW YORK COUNTY: PART 7**

MERCEDES MILAGROS DE SOTO CORPORAN,

Plaintiff,

-against-

PRIMAVERA PROPERTIES, LP, and 181ST STREET URGENT CARE CENTER,

Defendant(s).

181ST STREET URGENT CARE CENTER,

Third-Party Plaintiff,

-against-

WASHINGTON HEIGHTS BUSINESS IMPROVEMENT DISTRICT, and WASHINGTON HEIGHTS BUSINESS IMPROVEMENT DISTRICT MANAGEMENT,

Third-Party Defendant(s).

Index No: 451997/2017
**DECISION/ORDER**
Motion Seq. No. 001

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing third-party defendant Washington Heights Business Improvement District and Washington Heights Business Improvement District Management's motion for summary judgment.

| **Papers** | **NYSEF Documents Numbered** |
|---|---|
| Third-Party Defendant Washington's Notice of Motion | 4 |
| Third-Party Defendant Washington's Affirmation in Support | 5-14 |
| Defendant/Third-Party Plaintiff Urgent's Affirmation in Opposition | 19-22 |
| Plaintiff Corporan's Affidavit in Opposition | 33-38 |
| Third-Party Defendant Washington's Reply Affirmation | 45-46 |

*Brooke Lombari, Esq.*, New York, for plaintiff Mercedes Milagros De Soto Corporan.
*The Law Office of James J. Tommey*, New York (Frederick D. Schmidt, Jr. of counsel), for third-party defendants Washington Heights Business Improvement District and Washington Heights Business Improvement District Management
*Morry, Duffy, Alonso & Faley*, New York (Jenna L. Mastroddi of counsel), for defendant/third-party plaintiff 181st Street Urgent Care Center.

Plaintiff Mercedes Milagros De Soto Corporan filed a negligence action under Index No. 6576/2014 in Kings County against Primavera Properties, LP (Primavera), and 181st Street Urgent Care Center (Urgent). Plaintiff claims that defendants' negligence in removing snow proximately caused plaintiff's slip-and-fall injury on the sidewalk in front of the premises

located at 521 West 181st Street, New York, New York. Defendant Primavera moved to change venue from Kings County to New York County. The Kings County case was transferred to New York County under Index No. 451997/2017.

Defendant/third-party plaintiff Urgent filed a third-party complaint against Washington Heights Business Improvement District and Washington Heights Business Improvement District Management (collectively Washington) for liability in plaintiff's slip-and-fall incident. Washington now moves under CPLR 3212 for summary judgment to dismiss plaintiff Corporan's complaint and all cross-claims and counterclaims against Washington on the ground that Washington is not liable for the alleged incident.

Washington's motion for summary judgment is denied.

## I. Background

Primavera is the property owner of the premise located at 521 West 181st Street, New York, New York. Urgent is the ground-floor tenant of this real property. Defendant Primavera pays the City of New York (NYC) to provide the maintenance and sanitation service in this district, the subject sidewalk included. (Third-Party Defendant Washington's Affirmation in Support, Exhibit G, Angela Ramirez's Deposition, at 32.) NYC contracted with third-party defendant Washington to provide these maintenance and sanitation services. Washington subcontracted these services to Atlantic Maintenance Corporation (Atlantic).

On or about February 14, 2014, at approximately 8:45 p.m., plaintiff was walking on the subject sidewalk when she slipped and fell on alleged black ice. At the time of the incident, plaintiff alleges that she was walking in the middle of the subject sidewalk and that there was snow on both sides along the sidewalk. (Third-Party Defendant Washington's Affirmation in Support, Exhibit F, Plaintiff's Deposition, at 16.) She claims that she cannot remember whether the sidewalk near where she fell was clear of snow. (*Id.*) She alleges that she did not see ice on the sidewalk before falling and that she saw the alleged black ice when she was laying down on the sidewalk. (*Id.* at 17) She alleges that there was no salt or sand on the sidewalk. (*Id.*)

## II. Washington's Summary-Judgment Motion to Dismiss Plaintiff's Complaint

Washington's summary-judgment motion to dismiss plaintiff Corporan's complaint is denied. "Any party may move for summary judgment in any action, after issue has been joined . . . ." (CPLR 3212 [a].) Washington is a non-party to plaintiff Corporan's case against defendants Primavera and Urgent. Washington may not file a summary judgment motion to dismiss Corporan's complaint.

## III. Washington's Summary-Judgment Motion to Dismiss All Cross-Claims and Counterclaims Against Washington

Washington's summary-judgment motion to dismiss the cross-claims and counterclaims against Washington is denied.

Washington fails to make a prima facie showing that Washington has no duty to remove snow on the subject sidewalk. A summary-judgment movant must make a prima facie showing of entitlement to judgment as a matter of law and showing absence of any material issue of fact. (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985].)

This court agrees with Washington that it does not own or control the premises adjoining the subject sidewalk, but disagrees with Washington that its subcontract with Atlantic can prove that it has no duty to remove the snow on the subject sidewalk. Washington's executive director, Angela Ramirez, testified at her deposition that Washington's subcontract with Atlantic gave Atlantic the duty to remove the snow in the catch basins and pedestrian crosswalks but that the duty did not include removing the snow from the sidewalks. (Third-Party Defendant Washington's Affirmation in Support, Exhibit G, Angela Ramirez's Deposition, at 30.) Ramirez claims that property owners and/or tenants are generally responsible for removing snow on the sidewalk in front of their properties. (*Id.* at 18.)

Washington's argument about subcontract is meritless. Subcontractor is not in privity with a project owner; thus, a subcontract may not bind an owner. (*Adams v Boston Properties Limited Partnership*, 41 AD3d 112, 112 [1st Dept 2007]; *Braun Equipment v Meli Borelli Associates*, 220 AD2d 312, 312 [1st Dept 1995].) Washington's contract with NYC shows that Washington would be responsible for "the sweeping of sidewalks and the removal of litter and snow within the District." (Defendant/Third-Party Plaintiff Urgent's Affirmation in Opposition, Exhibit B, Contract Between the City of New York and Washington, at 6.) Regardless whether Washington subcontracted its duties to remove the snow to Atlantic — the catch basins and cross walks — Washington had a duty to remove the snow on the sidewalks. It is undisputed that plaintiff's fall occurred on the sidewalk, not on a catch basin or cross walk. Therefore, Washington has a duty to remove the snow on the subject sidewalk.

No evidence shows that Washington had actual notice of the conditions alleged by plaintiff, but this court disagrees with Washington that it did not have constructive notice of the alleged conditions and thus has no duty to remove the snow on the subject sidewalk. "[T]o constitute constructive notice of a defect, a defect must be visible and apparent and it must exist for a sufficient length of time prior to accident to permit [defendant] to discover and remedy it." (*Hayes v Riverbend Hous. Co., Inc.*, 40 AD3d 500, 500 [1st Dept 2007].) Plaintiff's expert, a meteorologist, filed an affidavit that the icy, slippery conditions on the subject sidewalk had been presented about 15 hours before the time of the incident. (Plaintiff Corporan's Affidavit in Opposition, Exhibit A, Report of Plaintiff's Expert Meteorologist, at 10.) The day before the incident, approximately 10 inches of snow was on the ground. (*Id.* at 8) On the day of the incident, an additional 3.2 inches of snow accumulated on the ground. (*Id.* at 9) Therefore, the snow fell between 12:22 a.m. through 5:50 a.m. on the morning of the accident and the past snow days gave Washington sufficient time and constructive notice of the icy, slippery conditions on the subject sidewalk.

Washington's argument that it did not cause, create, or exacerbate the alleged sidewalk conditions does not disprove its duty to remove the snow on the subject sidewalk. Under the storm-in-progress rule, it is the landowner's duty to take reasonable measures to remedy a dangerous condition caused by a storm while the storm is ongoing until a reasonable time after

the storm has ended. (*Baumann v Dawn Liquors Inc.*, 148 AD3d 535, 537 [1st Dept 2017].) New York City requires that "owners of abutting properties have four hours from the time the precipitation ceases, excluding the hours between 9:00 p.m. and 7:00 a.m., to clear ice and snow from the sidewalk." (New York City Administrative Code § 16-123 [a].) Here, the snow had ended 15 hours before the time of the incident. (Plaintiff Corporan's Affidavit in Opposition, Exhibit A, Report of Plaintiff's Expert Meteorologist, at 10.) Even if Washington could prove that it did not cause, create, or exacerbate the alleged sidewalk conditions, it still had a duty to remove the snow on the subject sidewalk. Washington assumed the covenant of NYC's contract with the landlord Primavera requiring NYC to provide snow-removal services on the subject sidewalk.

Accordingly, it is hereby

ORDERED that third-party defendant's summary-judgment motion is denied.

Dated: September 25, 2018

J.S.C.

9/25/2018
DATE

GERALD LEBOVITS, J.S.C.

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| CHECK ONE: | | CASE DISPOSED | | X | NON-FINAL DISPOSITION | | |
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| APPLICATION: | | SETTLE ORDER | | | SUBMIT ORDER | | |
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