SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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CARRIE QUINN,

Plaintiff,

-against-

GREENBLATT FAMILY ASSOCIATES LLC, ZERO EIGHT PROPERTIES LLC, MDSL ASSOCIATES, ALAN LEWIS and CHRISTINE JELALIAN,

Defendants.

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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. EF011360-2018

Motion Date: May 17, 2021

GREENBLATT FAMILY ASSOCIATES LLC, ZERO EIGHT PROPERTIES LLC, MDSL ASSOCIATES, ALAN LEWIS and CHRISTINE JELALIAN,

Third-Party Plaintiffs,

-against-

ADVANTAGE LAWNCARE & LANDSCAPING,

Third-Party Defendant.

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The following papers numbered 1 to 6 were read on the Third-Party Defendant's motion for summary judgment dismissing the Third-Party Complaint:

Notice of Motion - Affirmation / Exhibits 1-2

Affirmation in Opposition. 3

Reply Affirmation 4

Upon the foregoing papers it is ORDERED that the motion is disposed of as follows:

A. Factual Background

This is an action to recover for personal injuries arising out of plaintiff Carrie Quinn's slip and fall on "white" ice at or about 7:00 p.m. on February 1, 2017 in the parking lot at office premises owned by Defendants at 425 Robinson Avenue, Newburgh, New York.

Defendants orally contracted with Third-Party Defendant Advantage Lawncare & Landscaping ("Advantage") for snow removal and salting services. There is evidence that Advantage used its discretion in determining when to perform services at Defendants' premises. There is also evidence that Defendants' personnel would sometimes summon Advantage to the premises, and at other times perform salting on their own.

The evidence of record shows that snow fell on the day before Plaintiff's accident. Advantage cleared the parking lot and piled the snow. Advantage's principal testified that it was Advantage's practice to pile the snow at the bottom of the parking lot so that snowmelt would run off into the street. However, Plaintiff testified that on February 1, 2017, the date of her accident, snow was piled to the side higher up in the parking lot. The day was sunny and clear, and when she arrived for work in the morning the parking lot was clear and dry. At 7:00 p.m. that evening, after she had finished work and was leaving for the day, she slipped and fell on a sheet of "white" ice that extended four feet past her car.

B. The Pleadings

1. Plaintiff's Complaint

The Plaintiff's Complaint, which does not name Advantage as a direct defendant, alleges in pertinent part as follows:

69. That the defendants, through its agents, servants, employees, were negligent, reckless and careless in allowing and permitting a falling hazard to exist at the aforesaid premises; that the lack of action on the part of the defendants produced a hazardous condition; in failing to correct and/or remedy the aforesaid conditions; in failing to regularly inspect the aforesaid premises; in failing to clear snow and ice from the parking lot; in failing to salt and sand; in failing to recognize the melt and re-freeze; in failing to observe that degree of caution, prudence and care which was reasonable and proper so as to avoid the contingency which occurred herein; in failing to warn the public, and plaintiff in particular, of the dangerous conditions that existed; in hiring incompetent, inept and untrained employees; in causing, allowing and permitting the aforementioned parking lot to accumulate ice and snow so as to render the parking lot dangerously slippery and unsafe for use; in that the defendants, their servants, employees and/or agents failed to provide supervision or instructions for the plaintiff at the aforesaid premises as and when required, not did the defendants post warning signs to inform the plaintiff of the dangerous and defective conditions then and there existing, nor did defendants apply salt, sand, or ice melting agents, nor erect cones, signs or any other mechanism to warn of the possible slippery conditions therefrom then and there existing, nor did they bar access to the subject area which would have prevented the happening of the accident in its entirety; in allowing said condition to exist for a long period of time, in causing a hazard, nuisance menace and trap-like condition to be present at said location for an unreasonable length of time, all of which the defendants had due notice or by reasonable inspection thereof, might and should have had due notice and knowledge; in failing to provide the plaintiff with a safe passage; in failing to supply guards to prevent this occurrence; in negligently, carelessly and unlawfully maintaining the premises in a dangerous and defective condition in violation of the laws of the State of New York and in failing to own, operate, maintain, manage and control the said premises in accordance with the laws, regulations and ordinances of the State, County and Municipal Authorities, including but not limited to failing to maintain, and keep the above premises in a safe and proper condition; in failing to report dangers at the location described; in failing to use that degree of caution, prudence; and the defendants, their agents, servants and/or employees were in other ways negligent, wanton, reckless and careless.

2. Plaintiff's Bill of Particulars

Plaintiff's April 4, 2019 Bill of Particulars alleges in pertinent part:

5. On and prior to February 1, 2017 the Defendants, disregarding their duties aforesaid, negligently, carelessly, and unlawfully made, permitted, and allowed the area parking lot as above-described to be and become and remain in an unsafe and dangerous condition so as to constitute a nuisance, menace, and danger to those lawfully using it; in permitting there to be a wet and slippery surface in that the said location of the said parking lot area was icy; that the defendant failed to undertake necessary maintenance to the subject area; in that the defendants failed to give proper warning of the dangerous and defective

conditions then and there existing; in failing to have in place adequate ice removal and maintenance; and in failing to properly maintain that area of the parking lot above mentioned which would have prevented the happening of the accident complained of herein; in that defendants failed to post proper warning signs, place cones, place an arrow or sign diverting pedestrian traffic away from the location of the parking lot; all of which the defendant had due notice or, by reasonable inspection thereof, might and should have had due notice and knowledge.

3. Defendants' Third-Party Complaint

Defendants' Third-Party Complaint alleges in pertinent part as follows:

3. On or before February 1, 2017, Third-Party Defendant Advantage entered into a contract with one or more of the Third-Party Plaintiffs to perform salting and snowplowing services for parking areas, aisles, and walkway surfaces for the subject premises.

4. This contract included a provision that required Advantage to defend and indemnify Third-Party Plaintiffs from all actions, costs, claims, losses, expenses, and damages caused by Advantage's activities or the apparent failure to act in adherence with their agreement.[1]

5. On February 1, 2017, Advantage was responsible for snow removal and salting of the parking lot and surrounding area at the subject premises.

6. On October 30, 2018, Plaintiff Carrie Quinn filed the above-captioned complaint where Plaintiff alleged to have fallen on snow and/or ice in the parking lot of the subject premises on February 1, 2017....

Based on the foregoing, Defendants assert third-party claims for contribution and common law indemnification against Advantage.

Advantage now moves for summary judgment dismissing Defendants' third-party claims for contribution and common law indemnification.

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[1]The evidence establishes that there was no written agreement for snowplowing / salting services. The agreement between Defendants and Advantage was purely oral, and there is no evidence of any oral indemnification agreement. The Third-Party Complaint makes no claim for contractual indemnification.

C. The Burden Of Proof On Motions For Summary Judgment

"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 issues of fact from the case." *Winegrad v. New York University Medical Center,* 64 NY2d 851, 853 (1985). A defendant moving for summary judgment bears "the initial burden of establishing prima facie entitlement to judgment as a matter of law by affirmatively demonstrating the merit of its defense, rather than by pointing to gaps in the plaintiffs' evidence." *Wheaton v. East End Common Associates, LLC,* 50 AD3d 675, 677 (2d Dept. 2008). "[T]he prima facie showing which a defendant must make on a motion for summary judgment is governed by the allegations of liability made by the plaintiff in the pleadings." *Foster v. Herbert Slepoy Corp.*, 76 AD3d 210, 214 (2d Dept. 2010) (citing *Alvarez v. Prospect Hospital,* 68 NY2d 320, 325, and *Winegrad v. New York University Medical Center, supra*). The movant's failure to meet this burden of proof "requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v. New York University Medical Center, supra.* If, on the other hand, the movant establishes *prima facie* entitlement to summary judgment, the opponent, to defeat the motion, "must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Zuckerman v. City of New York,* 49 NY2d 557, 562 (1980).

D. Contribution

CPLR §1401 provides in pertinent part that "two or more persons who are subject to liability for damages for the same personal injury...may claim contribution among them whether

or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought."

"The 'critical requirement' for apportionment by contribution under CPLR article 14 is that 'the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought'." *Raquet v. Braun,* 90 NY2d 177, 183 (1997) (quoting *Nassau Roofing & Sheet Metal Co. v. Facilities Dev. Corp.,* 71 NY2d 599, 603). A property owner's claim for contribution against its contractor may be founded on the alleged contributor's "duty of reasonable care to the plaintiff or a duty of reasonable care independent of its contractual obligations to the owner." *See, Bryan v. CLK-HP 225 Rabro, LLC,* 136 AD3d 955, 956 (2d Dept. 2016); *Foster v. Herbert Slepoy Corp., supra,* 76 AD3d at 216; *Roach v. AVR Realty Company, LLC,* 41 AD3d 821, 824 (2d Dept. 2007); *Baratta v. Home Depot USA, Inc.,* 303 AD2d 434, 435 (2d Dept. 2003). *See also, Raquet v. Braun, supra,* 90 NY2d at 182; *Sommer v. Federal Signal Corporation,* 79 NY2d 540, 559 (1992).

1. Duty To Plaintiff

"As a general rule, a limited contractual obligation to provide snow removal services does not render the contractor liable in tort for the personal injuries of third parties." *Rudloff v. Woodland Pond Condominium Ass'n, supra,* 109 AD3d 810 (2d Dept. 2013). *See, Espinal v. Melville Snow Contrs.,* 98 NY2d 136, 138 (2002). In *Espinal,* the Court of Appeals identified three exceptions to the general rule, pursuant to which "a party who enters into a contract to render services may be said to have assumed a duty of care – and thus be potentially liable in tort – to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launche[s] a force or instrument of harm; (2) where the plaintiff

detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely." *Id.*, 98 NY2d at 140.

On a motion for summary judgment, as noted above, "the prima facie showing which a defendant must make...is governed by the allegations of liability made by the plaintiff in the pleadings." *Foster v. Herbert Slepoy Corp., supra,* 76 AD3d at 214. Therefore, to demonstrate *prima facie* entitlement to summary judgment, a snow removal contractor is required to affirmatively negate the *Espinal* exceptions only if the plaintiff (or third-party plaintiff) in his complaint or bill of particulars has alleged facts which would establish their applicability – and, in this regard, boilerplate allegations that a contractor "created" the condition are insufficient to trigger *Espinal*. *See, Foster v. Herbert Slepoy Corp., supra*, 76 AD3d at 212, 214. *See also, Bryan v. CLK-HP 225 Rabro, LLC, supra,* 136 AD3d at 956; *Rudloff v. Woodland Pond Condominium Ass'n, supra,* 109 AD3d at 811. In such circumstances, a snow removal contractor demonstrates his *prima facie* entitlement to judgment as a matter of law "merely by coming forward with proof that the plaintiff was not a party to his...snow removal contract and that he therefore owed no duty of care to the plaintiff." *Foster v. Herbert Slepoy Corp., supra*, 76 AD3d at 214. *See, Bryan v. CLK-HP 225 Rabro, LLC, supra*; *Rudloff v. Woodland Pond Condominium Ass'n, supra*.

Here, neither Plaintiff in her Complaint and Bill of Particulars nor Defendants in their Third-Party Complaint have alleged facts that would demonstrate the applicability of any of the *Espinal* exceptions. Defendants' counsel insists in this regard that Plaintiff's sole allegation here is that Advantage created the icy condition at issue by improperly piling snow which then melted

and refroze in the parking lot. However, no such allegation appears in the lengthy recitations of alleged negligence in Plaintiff's Complaint or Bill of Particulars (quoted above). At most, the Complaint alleges that "the defendants, through its agents, servants, employees, were negligent, reckless and careless...in causing, allowing and permitting the aforementioned parking lot to accumulate ice and snow so as to render the parking lot dangerously slippery and unsafe for use" (Complaint ¶69). As noted above, such boilerplate allegations that a contractor created the condition at issue are insufficient to trigger *Espinal*.

Therefore, Advantage established *prima facie* that it owed no duty to Plaintiff simply by virtue of the fact that Plaintiff was not a party to its snow removal contract with Defendants. Consequently, the burden shifted to the Defendants to demonstrate the existence of a triable issue of fact on that score with respect to at least one of the three *Espinal* exceptions.

Defendants contend, first, that Advantage launched a force or instrument of harm by creating piles of snow which foreseeably resulted in a dangerous condition because of melting and refreezing. However, to raise an issue of fact in that regard, Defendants were required to introduce evidence linking Advantage's conduct to the creation or exacerbation of the condition which caused Plaintiff's injury. *See, Santos v. Deanco Services, Inc.*, 142 AD3d 137, 142 (2d Dept. 2016); *Foster v. Herbert Slepoy Corp., supra*, 76 AD3d at 215. In other words, they had to "offer a basis from which it could be reasonably inferred that defendant's snow-removal efforts 'created or heightened' the alleged hazardous condition." *See, Rivas v. NYCHA,* 140 AD3d 580 (1st Dept. 2016). Mere speculation is insufficient. *See, Santos v. Deanco Services, Inc., supra,* 142 AD3d at 142-143; *Silva-Carpanzano v. Schecter,* 105 AD3d 1030, 1031 (2d Dept. 2013); *Foster v. Herbert Slepoy Corp., supra; Folki v. McCarey Landscaping,*

Inc., 66 AD3d 825, 825-826 (2d Dept. 2009); *Zabbia v. Westwood, LLC,* 18 AD3d 542, 544 (2d Dept. 2005); *McCord v. Olympia & York Maiden Lane Co.*, 8 AD3d 634, 636 (2d Dept. 2004).

In *Zabbia, supra,* the Second Department held that the plaintiff's failure to adduce proof as to how or when the alleged melting-and-refreezing of piled snow occurred was fatal to her claim:

> The plaintiffs' sole theory of liability in this case was that the "black" ice allegedly was created by [defendants] as the result of piling snow adjacent to the parking lot and allegedly allowing it to melt and re-freeze. In opposition to the defendants' prima facie case, however, the plaintiffs tendered no proof, expert or otherwise, as to exactly how or when the icy condition may have formed during the four-hour period between their arrival at the mall and the accident. Thus, their claim that the defendants caused or created the ice patch through incomplete snow removal efforts [cit.om.] was based on speculation, which was insufficient to defeat a motion for summary judgment [cit.om.].

Zabbia, supra, 18 AD3d at 544. In *McCord, supra,* the plaintiff adduced climatological evidence, but his expert's affidavit was nevertheless deemed conclusory and insufficient to defeat the defendant's motion for summary judgment:

> [T]he plaintiff failed to raise a triable issue of fact as to whether [defendant] created or exacerbated the condition [cit.om.]. The plaintiff submitted, inter alia, an affidavit of a professional engineer. The expert averred that his opinions were based on, among other things, climatological records, but he did not point to any specific part of the climatological records to justify his conclusion that water could have melted from the allegedly "over-piled" snow and refroze on the sidewalk [cit.om.]. Under the circumstances, the expert's affidavit was conclusory, and thus, insufficient to defeat a motion for summary judgment [cit.om.].

McCord, supra, 8 AD3d at 636. *See also, Folki v. McCarey Landscaping, Inc., supra* (same).

The evidence adduced by Defendants in this case is likewise deficient. There is no proof, expert or otherwise, as to how or when on February 1, 2017 the icy condition which caused Plaintiff's slip and fell may have formed. Neither climatological records nor topological evidence has been offered to support an inference that water could have melted from allegedly

over-piled snow, flowed across the parking lot and refrozen. The claim that Advantage launched an instrument of harm by stockpiling the snow in the parking lot is, on the present record, wholly speculative.

Secondly, Defendants contend that Advantage entirely displaced Defendants' duty to maintain their premises safely by virtue of an oral agreement for snow removal services pursuant to which Advantage enjoyed discretion as to when it would appear and provide those services. However, a contractor displaces the property owner's duty to maintain and assumes liability for injury to third parties on the premises only when its maintenance agreement is "comprehensive and exclusive"; when it has become "the sole privatized provider for a safe and clean...premises"; when it "contracts to inspect and repair and possesses the exclusive management and control of real...property which results in negligent infliction of injury..." *See, Palka v. Servicemaster Management Services Corp.*, 83 NY2d 579, 588-589 (1994). The mere fact that Advantage enjoyed discretion to decide when to appear at Defendants' premises in the context of an otherwise limited oral engagement to provide snow removal and salting services does not even begin to demonstrate the existence of a comprehensive and exclusive maintenance agreement within the meaning of *Espinal* and *Palka*. Indeed, the evidence here explicitly shows that Defendants did not wholly cede their maintenance obligation to Advantage, but sometimes summoned Advantage and sometimes salted the premises on their own.

In view of the foregoing, the Court concludes as a matter of law that Advantage established *prima facie* that it owed no duty of care to Plaintiff, and Defendants in opposition failed to demonstrate the existence of any triable issue of fact.

2. Duty To Third-Party Plaintiffs

In the absence of a duty of care running to the injured Plaintiff, "a claim for contribution may be asserted if there has been a breach of a duty that runs from the contributor to the defendant who has been held liable." *Raquet v. Braun, supra,* 90 NY2d at 182. *See also, Sommer v. Federal Signal Corporation, supra,* 79 NY2d at 559. However, a defendant seeking contribution on this basis must demonstrate that the contributor "owed [it] a duty of reasonable care independent of its contractual obligations." *See, Bryan v. CLK-HP 225 Rabro, LLC, supra*; *Foster v. Herbert Slepoy Corp., supra*; *Roach v. AVR Realty Company, LLC, supra*; *Baratta v. Home Depot USA, Inc. See also, Hites v. Toys "R" Us, Inc.*, 33 AD3d 759, 761 (2d Dept. 2007). Here, the Court discerns no duty independent of contractual obligations running from Advantage to the Defendants.

3. Conclusion

In view of the foregoing, Advantage's motion for summary judgment dismissing the Defendants' third-party claim for contribution is granted, and the contribution claim is dismissed.

E. Common Law Indemnification

One who employs an independent contractor may obtain common law indemnification from the contractor if the plaintiff's injury "can be attributed solely to negligent performance or nonperformance of an act solely within the province of the contractor." *Curreri v. Heritage Property Investment Trust, Inc.*, 48 AD3d 505, 507 (2d Dept. 2008). *See, Foster v. Herbert Slepoy Corp., supra,* 76 AD3d 210, 216 (2d Dept. 2010); *Roach v. AVR Realty Company, LLC, supra,* 41 AD3d 821, 824 (2d Dept. 2007). Common law indemnification would be available, therefore, to a property owner if its liability to an injured plaintiff were based solely on vicarious

liability for its contractor's conduct and not on its own wrongdoing in failing to properly maintain its property. *See, Keshavarz v. Murphy,* 242 AD2d 680, 681 (2d Dept. 1997) (citing *County of Westchester v. Welton Becket Assoc.*, 102 AD2d 34, 47, *aff'd* 66 NY2d 642).

Thus, to obtain summary judgment dismissing the Defendants' claim for common law indemnification, Advantage was required to establish as a matter of law that its allegedly having caused the parking lot to accumulate ice (*see,* Complaint ¶69) was not the sole proximate cause of Plaintiff's accident, and that negligence on the Defendants' part also contributed to the accident. *See, e.g., Foster v. Herbert Slepoy Corp., supra,* 76 AD3d at 216; *Villon v. Town Sports International LLC,* 128 AD3d 609 (1st Dept. 2015). So far from meeting its burden on that point, Advantage (in supporting Defendants' motion for summary judgment) urged to the contrary that no negligence on Defendants' part contributed to Plaintiff's accident. Advantage thus failed to eliminate as a matter of law all issues of fact as to whether Defendants' liability to Plaintiff, if any, is based exclusively on negligent acts or omissions solely within Advantage's province or rather, in whole or in part on Defendants' own wrongdoing in failing to properly maintain their property.

Consequently, Advantage's motion for summary judgment dismissing the third-party claim for common law indemnification must be denied regardless of the sufficiency of the opposing papers.

It is therefore

ORDERED, that the motion of Third-Party Defendant Advantage Lawncare & Landscaping for summary judgment dismissing the Third-Party Complaint is granted to the limited extent that the Defendants / Third-Party Plaintiffs' claim for contribution is dismissed,

and it is further

ORDERED, that the said motion for summary judgment is otherwise denied.

The foregoing constitutes the decision and order of the Court.

Dated: June 16, 2021 ENTER
Goshen, New York

Catherine M. Bartlett

HON. CATHERINE M. BARTLETT, A.J.S.C.

HON. C. M. BARTLETT
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE