Eisenberg v Avalon Bay Communities, Inc.
2018 NY Slip Op 32351(U)
September 20, 2018
Supreme Court, Suffolk County
Docket Number: 01214/2016
Judge: William B. Rebolini
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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Francine Eisenberg,

Plaintiff,

-against-

Avalon Bay Communities, Inc.
and The Brickman Group LTD, LLC,

Defendants.

Index No.: 01214/2016

Motion Sequence No.: 001 MOTD
Motion Date: 2/6/18
Submitted: 6/27/18

Motion Sequence No.: 002; MG
Motion Date: 5/30/18
Submitted: 6/27/18

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Clerk of the Court

Upon the Notice of Motion and supporting papers by defendant Avalon Bay Communities, Inc. dated January 10, 2018 for summary judgment dismissing the plaintiff's complaint as against it and for summary judgment on its cross-claims against defendant The Brickman Group, Ltd., LLC, pursuant to CPLR 3212, the Answering affidavits and supporting papers of plaintiff dated March 2, 2018, the Answering affidavits and supporting papers of defendant The Brickman Group, Ltd., LLC dated May 2, 2018, the Replying affidavits and supporting papers of defendant Avalon Bay Communities, Inc. dated June 7, 2018 as to plaintiff's opposition papers, and the Replying affidavits and supporting papers of defendant Avalon Bay Communities, Inc., dated June 7, 2018 as to the

opposition papers of defendant The Brickman Group, Ltd., LLC (Motion Sequence 001) and upon the Notice of Motion and supporting papers by defendant The Brickman Group, Ltd., LLC dated May 7, 2018 for summary judgment dismissing the plaintiff's complaint as against it and granting it summary judgment dismissing the cross-claims of defendant Avalon Bay Communities, Inc. pursuant to CPLR 3212, the Answering affidavits and supporting papers of plaintiff dated May 21, 2018, the Answering affidavits and supporting papers of defendant Avalon Bay Communities, Inc., dated June 5, 2018 and the Replying affidavits and supporting papers of defendant The Brickman Group, Ltd., LLC dated June 26, 2018 (Motion Sequence 002); it is

ORDERED that the motions (Motion Sequences 001 and 002) are being consolidated for the purposes of a determination herein; and it is further

ORDERED that the motion by defendant Avalon Bay Communities, Inc. for summary judgment dismissing the complaint as against it pursuant to CPLR 3212 is granted; and it is further

ORDERED that the motion by defendant The Brickman Group, Ltd., LLC for summary judgment dismissing the complaint as against it pursuant to CPLR 3212 is granted; and it is further

ORDERED that the motion by defendant The Brickman Group, Ltd., LLC for summary judgment dismissing the cross-claims asserted against it by defendant Avalon Bay Communities, Inc., pursuant to CPLR 3212 is granted; and it is further

ORDERED that the motion by defendant Avalon for summary judgment on its cross-claims against defendant The Brickman Group, Ltd., LLC, pursuant to CPLR 3212 is denied.

FACTUAL AND PROCEDURAL BACKGROUND

This action was commenced by the filing of a summons and complaint on February 3, 2016 seeking damages for personal injuries allegedly sustained by the plaintiff as a result of an alleged slip and fall on snow/ice on January 26, 2015 at 100 Court Drive North, Melville, New York. Issue was joined by defendant Avalon Bay Communities, Inc. ("Avalon") by service of its answer on February 9, 2016 and by defendant The Brickman Group Ltd., LLC ("Brickman") by service of its answer on March 15, 2016. Plaintiff's bill of particulars to defendant Avalon was served on May 6, 2016 and was served on defendant Brickman on May 20, 2016. Plaintiff alleges in her bill of particulars that she slipped and fell on a snow covered ice patch on January 26, 2015 at approximately 10:00 a.m. outside of her home at the end of her driveway where it meets the roadway in Avalon Bay, 100 North Court Drive, Melville, New York (the "subject premises"). Plaintiff further alleges that snow and ice were the dangerous condition which caused her fall and that defendants Avalon and Brickman were negligent in the maintenance and control of the snow removal at the subject premises. Plaintiff's deposition was conducted on February 28, 2017, the deposition of defendant Avalon by Deosaran Ramkisson ("Ramkisson") was held on June 28, 2017 and the deposition of defendant Brickman by Michael Vrtodusic ("Vrtodusic") was held on June 28, 2017. Defendant Avalon now moves for summary judgment dismissing the complaint and for summary judgment on its cross-

claim against defendant Brickman for indemnification. In support of its motion for summary judgment defendant Avalon submits a copy of the pleadings, plaintiff's verified bill of particulars, the certified transcript of the deposition of plaintiff, the certified transcript of the deposition of Ramkisson, the certified transcript of the deposition of Vrtodusic, the landscape maintenance and snow removal agreement entered into between defendants Avalon and Brickman (the "agreement"), and the Brickman Winter Storm Documentation Log for the subject premises from January 24, 2015 to January 26, 2015 (the "Brickman snow log"). Plaintiff opposes the motion and defendant Brickman opposes summary judgment in favor of defendant Avalon on its cross-claim. Defendant Avalon replies. Defendant Brickman also moves for summary judgment dismissing the complaint as against it and the cross-claims asserted against it by defendant Avalon. In support of its motion for summary judgment, Brickman submits a copy of the pleadings, plaintiff's bill of particulars, the deposition transcript of plaintiff, the affidavit of plaintiff sworn to on January 29, 2018, the deposition transcript of Ramkisson and Vrtodusic, the agreement, the Brickman snow log, and the expert affidavit of George Wright, CCM. Plaintiff opposes the Brickman motion for summary judgment and defendant Avalon opposes the motion insofar as it pertains to its cross-claim.

THE TESTIMONY OF THE PARTIES

Plaintiff testified that on the date of her accident, she left her apartment at approximately 10:00 am to retrieve her mail. She proceeded down her driveway towards the roadway and was heading towards the right where her mailbox was located, when she slipped and fell on ice near the edge of her driveway. Plaintiff further testified that prior to her accident, she never observed any ice on her driveway or the roadway and only determined that ice caused her to fall when she felt the ground after she fell. Plaintiff testified that at the location of her fall, there was a powder light dusting of snow with ice under it. Plaintiff was unsure if the ice was within her driveway or was on the roadway. Plaintiff further testified that she did not give any notice to defendant Avalon about the alleged icy condition and only contacted the management office after her alleged accident. Ramkisson testified that defendant Brickman was responsible for snow and ice removal at the subject premises, including all walkways, driveways, and roadways, pursuant to the agreement. Ramkisson further testified that the agreement contained an indemnification clause requiring Brickman to indemnify and hold Avalon harmless for all loss, damage, and expenses incurred by Avalon arising from any personal injury claims brought by any person resulting from the services provided by Brickman. Vrtodusic testified that on January 24, 2015 and for "several days after," Brickman removed snow and ice at the subject premises, and in particular, "all the driving lanes, asphalt areas, parking stalls, and sidewalks." Vrtodusic further testified that Brickman returned to the subject premises numerous times between January 24, 2015 and January 27, 2015 and that each time after Brickman completed the work at the subject premises, they made a final tour to ensure that "all areas were done." As part of its regular business practice, Vrtodusic testified that Brickman maintains a winter storm documentation log, and that according to the Brickman snow log, Brickman arrived at the subject premises for an "ice watch" from 4:00 am to 6:00 am on January 26, 2015, which was approximately four hours prior the plaintiff's fall. Vrtodusic testified that an "ice watch" involves visiting the premises to check for any re-freezing that might occur. The Brickman employee who completed the "ice watch" entry in the Brickman snow log, noted that Brickman arrived on site for the "ice watch" and inspected all roadways and walks before completing its inspection. The

Court notes that the unsigned deposition transcripts of the parties are admissible on defendants' motions for summary judgment, as no party has challenged the accuracy of the testimony as transcribed and each transcript was certified as accurate by a notary (*see* ***Martin v City of New York***, 82 AD3d 653 [2011]); ***Rodriguez v Ryder Truck, Inc.***, 91 AD3d 935, 937 NYS2d 602 [2d Dept 2012]; ***Zalot v Zieba***, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]; *see also* ***Bennet v Berger***, 283 AD2d 374, 726 NYS2d 22 [1st Dept 2001]; ***Zabari v City of New York***, 242 AD2d 15, 672 NYS2d 332 [1st Dept 1998]) and they have been adopted by the party deponents (***Rodriguez v Ryder Truck, Inc.***, *supra*; ***Ashif v Won Ok Lee***, 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]; ***Wojtas v Fifth Ave. Coach Corp.***, 23 AD2d 685, 257 NYS2d 404 [2d Dept 1965]).

DEFENDANT AVALON'S MOTION FOR SUMMARY JUDGMENT

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see* ***Rotuba Extruders, Inc. v Ceppos***, 46 NY2d 223, 413 NYS2d 141 [1978]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (***S.J. Capelin Assoc., Inc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (***Benincasa v Garrubbo***, 141 AD2d 636, 637, 529 NYS2d 797, 799 [2d Dept 1988]). Once a *prima facie* showing has been made, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*). However, conclusory allegations unsupported by competent evidence are insufficient to defeat a summary judgment motion (***Alvarez,*** *supra*, 68 N.Y.2d at 324-325, 508 N.Y.S.2d 923, 501 N.E.2d 572). Further, a party may not, through an affidavit submitted on summary judgment, contradict his or her own deposition testimony in order to feign an issue of fact (***Freiser v Stop & Shop Supermarket Co., LLC***, 84 AD3d 1307, 923 NYS2d 732 [2d Dept 2011]; ***Andrew T.B. v Brewster Cent. School Dist.***, 67 AD3d 837, 889 NYS2d 240 [2d Dept 2009]; ***Knox v United Christian Church of God, Inc.***, 65 AD3d 1017. 884 NYS2d 866 [2d Dept 2009]; ***Abramov v Miral Corp.***, 24 AD3d 397, 805 NYS2d 119 [2d Dept 2005]). Where a feigned factual issue is designed to avoid the consequences of an earlier admission (*see* ***McGuire v. Quinnonez***, 280 A.D.2d 587, 720 N.Y.S.2d 812 [2001]), it is insufficient to defeat summary judgment (*see* ***Israel v. Fairharbor Owners, Inc.***, 20 A.D.3d 392, 798 N.Y.S.2d 139 [2005]).

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]). Premises liability for an injury caused by a dangerous condition is predicated upon ownership, occupancy, control, or special use (*see* ***Rodriguez v. 5432-50 Myrtle Ave., LLC***, 148 AD3d 947, 50 NYS2d 99 [2d Dept 2017]; ***Russo v. Frankels Garden City Realty Co.***, 93 AD3d 708, 940 NYS2d 144 [2d Dept 2012]; ***Ellers***

*v. **Horwitz Family Ltd. Partnership***, 36 AD3d 849, 831 NYS2d 417 [2d Dept 2007]). "A property owner 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" (***Medina v. La Fiura Dev. Corp.***, 69 AD3d 686, 686, 895 NYS2d 98, 99 [2d Dept 2010]).

Thus, property owner defendants seeking summary judgment in a slip and fall case have the initial burden of making a prima facie showing that they did not create or have either actual or constructive notice of the dangerous condition (*see* ***Mercedes v City of New York***, 107 AD3d 767, 968 NYS2d 519 [2d Dept 2013]; ***Villano v. Strathmore Terrace Homeowners Assn., Inc.***, 76 AD3d 1061, 908 NYS2d 124 [2d Dept 2010]; ***Valdez v. Aramark Serv.***, 23 AD3d 639, 804 NYS2d 811 [2d Dept 2005]; *see also see* ***Farren v. Board of Education of City of New York,*** 119 AD3d 518, 988 NYS2d 684 [2d Dept. 2014]; ***Williams v. SNS Realty of Long Island,*** 70 AD3d 1034, 895 NYS2d 528 [2d Dept. 2010]). This burden cannot be satisfied by merely pointing out gaps in the plaintiff's case (*see* ***Valdez v Aramark Serv.***, 23 AD3d 639, *supra*). A defendant has constructive notice of a hazardous condition on property when the condition is visible and apparent, and has existed for a length of time sufficient to afford the defendant a reasonable opportunity to discover and remedy it (*see* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 837, 501 NYS2d 646 [1986]; ***Perez v New York City Housing, Auth.***, 75 AD3d 629, 906 NYS2d 299 [2d Dept 2010]; ***Bolloli v Waldbaum, Inc.***, 71 AD3d 618, 619, 896 NYS2d 400, 402 [2d Dept 2010]; ***Robinson v Ludo***, 261 AD2d 525, 690 NYS2d 640 [2d Dept 1991]).

Owners and occupants of stores, office buildings, and other places onto which members of the general public are invited have a nondelegable duty to provide the public with reasonably safe premises (***Blatt v L'Pogee, Inc.***, 112 AD3d 869, 978 NYS2d 291 [2d Dept 2013]; ***Podlaski v Long Is. Paneling Ctr. of Centereach, Inc.***, 58 AD3d 825, 826, 873 NYS2d 109 [2d Dept 2009]), and have a nondelegable duty to maintain the property in a reasonably safe condition to prevent the occurrence of foreseeable injuries (*see* ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606 [1980]; ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]). This nondelegable duty includes the duty to provide the public with a safe means of ingress and egress (*see* ***Podlaski v Long Is. Paneling Ctr. of Centereach, Inc.***, 58 AD3d 825, 826, 873 NYS2d 109 [2d Dept 2009]). A property owner who removes snow from its premises must do so without creating a hazardous condition or exacerbating a natural hazard created by the storm (*see* ***Balan v Rooney***, 152 AD3d 733, 61 NYS3d 29 [2nd Dept 2017]; ***Anderson v Landmark at Eastview, Inc.***, 129 AD3d 750, 10 NYS3d 605 [2d Dept 2015]; ***Kantor v Leisure Glen Homeowners Assn., Inc.***, 95 AD3d 1177, 944 NYS2d 640 [2d Dept 2012]).

However, a landowner is not an insurer of the safety of others using its property (*see* ***Maheshwari v City of New York***, 2 NY3d 288, 778 NYS2d 442 [2004]), and may only be liable if it affirmatively created the condition which caused the injury or had actual or constructive notice of its existence (*see* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Barretta v Glen Cove Prop., LLC***, 148 AD3d 1100, 50 NYS3d 520 [2d Dept 2017]). Furthermore, an owner of property may be held vicariously liable for the negligence of its independent contractor if such negligence violated the owner's nondelegable duty to maintain the premises in a safe condition (*see* ***Pesante v Vertical Indus. Development Corp.***, 29 NY3d 983, 53

NYS3d 249 [2017]; *affg* 142 AD3d 656, 36 NYS3d 716 [2d Dept 2016]; ***Olivieri v GM Realty Co., LLC,*** 37 AD3d 569, 830 NYS2d 284 [2d Dept 2007]).

Defendant Avalon asserts that there is no evidence that it created or had actual or constructive notice of the alleged dangerous condition that caused plaintiff to fall. Further, Avalon asserts that there is no evidence that it had actual notice of the condition, as plaintiff did not give any notice to Avalon about the alleged ice at or near her driveway and mailbox prior to her accident. Moreover, Avalon avers that it did not have constructive notice as there is no evidence when the alleged icy condition formed. Plaintiff testified that she did not observe the alleged icy condition prior to her fall nor are there any photographs of the alleged icy condition. Plaintiff testified that she did not know what caused her accident until after her fall. Defendant Avalon further argues that there is no evidence that the alleged condition existed long enough for Avalon to discover and remedy it. The uncontroverted description given by plaintiff during her deposition establishes that if there was any ice, it was not visible and apparent. Without evidence that plaintiff knew there was ice on the ground prior to her fall, defendant Avalon argues that there is no rational basis to support a finding that defendant Avalon had constructive notice of the alleged dangerous condition and had a reasonable opportunity to remedy it (*see* ***Carricato v. Jefferson Valley Mall Limited Partnership***, 299 A.D.2d 444, 749 N.Y.S.2d 575 [2d Dept. 2002]; ***Brunson v. National Amusements, Inc.***, 292 A.D.2d 413, 739 N.Y.S.2d 407 [2d Dept. 2002]). Furthermore, defendant Avalon asserts that according to the Brickman snow log, its employees returned to the subject premises numerous times between January 24, 2015 and January 27, 2015 to ensure that "all areas were done." The Brickman snow log further indicates that the subject premises were on "ice watch" from 4:00 AM to 6:00 AM, which was approximately four (4) hours prior to the plaintiff's accident, and that all roadways and walks were inspected prior to their departure on the date of the accident. In addition, Ramkisson testified for Avalon that he did not receive any complaints on or after January 24, 2015 regarding Brickman's snow removal services. Ramkisson further testified that he and another Avalon employee drove through and inspected the entire subject premises after the January 24, 2015, that he had no complaints about Brickman's work after the inspection, and there were no incidents of snow or ice conditions not attended to that could create a condition that could cause someone to fall.

Based upon the above, defendant Avalon has established a prima facie entitlement to summary judgment that it did not cause or create the alleged icy condition nor did it have actual or constructive notice of it inasmuch as the plaintiff did not see the alleged ice prior to her fall (*see* ***Scott v. Avalonbay Communities, Inc.,*** 125 AD3d 839, 4 NYS2d 243 [2d Dept. 2015]; ***Haberman v. Meyer,*** 120 AD3d 1301, 983 NYS2d 80 [2d Dept. 2014]; ***Gushin v. Whispering Hills Condominium I,*** 96 AD3d 721, 946 NYS2d 202 [2d Dept. 2012]; ***Gershfeld v. Marine Park Funeral Home,*** 62 AD3d 833, 870 NYS2d 549 [2d Dept. 2009]; ***Christal v. Ramapo Cirque Homeowners Assoc.,*** 51 AD3d 730, 858 NYS2d 304 [2d Dept. 2008]; ***Makaron v. Luna Park Housing Corp.,*** 25 AD3d 770, 809 NYS2d 520 [2d Dept. 2006]; ***Zabbia v. Westwood, LLC,*** 18 AD3d 542, 795 NYS2d 319 [2d Dept. 2005]; ***Murphy v. 136 N. Blvd. Assoc.,*** 304 AD2d 540, 747 NYS2d 582 [2d Dept. 2003]; ***Carricato v. Jefferson Valley Mall. Ltd. Partnership,*** 299 AD2d 444, 749 NYS2d 575 [2d Dept. 2002]; ***Lissauer v Shaarei Halacha, Inc.,*** 37 AD3d 427, 829 NYS2d 229 [2d Dept. 2007]; ***Oettinger v Amerada Hess Corp.***, 15 AD3d 638, 790 NYS2d 693 [2d Dept 2005]; ***Carricato v. Jefferson Valley Mall Limited Partnership***, 299 A.D.2d 444, 749 N.Y.S.2d 575 [2d

Dept. 2002]; ***Rizzi v Y.S.G.F. Realty, LLC.***, 15 Misc.3d 1113, 839 NYS2d 436 [Richmond Cty. 2007]).

The burden then shifted to plaintiff to create a triable question of fact (***Zuckerman v. City of New York,*** NY2d 557, 427 NYS2d 595 [1980]). In opposition to defendant Avalon's motion for summary judgment, plaintiff submits an attorney affirmation, an affidavit of plaintiff, photographs of the subject premises, and an uncertified weather history report for the Farmingdale/Melville area for January 24, 2015. Plaintiff's attorney argues that the snow fall occurred on January 24,2015,which is undisputed, and plaintiff's fall occurred on January 26, 2015, which two day span plaintiff argues provided defendants with a sufficient amount of time to discover and remedy the icy condition prior to plaintiff's accident. In her affidavit, plaintiff describes a defective gutter at her unit that had repeated instances of water overflowing and flooding plaintiff's driveway, which is directly under the gutter. Plaintiff states in her affidavit that "there was (and is) a corner of my unit where the roof does not drain properly. As a result, water pools where the gutters are 'plugged up' and then pours over the top of the gutters onto the driveway. In winter, this overflowing water turns into icicles when the temperatures drop. Once the sun hits the icicles, a melting of the icicles causes the water to drip onto the driveway....[o]n January 26, 2015, the driveway was in a slick condition from the snow fall two days prior, which was exacerbated by the water coming from my roof." Plaintiff further asserts in her affidavit that this gutter problem was reported to defendant Avalon's maintenance employees on several occasions prior to January of 2015. Plaintiff further alleged in her affidavit that she "was told [by Avalon maintenance employees] that nothing could be done until the roofs were repaired." These allegations regarding the faulty gutter are not contained in plaintiff's complaint nor in her verified bill of particulars. Nevertheless, the court may consider these alleged facts appearing in the record without regard to technical defects in pleading (***Nidzyn v. Stevens,*** 148 AD2d 592, 539 NYS2d 57 [2d Dept. 1989]). Plaintiff further provided pictures of the driveway and gutters to her unit. The Court notes, however, that plaintiff does not mention the photographs in her affidavit and plaintiff does not refer to any deposition testimony of any of the parties to authenticate the photographs submitted herein. In addition, the weather report printout submitted by plaintiff is from www.wunderground.com. This weather report is unreliable and thus is inadmissible. Plaintiff provides no expert opinion as to whether an icy condition may have existed at all, and if so, for how long. (***Robinson v. Albany Housing Authority***, 301 A.D.2d 997, 754 NYS2d 450 [3rd Dept 2003]. Plaintiff further provides no documentary evidence that she made any such complaints to Avalon regarding the alleged faulty gutter at her unit nor does plaintiff assert that Avalon had constructive notice of the alleged faulty gutter system.

In reply, defendant Avalon submits an affidavit of Michael Ryan, Community Manager with Avalon who avers that he "reviewed AvalonBay's records for the plaintiff's unit, 100 North Court Drive, unit 1907 from the start of her lease until January 26, 2015 and did not locate any notations regarding maintenance requests or complaints regarding this alleged condition." Further, defendant Avalon directs the court to plaintiff's testimony wherein plaintiff indicates "I don't even know if I made any complaints at that point [the date of the incident]....subsequently, maybe subsequent, yeah." A review of plaintiff's deposition testimony indicates that if she did make any complaints to defendant Avalon about the alleged defective gutter, then they were made after the accident alleged in her complaint. Plaintiff's affidavit therefore contradicts her prior testimony in that any

alleged complaints to Avalon about her gutter were made subsequent to her accident on January 26, 2015. To that extent, those statements in plaintiff's affidavit must be rejected by the court (*see* ***Hartman v. Mountain Valley Brew Pub, Inc.,*** 301 AD2d 570, 754 NYS2d 31[2d Dept. 2003]; ***Prunty v. Keltie's Bum Steer,*** 163 AD2d 595, 559 NYS2d 354 [2d Dept. 1990]; ***Irizarry v. The Rose Bloch 107 Univ. Place Partnership***, 12 Misc. 3d 733, 736, 819 N.Y.S.2d 398, 402 [Kings Cty. 2006]). In any event, plaintiff has provided no documentary evidence to support her new theory, which is speculative, at best (*see, e.g.,* ***Escobar v. Lowe Properties, LLC,*** 145 AD3d 665, 43 NYS3d 119 [2d Dept. 2016]; ***Morreale v. Esposito,*** 109 AD3d 800, 971 NYS2d 209 [2d Dept. 2013]; ***Nidzyn v. Stevens,*** 148 AD2d 592, 539 NYS2d 57 [2d Dept. 1989]). Indeed, the court need not consider the new claim asserted by plaintiff when there is no factual basis in the record supporting the claim (***Nidzyn v. Stevens,*** 148 AD2d 592, 539 NYS2d 57 [2d Dept. 1989]). On the other hand, Avalon has provided evidence that plaintiff provided no notice to Avalon of any issues with respect to the gutter system at her unit. Defendant Avalon also references an expert affidavit of Mr. George Wright, CCM, submitted by defendant Brickman on its motion for summary judgment, which opines that any snow that accumulated on January 24, 2015 "would have entirely melted" by the morning of January 26, 2015 when plaintiff allegedly fell. Defendant Avalon avers that based upon the expert affidavit of Mr. Wright, that any slick condition encountered by plaintiff was due to an ongoing storm that began on the morning of January 26, 2015 at approximately 6:45 a.m. to 7:00 a.m. and did not end until the night of January 26, 2015.[1]

In regards to whether the defendant created or caused the alleged dangerous condition, plaintiff also has failed to raise a question of fact through the submission of admissible evidence, such as an expert's opinion, that the alleged defect in the gutter system at plaintiff's unit created or caused the icy condition on her driveway. Plaintiff offers no more than her own self-serving statements in this regard. Viewing the evidence herein in the light most favorable to the plaintiff, the court finds that the plaintiff has not presented a triable question of fact as to whether or not the alleged icy conditions were caused by the defective gutter at the plaintiff's unit or that defendant had actual or constructive notice of the alleged dangerous condition. Plaintiff fails to submit any admissible evidence to substantiate any theory of liability. Mere conclusions, unsubstantiated allegations, and self-serving assertions are insufficient to raise any triable issue 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]; ***Lupinsky v. Windham Construction Corp.,*** 293 AD2d 317, 739 NYS2d 717 (1st Dept. 2002]). Indeed, plaintiff's reliance upon speculation, conjecture, contradictions, and inconsistencies is merely an attempt to create feigned issues of fact, which are insufficient to defeat defendant's motions for summary judgment (*see* ***Soussi v. Gobin***, 87 A.D.3d 580, 581–582, 928 N.Y.S.2d 80 [2d Dept. 2001]***; Freiser v Stop & Shop Supermarket Co., LLC***, 84 AD3d 1307, 923 NYS2d 732 [2d Dept 2011]; ***Andrew T.B. v Brewster Cent. School***

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[1]Defendant Avalon appears to be arguing the "storm in progress" rule whereby "a property owner will not be held responsible for accidents occurring as a result of the accumulation of snow and ice on its premises until an adequate period of time has passed following the cessation of the storm to allow the owner an opportunity to ameliorate the hazards caused by the storm" (*see* ***Aronov v. St. Vincent's Housing Development Fund Company, Inc.,*** 145 AD3d 648, 43 NYS3d 99 [2d Dept. 2016]).

Dist., 67 AD3d 837, 889 NYS2d 240 [2d Dept 2009]; ***Knox v United Christian Church of God, Inc.,*** 65 AD3d 1017. 884 NYS2d 866 [2d Dept 2009]; ***Makaron v. Luna Park Housing Corporation***, 25 A.D.3d 770, 809 N.Y.S.2d 520 [2006]; ***Abramov v Miral Corp.,*** 24 AD3d 397, 805 NYS2d 119 [2d Dept 2005]). The court has considered the remaining contentions of the plaintiff and finds them to be without merit.

Accordingly, the motion by defendant Avalon for summary judgment dismissing the complaint as against it is granted.

DEFENDANT BRICKMAN'S MOTION FOR SUMMARY JUDGMENT

Generally, a third-party contractor is not liable in tort to an injured plaintiff (*see* ***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 141-142, 746 NYS2d 120 [2002]; ***Nachamie v County of Nassau***, 147 AD3d 770, 47 NYS3d 58 [2d Dept 2017]). 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. Liability 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.***, 98 NY2d 136, 141-142, 746 NYS2d 120 [2002] *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; (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.***, 76 NY2d 220, 226, 557 NYS2d 286 [1990]); 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]).

Defendant Brickman argues that although it was the independent contractor for certain snow and ice removal for the subject premises at the time of the accident, it did not totally displace defendant Avalon's duty to maintain the premises, it did not contract at all to monitor or repair the gutter system at plaintiff's unit, and none of the above three ***Espinal*** exceptions apply. In support of its motion for summary judgment, defendant Brickman relies upon the testimony of Ramkisson, the manager of the subject premises for defendant Avalon, who testified that he did not recall receiving any complaint's about Brickman's snow removal services after the January 24, 2015 snow removal work was completed, that he and another Avalon employee drove through the entire property and inspected Brickman's work after the subject storm, that he did not recall having to contact Brickman to revisit any of the areas it serviced after the subject storm, and that there were otherwise no issues at all with regard to the snow and ice removal services provided by Brickman after the January 24, 2015 snow storm. Moreover, Ramkisson testified that Brickman was not responsible for all snow and ice conditions but only when the snow fall exceeded two inches and further he testified that prior to a snow event, Avalon would have pre-storm communications with Brickman to discuss whether Brickman would even need to attend to the property considering the two inches of snow threshold provision in the agreement. In addition, when the snow fall did exceed two inches, Brickman would remove the snow to an area designated by Avalon and Avalon would

determine if any additional saltings were required after Brickman completed snow removal services. Further, the Brickman snow logs indicated that it performed snow and ice removal services on the subject property on January 24, 2015 beginning at 4:30 a.m. and ending at 8:10 p.m. After Brickman completed its services on January 24, 2015 and after Ramkisson's drive through inspection, the Brickman snow log does not indicate that defendant Avalon requested any additional services from Brickman until the next storm event on January 26, 2015. Brickman further submits the affidavit of George Wright, its expert meteorologist, who opines that after the January 24, 2015 snow event, the temperatures warmed to above freezing and the precipitation changed to rain and "the combination of the rain and above freezing temperatures melted the snow that fell." On January 25, 2015, Mr. Wright further opines that "the combination of bright sunshine and well above freezing temperatures completely melted any remaining snow or ice that may have been present in the subject driveway...the combination of low relative humidity and brisk, dry winds completely dried the subject driveway through evaporation. As a result, there would not have been any water present on the subject driveway that could have turned into ice on the day before plaintiff's alleged accident." Mr. Wright further indicated that snow developed again on January 26, 2015 at approximately 6:45 a.m. to 7 a.m. Mr. Wright concluded that his "analysis of the weather conditions that occurred on the premises indicate that approximately ½ inch to 1 inch on snow would have fallen at the premises by 10:00 a.m. on January 26, 2015." Based upon its expert's opinion, defendant Brickman asserts that it had no obligation under the agreement to attend to the subject premises on the date of the accident inasmuch as the two inches of snow threshold had not been met and it had not been contacted by Avalon to arrive at the subject premises at anytime before the plaintiff's accident on January 26, 2015.

Here, defendant Brickman established its prima facie entitlement to summary judgment dismissing the complaint against it by demonstrating that plaintiff was not a party to the agreement and therefore no contractual duties owed by Brickman to Avalon extended to plaintiff, and that none of the ***Espinal*** exceptions apply herein. (***Castillo v Port Auth. of N.Y. & N.J.,*** 159 AD3d 792, 72 NYS3d 582 [2d Dept 2018]; ***Bryan v CLK-HP 225 Rabro, LLC***, 136 AD3d 955, 26 NYS3d 207 [2d Dept 2016]; ***Diaz v Port Auth. of NY & NJ***, 120 AD3d 611, 990 NYS2d 882 [2d Dept 2014]). As to the first ***Espinal*** exception, "a launch of a force or instrument of harm has been interpreted as requiring that the contractor create or exacerbate the dangerous condition" (***Santos v. Deanco Services, Inc.,*** 142 AD3d 137, 35 NYS3d 686 [2d Dept. 2016]). In this regard, it has been determined that "[a] failure to apply salt would ordinarily neither create ice nor exacerbate an icy condition, as the absence of salt would merely prevent a preexisting ice condition from improving" (***Santos v Deanco Servs., Inc.***, 142 AD3d 137, 143, 35 NYS3d 686 [2d Dept 2016]). The admissible evidence establishes that defendant Brickman did not leave the subject premises in a more dangerous condition than it found them in to constitute a "launching of an instrument of harm" (*see* ***Foster v. Herbert Slepoy Corp.,*** 76 AD3d 210, 905 NYS2d 226 [2d Dept. 2010]). Plaintiff herein does not allege the second ***Espinal*** exception in that there are no allegations in the complaint or the verified bill of particulars that she relied to her detriment on defendants continued performance under the agreement. Even had plaintiff pled this exception, there is no evidence that plaintiff had knowledge of the snow removal agreement at the time of her accident (***Castro v. April Run Condominium Assoc.,*** 41 AD3d 412, 837 NYS2d 729 [2d Dept. 2007]). Finally, the third ***Espinal*** exception does not apply inasmuch as under the agreement, defendant Brickman does not

entirely displace Avalon of its duty to maintain the subject premises. The agreement specifically provides that Brickman's services were only required when accumulations of snow reached two inches. Thus, Brickman was not contractually obligated to perform services under two inches of snow. The testimony further revealed that Avalon monitored and inspected the subject premises after a snow event to determine if additional services were required from Brickman. Therefore, the duty to maintain the subject premises was not entirely delegated to or displaced by defendant Brickman. Thus, the third ***Espinal*** exception has no application herein.

Having established a prima facie case, the burden shifts to plaintiff to submit sufficient proof to raise a triable issue of fact regarding the applicability of one or more of the ***Espinal*** exceptions (***Bryan v CLK-HP 225 Rabro, LLC***, 136 AD3d 955, 26 NYS3d 207; ***Foster v Herbert Slepoy Corp.***, 76 AD3d 210, 905 NYS2d 226 [2d Dept 2010]). In opposition, plaintiff's counsel incorrectly places the burden on defendant Brickman to establish that it did not create the alleged dangerous condition. Defendant Brickman is not the owner of the subject premises and, as such, this burden is placed upon defendant Avalon, not defendant Brickman. Plaintiff is not a party to the snow removal agreement and "a mere contractual obligation to one party does not give rise to tort liability in favor of a third party" (***Espinal,*** 98 NY2d at 486-87, 746 NYS2d at 122). Plaintiff submits that Brickman's failure "to completely clear plaintiff's driveway of snow and ice constituted the launching of a force or instrument of harm by creating or exacerbating the presence of ice in front of plaintiff's home." Plaintiff further argues that defendant Brickman had ample time to remedy the icy conditions on the driveway as there was a two-day period of time between the prior snow event on January 24, 2015 and plaintiff's accident. Plaintiff's argument has been rejected by the Second Department in the absence of evidence that it was the snow removal contractor's conduct that created or exacerbated the alleged icy condition (*see* ***Santos v. Deanco Services, Inc.,*** 142 AD3d 137, 35 NYS3d 686 [2016]). It has been firmly established that a snow removal contractor's "passive omissions" do not constitute a launch of a force or instrument of harm "where there is no evidence that the passive conduct created or exacerbated the dangerous condition" (*see* ***Santos v. Deanco Services, Inc.,*** 142 AD3d 137, 35 NYS3d 686 [2016]). The Second Department furthermore has held that a snow removal contractor cannot be said to have created a dangerous condition and thereby launched a force of instrument of harm "by merely plowing according to the contract and leaving some residual snow or ice...[there must be] some showing that the contractor left the premises in a more dangerous condition than he or she found them" (***Foster v. Herbert Slepoy Corp.,*** 76 AD3d 210, 229, 905 NYS2d 226 [2d Dept. 2010]). Indeed, plaintiff does not substantiate the first ***Espinal*** exception with any admissible evidence. Moreover, plaintiff's reliance upon an unadmissible weather report printout from www.wunderground.com, does not create a question of fact. Plaintiff otherwise provides no expert opinion to refute the opinion provided by Brickman's expert as to whether an icy condition may have existed at all, and if so, for how long. (***Robinson v. Albany Housing Authority***, 301 A.D.2d 997, 754 NYS2d 450 [3rd Dept 2003]). Plaintiff's argument that the icy conditions on her driveway resulted from the January 24, 2015 snow fall were refuted by defendant Brickman's expert who concluded that the alleged slick conditions on the driveway to plaintiff's unit could not have been caused by the snow fall two days prior, as any slick or icy condition from the January 24, 2015 snow storm would have melted. Further, defendant Brickman's expert opined that the snow on the subject premises at the time and date of the accident did not meet the contractual two inches of snow threshold. As such, Brickman had no contractual obligation to

perform any services on January 26, 2015 prior to plaintiff's accident. Plaintiff otherwise has failed to submit any proof in admissible form and its conclusory assertions are insufficient to raise a triable question of fact to defeat Brickman's entitlement to summary judgment in its favor (***Ehrlich v. American Moninger Greenhouse***, 26 N.Y.2d 255, 259 [1970](merely stating conclusions, of fact or of law, are insufficient to defeat summary judgment); ***Scott v. Avalonbay Communities, Inc.,*** 125 AD3d 839, 4 NYS2d 243 [2d Dept. 2015]). The court has considered the remaining contentions of the plaintiff and finds them to be without merit.

Accordingly, defendant Brickman's motion for summary judgment dismissing the complaint as against it is granted.

THE CONTRACTUAL INDEMNIFICATION SUMMARY JUDGMENT MOTIONS

The right to contractual indemnification depends upon the specific language of the contract between the parties (*see* ***Sovereign Bank v Biagioni***, 115 AD3d 847, 982 NYS2d 322 [2d Dept 2014]; ***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]; ***Kader v City of NY. Hour. Preserv. & Dev.***, 16 AD3d 461, 791 NYS2d 634 [2d Dept 2005]; ***Gillmore v Duke/Fluor Daniel***, 221 AD2d 938, 939, 634 NYS2d 588 [4th Dept 1995]). 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 vInternap 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]; *see also* ***Drzewinski v Atlantic Scaffold & Ladder Co.***, 70 NY2d 774, 521 NYS2d 216 [1987]; ***Blank Rome, LLP v Parrish***, 92 AD3d 444, 938 NYS2d 284 [1st Dept 2012]; ***Torres v LPE Land Dev. & Constr. Inc.***, 54 AD3d 668, 863 NYS2d 477 [2d Dept 2008]; ***Canela v TLH 140 Perry St.***, 47 AD3d 743, 849 NYS2d 658 [2d Dept 2008]).

The aim of the court when interpreting a contract is to arrive at a construction that gives fair meaning to all of its terms and provisions, and to reach a "practical interpretation of the expressions of the parties so that their reasonable expectations will be realized" (*see* ***Pellot v Pellot***, 305 AD2d 478, 759 NYS2d 494 [2d Dept 2003]; ***Gonzalez v Norrito***, 256 AD2d 440, 682 NYS2d 100 [2d Dept 1998]; ***Joseph v. Creek & Pines, Ltd.***, 217 A.D.2d 534, 535, 629 N.Y.S.2d 75 [2d Dept], *lv dismissed* 86 N.Y.2d 885, 635 N.Y.S.2d 950 [1995], *lv denied* 89 N.Y.2d 804, 653 N.Y.S.2d 543 [1996]; ***see also Matter of Matco-Norca, Inc.***, 22 A.D.3d 495, 802 N.Y.S.2d 707 [2d Dept 2005]; ***Tikotzky v. City of New York***, 286 A.D.2d 493, 729 N.Y.S.2d 525 [2d Dept 2001]; ***Partrick v. Guarniere***, 204 A.D.2d 702, 612 N.Y.S.2d 630 [2d Dept], *lv denied* 84 N.Y.2d 810, 621 N.Y.S.2d 519 [1994]). As it is a question of law whether or not a contract is ambiguous (***W. W. W. Assoc. v. Giancontieri***, 77 N.Y.2d 157, 565 N.Y.S.2d 440 [1990]), a court must first determine whether the agreement at issue on its face is reasonably susceptible to more than one interpretation (***see Chimart Assoc. v. Paul***, 66 N.Y.2d 570, 498 N.Y.S.2d 344 [1986]). When a contract term or clause is ambiguous, and the determination of the parties' intent depends on the credibility of extrinsic evidence or a choice among inferences to be drawn from extrinsic evidence, then the interpretation of such language is matter for trial (***Amusement Bus. Underwriters v. American Intl. Group***, 66

N.Y.2d 878, 880, 498 N.Y.S.2d 760 [1985]; ***see Brook Shopping Ctrs. v. Allied Stores Gen. Real Estate Co.***, 165 A.D.2d 854, 560 N.Y.S.2d 317 [2d Dept 1990]).

It is well established that any ambiguity in a contract is to be construed against the party who drafted such contract (*see* ***Guardian Life Ins. Co. of Am. v. Schaefer***, 70 N.Y.2d 888, 524 N.Y.S.2d 377 [1987]). Further, "[w]hen a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (***Hooper Assoc. v. AGS Computers***, 74 N.Y.2d 487, 491, 549 N.Y.S.2d 365 [1989]; ***see Heimbach v. Metropolitan Transp. Auth.***, 75 N.Y.2d 387, 553 N.Y.S.2d 653 [1990]). Thus, a contract provision granting a party who has been actively negligent the right to indemnification is carefully scrutinized by the courts for an expression of an intent to indemnify and for an indication of the scope of such indemnification (***see Levine v. Shell Oil Co.***, 28 N.Y.2d 205, 321 N.Y.S.2d 81 [1971]). Moreover, to determine the parties' intent, the language of such provision must be analyzed in light of the surrounding facts and circumstances (*see* ***Hooper Assoc. v AGS Computers***, *supra*; ***Margolin v. New York Life Ins. Co.***, 32 N.Y.2d 149, 344 N.Y.S.2d 336 [1973]). Stated differently, "[t]he language of an indemnity provision should be construed so as to encompass only that loss and damage which reasonably appear to have been within the intent of the parties. It should not be extended to include damages which are neither expressly within its terms nor of such character that it is reasonable to infer that they were intended to be covered under the contract" (***Niagra Frontier Trans. Auth. v. Tri-Delta Constr. Corp.***, 107 A.D.2d 450, 453, 487 N.Y.S.2d 428 [4th Dept], *affd* 65 N.Y.2d 1038, 494 N.Y.S.2d 695 [1985]). It is well settled that "[e]vidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing" (***W.W.W. Assoc.***, 77 N.Y.2d at 162, 565 N.Y.S.2d 440, 566 N.E.2d 639; *see* ***Alt v. Laga***, 207 A.D.2d 971, 971, 617 N.Y.S.2d 84 [4th Dept. 1994]).

Courts may resolve ambiguities appearing in the documents on a motion for summary judgment when there are only documents to interpret (*see* ***Rentways, Inc. v. O'Neill Milk & Cream Co.***, 308 N.Y. 342, 349 [1955]). Where the language is clear, unequivocal and unambiguous, the contract is to be interpreted by its own language (***R/S Assocs. v. N.Y. Job Dev. Auth.***, 98 N.Y.2d 29, 32 [2002]). The mere assertion by a party that contract language is ambiguous is not, in and of itself, enough to raise a triable issue of fact precluding summary judgment (***Bethlehem Steel Co. v. Turner Constr. Co.***, 2 N.Y.2d 456, 460 [1957]). However, if the intent must be determined by disputed evidence or inferences outside the written words of the instrument, then there is a question of fact presented (***Ashland Management v. Janien***, 82 N.Y.2d 395, 401-402 [1993]; ***Mallad Constr. Corp. v. County Fed. S&L Ass'n,*** 32 N.Y.2d 285, 290-91 [1973]).

Here, the snow removal contract provides that Brickman "will defend, indemnify, and hold [Avalon] harmless from all loss, damage and expenses sustained by [Avalon] and from all claims, liability and expense suffered by it by reason of any property damage...personal injury or other claim or action ...that results from the...services referred to in this Agreement." There is no dispute that the services referred to in the snow removal agreement were only triggered when the snow accumulation reached two inches. Defendant Brickman provided an expert opinion that any snow or ice from the January 24, 2015 snow storm would have melted prior to the new storm that began around 6:45 to 7:00 am on January 26, 2015. The Brickman expert opined that there was approximately ½ inch to

one inch of new snow at the time of the plaintiff's accident. In addition, the testimony of Ramkisson on behalf of Avalon confirms that the snow removal services provided by Brickman on January 24, 2015 were concluded satisfactorily and it was not necessary to contact Brickman to revisit any areas at the subject premises. A drive through inspection of the subject premises after the completion of Brickman's work was conducted by Ramkisson and another Avalon employee, as a result of which there was no further request of Brickman to redress any areas at the subject premises. The admissible evidence establishes that plaintiff's accident was not caused by any services provided by Brickman relative to the January 24, 2015 snow storm. Moreover, Brickman's obligations to service the subject premises did not arise until there was an accumulation of two inches of snow fall. At the time of plaintiff's accident, there was less than two inches of snow on the ground according to Brickman's expert and there was no evidence presented that Avalon contacted Brickman prior to 10:00 a.m. on January 26, 2015 to perform additional snow removal services. Defendant Avalon has not submitted any expert affidavit to refute the opinion of Brickman's expert. Indeed, the indemnification clause clearly and unequivocally only pertains to claims of personal injury resulting from services provided by Brickman. According to Brickman's expert, there could not have been any icy conditions on the plaintiff's driveway due to the rain and warmer temperatures after the January 24, 2015 snow storm. Moreover, Brickman was not contractually responsible for any snow removal services on January26, 2015 at or before the time of the plaintiff's accident, as the snow accumulation was less than two inches. Thus, Brickman was not contractually obligated to perform any services prior to plaintiff's accident on January 26, 2015. While plaintiff has advanced a new theory that the icy condition on her driveway was caused by a faulty gutter system in her unit, it is undisputed that repairing the gutter system was not a function to be performed by Brickman. Being that plaintiff's accident could not have been caused by any services provided by Brickman relative to the January 24, 2015 snow storm and Brickman was not obligated to perform any snow removal services on January 26, 2015 prior to plaintiff's accident, defendant Brickman is entitled to summary judgment dismissing the cross-claims asserted against it by defendant Avalon. The court has considered the remaining contentions of defendant Avalon Bay and finds them to be without merit.

Accordingly, defendant Brickman's motion for summary judgment dismissing the cross-claims asserted against it by defendant Avalon is granted.

Dated: 9/20/2018

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

___X___ FINAL DISPOSITION_____ NON-FINAL DISPOSITION