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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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JOANN MIZZI,

Plaintiff,

-against-

KIMCO 44 PLAZA, LLC, STOP AND SHOP II CORP., INDIVIDUALLY, AND D/B/A SUPER STOP AND SHOP STORE #0540, THE STOP & SHOP SUPERMARKET COMPANY LLC AND KIMCO REALTY CORPORATION, COREWOOD VENTURES, INC., COREWOOD VENTURES II, LLC,

Defendants.

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DECISION AND ORDER

Index No. 52777/2016

PAGONES, J.D., A.J.S.C.

Defendants Kimco 44 Plaza, LLC, Kimco Realty Corporation and The Stop & Shop Supermarket Company, LLC move for an order: (1) pursuant to CPLR 3212, granting defendant The Stop & Shop Supermarket Company, LLC (hereinafter "Stop & Shop") summary judgment dismissing the plaintiff's complaint and all cross-claims; and, (2) pursuant to CPLR 3212, granting defendants Kimco 44 Plaza, LLC and Kimco Realty Corporation (hereinafter "Kimco") summary judgment on their cross-claims of indemnification as against defendant Corewood Ventures, Inc. Defendant Corewood Ventures, Inc. move for an order: (1) pursuant to CPLR 3212, dismissing the plaintiff's complaint, cross complaint and any and all cross-claims against it; and, (2) granting it summary

judgment on all cross claims of indemnification as against Kimco and Stop and Shop.

The following papers were read:

Notice of Motion-Affirmation-Exhibits A-N	1-16
Affirmation in Partial Opposition	17
Notice of Motion-Affirmation in Support-Exhibits A-Q	18-36
Affidavit-Affidavit-Affirmation-Annexed Exhibits-Affidavit-Exhibit	37-42
Affidavit-Affidavit-Affirmation-Affidavit Exhibits 1-3	43-49
Affirmation in Reply	50
Affirmation in Reply	51
Affirmation in Opposition-Exhibit A	52-53
Reply Affirmation	54

Upon the foregoing papers, the motions are decided as follows:

By way of background, plaintiff brings this action seeking damages for alleged injuries sustained a result of a slip-and-fall on ice on February 22, 2014 in the parking lot of the Kimco owned shopping plaza located on Route 44 in Poughkeepsie, New York.

On a motion for summary judgment, the test to be applied is whether triable issues of fact exist or whether on the proof submitted judgment can be granted to a party as a matter of law (*see Andre v. Pomeroy*, 35 NY2d 361 [1974]). The movants must set forth a *prima facie* showing of entitlement to judgment as matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (*see Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the movants sets forth a prima facie case, the burden of going forward shifts to the opponent or opponents of the motion to produce evidentiary proof in

admissible form sufficient to establish the existence of material issues of fact (*see Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

Defendant The Stop & Shop's Motion for Summary Judgment

Defendant Stop & Shop's motion for summary judgment is granted without opposition. Plaintiff advises the Court that she does not oppose this motion (*see* Affidavit of Plaintiff at Paragraph 3). The partial opposition of Corewood solely addresses the branch of the motion in which Kimco seeks indemnification. Accordingly, plaintiff's complaint and all cross-claims are dismissed as to defendant Stop & Shop Supermarket Company, LLC.

Defendants Kimco's Motion for Summary Judgment

In support of their motion for summary judgment defendants Kimco seek both common law and contractual indemnification. To be entitled to common law indemnification, defendants Kimco are required to show that they were not negligent and that the parties from which they sought indemnification were negligent in connection with the plaintiff's accident or, in the absence of any negligence by those parties, that those parties had the authority to direct, supervise, and control the work giving rise to the injury (*see Kielty v. AJS Const. of L.I., Inc.*, 83 AD3d 1004 [2nd Dept 2011]). As to the claim for contractual indemnification, the right to contractual indemnification depends upon the specific language of the contract (*see Bleich v.*

Metropolitan Management, LLC, 132 AD3d 933 [2nd Dept 2015]). The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances (*id.*). Moreover, it is axiomatic that a party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor (*id.*).

In support of its motion, Kimco offers the deposition testimony of the plaintiff Joann Mizzi. Mrs. Mizzi testified that her accident occurred in the parking lot of the plaza (*see* Deposition of Mizzi at pp 13-14, lines 2-5). She did not recall seeing any ice or snow on the ground prior to falling (*see* Deposition of Mizzi at p 24 lines 2-13). Mrs. Mizzi did not learn what she had slipped on; however, she indicates that while laying on the ground, she noticed the back of her pants were wet (*see* Deposition of Mizzi at p 31 lines 16-24). Kimco next offers the deposition testimony of David Sherwood, employee of Corewood Ventures, Inc. Mr. Sherwood indicates that another employee was assigned the lot the day of February 22, 2014 (*see* Deposition of Sherwood at p 13 lines 3-12). However, Mr. Sherwood testified to his co-employees action as follows "It's a groundhog day there. We go there every morning and check for ice spots when it's not snowing" (*see* Deposition of Sherwood at p 14 lines 5-13). Mr. Sherwood also testified that Corewood performed inspection of the

lot on a daily basis (*see* Deposition of Sherwood at p 31 lines 21-24).

The contract between defendants Kimco and Corewood started on November 1, 2012 and ended on October 31, 2014. Relevant to this discussion, the contract reads as follows:

> "Contractor will perform and manage, in a professional manner, all aspects of snow plowing, snow blowing, snow shoveling, and snow removal...at the subject property"

Additionally, the contract states:

> "This contractor will and does agree to INDEMNIFY, SAVE & HOLD HARMLESS this Owner, the Architects, their agents and employees, and assigns of and from all liabilities, claims, losses, damages, injury causes and actions, suits of whatsoever nature for personal injury, including death resulting there from, and for property damage, alleged to arise out of, or any conditions of the work performed under this Contract..."

The pretense for any individual or company seeking common law or contractual indemnification is a showing that he or she or it was not negligent as a matter of law. In this regard, counsel for the movant indicates the following:

> "In the instant case, Kimco did not have notice of the specific black ice condition. Absent this evidence of notice, Kimco is not negligent."

While the Court acknowledges counsel's testimony in this regard, the motion papers do not reflect actual evidence of the same. The movant fails to offer any admissible evidence establishing that Kimco lacked notice of the condition. The affirmation of counsel is without evidentiary value and thus unavailing (*see Zuckerman v. City of New York*, 49 NY2d 557 [1980]). Accordingly, defendant Kimco fails to establish its

prima facie entitlement to summary judgment on its claims for indemnification.

Defendant Corewood's Motion for Summary Judgment

In general, a snow-removal contractor's contractual obligation for snow removal standing alone will not give rise to tort liability to an injured pplaintiff unless: (1) in failing to exercise reasonable care in the performance of its duties, it launched a force or instrument of harm; (2) the plaintiff detrimentally relied on the continued performance of the snow removal contractor's duties; or (3) the snow removal contractor has entirely displaced the property owner's duty to maintain the premises safely (*see Espinal v. Melville Snow Contrs.*, 98 NY2d 136 [2002]). The deposition testimony of the parties fail to offer any inference of Corewood launching an instrument of harm, Moreover, the injured plaintiff was not a party to the snow removal contract; thus, it owed no duty of care to the injured plaintiff (*see Rudloff v. Woodland Pond Condominium Assn*, 109 AD3d 810 [2nd Dept 2013]). Furthermore, there is evidence that the property owner maintained some control over the piling, staging or dumping of snow; thus, establishing that Corewood did not entirely displace Kimco's duty to maintain the premises safely.

In the interest of judicial economy, the Court will address the plaintiff's opposition papers prior to addressing the balance of Corewood's motion concerning summary judgment as to its cross-

claims for indemnification.

Since defendant Corewood has made a *prima facie* showing of entitlement to judgment as a matter of law as to plaintiff's complaint (*see Zuckerman v. City of New York*, 49 NY2d 557 [1980]), plaintiff must show that genuine triable issues of material fact exist in order to defeat defendant's motion (*id.*)

In opposition, plaintiff submits her own affidavit, that of her husband John Mizzi and that of Thomas Cummings, a professional engineer. Upon his review of the materials associated with this action, Mr. Cummings concludes that "there is an indication that there was absolutely no snow and ice control on the area where she [Mrs. Mizzi] fell". Further, Mr. Cummings is of the opinion that the failure to use sand or other abrasive material in areas upon which pedestrians are likely to walk is negligence. This statement is expanded upon based upon the records of Corewood. Specifically, Mr. Cummings states that "Assuming an application at 5:30 in the morning was made at 15 degrees; at approximately 9:30 in the morning the temperature would rise as per the attached official NOAA document (Exhibit '3') which have been provided. It clearly shows that by that point in time the temperature was over 30 degrees which would mean that the ice would finally start to melt creating a slippery sheen difficult to see by pedestrians that would cause a slip and fall. Thus, a dangerous condition, without use of sand or other abrasive." It is well established that the court's role in determining a summary judgment motion is issue finding not issue

determination (*see Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957] *reargument denied* 3 NY2d 941). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*see Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1978]). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied (*see Stone v. Goodson*, 8 NY2d 8 [1960] *reargument denied* 8 NY2d 934). Here, the affidavit of Mr. Cummings establishes an issue of fact as to whether or not Corewood's application of salt alone (specifically Magic Salt), without applying sand or another abrasive, launched a force or instrument of harm.

Accordingly, defendant Corewood's motion for summary judgment must be denied.

Likewise, as issues of fact remain as to Corewood's potential negligence, the branch of its motion seeking summary judgment as to its cross-claims for indemnification must also be denied as academic.

Based upon the foregoing, defendants Kimco 44 Plaza, LLC, Kimco Realty Corporation and The Stop & Shop Supermarket Company, LLC motion is granted to the extent that plaintiff's complaint is dismissed as to Stop & Shop. The branch of the motion seeking summary judgment as to Kimco's claims of common law and contractual indemnification is denied. Defendant Corewood's motion is also denied. This matter is scheduled for a further

Pre-Trial Conference on August 28, 2018 at 9:30 a.m.

Adjournments are only granted with leave of the Court.

The foregoing constitutes the decision and order of the Court. This decision and order has been filed electronically.

Dated: July 27, 2018
Poughkeepsie, New York

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