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 WESTCHESTER

----------X

JOANNE CANNALE and ALEXANDER CANNALE,

Plaintiffs,

-against-

WESTROCK DEVELOPMENT LLC, 272 N. BEDFORD ROAD LLC, HERITAGE MANAGEMENT SERVICES, LLC, and BROOKSIDE VILLAGE HOMEOWNERS ASSOCIATION, INC.,

Defendants.

----------X

DECISION & ORDER
Index No. 51308/2017
Sequence Nos. 1,2,3

WOOD, J.

New York State Courts Electronic Filing ("NYSCEF") Documents Numbers 35 through 114 were read in connection with summary judgment motions of defendants Brookside Village Homeowners Association, Inc. ("Brookside") (Seq 1); Westrock Development LLC ("Westrock") and 272 N. Bedford Road LLC ("272 N. Bedford") ("Westrock Defendants") (Seq 2); and Heritage Management Services LLC ("Heritage") (Seq 3).

This action arises from a slip and fall by injured plaitniff ("plaintiff") on December 14, 2016 at 8:30 A.M., as a result of black ice in the parking lot at 272 N. Bedford Road ("the subject property") in Mount Kisco. Based upon the foregoing, the motions are decided as follows:

It is well settled that a 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 demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; see

Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; see also Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (see Zuckerman v New York, 49 NY2d 557, 562 [1980]; see also Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). Conclusory, unsubstantiated assertions will not suffice to defeat a motion for summary judgment (Barclays Bank of New York, N.A. v Sokol, 128 AD2d 492 [2d Dept 1987]). A party opposing a motion for summary judgment may do so on the basis of deposition testimony as well as other admissible forms of evidence, including an expert's affidavit, and eyewitness testimony (Marconi v Reilly, 254 AD2d 463 [2d Dept 1998]). In deciding the motion, the court is required to view the evidence presented "in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion" (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; see Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). The court must accept as true the evidence presented by the nonmoving party and must deny the motion if there is "even arguably any doubt as to the existence of a triable issue" (Kolivas v Kirchoff, 14 AD3d 493 [2d Dept 2005]); Baker v Briarcliff School Dist., 205 AD2d 652,661-662 [2d Dept 1994]). Issue finding, not issue determination, is the key to summary judgment (Krupp v Aetna Life & Cas. Co., 103 AD2d 252, 261 [2d Dept 1984]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (68 NY2d 320,324). CPLR 3212(b) specifically provides that "the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact".

The elements of common law negligence are: "(1) a duty owed by the defendant to the

plaintiff, (2) a breach of that duty, and (3) a showing that the breach of that duty constituted a proximate cause of the injury" (Ingrassia v Lividikos, 54 AD3d 721, 724 [2d Dept 2008]). A threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party (Darby v Compagnie Natl. Air France, 96 NY2d 343 [2001]) It is for the courts to decide in the first instance whether any duty exists and, if so, the scope of such duty (Church v Callanan Indus., 99 NY2d 104, 110-11, [2002]; (Espinal v Melville Snow Contractors, Inc., 98 NY2d 136, 138 [2002]).

A defendant who moves for summary judgment in a slip and fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it within a reasonable time (Gordon v American Museum of Natural History, 67 NY2d 836 [1986]); Baillet v Auerbach, 277 AD2d 335 [2d Dept 2000]). In other words, to be entitled to summary judgment in a trip and fall case, defendant must establish prima facie, that it maintained the premises in a reasonable safe condition and did not have notice of, or create, a dangerous condition that posed a foreseeable risk of injury to persons expected to be on the premises (Villano v Strathmore Terrace Homeowners Assn., Inc, 76 AD3d 1061 [2d Dept 2010]). An owner or possessor of real property is not an insurer of the safety of the people on its property (Nallan v Helmsley-Spear, Inc., 50 NY2d 507 [1980]: Donohue v Seaman's Furniture Corp., 270 AD2d 451 [2d Dept 2001]). A property owner has no duty to protect or warn against an open or obvious condition that is inherent or incidental to the nature of the property, that could be reasonably anticipated by those using it and is " readily observable by the use of one's senses" (Neiderbach v 7-Eleven, Inc., 56 AD3d 632 [2d Dept 2008]); (Groom v Village of Sea Cliff, 50 AD3d 1094 [2d Dept 2008]; "A defendant has constructive notice

of a defect when it is visible and apparent, and has existed for a sufficient length of time before the accident that it could have been discovered and corrected. To meet its initial burden on the issue of lack of constructive notice, a defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" (Feola v City of New York, 102 AD3d 827-828 [2d Dept 2013]). A landowner will not be held liable for injuries arising from conditions on the property that are inherent to the nature of the land and could be reasonably anticipated by those using it (Mazzola v Mazzola, 16 AD3d 629, 630 [2d Dept 2005]). "On a motion by a defendant for summary judgment, only after the defendant has satisfied the threshold burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of the hazardous condition, will the court examine the sufficiency of the plaintiff's opposition" (Mauge v Barrow St. Ale House, 70 AD3d 1016 [2d Dept 2010]).

It is undisputed that 272 N. Bedford is the owner of the subject property, and that Westrock is the property manager. Brookside is the owner of the property abutting the subject property and Heritage is the property manager of the Brookside. The Brookside property is situated slightly uphill from the subject property.

Deposition testimony was taken from Jody Stokhamer who is and has been the president of the Board of Directors for Brookside, since 2013, and during her tenure she made periodic inspections of the Brookside property, and never received any complaints from their neighbors 272 N. Bedford, regarding the pooling or drainage of water from Brookside onto the subject property. She was shown two videos depicting water flowing out of pipes purportedly showing water flowing from the Brookside property onto the subject property. She testified that she has never seen water like that flowing from the Brookside property to the subject property.

Kevin Cullen is a property manager for Heritage and has been so for the Brookside property for the past 9 years. Prior to the accident, Mr. Cullen never received any complaints or notices regarding water flowing from Brookside onto the subject property. When shown two white PVC pipes purportedly on the hillside of the Brookside property next to the subject property, he testified that even though walk throughs of the Brookside property occurred at least twice per year, he has never seen the two pipes before, and does not know where they are coming from and does not know what they are connected to.

Edward Rosenblatt is a property manager for Westrock (property manager for the subject property), and has been for the past 10 years. He has managed the subject property continuously from 2006 to 2017. Westrock was responsible for keeping the parking lot safe, including snow and ice removal. Before the date of the accident, Mr. Rosenblatt conducted weekly inspections of the subject property, and at no time did he observe any discharging of water on the subject property. He has never experienced any drainage issues in the parking lot. He does not know of any pipes flowing water onto the lot area from the property above. He never received any complaints about flooding in the parking lot. Mr. Rosenblatt testified that he has never seen the two pipes before, did not know they were there and has never heard of or seen any water flowing form the pipes.

Joseph Smith is the president of non party Estate Property Services ("EPS"). He explains that EPS provided handyman services to Heritage, which provided general maintenance services at Brookside. Smith testified that water running off the Brookside property was not an issue as between the Brookside property and the premises, there is a wooded area which was designated to be a buffer between the properties..He also was shown a picture of the PVC pipes and testified that he doesn't know where the PVC pipes shown in the video are located, he doesn't know whether the water was

coming from and does not know what property it was coming from.

Addressing the Brookside summary judgment motion, Brookside contends that it had no duty to conduct maintenance, snow removal or de-icing in the back parking lot of the subject property where the accident occurred, insofar as Brookside does not own, operate, maintain or inspect the subject property, and thus had no responsibilities with respect to snow and/or ice removal on the subject property. Moreover, Brookside maintains that plaintiff has produced no evidence demonstrating that Brookside either created the alleged condition, or had notice (either actual or constructive) of the alleged condition so as to create a duty of care owed to plaintiff. It is Brookside's contention that plaintiff is unable to establish a prima facie case of negligence against Brookside as Brookside did not owe here a duty of care.

Brookside argues that as the premises where plaintiff fell was owned and operated by Westrock Defendants, it was Westrock that was hired to manage the premises and subsequently contracted with an outside snow contractor to maintain the premises regarding ice removal.

The crux of plaintiff's argument as to Brookside's liability for the accident, is not that Brookside owned the premises (they do not), it is that Brookside is responsible for the discharge of water onto the subject property, where plaintiff's accident occurred. Brookside claims that plaintiff cannot demonstrate Brookside created and /or caused the alleged condition, insofar as: no one has ever seen the two white PVC pipes that plaintiff alleges distribute water from Brookside onto the abutting properties parking lot before plaintiff's fall; no one knows where the pipes are coming from or going to, where they are located, what property they are coming form, or where the water is coming from; plaintiff has produced no evidence demonstrating Brookside discharged any water onto another's property; and the wooded area located between Brookside and 272 Bedford Road is

at least partially owned by Brookside and was designed to be a buffer between the properties. Moreover, any discharged water if any occurred on Brookside's property, not another property, and thus, Brookside cannot be held liable for created the alleged condition. Further, plaintiff cannot demonstrate the alleged condition was even present at the time of her fall. The photographs and/or videos taken by plaintiff on January 13, 2017 and January 25, 2017 represent the conditions of the parking lot over a month after plaintiff's fall. Brookside refers to plaintiff's testimony that she did not see the ice extend up to the wooded area at the time of her fall, and that within the week before her accident, she never observed any water or ice in the parking lot, and thus never made any complaints to anyone regarding ice forming in the parking lot, nor heard of anyone else making complaints either. No one knew the subject piping was present, let alone discharging water, prior to plaintiff's fall. Likewise, there has been no testimony or other admissible evidence to date, which reveals that plaintiff or any one else complained to anyone about the existence of ice in the parking lot of the abutting property involved herein before the accident. For all of these reasons, Brookside argues that there is no evidence that Brookside created or had actual or constructive notice of the alleged condition. Brookside owed no duty of care to plaintiff.

Under these circumstances, Brookside cannot meet its prima facie burden of demonstrating that it is free from any and all negligence regard the alleged dangerous condition of the premises. "A landowner will not be liable for damages to abutting property caused by the flow of surface water due to improvements to his or her land, provided that the improvements were made in good faith to make the property fit for some rational use, and that the water was not drained onto the other property by artificial means, such as pipes and ditches" (Biaglow v Elite Prop. Holdings, LLC, 140 AD3d 814, 815 [2d Dept], leave to appeal dismissed, 28 NY3d 1059 [2d Dept 2016]). Taking the

evidence in a light most favorable to the non-moving party, there are issues of fact as to Brookside's breach of duty of care as well as its actual and constructive notice of the alleged dangerous condition at the subject parking lot. Mr. Cullen testified that there is a history of drainage issues at Brookside (*See Cullen's Deposition* Ex H at 40). The court viewed the videos of the two PVC pipes, and photographs, which depict a steady stream of water flowing downhill into the subject parking lot. Plaintiff testified that she slipped on black ice and that the area of black ice corresponded to the affected area depicted in the videos and photographs. While no party is taking responsibility for these pipes or know their origin, it certainly raises a question of fact, as to the genesis of the water, and the parties' constructive notice of the water flow. The fact is that Brookside owns an adjacent property to the subject property. The evidence certainly suggests the possibility that through the use of a pipe drainage system, Brookside may be redirecting water from its own property and onto the adjacent premises where plaintiff was injured.

Similarly, in Westrock Defendants' motion for summary judgment, they argue that the condition at issue was not created by Westrock nor did they have actual or constructive notice of the alleged condition. Westrock Defendants contend that plaintiff did not know it was ice until she had fallen. Plaintiff testified that there was no precipitation on the date of the accident, which is consistent with Mr. Rosenblatt's testimony. Plaintiff saw dampness and didn't even know it was ice until she slipped when she felt the ground. As a result, since the ice was not visible and there was no known precipitation or any other contributing factor that the moving defendants should have known that black ice would form, the moving defendant did not have notice of the black ice. After the accident, plaintiff surmised that the water that turned to ice was coming from a pipe in the wooden area in the back of the condominium complex on the abutting property. Westrock

Defendants point out that Mr. Rosenblatt testified that he did not have notice of the condition before the accident, nor did they create the condition. Neither Jody Stokhamer of Brookside, nor Kevin Cullen of Heritage had any communication with Rosenblatt regarding complaints concerning water drainage of the adjacent properties. Yet, Mr. Smith testified that Brookside did discharge storm water from its units' gutter systems directly onto the hillside above the subject premises. He testified that he replaced drain pipes that terminated at the back of the property and emptied directly onto the hillside above the parking of the subject premises.

The Westrock Defendants as property owner have a non-delegable duty to take reasonable care of the subject property. They failed to meet their burden to establish that they did not have constructive notice of the defective condition. Mr. Rosenblatt testified that Westrock was responsible for the snow and ice remediation and removal in the subject parking lot at the subject premises. Rosenblatt further testified that he was not actually sure whether or not he ever inspected the hillside area to see if there were any pipes discharging water and flowing onto the subject property. Plaintiff argues that even though Rosenblatt testified that there was a water main break at Brookside's property, all other evidence indicates that the PVC pipes on Brookside's property are the source of water pouring directly onto Westrock's parking lot.

In light of the foregoing, there are genuine issues of fact as to whether the Westrock Defendants had constructive notice of the flow of water from the pipes into the parking lot; had notice of the black ice on the subject property; whether they appropriately inspected the area; and whether the black ice or other conditions on the property were readily observable, even at 8:30 in the morning.

As for Heritage's (property manager of Brookside) motion for summary judgment, it argues

that it did not own, operate, control, maintain the subject property, and had no responsibility to remediate any snow or ice on the subject property. Thus, it argues that it had no duty of care owed to plaintiff and cannot be held negligent for the alleged accident. Even if it did owe a duty of care to plaintiff from the neighboring property, the evidence shows that Heritage did not create or have any notice actual or constructive of any alleged dangerous condition on the premises. Heritage continues that plaintiff cannot establish that, on the date of the accident, there was a dangerous condition on the subject property -let alone one created by Heritage that caused her alleged accident. There is a question as to whether a dangerous condition on the Brookside property led to plaintiff's accident on the subject property. If water was traveling onto the parking lot of the subject property, Westrock Defendants would bear potential liability for failing to observe the water, failing to notify Brookside and or Heritage of the water, failing to warn invitees on their premises including plaintiff and failing to take any action to remediate and/or remove the water coming onto their property.

Plaintiff argues that Heritage was responsible for the discharge of water from the Brookside property onto the premises, and such water was caused to travel onto the parking lot and such water was caused to freeze into ice on the parking lot, and such ice eventually caused plaintiff to slip and fall.

Under these circumstances, triable issues of fact exist as to whether Heritage's alleged water drainage system diverted water onto the subject property, precluded summary judgment in favor of Heritage. Moreover, there is a question whether Heritage had constructive notice regarding the existence of the alleged defective pipe drainage system that discharged water onto the abutting property.

All matters not specifically addressed are herewith denied. This constitutes the decision and order of this court.

Accordingly, it is hereby:

ORDERED, that defendant Brookside's motion for summary judgment (Seq 1) is **denied**, and it is further

ORDERED, that Westrock's motion for summary judgment (Seq 2) is **denied**; and it is further

ORDERED, that Heritage's motion for summary judgment (Seq 3) is **denied**; and it is further

ORDERED, that the parties are directed to appear on Feb. 26th at 9:15 am, 2019, in Courtroom 1600, the Settlement Conference Part, The Westchester Courthouse, 111 Dr. Martin Luther King Jr. Blvd., White Plains, New York 10601.

Dated: **January 25, 2018**
White Plains, New York

HON. CHARLES D. WOOD
Justice of the Supreme Court

To: All Parties by NYSCEF