SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. W. FRANC PERRY** **PART** **IAS MOTION 23EFM**

Justice

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BRENDA TURNER,

Plaintiff,

- v -

TREELINE 900 STEWART LLC, THE TREELINE COMPANIES, TREELINE 990 STEWART PARTNERS, LLC, TREELINE 900 LLC, SUPERIOR LANDSCAPING SERVICES, INC., CUSTOM DESIGN LANDSCAPING, SUPERIOR LANDSCAPING SERVICES, INC. D/B/A CUSTOM DESIGN LANDSCAPING, TREELINE MANAGEMENT CORP., TL ASSET MANAGEMENT CORP., SPANIER BUILDING MAINTENANCE COMPANY,

Defendants.

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TREELINE 990 STEWART LLC, TREELINE MANAGEMENT CORP., and TL ASSET MANAGEMENT CORP.,

Third-Party Plaintiffs,

-v-

SPANIER BUILDING MAINTENANCE COMPANY,

Third-Party Defendant.

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SUPERIOR LANDSCAPING SERVICES INC. D/B/A CUSTOM DESIGN LANDSCAPING,

Second Third-Party Plaintiffs,

-v-

SPANIER BUILDING MAINTENANCE COMPANY,

Second Third-Party Defendant.

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INDEX NO. 101828/2012

MOTION DATE 05/02/2019, 05/02/2019

MOTION SEQ. NO. 007, 008

DECISION + ORDER ON MOTION

Third-Party Index No.: 590275/2014

The following e-filed documents, listed by NYSCEF document number (Motion 007) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 49, 50, 51, 52, 57, 58, 81, 82, 83, 84, 85, 86, 87, 88, 89

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 53, 54, 55, 56, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

This personal injury action arises out of plaintiff Brenda Turner's alleged trip and fall as a result of an icy condition outside an office building located at 990 Stewart Avenue in Garden City, New York. Plaintiff commenced a direct action against defendants Treeline 990 Stewart, LLC, The Treeline Companies, Treeline 990 Stewart Partners, LLC, Treeline 990, LLC, Treeline Management Corp. and TL Asset Management Corp. (collectively, Treeline), the owner of the property and against Superior Landscaping Services, Inc. d/b/a Custom Design Landscaping (Superior), the snow removal contractor.

Treeline then commenced a third-party action against Spanier Building Maintenance Company (Spanier), with whom it had a janitorial services contract, seeking contractual and common-law indemnification, and contribution, in the event plaintiff recovers a judgment against Treeline.

Superior also brought a second third-party action against Spanier seeking common law indemnification and/or contribution in whole or in part due to Spanier's negligent acts or omissions, in the event that Superior is held liable to plaintiff or any party.

In motion sequence 007, third-party/second third-party defendant Spanier, moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the two third-party complaints asserted as against Spanier.

In motion sequence 008, Superior moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint as well as any cross claims asserted as against Superior. Defendant/third-party plaintiff Treeline cross-moves, pursuant to CPLR Section 3212, for an order dismissing plaintiff's complaint in its entirety, on the grounds of the "storm in progress rule."

Plaintiff opposes the cross motion and the other motions. Motion sequence numbers 007 and 008 are hereby consolidated for disposition.

BACKGROUND AND CONTENTIONS

Plaintiff alleges that, as she was leaving work at approximately 3:15 p.m. on February 1, 2011, she sustained personal injuries when she slipped and fell on ice/snow on the steps outside the office building located at 990 Stewart Avenue in Garden City, New York. After exiting the building to reach street level, plaintiff had to walk 25 to 30 feet on a plaza landing and then walk down five cement steps. Plaintiff testified that when she arrived at work that morning at 6:45 a.m., the plaza landing and steps had snow and ice on them and had not been cleared. There were snowbanks on both sides of the landing and no railing. She stated that she had notified a maintenance person about the "ice and stuff out there." Treeline's exhibit B, plaintiff's tr at 54. Plaintiff testified that there was no precipitation on the day of her accident but that it had snowed three or four days before. Plaintiff's accident occurred on a Tuesday and she had not seen anyone shoveling the steps since the Thursday before.

When plaintiff left the building in the afternoon, the "landing appeared to have all ice and snow," the snow had not been cleared and there was no sand or salt. *Id.* at 38. Plaintiff stated that she saw the ice as she approached the end of the landing area but could not walk over it, as there was no other way to get down the stairs to the bus stop. When she tried to reach for the

railing on the stairs, she slipped on the ice that was on the landing. Plaintiff testified that her accident took place, "toward the left side of the steps, as you were going down to the bus stop." *Id.* at 32. She continued, "my right foot - - I went to reach for the (indicating) rail and my right foot slipped on the first step. And then I just went down the next - - all the other steps." *Id.* at 33. Plaintiff fell on her neck, hip and shoulder. After the accident, plaintiff had neck surgery. However, plaintiff testified that she still feels pain in her neck, arms, hands, fingers, her hips and legs.

On March 3, 2015, plaintiff testified a second time after the commencement of the third-party action. *See* NYSCEF Doc. No. 22. During this deposition, she testified that when she arrived at work that morning, the steps were covered in snow and the plaza was covered in ice. She stated that she saw piles of snow on the sidewalks and that she did not see piles of snow at the top of the steps or on the plaza landing area. She reported the slippery condition to the maintenance person, whom she thinks may have been Floyd Viscusi (Viscusi), both in the morning and at lunch. The maintenance person stated that they were short staffed and that he could not promise to get to it, and they were doing the best that they could. When she left work in the afternoon there was a dusting of snow on the plaza and snow and ice everywhere on the landing. Plaintiff testified that, although it was a little better than in the morning, there was still snow and ice on the steps and she did not see any salt or sand.

After the accident, plaintiff's supervisor filled out an incident report that stated, "[u]pon leaving the building Brenda slipped and fell on the steps due to an icy condition and no salt on steps and platform leading to steps." NYSCEF Doc. No. 73 at 1.

Treeline owned the building located at 990 Stewart Avenue. Glenn Schor (Schor), Treeline's president, testified that Treeline hired a property manager, TL Asset Management

Corp., to be responsible for the "day-to-day operations of the building." Treeline's exhibit D, Schor tr at 14. TL Asset Management Corp. was responsible for "[c]ollecting the rent, paying the bills, signing the necessary contracts to operate the building, maintaining insurance, everything that is involved with administering the leases, everything involved with keeping an office building operating on a daily basis." *Id.* at 23. Treeline had a contract with Superior, the snow removal company. Schor testified that Superior's "fundamental task was to come and cleanup the snow, salt and sand." *Id.* at 53.

Superior provided snow removal services pursuant to a "snow plowing contract." The contract stated, in relevant part, that if a storm occurs during the night, the contractor will be on the property at 5:30 in the morning and that a storm is two inches or more based on Islip-McArthur Airport and Newsday readings. The contract was based on an unlimited amount of snow and storms, with a flat price for snow removal. The contract listed everything Superior was responsible for, among other things, plowing, applying sand and salt after the completion of plowing, and cleaning all stairways and applying ice-melt. Further, Superior was not "responsible for the removal of any accumulated snow as a result of snow plowing. Only applies if snow has to be removed from premises." NYSCEF Doc. No. 99 at 2. There was no indemnification provision in the contract.

Spanier provided maintenance services for Treeline pursuant to a contract. In addition to the list of cleaning services required for the building such as cleaning all lavatories, the contract required that Spanier "[p]rovide Day Porter Services, Day Matron Services and Handyman Services as requested by Treeline," and that Spanier will "[p]rovide snow removal as requested by Treeline." NYSCEF Doc. No. 17 at 9. Article 6 of the contract, entitled indemnification, states the following:

> "To the fullest extent permitted by law, [Spanier] shall indemnify and hold [Treeline], its members, partners, affiliates and management company, harmless from and against claims, damages, losses and expenses, including but not limited to attorneys' fees arising out of or resulting from the performance or omission of any of the Work performed by [Spanier], or anyone directly or indirectly employed by [Spanier]. This provision shall survive the expiration of the Work."

Id. at 5.

The contract further indicates that Spanier may be asked to perform additional services by Treeline and that the indemnification provisions cover such additional services. The clause states, in relevant part:

> "Notwithstanding any specific language in the Contract, the parties hereto acknowledge that [Spanier] may perform other, different and additional services for [Treeline]. It is the specific intention of the parties hereto that all indemnities, guaranties and insurance provided for by this Contract (to both [Treeline] and all other parties listed above) be deemed to and does cover such additional other and additional services rendered to [Treeline] by [Spanier]."

Id. at 4-5.

Schor testified that, "as is in every one of our properties, Spanier provides the employee to the premises . . . super, porter, the handyman. Floyd Viscusi (Viscusi) was the handyman/super at the building. He had a day porter with him at the building. It was their responsibility on a day-to-day basis to maintenance the building." Schor tr at 52. According to Schor, Viscusi was Treeline's "representative on the ground at the building." *Id.* at 54. Schor testified that part of Viscusi's responsibilities included policing the exterior area that was pre-cleaned by Superior. Superior's job was to provide a "clean area," and then if there was a melt and refreeze, Viscusi would go out and assess the situation.

If a tenant had a complaint about snow or ice, it would be Viscusi's responsibility to first go out and inspect the area and see if he could remedy it himself or with the help of the porter. If Viscusi felt that he and his porter could handle the snow removal and/or maintenance, they

would shovel it and add salt and sand. However, if the snow removal job required a snow blower, truck or other equipment, Viscusi had the option to call Superior to provide a "special" re-clean of the area. This would appear as an extra charge, in addition to the flat fee paid by Treeline to Superior for snow removal services.

Schor testified that he did not know if Superior provided snow removal services on the date of plaintiff's accident and he did not know if anyone in the building kept a log. There were no invoices on file for any "extras" paid to Superior for snow removal services the week of plaintiff's accident. Schor did not remember hearing any complaints about snow or ice removal in 2011. Treeline and the managing agent were satisfied with Superior's work and paid the full contract price without issue.

Thomas D'Antonio (D'Antonio), the president of Superior, testified on its behalf. D'Antonio testified that Treeline hired Superior for landscape maintenance and snow removal services. Superior would monitor the weather services and then automatically dispatch employees to the property after two inches of snow had fallen. D'Antonio was present on site to oversee the snow removal operations. He stated that, under "normal protocol," Superior would get a phone call from Viscusi if additional snow removal services were needed. Treeline's exhibit C, D'Antonio tr at 29. There would only be snow piles on the outer perimeter of the property, not in the plaza areas. D'Antonio testified that there would be snow in the planters that are in the corners of the plaza area, so it would "look like piles." *Id.* at 53.

Superior's records indicated that Superior provided snow removal services on January 26, 27 and 28, and 31, 2011. Sixteen inches of snow fell between January 26 and 27. Ice melt was specifically placed on the walkways, including the steps. For the date of January 28, 2011,

Superior's logs indicated that ice melt was placed on the walkways. On January 31, 2011, salt/sand was applied to the parking area only and ramps going into the parking garages.

For the date of February 1, 2011, Superior had noted on its invoice that it was a snowstorm of under two inches. However, D'Antonio testified that if they receive the weather report and it states that it was under two inches, they still go to the actual site to take the measurement. On February 1, 2011, someone went to the site by 2 a.m., took a measurement and, since it was at least two inches, started snow removal services. Eight men shoveled the plaza area and the walkways around the building. It was normal protocol to have the building cleared by 8:30 a.m. and the ice melt on the steps would have been completed closer to 8:30 a.m. Superior's record for February 1, 2011 stated that it plowed between 2 a.m. and 8:30 a.m. It cleared the parking area and the plaza area where plaintiff had her accident. Although ice melt was not listed in the work log, D'Antonio testified that normal protocol would be to plow and treat the area with ice melt so that the brick was exposed underneath. The shoveled areas would be treated with ice melt and the parking lot would be treated with sand.

D'Antonio testified that usually Viscusi or the property manager would do an inspection after the completion of snow removal services. Viscusi had access to the ice melt if he needed it and he and his assistants would use the additional shovels. D'Antonio testified that with Viscusi being the superintendent, Superior "would check with him periodically and let him know what was going on with the property . . .." *Id.* at 46. "If we left the property and something came up, normally [Viscusi] would either call me or he would go out and do his treatment or however he felt was deemed necessary for the sake of the residents." *Id.* at 46.

Viscusi testified that, although he was hired by Treeline, he was employed by Spanier full time as a building manager and assigned to 990 Stewart Avenue. Viscusi worked there from

2007 to 2014. He stated that he got his checks from Spanier but that he reported to Treeline. "All the interviews for that position over there would go through the management company, which was Treeline, and Spanier was like a third party actually. I got my checks from them, but I was basically reporting to Treeline." NYSCEF Doc. No. 72, Viscusi tr at 25. Viscusi had a porter working for him. He never had any conversations about snow removal with Spanier and Spanier never told him that he was not supposed to perform any snow or ice removal on the exterior of the building.

During inclement weather in the winter months, Viscusi would arrive at the building around 4 or 5 a.m. to make sure that the sidewalks were clear of ice and snow and to salt the entranceways. When there was a big snowstorm Viscusi testified that he "made sure" that Superior was there doing the proper job. *Id.* at 16. After Superior would leave the premises after providing snow removal services, Viscusi "would walk around the perimeter of the building making sure it was safe, the walkway and the sidewalks were clear, and if they needed salt to be treated or whatever, I would look, get hold of [the porter] and we put the salt out." *Id.* at 20. Treeline would drop off salt, sand, ice melt and spreaders for Viscusi to use.

If a tenant complained about an icy condition on the stairs or anywhere, it would be common practice that Viscusi would go out immediately and remediate the condition by salting and sanding the condition until it was safe. He was told that part of his duties included monitoring the property for snow hazards and remediating them if he could handle it by shoveling, salting or sanding. If Viscusi deemed the condition to be hazardous, he had caution tape and could block off the area. He testified there are numerous ways to exit the building if one exit is roped off. Treeline's property manager would also be at the building daily and inspect the grounds. If the property manager saw areas that needed salting or sanding, he would

inform Viscusi. The two of them would walk the building together. There were times when they both inspected Superior's work after it was complete and there were other times where it was just Viscusi.

Viscusi did not recall the weather conditions on the date of plaintiff's accident. He did not recall plaintiff complaining to him on the date of the accident about the snow/ice conditions and never had any conversations with plaintiff about her accident. Viscusi testified that the security guard advised him of plaintiff's accident and then Viscusi wrote up an incident report. It was company policy to write up an incident report about anything that occurred on company property.

Viscusi testified that there were times where Superior would remove the bulk of the snow or ice, but depending on the temperature, the snow and ice would melt and refreeze. Viscusi and his porter would monitor the exterior of the property for this potentially hazardous condition, among others. He stated that they "are monitoring it constantly during inclement weather from the snow melt to the refreeze and one of us monitors the outside of the sidewalks and steps, the brick, whatever you call it . . . The plaza. That is always monitored." *Id.* at 39. Viscusi would not have to ask anyone's permission before going out and using ice melt or sand or salt, even if it "was a condition such as refreezing or a layer of ice and the steps or the plaza or anything like that . . ." *Id.* at 41.

After plaintiff's accident, Viscusi provided an incident report which stated:

> "Incident: 2/1/11
> "I Floyd Viscusi Building Maint. Did in fact put salt on steps & front (westside) of building @ 990 Stewart Ave. G.C. N.Y. 11539. Salt is put down many times a day by personnel. Not only in accident area, but all around the perimeter of building = sidewalks, ramps, parking lot etc."

NYSCEF Doc. No. 73 at 2.

Spanier also submitted an affidavit and testimony from Hugo Iglesias (Iglesias), field supervisor and then manager, who occasionally visited building sites, and an affidavit from Dave Parsons (Parsons), Spanier's Executive VP. In essence, both Iglesias and Parsons claimed that it was not intended for Spanier employees to engage in any type of snow removal prior to receiving a work order from Treeline. If a tenant complained about an icy condition at the entrance of the building, it was their opinion that the tenant would have to contact Treeline, who would then contact Spanier to remediate the situation. They maintained that Treeline had a different company for snow removal services and that, only upon Treeline's request, could Spanier's employees assist and complement the snow removal contractor's services. Spanier was in no way responsible for monitoring the perimeter of the building for icy conditions. Parson wrote: "Under no circumstances would the day porter or superintendent of Spanier clean snow unless they were requested by Treeline to do so. Given the fact that Spanier had not agreed to be responsible for snow and icy conditions on the exterior of the premises, Spanier had not agreed to indemnify Treeline for accidents resulting from any and all icy conditions present at the building." NYSCEF Doc. No. 27, Parsons aff ¶ ¶ 5-6. Iglesias testified that if Spanier employees were removing snow and ice, it was only because Treeline called them with a work order. This work order could entail "[a]ny specific [snow and ice removal], like removing ice or spread salt in the parking lot of the sidewalk. They have to specify what they want to do." NYSCEF Doc. No. 28, Iglesias tr at 31.

Snow Conditions on the Date of Plaintiff's Accident

The parties dispute the weather conditions that existed on February 1, 2011. Treeline and Spanier allege that there was a "storm in progress." Spanier submitted weather reports prepared by CompuWeather indicating that there was a significant amount of snowfall on January 26 and

27, 2011. There was light snow with little cumulative effect on January 28 and 29, 2011. On January 30 and 31, 2011, there was no precipitation. The weather report concluded:

> "On February 1, 2011 (date of the incident) approximately 12.5 inches of snow and ice cover was present at the start of the day (midnight). Precipitation in the form of snow occurred frequently from around 12:00-12:15 AM EST through 4:55 AM EST. After 4:55 AM EST, precipitation fell frequently in form of freezing rain, freezing drizzle, and sleet, occasionally mixed with drizzle and snow, through around 1:50 PM EST. After 1:50 PM EST, precipitation fell intermittently in the form of light freezing rain and freezing drizzle through around 9:55 PM EST. After 9:55 PM EST, precipitation fell frequently in the form of freezing rain and freezing drizzle though the remainder of the evening. Approximately 0.5-0.9 inch of snow, sleet, and freezing rain fell on this day. Due to melting and compaction, approximately 12.5 inches of snow and ice cover was present at the end of the day. The high temperature was near 33 F and the low temperature was near 25 F."

NYSCEF Doc. No. 19 at 6.

James V. Bria, III, (Bria), a Senior Forensic Meteorologist at CompuWeather Forensic Services Division, concluded that at 3:45 p.m., "the sky was cloudy, light freezing rain and freezing drizzle may have been falling intermittently, and the temperature was near 26 F." *Id.* at 9.

Bria also submitted an affidavit discussing the CompuWeather findings. He stated:

> "Therefore, I can state within a reasonable degree of scientific/meteorological certainty that significant snowstorms occurred in the New York City Metropolitan Area, including Garden City, Long Island on January 27, 2011 through February 1, 2011, with significant accumulations of snow and ice resulting from those storms. There was snow, sleet and freezing rain occurring in Garden City, Long Island throughout the entire day of February 1, 2011 up until the late evening of that day, with an accumulation of 0.5 to 0.9 inch of snow, sleet and freezing rain."

NYSCEF Doc. No. 20, Aff, ¶ 10.

Plaintiff provides an expert affidavit from George Wright (Wright), a meteorologist, who analyzed various weather and climatological data in order to form his opinion. Wright stated that a winter storm produced 15-16 inches of snow, sleet and freezing rain on January 26-27, 2011. There was light precipitation over the next couple of days. There was no precipitation on January 30 and 31, 2011. On January 31, 2011, there was approximately 12 inches of snow and

ice present on the ground. Snow started to fall around 1:00 a.m. on February 1, 2011, with approximately one-half to one inch of snow, sleet and freezing rain occurring. This precipitation tapered off by 4:30 a.m.

At 3:15 p.m., the time of plaintiff's accident, there was no precipitation and 12 inches of snow/ice on the ground. The weather records for Republic Airport stated that there was no measurable precipitation after 5 a.m. on February 1, 2011 and that the last precipitation occurred at 1:18 p.m. The precipitation in between 5:00 a.m. and 1:18 p.m. had been measured as "trace." Wright noted that Bria utilized some data from J.F.K. Airport, in addition to other locations. However, according to Wright, only data from Republic Airport should be considered, as Republic Airport is more "climatologically representative" of weather conditions occurring at the accident location. *Id.*, ¶ 19.

Wright concluded, in relevant part:

> "In my opinion, based upon a reasonable degree of meteorological certainty, the snow and ice that covered the subject landing and stairway where Plaintiff slipped and fell was formed by the snow, sleet and freezing rain that occurred prior to 4:30 a.m. on February 1, 2011 that was not completely removed and salted since no measurable snow, sleet or freezing rain occurred after this time. The snow and ice on the subject landing and stairway was present for more than 10 hours prior to Plaintiff's incident and was therefore a long-standing condition."

Id., ¶ 24.

Spanier's Motion for Summary Judgment

Spanier argues that, pursuant to its contractual obligations, it did not owe Treeline or Superior a duty to investigate and/or remove the icy/snowy condition that caused plaintiff's accident. Regarding snow removal, the janitorial maintenance contract only states that "Spanier provide snow removal as requested by Treeline." Spanier argues that, pursuant to these terms, Treeline, and not Spanier, was responsible for deciding whether Spanier should provide snow

removal services. According to Spanier, it was under no obligation to inspect and monitor the outside of the building for snow or ice and then perform snow removal services. Treeline hired a separate company for snow removal services and Spanier did not intend to indemnify Treeline for any damages resulting from snow removal services. Any directive by Treeline to Viscusi regarding routinely checking the exterior of the building and also after Superior provided snow removal services would be inadmissible parole evidence that cannot be used to interpret Spanier's obligations under its written contract.

As a result, Spanier argues it is not contractually obligated to indemnify Treeline for any damages sustained by plaintiff as Spanier was not requested by Treeline, in this situation, to remove the snow and ice involved in plaintiff's accident.

The second third-party complaint alleges that Spanier had a duty to keep the accident location safe, including addressing any snow/ice issues. It continues that, if Superior is held liable to plaintiff or any other party, this liability arose from Spanier's negligence. As a result, Superior is entitled to common law indemnification and/or contribution from Spanier.

Spanier argues that Superior's second third-party action against it should be dismissed because Spanier's contract with Treeline did not obligate it to monitor the perimeter of the building. Spanier continues that neither Treeline nor Superior are entitled to common law indemnification from Spanier because there is no evidence that Viscusi created or exacerbated the allegedly icy condition where plaintiff slipped. Superior left the property around 8:30 a.m. and the weather records then indicated that precipitation was intermittent throughout the day. As a result, any icy condition could have been present after Superior's snow removal operations or as a result of the continued freezing rain on the date of the accident. According to Spanier, it is

speculative to conclude that any attempts by Viscusi to shovel, salt or sand exacerbated or created the icy condition.

Alternatively, Spanier alleges that icy conditions remained because of a storm in progress. Under the storm in progress doctrine, neither Treeline nor any other party, would have a duty to plaintiff to remove the icy/snow on the steps present at the time of plaintiff's accident, mooting out the third-party actions against Spanier.[1]

Treeline's Cross Motion

Treeline also argues that, under the circumstances, it is entitled to summary judgment dismissing the complaint based on the storm in progress doctrine. Treeline alleges that a storm was occurring at the time of plaintiff's accident. The weather reports indicated that there had been several snowstorms in the days leading up to plaintiff's accident and that, around the time of plaintiff's accident, there was freezing rain. Thus, during this time, its duty to remove the snow/ice was suspended and did not re-commence until a reasonable time after the storm ended. Nonparty witness Kevin Outen (Outen), one of plaintiff's co-workers at the building, testified that the snow was falling at a steady rate when he arrived at work that morning between eight and nine and when he left work in the afternoon between three and four. He stated that "[the snow] was coming down hard and I remember when I was leaving it was very icy." NYSCEF Doc. No. 98, Outen tr at 20.

However, in opposition to Spanier's motion, Treeline argues that, if plaintiff's complaint is not dismissed as against it, Spanier's motion for summary judgment dismissing Treeline's third-party complaint against Spanier seeking contractual and common law indemnification should not be dismissed. Referring to the testimony and documents cited above, Treeline argues

[1] Superior does not oppose Spanier's motion.

that it had a contract with Spanier to provide janitorial/maintenance services and that minor snow removal services were duties included in this contract. Specifically, the contract set forth that Spanier was to provide snow removal services as requested by Treeline, or any other additional services as requested by Treeline, and this is exactly what Viscusi, an employee of Spanier, was doing on the date of the accident. As Schor and Viscusi testified to at length, Viscusi was also informed that his duties included inspecting the gross snow removal by Superior and then monitoring the conditions for additional snow removal. If there was any additional snow/ice removal necessary, Viscusi made the decision whether he and his helper could handle it or whether he would have to call Superior to the premises.

Treeline alleges that, on the date of plaintiff's accident, it is undisputed that Superior provided snow removal services. Further, the weather reports confirm that, after Superior left the premises, it continued to precipitate, causing ongoing accumulation of snow and ice patches. Viscusi testified that it was his regular routine, up to, and including, the date of plaintiff's accident to perform minor snow/ice removal and that he did so on the date of plaintiff's accident. The contract between Spanier and Treeline included an indemnification provision whereby Spanier would indemnify Treeline for all claims that arise out of or result from the performance or omission of any work performed by Spanier. Therefore, according to Treeline, if Viscusi or his helper's snow removal procedures, or lack thereof, caused plaintiff's accident, Spanier will be contractually liable to indemnify Treeline.

Further, Treeline argues that questions of fact remain precluding the dismissal of Treeline's claim for common law indemnification against Spanier. According to Treeline, as none of Treeline's employees were present on the date of plaintiff's accident, nor did they perform snow removal procedures, any potential liability attaching to Treeline would be

vicarious. Therefore, regardless of any contractual duty on Spanier's part to provide snow removal services, if a jury determined that Viscusi negligently performed his duties or exacerbated the conditions, Treeline would have a viable claim for common law indemnification.

Plaintiff opposes Treeline's cross motion and Spanier's motion, to the extent that it seeks to dismiss plaintiff's complaint on the basis of the storm in progress doctrine. As discussed below, plaintiff argues that there was no storm in progress, as her weather expert has established that the storm ended by 4:30 a.m. on the date of plaintiff's accident.

Superior's Motion

Superior is seeking summary judgment dismissing the complaint as well as any cross claims asserted as against Superior. Superior summarizes that, on the date of plaintiff's accident, it provided snow removal services pursuant to its contract with Treeline. It completed the work at approximately 8:30 a.m. It was common practice for the property owner/building superintendent to inspect the snow removal services upon completion. On the date in question, Superior performed its snow removal services to the satisfaction of the property owner and then left the property. It was paid in full for its services. No additional services were requested on the date of plaintiff's accident. After Superior completed its work, building maintenance staff continued to inspect the area, applying salt/sand when necessary.

Independent contractors, such as Superior, do not owe a duty of care to third parties. *Espinal v Melville Snow Contrs.*, 98 NY2d 136 (2002). However, there are three exceptions:

> "(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches 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. at 140 (internal quotation marks and citations omitted).

Citing *Espinal v Melville Snow Contrs.*, *supra*, Superior argues that it should be granted summary judgment dismissing plaintiff's complaint as none of the three exceptions apply that would give rise to tort liability. First, Superior alleges that it did not launch an instrument of harm as it plowed the area to the satisfaction of the property owner and was not called back for additional services. In addition, Superior alleges that its snow removal activities did not leave the area in a more dangerous condition than before Superior arrived. Further, the record indicates that Viscusi and/or his staff provided salting/sanding to the area where plaintiff's accident occurred, thereby changing the nature of the area after Superior's snow removal services. Second, as plaintiff was unaware of Superior's contract to perform snow removal services, she cannot make a showing of detrimental reliance. Lastly, Superior states that the property owner itself removed snow and ice from the premises on numerous occasions, including the date of the accident. As a result, according to Superior, it did not entirely displace the property owner's common law duty to maintain the premises.

Superior further notes that, pursuant to its contract, it automatically provided services only if there was a storm of two or more inches of snowfall. It would provide additional sanding only if requested and had no ongoing obligation to inspect or maintain the property. It notes that the property owner was responsible for monitoring the property for icy conditions and addressing any melting/refreezing.

Superior also argues that it should be granted summary judgment dismissing Treeline and Spanier's cross claims for contribution and indemnification. Regarding any cross claims, Superior contends that any claim for contribution is not viable as Superior did not owe plaintiff a duty. Similarly, as Superior was allegedly not liable for plaintiff's accident, there is no basis for common law indemnification. Further, Superior argues that the cross claim for contractual

indemnification must be dismissed, as there is no indemnification provision in its contract with Treeline.

Treeline opposes Superior's motion for summary judgment, arguing that a question of fact remains as to whether Superior's actions were a contributing factor to plaintiff's accident. Plaintiff testified that the plaza was covered with snow and ice. According to Treeline, Superior was required to remove not only the new snow, but also any ice that had formed under the snow, and to then salt and sand the area. As such, questions of fact remain whether Superior followed its custom and practice in terms of snow removal on the date of accident. Treeline further states that "the dispositive issue in this case is whether Superior's snow and ice removal services created or exacerbated the condition of the accident location." NYSCEF Doc. No. 90, ¶ 22. Under the circumstances, it is premature to grant Superior summary judgment, as Superior could be held liable to Treeline under the principles of common law indemnification.

Plaintiff opposes Superior's motion, and contends that Superior created the dangerous condition by its snow removal activities.[2]

DISCUSSION

I. Summary Judgment

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007). The movant's burden is "heavy," and "on a motion for summary judgment, facts must be viewed in the light most favorable to the

[2] Spanier does not oppose Superior's motion to dismiss the cross claims. In Spanier's answer to the first and second third-party complaints, Spanier brought counterclaims against Superior and Treeline and cross claims against each defendant alleging that, in the event that plaintiff and/or third-party plaintiffs recover a verdict or judgment against Spanier, defendants are liable to indemnify Spanier and that, in fairness, the relative responsibilities of all said defendants must be apportioned by a separate determination.

non-moving party." *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 (2013) (internal quotation marks and citation omitted). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact." *People v Grasso,* 50 AD3d 535, 545 (1st Dept 2008) (internal quotation marks and citation omitted). "A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility." *Ruiz v Griffin*, 71 AD3d 1112, 1115 (2d Dept 2010) (internal quotation marks and citation omitted).

II. Treeline's Cross Motion Seeking Summary Judgment Dismissing the Complaint

It is well settled that "a landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, which include the likelihood of injury to third parties, the potential that any such injury would be of a serious nature, and the burden of avoiding the risk." *Perez v Bronx Park S. Assoc.*, 285 AD2d 402, 403 (1st Dept 2001) (citation omitted).

Despite the duty to keep the property in a reasonably safe condition, a landowner "will not be held liable in negligence for a plaintiff's injuries sustained as the result of an icy condition occurring during an ongoing storm or for a reasonable time thereafter." *Sherman v New York State Thruway Auth.*, 27 NY3d 1019, 1020-1021 (2016) (internal quotation marks and citation omitted). The "storm in progress" doctrine is designed to provide relief to the worker shoveling snow during a storm, whose efforts would be "fruitless," if the precipitation is "simply re-covering the walkways as fast as they are cleaned . . ." *Powell v MLG Hillside Assocs.*, 290 AD2d 345, 345 (1st Dept 2002). "Once there is a period of inactivity after cessation of the

storm, it becomes a question of fact as to whether the delay in commencing the cleanup was reasonable." *Id.* at 346. Even a temporary break in the storm at the time of an accident may not present a reasonable opportunity for snow removal. *Id.* at 345.

Plaintiff's and defendants' experts provide conflicting affidavits as to whether it was precipitating at the time of plaintiff's accident.[3] In brief, both Bria, defendants' expert, and Wright, plaintiff's expert, agree that it started to snow after midnight on February 1, 2011, with the snow tapering off by 5:00 a.m. After 5:00 a.m., Bria contends that there was mixed precipitation of freezing rain, sleet and snow, occurring frequently until 1:45 p.m. While Wright also agrees with this, he notes that the precipitation stopped between 4:30 a.m. and 7:30 a.m., and between 12:30 p.m. and 1:45 p.m., with no precipitation occurring after 1:45 p.m. CompuWeather records state that, after 1:50 p.m. the precipitation then fell intermittently, in the form of light freezing rain and freezing drizzle through the late evening. Bria found that precipitation may have been falling intermittently around 3:45 p.m.

Accordingly, in opposition to Treeline's cross motion, plaintiff has raised a triable issue of fact as to whether the storm in progress doctrine would shield Treeline from liability. The CompuWeather reports were compiled using data received from multiple sites, some of which are sites located at the Republic Airport, J.F.K. Airport, and Mineola, New York. The climatological data from Republic Airport, which is three miles closer to the premises than J.F.K. Airport, indicates that the last precipitation ended approximately two hours prior to plaintiff's accident and did not restart until after 10 p.m. This precludes granting Treeline's cross motion for summary judgment, as "triable issues of fact exist as to whether plaintiff's accident occurred

[3] A discussion on the issue of notice is unwarranted, as Treeline does not move for summary judgment on the basis "that it did not cause, create or have notice of the alleged hazardous condition . . ." *Karan v First Paradise Theaters Corp.*, 118 AD3d 424, 424 (1st Dept 2014).

while the storm was still in progress or whether there was a significant lull in the storm, and whether the [time] that elapsed between the last freezing rain and plaintiff's accident afforded defendant a reasonable opportunity to clear the steps." *Ndiaye v NEP W. 199th St. LP*, 124 AD3d 427, 428 (1st Dept 2015).

Further, the morning precipitation measured at Republic Airport after 5:00 a.m. was considered "trace." Courts have denied summary judgment motions based on the storm in progress doctrine when "the record establishes that at the time of plaintiff's accident, there was no storm but rather only trace amounts of snow." *Haraburda v City of New York*, 168 AD3d 485, 486 (1st Dept 2019). Lastly, although a nonparty witness testified that it was snowing when he left the building and plaintiff's second deposition testimony varies slightly from her first, credibility issues are "properly left for the trier of fact." *Yaziciyan v Blancato*, 267 AD2d 152, 152 (1st Dept 1999).

Accordingly, Treeline's cross motion for summary judgment dismissing plaintiff's complaint on the basis of a storm in progress doctrine, is denied.

III. Superior's Motion for Summary Judgment Dismissing the Complaint and Cross Claims

The elements required to prove a cause of action in negligence are: "(1) the existence of a duty on defendant's part as to plaintiff; (2) a breach of this duty; and (3) injury to the plaintiff as a result thereof." *Rodriguez v Budget Rent-A-Car Systems, Inc.*, 44 AD3d 216, 221 (1st Dept 2007) (internal quotation marks and citation omitted). As noted above, in general, independent contractors, such as Superior, who have a limited contractual obligation to provide snow removal services, are not liable for injuries sustained by a third party.[4] "A snow removal contractor (or

[4] The three exceptions stated above, include the following:

> (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the

one in a similar line of work) who 'creates or exacerbates' a harmful condition may generally be said to have 'launched' it." *Espinal v Melville Snow Contrs.*, 98 NY2d at 142.

As set forth below, Superior established, prima facie, that, as a third-party contractor, it did not owe a duty to plaintiff and that none of the three exceptions apply. First, the record indicates that, after measuring a two-inch snow fall by 2:00 a.m. on February 1, 2011, Superior performed snow removal services pursuant to its contract with Treeline. Superior provided shoveling, plowing and ice melt from 2:00 a.m. until 8:30 a.m. "[A] claim that a contractor exacerbated an existing condition requires 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, 215 (2d Dept 2010). It is well settled that, "by merely plowing the snow, as required by the contract, defendant's actions could not be said to have created or exacerbated a dangerous condition." *Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 361 (2007) (internal quotation marks and citation omitted). After Superior's work was inspected and approved, Superior left the property and was not asked to return for the remainder of the day. After Superior provided the gross snow removal services, Viscusi monitored the area and applied salt/sand as necessary, several times throughout the day.

In opposition to Superior's motion, as relevant here, plaintiff claims that Superior affirmatively created the dangerous condition, thereby launching an instrument of harm. Plaintiff testified that the area where her accident occurred looked almost the same way it did in the afternoon as it did in the morning and that she had not seen any snow removal activities that

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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.

Espinal v Melville Snow Contrs., 98 NY2d at 140 (internal quotation marks and citations omitted).

day. As a result, plaintiff argues that Superior created the dangerous condition, by failing to completely clear the plaza. However, "[a] snow removal contractor cannot be held liable for personal injuries on the ground that the snow removal contractor's passive omissions constituted the launch of a force or instrument of harm, where there is no evidence that the passive conduct created or exacerbated a dangerous condition." *Trombetta v G.P. Landscape Design, Inc.*, 160 AD3d 677, 678 (2d Dept 2018) (internal quotation marks and citations omitted).

Plaintiff's expert states that if the snow and ice had been completely removed and salted prior to 4:30 a.m., the snow and ice plaintiff tripped on would not be present. However, there is no support for the allegation that by failing to perform these duties, Superior left the site of the accident in a more dangerous condition than before Superior started its work. "[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.*" *Id.* at 678 (internal quotation marks and citations omitted).

Plaintiff's counsel suggests that Superior left piles of snow on the plaza landing and that these could create a dangerous condition if they melted and refroze. However, this is speculative, as plaintiff testified that she could not remember where the snow piles were located. *See e.g. Warrington v Ryder Truck Rental, Inc.*, 35 AD3d 455, 456 (2d Dept 2006) ("The deposition testimony annexed to the motion papers did not address those issues, and thus failed to put forth sufficient evidentiary proof to support the attorney's affirmation"). In addition, plaintiff's attorney offers no support for the theory that applying ice melt after shoveling could be a basis for liability. Accordingly, this "argument is speculative and based solely upon her attorney's affirmation." *Trent-Clark v City of New York*, 114 AD3d 558, 559 (1st Dept 2014).

In opposition to Superior's motion, Treeline also argues that questions remain as to whether Superior launched an instrument of harm by failing to completely clear the area as per Superior's custom and practice. However, as noted above, snow removal contractors are not found to have created a dangerous condition by plowing the snow in accordance with a contract, even if they leave residual snow and ice. "Indeed, by merely plowing the snow in accordance with the contract and leaving some residual snow or ice on the plowed area, [a snow removal contractor] cannot be said to have created a dangerous condition and thereby launched a force or instrument of harm." *Foster v Herbert Slepoy Corp.*, 76 AD3d at 215.

In conclusion, Superior did not owe plaintiff a duty of care and Superior's actions do not fall within the three exceptions where it would be liable for plaintiff's injuries. Accordingly, Superior's motion for summary judgment is granted dismissing plaintiff's complaint as against it.

Superior also moves for summary judgment dismissing Treeline and Spanier's cross claims for indemnification and contribution. Superior had a contract with Treeline to perform snow removal services, which included shoveling, salting, sanding, cleaning all stairways and applying ice melt. D'Antonio testified that it would be normal practice for the stairs to be cleaned so that the actual surface of the steps was exposed. On the date of the accident, Superior could not recall when the shoveling was completed and when the ice melt had been applied. Plaintiff testified that it had snowed in the week prior to her accident and that she had not seen anyone clear the stairs since the prior Thursday. When she arrived at work the following Tuesday, it did not appear, both upon entering and exiting the building, that any snow and ice had been removed from the area where she had her accident. Here, in opposition to Superior's motion, plaintiff has raised a triable issue of fact as to whether Superior negligently performed its snow removal services pursuant to its contract.

"The right to indemnification may be created by express contract, or may be implied by law to prevent an unjust enrichment or an unfair result." *Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 451-452 (1st Dept 1985). It is undisputed that there was no contractual indemnification provision in the contract between Superior and Treeline. The right to indemnification may be implied by common law to "prevent an unfair result or the unjust enrichment of one party at the expense of the other." *Richter v Hunter's Run Homeowners Assn. Inc.*, 14 AD3d 601, 602 (2d Dept 2005).

To be granted summary judgment dismissing a cross claim for common law indemnification, a snow removal contractor must establish "that the injured plaintiff's accident was not due solely to its negligent performance or non-performance of an act solely within its province." *Roach v AVR Realty Co., LLC*, 41 AD3d 821, 824 (2d Dept 2007). If a factfinder determines that Treeline's duties to remedy the dangerous condition were suspended as a result of a storm in progress, Treeline's cross claims will be moot. However, if a factfinder determines that Superior negligently failed to perform its snow removal duties pursuant to its contract either on the date of the accident or prior, Treeline may have a viable cross claim for common law indemnification as against Superior. "[S]ince there are questions of fact as to whether the accident resulted from [the snow removal company's] alleged failure to fulfill its obligations pursuant to the terms of the snow removal contract the cross claim for common-law indemnification cannot be resolved as a matter of law." *Wheaton v East End Commons Assoc., LLC*, 50 AD3d 675, 678 (2d Dept 2008) (internal quotation marks and citations omitted).

In addition, both Bria and Wright agree that there were several snowstorms in the week prior to plaintiff's accident, leaving an accumulation of approximately 12-13 inches of snow and ice on the ground as of midnight, on February 1, 2011. Bria states that, as of 3:45 p.m. on

February 1, 2011 there was "approximately 12.5-13.4 inches of snow and ice" on the ground outside the building. He continues that this snow and ice was the result of several recent snowfalls and the ongoing precipitation occurring since midnight on February 1, 2011. Further, plaintiff's expert claims that, as there was no measurable precipitation after 4:30 a.m. on the date of plaintiff's accident, the snow/ice that caused plaintiff to trip was the result of the prior and long-standing snow and ice. Accordingly, in light of the weather records and Bria's accompanying statements, Superior "failed to eliminate all issues of fact, including whether remnants of ice and snow from the prior, recent snowfalls had contributed to the subject hazardous condition." *Genao v M.E.I.T. Assoc.*, L.L.C., 126 AD3d 497, 498 (1st Dept 2015).

Accordingly, Superior's motion for summary judgment with respect to Treeline's cross claim for common law indemnification is denied.

However, Superior is granted summary judgment dismissing Spanier's cross claim for common law indemnification. If plaintiff recovers against Treeline as a result of Spanier's negligence, then Spanier will not have a viable claim for common law indemnification against Superior. "Since the predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine." *Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d at 453.

Further, Superior is entitled to summary judgment dismissing Treeline and Spanier's cross claims for contribution. As a result of this decision, plaintiff's complaint has been dismissed as against Superior. Accordingly, cross claims for contribution are not viable, "since [Superior] did not owe a duty of reasonable care to the plaintiff or a duty of reasonable care

independent of its contractual obligations to [Treeline]." *Turner v Birchwood on the Green Owners Corp.*, 171 AD3d 1119, 1121 (2d Dept 2019).

IV. Spanier's Motion for Summary Judgment Dismissing the Third-Party Complaints

Spanier is seeking summary judgment dismissing Treeline's third-party complaint as against Spanier. As set forth at length above, Spanier claims that it was a janitorial maintenance company, that it was not contractually obligated to provide snow removal services and that Treeline had a separate snow removal contractor. As it had no duty to remove the ice or snow, Spanier cannot be held liable to Treeline for contractual indemnification on the basis that it failed to remedy the condition at the accident site. Regarding the contract, Spanier maintains that "providing snow removal as requested by Treeline" indicates that Treeline would decide when snow removal was required and then contact Viscusi. Pursuant to these terms, Spanier would have to wait and receive a work order from Treeline prior to providing snow removal services. Further, snow removal services would not include monitoring the perimeter to assess the snow/ice condition.

It is well settled that "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *Quadrant Structured Prods. Co., Ltd. v Vertin*, 23 NY3d 549, 559-560 (2014). Spanier was the building maintenance company that provided complete janitorial services for 990 Stewart Avenue. Iglesias even testified that it would have been possible for Spanier employees to be removing ice or spreading salt, given that they received a work order. Although Treeline had a separate snow removal contract with Superior, this contract was limited, was only triggered when there was a storm of two or more inches and did not include follow-up snow/ice maintenance. This court declines to summarily adopt Spanier's interpretation that Spanier's employees needed to wait and receive a

new work order for a snow removal request prior to making sure that an entrance/exit of a building was free from snow/ice for all the people entering and exiting. "A court may not . . . construe the language in such a way as would distort the contract's apparent meaning." *Fleming v Fleming*, 137 AD3d 1206, 1207 (2d Dept 2016) (internal quotation marks and citations omitted).

"A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances." *Karwowski v 1407 Broadway Real Estate, LLC*, 160 AD3d 82, 87-88 (1st Dept 2018) (internal quotation marks and citations omitted). The record indicates that Spanier's employees did perform removal services, "as requested by Treeline," on an ongoing basis. They were advised that these snow removal duties included inspecting the exterior of the property after Superior provided its snow removal services and, if they were able to, maintaining this snow removal by shoveling and applying salt/sand. Spanier's employees had the authority to call Superior if they could not handle any snow or ice removal, including any melt/refreeze situations.

The indemnification provision states that Spanier is to indemnify Treeline for any claims/damages arising out of or resulting from the performance or omission of the work performed by Spanier's employees. On the date of the accident, Viscusi stated that he salted the area where plaintiff's accident occurred and that salt is put down many times a day by personnel. If plaintiff recovers a judgment against Treeline on the basis that the accident resulted from Viscusi's or the porter's snow removal activities, or lack thereof, in carrying out its contractual obligations, the contractual indemnification provision may be triggered. Accordingly, Spanier

has failed to establish its entitlement to judgment as a matter of law dismissing Treeline's third-party claim for contractual indemnification.

Even accepting Spanier's interpretation that snow removal was only triggered when Spanier was called or that snow removal did not include monitoring the perimeter, Spanier's motion for summary judgment dismissing the contractual indemnification claim would still be denied. The language in the contract states that Treeline may ask Spanier to perform additional services and that the indemnification and insurance provisions apply to these services. Here, it has been acknowledged by Spanier's employee that Treeline did request for him to perform additional services, which included monitoring the perimeter for snow removal. Accordingly, Spanier "failed to sustain its burden on the issue of contractual indemnification since a question of fact exists with respect to whether it breached the contract by failing to perform one or more of the services for which it was retained." *Peycke v Newport Media Acquisition II, Inc.*, 17 AD3d 338, 339 (2d Dept 2005).

Irrespective of whether Spanier was contractually obligated to monitor the steps where plaintiff fell, it is undisputed that Viscusi and his staff took it upon themselves to do so, and put salt down on the steps several times throughout the day. After Superior left the premises, no one besides Spanier employees attempted to clear the snow/ice. The cause of plaintiff's slip and fall has not yet been determined. Accordingly, Spanier "failed to establish its entitlement to judgment as a matter of law dismissing [Treeline's third-party] claim which was for common-law indemnification. A triable issue of fact exists as to whether the plaintiff's injuries were attributable to the nonperformance of an act that was solely within the province of [Spanier]." *Id.* at 339.

However, Spanier is granted summary judgment dismissing Superior's second third-party action as against it. As a result of this decision, plaintiff will not recover against Superior. If Treeline is able to recover against Superior, this recovery would be the result of Superior's negligence, precluding any claims for common-law indemnification. *See e.g. American Ins. Co. v Schnall*, 134 AD3d 746, 749 (2d Dept 2015) ("Scientific's liability if any, would be based on its actual wrongdoing, not its vicarious liability for Brooklynbaca's allegedly negligent conduct, thus defeating all claims for common-law indemnification").

"To sustain its claim for contribution, [Superior] was required to show that [Spanier] owed it a duty of reasonable care independent of its contractual obligations or that a duty was owed to the plaintiffs as injured parties and that a breach of this duty contributed to the alleged injuries." *Baratta v Home Depot USA, Inc.*, 303 AD2d 434, 435 (2d Dept 2003) (citations omitted). Spanier has no contract with Superior and has also met its burden establishing that it did not owe plaintiff a duty of care. Similar to the discussion above regarding Superior, Spanier's actions do not fall within the three exceptions where it would be liable in tort for plaintiff's injuries. Even if Viscusi applied salt/sand to the condition, this would not exacerbate the condition and launch an instrument of harm. Accordingly, Superior's third-party claim against Spanier for contribution is also dismissed.[5]

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion for summary judgment brought by defendant Spanier Building Maintenance Company (motion sequence 007) is granted with respect to dismissing the

[5] In addition, in response to Spanier's motion, Treeline does not address its claim for contribution. For similar reasons, Spanier has met its burden establishing its entitlement to summary judgment as a matter of law dismissing Treeline's third-party claim for contribution.

second third-party complaint as against it, and granted with respect to dismissing the third-party claim for contribution by defendants Treeline 990 Stewart, LLC, The Treeline Companies, Treeline 990 Stewart Partners, LLC, Treeline 990, LLC, Treeline Management Corp. and TL Asset Management Corp. (collectively, Treeline), but is denied with respect to dismissing Treeline's third-party complaint as against it seeking contractual and common law indemnification; and it is further

ORDERED that the motion for summary judgment brought by defendant Superior Landscaping Services, Inc. d/b/a Custom Design Landscaping (motion sequence 008) is granted with respect to dismissing plaintiff Brenda Turner's complaint as against it and granted with respect to dismissing Spanier Building Maintenance Company's cross claims and Treeline's cross claim for contribution, but is denied with respect to Treeline's cross claim for common law indemnification, and it is further;

ORDERED that the cross motion for summary judgment dismissing plaintiff's complaint brought by defendant Treeline is denied; and it is further

ORDERED that the complaint is hereby severed and dismissed in its entirety as against Superior Landscaping Services, Inc. d/b/a Custom Design Landscaping, with costs and disbursements to Superior Landscaping Services, Inc. d/b/a Custom Design Landscaping, as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of Superior Landscaping Services, Inc. d/b/a Custom Design Landscaping; and it is further

ORDERED that the second third-party complaint is hereby severed and dismissed in its entirety as against Spanier Building Maintenance Company, with costs and disbursements to Spanier Building Maintenance Company, as taxed by the Clerk of the Court, and the Clerk is

directed to enter judgment accordingly in favor of Spanier Building Maintenance Company; and it is further

ORDERED that all remaining claims and cross claims shall continue.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

September 23, 2019
DATE

W. FRANC PERRY, J.S.C.

CHECK ONE:		CASE DISPOSED			x	NON-FINAL DISPOSITION	
		GRANTED		DENIED	x	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE