SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

MADELINE BERKOWITZ,	TRIAL/IAS PART 32 NASSAU COUNTY
Plaintiff,	Index No.: 604642/15 Motion Seq. Nos.: 01, 02 Motion Dates: 08/08/19 08/28/19
- against -	
KIOP MEADOWBROOK L.P. and MARSHALLS OF MA, INC.,	
Defendants.	

The following papers have been read on these motions:

	Papers Numbered
Notice of Motion (Seq. No. 01), Affirmation and Exhibits, Affidavits and Exhibits and Memorandum of Law	1
Notice of Motion (Seq. No. 02), Affirmation and Exhibits	2
Affirmation in Opposition to Motions (Seq. Nos. 01 and 02) and Exhibits	3
Reply Affirmation to Motion (Seq. No. 01) and Exhibits	4
Reply Affirmation to Motion (Seq. No. 02)	5

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Defendant KIOP Meadowbrook L.P. ("KIOP") moves (Seq. No. 01), pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's Verified Complaint as against it, as well as any and all cross-claims as against it. Plaintiff opposes the motion.

Defendant Marshalls of MA, Inc. ("Marshalls") moves (Seq. No. 02), pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's Verified Complaint as against it, as well as any and all cross-claims as against it. Plaintiff opposes the motion.

The instant action was brought to recover for personal injuries allegedly sustained by plaintiff on August 27, 2013, at approximately 1:00 p.m., when she slipped and fell on the sidewalk outside of the Marshalls store located at 256 East Sunrise Highway, Freeport, County of Nassau, State of New York. *See* Defendant KIOP's Affirmation in Support Exhibit D. Plaintiff commenced the action with the filing of a Summons and Verified Complaint on or about July 14, 2015. *See* Defendant KIOP's Affirmation in Support Exhibit A. Issue was joined by defendant KIOP on or about September 8, 2015. *See* Defendant KIOP's Affirmation in Support Exhibit B. Issue was joined by defendant Marshalls on or about September 9, 2015. *See* Defendant KIOP's Affirmation in Support Exhibit C.

With respect to defendant KIOP's motion (Seq. No. 01), its counsel submits, in pertinent part, that, "[t]he basis for the making of the within motion is that the plaintiff has failed to identify a dangerous or defective condition at the location of her fall. During plaintiff's deposition on April 13, 2016, while she repeatedly testified that she fell right outside the door going into Marshalls and just a couple of feet from it, when she was shown several photographs of the sidewalk in this area, she failed to identify any defective or dangerous condition right outside the entrance doors to the Marshalls store. As no defective or dangerous condition existed on the sidewalk in this area, the plaintiff is unable to establish that KIOP created such condition which caused her fall or had actual or constructive notice of same."

In support of the motion (Seq. No. 01), defendant KIOP submits the transcripts from plaintiff's Examinations Before Trial ("EBT") testimony, the transcript from defendant Marshalls' employee, David Mercado, and the affidavit of the property manager of the subject shopping center at issue, Morgan Nuss of Kimco Realty Corporatio,. *See* Defendant KIOP's Affirmation in Support Exhibits F, H and J; Defendant KIOP's Nuss Affidavit in Support.

Counsel for defendant KIOP contends, in pertinent part, that, "[t]he plaintiff identified nine (9) photographs she took of the accident location.... They were marked at her deposition as Ex's A through I and are marked hereto as Exhibits K through S, respectively. On pages 94-95, she testified that Ex. A, marked here as **Exhibit 'K'** and Ex. B, marked here as **Exhibit 'L'** do not show the crack and/or hole she alleges caused her accident, although they do accurately depict the outside of Marshalls on the date of loss. She testified n pages 94-95 that Ex. C, marked here as **Exhibit 'M'**, Ex. E, marked here as **Exhibit 'O'**, Ex. F marked here as **Exhibit 'P'**, Ex. G, marked here as **Exhibit 'Q'**, Ex. H, marked here as **Exhibit 'R'**, and Ex. I, marked here as **Exhibit 'S'** depict the hole and/or crack which caused her fall. On pages 96 and 97 the plaintiff placed circles around the area on such exhibits. She was unable to see the hole and/or crack in Ex. D, marked here as **Exhibit 'N'** and as such, no markings were place upon this exhibit. A review of the photographs finds that the plaintiff circled two different areas upon which she alleges she fell. Further, based upon a review of Ex's K through S, it is clear that both of these areas are located in front of the *Exit doors* to the Marshall's (*sic*) store; not the *Entrance doors*; where the plaintiff testified her accident occurred. Ex. K depicts the front of the store. There are two entrance doors on the right side of the photograph. Each have decals with black arrows on same; which pictorially advise a customer to enter at these doors. Ex. K also depicts two Exit doors leading from the store as well as two metal railings on either side of the Exit doors. On one of the Exit doors can be seen a red circle with white letters as well as a yellow circle with black letters. Ex. L depicts a close up of the Exit doors with two red warning signs on same, advising 'Do Not Enter'. In the same photo, immediately to the left of the doors is the metal railing furthest from the entrance doors. Ex. M was marked by plaintiff with a circle and her initials. The area circled is one of the areas where she alleges she fell.... A review of the exhibit shows that the area circled is located just to the left of the metal railing shown in the

forefront of the photograph. This handrail separates the Entrance side from the Exit side of the store. This area is at the Exit doors to the store; not in the front of the Entrance doors which are the doors plaintiff testified she was standing in front of at the time of the accident. According to plaintiff's testimony, Ex. O shows the area alleged to have caused the accident.... This area was circled and initialed by plaintiff. This area is just in front of the metal railing located *furthest* from the entrance doors and is not the same area circled by plaintiff in Ex. M. (Please refer to the affidavit of Joseph Staigar attached hereto with respect to the distance from the Entrance doors to the area marked by plaintiff in Ex. O). This area is also located on the sidewalk in front of the Exit doors. The area in Ex. P circled by plaintiff is the same area marked by plaintiff in Ex. O. The garbage pail against the brick wall and to the left of the railing can be used as a point of reference Similarly, the area circled and initialed by plaintiff in Ex's Q and R is the same area as that circled in Ex's O and P; located at the store's Exit, near the metal railing *farthest* from the entrance doors. Based upon plaintiff's testimony, her accident could not have occurred at the area circled by plaintiff in Ex's O, P, Q and R. She would have only had occasion to walk upon the area she identified in these photos if she turned around from her location right outside the entrance door and walked past the railing or if she had been inside the store and was exiting same. She offered no testimony that she turned around and took steps walking past the railing and offered no testimony that she entered the store. Instead, she stated that she was only a couple of feet from the entrance doors, and fell right outside said door to enter the store. Certainly, the plaintiff, who shopped at this Marshalls once or twice a month for years prior to the accident, was familiar with the entrance doors to the store and was able to give accurate testimony at her deposition as to where she was standing at the time of the accident. The area identified in Ex's O through R is not located in front of the entrance doors and therefore did not cause the accident alleged herein. Finally, Ex. S, also marked by plaintiff at her deposition ..., depicts the same area she identified in Ex. M; also, at the Exit to the store; not at the Entrance doors. As such, this area did not cause the accident alleged. It is noted and as will be set forth below, plaintiff's expert,

Stanley Fein, does not make any mention of this area as a cause of plaintiff's alleged accident but instead opines about the area marked by plaintiff in Ex's O, P, Q and R. Further the attached affidavit of Joseph Staigar addresses the distance from the entrance doors to the area identified by plaintiff in Ex. M and Ex. S. A review of the photographs marked by the plaintiff during her deposition finds that the plaintiff has not circled any area at the Entrance doors to the store. In fact, her photographs focus only upon two areas on the entire sidewalk at the front of the store; both at the Exit doors. It appears that when the plaintiff returned to the Marshalls store within days of her accident, and looked at the sidewalk she was uncertain where she fell; causing her to photograph two different areas bot (*sic*) at the Exit doors. Indeed, while plaintiff's photographs Ex's Q and R hereto depict the sidewalk at both the Entrance and Exit doors and plaintiff easily could have circled an area on the sidewalk at the Entrance doors, she plaintiff (*sic*) circled areas at the Exit doors as depicting where she fell. It is respectfully submitted that the plaintiff has failed to identify a dangerous or defective condition in front of the Entrance doors where she testified her accident occurred on August 27, 2013." *See* Defendant KIOP's Affirmation in Support Exhibits K-T.

Counsel for defendant KIOP also submits the report of plaintiff's expert, Stanley Fein, P.E. ("Fein"). *See* Defendant KIOP's Affirmation in Support Exhibit T. Counsel for plaintiff contends, in pertinent part, that, Fein "states on page 1 of his report, 'on this date, she was exiting the store and started proceeding towards the street. When she got to a point approximately 18 inches from the right-hand rail (while walking out)... she was caused to trip, fall and sustain serious injury on a defective, depressed, and deteriorated portion of the sidewalk (Photo #2 and 3).' As mentioned above, Mr. Fein does not address the area identified by plaintiff in Exs M and S and further fails to make mention of the fact that the plaintiff identified two different areas in front of the exit doors as the area where she fell. It is clear from Mr. Fein's report that the allegedly defective condition which he opines to be the cause of the plaintiff's accident is that depicted in his photos #2 and #3 as well as in plaintiff's photographs Exs O, P, Q

and R hereto. As Mr. Fein states in his report, his markings on photo #2 indicate an area just in front of the metal railing furthest from the entrance doors. Telling is Mr. Fein's statement that the plaintiff fell as she was 'walking out' of the store and was proceeding to the street. Indeed, in order for the plaintiff to have fallen in the area of she identified on the photographs during her deposition, she would have been exiting the store; not entering same as she testified she was about to do at the time of the accident. A review of the photographs of the Exit doors to the store show that one cannot enter the store through the same from the sidewalk. As is set forth in the affidavit of KIOP's expert engineer, Joseph Staigar, ..., who has visited the Marshalls store, and as is depicted in his drawing of the entrance and exit of the store ... , in order to use the Exit doors, one must enter the Entrance doors to the store, and either walk through the entrance vestibule and a second set of entrance doors into the store and then proceed to the exit side of the vestibule and out the exit doors or enter the vestibule, zig zag around two metal railings within the vestibule and then walk out of the store through the Exit doors. As the plaintiff never entered the store on the day of her accident, she could not have exited through the Exit doors. Further, the Exit doors open out onto the sidewalk. If one stands on the sidewalk at the Exit doors, they will not open. A customer simply cannot enter through the Exit doors. It is respectfully submitted that the area identified by the plaintiff and her expert as the specific location of her accident, is simply not where the accident occurred based upon plaintiff's own deposition testimony... Mr. Staigar compared the photographs taken by plaintiff with his personal observations of the sidewalk in front of the Marshall's (*sic*) store. He notes in this affidavit that the area has not been repaved since the accident. Based upon his observations and a review of plaintiff's photographs, he states that there were no defects or deviations of any sort on the sidewalk in front of the entrance doors to the store at the time of the accident which could have caused same.... According to Mr. Staigar's measurements of the sidewalk, the distance from the center of the Entrance doors of the store to the area shown in the Exhibits O-R, in Mr. Fein's photographs 2 and 3 and in Mr. Staigar's own photographs attached to his affidavit as Ex's 3 and 4 is 13-14 feet from the

center of the enter (*sic*) doors where the plaintiff testified that she was located at the time of the accident. Mr. Staigar states in his affidavit that this distance is at least 5 walking strides. Based upon plaintiff's deposition testimony ..., she did not take 5 steps from her position right in front of the entrance doors before the accident occurred. Instead, she testifies that she was right outside the door going into Marshalls, turned around and went flying. Based upon the measurements taken by Mr. Staigar and the deposition testimony of the plaintiff, the accident could not have occurred in the area identified by the plaintiff and opined by her expert to be the cause of her accident. Furthermore, Mr. Staigar notes that the other area circled by plaintiff in Ex's M and S is also located at the exit doors and is approximately 8 feet from the center of the entrance doors. Again, based upon plaintiff's deposition testimony, the area identified in these Exhibits cannot depict the area where she claims she fell." *See id.*; *See* Defendant KIOP's Staigar Affirmation in Support and Exhibits 1-9.

In support of defendant Marshalls' motion (Seq. No. 02), its counsel submits, in pertinent part, that, "[d]efendant MARSHALLS OF MA, INC., hereby adopts references and incorporated the arguments set forth by co-defendant, KIOP MEADOWBROOK, L.P., in their motion for summary judgment as if fully set forth therein."

In opposition to defendants' motions (Seq. Nos. 01 and 02), counsel for plaintiff submits, in pertinent part, that, "[t]his matter arises from a trip and fall on a cracked and defective sidewalk outside the doors of Marshalls on August 27, 2013 located at 256 East Sunrise Highway, Freeport, New York. Ms. Berkowitz arrived at Marshalls and parked in the handicap spots which are to the left of the doors when facing the store. She exited her car and proceeded to walk to the doors at Marshall (*sic*) when she changed her mind and decided to leave to go home without entering. While (*sic*) she turned around, her foot got stuck in the dangerous cracked sidewalk and she went flying up in the air and larded (*sic*) on the concrete.... Defendants' motion (*sic*) must be denied as (1) the photographs show an irrefutable defective condition; (2) the testimony of Ms. Berkowitz is first hand and defendants' (*sic*) cannot be judge and jury of

her testimony; (3) there is no question that defendants owned and maintained the sidewalk where plaintiff fell; and (4) plaintiff's engineer, Stanley H. Fein, P.E.[,] stated in his Affidavit that defendants were negligent in permitting this defective condition to exist. Plaintiff deserves that a jury of her peers determine culpability and damages. Despite defendants' counsels' best efforts to delay, derail and trick Ms. BERKOWITZ at her hours and hours of deposition testimony, justice should overcome, and this matter must proceed to trial."

Counsel for plaintiff further contends, in pertinent part, that, "[i]t must be pointed out that nowhere in over three hours of testimony did plaintiff ever state that she fell at the entrance door. She continually stated the doors with no specification. As such, it would make sense that plaintiff parked her car in the handicap spot, walked towards the doors and fell on the hole she identified in the pictures. Almost 3 years later, on March 19, 2019, Ms. Berkowitz appeared for a further deposition regarding her knee surgery.... Ms. Berkowitz was asked the following question at the beginning of her deposition: ... Q. We are here today to discuss an injury that you allege you sustained back on August 27th of 2013 as you were about to enter the entrance door to a Marshalls that's located in Freeport - A. Yes. Q. - is that correct? As stated in plaintiff's Affidavit of Merit, plaintiff stated yes and would have stated yes had the question referenced exiting the area. The only fact this single question establishes is that defendants' attorney managed to trick a 77 years (*sic*) old woman at a further deposition on damages. All of defendants' arguments rise and fall on the argument of where this accident occurred. Plaintiff's counsel contends that this Court should find plaintiff's deposition testimony credible from her initial questioning and afford for rehabilitation regarding the second at trial. Ms. Berkowitz has a credible explanation for the inconsistency that on this motion cycle (*sic*) the Court should find in the light most favorable to her. Defendants' motion (*sic*) must be denied because Ms. Berkowitz knows where she fell, and she will be able to establish a prima facie case more properly adjudicated by a jury at trial. Should defendants be doubting Ms. Berkowitz version of the fall, the proper avenue to address that would be on cross examination of the witness, not a motion for

summary judgment.... Where, as here, the facts are in dispute, or where different inferences may be drawn or the credibility of witnesses is in question, the motion should not be granted. Since a jury could draw conflicting inferences as to how the accident occurred, and the credibility of the witnesses is an issue for the jury to determine, defendants' motion (*sic*) should be denied." *See* Plaintiff's Affirmation in Opposition Exhibit A; Defendant KIOP's Affirmation in Support Exhibits F and I.

Counsel for plaintiff also asserts, in pertinent part, that, "[d]efendants argue that plaintiff identified two different spots where she fell. Plaintiff explains in her Affidavit of Merit that it was difficult to tell from the photographs that they were different spots.... Moreover, plaintiff took the photographs within days of her fall.... Plaintiff has consistently stated she fell on a hole in the sidewalk. The fact that an elderly woman was confused by similar close up pictures does not warrant dismissal of her case. A jury should judge her credibility." *See* Plaintiff's Affirmation in Opposition Exhibit A.

Counsel for plaintiff additionally submits the Expert Affidavit of Stanley Fein, P.E., in support of the opposition. *See* Plaintiff's Affirmation in Opposition Exhibit B. Counsel argues, in pertinent part, that, "[i]t is Mr. Fein's opinion, with a reasonable degree of engineering certainty, the defective portion of the sidewalk created a dangerous and unexpected trap for pedestrians. When one is walking and looking straight ahead, their line of sight is between the horizontal and 18 degrees below the horizontal. When they approach a defect such as the one at this location, the defect is below the 18 degrees and therefore comes upon a pedestrian as a dangerous unexpected trap.... Mr. Fein's inspection of the defect also indicated that the sidewalk, when originally poured, was poured with an improper mix with a heavy amount of gravel which permitted the sidewalk in the area to come loose ad (*sic*) create a deteriorated depression.... In conclusion, it is Mr. Fein's opinion within a reasonable degree of engineering certainty, the owner of the premises was negligent in creating this condition and permitting it to exist as a dangerous and unexpected trap.... As Stanley Fein, P.E. found a defective condition which caused

plaintiff's fall, defendants' motion (*sic*) must be denied. Defendants submit the Affidavit of Joseph J. Staigar, P.E. for the proposition that plaintiff could not have fallen on the defective condition because it is by the exit door. As discussed above, there is an issue of fact as to whether this is correct. Further, Mr. Staigar (*sic*) Affidavit merely dismisses the fact that she could not have fallen on the defect. He never addresses whether the defect identified by Mr. Fein was in fact dangerous. As such, defendants' motion (*sic*) must be denied in light of the fact that defendant has submitted no affidavits from anyone disputing that a dangerous condition existed causing plaintiff's fall. Defendants merely argue that plaintiff could not have fallen on the defect in question." *See id.*; Defendant KIOP's Staigar Affirmation in Support.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to

determine if any such material issues of fact exist. *See Sillman v. Twentieth Century-Fox Film Corp.*, *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

Summary judgment is a drastic remedy which should not be granted when there is any doubt about the existence of a triable issue of fact. *See Sillman v. Twentieth Century-Fox Film Corp.*, *supra*. It is nevertheless an appropriate tool to weed out meritless claims. *See Lewis v. Desmond*, 187 A.D.2d 797, 589 N.Y.S.2d 678 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N.A.*, 82 A.D.2d 168, 442 N.Y.S.2d 610 (3d Dept. 1981).

Issue finding, rather than issue determination, is the key to summary judgment. *See In re Cuttitto Family Trust*, 10 A.D.3d 656, 781 N.Y.S.2d 696 (2d Dept. 2004); *Greco v. Posillico*, 290 A.D.2d 532, 736 N.Y.S.2d 418 (2d Dept. 2002); *Gniewek v. Consolidated Edison Co.*, 271 A.D.2d 643, 707 N.Y.S.2d 871 (2d Dept. 2000); *Judice v. DeAngelo*, 272 A.D.2d 583, 709 N.Y.S.2d 427 (2d Dept. 2000). The court should refrain from making credibility determinations (*see S.J. Capelin Assoc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 357 N.Y.S.2d 478 (1974); *Surdo v. Albany Collision Supply, Inc.*, 8 A.D.3d 655, 779 N.Y.S.2d 544 (2d Dept. 2004); *Greco v. Posillico*, *supra*; *Petri v. Half Off Cards, Inc.*, 284 A.D.2d 444, 727 N.Y.S.2d 455 (2d Dept. 2001)), and the papers should be scrutinized carefully in the light most favorable to the party opposing the motion. *See Glover v. City of New York*, 298 A.D.2d 428, 748 N.Y.S.2d 393 (2d Dept. 2002); *Perez v. Exel Logistics, Inc.*, 278 A.D.2d 213, 717 N.Y.S.2d 278 (2d Dept. 2000).

In order for plaintiff to make a *prima facie* case of negligence, he or she must establish the existence of a dangerous or defective condition in the first instance. *See Pillato v. Diamond*,

209 A.D.2d 393, 618 N.Y.S.2d 446 (2d Dept. 1994). Plaintiff must also demonstrate that the defendant's negligence was a substantial cause of the incident. *See Howard v. Poseidon Pools, Inc.*, 72 N.Y.2d 972, 534 N.Y.S.2d 360 (1988).

"To impose liability upon a defendant in a trip-and-fall action, there must be evidence that a dangerous or defective condition existed, and that the defendant either created the condition or had actual or constructive notice of it." *See Leary v. Leisure Glen Home Owners Ass'n, Inc.*, 82 A.D.3d 1169, 920 N.Y.S.2d 193 (2d Dept. 2011); *Williams v. SNS Realty of Long Island, Inc.*, 70 A.D.3d 1034, 895 N.Y.S.2d 528 (2d Dept. 2010); *Dennehy-Murphy v. Nor-Topia Serv. Center, Inc.*, 61 A.D.3d 629, 876 N.Y.S.2d 512 (2d Dept. 2009). *See also Denker v. Century 21 Dept. Stores, LLC*, 55 A.D.3d 527, 866 N.Y.S.2d 681 (2d Dept. 2008); *Rubin v. Cryder House*, 39 A.D.3d 840, 834 N.Y.S.2d 316 (2d Dept. 2007). "A defendant has constructive notice of a defect when the defect is visible and apparent, and has existed for a sufficient length of time before the accident that it could have been discovered and corrected." *Dennehy-Murphy v. Nor-Topia Serv. Center, Inc., supra; Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 501 N.Y.S.2d 646 (1986); *Nelson v. Cunningham Associates, L.P.*, 77 A.D.3d 638, 908 N.Y.S.2d 713 (2d Dept. 2010); *Cusack v. Peter Luger, Inc.*, 77 A.D.3d 785, 909 N.Y.S.2d 532 (2d Dept. 2010).

Whether a dangerous or defective condition exists on the property so as to give rise to liability depends on the circumstances of each case and is generally a question of fact for the jury. *See Surujnaraine v. Valley Stream Cent. High School Dist.*, 88 A.D.3d 866, 931 N.Y.S.2d 119 (2d Dept. 2011); *Katz v. Westchester County Healthcare Corp.*, 82 A.D.3d 712, 917 N.Y.S.2d 896 (2d Dept. 2011); *Perez v. 655 Montauk, LLC*, 81 A.D.3d 619, 916 N.Y.S.2d 137 (2d Dept. 2011); *Sabino v. 745 64th Realty Associates, LLC*, 77 A.D.3d 722, 909 N.Y.S.2d 482 (2d Dept. 2010); *Trincere v. County of Suffolk*, 90 N.Y.2d 976, 665 N.Y.S.2d 615 (1997).

The credibility of witnesses, the reconciliation of conflicting statements, a determination of which should be accepted and which rejected, the truthfulness and accuracy of the testimony,

whether contradictory or not, are issues for the trier of the facts. *See Lelekakis v. Kamamis*, 41 A.D.3d 662, 839 N.Y.S.2d 773 (2d Dept. 2007); *Pedone v. B&B Equipment Co., Inc.*, 239 A.D.2d 397, 662 N.Y.S.2d 766 (2d Dept.1997).

Viewing the evidence in the light most favorable to plaintiff (*see Taylor v. Rochdale Village Inc.*, 60 A.D.3d 930, 875 N.Y.S.2d 561 (2d Dept. 2009); *Judice v. DeAngelo*, 272 A.D.2d 583, 709 N.Y.S.2d 427 (2d Dept. 2000); *Robinson v. Strong Memorial Hosp.*, 98 A.D.2d 976, 470 N.Y.S.2d 2398 (4th Dept. 1983)), the Court finds that there are material triable issues of fact which preclude the granting of summary judgment.

Therefore, based upon the above, defendant KIOP's motion (Seq. No. 01), pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's Verified Complaint as against it, as well as any and all cross-claims as against it, is hereby **DENIED**.

Defendant Marshalls' motion (Seq. No. 02), pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's Verified Complaint as against it, as well as any and all cross-claims as against it, is also hereby **DENIED**.

All parties shall appear for Trial, in Nassau County Supreme Court, Differentiated Case Management Part (DCM), at 100 Supreme Court Drive, Mineola, New York, on December 9, 2019, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
December 3, 2019

ENTERED
DEC 04 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE