At a term of the IAS Part of the Supreme Court of the State of New York, held in and for the County of Orange, at the Orange County Court House, 285 Main Street, Goshen, New York 10924 on the 28th day of July, 2020.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

MICHELLE HENNESSY,

Plaintiff,

-against-

CZARCO MANAGEMENT CORP., AMADA'S KITCHEN LLC and VILLAGE OF WASHINGTONVILLE,

Defendants.

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, on all parties.

DECISION & ORDER
INDEX #EF010515-2017

Motion date: 6/25/20
Motion Seq. #1 #2 and #3

VAZQUEZ-DOLES, J.S.C.

The following e-filed papers numbered 1 - 57 were read on the motion of the defendant, Village of Washingtonville (hereinafter the Village), for an order pursuant to CPLR §3212 granting the Village summary judgment dismissing all claims asserted against it in this action (Motion #1), on the motion of the defendant, Amada's Kitchen LLC (hereinafter the Kitchen) for an order pursuant to CPLR 3212 granting the Kitchen summary judgment dismissing all claims asserted against it in this action (Motion #2), and on the cross-motion of the plaintiff for an order pursuant to CPLR 3025 granting leave to amend the complaint in this action to add Magdalena Sanchez as a direct party defendant (Motion #3) in this action to recover damages for personal injuries sustained as the result of a slip and fall on ice:

Notice of Motion(mtn #1-granted)- Affirmation of M. Martens, Esq.-Affidavit of C. Shenkman - Affidavit of C. Martino - Exhibits A-T - Memorandum of Law (Motion #1)	1 - 24
Affirmation in Opposition of M. Cambareri, Esq. - Exhibits 1-2 (Motion #1)	25- 27
Affirmation in Opposition of M. O'Sulivan, Esq., Exhibit A (Motion #1)	28-29
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Notice of Motion(mtn# 2-denied) - Affirmation of E. Souto ,Esq. - Affidavit of M. Sanchez - Exhibits A-L 35 - 49
Affirmation in Opposition of M. O'Sulivan, Esq., Exhibits A-B (Motion #2) 50 - 51
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Notice of Cross- Motion(mtn #3-denied) - Affirmation of M. Cambareri, Esq. - Exhibit 1 53 - 55
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Upon the foregoing papers, the Village's motion is granted, the Kitchen's motion is denied and the plaintiff's motion is denied.

The plaintiff fell on a Saturday morning on February 11, 2017[1] at approximately 11:30 AM. Plaintiff fell after leaving the Kitchen, a restaurant located at 15 East Main Street in Washingtonville, New York. As she exited the restaurant with her husband's lunch in hand, she turned left onto the concrete sidewalk, walked along the front of the building intending to turn left to walk on the paved walkway running along the side of the building and leading to the municipal parking lot behind the building. She slipped and fell on ice on the concrete sidewalk at the corner of the building where the concrete sidewalk met the paved walkway. Photographs taken shortly after the fall show the plaintiff on the walkway in the area where she landed, the icy condition of the sidewalk, and ice surrounding the end of a downspout that ran down the corner of the building and terminated at the concrete sidewalk. The photographs also show piles of snow in the area of the sidewalk and the walkway. Other than the photographs, there is no evidence in the record as to who created the piles of snow. The paved walkway was part of the municipal parking lot behind the building and is controlled and maintained by the Village. While

[1]The Notice of Claim and Complaint state the accident date was February 2, 2017 and the Bill of Particulars indicates the date of the accident was February 11, 2017. Since February 11, 2017 was a Saturday, the court is assuming that the plaintiff's fall happened on that day.

the Village provides snow removal for the municipal lot and the paved walkway leading to it, the Village does not perform snow and ice removal on the sidewalk. According to the testimony of the head of the Village Department of Public Works, the businesses are required to perform snow and ice removal in front of their stores and are to push the snow into the street from where it would be removed by the Village. The building at 15 East Main Street was owned by defendant Czarco Management Corp. (hereinafter Czarco) and occupied on the first floor by the Kitchen and a barber shop. The second floor was occupied by two residential apartments. A lease for the area of the building occupied by the Kitchen was signed by Czarco and the owner of the Kitchen, Magdalena Sanchez. This lease was signed before Amada's Kitchen LLC was created and was still in effect on February 11, 2017. The area subject to this lease was occupied by the Kitchen. The front entrance to the building is the only public entrance for the Kitchen's patrons. Ms Sanchez identified the photograph of the downspout and testified that Czarco had turned the end of the downspout towards the sidewalk after she complained that the downspout was causing water to drain into the basement of the building. After this alteration to the downspout, Ms. Sanchez noticed that water from the downspout was icing up the area of sidewalk where the plaintiff says she slipped. Ms. Sanchez complained to Czarco about this problem in December 2016. The president of Czarco testified that the lease required the tenant to remove snow and ice from the front of the entrances to the Kitchen. He also testified that the replacement or repair of the downspout was Czarco's responsibility. He further testified that he had seen ice form around the downspout and that this would be the Kitchen's responsibility to remove the ice that formed. However, Czarco's maintenance person testified that he would shovel and salt the front of the store and the area of the downspout if he saw ice there. He testified that he had salted the front

sidewalk in that area on the morning the plaintiff fell. The lease signed by Ms. Sanchez provides: "That the Tenant agrees to be responsible for the cleaning of snow and ice or debris in front of all entrances to its premises." Ms. Sanchez testified that she or one of her employees would shovel and salt the sidewalk as well. She testified that there would be ice on the sidewalk from the downspout when it was cold in the morning and that she or someone from the Kitchen would salt the area almost every morning in the winter.

Discovery is complete, a note of issue has been filed, and the Village and the Kitchen have moved for summary judgment dismissing the complaint and any cross claims.

The proponent of a motion for summary judgment must establish that there is no defense to the cause of action or that the cause of action or defense has no merit sufficiently to warrant the court as a matter of law to direct judgment in his or her favor. *Bush v St. Clare's Hospital*, 82 NY2d 738 (1993). "The proponent of a summary judgment motion is required to make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact from the case. Failure to do so required denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). This standard requires that the proponent of the motion tender evidentiary proof in admissible form sufficient to eliminate any material issues of fact from the case. *Zuckerman v New York*, 49 NY2d 557 (1980). Summary judgment is a drastic remedy only granted where this burden is met and then only if the opposition to the motion fails to establish the existence of a material issue of fact requiring a trial. *Vega v Restani Construction. Corp.*, 18 NY3d 499 (2012), *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986).

One opposing a motion for summary judgment must produce evidentiary proof in

admissible form sufficient to require the trial of a material question of fact on which she rests her claim or must demonstrate an acceptable excuse for her failure to meet the requirement. *Zuckerman v New York*, 49 NY2d 557 (1980).

In deciding a motion for summary judgment, a Court's function is to identify material triable issues of fact, not to make credibility determinations or findings of fact. Issue-finding, rather than issue-determination is required. *Vega v Restani Construction. Corp.*, 18 NY3d 499 (2012). It is not for the court to assess credibility unless it clearly appears that the issues are feigned and not genuine, and any conflict in the testimony or evidence presented merely raises an issue of fact. *Brown v Kass*, 91 AD3d 894 (2nd Dept 2012). Summary judgment is inappropriate where credibility issues are raised. *Zuckerman v New York*, 49 NY2d 557 (1980).

On a motion for summary judgment, the evidence is to be viewed in the light most favorable to the nonmoving party, and the nonmoving party is given the benefit of all reasonable inferences that can be drawn from the evidence. *Negri v Stop & Shop, Inc.*, 65 NY2d 625 (1985). Summary judgment should be granted where only one conclusion may be drawn from the established facts. *Kriz v Schum*, 75 NY2d 25 (1989). If there is any doubt as to the existence of a triable issue, then the motion for summary judgment should be denied. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223 (1978). Nevertheless, only the existence of a bona fide triable issue demonstrated by evidentiary facts will defeat a summary judgment. Conclusory or irrelevant allegations will not suffice. *Id.*

The Village has moved for summary judgment on the grounds that it cannot be held responsible for the icing condition on the sidewalk because it did not receive prior written notice of the condition as required by the Village of Washingtonville Code Section 119-2. In support of

the motion, the Village submitted proof that the records of the Village Clerk had been searched and no notice regarding an icy condition at 15 East Main Street was found. The Village demonstrated that the icing condition was not the result of any special use of the area by the Village and that the icy condition was not the result of any affirmative act of negligence by the Village. This showing established the Village's entitlement to summary judgment. *Lima v Village of Garden City*, 131 AD3d 947 (2nd Dept 2015). In opposition, none of the parties raised a triable issue of fact regarding the lack of prior written notice or the two exceptions to the rule (special use or affirmative act of negligence). Under Section 119-2, the Village Clerk maintains and indexes the original record of any notice and sends a copy to the Mayor, presumably so that the Village can act on the notice. Section 119-2-9 does not require that the Mayor retain the copy of any notice sent to him by the Village Clerk.

As to the motion of the Kitchen for summary judgment, the record demonstrates the existence of triable issues of fact as to whether the Kitchen is responsible for the removal of the ice that formed in the area of the downspout. The examination before trial testimony of the defendants demonstrates that the Kitchen was aware of the icing condition in the area where the plaintiff slipped, that this was a recurring condition during the winter, and that the Kitchen regularly addressed the icing as part of its obligations to its customers. As an occupant of the property, and as the instrument through which Ms. Sanchez performed her obligations under the lease with Czarco, the Kitchen had a duty to maintain the sidewalk in a reasonably safe condition. Czarco testified that the Kitchen's obligation to remove snow and ice included the area where plaintiff slipped.

As to plaintiff's motion to add Magdalena Sanchez as a party defendant and serve an

amended complaint, the motion should be denied. Mrs. Sanchez did sign the lease in her individual capacity and not as an agent of the Kitchen. The Kitchen did not exist when she signed the lease. The proposed cause of action against Mrs. Sanchez is a claim that the Kitchen is vicariously liable for the acts of Ms. Sanchez. As conceded by the Kitchen's attorneys, the Kitchen is already liable for Ms. Sanchez negligence as an employee/owner of the business. There is no need to add Ms. Sanchez as a party defendant to make this claim. As a lessee, Ms. Sanchez did have obligations under the lease with regard to snow and ice removal. The proposed complaint does not state a cause of action against her for this obligation.

Accordingly, the Village's motion is granted and the Village may enter judgment dismissing and severing all claims against it in this action. The Kitchen's motion is denied, and the plaintiff's cross-motion is denied.

The foregoing constitutes the Decision and Order of this Court.

Dated: July 28th , 2020
Goshen, New York

ENTER:

HON. MARIA S. VAZQUEZ-DOLES, J.S.C.

To:

All Counsel via NYSCEF