Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS** IAS PART 30
Justice

----------X Index No.:701504/2018
DENISE LAURINE COX,

Plaintiff,

Motion
Dates: September 22, 2021

-against-

WALGREEN STORE #11808, WALGREEN CO, WALGREEN EASTERN CO., INC., SUNCO REALTY LLC, FERRANDINO & SON, INC., and PRO-TEK LANDSCAPING AND SNOW REMOVAL,

Motion Cal. No.: **6, 7** and **8**

Motion Sequence No.: **3, 4** and **5**

Defendants.
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The following e-filed papers numbered EF 85-99; 133-135 and 140 submitted and considered on this **motion sequence number 3** by SUNCO REALTY LLC (hereinafter referred to as "Sunco") pursuant to Civil Practice Law and Rules (hereinafter referred to as "CPLR") 3212 granting Sunco summary judgment dismissing all claims and cross claims asserted against Sunco and granting Sunco summary judgment on its contractual indemnity claim; the e-filed papers numbered EF 100-117, 132 and 141-142 submitted and considered on this **motion sequence number 4** by defendants WALGREEN STORE #11808, WALGREEN CO, WALGREEN EASTERN CO. INC. and FERRANDINO & SONS, INC. (collectively referred to as "Walgreen") also seeking an Order pursuant to CPLR 3212 granting summary judgment and dismissing plaintiff's action with prejudice and the efiled papers numbered EF 118-130, 136 and 143 submitted and considered on this **motion sequence number 5** by defendants PRO-TEK LANDSCAPING AND SNOW REMOVAL("Pro-Tek") seeking summary judgment on the grounds that they have no liability and dismissing all claims and cross-claims against them; all seeking such other and further relief as this Court deems just and proper.

	Papers Numbered
Motion Sequence #3	
Notice of Motion - Aff.- Exhibits.....	EF 85-99
Opposition- Exhibits.....	EF 133-134
Opposition.....	EF 135
Reply Aff.....	EF 140

Motion Sequence #4

Notice of Motion- Aff-Exhibits.....	EF 100-117
Stipulation.....	EF 132
Opposition.....	EF 135
Reply.....	EF 141-142

Motion Sequence #5

Notice of Motion Aff- Exhibits.....	EF 118-130
Opposition.....	EF 135
Opposition.....	EF 136
Reply.....	EF 143

Plaintiff commenced this action to recover for personal injuries allegedly sustained on December 15, 2017 at a Walgreen's store located at 4915 Flatlands Avenue and Utica Avenue, County of Kings and State of New York (hereinafter referred to as the "Premises"), which was owned by Sunco and leased by WALGREEN STORE #11808, WALGREEN CO, WALGREEN EASTERN CO. INC. The lessor contracted with FERRANDINO & SONS, INC. to provide maintenance and construction services. FERRANDINO & SONS, INC. subcontracted with Pro-Tek to provide snow removal and related services.

Plaintiff alleges on December 15, 2017 she visited the Premises after work and purchased laundry detergent. Plaintiff alleges snow fell that day but that the snow stopped falling prior to her leaving work. As she exited the Premises, Plaintiff alleges she tripped and fell.

Now, Sunco moves for summary judgment alleging it is an out-of-possession landlord. Walgreen, Sunco and Pro-Tek argue that dismissal is warranted because Plaintiff tripped on a shrub root which was inherent and incidental to the landscaped area, Plaintiff was familiar with the location and that dismissal is warranted to the extent that Plaintiff's claims are related to snow-related conditions because there was a winter storm in progress. Also, Pro-Tek argues it did not owe a duty to Plaintiff.

The moving party on a motion for summary judgment has the burden of demonstrating "a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 852 [1985]). Once the movant has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "A property owner, or a party in possession or control of real property, has a duty to maintain the property in a reasonably safe condition" (*Bishop v Pennsylvania Ave. Mgt., LLC*, 183 AD3d 685 [2020], quoting *Chang v Marmon Enters., Inc.,* 172 AD3d 678, 678 [2019]). Thus, a defendant moving for summary judgment in a premises liability action has the burden of making a prime facie showing that it neither created the alleged hazardous or defective condition nor had actual or

constructive notice of its existence (*see Johnson v NBO Realty, Inc.*, 147 AD3d 743 [2017]; *Beri v Chung Fat Supermarket, Inc*., 125 AD3d 587 [2015]).

Inherent and Incidental to the landscape

Sunco, Walgreen and Pro-Tek argue that Plaintiff tripped after bumping her foot against a root that was inherent and incidental to that portion of the landscape. Sunco testified that the landscaped area was placed around the parking area "per the city's green code" (pg 14 line 15).

The parties point to *Michael A. Miano v Rite Aid Hqrtrs. Corp. et al.* (160 AD3d 713 [2nd Dept 2018]) where plaintiff parked his vehicle in defendant's parking lot, stepped upon the curb and walked through a landscaped area adjacent to the parking lot in an effort to access the sidewalk to the defendant's store (*id*). The landscaped area contained trees, shrubs, mulch and a gap. Plaintiff alleges he sustained injures as he was walking through the gap when he tripped and fell on a root. According to the court, "A landowner has a duty to exercise reasonable care in maintaining [its] property in a safe condition under all circumstances, including the likelihood of injury to others, the seriousness of the potential injuries, the burden of avoiding the risk, and the foreseeability of a potential plaintiff's presence on the property" (*id* quoting *Jackson Groom v Village of Sea Cliff et al.,* 50 AD3d 1094 [2nd Dept 2008]). "However, a landowner will not he held liable for injuries arising from a condition on the property that is inherent or incidental to the nature of the property, and that could be reasonably anticipated by those using it" (*id* at 714 [citation omitted]). The court found that defendant established prima facie entitlement to judgment as a matter of law by demonstrating that the root at issue was inherent or incidental to the landscaped area and that it could be reasonably anticipated by those using it (*id*).

Here, the defendants have established that the root that caused Plaintiff to trip was inherent and incidental to the landscape. However, defendants have failed to establish that said condition "could be reasonably anticipated by those using it"(*id*) . The facts of this case are distinguishable. Plaintiff alleges snow was covering the area. In fact, there is no dispute that up to six inches of snow was present in the area on December 15, 2017. Plaintiff alleges the root was covered by snow and was not visible. Plaintiff testified that the bushes and the sidewalk were covered in snow. To the extent that Plaintiff's view of the terrain was obstructed by snow, this Court finds there is an issue of fact as to whether Plaintiff could have "reasonably anticipated" that which she claims she could not see. In *Patrice Katz v Westchester County Healthcare Corp. et al.* (82 AD3d 712, 713 [2nd Dept 2011]) the court stated "whether a hazard is open and obvious cannot be divorced from the surrounding circumstances. A condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted." The court denied defendants motion for summary judgment (*id*).

Furthermore, the defendants' assertions that Plaintiff was familiar with the landscape because she frequented the Premises prior to the accident is of no moment, where here the testimony fails to illustrate the extent to which Plaintiff was familiar with the outside parameters of the Premises. To hold that Plaintiff is comparatively or solely at fault because she frequented the Premises, without

more, would be speculative.

Storm-in-progress

All defendants argue that Plaintiff's claim should be dismissed due to the snow-in-progress rule. "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986] [internal citations omitted]; see also *Diaz v LaGuardia Express, LLC*, 186 AD3d 1616 [2020]). "Mere reference to general cleaning practices, with no evidence regarding any specific cleaning or inspection of the area in question, is insufficient to establish a lack of constructive notice" (*Milorava v Lord & Taylor Holdings, LLC*, 133 AD3d 724 [2015]; *Fernandez v Festival Fun Park, LLC*, 122 Ad3d 794 [2014]). With respect to constructive notice, a defendant is required to offer some evidence as to when the accident site was last cleaned or inspected prior to the plaintiff's fall (*see Reed v 64 JWB, LCC,* 171 AD3d 1228, 119 [2019]*; Mehta v Stop & Shop Supermarket Co, LLC*, 129 AD3d 1037, 1038 [2015]).

Under the snow-in-progress rule, "a property owner will not be held responsible for accidents occurring as a result of the accumulation of snow and ice on its premises until an adequate period of time has passed following the cessation of the storm to allow the owner an opportunity to ameliorate the hazards caused by the storm" (*see Bradshaw v Pel 300 Assocs.,* 152 AD3d 635 [2d Dept 2017]; *Scarlato v Town of Islip*, 135 AD3d 738 [2d Dept 2016]). However, snow and ice removal undertaken during the storm is actionable if performed negligently (*Grau v Park*, 283 AD2d 551 [2d Dept 2001], *lv denied* 96 NY2d 721 [2001]). A landowner or tenant is charged with the duty at that juncture to exercise "reasonable care so as to avoid creating a hazardous condition or exacerbating a natural hazard created by the storm" (*Fernandez v City of New York*, 125 AD3d 800 [2d Dept 2015], *quoting Yassa v Awad*, 117 AD3d 1037 [2d Dept 2014]).

Plaintiff testified as follows:
Q: On the day of the accident, could you see snow falling outside?
A: Yes, ma'am.
Q: Can you tell me how much snow was falling that day?
A: It was falling heavily that day. Maybe about four to six inches of snow fell.
Q: Was the snow still falling when they let you go early?
A: Not really. No. It was subsided. It had stopped falling.
Q: It had stopped falling completely?
A: Yea, basically.
Q: When you say "basically", my question is, at the time--
A: It stopped falling. Because there was no snow, unless it was blowing of the buildings, That's how you see a little snow coming down. It had stopped falling.
(Page 59- 60 lines 7-25 and 2-4)

Plaintiff testified she finished working at or around 5:30 P.M. However, Plaintiff could not

provide specific testimony as to when the snow stopped falling, she testified that the snow started at about 3:00 P.M. on the date of the accident.

Defendant Pro-Tek presents the affidavit of George Wright ("Wright") a Certified Consulting Meteorologist. Wright based his conclusions off of various sources of official weather and climatological data which "professional meteorologists regularly reply [sic] upon to analyze past weather conditions to a reasonable degree of meteorological certainty". According to Wright, snow developed at the Premises at or around 2:15 PM or 2:30 PM. Wright states, snow was falling at the Premises at approximately 6:00 PM. According to Wright, between 1.3 and 1.5 inches of snow fell at the Premises on December 15, 2017.

Wright has established prima facie that there may not have been a duty to remove snow at the time of Plaintiff's fall, as a storm was likely still in progress. However, issues of fact remain. The uncertified weather reports relied upon by the defendants suggest that snow fell on December 10th, 13th, 14th and 15th. If only 1.3 to 1.5 inches fell on December 15, 2017 then, Plaintiff's testimony that 4 to 6 inches had accumulated by the time she fell begs the question whether a duty arose and was breached on the 10th ,13th , 14th and or the 15th (prior to 2:15PM) to remove snow.

Out of Possession Landlord

Sunco argues they are not liable as out-of-possession landlords.

It is well settled that liability may be imposed on an out of possession landlord for injuries which occur on the leased premises only where the landlord has a duty imposed by statute, by contract or by a course of conduct (*see Fox v Patriot Saloon*, 166 AD3d 950, 951 [2018]; *Casson v McConnell*, 148 AD3d 863, 864 [2017]; *Villarreal v CJAM Assocs., LLC*, 125 AD3d 644 [2015]; *Seawright v Port Auth. of N.Y. & N.J.*, 90 AD3d 1017 [2011]). The Administrative Code of the City of New York § 7-210 imposes upon property owners a nondelegable duty to maintain the sidewalk abutting the premises in a reasonably safe condition, regardless of whether they are out-of-possession landlords (*see Cook v Consolidated Edison Co. of NY, Inc.*, 51 AD3d 447 [1st Dept 2008]). That duty includes the duty to remove snow and ice from the abutting sidewalk (Administrative Code § 7-210[b]; *see Metzker v City of New York*, 139 AD3d 828 [2d Dept 2016]). While the statutory duty is nondelegable, Administrative Code § 7-210 does not impose strict liability upon the property owner, and the owner may be held liable for injuries arising out of the failure to remove snow and ice on the abutting sidewalk only if the owner created the dangerous condition or had actual or constructive notice of it for a sufficient length of time to discover and remedy it (*see Kabir v Budhu*, 143 AD3d 772 [2d Dept 2016]; *Khaimova v City of New York*, 95 AD3d 1280, 1281 [2d Dept 2012]; *Harakidas v City of New York*, 86 AD3d 624, 627 [2d Dept 2011]). "In the absence of a statute or ordinance imposing tort liability on the lessee, it can be held liable only if it, or someone on its behalf, undertook snow and ice removal efforts which made the naturally-occurring conditions more hazardous" (*Schron v Jean's Fine Wine & Spirits, Inc.*, 114 AD3d 659, 660-661 [2d Dept 2014]; *see Bleich v Metropolitan Mgt., LLC*, 132 AD3d 933 [2d Dept 2015]; *Forlenza v Miglio*, 130 AD3d 567 [2d Dept 2015]; *Ferguson v Shu Ham Lam*, 74 AD3d 870 [2d Dept 2010]; *Robles v City of New*

York, 56 AD3d 647 [2d Dept 2008]; *Bruzzo v County of Nassau*, 50 AD3d 720 [2d Dept 2008]).

Sunco must established they neither created the hazardous condition nor had constructive notice and sufficient time to remedy it (*Kabir* at 772). Sunco argues they leased the entire Premises to the defendant Walgreen via a triple net lease. That, pursuant to the lease "Walgreens bore all responsibility for maintaining the interior and exterior of the store including, explicitly, the parking lot, landscaped areas, and other improvements, all of which were part of the Leased Premises."

Sunco testified as follows:
Q: Does the lease delineate the duties of the landlord with respect to this property after the keys were turned over?
A: I believe it does.
Q: Are you familiar with what those duties were generally?
A: Yup.
Q: Could you tell us what those duties were?
A: It's the true nature of a triple net lease where tenants are responsible for rent, common area, real estate taxes, operating a pharmacy, managing the property and exterior and sidewalk.
(Page 13-14 lines 17-25 and 2-9)

Q:Did the lease cover snow removal?
A: Yes.
Q: What is your understanding of the lease provisions with respect to that?
A: I don't know specifically in this lease but generally it's probably similar to our leases. Usually tenants are responsible for maintenance of the sidewalk outside of their premises.
Q: Has Sunco ever provided landscaping services to the premise [sic]?
A: No.
Q: Has Sunco ever provided snow removal services to the premise [sic]?
A: No.
(Page 15 lines 11-25)

Sunco further testified they never received complaints requiring either landscaping or snow removal (Page 16 lines 14-21). Sunco has established prima facie entitlement to judgment as a matter of law. The burden now shifts to the opposing parties to raise a triable issue of fact.

Plaintiff asserts that the lease submitted by Sunco is uncertified and unauthenticated, thus it is inadmissable hearsay. However, Plaintiff fails to address Sunco's testimony that they were not responsible for snow removal or landscaping at the Premises, never provided those services and never received complaints regarding those services.

Walgreen in opposition alleges it is entitled to contractual indemnification from Sunco pursuant to the terms of the lease between the parties. According to Walgreen, it subcontracted all of it's snow removal duties and at no time prior to Plaintiff's accident did Walgreen "perform work at the subject premises, including snow removal, deicing, plowing or landscaping." As such,

according to Walgreen, it cannot be established that they caused or created the alleged dangerous condition.

On the contrary, the failure to act may have been the exact "act" that created the alleged dangerous condition. Walgreen's failure to remove snow may have created the condition. Thus, Walgreen's argument fails.

Walgreen testified as follows:
Q: Okay. I'm going to ask you generally some policies and procedures at your store since you've been the manager if you would. Do you have shovels and ice melt or salt in your store to utilize on the walkways?
A: Yes.
Q: And after a snowfall, does any of your staff shovel the walkways and apply salt or Ice Melt?
A: Yes.
Q: And who within the store would do that?
A: Delegated tasks, it could be from me to one of my customer service associates.
Q: And in this store that you were working back in December of 2017, did that store also take care of its own sidewalks by way of shoveling Ice Melt and salt?
A: Yes, they also did.
Q: Have all the Walgreens you've worked in followed that same general policy?
A: Yeah, they also do that and they have an outside vendor.
Q: Okay. So tell me from the last winter when you worked at the Walgreens on Flatlands, what your staff within the store would do after a snowfall or during a snowfall?
A: We would clear some of the sidewalk, we would clear the front of the store. Usually, we'd have those snowfalls, the cleaning services are automatic so they come frequently, so they usually come and they do the parking lot and they help out, but we try to get it at least cleared up a little bit and when they come they take care of the rest.
(Pages 10-11 lines 7-25 and 2-17)

Q: Okay. Did you receive training from Walgreens as to how and when that would take place?
A: Usually the outside vendor would take care of the major, the majority of the parking lot, some of the sidewalk. The direction from us is to try to keep it clear of snow as much as possible, put down the rock salt, so if we open and there's some snow, it's still our responsibility to clear the front entrance, clear the pathway so customers can come in and out safely .
(Pages 12-13 lines 18-25 and 2-5)

Walgreen's testimony suggests that despite delegating the task of snow removal services, they retained a level of responsibility as it relates to the same. Therefore, there is an issue of fact as to whether Walgreen was negligent.

No Duty owed

Pro-Tek argues they owed no duty to Plaintiff and breached no duty to Plaintiff.

In *Espinal v. Melville Snow Contractors* (98 N.Y.2d 136, 137 [2006]), the petitioner slipped and fell in her company's parking lot on what she claimed was an icy condition. She then sued the third party company that contracted with the owner of the parking lot to perform snow removal services (*id*). The respondent moved for summary judgment alleging it had no duty to the petitioner (*id* at 138). The court recognized three instances in which a party who enters into a contract *to render service(s) may assume a duty of care and become liable under tort law to third persons (id* at 140). "(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties 'launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument of good' (*id* at 139); (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).The court held that respondent owed no duty to the petitioner.

The court found that the respondent was not liable under the first instance (*id* at 141). The petitioner argued the snow removal activities that respondent engaged in created dangerous icy conditions. In support of its argument, petitioner pointed to the testimony of a former corporate secretary that stated that the plowing would leave residual snow or ice on the plowed area that could cause the melted snow to re-freeze if left untreated (*id* at 142). The court held the respondent merely removed the snow as was required by the contract, "[b]y merely plowing the snow, Melville cannot be said to have created or exacerbated a dangerous condition" (*id*).

The court did not find that respondent was liable under the second instance (*id* at 141). The court held the petitioner failed to allege detrimental reliance on respondents continued performance of its contractual obligations (*id*).

Finally, the court did not find that the respondent was liable under the third instance. According to the court, respondents obligations under the contract included clearing snow from roadways, parking lots, and loading areas by truck and plow only when snow accumulation exceeded 3 inches (*id*). Respondent was also required to spread a mixture of salt and sand on the property upon request of the owner. Furthermore, within the contract it specified that the Owner was responsible for deciding whether a icy condition warrants application of ice treatment (*id*). Therefore, according to the court, the contract was not the type of comprehensive and exclusive property maintenance obligation which would spark a duty to third parties (*id*).

Pro-Tek testified as follows:
Q: Did they have to call you and tell you when to come or did you monitor the conditions and come on your on [sic]?
A: We monitored the conditions. Walgreens didn't allow any pre-salting prior to snow. So we only serviced them upon snow.

Q: Did that servicing depend on the amount of snow fall?
A: Well, the more it snowed the more times we would go there to plow or salt, whatever needed to be done to keep the property clear.
Q: If it snowed less than an inch would you come out?
A: Yes, we always serviced it even if it hardly – if there was a little bit of snow that came down, we at least went there and salted it if we couldn't plow.
(Page 11 lines 8-24)

Pro-Tek's testimony establishes that they may have owed a duty to Plaintiff under the first prong of *Espinal*. There are issues of fact surrounding whether Pro-Tek breached their duty to Plaintiff. Pro-Tek provided evidence that they performed work at the Premises on the December 15, 2017 and the prior days. However, the evidence is unclear regarding what times correspond to what days. Based upon the foregoing it is,

ORDERED, that motion sequence number 3 is granted; and it is further

ORDERED, that the caption shall be amended as follows:

----------X Index No.:701504/2018
DENISE LAURINE COX,

Plaintiff,

-against-

WALGREEN STORE #11808, WALGREEN CO, WALGREEN EASTERN CO., INC., FERRANDINO & SON, INC., and PRO-TEK LANDSCAPING AND SNOW REMOVAL,

Defendants.
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and it is further,

ORDERED, that motion sequence numbers 4 and 5 are denied.

The foregoing constitutes the decision and Order of this Court.

Dated: October 1, 2021

FILED
10/4/2021
COUNTY CLERK
QUEENS COUNTY

Hon. Chereé A. Buggs, JSC