At the term of the Supreme Court of the State of New York, held in and for the County of Dutchess, at 10 Market Street, Poughkeepsie, 12601 on November 5, 2021.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

----------x

SYLVIA F. WILSON, Plaintiff

Index No.: 2018-51467

-against-

PAGE PARK ASSOCIATES, LLC,
Defendant

DECISION AND ORDER
(Motion Sequence(s) 1 & 2)

----------x

PAGE PARK ASSOCIATES, LLC,
Third-Party Plaintiff,

-against-

TOTAL PACKAGE LANDSCAPING
SERVICE, LLC and TPLS, INC.,
Third-Party Defendants.

----------x

Greenwald, J.

The following papers numbered 1-7 were considered by the Court in deciding Third Party Defendant's Notice of Motion and Defendant/Third Party Plaintiff Notice of Motion:

Papers	Numbered
Third Party Defendant Notice of Motion (*Motion Sequence 1*) /Affirmation of Nick Migliaccio, Esq./Statement of Material Facts/ Exhibits A-P/Memorandum of Law	1
Affirmation of Petar K. Vanjak, Esq., in Opposition/ Counter Statement of Facts	2
Reply Affirmation of Nick Migliaccio, Esq.	3
Defendant/Third Party Plaintiff Notice of Motion (*Motion Sequence 2*) /Affirmation of Petar K. Vanjak, Esq./Statement of Material Facts /Exhibits A-O	4
Affirmation of Nick Migliaccio, Esq. in Partial Opposition	5
Reply Affirmation of Petar K. Vanjak, Esq.	6
OTHER: NYSCEF DOCS NO. 1-74	7

RELEVANT BACKGROUND

Motion Sequence 1

TOTAL PACKAGE LANDSCAPING SERVICE, LLC and TPLS, INC. ("TPLS"), Third party Defendants seek an Order pursuant to CPLR §3212 granting Summary Judgment dismissing third-party plaintiff's complaint in its entirety with prejudice as against the third-party defendant, along with any and all claims and/or crossclaims. TPLS admits that it entered into a contract with Page Park Associates, LLC ("PPA"), the owners of the premises located at 301 Manchester Road, Poughkeepsie, N.Y, for snow and ice removal services. These premises are the location of the alleged accident of Plaintiff in the action. TPLS denies any liability for the accident, attesting that it provided snow and ice removal services during February 8, 2017 through February 10, 2017, and there were no snow or ice issues that would have been the cause of Plaintiff's accident. TPLS states that Plaintiff is not a party to the contract, thus not owed a duty of care by TPLS. TPLS alleges that the contract has no indemnification language so as to warrant indemnification or the intent to indemnify PPA and or require contribution from TPLS in any actions as it relates to liability. *See,* Affirmation of Nick Migliaccio, Esq.

PPA opposed TPLS's motion for summary judgment. PPA argues that there are at least two of the Espinal exceptions that are applicable to the case at hand, warranting liability to be attributed to TPLS. The first being, that TPLS failed to exercise reasonable care in the performance of duties, and therefore launched a force or instrument of harm. PPA states there is no evidence that any form of an ice condition existed at the location where the Plaintiff allegedly slipped and fell. However, PPA contends that if a condition existed which caused Plaintiff's fall, it is solely created by TPLS. The other exception is that that pursuant to the contract, TPLS has the sole discretion for snow/ice removal and is responsible for the snow and ice removal on the premises and as the contracting party, which entirely displaces PPA's duty to maintain the premises safely. PPA also argues that it is entitled to indemnification and/or contribution under the contract as well as under common law. PPA states that the language of the contract states TPLS was to name the building owner as additional insured waived their right to subrogate against the building owner and hold them harmless." See Exhibit "J". PPA argues there are triable issues of fact raised, therefore judgment in favor of TPLS should not be granted. *See.* Affirmation of Petar K. Vanjak, Esq

In reply, TPLS asserts that negligent hiring and supervision claim raised by PPA should be deemed abandoned that as PPA fails to address this issue. TPLS contends that the Espinal exceptions do not apply to the instant matter. TPLS argues that PPA has non-delegable duty to safely maintain is premises from hazards, which was not displaced by the parties' contract. TPLS states that the contract was for snow and ice removal and did not require TPLS to inspect the subject premises after snow and ice removal services were rendered, neither did it require TPLS to always maintain the subject premises and in all ways. TPLS also argues that to demonstrate that a contractor exacerbates an existing condition requires some showing

that the contractor left the premises in a more dangerous condition than the premises were in before the contractor provided services, which was not the case in the instant matter, thus neither of the Espinal exceptions PPA asserts are applicable. TPLS asserts that PPA concedes that there is no evidence of any negligent snow or ice removal, and that PPA has only proffered speculations without any proof that TPLS's performance or lack thereof created or caused the accident. TPLS denies any liability asserting that PPA was responsible for any hazardous conditions on the subject premises. *See,* Affirmation of Nick Migliaccio, Esq. and Memorandum of Law

Motion Sequence 2

PPA seeks summary judgment in its favor against Plaintiff and seeks to have the Plaintiff's Complaint dismissed. PPA asserts that a prima facie case of negligence requires Plaintiff to establish not only that a defective condition existed, but also that the defendant either created the condition that caused the plaintiff's fall or had actual or constructive notice of the condition and failed to remedy it within a reasonable time. PPA argues that Plaintiff failed to present evidence that demonstrates that PPA created the dangerous condition nor that PPA was on notice, actual or constructive of the alleged icy condition. PPA states that there is no evidence to demonstrate that the alleged ice condition resulted from negligent or incomplete snow removal in this matter. PPA contends, that in the absence of any material fact that PPA caused the dangerous condition or was on notice of said condition PPA is entitled to judgment as a matter of law. *See,* Affirmation of Petar K. Vanjak, Esq. on Motion Sequence 2

TPLS supports PPA's motion for summary judgment, to the extent that it asserts that PPA did not have actual or constructive notice of the alleged condition and that PPA concedes that there is no evidence of negligent snow removal, thus no proof of that an icy condition that created the accident. However, TPLS contends that PPA is not entitled to summary judgment pursuant to CPLR 3212(a) over and against TPLS as the non-delegable duty to safely maintain its property and is not entitled to common law indemnity, contribution, or contractual indemnity and has failed to demonstrate its entitlement to such relief or that the Espinal exceptions apply in the instant matter. *See,* Affirmation of Nick Migliaccio, Esq. on Motion Sequence 2

In reply, PPA reiterates that the first and third Espinal exceptions apply, that TPLS was solely responsible for snow/ice removal at the subject premises and as such, even as there is no evidence that there was negligent snow/ice removal, if an icy condition existed, it was caused by TPLS. PPA states that common law indemnification applies in the instant matter as a property owner that employs an independent contractor may obtain common law indemnification from the contractor if the plaintiff's injury can be attributed solely to negligent performance or nonperformance of an act solely within the province of the

contractor. PPA asserts that the basis for its arguments that if the accident resulted from an icy condition, the accident should be attributed to TPLS pursuant to its contractual duties. PPA contends that based on the foregoing arguments, it should be granted judgment in its favor dismissing the complaint and counterclaims, as well as against third-party Defendant TPLS. Reply Affirmation of Petar K. Vanjak, Esq. on Motion Sequence 2.

On or about February 10, 2017, Plaintiff alleged that she slipped and fell in the parking lot of the subject premises. Plaintiff alleges that the cause of her fall was the ice in the handicap parking lot area where she parked her car. PPA and TPLS, both maintain that Plaintiff has provided no evidence to substantiate that any form of an ice condition existed at the subject premises where Plaintiff allegedly slipped and fell. Plaintiff has filed an action against PPA only, not against TPLS. Upon review of the electronic file, Plaintiff has not submitted any opposition to PPA's motion for summary judgment (Motion Sequence 2) or TPLS's motion for summary judgment (Motion Sequence 1). *See,* Third-Party Defendant's Statement of Facts; *see also,* Defendant/Third-Party Plaintiff Statement of Facts and Summons and Complaint.

TPLS presents the examination before trial (EBT) testimony of Darin Page, Christopher Oliver and Donna Geick, as evidence in support of its motion for summary judgment along with other exhibits. There is no dispute that TPLS performed its snow/ice removal services on February 10, 2017 at the subject premises. The evidence also demonstrates that there were no issues seen or reported regarding snow, ice and drainage in the handicap spaces and area in the parking lot reported to PPA or TPLS on or near the date of the fall. Ms. Geick's EBT testimony states her perception on that day, where she found Plaintiff on the ground, was that it was apparent that the snow/ice were plowed in the area where Plaintiff fell, however there was some sort of snow/ice film on the pavement. Oliver's EBT testimony stated he was present when services were rendered on the subject date and all the protocols and procedures where administered, resulting in clear access. Page's EBT testimony stated that he had observed TPLS's services previously, that there had been no reported problems and that he had previously observed the handicap parking area of the lot after snow or ice removal and was unaware of any problems resulting from these services. *See.* Affirmation of Nick Migliaccio, Esq and Third-Party Defendant's Exhibits I, M and N.

The parties agree that their contract was for snow and ice removal services to be rendered upon the start of a storm, throughout snowfall and any follow up snow clearing that may have been required to allow free and clear access to the building and lot by PPA employees and visitors at all times; and TPLS was to be available 24/7 to provide this service and if necessary, the TPLS was to return after midnight the following day to final clean all areas. However, the parties dispute whether pursuant to their contract, the services rendered by TPLS displaced PPA's non-delegable duty to safely maintain the premises at all times

and if the contract or by common law, PPA is entitled to indemnity or contribution by law *See.* Third-Party Defendant's Exhibit J.

DISCUSSION

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact as to the claim or claims at issue. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. Once the prima facie showing has been made, the party opposing a motion for summary judgment bears the burden of producing evidentiary proof in admissible form sufficient to require a trial of material questions of fact. The substantive law governing a case dictates what facts are material, and only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. *See,* Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); *see also,* People ex rel. Spitzer v Grasso, 50 A.D.3d 535, 545 (1st Dept. 2008).

It is well settled law, that a finding of negligence must be based on the breach of a duty, therefore a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party. A property owner will be held liable for a slip-and-fall accident involving snow and ice on its property only when it created the dangerous condition which caused the accident or had actual or constructive notice of the icy condition. *See,* Moore v Great Atl. & Pac. Tea Co., Inc., 117 A.D. 3d 695, 695 (2nd Dept. 2014) and Ricca v Ahmad, 40 A.D.3d 728, 728-29 (2nd Dept. 2007). When the circumstances involve a contractor for snow and ice removal services, under decisional law a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party. However, there are three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care—and thus be potentially liable in tort—to third persons: (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. *see also,* Espinal v Melville Snow Contractors, Inc., 98 N.Y.2d 136, 138-140 [2002].

In general, the party who retains an independent contractor is not liable for the negligence of the independent contractor because it has no right to supervise or control the work. An exception to this general rule is the nondelegable duty exception, which is applicable where the party is under a duty to keep premises safe. Where, for example, premises are open to the public, the owner has a nondelegable duty to provide the public with a reasonably safe premises, and a safe means of ingress and egress. The nondelegable duty of the property owners' exception is premised on principles of basic fairness as well as policy considerations relating to allocation of the risk. An owner may be held vicariously liable for the

negligence of its independent contractor because the owner in possession has retained control over the premises. The owner not only has a nondelegable duty to provide safe means of ingress, but the responsibility of taking the necessary precautions to ensure that the people who are in the habit of passing on said premises where the contractor has done work, would not be endangered. This affirmative responsibility is consistent with an owner's general duty of reasonable care under all circumstances. Clearly it would be inequitable to permit a property owner to escape liability by merely delegating the obligation to repair or maintain the premises to an independent contractor and would simply undermine the underlying policies of public safety and building owner responsibility. *See,* Backiel v Citibank, N.A., 299 A.D.2d 504, 505-506 (2nd Dept. 2002).

It is well settled that a contractor will not be held liable for injuries, where the contract for services did not assume the duties of a comprehensive and exclusive property maintenance obligation intended to displace the owner's duty to safely maintain the property. *See,* Pavlovich v Wade Assoc., Inc., 274 A.D.2d 382, 382-83 (2nd Dept 2000); *see also,* Kaehler-Hendrix v Johnson Controls, Inc., 58 A.D.3d 604, 607 (2nd Dept. 2009).

Motion Sequence 1

There is no evidence to demonstrate that TPLS created or caused the alleged icy condition at the subject premises. There is no evidence that TPLS had actual or constructive notice of the icy condition, prior to the accident, and failed to remediate the condition. Of the two Espinal exceptions which PPA asserts, there is no evidence to demonstrate the TPLS failed to exercise reasonable care in the performance of its duties, and therefore launched a force or instrument of harm; or that TPLS left the subject premises in a worse condition that it was in before it performed its snow and ice removal services on or before February 10, 2017. Merely plowing the snow in accordance with the contract and leaving some residual snow or ice on the plowed area, cannot be said to have created a dangerous condition and thereby launched a force or instrument of harm. *See,* Foster v Herbert Slepoy Corp., 76 A.D. 3d 210, 215(2nd Dept. 2010). There is also no evidence in support of the other exception which PPA asserts, that TPLS or the provisions within its contract entirely displaced the PPA from its duty to maintain the premises safely. There is no language in the contract that suggests that TPLS was to exclusively maintain the premises after services. TPLS was only expected to perform snow and ice removal; return for final cleanups after snow if necessary and upon request to further salt when necessary, at no additional charge. That is not to say that TPLS was not responsible for the quality and review of their work. However, the contract emphasizes the times for TPLS to provide snow and ice removal, that notice is required within four (4) hours after snow or ice had stopped falling if for some reason the entire property could not be completely plowed within, that TPLS

was to be available 24/7, and provide the building owner representative with all current contact phone numbers for 24/7 contact. This demonstrates that PPA was to contact TPLS, if it deemed additional services were needed, therefore requiring PPA to observe the condition at the subject premises and ascertain if further snow and ice removal services were needed at the subject premises, thus TPLS was not to exclusively inspect or maintain the property, after its services were performed. *See,* Exhibit J. There is no evidence that PPA contacted TPLS on the date of the accident or any day prior, to request additional salting or services. There is no evidence that PPA's non-delegable duty to safely maintain the subject property had been displaced. Neither Espinal exception applies to the instant matter. PPA presents no other basis to retract its nondelegable duty to safely maintain the property and general duty of reasonable care.

TPLS has also demonstrated that there is no evidence that TPLS caused or created a dangerous condition at the subject premises on the day of the accident. TPLS has demonstrated that it had no actual or constructive notice of the dangerous condition at the subject premises which would render it liable for negligence. TPLS has demonstrated with proof, that the Espinal exceptions do not apply to the instant matter, so as to render it liable for negligence. TPLS has demonstrated that there is no common law right under contract law or basis to warrant it responsible to indemnify or contribute to PPA, for negligence. TPLS has met its burden of proof for a grant of summary judgment in its favor, and the arguments and evidence submitted by PPA is insufficient to rebut said proof. Based on the foregoing, TPLS's motion for summary judgment in its favor and to dismiss the third-party complaint by PPA against TPLS is **granted.**

Motion Sequence 2

The Plaintiff did not oppose PPA's motion for summary judgment. PPA demonstrates that there is no evidence presented to demonstrate that PPA created or caused the icy condition at the subject property. PPA also demonstrates that there is no evidence that PPA had actual or constructive notice of the alleged ice condition on the day of the alleged accident. Based on the foregoing there are no triable issues of fact, as to the negligence claims raised by Plaintiff.

PPA proffers Page's testimony to demonstrate that it contracted with TPLS for snow and ice removal services and while it had not observed the services being performed by TPLS, it had observed the subject property after TPLS had completed its snow and ice removal services on several occasion and he did not observe anything problematic with TPLS's services. PPA conceded that there was no evidence of any negligent snow or ice removal that resulted in an icy or dangerous condition in the handicap parking lot area at the subject premises that caused Plaintiff's alleged accident. As stated above, there is no basis for the Espinal exceptions to apply. PPA fails to demonstrate language in the contract that displaces its duty to safely maintain the subject premises. PPA fails to provide a basis with proof that demonstrates that

TPLS should be liable to PPA for indemnification or contribution. Therefore, Defendant's application for summary judgment as against Plaintiff and to dismiss Plaintiff's complaint is **granted but as against TPLS, Third-party Defendant, PPA's application for summary judgment in its favor as Third-Party Plaintiff is denied.**

Accordingly, it is hereby,

ORDERED, that Third-Party Defendants' Total Package Landscaping Service, LLC and TPLS, Inc. ("TPLS") Motion for Summary Judgment is granted, and the Third-Party Complaint is dismissed; and it is further

ORDERED, that the Defendant/Third-Party Plaintiff Page Park Associates, LLC ("PPA") Motion for Summary Judgment is granted in part, as against Plaintiff, Sylvia F. Wilson and Plaintiff's Complaint shall be dismissed, and denied in part, as against Third Party Defendant Total Package Landscaping Service, LLC and TPLS, Inc.

Any relief not specifically granted herein is denied.

The foregoing constitutes the decision and order of this Court.

Dated: November 5, 2021
Poughkeepsie, New York

ENTER:

Hon. Hal B. Greenwald, J.S.C.

CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

When submitting motion papers to the Honorable Hal B. Greenwald's Chambers, please do not submit any copies. Please submit only the original papers.