

Flanigan v Cornerstone Family Healthcare
2026 NY Slip Op 32074(U)
March 26, 2026
Supreme Court, Orange County
Docket Number: Index No. EF 009339-2019
Judge: Maria S. Vazquez-Doles
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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 285 Main Street,
Goshen, New York 10924 on the 26th day of March 2026

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

JENNIFER FLANIGAN

PLAINTIFF,

-against-
CORNERSTONE FAMILY HEALTHCARE,

DEFENDANT.

CORNERSTONE FAMILY HEALTHCARE,

THIRD PARTY PLAINTIFF,

-against

84 LANDSCAPING, INC. et al.,

THIRD PARTY DEFENDANTS.

VAZQUEZ-DOLES, J.S.C.

The following papers were read on Motion Seq. #1 of Plaintiff for summary judgment
pursuant to CPLR §3212:

Notice of Motion#1/Affirmation/Memo Law/Statement Facts/Ex. 1-8..... 1-12
Affirmation Opposition/Statement Facts/Ex.A-B.....13-16
Reply Affirmations/Ex. 9.....17-19

and on Cross-Motion Seq. #2 of Third Party Defendants 84 Landscaping and Mozo Ventures, Inc.
(collectively, “TPD Mozo”) for summary judgment pursuant to CPLR §3212:

Notice of Cross-Motion#2/Affirmation/Statmt Facts/Response Facts/Ex. A-M..... 1-17
Affirmation Opposition - Plaintiff/Statement Facts.....18-19
Reply Affirmation-Plaintiff.....20
Affirmation Opposition - Cornerstone/Statement Facts.....21-22
Reply Affirmation-Cornerstone/Response Facts.....23-24

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 No. EF 009339-2019
Motion Date: 1/21/26
Motion Seq.# 1 and 2

Summary of Decision

Plaintiff set forth a prima facie case of negligence as to the existence of a pothole and icy conditions in Defendant's parking area, both of which caused her to fall and allegedly sustain injuries. The pothole predated the accident by at least 30 days. Defendant failed to raise any issue of fact as to the conditions of its premises or constructive notice. Defendant did not rebut the Plaintiff's firsthand testimony with any admissible evidence, submitting only an attorney affirmation. Plaintiff's motion Seq. #1 is GRANTED and Defendant is liable as a matter of law. The extent, if any, of Plaintiff's comparative fault will be decided in a liability trial.

TPD Mozo cannot be liable for common law indemnity and contribution where Defendant/TPP is negligent for a premises defect (pothole) unrelated to TPD Mozo and Plaintiff did not sue Mozo. The snow/ice agreement between Defendant/TPP and TPD Mozo has no indemnification provision. For these reasons, TPD Mozo's motion Seq. #2 is GRANTED IN PART and the First, Second and Third causes of action are DISMISSED.

TPD Mozo did not establish that its contract with Defendant exempted it from remediating icy conditions in the days leading up to, and on the day of, Plaintiff's accident. The contract required remediation after certain weather conditions. Whether those conditions were extant in the days leading up to the accident and thereby created a contractual duty of TPD Mozo to remediate ice, remains a question of fact. Meteorological records and party testimony did not resolve the issue. Additionally, Seq. #2 failed to address whether TPD Mozo procured insurance for Defendant/TPP. For these reasons, that part of TPD Mozo's motion as to the Fourth Count is DENIED.

Facts Underlying the Claims and Defenses

On March 26, 2018, Plaintiff was an invitee of Defendant at 10 Benton Avenue, Middletown, NY (“the Premises”). The Premises was owned by Defendant. Plaintiff had been visiting the Premises for 23 years on a periodic basis. On prior visits to the Premises, Plaintiff observed multiple potholes in the parking area of the Premises. She observed one or two months prior a specific pothole that caused her to fall on the accident date.

Plaintiff parked and exited her vehicle. She went to the trunk to remove some of her work materials. As she went to close her trunk and step forward, her right foot went into a pothole that was filled with dirty snow and ice. Her left foot at the same time slipped on ice on the pavement. Plaintiff fell partially into her SUV trunk area and partially to the ground. She alleges injuries as a result of the fall.

TPD Mozo and Defendant had entered into a written contract for TPD Mozo to perform snow plowing and ice remediation services to, inter alia, the parking area of the Premises. The contract provided that TPD Mozo was required to “ensure that all parking areas . . . are clear and well-salted/sanded to the road, [sic] sidewalks surface and maintain the application throughout/during and after the ice and freezing rain event.” The contract does not define an “ice event.”

A contract, or more accurately, two contracts, are annexed to Seq. #2 as Exhibit L. Defendant/TPP did not annex any contracts to the current Third-Party Complaint. TPD Mozo alleges that Exhibit L is the contract between the parties and Defendant/TPP itself refers to Exhibit L in responding to the Statement of Material Facts.

What the parties call a contract essentially consists of two separate agreements. The first states that it is an agreement “for Snow Removal and Plowing.” That document does not contain

an indemnity clause. It does provide that TPD Mozo must secure insurance that names Defendant/TPP as an additional insured. The agreement is signed by both parties on the last page.

The second agreement is titled “Business Associate Addendum” and states that it concerns the handling of “Protected Health Information” and similar health data between the parties. The first paragraph of the Addendum refers to “this Agreement” as the document setting forth conditions for compliance with HIPAA and related laws, not snow removal or similar services. The Addendum includes an indemnity clause that requires each party to indemnify the other for “actual and direct losses . . . all liability to third parties arising from or in connection with any breach of *this Agreement* . . . or from any negligence . . .” (emphasis added). The words “this Agreement” in the indemnity clause breach provision refer to the Addendum only, because it is a separate signed contract that includes a shorthand use of “this Agreement” in the first paragraph.

No party on this motion submitted any evidence as to the most recent time before Plaintiff fell that TPD Mozo had placed salt/sand or taken any other actions to remediate ice in the parking area. TPD Mozo’s witness could not recall, for the winter of 2018, whether he was called back by Defendant to salt the Premises; if any procedure existed between the parties upon refreezing; whether Defendant ever required TPD Mozo to return to the Premises because of refreezing; or whether TPD Mozo maintained work logs.

Defendant’s witness was not involved in property maintenance as of 2018. He was not aware of when the parking area had last been inspected before the accident for snow, ice or potholes; when potholes had last been repaired; whether a contract existed for snow and ice removal services; and when such snow and ice services had occurred most recently before the accident.

TPD Mozo has submitted certified meteorological records for March 2018 from the US

Government's weather station at "Montgomery Orange County Airport." No witness provided testimony as to the distance between that weather station and the Premises. No witness addressed whether the conditions at that station would have been the same as at the Premises.

Apart from this foundational lapse, the weather data reflects precipitation most recent to the accident on March 21 and 22. The abbreviation "FZFG" on March 21 is not found in the legend for the data. The legend separately defines "FZ" as "freezing" and "FG" as "fog." Notably, the data reflects that temperatures fluctuated every day from above freezing to below freezing from March 5 until and including the accident date, March 26, 2018.

Procedural History

Plaintiff filed this lawsuit on November 25, 2019, against Defendant only. Plaintiff did not sue TPD Mozo. Defendant filed an Answer on July 7, 2020. Defendant filed a Third-Party Complaint against TPD Mozo on June 16, 2022, but stipulated to dismiss it later that year.

Defendant filed a new Third Party Complaint against TPD Mozo on June 7, 2024. The Third-Party Complaint pled causes of action for common law indemnity, contribution, contractual indemnity and breach of contract. TPD Mozo filed an Answer on July 15, 2024.

Summary Judgment Motion of Plaintiff – Seq. #1

CPLR §3212(b) states, in pertinent part, that a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." Section §3212(b) further states that "the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." "Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a material and triable issue of fact" *Anyanwu v Johnson*, 276 A.D.2d 572 (2nd Dept. 2000). Issue finding, not

issue determination, is the key to summary judgment. *Krupp v Aetna Casualty Co.*, 103 A.D.2d 252 (2nd Dept. 1984).

In deciding the motion, the court must view the evidence in the light most favorable to the non-moving party. *Kutkiewicz v Horton*, 83 A.D.3d 904 (2nd Dept. 2011). Therefore, the Court will assume for purposes of the motion that Plaintiff did fall in both the pothole and on the ice. While Defendant repeatedly contests this fact, it presents no evidence to refute the clear and consistent testimony of Plaintiff in both segments of her deposition.

A property owner or possessor of land owes a duty to maintain its property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to invitees. *Basso v. Miller*, 40 NY2d 233 (1976). Here, Defendant owed a duty to invitees such as Plaintiff to maintain the parking area in a condition without hazards that would cause patrons to slip or fall. A defendant that owes a duty to a person injured in an accident involving snow and ice is liable only if it created the dangerous condition that caused the accident or had actual or constructive notice of its existence. *Steffens v Sachem School District*, 190 AD3d 1003 (2d Dept 2021); *Bennett v. Alleyne*, 163 A.D.3d 754, 754–755 (2d Dept 2018); *Koelling v. Central Gen. Community Servs., Inc.*, 132 A.D.3d 734, 735 (2d Dept 2015).

Plaintiff set out a prima facie case of negligence. She established that Defendant owned the premises, and she was a lawful invitee. She established that Defendant owed her a duty to maintain the parking area free of hazards. Plaintiff testified to how she saw potholes repeatedly in her visits leading up the accident date, including the one into which she fell. She established ice was present and caused her to slip and fall.

It then became incumbent upon Defendant to rebut that showing with evidence as to a lack of any pothole or, if a pothole did exist, a lack of notice. Defendant's witness was not aware of

whether potholes existed. He also was unable to address when the parking area was last inspected relative to the time when the plaintiff fell. *Birnbaum v. New York Racing Assn., Inc.*, 57 A.D.3d 598, 598–599 (2d Dept 2008); *Oliveri v. Vassar Bros. Hosp.*, 95 A.D.3d 973 (2d Dept 2012). Defendant therefore did not rebut the testimony of Plaintiff as to potholes or as to notice.

Likewise, in a snow and ice case, a defendant must submit testimony or other evidence establishing the most recent inspections for snow and ice on the Premises to rebut Plaintiff's prima facie case. *E.g. Ferro v. 43 Bronx River Road*, 139 Ad3d 897 (2d Dept 2014). Here, Defendant submits no evidence of any inspections, leaving open the question of how long before the accident that it or its contractor had checked for and treated the parking area for ice. The sole witness for Defendant provided no information on the critical issue of when it became aware of the ice in the parking area and if TPD Mozo took action to remediate the ice.

The weather data that TPD Mozo submitted supports Plaintiff. It shows a constant thaw and refreeze of snow and ice was feasible for weeks up to and including the accident date, because of the swing in temperature each day from above to below freezing. Thus, the creation of new ice from a thaw and refreeze of snow or ice required Defendant to periodically inspect its parking area for this potential hazard. Defendant admits it has no evidence of any inspections. Its contractor, TPD Mozo, likewise could not recall anything in this regard.

For these reasons, Motion Seq. #1 is GRANTED. Plaintiff established a lack of any issue of fact as to whether Defendant breached its duty owed to her. Defendant did not rebut that showing. The negligence of Defendant is established as a matter of law. Whether Plaintiff in any degree contributed to her own accident remains a question for a liability trial.

Motion for Summary Judgment of TPD Mozo- Seq. #2

Defendant/Third Party Plaintiff pled four causes of action against TPD Mozo: common law

indemnity, common law contribution, contractual indemnity, and breach of contract for insurance coverage. Initially, TPD Mozo seeks summary judgment on a misplaced theory that it owes no duty to the Plaintiff. While it is true that a contract between two parties does not generally give rise to a duty to a third party not in privity (*Espinal v. Melville Snow Constr.*, 98 NY2d 136 (2002)), that doctrine has no direct application to the claims of Defendant/TPP. Plaintiff did not sue Mozo. Only Defendant/TPP sued Mozo. Thus, the discussion of whether a claim by Plaintiff against Mozo would lie is strictly academic and not a ripe issue for the Court's consideration.

Instead, the claims of Defendant/TPP against TPD Mozo are governed by common law negligence principles and/or contract law. The claim for common law indemnity requires that Defendant/TPP be free of any fault so that it can shift the entire basis for liability to TPD Mozo. "Implied, or [common-law,] indemnity is a restitution concept which permits shifting the loss because to fail to do so would result in the unjust enrichment of one party at the expense of the other." *Castillo v Port Authority of NY and NJ*, 159 AD3d 792 (2d Dept 2018). Common-law indemnification is generally available "in favor of one who is held responsible solely by operation of law because of his relation to the actual wrongdoer . . . and, thus, reflects an inherent fairness as to which party should be held liable for indemnity." *Id.* The Court has already found, *supra*, that Defendant is liable to some degree to Plaintiff for its own active negligence in relation to the pothole.

TPD established that it owed no duty to the Defendant/TPP for premises upkeep as it concerns potholes. The contract at issue concerns snow and ice. Thus, the fault of Defendant is at least in part not subject to shifting to TPD Mozo. No claim for common law indemnity will lie in this circumstance. The First Count is therefore DISMISSED.

Nor will a claim for common law contribution lie where Plaintiff has not sued TPD Mozo.

Recognizing such a claim would vitiate *Espinal* and de facto create a claim by Plaintiff against TPD Mozo. *See Castillo*, 159 AD3d at 795 (requiring codefendant to show, as basis for contribution claim, that the other defendant “owed it a duty of reasonable care outside their respective contractual obligations, or that a duty was owed to the plaintiff as an injured party and that a breach of this duty contributed to the alleged injuries.”). Here, the contribution claim is even more attenuated than in *Castillo* because Mozo is not a direct defendant, only a third-party defendant. The Second Count is therefore DISMISSED.

The Third Count pled contractual indemnity where no such clause exists in the snow and ice contract. That contract is not the same as the Addendum. Notably, the Third-Party Complaint does not plead the specific wording of an indemnity clause and does not even attach the contract to the pleading. The Third Count is therefore DISMISSED.

The Fourth Count pled breach of contract. The essential elements of a cause of action to recover damages for breach of contract are “the existence of a contract, the plaintiff’s performance under the contract, the defendant’s breach of that contract, and resulting damages.” *JP Morgan Chase v JH Elec of NY*, 69 AD3d 802 (2d Dept 2010). Plaintiff pled those elements in its Third-Party Complaint.

The contract provided that TPD Mozo was required to “ensure that all parking areas . . . are clear and well-salted/sanded to the road, [sic] sidewalks surface and maintain the application throughout/during and after the ice and freezing rain event.” The contract does not define an “ice event.” As noted supra, the weather conditions according to TPD Mozo involved temperatures conducive to repeated thawing and freezing of snow and ice for weeks. The weather also included precipitation four and five days before the accident. Some type of “FR”, i.e., freeze, occurred in those days. However, the weather records alone, without witness testimony, do not clarify what type of

freeze occurred.

Under the contract terms, TPD Mozo owed a duty to Defendant/TPP to apply salt and sand after “ice events,” however defined. It is not clear from testimony if any protocol existed between the parties of what constituted such an event and for what duration of time thereafter TPD Mozo would continue to apply salt and sand on the ice. For these reasons, the Court cannot decide on the current record as a matter of law whether TPD Mozo breached its contract. If it had done so, the fall by Plaintiff would arguably be a consequential loss of Defendant/TPP caused by that breach.

TPD Mozo did not adequately address the claim of lack of insurance in the motion papers. TPD Mozo asserts it was not negligent and therefore the insurance clause is inapplicable. That assertion has no legal citation and finds no basis in New York law. TPD Mozo confuses indemnity, and the general prohibition of indemnifying another party for its own negligence, with a duty to procure insurance. The latter falls outside the issue of negligence and instead is a financial decision among the contracting parties as to who bears the cost of insurance. Here, TPD Mozo promised to obtain insurance for Defendant/TPP and its motion does not establish that it did so.

Considering the numerous factual ambiguities and uncertainties surrounding contract performance, the Court is unable to decide the claims for breach of contract as a matter of law. The motion is DENIED as to the Fourth Count of the Third-Party Complaint.

Upon the foregoing, it is hereby

ORDERED that Motion Seq. #1 is **GRANTED** and Defendant is negligent as a matter of law, and it is further

ORDERED that a trial on liability as to the comparative fault, if any, of Plaintiff will be held in abeyance until the trial of the third-party claims, and it is further

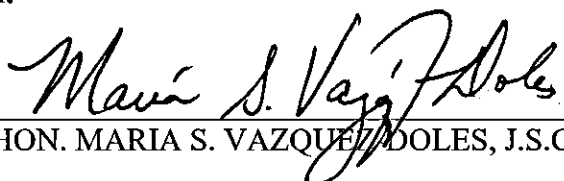
ORDERED that Motion Seq. #2 is **GRANTED IN PART** as to the First, Second and Third Counts of the Complaint, and it is further

ORDERED that the First, Second and Third Counts of the Third Party Complaint are hereby **DISMISSED**.

This Decision constitutes the Order of this court.

Dated: March 26, 2026
Goshen, New York

ENTER:


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