

SHORT FORM ORDER

INDEX No. 600483/2016
 CAL. No. 202500292OT

SUPREME COURT - STATE OF NEW YORK
 I.A.S. PART 55 - SUFFOLK COUNTY

PRESENT:

Hon. GEORGE M. NOLAN
 Justice of the Supreme Court

MOTION DATE 10/3/25 (004, 005)
 MOTION DATE 11/20/25 (006)
 ADJ. DATE 4/23/26
 Mot. Seq. # 004 MotD
 Mot. Seq. # 005 MD
 Mot. Seq. # 006 MD

-----X
 BRENDA LUCKOW and KENNETH
 LUCKOW,

Plaintiffs,

- against -

TIMBER RIDGE AT HOLBROOK HOME
 OWNERS ASSOCIATION, INC., FAIRFIELD
 PROPERTIES GROUP, LLC, FAIRFIELD
 PROPERTY SERVICES, L.P., FAIRFIELD
 PROPERTIES, LLC, FAIRFIELD
 PROPERTIES, INC., BROTHERS II
 LANDSCAPES INC. and FPS PHASE II LLC
 d/b/a FAIRFIELD PROPERTIES,

Defendants.
 -----X

PLAINTIFFS' ATTORNEY

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DEFENDANTS' ATTORNEYS

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 Holbrook HOA and Brothers II Landscapes Inc.*
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Upon the following papers read on these motions and cross-motion for summary judgment: Notice of Motions/Order to Show Cause and supporting papers by Fairfield, filed August 14, 2025; by HOA and Brothers, filed August 14, 2025; Notice of Cross-Motion and supporting papers by plaintiffs, filed November 5, 2025; Answering Affidavits and supporting papers by HOA and Brothers, filed January 12, 2026 and January 12, 2026; by Fairfield, filed March 27, 2026; Replying Affidavits and supporting papers by plaintiffs, filed January 20, 2026; by Fairfield, filed March 27, 2026 and April 1, 2026; by HOA and Brothers, filed April 22, 2026; Other __; it is

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ORDERED that these motions are consolidated for purposes of this determination; and it is

ORDERED that the motion by defendant FPS Phase II LLC d/b/a Fairfield Properties for summary judgment dismissing the complaint against it and in its favor on its cross-claims against defendant Brothers II Landscapes, Inc., is granted to the extent of granting summary judgment dismissing the complaint against it, and is otherwise denied; and it is

ORDERED that the motion by defendants Timber Ridge at Holbrook Home Owners Association, Inc. and Brothers II Landscapes, Inc. for summary judgment dismissing the complaint and all cross-claims against them and in favor of defendant Brothers II Landscapes, Inc. on its cross-claims against defendant FPS Phase II LLC d/b/a Fairfield Properties is denied; and it is further

ORDERED that the cross-motion by plaintiffs for summary judgment in their favor on the issue of liability against defendant Timber Ridge at Holbrook Home Owners Association, Inc. is denied.

This action arises out of two separate incidents that occurred on February 4, 2015, and on February 25, 2015, when plaintiff Brenda Luckow (plaintiff) allegedly slipped and fell on ice while walking on the driveway and walkway in front of her condominium, located at 64 Timber Ridge in Holbrook, New York. The condominium development is managed and maintained by defendants Timber Ridge at Holbrook Home Owners Association, Inc. (HOA) and FPS Phase II LLC d/b/a Fairfield Properties (Fairfield). Prior to the accidents, the HOA entered into a management agreement with Fairfield, requiring Fairfield to maintain the subject premises. The HOA also entered into a snow removal contract with Brothers II Landscapes, Inc. (Brothers). The gravamen of the complaint is that defendants were negligent in failing to properly maintain, manage, and control the premises, thereby creating a hazardous condition. As relevant to the instant matter, Fairfield and Brothers assert cross-claims against each other for contribution and common-law indemnification. Additionally, Fairfield asserts a cross-claim against Brothers for contractual indemnification and cross-claims against the HOA for contribution and common-law indemnification.

Fairfield moves for summary judgment dismissing the complaint against it and in its favor on the cross-claims against Brothers for contribution and common-law indemnification, arguing, inter alia, that it did not owe a duty of care to plaintiff, and that it did not cause or create the icy condition which allegedly caused plaintiff's injury. In support of the motion, Fairfield submits, among other things, the pleadings, the bill of particulars, the transcripts of the parties' testimony, a management agreement between the HOA and Fairfield, and a snow removal contract between the HOA and Brothers.

The management agreement provides, in pertinent part, that Fairfield "shall not be liable to the [HOA] or others for any act or omission on the part of such contractors. Ordinary repairs should be initiated up to a maximum of \$1,000 per event, but emergency repairs immediately necessary for the preservation or safety of the Common Elements or for the safety of Unit owners or other persons, or required to avoid the suspension of any necessary service in the Common Elements may be made by [Fairfield] with no limit without the prior approval of the [HOA]." It further provides, in pertinent part, that "[t]he [HOA] agrees to hold [Fairfield] harmless from: (a) Any liability, damages, costs and

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expenses (including reasonable attorney's fees) sustained or incurred for injury to any person or property in, on or about the subject property . . . unless such injury shall be caused by [Fairfield]'s own negligence and/or willful misconduct or failure to comply with its obligations hereunder."

Generally, a contractual obligation, standing alone, will not give rise to tort liability in favor of a third party (see *Espinal v. Melville Snow Contrs.*, 98 NY2d 136, 746 NYS2d 120 [2002]; *Farmer v. Gazebo Contr., Inc.*, 218 AD3d 644, 193 NYS3d 196 [2d Dept 2023]). However, the Court of Appeals has recognized three exceptions to this general rule: (1) where the contracting party, in failing to exercise reasonable care in the performance of his or her 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 another party's duty to maintain the premises safely (see *Espinal v. Melville Snow Contrs.*, 98 NY2d 136, 746 NYS2d 120; *Kapoian-Trapani v. City of New York*, 241 AD3d 895, 238 NYS3d 709 [2d Dept 2025]; *Brito-Hernandez v. Superior Contr.*, 233 AD3d 1058, 223 NYS3d 280 [2d Dept 2024]). As part of its prima facie showing on a motion for summary judgment in its favor, a contracting defendant is only required to negate the applicability of the *Espinal* exceptions that were expressly pleaded by the plaintiff or expressly set forth in the plaintiff's bill of particulars (see *Bushneva v. City of New York*, 203 AD3d 796, 160 NYS3d 892 [2d Dept 2022]; *Ramsey v. Temco Serv. Indus. Inc.*, 179 AD3d 726, 117 NYS3d 85 [2d Dept 2020]; *Glover v. John Tyler Enters., Inc.*, 123 AD3d 882, 999 NYS2d 150 [2d Dept 2014]).

When a party, by its affirmative acts of negligence, has created or exacerbated a dangerous condition which is the proximate cause of plaintiff's injuries, it may be held liable in tort (see *Espinal v. Melville Snow Contrs.*, 98 NY2d 136, 746 NYS2d 120; *Figueroa v. Lazarus Burman Assoc.*, 269 AD2d 215, 703 NYS2d 113 [1st Dept 2000]; *Levine v. Zarabi*, 243 AD2d 448, 663 NYS2d 68 [2d Dept 1997]). To make a *prima facie* showing of entitlement to judgment as a matter of law, a contractor is required to establish that it did not perform any work in the premises which caused plaintiff's injury or, alternatively, that the work it performed did not create or exacerbate a dangerous condition (see *Diaz v. City of New York*, 93 AD3d 755, 940 NYS2d 654 [2d Dept 2012]; *Schwint v. Bank St. Commons, LLC*, 74 AD3d 1312, 904 NYS2d 220 [2d Dept 2010]; *Keese v. Imperial Gardens Assoc., LLC*, 36 AD3d 666, 828 NYS2d 204 [2d Dept 2007]).

Here, Fairfield's limited contractual undertaking to maintain the condominium development was not a comprehensive and exclusive property maintenance obligation which entirely displaced the property owner's duty to maintain the premises in a reasonably safe condition (see *Balagyozyan v. Federal Realty L.P.*, 191 AD3d 749, 142 NYS3d 77 [2d Dept 2021]; *Pinto v. Walt Whitman Mall, LLC*, 175 AD3d 541, 107 NYS3d 373 [2d Dept 2019]). Fairfield also made a prima facie showing that it did not launch a force or instrument of harm by demonstrating that it did not perform any ice removal work at the subject premises prior to the accident. Lori Vivona, then Fairfield's manager, testified at her deposition that Fairfield did not employ, maintain, or station any on-site maintenance personnel at the subject premises to perform snow and ice removal. She further testified that Fairfield did not own or maintain any physical snow remediation equipment of its own on the premises, such as snowplows or shovels, and never provided sand or salt to any resident.

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In opposition, plaintiffs contend that Fairfield entirely displaced the HOA's duty to maintain the premises safely based on the emergency repairs section, which requires Fairfield to perform any necessary service for the safety of the residents without the HOA's prior approval. Plaintiffs further contend that Fairfield failed to exercise a discretionary power to order extra snow removal services prior to the accident. However, the section clearly indicates that such emergency repairs "may be made" by Fairfield; thus, Fairfield's obligations under the maintenance agreement did not entirely displace the HOA's duty to maintain the premises safely. A contractual provision stating an agent "may" take certain actions vests the agent with discretionary authority rather than a mandatory obligation. Because the emergency repairs clause provides permissive authorization, as here, Fairfield's failure to order extra ice remediation constitutes, at most, nonfeasance, which cannot give rise to direct tort liability to a third party (*see Espinal v. Melville Snow Contrs.*, 98 NY2d 136, 746 NYS2d 120; *Castillo v. Port Auth. of N.Y. & N.J.*, 159 AD3d 792, 72 NYS3d 582 [2d Dept 2018]; *Quinn v. Greenblatt Family Assoc. LLC*, 2021 NY Slip Op 33497[U] [Sup Ct, Orange County 2021]). Plaintiffs' other claims are considered and are found to be without merit. Thus, the branch of Fairfield's motion for summary judgment dismissing the complaint against it is granted.

As to the branch of Fairfield's motion for summary judgment in its favor on the cross-claims for contribution and common-law indemnification against Brothers, issues of fact regarding Brothers' negligence preclude summary judgment on this issue (*see Nyanteh v. 590 Madison Ave., LLC*, 238 AD3d 643, 236 NYS3d 131 [1st Dept 2025]; *Pressley v. 535 Greenwich LLC*, 232 AD3d 429, 220 NYS3d 287 [1st Dept 2024]).

The HOA and Brothers move for summary judgment dismissing the complaint and all cross-claims against them. Addressing the HOA's application first, the HOA argues it is entitled to summary judgment because a storm was in progress at the time of the February 4 accident. Specifically, the HOA asserts that plaintiff testified that it was actively snowing prior to her fall on February 4. The HOA further argues that it neither created the dangerous icy condition that allegedly caused the February 25 accident nor had actual or constructive notice of it. In support of the application, the HOA submits, among other things, the pleadings, the bill of particulars, the transcripts of the parties' testimony, and a snow removal contract between the HOA and Brothers. In opposition, plaintiffs submit, among other things, the affirmation of Steven Roberts, a meteorologist.

A real property owner or a party in possession or control of real property will be held liable for injuries sustained in a slip-and-fall accident involving snow and ice on its property only if it created the dangerous condition or had actual or constructive notice of the condition (*see Devlin v. Selimaj*, 116 AD3d 730, 986 NYS2d 149 [2d Dept 2014]; *Morreale v. Esposito*, 109 AD3d 800, 801, 971 NYS2d 209 [2d Dept 2013]; *Gushin v. Whispering Hills Condominium I*, 96 AD3d 721, 721, 946 NYS2d 202 [2d Dept 2012]). Thus, a defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (*see Dhu v. New York City Hous. Auth.*, 119 AD3d 728, 989 NYS2d 342 [2d Dept 2014]; *Cruz v. Rampersad*, 110 AD3d 669, 972 NYS2d 302 [2d Dept 2013]; *Santoliquido v. Roman Catholic Church of Holy Name of Jesus*, 37 AD3d 815, 830 NYS2d 778 [2d Dept 2007]). To meet its prima facie

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burden on the issue of constructive notice, the moving defendant must offer evidence as to when the area at issue was last cleaned or inspected before the accident (*see Malloy v. Montefiore Med. Ctr.*, 183 AD3d 811, 122 NYS3d 532 [2d Dept 2020]; *Rodriguez v. New York Hous. Auth.*, 169 AD3d 947, 94 NYS3d 318 [2d Dept 2019]; *Quinones v. Starret City, Inc.*, 163 AD3d 1020, 81 NYS3d 184 [2d Dept 2018]). Furthermore, whether a dangerous condition exists on real property so as to create liability on the part of the landowner depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury (*see Clark v. AMF Bowling Ctrs., Inc.*, 83 AD3d 761, 921 NYS2d 273 [2d Dept 2011]; *Moons v. Wade Lupe Constr. Co.*, 24 AD3d 1005, 805 NYS2d 204 [3d Dept 2005]; *Fasano v. Green-Wood Cemetery*, 21 AD3d 446, 799 NYS2d 827 [2d Dept 2005]).

Here, the HOA failed to establish its prima facie entitlement to judgment as a matter of law by demonstrating that a storm was in progress at the time of the February 4 accident. Contrary to the HOA's allegation that plaintiff testified that it was actively snowing prior to her fall on February 4, she actually testified that she did not recall the exact date or time the snow had last fallen prior to her accident. Instead, plaintiff explicitly testified that the hazardous ice and snow cover on the driveway had been there for at least a few days prior to February 4. Moreover, the affirmed report of plaintiffs' expert, Roberts, reveals that the heavy snowfall completely ceased on February 2, 2015, at approximately 6:45 p.m., leaving approximately 16 inches of accumulated snow and ice cover on the ground, and that no precipitation occurred in the subject area on February 3 or February 4, 2015. The HOA also failed to establish a prima facie case of entitlement to judgment that it lacked constructive notice of the alleged icy condition relative to the February 25 accident. While plaintiff testified she did not observe the black ice prior to her fall on February 25, 2015, she also stated she became aware of the icy condition immediately afterward, describing the surface upon which she landed as a complete sheet of ice. Under these circumstances, triable issues of fact exist as to whether a dangerous condition existed on the premises so as to create liability on the part of the HOA, whether the HOA possessed actual or constructive notice of the condition on the ground (*see Sassone v. 22 Main St., LLC*, 239 AD3d 781, 236 NYS3d 681 [2d Dept 2025]; *Rhodes-Evans v. 111 Chelsea LLC*, 44 AD3d 430, 843 NYS2d 237 [1st Dept 2007]), and whether reasonable inspections were made on the subject area prior to the incident (*see McCummings v. New York City Tr. Auth.*, 81 NY2d 923, 597 NYS2d 653 [1993]; *Garcia v. Soho AOA Owner, LLC*, 234 AD3d 572, 225 NYS3d 254 [1st Dept 2025]). Thus, the branch of the motion for summary judgment dismissing the complaint against the HOA is denied.

As to the branch of the motion for summary judgment dismissing Fairfield's cross-claims for contribution and contractual and common-law indemnification against the HOA, it has failed to adequately address any cross-claims in its motion papers and is not entitled to relief on this branch of its motion (*see Alvarez v. Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]). Thus, the branch of the motion for summary judgment dismissing the cross-claims against the HOA is denied.

Brothers also moves for summary judgment dismissing the complaint and all cross-claims against it, arguing it is entitled to summary judgment because it did not owe a duty of care to plaintiff, and that it did not cause or create the icy condition which allegedly caused plaintiff's injury.

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Here, Brothers established a prima facie case that it owed no duty of care to plaintiff, as she was not a party to the snow removal contract it had with the HOA. Brothers also established that its limited contractual undertaking was not a comprehensive and exclusive property maintenance obligation which entirely displaced the property owner's duty to maintain the premises safely (*see Balagyozyan v. Federal Realty L.P.*, 191 AD3d 749, 142 NYS3d 77; *Pinto v. Walt Whitman Mall, LLC*, 175 AD3d 541, 107 NYS3d 373). Nevertheless, Brothers' submissions failed to establish its entitlement to judgment as a matter of law on the issue of whether it created or exacerbated a dangerous condition on the premises (*see Keese v. Imperial Gardens Assoc., LLC*, 36 AD3d 666, 828 NYS2d 204 [2d Dept 2007]). It is undisputed that Brothers performed snow removal operations on the subject premises until approximately 1:30 a.m. on February 3, 2015, and that plaintiff slipped and fell on ice on her driveway at approximately 7:55 a.m. on February 4, 2015. Under these circumstances, there are issues of fact as to whether Brothers properly performed snow and ice removal operations related to the condition on the driveway which caused plaintiff's fall, and whether it exercised reasonable care under the circumstances (*see Lindquist v. Scarfogliero*, 129 AD3d 789, 11 NYS3d 237 [2d Dept 2015]). Thus, the branch of the motion for summary judgment dismissing the complaint against Brothers is denied.

The branch of Brothers' motion for summary judgment dismissing Fairfield's cross-claims for contribution and contractual and common-law indemnification against it is denied, as it failed to adequately address any cross-claims against it in its motion papers (*see Alvarez v. Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]). The branch of Brothers' motion for summary judgment in its favor on its cross-claims for contribution and contractual and common-law indemnification against Fairfield is denied as there was no contractual relationship between Brothers and Fairfield. Further, Brothers is not entitled to common law indemnification from Fairfield as the Court has determined herein that Fairfield was not negligent and there is no evidence that Fairfield exercised actual supervision or control over the injury producing work (*see McCarthy v. Turner Const.*, 17 NY3d 369, 929 NYS2d 556 [2011]).

As for plaintiffs' cross-motion for summary judgment, CPLR 3212 (a) provides that if no date for making a summary judgment motion has been set by the court, such a motion "shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown." Absent a "satisfactory explanation for the untimeliness," constituting good cause for the delay, the court must deny an untimely summary judgment motion without consideration of the merits (*Brill v. City of New York*, 2 NY3d 648, 652, 781 NYS2d 261 [2004]; *see Ragoonanan v. 43-25 Hunter, LLC*, 214 AD3d 831, 185 NYS3d 265 [2d Dept 2023]; *Panzavecchia v. County of Nassau*, 211 AD3d 846, 179 NYS3d 763 [2d Dept 2022]).

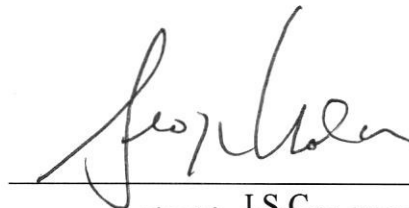
In this action, plaintiffs filed a note of issue on March 12, 2025, and the statutory 120-day period for making a summary judgment motion expired on July 10, 2025. By so-ordered stipulation filed July 2, 2025, the court granted the parties' request to extend their time to move for summary judgment to August 14, 2025. Fairfield, the HOA, and Brothers timely filed their motions for summary judgment on August 14, 2025. Plaintiffs' cross-motion, however, was not made until November 5, 2025 (*see* CPLR 2211), and their moving papers neither acknowledge nor otherwise explain the delay in making the instant cross-motion (*see Navarro v. Damac Realty, LLC*, 202 AD3d 1100, 159 NYS3d 887 [2d Dept 2022]; *Deutsche Bank National Trust Company Americas v. Banu*, 205 AD3d 887, 169 NYS3d 318

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[2d Dept 2022]; *Lanza v. M-A-C Home Design & Constr. Corp.*, 188 AD3d 855, 135 NYS3d 495 [2d Dept 2020]). Moreover, while a cross-motion for summary judgment made after the expiration of the statutory 120-day period may be considered by the court if a timely motion for summary judgment was made seeking relief “nearly identical” to that sought by the cross-motion, the court finds that the relief sought by defendants’ motions are not “nearly identical” (see *Teitelbaum v. Crown Hgts. Assn. for the Betterment*, 84 AD3d 935, 922 NYS2d 544 [2d Dept 2011]). Accordingly, plaintiff’s cross-motion is denied.

Dated

September 1, 2026



HON. ^{JSC} GEORGE NOLAN

____ FINAL DISPOSITION X NON-FINAL DISPOSITION