STATE OF NEW YORK
SUPREME COURT COUNTY OF CLINTON

LINA CIANCIULLO-BIRCH and THOMAS P. BIRCH,

Plaintiffs,

-v-

CHAMPLAIN CENTRE NORTH LLC,
THE PYRAMID MANAGEMENT GROUP, LLC,
DICK'S SPORTING GOODS, INC. and
UGL SERVICES UNICCO OPERATIONS CO.,

Defendants.

CHAMPLAIN CENTRE NORTH, LLC,

Third-Party Plaintiff,

-v-

ROBERT TRIPP d/b/a R. TRIPP TRUCKING
& EXCAVATING,

Third-Party Defendant.

DECISION AND ORDER

Index No. 2012-1583
RJI No. 09-1-2013-0768

LaFave, Wein & Frament, PLLC, Guilderland (*Paul H. Wein* of counsel), for plaintiffs.

Corrigan, McCoy & Bush, PLLC, Rensselaer (*Scott W. Bush* of counsel), for defendant UGL Services UNICCO Operations Co.

Goldberg Segalla, LLP, Syracuse (*Kevin P. Ryan* of counsel), for defendants Champlain Centre North, LLC, Pyramid Management Group and Dick's Sporting Goods, Inc. and third-party plaintiff, Champlain Centre North, LLC.

Hancock Estabrook, LLP, Syracuse (*Maureen E. Maney* of counsel), for third-party defendant Robert Tripp d/b/a R. Tripp Trucking & Excavating.

ROBERT J. MULLER, J.S.C.

This action arises out of an incident that occurred on March 27, 2011 at the Champlain Centre North Mall in Plattsburgh, New York [hereinafter Mall]. The Plaintiff, Lina

Cianciullo-Birch, went to Dick's Sporting Goods [hereinafter Dick's] to purchase a soccer ball and, after exiting the store with the intention of returning to her nearby parked car, she crossed a sidewalk and stepped off of the curb, adjacent to the Mall's entranceway, and onto the road. In the process she stepped onto some small debris consisting of sand and small rocks and, or, small pieces of ice. The plaintiff has also testified that she failed to see that there was a step as she proceeded.

In distilling what appear to be boilerplate generalizations from the bill of particulars the liability against all save UGL Services UNICCO Operations Co. (hereinafter UGL) is described therein as a failure to clear the area of debris related to the presence of parking lot sand and salt attendant to snow and ice maintenance issues - and a quite distinct theory that the area was rendered dangerous and defective due to a failure to mark and, or, paint pedestrian ramps. Essentially it is claimed that the curb was not properly marked or painted and, or, there was sand on the roadway/parking area into which plaintiff stepped causing her to injure her foot. UGL is the entity with whom the Mall contracted for maintenance services which did not include snow and ice removal. The Court cannot tell if a bill of particulars was demanded by UGL but suffice it to say that the papers on the motion do not include one.

UGL was to sweep the parking areas and the roadways everyday and to remove sand. Dick's is a Mall tenant and the Mall is the landowner. There is a note of issue filed together with motions on behalf of Robert Tripp d/b/a R. Tripp Trucking & Excavating, [hereinafter Tripp] and the Mall, to strike it and extend discovery which includes compelling plaintiff to furnish authorizations for mental health providers. There is a cross motion on behalf of the plaintiffs seeking a protective order concerning the mental health records. There is a second motion on

behalf of Tripp seeking summary judgment in the third party action as well as a first motion on behalf of UGL seeking the same relief in the direct action. Only the summary judgment motions are considered herein.

UGL Motion

In order to prove a negligence action the plaintiff must show that: (1) the defendant owed the plaintiff a duty of care; (2) the defendant breached that duty of care, (3) and the breach proximately caused damages to the plaintiff (see *Turcotte v Fell*, 68 NY2d 432, 438 [1986]; *Evarts y Pyro Eng'g, Inc*., 117 AD3d 1 148, 1150 [3d Dept 2014]; *Ortega v Liberty Holdings, LLC*, 111 AD3d 904, 906 [3d Dept 2013]; *Merchants Mut. Ins. Co. v Quality Signs of Middletown*, 110 AD3d 1042, 1043 [3d Dept 2013]).

"'The existence and scope of [the] alleged tortfeasor's duty is, in the first instance, a legal question for determination by the court'" (*Evarts v Pyro Eng'g, Inc*., 117 AD3d at 1150, quoting *Di Ponzio v Riordan*, 89 NY2d 578, 583 [1997] [citations omitted]). "In analyzing questions regarding the scope of an individual actor's duty, the courts look to whether the relationship of the parties is such as to give rise to a duty of care, whether . . . plaintiff was within the zone of foreseeable harm and whether the accident was within the reasonably foreseeable risks" (*Di Ponzio v Riordan*, 89 NY2d at 582 [citations omitted]; see *Espinal v Melville Snow Contrs*., 98 NY2d 136, 138 [2002]; *Palka v ServiceMaster Mgmt. Servs. Corp*., 83 NY2d 579, 585 [1994]; *Kemper v Arnow*, 18 AD3d 939, 940-941 [2005]; see also *Dance Magic, Inc. v Pike Realty, Inc*., 85 AD3d 1083, 1088-1089 [2011]).

The "contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*Espinal v Melville Snow Contrs*., 98 NY2d at 138; see *Eaves Brooks*

Costume Co. v Y.B.H. Realty Corp., 76 NY2d 220, 226 [1990]). To the contrary, such a contractual obligation "'will impose a duty only in favor of the promisee and intended third-party beneficiaries'" (*Espinal v Melville Snow Contrs*., 98 NY2d at 140, quoting *Eaves Brooks Costume Co. v Y.B.H. Realty Corp.*, 76 NY2d at 226). The oft repeated rule is that contracts, independently, do not create a duty to exercise reasonable care (see *Espinal v Melville Snow Contrs*., 98 NY2d at 138; *Belmonte v Guilderland Assoc., LLC*, 112 AD3d 1128, 1129 [2013]; *Baker v Buckpitt*, 99 AD3d 1097, 1098 [2012]; *Gibson v Dynaserv Indus., Inc*., 88 AD3d 1135, 1135 [2011]; *Phillips v Young Men's Christian Assn*., 215 AD2d 825, 826 [1995]; see also *DeCanio v Principal Bldg. Servs. Inc*., 115 AD3d 579, 579 [2014]; *Roach v AVR Realty Co., LLC*, 41 AD3d 821, 823 [2007]; *McConologue v Summer St. Stamford Corp*., 16 AD3d 468, 469 [2005]).

There are exceptions to this rule and *Espinal v Melville Snow Contrs*. (supra) instructs of three situations upon which it may be concluded that a party who enters into a contract to render services may be said to have assumed the 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, 'launche[s] 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" (id. at 140, quoting *Moch Co. v Rensselaer Water Co.*, 247 NY 160, 168 [1928]; see *Church v Callanan Indus.*, 99 NY2d 104, 111 [2002]; *Palka v Servicemaster Mgt. Servs. Corp*., 83 NY2d 579, 589 [1994]; *Eaves Brooks Costume Co. v Y.B.H. Realty Corp*., 76 NY2d at 226; *Baker v Buckpitt*, 99 AD3d at 1098; *Gibson v Dynaserv Indus., Inc*., 88 AD3d at 1135; *Phillips v*

Young Men's Christian Assn., 215 AD2d at 826).

Taking this analysis incrementally the plaintiff is not a contracting party and thus defendant only owes a duty to the plaintiff if one of the *Espinal* exceptions applies. First is whether the defendant "launched a force or instrument of harm" or worsened the conditions of the parking lot. In order to succeed here plaintiff must present evidence that defendant 'left the premises in a more dangerous condition than [it] found them' or, launched a force or instrument of harm that caused her to fall and be injured" (*Gibson v Dynaserv Indus., Inc*., 88 AD3d at 1136, quoting *Foster v Herbert Slepoy Corp*., 76 AD3d 210, 215 [2010]; see *Church v Callanan Indus*., 99 NY2d at 111; *Moch Co. v Rensselaer Water Co.*, 247 NY at 168). Mostly, the plaintiffs' generic negligence allegations in the complaint are that UGL designed, constructed, operated, and maintained the premises. As already noted there is no bill of particulars pertaining to UGL which amplifies these allegations. Nevertheless, plaintiffs do not in any fashion address the "launch[ing of] a force or instrument of harm" or "leaving the premises in a more dangerous condition than [it] found them" in opposing this motion. Quite simply the plaintiffs' conclusory allegations, without more, are insufficient to create a triable issue of material fact as to whether UGL made the premises more dangerous or launched an instrument of harm relating to the conditions complained of. (*Baker v Buckpitt*, 99 AD3d at 1100; see also *Abbattista v King's Grant Master Assn., Inc*., 39 AD3d 439, 441 [2007]; *Zabbia v Westwood, LLC*, 18 AD3d 542, 544-545 [2005]).

Next, secondly, is to consider whether plaintiffs detrimentally relied upon UGL's continued performance of the contract. "To limit an open-ended range of tort liability arising out of contractual breaches, injured non-contracting parties must show that the 'performance of

contractual obligation [between others] has induced detrimental reliance [by them] on continued performance and inaction would result not 'merely in withholding a benefit, but positively or actively in working an injury" (*Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d at 587 [citations and internal quotation marks omitted]). "The nexus for a tort relationship between the defendant's contractual obligation and the injured non-contracting plaintiff's reliance and injury must be direct and demonstrable, not incidental or merely collateral" (id, citing *Strauss v Belle Realty Co.*, 65 NY2d 399, 404 [(1985]; *White v Guarente*, 43 NY2d 356, 361 [1977]; *Ultramares Corp. v Touche*, 255 NY 170, 182-85 [1931]). This rule has not evolved in a vacuum. "[T]he boundaries of duty are not simply contracted or expanded by the notion of foreseeability, for if it were, [e]veryone making a promise having the quality of a contract will be under a duty to the promisee by virtue of the promise, but under another duty, apart from contract, to an infinite number of potential beneficiaries when performance has begun'" (*Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d at 586, quoting *Moch Co. v Rensselaer Water Co.*, 247 NY at 168; see *Beck v FMC Corp*., 42 NY2d 1027, 1028 [1977]; *Tobin v Grossman*, 24 NY2d 609, 616-617 [1969]).

The plaintiffs' submissions in opposition to this motion offer nothing to establish the plaintiffs' reliance on UGL.

The final issue left in this *Espinal v Melville Snow Contrs*. (supra) discussion is whether UGL displaced the Mall's own duty to maintain these premises in a reasonably safe manner. "While plaintiff is not bound by the provisions or a contract to which it is not a party, the limited scope of defendants' undertaking is nonetheless relevant in determining whether a tort duty to others should arise from their performance of the contractual obligations" (*Eaves Brooks*

Costume Co. v Y.B.H. Realty Corp., 76 NY2d at 227; see *Palka v Servicemaster Mgt. Servs. Corp*., 83 NY2d at 588). The scope of UGL's contractual responsibility was to maintain and operate a Mall owned lot sweeper at least daily for sweeping and removal of all sand, litter and debris from the property including hand sweeping the parking lots, drive aisles, ring roads, loading areas, and corners the sweepers could not reach. The services described in the contract as 'all the cleaning, clean up and general cleaning maintenance of the [Mall]... including handpicking areas where mechanical and manual sweeping was not practical" are comprehensive enough under *Espinal* to establish UGL owed a duty of care to the plaintiffs.

In seeking summary judgment defendant carries the initial burden 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" (*Winegrad v New York Univ. Med. Ctr*., 64 NY2d 851, 853 [1985]). To that end, UGL has twice succeeded in a motion where not all, but any of three strikes were required. Here, the defendant's own submissions, however, establish UGL entirely displaced the Mall's own duty to keep the premises maintained in a reasonably safe manner. Only a myopic reading of *Espinal* and its close relatives would allow the existence of a separate snow removal contact with a third party to undo this reasoning.

The motion for summary judgment on behalf of UGL is denied.

Tripp Motion

The Mall has commenced a third-party action against Tripp with whom the former had contracted for snow plowing and this third party defendant now seeks summary judgment against the Mall. In this action the Mall's theories are embedded in a cause of action for 1) CPLR Article 14 contribution, 2) common law indemnification, 3) contractual indemnification, and 4)

breach of contract relating to a failure to procure liability insurance.

The affairs between these parties are governed by a snow removal agreement upon which Tripp was required to remove and clean up any salt or sand mix left in the salt and sand stockpile outside the outer ring road before their equipment was removed from the Mall. The records on the motion demonstrate that each contracting party considered the responsibility of parking lot sand and debris removal extended - not to the overall parking lot - but only toward salt and sand stockpiles which were not in the area of the plaintiff's incident. This interpretation of the Mall/Tripp contract is reinforced by the mall having hired another contractor - UGL - to remove any sand and debris elsewhere in the parking lot other than the stockpile of sand/salt.

As already observed, UGL's contractual responsibility was to maintain and operate a Mall owned lot sweeper at least daily for sweeping and removal of all sand, litter and debris from the property including hand sweeping the parking lots, drive aisles, ring roads, loading areas, and corners the sweepers could not reach. These comprehensive services included handpicking areas where mechanical and manual sweeping was not practical.

Since Article 14 contribution is the first cause of action the question at the forefront of this inquiry is to take note of the facts supporting the complaint's allegations of negligence which are essentially Tripp's failure to properly perform the services outlined in its contract. Assuming arguendo that the cause of plaintiff's injuries were directly related to Tripp's deposit of salt and sand - or perhaps even other debris left behind in the course of snow removal - the Court is challenged to identify any negligence of Tripp in light of the terms of that contract - examined under the brighter lights of the UGL contract. The movant correctly argues that the parameters of the contract's terms establish the extent of its duties and viewing the evidence in

the light most favorable to plaintiff, as well as the other nonmoving parties (see *Hartford Insurance Company v. General Accident*, 177 AD2d 1046 [1991]; *Minkler v. United Parcel*, 132 A.D.3d 1186 [2015]; *Cicci v. Chemung County*, 122 A.D.3d 1181, 1183, [2014], lv. dismissed and denied 25 N.Y.3d 1062, 11 N.Y.S.3d 546, [2015]) summary judgment in Tripp's favor is appropriate on this first cause of action. UGL's contract actually eliminates the Mall's potential for contribution from Tripp.

Common law indemnification is the Mall's next cause of action. This type of indemnification is an equitable remedy that avoids unfairness by shifting losses arising from an obligor's discharge of a joint duty when failure to do so would result in unjust enrichment (see *McCarthy v. Turner Constr., Inc*., 17 N.Y.3d 369, 374–375, [2011]) This implied obligation "may arise from contractual relations or from the status of the parties as a matter of law...." (*Sea Ins. Co. v. U.S. Fire Ins. Co.*, 71 A.D.2d 51, 53–54, [1979], lv. denied 49 N.Y.2d 702, [1980] The foregoing discussion, however, has already found a separate duty imposed by contract upon UGL, leaving no basis for a cause of action in common-law indemnification against this third party defendant. This analysis includes considerations of precisely that which the Tripp contract required - snow removal in areas which excluded sidewalks, walkways and exterior stairwells. Tripp is entitled to summary judgment on this second cause of action.

Concerning the presence of a third cause of action for contractual indemnification the snow removal agreement contains an indemnification provision which requires some scrutiny. Section 14 of the agreement entitled "Indemnification" provides, in relevant part:

> (a) Subject to the terms of this indemnification paragraph as set forth in subsection (a) above and in addition to and not in limitation of any other indemnification provision contained in this Agreement, the Contractor [Tripp] agrees that the Contractor shall indemnify, defend and hold harmless the Owner

> [Mall], and the Other Indemnities from and against and any all damages, claims, liabilities, losses, costs and expenses, including reasonable attorneys and consultant fees, asserted or incurred against or by the Owner or the Other Indemnities from the date of this Agreement arising out of, attributable to, or incurred with respect to any accident, injury or damage whatsoever caused to any person or property arising, directly or indirectly and whether by an act or an omission, out of the Contractor's or any of the Contractor's employees, agents, subcontractors, suppliers or materialmen (the "Contractor's Agents") performing the Services or otherwise acting in connection with the Terms and Conditions, or arising directly or indirectly, out of the Contractor or the Contractor's Agents being on and in or using the Shopping Center.

Notably the indemnification does not - and cannot - require Tripp to indemnify the Mall for either the Mall's own negligence or that of a third party such as UGL. Tripp is entitled to summary judgment on this third cause of action.

Lastly, the Mall's final cause of action is a claim for breach of contract for the alleged failure to procure insurance naming the Mall as an additional insured. It is well established that the agreement to purchase insurance coverage is clearly distinct from and treated differently from the agreement to indemnify (see, *Kinney v. G.W. Lisk Co.*, 76 N.Y.2d 215, 557 N.Y.S.2d 283, 556 N.E.2d 1090; *Mathew v. William L. Crow Constr. Co.*, 220 A.D.2d 490, 632 N.Y.S.2d 181) and Tripp's tacit admission that it did not purchase the insurance required under its contract renders it responsible for all "resulting damages, including liability to [the third-party] plaintiff" (see, *Kinney v. Lisk Co.*, supra, at 219, 557 N.Y.S.2d 283, 556 N.E.2d 1090; *Mathew v. Crow Constr. Co*, supra; *DiMuro v. Town of Babylon*, 210 A.D.2d 373, 620 N.Y.S.2d 114; *Roblee v. Corning Community Coll.*, 134 A.D.2d 803, 805, 521 N.Y.S.2d 861). In line with this logic, a factual determination as to whose negligence, if anyone's, caused plaintiff's injuries is not required to award damages for breach of an insurance procurement clause since the clause is entirely independent of the contract's indemnification provisions. *Spector v. Cushman &*

Wakefield, Inc., 100 A.D.3d 575, (1st Dep't 2012).

Tripp relies upon the equitable doctrine of estoppel to relieve it of this obligation asserting that comments made by Mall agents induced it to believe the Mall procured insurance elsewhere. The Court is not persuaded that this theory is adequate enough, mindful of the standards upon which summary judgment should be granted, to apply it here. Whether estoppel applies in a particular case is ordinarily - as it is here - a question of fact for trial. (*Agress v. Clarkstown Cent. School Dist*., 69 A.D.3d 769 (2d Dep't 2010); *Schutz-Prepscius v. Incorporated Village of Port Jefferson,* 51 A.D.3d 657 (2d Dep't 2008); *Renda v. Frazer*, 100 Misc. 2d 511, (Sup 1979), order aff'd, 75 A.D.2d 490, (4th Dep't 1980). Third party plaintiff's fourth cause of action - concerning the procurement clause - is denied.

The last controversies to address are the motions of all defendants and the third party defendant to strike the note of issue, compel production of mental health records, and extend discovery. This is juxtaposed with plaintiffs' cross motion for a protective order. The genesis of this dispute is traceable to an entry in a bill of particulars that plaintiff's damages include exacerbation of pre-existing anxiety, and, or depression, weight gain and loss of enjoyment of life. The inclusion of these damages spawned defense demands for access to records and in the course of conferencing on this issue - pre and post motion - plaintiffs' counsel reported they intended to withdraw claims for "mental injuries."

The Notices of Motion each dated February 17, 2015 and the Notice of Cross Motion dated March 12, 2015 are hereby scheduled for oral argument on **March 25, 2016 at 11:00 A.M.** at the Warren County Courthouse in Lake George, NY. Plaintiffs' counsel is to directed to immediately furnish the amended bill of particulars which was requested by this Court in its

correspondence of September 24, 2015.

The within constitutes the Decision and Order of this Court.

Therefore, having considered the Affirmation of Maureen E. Maney, Esq. with Exhibits "A" through "M" attached thereto, dated June 29, 2015, submitted in support of the motion together with a Memorandum of Law dated June 29, 2015, Affidavit of Scott W. Bush, Esq., sworn to June 30, 2015 with Exhibits "1" through "8" and a Memorandum of Law dated June 30, 2015 in support of the motion, the opposing Affirmation of Paul H. Wein, Esq., dated July 28, 2015 with reference to the summary judgment motion of UGL, the opposing Affirmation of Paul H. Wein, Esq., dated July 28, 2015 with reference to the summary judgment motion of Tripp, the Reply Affirmation of Kevin P. Ryan, Esq., dated August 14, 2015, and the Reply Affirmation of Maureen E. Maney dated August 18, 2015 it is hereby

ORDERED that defendant UGL's motion for summary judgment is denied in its entirety, and it is further

ORDERED that the motion for summary judgment on behalf of third-party defendant Tripp is granted with respect to the first, second, and third causes of action, and is otherwise denied, and it is further

ORDERED the Notices of Motion each dated February 17, 2015 and the Notice of Cross Motion dated March 12, 2015 are hereby scheduled for oral argument on **March 25, 2016 at 11:00 A.M.** at the Warren County Courthouse in Lake George, NY and it is further

ORDERED that plaintiffs' counsel shall immediately furnish the amended bill of particulars which was requested by this Court in its correspondence of September 24, 2015.

The original of this Decision and Order has been filed by the Court together with the

Notices of Motion dated June 29, 2015 and June 30, 2015 and the submissions enumerated above. Counsel for Champlain Centre North Mall is hereby directed to promptly obtain a filed copy of the Decision and Order for service with notice of entry upon all parties in accordance with CPLR§ 5513.

Dated: February 22, 2016
Lake George, New York

ENTER:

ROBERT J. MULLER, J.S.C.