To commence the statutory time period
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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS
---X
MELISSA GORSKI,

Plaintiff,

DECISION & ORDER

-against-

Index No.: 2024-51906
Motion Seq.: 1-2

NEVILLE COMPANIES, INC., MARTIN'S FOODS OF SOUTH BURLINGTON, LLC, HANNAFORD BROS. CO., LLC, and BOB'S YEAR ROUND SERVICE INC.,

Defendants.
---X
ACKER, J.

The papers filed electronically as NYSCEF Docs. 85-168 were read on (1) this Notice of Motion by defendants Neville Companies, Inc., Martin's Foods of South Burlington LLC, and Hannaford Bros. Co. LLC, for an Order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint and all cross claims against them (Sequence #1); and (2) this Notice of Motion by defendant Bob's Year Round Service, Inc. for an Order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint and all cross claims against it or, in the alternative, summary judgment on its cross claims (Sequence #2).

Upon the foregoing papers, the motions are consolidated for purposes of decision and are determined as follows.

In this premises liability action arising from a slip and fall in a supermarket parking lot, defendants show that they breached no duty to plaintiff given weather experts' consensus that any black ice on which plaintiff slipped developed too soon before her fall to accord constructive notice. Two defendants also show that they were plaintiff's employer or its corporate alter ego, and thus plaintiff's workers' compensation claim barred this action against them. As such, and for the further reasons described below, all plaintiff's claims and defendants' cross claims must be dismissed.

Background

Plaintiff Melissa Gorski's amended complaint alleges that she sustained personal injuries at approximately 8:00 p.m. on February 13, 2024, when she slipped and fell in the parking lot of the Hannaford supermarket where she worked at 162 Route 22 in Pawling, New York. Property manager Neville Companies, Inc. ("Neville"), premises lessee and supermarket operator Martin's Foods of South Burlington LLC, and its corporate parent Hannaford Bros. Co. LLC (together, "Hannaford"), jointly answered with general denials and affirmative defenses, principally including the Workers' Compensation Law bar to recovery because plaintiff filed a successful workers' compensation claim arising from this incident. Neville and Hannaford also asserted cross claims against snow-removal contractor Bob's Year Round Service, Inc. ("Bob's") for common-law and contractual indemnity. Bob's answer asserts denials and affirmative defenses including lack of duty to plaintiff and lack of actual or constructive notice, along with a cross claim against Neville and Hannaford for common-law indemnification.

Timely after plaintiff filed the Note of Issue, Bob's now moves for summary judgment dismissing the complaint and the cross claims against it or, in the alternative, for summary judgment on its cross claim against Neville and Hannaford (Motion #1); Neville and Hannaford move for summary judgment dismissing the complaint and Bob's cross claim (Motion #2).

As relevant here, before the Court are Notices to Admit attaching and authenticating the snow-removal contract (NYSCEF 91-92); Hannaford's surveillance video of the incident (NYSCEF 96); plaintiff's Hannaford time sheets (NYSCEF 99); Bob's work log for the accident date (NYSCEF 100); the property management agreement (NYSCEF 106); deposition transcripts of plaintiff (NYSCEF 93), Bob's owner Robert Brill (NYSCEF 98), Hannaford's local evening manager Ryan Donovan (NYSCEF 101), Neville's property manager Coty Fitzgerald (NYSCEF 102), and Neville president and owner Geoffrey Grab (NYSCEF 105); and affidavits from Bob's weather experts John Lombardo and Alex Bielfeld jointly (NYSCEF 107), Brill (NYSCEF 119), Hannaford corporate operations director Mary Kramer (NYSCEF 129), plaintiff weather expert Mark Kramer (NYSCEF 146),[1] and again from Lombardo and Bielfeld in reply to meteorologist

[1] There is no evidence that Hannaford operations manager Mary Kramer and plaintiff's weather expert Mark Kramer are related.

Mark Kramer (NYSCEF 161); plaintiff's Workers' Compensation Board ("WCB") benefit application (NYSCEF 166), and the WCB decision awarding benefits (NYSCEF 151).

Hannaford's surveillance video clip shows plaintiff walking across the parking lot, which had a visually clear road surface except immediately around her parked vehicle, then sweeping snow or ice from one side of her vehicle. The video next shows plaintiff, with the vehicle's headlights on, walking around the front of her vehicle and falling in front of her vehicle.

Plaintiff testified that she had driven to her worksite during a snowfall that morning (*see* Pl Tr, at 33, 107); parked in the lot that Hannaford shares with other businesses (*see id.*, at 29); worked her 11-hour shift as a Hannaford pharmacist; and then left the building for her parked car. Plaintiff continued that en route to her car, she encountered no snow or ice in the parking lot (*see id.*, at 113) until she reached her car (*see id.*, at 116); she then took an ice scraper from the car's backseat and "started cleaning the front windshield of the car. Then I went to walk around to the other side of the car, didn't see black ice, and then went flying" (*id.*, at 37; *see id.*, at 118-119). Plaintiff clarified that at her car, there "wasn't black ice" on the ground where she fell but rather snow (*id.*, at 38), and that she had brushed "ice" off her car (*id.*). Plaintiff nevertheless believed that she fell on black ice (*see id.*, at 113) but could not see it (*see id.*, at 50). Plaintiff confirmed that she had not complained about lot conditions that day, and was unaware if anyone had (*see id.*, at 52, 112-113). She also stated that she had never heard of Bob's (*id.*, at 109, 144).

By Decision filed on April 30, 2025, the WCB approved plaintiff's application for workers' compensation benefits held that plaintiff sustained "work related injur[ies]" including a traumatic brain injury and various orthopedic injuries (WCB Decision, at 1). Below its half-page decision are listed plaintiff's name, case number, accident date, workers' insurance policy number and case identification number, as well as plaintiff's "[e]mployer" and "[c]arrier." The latter are listed as "Delhaize America LLC."

The affirmation of Hannaford operations manager Mary Kramer attests that at all relevant times plaintiff was an employee of Martin's Foods of South Burlington LLC, a d/b/a name for and wholly owned subsidiary of Hannaford Bros. Co., itself a wholly owned subsidiary of Ahold Delhaize USA LLC that had a pre-incident name change to Ahold Delhaize USA Services LLC by merger with nonparty Retail Business Services, LLC (*see* M. Kramer Aff, at ¶¶ 4, 9). She attests that all three entities – Martin's Foods of South Burlington LLC; Hannaford Bros. Co.

LLC; and Ahold Delhaize USA Services LLC – are jointly covered under the same general liability and workers' compensation insurance policies (*see id.*, at ¶ 13). According to Kramer, Martin's Foods of South Burlington LLC acquired the subject property in 2013 by merger with a related entity, Martin's Foods of South Burlington, Inc. (*see id.*, at ¶ 5). She continues that Martin's Foods of South Burlington LLC and Hannaford Bros. Co. LLC have the common purpose to operate grocery stores including the subject Hannaford location; that they maintain the same office and have identical corporate directors (*see id.*, at ¶¶ 10-11); and that New York employees of Martin's Foods of South Burlington LLC are serviced by Hannaford's human resources department and receive their payroll, benefits training and evaluation via Hannaford (*see id.*, at ¶ 12).

Party Arguments

Bob's argues that its snow-removal contract for the lot, and Bob's performance of the contract, generated no duty to plaintiff under *Espinal v Melville Snow Contrs., Inc.* (98 NY2d 136 [2000]) and *Palka v ServiceMaster Mgt. Servs. Corp.* (83 NY2d 579 [1994]), and that *Nesbitt v Advanced Serv. Solutions* (224 AD3d 841 [2d Dept 2024]) requires Bob's to prove nothing further because the amended complaint alleges no facts that could establish any *Espinal* exception. In any event, Bob's points to the contract, the deposition testimony of plaintiff and Donovan, and Bob's weather experts to show that none of the three *Espinal* exceptions apply. The exception for "comprehensive and exclusive" third-party property maintenance that entirely displaces the owner's duty of care (*Espinal*, 98 NY2d at 141, *quoting Palka*, 83 NY2d at 584) does not apply, Bob's argues, based on the contract's plain language restricting certain of Bob's services and imposing preapproval duties on Hannaford,[2] and on Donovan's testimony that he kept bags of ice and snow at the store door, on the sidewalk, and at the parking lot for Hannaford employees to use as needed (*see* Donovan Tr, at 66). The *Espinal* exception for a plaintiff's detrimental reliance on performance of the snow-removal contract (*see Espinal*, 98 NY2d at 141)

[2] The contract provides, in relevant part, that Bob's must perform services "at the onset of accumulating snow or ice conditions on the property" (Contract [NYSCEF 66], Exh A, at 1); "snow will be piled, dumped or staged in areas designated by the Property Manager" (*id.*); and "snow hauling or relocation is only to be performed upon the authorization of the Property Manager... The anchor store manager must approve the cost of the work to the Property Manager. NO EXCEPTIONS" (*id.*).

does not apply, Bob's argues, because plaintiff's complaint did not allege it and, in any event, plaintiff testified that she knew nothing of Bob's and did not complain to Bob's about lot conditions before her fall. The final *Espinal* exception, for "launch[ing] a force or instrument of harm" by negligently creating or exacerbating a dangerous condition (*Espinal*, 98 NY2d at 141-142, *quoting H.R. Moch Co., Inc. v Rensselaer Water Co.*, 247 NY 160, 168 [1928]) cannot apply, Bob's argues, for two reasons. First, "by merely plowing the snow, [a snow-plowing entity] cannot be said to have created or exacerbated a dangerous condition" (*Espinal*, 98 NY2d at 142). Second, Bob's points to the Lombardo-Bielfeld affidavit attesting that there was no snow or ice at the subject location until the day of plaintiff's fall, during which 9.4" of snow fell and then temperatures rose above freezing until 7:05 p.m., just one hour before plaintiff's fall (*see* Lombardo-Bielfeld Aff, at ¶ 40). Lombardo and Bielfeld thus conclude that the ground had been wet and refroze during the hour just prior to plaintiff's fall. As such, arguably Bob's had no reasonable opportunity – and thus no duty – to remedy that black-ice condition around plaintiff's car before she fell. Bob's continues that even if it did owe plaintiff a duty of care, Bob's had no actual or constructive notice of any black-ice condition and therefore did not breach any such duty. As proof, Bob's points to the Lombardo-Bielfeld affidavit that any black ice had formed only within the hour before plaintiff's fall, and also to plaintiff's testimony that she did not complain about lot conditions before her fall.

As to the Neville-Hannaford cross complaint, Bob's argues that the contractual indemnity claim does not lie because Bob's contracted not with any of the co-defendants but with nonparty Retail Business Services LLC, whose mere "agent" for this purpose was defendant Neville (*see* Contract, at 1). The contract, Bob's argues, does not define the "Owner" or "Owner's partners" that the contract entitles to indemnification (*see id.*, at ¶ 5). Bob's also points to Neville owner Brill's testimony that Neville prepared the contract (*see* Brill Aff, at ¶ 4), any argues that any ambiguity therefore must be construed against Neville.

Even as to Neville, Bob's argues that no liability lies because it did not negligently perform the contract. For this proposition, Bob's offers Brill's affidavit authenticating Bob's work records showing that Bob's pre-salted the lot at 1:30 a.m. on the morning of the accident, before the snow began, and plowed and salted periodically from 3:30 a.m. through 4:00 p.m. when the snow had stopped (*see* Brill Aff, at ¶ 8; Bob's Time Sheets [NYSCEF 99], at 1-3).

Bob's also offers Brill's affidavit which attested that Bob's does not and cannot plow between closely parked cars, and the contract does not require Bob's to "shovel snow from around, beneath or between parked vehicles, or to apply salt around, beneath or between parked vehicles. The [c]ontract, by its express terms, provides… that Bob's *plow* the roadways and parking field and that Bob's *shovel* the walks, doorways, ramps, dumpster enclosures, pathway to propane tank storage and generators, steps, loading docks, mailboxes and hydrants" (*id.*, at ¶ 13 [emphasis original], *citing* Contract, Appx A). Brill further attests that it was "impossible for Bob's to plow within and around [plaintiff's] parking space" … and "salt from the salt spreaders attached to the rear of the plow trucks would not reach the area within that parking space or beneath the plaintiff's parked vehicle" (*id.*, at ¶ 14). From his 20 years of experience, Brill opines that it also would have been impossible for Bob's to push snow or ice to the area around plaintiff's car (*see id.*, at ¶ 16), and that the visual depictions of the lot's otherwise bare concrete at and after the time of the incident show that "where there was sufficient space to plow snow from and apply salt to the parking spaces within the parking lot throughout the day, Bob's did so" (*id.*, at ¶ 17). Brill continues that at no time did anyone request additional salt applications, which could not have been at Bob's discretion because the contract requires the anchor store manager to pre-approve that cost (*see id.*, at ¶ 19). From the foregoing, Bob's concludes that it was not negligent and that plaintiff's accident was not proximately caused by any Bob's act or omission, and thus there is no basis for the Neville-Hannaford cross claims.

Neville and Hannaford argue that plaintiff cannot recover from them because the WCB, in approving plaintiff's WCB claim, held that plaintiff sustained her injuries on the job and in the course of her job duties, thus triggering the WCL §§ 11(1) and 29(b) exclusivity bar against also recovering judicially from her employer and its alter-ego entities. They continue that, even if this action could survive this bar, they had no actual or constructive notice of any dangerous lot condition. As to actual notice, they point to plaintiff's deposition testimony that she did not complain to them about lot conditions before her fall and had no awareness if anyone else did (*see* Pl Tr, at 52**)**, Donovan's corresponding testimony that he did not recall if Hannaford received any such complaint (*see* Donovan Tr, at 49-50, 110, 114-115), and Fitzgerald's testimony that Neville received no such complaint or notice of any prior slip-and-fall incident (*see* Fitzgerald Tr, at 43-44, 90-91). As to constructive notice, Neville and Hannaford argue that black ice is not visible or apparent as a matter of law (*see Elassad v Nastasi*, 165 AD3d 1040, 1040-1041 [2d Dept 2018]; *Hall v Staples the Off. Superstore E., Inc.*, 135 AD3d 706, 706-707 [2d Dept 2016]; *Carricato v Jefferson Valley Mall L.P.*, 299 AD2d 444 [2d Dept 2002]); and that plaintiff testified she did not know how long the black ice was present and she herself could not see it before her fall.

In the alternative, Neville and Hannaford argue that they are entitled to judgment on their cross claims against Bob's for common law and contractual indemnification based on *Espinal* exceptions for duty displacement and affirmative launching of an instrument of harm. The contract's defense and indemnification provisions apply, they argue, because they were the contract's direct and intended beneficiaries, and because the claim arose from Bob's service under the agreement – a lesser trigger than an affirmative finding of Bob's negligence under *Emerson v KPH Healthcare Servs., Inc.* (203 AD3d 1272 [3d Dept 2022]). They continue that they are entitled to common-law indemnification because there is no evidence of their negligence and, they argue, the contract entirely displaced their duty of care for the parking lot.

Bob's opposes the branch of the Neville-Hannaford motion, asserting – as before – that the contract did not entirely displace their duty of care under *Espinal* and there is no evidence that Bob's negligently created or contributed to any black-ice condition. Also as before, Bob's points to the contract's reservation to Hannaford of the duty to request additional salting and prior approval of costs, along with the various deposition transcripts confirming that Bob's received no such request or approval and, in any event, could not physically salt or plow between parked cars. Bob's also argues that Neville and Hannaford's reliance on *Emerson* is misplaced because in that case, unlike here, the snow-removal duty was pursuant to a "comprehensive and exclusive common area maintenance agreement" (Bob's Mem [NYSCEF 39], at 4).[3] As such, Bob's concludes, there is no common-law or contractual duty to defend or indemnify. Bob's also argues that Neville and Hannaford failed to establish prima facie that they lacked at least

[3] Bob's argument that the contract is not properly in evidence, and therefore Neville and Hannaford cannot carry their prima facie case on their cross claim, is without merit. Bob's itself submits plaintiff's second Notice to Admit annexing the contract (NYSCEF 91) along with Brill's response, sworn by Brill, admitting and authenticating the contract (NYSCEF 92). Brill's affirmation also incorporates the contract and points to its attachment elsewhere in the record (*see* Brill Aff, at ¶ 3), and Neville and Hannaford cite to those instruments. As such, the contract is properly in evidence for all purposes and Bob's cannot be heard to assert otherwise.

constructive notice, based on Fitzgerald's testimony that he performed only monthly inspections (*see* Fitzgerald Tr, at 16),[4] and in any event Bob's did not negligently perform the contract and thus cannot be charged with common-law or contractual indemnification.[5]

Plaintiff argues as to Bob's that all three *Espinal* exceptions apply, or at minimum that triable issues of fact exist as to their applicability. As to the detrimental-reliance exception, plaintiff asserts that the contract's "24/7" provision contemplated her as a contract beneficiary and Fitzgerald agreed during his deposition that snow removal was for the benefit of Hannaford employees such as plaintiff (*see* Fitzgerald Tr, at 37). As to the duty-displacement exception, plaintiff presses, Fitzgerald testified that Bob's was responsible for the lot "24/7," and Bob's did not prove when it was last at the premises and thus cannot show that it was non-negligent. As to the force-of-harm exception, plaintiff argues that Bob's cannot show that it did not negligently create or exacerbate the black ice on which plaintiff slipped. Plaintiff adduces meteorologist

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[4] Neville and Hannaford's retort that Bob's violated the contract by failing to take required photographs pre- and post-work is without merit. The contract does not require pre-work photographs but only post-work photographs (*see* Contract, Exh A, at 1), and Neville and Hannaford concede from Fitzgerald's testimony that he received Bob's post-work photographs by text from Brill (*see* Neville-Hannaford Mem [NYSCEF 130], at ¶ 45).

[5] Bob's further assertion that Hannaford spoliated the full surveillance video, and thus Neville and Hannaford should be precluded from arguing that Bob's negligently performed the contract, is without merit for numerous independent reasons. First, Bob's makes no application for spoliation sanctions. Second, even had Bob's done so, Bob's offers no basis to find that Hannaford destroyed the full video "with a culpable state of mind" whether negligent or intentional (*Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547 [2015], *quoting VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 45 [1st Dept 2012]). Third, absent a showing that any destruction was intentional or otherwise willful, any spoliation remedy would require Bob's to further show that the full video would have been relevant to its position on these motions (*see Pegasus Aviation*, 26 NY3d at 547 [internal citations omitted]). Bob's did not make that showing: Bob's states only its speculative contention that the full video would have shown non-negligent contract performance (*see* Bob's Opp Mem [NYSCEF 135]), at ¶ 17). In any event, Bob's also fails to show that the full video could have shown anything different from the video clip that already depicts clear pavement throughout the parking lot at the time of plaintiff's fall – leaving aside any invisible black ice – except for snow immediately adjacent to plaintiff's vehicle. Bob's argument also appears to ignore that plaintiff herself testified that she encountered no snow or ice in the parking lot until she reached her own vehicle (*see* Pl Tr., at 113, 116). As Bob's does not assert that the video would have shown that Bob's salted the black ice – indeed, Bob's argues that it had no constructive notice of it could have had none given its formation just immediately before plaintiff's fall – this record leaves this Court to find that the full video's evidentiary value would have been only cumulative in nature, and thus no preclusion or negative-inference remedy can lie (*cf. Delmur, Inc. v School Constr. Auth.*, 174 AD3d 784, 786 [2d Dept 2019]; *Samaroo v Bogopa Serv. Corp.*, 106 AD3d 713, 714 [2d Dept 2013]).

Kramer's affidavit which attests, based on meteorological records, that no snow or ice was present at the incident location prior to the day-of-accident storm, 9.4" of snow fell between 3:00 a.m. and 11:50 a.m., and melting-and-freezing processes caused new ice to form between approximately at 2:10 p.m. and 3:10 p.m. and then again between 5:05 p.m. and 7:05 p.m. (*see* Kramer Aff, at ¶ 35). Kramer continued that the local forecast office issued a special weather statement at 7:23 p.m. advising of potential black-ice formation (*see id.*, at ¶ 37), and that "[i]t is more likely than not that th[e] shiny area [immediately at plaintiff's car] is the ice that formed as snow that surrounded her car melted and refroze" (*id.*, at ¶ 40[g]). Finally, plaintiff argues that Bob's failure to offer post-work pictures bars a finding that Bob's did not create the icy condition on which plaintiff fell (*see Eisenberg v Town of Clarkstown*, 172 AD3d 683 [2d Dept 2019]).

As to Neville and Hannaford, plaintiff asserts that neither of them was her employer and therefore the WCL bar does not apply, or at minimum that there exist triable issues of fact as to her true employer's identity. For this proposition, plaintiff points to the WCB determination that listing below the decision that plaintiff's employer and insured for workers' compensation purposes was nonparty Delhaize America LLC. Plaintiff argues that this "finding" is entitled to collateral estoppel effect under WCL §§ 11(2) and 118-a. While plaintiff concedes that there was no actual notice, plaintiff argues that triable issues of fact exist as to constructive notice based on (1) Fitzgerald's testimony that he inspected the lot only monthly, (2) the ostensible conflict between the Neville-Hannaford position that the snow-removal contract entirely displaced their duty and Bob's position that it did not, and (3) based on *Eisenberg,* the lack of record basis for the lot's condition after Bob last removed snow from the premises and before plaintiff's fall (*see* Pl's Mem [NYSCEF 148], at 9).

Plaintiff also offers a reply Lombardo-Bielfeld affirmation attesting that meteorologist Kramer's affirmation is faulty because the latter relied on uncertified weather records, and did not consider reports from weather data-gathering locations more proximate to the incident site monitored by the Citizen Weather Observer Program or New York State Mesonet reports rather than the National Weather Service data on which Kramer primarily relied. Lombardo and Bielfeld attest that those more proximate sites were better representative of the parking lot wind and temperature conditions during the pivotal hours before plaintiff's accident (*see* Lombardo-Bielfeld Reply Aff, at 3). Nevertheless, Lombardo and Bielfeld continue to agree that after temperatures rose above freezing on the late afternoon of the incident, melting stopped by 5:05 p.m. and re-freezing occurred thereafter "up until only 55 to 61 minutes prior to the time of the incident" at approximately 8:00 p.m. (*id.*, at ¶ 11), at which time the temperature was "approximately 30 degrees Farenheit" (*id.*, at ¶ 7).

Bob's retorts on plaintiff's *Espinal* arguments that the detrimental reliance exception cannot lie because plaintiff was a nonparty to the contract, the contract was not specifically for her benefit, and plaintiff had no idea who Bob's was or what the contract entailed (*see e.g. Foster v Herbert Slepoy Corp.*, 76 AD3d 210, 215 [2d Dept 2010]; *Wheaton v E. End Commons Assocs., LLC*, 50 AD3d 675, 677 [2d Dept 2008]). Bob's continues that *Espinal*'s force of harm exception does not lie because plaintiff raised no issue of fact to rebut Bob's showing that it neither created the black-ice condition nor "left the premises in a more dangerous condition than [it] found them" (*Foster*, 76 AD3d at 215), and meteorologist Kramer's affirmation does not raise that issue of fact given his concurrence that there was no pre-storm ice or snow on the ground and plaintiff's testimony that she did know when the black ice formed. Plaintiff raises no triable issue of fact as to the *Espinal*'s duty-displacement exception, Bob's argues, based on the contract's plain language reserving performance pre-approval duties to Hannaford; Bob's presses that Fitzgerald's after-the-fact testimony about his understanding of the contract is irrelevant to what the contract actually requires. Bob's continues that Mary Kramer's affirmation attesting to the various business-entity relationships is inadmissible hearsay absent documentary proof, and thus Neville and Hannaford raise no triable issue of fact to defeat Bob's showing that Hannaford is not a party to the contract. As such, Bob's concludes, the Neville-Hannaford cross claims for defense and indemnification cannot lie.

Neville and Hannaford reply that plaintiff conceded "Hannaford" to be her employer in her WCB application, and even testified that she "ha[s] Workers' Comp through Hannaford" (Pl Tr, at 43), and that the WCB did not affirmatively find that Delhaize America LLC is plaintiff's employer. As such, they argue, the WCL § 11(1) claim-exclusivity requirement bars plaintiff's suit. They continue that plaintiff failed to raise a triable issue of fact that Neville or Hannaford created the black-ice condition or had constructive notice of it, and that plaintiff could not carry that burden given the invisibility of black ice and its formation just before plaintiff's fall. Meteorologist Mark Kramer's opinion that perhaps Bob's did not lay adequate salt around plaintiff's car (Mark Kramer Aff [NYSCEF 146], at ¶¶ 24, 26), they argue, is entirely speculative and beyond Kramer's competence. As to their cross claims against Bob's, Neville and Hannaford press that Bob's contract required ice treatment at all times and in all parts of the lot without limitation, Bob's therefore negligently performed the contract, and thus contractual indemnification lies because no party raised a triable issue of fact that Neville and Hannaford were negligent. Even had Bob's not negligently performed the contract, they add, the contract's defense requirement does not require a finding of liability against Bob's because the incident arose from Bob's performance of the contract.

Analysis

A CPLR 3212 summary judgment movant must tender evidentiary proof in admissible form sufficient to show that there remains no reasonably disputable triable issue of material fact such that judgment should be directed in its favor as a matter of law (*see Giuffrida v Citibank Corp.,* 100 NY2d 72 [2003], *citing Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Only upon the movant's sufficient prima facie showing does the burden shift to the respondent to rebut such showing (*see id.*; *compare Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the respondent then adduces record evidence or other materials that create any triable issue of material fact – giving the party adverse to the motion the benefit of every reasonable favorable inference – then summary judgment must be denied (*see id.*).

1. The Business Entities

The many implicated business entities occasion a need for upfront clarity about their relationships. This issue, in turn, has direct implications for the identity of plaintiff's employer and the legal construction and application of the snow-removal contract.

While the WCB decision lists plaintiff's employer and workers' compensation insurer as "Delhaize America LLC," Mary Kramer's unchallenged affirmation attested that Ahold Delhaize USA Services LLC held the operative workers' compensation policy that jointly covered Ahold Delhaize USA Services LLC, Hannaford Bros. Co. LLC and Martin's Foods of South Burlington LLC. Plaintiff does not argue to the contrary. As such, and given the total absence of record evidence or even a bald proposition that "Delhaize America LLC" is the correct name of any business entity relevant to this action, this Court construes the WCB's listing to mean Ahold Delhaize USA Services LLC. The Court notes that the WCB decision did not analyze this issue, but rather merely appended to the bottom of its decision a routine administrative listing of plaintiff's putative workers' compensation carrier and employer. While plaintiff is correct that a WCB *determination* as to a claimant's employer can be entitled to collateral estoppel effect under WCL § 118-a, there is nothing in this record to suggest that the WCB actually determined that issue. As such, the WCB decision is not entitled to preclusive effect on that issue here.

Even if the WCB decision's administrative listing somehow constituted a determination of that issue, preclusion still would not apply on this record for each of several independent procedural and substantive reasons. First, as with all potential applications of collateral estoppel, issue preclusion based on a WCB determination can lie only if the WCB "necessarily decided" the issue (*Auqui v Seven Thirty One Ltd. Partnership*, 22 NY3d 246, 255 [2013], *following Jeffreys v Griffin*, 1 NY3d 34, 39 [2003]), with necessity meaning that "the issue previously litigated was *necessary to support a valid and final judgment on the merits*" (*Conason v Megan Holding, LLC*, 25 NY3d 1, 17 [2015] [emphasis added]; *Williams v N.Y. City Tr. Auth.*, 171 AD3d 990, 991-992 [2d Dept 2019] [same]). "The party seeking the benefit of collateral estoppel bears the burden of proving that the identical issue was *necessarily* decided in the prior action *and is decisive of the present action*" (*Babad v Oratz*, 242 AD3d 807, 808 [2d Dept 2025] [emphasis added]; *Rosa v Triborough Bridge & Tunnel Auth.*, 218 AD3d 810, 194 NYS3d 68, 70 [2d Dept 2023] [same]).

Plaintiff fails to carry this burden and does not even address this standard of proof. In any event, the joint workers' compensation policy to which Mary Kramer attested stands squarely against a necessity finding: based on the workers' compensation policy and its joint coverage, it was irrelevant to the WCB decision granting plaintiff's benefits application whether her employer was Ahold Delhaize USA Services LLC, Hannaford Bros. Co. or Martin's Foods of South Burlington LLC. Accordingly, the identity of plaintiff's employer was not necessarily decided – or even necessarily litigated – in the WCB proceedings. Moreover, for reasons addressed further below, plaintiff fails to establish that WCL § 11(a) alter-ego principles do not cover all of those entities, and thus the ostensible employer-identity "determination" that plaintiff exhorts this Court to give preclusive effect is not "decisive of the present action."

Plaintiff's contrary suggestion is troubling given that plaintiff specifically attested to the WCB that "Hannaford" was her employer. In her 2024 WCB applications for benefits, plaintiff not once but four times lists her employer as "Hannaford" (Pl's WCB Application [NYSCEF 166] ["Hannaford"], at 1, 7 ["Hannaford Bros"], 9 ["Hannaford / Ahold Delhaize LLC"], 11 ["Hannaford"]). Plaintiff then "affirm[ed] that the information [she was] providing [was] true and accurate to the best of [her] knowledge and belief," on pain of criminal penalties (*see id.*, at 10). Plaintiff's current attorney of record even signed one of those instruments (*see id.*, at 11), and plaintiff plainly testified in this proceeding that her workers' compensation benefits come from "Hannaford." Thus, it strains credulity for plaintiff's counsel to suggest that the WCB made a contrary finding as to the identity of plaintiff's employer, with no analysis whatsoever to disagree with plaintiff's own attestation.

This Court also separately declines plaintiff's preclusion invitation in the exercise of judicial discretion. "Whether collateral estoppel should be applied in a particular case turns on 'general notions of fairness involving a practical inquiry into the realities of the litigation'" (*Auqui*, 22 NY3d at 255, *quoting Jeffreys*, 1 NY3d at 41; *Matter of Halyalkar v Bd. of Regents of State of N.Y.*, 72 NY2d 261, 268 [1988]). The overall "flexib[ility]" of collateral estoppel is even "more [so] in the context of the determinations of administrative agencies" such as the WCB (*see id.*, *quoting Jeffreys*, 1 NY3d at 40; *Allied Chem.*, 72 NY2d at 276). In the WCB's quasi-judicial context, courts consider "whether the procedures used in the administrative proceeding … were sufficient both quantitatively and qualitatively, so as to permit confidence that the facts asserted were adequately tested, and that the issue was fully aired'" (*id., quoting Jeffreys*, 1 NY3d at 40; *Allied Chem.*, 72 NY2d at 276-277). Plaintiff, however, offers nothing to explicate the WCB's procedures or their sufficiency in ostensibly "determining" the identity of her employer. Plaintiff's silence leaves this Court with the record. The WCB's entire determination was a mere half page, it did not so much as mention the issue of plaintiff's employer in its analysis, and there is no indication that either of the Hannaford defendants were on notice to the WCB proceedings. As such, it is not reasonable to impute to the WCB sufficient procedures that the WCB employed to make any actual finding on this issue, much less one that departed from plaintiff's own four assertions to the WCB that "Hannaford" was her employer.

Given the foregoing, nothing in this record occasions a basis to find that the WCB proceeding was possessed of such quasi-judicial procedural protections and requirements as to flesh out the issue, particularly where WCB proceedings generally are "swift[]" and "cursory" (*Garcia v Monadnock Constr., Inc.*, 235 AD3d 96, 99 [1st Dept 2025], *quoting* Senate Mem in Support, Bill Jacket, L 2022, ch 835 [adding WCL § 118-a]). The Court notes that WCL § 118 generally disclaims WCB use of judicial rules of evidence and procedure, and also notes that most employers and insurance carriers do not dispute their employees' WCB benefit claims (*see* M. Minkowitz, McKinney's Cons Laws of NY, Prac Comm, WCL § 118]). As such, while generally it is the burden of the party opposing application of collateral estoppel to show that the party lacked a full and fair opportunity to litigate the issue (*see e.g. Babad*, 242 AD3d at 808, *quoting Fowler v Indymac Bank, FSB*, 176 AD3d 682, 684 [2d Dept 2019] [collecting cases]; *Rosa*, 194 NYS3d 70; *see also In re Dunn*, 24 NY3d 699, 704 [2015]; *Langdon v WEN Management Co.*, 147 AD3d 450, 451 [2d Dept 1989]),[6] this record warrants no confidence that the WCB "adequately tested" the identity of plaintiff's employer after "fully air[ing]" that issue.

This Court also finds no merit in plaintiff's effort to exclude Mary Kramer's affidavit on grounds that its stated basis of her personal knowledge as corporate operations manager for Hannaford Bros. Co. LLC was insufficient, particularly as to Hannaford's relationship with its wholly-owned subsidiary Martin's Foods of South Burlington. Several courts have narrated that, in fact, Hannaford Bros. Co. wholly owns Martin's Foods of South Burlington (*see Conservation Law Found. v Hannaford Bros. Co.*, 327 F Supp 2d 325, 327 [D Vt 2004], *affd* 139 Fed Appx 338 [2d Cir 2005]; *see also In re Hinesburg Hannaford Act 250 Permit*, 179 A3d 727, ¶ 2 [Vt 2017]). This Court also finds no record basis to challenge so much of Mary Kramer's affirmation as attests that plaintiff received her salary, benefits and supervision from Hannaford.

This Court also finds no basis to exclude Mary Kramer's attestation of Hannaford's merged relationship with Ahold Delhaize USA Services LLC: that information reasonably is within her personal knowledge as Hannaford's corporate operations director. Even were this Court to accept plaintiff's argument that this attestation is hearsay because Mary Kramer submits

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[6] The Court also notes that the WCB determination did not so much as mention any of the defendants, even for purpose of providing notice of the decision, which begs the question of how WCB could have accorded them a full and fair opportunity to litigate the employer issue that plaintiff would preclude them from challenging here.

no documentary proof (*see Wells Fargo Bank, N.A. v Carrington*, 221 AD3d 746 [2d Dept 2023] ["(i)t is the business record itself, not [a] foundational affidavit, that serves as proof of the matter asserted"], *quoting HSBC Bank USA, N.A. v Boursiquot*, 204 AD3d 980, 982 [2d Dept 2022] [internal citations omitted]), nevertheless the Court would reach the same result on judicial notice of federal proceedings concerning the various supermarket business entities' mergers as a matter of law (*see* CPLR 4511[a] [federal common law], [b] [ordinances of federal agencies]).

By Decision and Order dated May 30, 2001, the U.S. Federal Trade Commission ("FTC") approved Hannaford Bros. Co.'s then-pending merger with Delhaize America, which changed its name from Food Lion (*see Etablissements Delhaize Freres et Cie "Le Lion," S.A., Delhaize Am., Inc. & Hannaford Bros. Co.*, Docket No. C-3962 [2001], *available at https://www.ftc.gov/sites/default/files/documents/-cases/2001/06/delhaizedo.htm* [accessed May 1, 2026]). By further Decision and Order dated October 14, 2016, FTC approved the merger of Delhaize America's parent entity with nonparty Dutch entity Koninklijke Ahold N.V. (*see Matter of Koninklijke Ahold N.V. & Delhaize Group NV/SA,* Docket No. C-4588 [2016] [consent decree], *available at https://www.ftc.gov/system/files/documents/cases/161031delhaizedo.pdf* [accessed May 1, 2026]), which finally resolved a federal antitrust suit brought by state attorneys general (*see Commonwealth of Massachusetts v Koninglujke Ahold N.V., et al.*, Index No. 1:16-cv-01512-TFH [DDC 2016] [incorporating Ahold-Delhaize merger decree by reference]). The new merged entity is the global supermarket holding company Ahold Delhaize (*see e.g. Matter of Koninklijke Ahold N.V./Delhaize Group NV/SA*, FTC Docket No. C-4566 [2019], *available at https://www.ftc.gov/system/files/documents/cases/151_0175_secretary_approval_letter_-supervalu_application_2-25-19.pdf* [accessed May 1, 2026]; *see also This LLC v HolaBelle, Inc.*, 2024 WL 2957037, *7 & n4 [D Conn 2024]). This is the same global entity that, Mary Kramer attested, had a name change for its U.S. operations after merger with Retail Business Services to become Ahold Delhaize USA Services LLC, the very entity that the WCB administratively listed below its decision in plaintiff's benefits case. Plaintiff offers nothing to the contrary.

While the foregoing do not necessarily resolve whether plaintiff's employer was actually Hannaford (as plaintiff asserted to the WCB), Martin's Foods of South Burlington LLC (as Mary Kramer attested), or its second-order parent Ahold Delhaize USA Services LLC (as the WCB listed administratively), these federal determinations make clear that Martin's Foods of South

Burlington LLC, Hannaford Bros. Co. LLC, and Ahold Delhaize are merged entities as a matter of law, in the shared business of conducting their supermarket business in the subject location.

This result drives construction and application of Bob's snow-removal contract. By its terms, the contract provides that Neville Companies, Inc. acted as agent of its principal, Retail Business Services LLC. As noted above, however, Retail Business Services LLC thereafter merged into Ahold Delhaize USA Services LLC, which had merged with Hannaford Bros. Co. LLC and Martin's Foods of South Burlington LLC. Given these mergers, Ahold Delhaize USA Services LLC is Retail Business Services LLC's successor principal under the contract.

2. <u>Workers' Compensation Exclusivity</u>

WCL § 11(a) provides, in relevant part:

> "The liability of an employer [on a benefits claim pursuant to WCL § 10] shall be exclusive and in place of any other liability whatsoever, to such employee … or any person otherwise entitled to recover damages, contribution or indemnity, at common law or otherwise, on account of such injury or death or liability arising therefrom….
>
> "An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a "grave injury" which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability."

Because plaintiff does not allege a "grave injury," the statute's plain language renders plaintiff's WCB claim to be the exclusive remedy against her "employer," and separately bars plaintiff's direct judicial action and any third-party claim against the "employer" for contribution or indemnification (*see id.*; WCL § 29[6]).

It has long been the law that this exclusivity provision also "may extend to suits brought by a plaintiff against corporations which are the alter egos of, or joint venturers with, the corporation which employs the plaintiff" (*Hageman v B & G Bldg. Servs., LLC*, 33 AD3d 860, 861 [2d Dept 2006], *following Ortega v Noxxen Realty Corp.*, 26 AD3d 361 [2d Dept 2006]; *see Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 358-359 [2007]; *Hernandez-Morataya v M&L Equities Auto, LLC*, __ AD3d __, 2026 NY Slip Op 01948, at *1 [2d Dept 2026]; *Gerardi v I.J. Litwak Realty Ltd. Partnership*, 160 AD3d 921, 922 [2d Dept 2019]; *Clarke v First Student, Inc.*, 160 AD3d 921, 922 [2d Dept 2018]). As the Second Department recently reiterated:

> "A defendant moving for summary judgment under this theory must show, prima facie, that it was the alter ego of the plaintiff's employer (*see Haines v Verazzano of Dutchess, LLC,* 130 AD3d [871,] 872 [2d Dept 2015]; *Batts v IBEX Constr., LLC,* 112 AD3d 765, 766 [2d Dept 2013]). 'A defendant may establish itself as the alter ego of a plaintiff's employer by demonstrating that one of the entities controls the other or that the two operate as a single integrated entity' (*Quizhpe v. Luvin Constr. Corp.,* 103 AD3d 618, 619 [2d Dept 2013]; *see Haines v Verazzano of Dutchess, LLC,* 130 AD3d [871,] 872 [2d Dept 2015]; *Samuel v Fourth Ave. Assoc., LLC,* 75 AD3d 594, 594–595 [2d Dept 2010]). 'However, a mere showing that the entities are related is insufficient where a defendant cannot demonstrate that one of the entities controls the day-to-day operations of the other' (*Batts v IBEX Constr., LLC,* 112 AD3d [765,] 767 [2d Dept 2013])"

(*Hernandez-Morataya*, at *1). Critically, "[i]n determining whether the exclusive remedy provision of the Workers' Compensation Law applies, it is not the title of the purported "employer" that controls, but rather the actual working relationship between that party and the purported "employee" (*Fung*, 9 NY3d at 360; *see Thompson v Gromman Aerospace Corp.*, 78 NY2d 553, 558 [1991]; *Fuller v KFG Land I, LLC*, 189 AD3d 666, 667-668 [1st Dept 2020] [collecting cases]). "Factors relevant to the determination of that issue include whether the two entities share a common purpose, have integrated or commingled assets, share a tax return, are treated by the owners as a single entity, share the same insurance policy, and share managers or are owned by the same person" (*Buchwald v 1307 Porterville Rd., LLC*, 160 AD3d 1464, 1465 [4th Dept 2018]; *see Crespo v Pucciarelli*, 21 AD3d 1048, 1049 [2d Dept 2005]).

The undisputed evidence is that Martin's Foods of South Burlington LLC and Hannaford Bros. Co. LLC are merged entities as a matter of law and having the same corporate owner, Ahold Delhaize USA Services LLC, with which they share joint insurance policies for general liability and workers compensation. Also undisputed is Mary Kramer's attestation that Martin's Foods of South Burlington LLC and Hannaford Bros. Co. LLC maintain the same corporate office, have the same corporate directors, and share a common purpose to operate supermarkets including the subject Hannaford location; and that while plaintiff's formal employer is Martin's Foods of South Burlington LLC, plaintiff receives her payroll, benefits training and evaluation from Hannaford. These formal and functional indicia of common purpose and operational control more than suffice to establish prima facie that Martin's Foods of South Burlington LLC and Hannaford Bros. Co. LLC are alter-ego entities of each other for WCL purposes of §§ 11(1) and 29(6), and that both may assert the exclusivity bar against plaintiff's tort claim arising from the same nexus of operative facts as plaintiff's successful WCB benefits claim.

Because plaintiff offers nothing to the contrary, these defendants are entitled to summary judgment dismissing plaintiff's direct claim against them.

This WCL exclusivity bar, however, does not apply on this record as to co-defendant Neville Companies, Inc. Mary Kramer does not attest to this entity's relevant corporate relationships, its indicia of legal control or functional operations, or its insurance status vis-à-vis this accident. Neville president Grab testified that he owns 100% of Neville (*see* Grab Tr, at 12), and thus Neville does not share ownership characteristics with its co-defendants. Grab also testified Neville's business is property management of diverse business rather than supermarkets (*see id.*, at 13-15), and thus Neville does not share a common business purpose with the co-defendants. As to this site, Grab testified that Neville manages only the "exterior of the property" (*see id.*, at 17), and thus does not clearly inter-operate with the co-defendants.

As such, so much of Hannaford's motion as seeks summary judgment dismissing the action against Neville Companies, Inc., based on the WCL § 11(1), 29(6) exclusivity bar must be denied.

3. Premises Liability

"[A] property owner … has a duty to maintain the property in a reasonably safe condition" (*Lyman v Cablevision of Ossining Ltd. Partnership*, 215 AD3d 945, 948 [2d Dept 2023]; *see Kellman v 45 Tiemann Assoc.*, 87 NY2d 871, 872 [1995]; *Basso v Miller*, 40 NY2d 233, 241 [1976]; *Sweeney v Hoey*, 211 AD3d 1071, 1072 [2d Dept 2022]; *Muller v City of New York*, 185 AD3d 834, 835 [2d Dept 2020]). "A landowner has a duty to exercise reasonable care in maintaining [its] property in a safe condition under all of the 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" (*Lyman*, 215 AD3d at 948, *quoting Groom v Vil. of Sea Cliff*, 50 AD3d 1094, 1094 [2d Dept 2008]). This duty "is premised on the landowner's exercise of control over the property, as 'the [entity] in possession and control of property is best able to identify and prevent any harm to others'" (*Gronski v County of Monroe*, 18 NY3d 374, 379 [2011], *quoting Butler v Rafferty*, 100 NY2d 265, 270 [2003]). Here, it is uncontested that defendants was not an out-of-possession landlord but rather had unfettered access to the subject lot and its particular location where Commisso fell.

"[I]n a premises liability case, a defendant property owner who moves for summary judgment has the initial burden of making a prima facie showing that it neither created an allegedly hazardous condition nor had actual or constructive notice of its existence" (*Dougherty v 359 Lewis Ave. Assocs., LLC*, 191 AD3d 763, 764 [2d Dept 2021], *quoting Beri v Chung Fat Supermarket, Inc.*, 125 AD3d 587, 587 [2d Dept 2015]). "A defendant has constructive notice of a dangerous condition [on property] when the condition is visible and apparent, and has existed for a sufficient length of time to afford the defendant a reasonable opportunity to discover and remedy it" (*Hussain v Neurology Continuum, P.C.*, 226 AD3d 987, 988 [2d Dept 2024], *citing Gordon v Am. Museum of Natural History*, 67 NY2d 836, 837 [1986]; *Rossi v City of New York*, 219 AD3d 1361, 1362 [2d Dept 2023]; *Kmitis v Macy's, Inc.*, 208 AD3d 467, 467 [2d Dept 2022]; *see Rivera v R.C. Archdiocese of N.Y.*, 197 AD3d 744, 745 [2d Dept 2021]).

Bob's establishes prima facie that it performed its snow- and ice-removal contract non-negligently, and Neville and Hannaford establishes that they reasonably relied on Bob's performance. Beyond these demonstrations, despite the parties' sometimes angular arguments, the key facts are not materially in dispute. Plaintiff's papers concede that no defendant had actual notice of any dangerous parking lot condition; she instead confines her theory of liability to constructive notice. The expert affirmations from meteorologists Kramer, Lombardo and Bielfeld agree that there was no snow or ice condition on the parking lot before the day of plaintiff's fall, thus establishing without record dispute that no previously created icy condition was a proximate result of the plaintiff's injury (*see e.g. Ayers v Pioneer Cent. Sch. Dist.*, 187 AD3d 1625, 1625-1626 [4th Dept 2020]; *Gervasi v Blagojevic*, 157 AD3d 613, 614 [2d Dept 2018]; *Burniston v Ranric Enters. Corp.*, 134 AD3d 873, 974 [2d Dept 2015]). These expert affirmations also establish without dispute that on the day of plaintiff's fall, 9.4" of snow fell until sometime just before 4:00 p.m., and that temperatures rose above freezing and melting began. Bob's establishes prima facie via its weather experts that melting stopped and re-freezing began only at approximately 7:00 p.m., one hour before plaintiff's fall. By contrast, plaintiff's weather expert establishes prima facie that the final refreezing began at approximately 5:00 p.m. and ended at approximately 7:00 p.m. Either way, the evidence is uncontested that there was no snow or ice anywhere on plaintiff's after-route walk through the parking lot between the Hannaford supermarket and plaintiff's vehicle at the time of her incident: plaintiff specifically testified as much. Bob's also shows prima facie that it last plowed and salted at 4:00 p.m., by which time snowfall had stopped; and that the National Weather Service issued its black-ice advisory at 7:23 p.m., just 37 minutes before plaintiff's fall at approximately 8:00 p.m.

The foregoing establishes that no defendant affirmatively created the black-ice condition on which plaintiff fell. "The mere failure of a defendant to remove all of the ice and snow, without more, does not establish that the defendant increased the risk of harm" so as to vitiate the storm-in-progress rule (*Corlette v SN Auto Repairs, Inc.*, 227 AD3d 858, 859 [2d Dept 2024], *quoting Aronov v St. Vincent's Hous. Dev. Fund Co., Inc.*, 145 AD3d 648, 649 [2d Dept 2016]; *see Keeney v Hempstead Turnpike, LLC*, 205 AD3d 896, 897 [2d Dept 2022]). Plaintiff's reliance on Mark Kramer's affidavit to suggest that Bob's did not lay enough salt prior to the melt-and-refreeze period is entirely speculative and thus insufficient to raise a triable issue of fact as to any defendant's negligence (*see Spinoccia v Fairfield Bellmore Ave., LLC*, 95 AD3d 993, 994 [2d Dept 2012]; *DeVivo v Sparago*, 287 AD2d 535 [2d Dept 2001]).

Given all of the foregoing, and construing the record in the light most favorable to each respondent on these motions, the foregoing also shows that the brief duration between the formation of black ice and plaintiff's fall eliminates a triable issue of fact as to constructive notice for all defendants. "Under the storm in progress doctrine, a landowner 'will not be held liable in negligence for a plaintiff's injuries sustained as a result of an icy condition occurring during an ongoing storm or for a reasonable time thereafter'" (*Jackson v City of New York*, 238 AD3d 1126, 1127 [2d Dept 2025], *quoting Sherman v N.Y. State Thruway Auth.*, 27 NY3d 1019, 1020-1021 [2016]; *see Harris v N.Y. City Tr. Auth.*, 241 AD3d 655, 656 [2d Dept 2025]; *Acocal v City of Yonkers*, 179 AD3d 630, 631 [2d Dept 2020]). "[T]he question of whether a reasonable time has elapsed may be decided as a matter of law by the court, based upon the circumstances of the case" (*Harris*, 241 AD3d at 656, *quoting Baolin Liu v Westchester Prop. Mgt. Group, Inc.*, 145 AD3d 942, 943 [2d Dept 2016]; *see Valentine v City of New York*, 57 NY2d 932, 933-934 [1982]; *Keckeisen v S. Nassau Communities Hosp.*, 188 AD3d 1174, 1175 [2d Dept 2020]).

Defendants show prima facie that black ice had not begun forming until 7:00 p.m., just one hour before plaintiff's incident, and that a public advisory about black-ice formation issued only 37 minutes before plaintiff's fall. This extraordinarily brief time is insufficient, as a matter of law, to accord any owner or contractor constructive notice of a developing black-ice condition (*see e.g. Harris*, 241 AD3d at 656 [five hours]; *Fitzsimmons*, 205 AD3d at 685 [two hours]; *Bryant v Retail Prop. Trust*, 186 AD3d 793, 794 [2d Dept 2020] [eight hours]).

In opposition, plaintiff raises no contrary issue of fact. Even if this Court could impute to Mark Kramer's affidavit an opinion that black ice had formed as of 5:00 p.m. – an untenable stretch given his stated opinion that the final re-freezing before plaintiff's fall merely began at approximately 5:00 p.m. and did not end until 7:05 p.m. – again that limited time would have been insufficient as a matter of law to accord any defendant constructive notice of developing black ice with a reasonable opportunity to redress it. As plaintiff raises no other triable issue of fact as to constructive notice, plaintiff's claim against all defendants must be dismissed, and it is irrelevant whether any *Espinal* exception might apply.[7]

[7] To be sure, viewed in the light most favorable to plaintiff, her bill of particulars as to Bob's alleges that Bob's "creat[ed] the subject dangerous, defective and hazardous condition" (Pl's Bill of Particulars [NYSCEF 136], at 1), which suffices to allege the *Espinal* exception for "launch[ing] a force or instrument of harm" by negligently creating or exacerbating a dangerous condition (*Espinal*, 98 NY2d at 141-142, *quoting H.R. Moch Co., Inc.*, 247 NY at 168). As such, contrary to Bob's argument, *Nesbitt* indeed would require Bob's to disprove prima facie the applicability of this *Espinal* exception (*see Nesbitt*, 224 AD3d at 843, *following Conrad v Global Indus. Servs., Inc.*, 180 AD3d 868, 869 [2d Dept

4. **Cross Claims**

As to the Neville-Hannaford cross-claim for contractual indemnity, "[t]he right to contractual indemnification depends upon the specific language of the contract" (*Selis v Town of N. Hempstead*, 213 AD3d 878, 879-80 [2d Dept 2023]; *quoting Burgos v 14 E 44 St. LLC*, 203 AD3d 688, 689 [2d Dept 2022]; *see O'Donnell v A.R. Fuels, Inc.*, 155 AD3d 644, 645 [2d Dept 2017]). "The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances" (*Venza v Catholic Charities of Diocese of Rockville Centre*, 235 AD3d 804, 807 [2d Dept 2025], *quoting Guiles v Vassar Bros. Hosp.*, 221 AD3d 666, 667 [2d Dept 2023]; *Errazuri v E Food Supermarket, Inc.*, 228 AD3d 732, 734 [2d Dept 2024]). "A party that moves for summary judgment dismissing a claim for contractual indemnification must make prima facie showing that it was not contractually obligated to indemnify the party asserting the indemnification claim" (*Selis*, 213 AD3d at 880; *Burgos*, 203 AD3d at 689; *see Assevero v Hamilton & Ch. Props., LLC*, 131 AD3d 553, 558 [2d Dept 2015]), whether because the contract does not govern that party or because "under the circumstances, [the] indemnification clause in [the contract] between the

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2020]; *Nachamie v County of Nassau*, 147 AD3d 770, 774 [2d Dept 2017]) – that is, if any primary liability existed. Conversely, plaintiff having failed to allege in the complaint or bill of particulars as to Bob's the other two *Espinal* exceptions, Bob's would not need to affirmatively disprove them to establish its prima facie entitlement to summary judgment (*see Nesbitt*, 224 AD3d at 842, *following Forbes v Equity One Northeast Portfolio, Inc.*, 212 AD3d 780, 781-782 [2d Dept 2023]; *Canciani v Stop & Shop Supermarket Co., LLC*, 203 AD3d 1011, 1013 [2d Dept 2022]). In any event, the record shows that none of the *Espinal* exceptions apply so as to potentially impose liability on Bob's as mere non-owner contractor. Plaintiff did not detrimentally rely on the contract because plaintiff did not know of Bob's or the contract; Fitzgerald's after-the-fact testimony about his understanding of the contract's intended reach to include all Hannaford employees and patrons cannot change the outcome as a matter of law without expanding the detrimental reliance exception into a universal-liability rule in derogation of *Espinal* itself. The force-of-harm exception does not apply because Bob's shows prima facie that it did not create or contribute to the black-ice condition and, in any event (1) plaintiff raises no contrary issue of fact for the reasons described above and (2) as a matter of law this *Espinal* exception does not apply merely where, as here, a snow- or ice-removal contractor does not remove all ice or snow. Had the record not affirmatively disproven primary liability, the duty-displacement exception to *Espinal* would not apply on this record in which the contract reserved to Hannaford the responsibility to request additional salt treatments and pre-approve their cost, and thus the contract did not "entirely" displace Hannaford's duty of care (*see e.g. Lingenfelter v Delevan Terrace Assoc.*, 149 AD3d 1522, 1524 [4th Dept 2017]; *Kozak v Broadway Joe's*, 296 AD2d 683, 685 [3d Dept 2002]).

parties either was not triggered or was otherwise inapplicable" (*Selis*, 213 AD3d at 880; *Burgos*, 203 AD3d at 689; *see Tolpa v One Astoria Sq., LLC*, 125 AD3d 755, 758 [2d Dept 2015]).

As an initial matter, there is no merit to Bob's argument that the contract accords none of the co-defendants standing to enforce its defense and indemnification provisions. As determined above, Ahold Delhaize USA Services LLC is the contract's successor principal to Retail Business Services by merger, and as a matter of law Bob's co-defendants are either the property manager (Neville Companies, Inc.) expressly named as contract beneficiary or are merged into Ahold Delhaize USA Services LLC. Moreover, the contract itself explicitly lists the subject property as the contract's subject matter, and even designates the property as "#8335 Hannaford" (Contract, at 1) and "Hannaford Plaza" (*id.*, at Appx D). Precisely because the contract does not define Owner, as Bob's recognizes, the Court looks to the "contract, read as a whole" to disclose its purpose and the parties' intent (*Donohue v Cuomo*, 38 NY3d 1, 13 [2022], *quoting Greenfield v Philles Records, Inc.,* 98 NY2d 562, 570 [2002]). As such, even if the contract itself might be susceptible to technical ambiguity on this point, the contract's other language clearly establishes its purpose for Hannaford to be a beneficiary and be treated as owner for this purpose. The same result obtains as to Martin's Foods of South Burlington LLC based on its merger into Hannaford, and therefore all of Bob's co-defendants have contractual standing to enforce the contract.

Even so, however, Bob's establishes prima facie that the Neville-Hannaford claim for contractual indemnification does not lie, by showing that Bob's was not negligent in performing the contract; neither Neville nor Hannaford asked for additional ice removal or salting once black ice began forming, as the contract required; that Bob's could not undertake those additional services without Hannaford's pre-approval; and thus that plaintiff's fall arose not from Bob's work but from weather conditions for which no party had constructive notice (*see Zapototsky v Ascape Landscape & Constr. Corp.*, 221 AD3d 1055, 1057 [2d Dept 2023]; *cf. Jamieson v Noble Constr. Group, LLC*, __ AD3d __, 2026 NY Slip Op 02634 [2d Dept 2026]). No party shows that the contract reasonably could be construed to require Bob's reasonably to monitor for post-storm formation of black ice (*see id.*); even if it could, it is uncontroverted that there was insufficient time between the development of black ice and plaintiff's fall for any such reasonable monitoring duty to attach.

Contrary to Neville and Hannaford, there is no basis to hold Bob's contractually liable for its defense costs given Bob's proof that it did not negligently perform the contract (*cf. Pena v 104 N. 6th St. Realty Corp.*, 157 AD3d 709, 711 [2d Dept 2018]). Because Bob's is not an insurer, its "duty to defend is no broader than its duty to indemnify" (*Zapototsky*, 221 AD3d at 1057, *quoting Rodriguez v Waterfront Plaza, LLC*, 207 AD3d 489, 491 [2d Dept 2022]; *see Brooklyn View v PRP, LLC*, 159 AD3d 865, 866 [2d Dept 2018]). Neville and Hannaford's contrary reliance on *Emerson* is meritless because, unlike the contract in *Emerson*, Bob's shows that the contract barred it from undertaking further remediation once storm-related performance was completed, absent prior approval from Hannaford (*cf. Emerson*, 203 AD3d at 1274-1275). Any other interpretation of this contract would require reading those provisions out of the contract and, in essence, convert Bob's into an insurer for Neville and Hannaford. Also unlike in *Emerson*, here there is no record evidence that the black-ice condition was one for which Bob's was actively aware and previously had addressed: the uncontroverted record shows that neither Bob's nor any of the defendants ever had heard of a slip and fall at the subject lot.

For each and all of the foregoing reasons, Bob's is entitled to summary judgment dismissing the Neville-Hannaford contractual defense and indemnification claim.

Finally, as to the branches of defendants' motions to dismiss their respective cross claims for common-law indemnification and contribution, for the above reasons Bob's and Neville-Hannaford also carry their respective prima facie burdens to show that plaintiff's "accident was not due to [their] own negligence" (*Calle v 16th Ave. Grocery, Inc.*, 219 AD3d 450, 452 [2d Dept 2023]), and therefore that none of them was a "wrongdoer" for whose wrongful act plaintiff might obtain judgment (*see De Heras v Avant Gardner, LLC*, 224 AD3d 883, 884 [2d Dept 2024]; *Santoro v Poughkeepsie Crossings, LLC*, 180 AD3d 12, 16 [2d Dept 2019]; *see D'Ambrosio v City of New York*, 55 NY2d 454 [1982]). As neither plaintiff nor the defendants raise a triable issue of fact as to the respective co-defendants' potential substantive liability, these final cross claims must be dismissed.

The Court has considered the parties' remaining contentions and deems them to be moot or to lack merit in light of the foregoing. Accordingly, it is hereby

ORDERED that this Motion by defendants Neville Companies, Inc., Martin's Foods of South Burlington LLC, and Hannaford Bros. Co. LLC, for an Order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint and all cross claims against them (Sequence #1) is granted; and it is further

ORDERED that this Motion by defendant Bob's Year Round Service, Inc. for an Order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint and all cross claims against it (Sequence #2) is granted; and it is further

ORDERED that this action is dismissed; and it is further

ORDERED that this action being subject to mandatory electronic filing, the Court's filing of this instrument via NYSCEF shall constitute good and sufficient service hereof on all counsel.

The foregoing constitutes the Decision and Order of this Court.

Dated: Poughkeepsie, New York
May 7, 2026

Christi J. Acker

CHRISTI J. ACKER, J.S.C.

cc: All counsel via NYSCEF