COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS.

SUPERIOR COURT
DEPARTMENT OF THE
TRIAL COURT
C.A. No.: ESCV2011-01030-A

MICHELLE ITURRALDE,)
Plaintiff)
)
V.)
)
BREWSTER GREEN INTERVAI,)
OWNER'S ASSOCIATION, INC.,)
Defendant)

PLAINTFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Statement of Facts

On February 6, 2010, in exchange for a fee, Michelle Iturralde was a guest in a rental unit at the Brewster Green Resort in Brewster, Massachusetts. Brewster Green is a timeshare vacation ownership property which offers units for short term rental. Michelle Iturralde is a member of Resort Condominium International, a timeshare membership organization, and arranged for the rental of the unit at Brewster Green through that entity. Michelle Iturralde had rented the unit for one week beginning on February 5, 2010 and running through February 12, 2010.

Ms. Iturralde arrived at the resort on February 5, 2010 and registered at the front desk and obtained the key to her unit. During that time, she was asked to sign a registration slip and general release form indicating that she and the members of her party would agree to abide by the rules of the resort. Based on her conversation with the registration clerk, she actually thought she was signing a paper stating that she would accept responsibility if any pots and pans or other items were missing once she left, or any damage was done to the unit while she was there. When

she signed the form, Michelle Iturralde did not intend to release the defendant from liability for its negligence during the course of her stay on its property. She intended and expected that the resort would exercise reasonable care over the areas under its control, and that it was not seeking to be held harmless for its own conduct. Had she known the form might be construed to release the defendant from its negligence, Ms. Iturralde certainly would not have signed it.

Thomas Warren, the resort manager, testified that the registration form is just an acknowledgment by the registered guest of her responsibility to abide by the rules of the resort. In other words, it was simply to encourage the guest and anyone in their party to act responsibly. Warren further testified that in having guests sign the form marked as Exhibit 3, Brewster Green was not expecting to minimize its duty to maintain the premises in a safe condition. In fact, it recognized that it had an obligation to maintain the premises. Moreover, Warren testified that Ms. Iturralde did not do anything that would trigger the language in the release form. Finally, Warren stated that it was not the expectation of the defendant that the general release form would absolve Brewster Green from any responsibility to the extent that it failed to maintain its property in a reasonably safe condition.

On February 6, 2010, while the plaintiff was lawfully on the premises at the Brewster Green Resort, she was caused to fall on a cement patio outside her unit after she slipped on an accumulation of snow and ice negligently caused or permitted to be present by the defendant. Defendant acknowledged that it was responsible for snow removal on the patio where Ms. Iturralde fell in accordance with its written "Snow Removal Policy."

In its motion, defendant is seeking summary judgment based upon plaintiff's signature on the general release form, arguing that it is not liable for its negligence because of that document.

As set forth by the plaintiff below, the general release is not enforceable for a number of reasons and should not preclude recovery in this case.

Argument

I. SUMMARY JUDGMENT STANDARD

Rule 56(c) of the Massachusetts Rules of Civil Procedure provides that a court should grant a motion for summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Mass.R.Civ.P. 56(c) (1992). The burden of proving that there is no genuine issue of material fact on every relevant issue raised by the pleadings falls upon the defendant. *Mathers v. Midland-Ross Corp.*, 403 Mass. 688 (1989).

In considering a motion for summary judgment, a court does not weigh the evidence or make its own determination of the facts. *Attorney General v. Bailey*, 386 Mass. 367, 370 (1982). In addition, a court should neither grant a motion for summary judgment because the facts offered by the moving party appear more plausible than the non-movant, nor because it appears the opponent is unlikely to prevail at trial. *Id.* Instead, in drawing inferences from the affidavits, depositions, exhibits or other material, the court must view them in the light most favorable to the party resisting the motion. *Hub Assocs v. Goode*, 357 Mass. 449, 451 (1970) (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). A mere "toehold" of controversy is enough to survive a motion for summary judgment. *Marr Equipment Corp. v. ITO Corp. of New England*, 14 Mass. App. Ct. 231, 235, fur. app. rev. den., 387 Mass. 1103 (1982). For this reason, summary judgment should be granted only where the opposing party has no reasonable

expectation of proving an essential element of that party's case. *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706 (1991) (emphasis added).

In this case, plaintiff presents ample evidence which demonstrates that summary judgment is wholly inappropriate. Summary judgment is not proper because the alleged release contract relied upon by defendant was void as a matter of law because it pertains to a rental unit, it's an adhesion contract that does not contain language which specifically precludes liability for defendant's negligent conduct, and the agreement was entered into by the parties as a result of a mutual mistake.

II. A CONTRACTUAL PROVISION EXEMPTING DEFENDANT FROM LIABILITY FOR ITS OWN NEGLIGENCE IS VOID UNDER G.L. c. 186 § 15

No person may, by agreement, exempt him or herself from liability for their negligence in the performance of a duty imposed on them by law, especially a duty imposed upon them for the benefit of the public, independently of the contract. *Kozan v. Comstock*, 270 F.2d 839 (5th Cir. 1959). The indemnification clause is unenforceable here because, under Massachusetts law, no lease or rental agreement may relieve a landlord of liability for injuries caused by the landlord's negligence. G.L. c. 186 § 15. The statute provides the following:

> Any provision of a lease or other rental agreement relating to real property whereby a lessee or tenant enters into a covenant, agreement or contract, by the use of any words whatsoever, the effect of which is to indemnify the lessor or landlord or hold the lessor or landlord harmless, or preclude or exonerate the lessor or landlord from any or all liability to the lessee or tenant, or to any other person, for any injury, loss, damage or liability arising from any omission, fault, negligence or other misconduct of the lessor or landlord on or about the leased or rented premises or on or about any elevators, stairways, hallways or other appurtenance used in connection therewith, shall be deemed to be against public policy and void.

In this case, § 15 applies because in exchange for a price, the landlord (Brewster Green) agreed to provide a guest room to the tenant (Michelle Iturralde). Brewster Green is appropriately termed a landlord for purposes of § 15 as there is a statutory recognition that a tenancy may occur in a hotel or lodging house. Daher and Chopp, *Landlord and Tenant Law*, 33 M.P.S. § 1:13, at 47 (2000). While hotels and lodging houses are exempt from some of the landlord/tenant statutes in Chapter 186, they are bound by the provisions of § 15. When the legislature intended to exclude hotels and lodging places, the exculpatory language was specifically included in the statute.[1] There is no such language exempting hotels and lodging houses from the provisions of § 15. Thus, the statutory prohibition against exculpatory clauses in real property rental agreements in G.L. c. 186, § 15 renders the clause in the Brewster Green's general release form void as against the public policy of Massachusetts.

III. THE WRITTEN AGREEMENT BETWEEN THE PARTIES WAS AN ADHESION CONTRACT WHICH SHOULD BE STRICTLY CONSTRUED AGAINST THE DRAFTING PARTY

In Massachusetts, indemnity clauses are "fairly and reasonably construed in order to ascertain the intention of the parties and to effectuate the purpose sought to be accomplished." *Cohen v. Steve's Franchise Co., Inc.*, 927 F.2d 26, 28 (1st Cir.1991), citing *Shea v. Bay State Gas Co.*, 383 Mass. 218, 418 N.E.2d 597 (1981). In this case, a fair and reasonable construction of the indemnity clause is that the parties intended that Iturralde would indemnify Brewster Green only under circumstances where Iturralde had control over the circumstances underlying

[1] Indeed, the only exemptions for hotels under Chapter 186 are for notice provisions regarding termination of the tenancy and the lessor's obligation to furnish certain utilities. In those instances where the legislature did not want include hotels or lodging places under the landlord-tenant statutes in this Commonwealth, it specifically incorporated statutory language exempting them. For example, in G.L. c. 186, § 13 regarding notice requirements and termination of a tenancy and G.L. c. 186, § 14 regarding lessor's obligation to furnish certain utilities, the legislature included the language "other than a room or rooms in a hotel" in the first paragraph. The legislature did not include any such exclusionary language in G.L. c. 186, § 15.

the incident. Because Brewster Green is uniquely positioned to notice and control the presence of ice and snow on common areas such as the patio at issue in this case, and because it had a snow removal policy in place that pertained to the patio, it is a leap in logic to suggest that Iturralde intended to indemnify Brewster Green for liability caused by a failure of its ice and snow removal program. Indeed, both Iturralde and Brewster Green testified that neither party intended to relieve Brewster Green of its obligation to maintain the premises in a reasonably safe condition.

In this case, the defendant Brewster Green, as a landowner, has a duty to act in a reasonably prudent manner with regard to the safety of lawful visitors. Moreover, it is important to note that release from liability provisions are "construed with every intendment" against the party seeking to enforce it. *Schillachi v. Flying Dutchman Motorcycle Club*, 751 F. Supp. 1169, 1173 (E.D. Pa. 1990).

Assuming, arguendo, this court upholds the validity of the waiver in this case, plaintiff should still prevail as the agreement was an adhesion contract and not enforceable to exclude the type of recovery sought here. Contracts of adhesion are offered on a "take it or leave it" basis to a consumer who has no realistic bargaining strength and who is unable to obtain the desired services or goods without consenting to the contract terms. *Cheney v. Automatic Sprinkler Corp. of America*, 377 Mass. 141, 147 (1979). The contract entered into between Iturralde and Brewster Green is a classic contract of adhesion. See Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 Harv. L. Rev. 1173, 1177 (1983). The parties did not negotiate the provisions to the agreement; the form was drafted by, or on behalf of, Brewster Green; Brewster Green, as the drafting party, participates in numerous transactions of the type

represented by the form and enters into these transactions as a matter of routine; and Iturralde, as the adhering party, enters into few transactions of this type. *Id.*

Contracts of adhesion are unenforceable if found to be unconscionable, offend public policy, or are shown to be unfair in particular circumstances. *Chase Commercial Corp. v. Owen*, 32 Mass. App. Ct. 248, 253 (1992). In the instant case, Iturralde did not find out about the release until she arrived at Brewster Green and was given the impression that it was an agreement to protect pots and pans and encourage adherence to rules. The court should not enforce the waiver because Iturralde was never given an adequate opportunity to understand the true import of the release and did not have an opportunity to read it before signing. See *Kroger v. Stop & Shop Companies Inc.*, 13 Mass. App. Ct. 310, 318 (1982). If the Brewster Green seriously desired to absolve itself from liability for its own negligence, it should have enclosed the release with the rental confirmation information sent to Iturralde before her arrival to give her an opportunity to fully understand the import of the document and take other action.

Further, the court should not enforce this adhesion contract because Brewster Green obtained Iturralde's assent through unequal bargaining positions, reflected by a weaker party's inability to negotiate the terms. See *Ernst & Norman Brothers, Inc. v. Town Contractors, Inc.*, 18 Mass. App. Ct. 60, 66 (1984); *Kroger*, 13 Mass. App. Ct. at 318. Because the Brewster Green is a member of VCI (the drafter of the release), it possesses a decisive advantage of bargaining strength against any member of the public seeking its services. See *Hannon v. Original Gunite Aquatech Pools,* Inc., 385 Mass. 813, 824 (1982). Iturralde's inexperience with release forms of this type, coupled with the absence of feasible alternatives, results in unequal bargaining power, making the present adhesion contract inherently unfair. Cf. *Hannon*, 385 Mass. at 824 (plaintiff, a college graduate, was familiar with contracts and had signed them in the past).

In addition, in order to absolve a person from liability for his or her own neglect, clear and explicit language must be used in the contract. *Doughnut Mach. Corporation v. Bibbey*, 65 F.2d 634, 637 (1st Cir. 1933). The waiver in the instant case makes no reference to "negligence" within the four corners of the document.[2] If Brewster Green had intended to be released from liability due to its own negligence, it should have stated this specifically in the release form. See, e.g., *Henry v. Mansfield Beauty Academy, Inc.*, 353 Mass. 507 (1968); see also *Schiele v. Simpson Safety Equipment, Inc.*, No. Civ. A. 91-1872, 1992 WL 73588 (E.D. Pa. April 7, 1992); *Bauer v. Aspen Highlands Sailing Corporation*, No. Civ. A. 91-13-1859, 1992 WL 73836 (D. Colo. April 19, 1992) (each contract was unambiguous because they contained the term "negligence"). At best the waiver is ambiguous as to its true meaning. Where such ambiguity exists, a writing is construed against the author of the doubtful language, *Lechmere Tire & Sales Co. v. Burwick*, 360 Mass. 718 (1972); *Wright v. Commonwealth*, 351 Mass. 666, 673 (1967), especially if the circumstances surrounding the use of the writing and ordinary meaning of words do not indicate the intended meaning of the language. *Merrimack Valley National Bank v. Baird*, 372 Mass. 721, 724 (1977).

Finally, Iturralde never had any intention of signing a contract exculpating the defendant from liability due to its own negligence, and would not have signed the release had she known so. Brewster Green knew or should have known that Iturralde would not have accepted the agreement if she had known she was releasing Brewster Green from liability for its own

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[2] The Supreme Judicial Court of Massachusetts has previously addressed the issue of a release signed by an individual prior to receiving a permanent hair wave from a hairdressing school student. *Henry v. Mansfield Beauty Academy*, 353 Mass. 507 (1968). The contract in Henry stated that the school would be released from any and all claims or liability. However, it differs from the present waiver form in that it specifically and unambiguously stated that the release was from liability from any "negligent or careless operation" on the part of its operators. Id. at 509. Additionally, the work performed by the defendant in Henry arose out of its clinical department, which was operated by its inexperienced students. Id. Participants having their hair done in this clinical program were fully apprised of the inexperience of the students. By contrast, Brewster Green is a company comprised of professionals experienced in the business of property rental.

negligence. See *Markline Co., Inc. v. Travelers Ins. Co.*, 384 Mass. 139, 142 (1981). In accordance with "justice and common sense and the probable intention of the parties," this adhesion contract should be rendered unenforceable. *Clark v. State Street Trust Co.*, 270 Mass. 140, 153 (1930).

IV. A MUTUAL MISTAKE OCCURRED BETWEEN THE PARTIES, RENDERING THE EXCULPATORY PROVISION OF THE AGREEMENT UNENFORCEABLE

If this court determines that the release form, as worded, would operate to bar a negligence claim by plaintiff, then Iturralde still must prevail because the provision barring such a claim appears in the contract as a result of a mutual mistake by the parties. Where a mistake is made between the parties at the time a contract is entered into as to the subject matter of the contract, there has been no meeting of the minds, and the contract is voidable at the election of the party adversely affected. *Lafleur v. C.C. Pierce Co.*, 398 Mass. 254, 257-58 (1986). While it is not always clear as to what constitutes a mutual mistake of fact sufficient to render a contract void, a contractual rescission will commonly be allowed when the mistake relates to a fact which is of the "very essence of the contract, the material element in the minds of both parties, and material in the sense that it is one of the things contracted about." *Wright and Pierce v. Town of Wilmington, Mass.*, 290 F.2d 30, 33 (1st Cir. 1961). The rationale underlying this rule is that it is essential that every contract adequately reflect the parties true intent. See *U.S. v. Lumbermens Mut. Cas. Co., Inc.*, 917 F.2d 654, 658 (1st Cir. 1990). Even where the parties had fully read the release, the language of the release would not be binding if the true intent of the parties had not been fulfilled. *McCamley v. Shockey*, 636 F.2d 256 (8th Cir. 1981).

In the present case, there was a mutual mistake as to the true intent of the parties. Iturralde had no intention of releasing the defendant from any liability arising out of the

negligence of its employees during the course of her stay at Brewster Green. In fact, Iturralde would not have signed the release had she been aware she was releasing the defendant from liability due to its own negligence. In addition, the Brewster Green property manager Thomas Warren stated in his deposition that Brewster Green never intended for the waiver to absolve itself of its own negligence. From these facts, one can only conclude that at the time the release was signed each party shared an erroneous state of mind as to a basic assumption upon which the contract was based. See *Covich v. Chambers*, 8 Mass. App. Ct. 740, 749 (1979).

Accordingly, the provision which allegedly precludes plaintiff from recovering for negligence on the part of Brewster Green must be stricken and Plaintiff allowed to proceed with her present action.

CONCLUSION

For the foregoing reasons, defendant's motion for summary judgment should be DENIED. Plaintiff should be granted summary judgment in her favor as the release is void and unenforceable for the reasons set forth above.

Plaintiff,
By her attorneys,

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Paul E. Ravech (BBO #552313)
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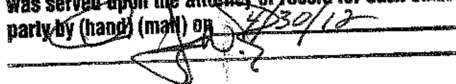
CERTIFICATE OF SERVICE
I hereby certify that a true copy of the above document was served upon the attorney of record for each other party by (hand) (mail) on 4/30/12



COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS.

ESSEX SUPERIOR COURT
Civil Action No. ESCV2011-01030-A

MICHELLE ITURRALDE,
Plaintiff

v.

BREWSTER GREEN INTERVAL OWNER'S ASSOCIATION, INC.,
Defendant

CONSOLIDATED STATEMENT OF MATERIAL FACTS PURSUANT TO SUPERIOR COURT RULE 9A(b)(5) WITH REGARD TO MOTION OF DEFENDANT BREWSTER GREEN INTERVAL OWNER'S ASSOCIATION, INC., FOR SUMMARY JUDGMENT

1. On or about February 6, 2010, Plaintiff, Michelle Iturralde was a guest at 203 Lund Farm Way, Brewster, Barnstable County, Massachusetts.(Exhibit 1, Plaintiff's Complaint, ¶4; Exhibit 2, Defendant's Deposition, 26:9-11)
2. Defendant is responsible for the property at 203 Lund Farm Way including the removal of snow in accordance with its written "Snow Removal Policy." (Exhibit 2, 16: 12-16)
3. Brewster Green has guests fill out a Registration Card and General Release Form when they check-in. (Exhibit 2, 57:17-58:14)
4. The General Release Form language was provided by VRI, the management company for Brewster Green and the management company made the General Release a part of the registration process. (Exhibit 2, 59:18-24)
5. Prior to February 6, 2010, Plaintiff signed Brewster Green Resort's General Release Form reading as follows:

   The undersigned, as a guest of Brewster Green Resort (Hereinafter referred to as the "Resort"), acknowledges and agrees to abide by the rules of the Resort, and that I/My Party uses said facility at our own risk.

Further, the undersigned and their party agree to hold harmless the Resort, Vacation Resorts International; resort and VRI employees, agents, contractors from any and all liability, costs and damages resulting from their use of any Resort facilities, including but not limited to: swimming pools, hot tub, sauna, game courts, horseshoe pits, children's play area, and other amenities and common areas of the Resort.

I/my party agree to abide by the Pool Rules as published in the guest information provided upon check in, and as posted in the pool area.

(Exhibit 3: Brewster Green Resort's General Release Form, Signed by Michelle Iturralde.).

PLAINTIFF'S ADDITIONAL STATEMENT OF ADDITIONAL FACTS

6. On February 6, 2010, in exchange for a fee, Michelle Iturralde was a guest in a rental unit at the Brewster Green Resort in Brewster, Massachusetts. Brewster Green is a timeshare vacation ownership property which offers units for short term rental (Exhibit 4, Iturralde affidavit, ¶ 2).
7. Michelle Iturralde is a member of Resort Condominium International, a timeshare membership organization, and arranged for the rental of the unit at Brewster Green through that entity (Exhibit 4, Iturralde affidavit, ¶ 3).
8. Michelle Iturralde had rented the unit for one week beginning on February 5, 2010 through February 12, 2010 (Exhibit 4, Iturralde affidavit, ¶ 4).
9. On or about February 6, 2010, while the plaintiff was lawfully on the premises at the Brewster Green Resort, she was caused to fall on a cement patio, by slipping upon an accumulation of snow and ice negligently caused or permitted to be present by the defendant or its agents, servants or employees (Exhibit 1, Plaintiff's complaint, ¶ 7).
10. Michelle Iturralde arrived at the resort on February 5, 2010 and registered at the front desk and obtained the key to her unit. During that time, she was asked to sign a

registration slip and form indicating that she and the members of her party would agree to abide by the rules of the resort. Based on her conversation with the registration clerk, she actually thought she was signing a paper stating that she would accept responsibility if any pots and pans or other items were missing once she left or any damage was done to the unit while she were there (Exhibit 4, Iturralde affidavit, ¶ 5).

11. When she signed the form, Michelle Iturralde did not intend to release the defendant from liability for its negligence during the course of her stay on its property. She intended and expected that the resort would exercise reasonable care over the areas under its control, and that it was not seeking to be held harmless for its own conduct (Exhibit 4, Iturralde affidavit, ¶ 6).
12. Had she known the form might be construed to release the defendant from its negligence, Michelle Iturralde certainly would not have signed it (Exhibit 4, Iturralde affidavit, ¶ 7).
13. Thomas Warren, the resort manager, testified that the registration form is just an acknowledgment by the registered guest of her responsibility to abide by the rules of the resort. In other words, it was simply to encourage the guest and anyone in their party to act responsibly (Exhibit 5, Warren deposition, page 58, lines 8-14).
14. According to Mr. Warren, Michelle Iturralde did not do anything that would trigger the release form marked as Exhibit 3 (Exhibit 5, Warren deposition, page 58, lines 20-24 through page 59, lines 1-6).
15. In having guests sign the form marked as Exhibit 3, Brewster Green was not expecting to minimize its duty to maintain the premises in a safe condition. In fact, it recognized that it had an obligation to maintain the premises (Warren deposition, page 60, lines 5-12, attached as Exhibit 5).

16. It was not the expectation of defendant Brewster Green that the form marked as Exhibit 3 to absolve them from any responsibility to the extent that it failed to maintain its property in a reasonably safe condition (Warren deposition, page 64, lines 15-22, attached as Exhibit 5).

EXHIBIT 1

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
DEPARTMENT OF THE
TRIAL COURT
C.A. NO. 11-1030

MICHELLE ITURRALDE, Plaintiff,	)
vs.	)
BREWSTER GREEN INTERVAL OWNER'S ASSOCIATION, INC., Defendant.	)

COMPLAINT AND DEMAND FOR JURY TRIAL

THE PARTIES

1. The plaintiff, Michelle Iturralde is an individual residing at 3114 Crane Brook Way, Peabody, Essex County, Massachusetts.

2. The defendant Brewster Green Interval Owner's Association, Inc. (hereinafter "Brewster Green") is a Massachusetts Corporation with a principal place of business located at 203 Lund Farm Way, in Brewster, Barnstable County, Massachusetts.

FACTUAL ALLEGATIONS COMMON TO ALL COUNTS

3. At all times relevant hereto, the defendant Brewster Green owned and/or controlled the condominium units known as Brewster Green Resort and located at 203 Lund Farm Way, Brewster, Barnstable County, Massachusetts.

4. On or about February 6, 2010 the defendant Brewster Green, as the property owner or entity in control of the property was responsible for removing snow and ice from the premises at the Brewster Green Resort.

5. On or about February 6, 2010 the defendant Brewster Green, as the property owner or entity in control of the property, controlled the common areas, including, but not limited to, the cement patios located behind the units.

6. On or about February 6, 2010 the defendant, Brewster Green was responsible for the maintenance, care, management, and inspection of the subject property, including the cement patios located behind the units.

7. On or about. February 6, 2010, while the plaintiff was lawfully on the premises at the Brewster Green Resort, she was caused to fall in on a cement patio, by slipping upon an accumulation of snow and ice negligently caused or permitted to be present by the defendant or its agents, servants or employees.

8. Due notice of the plaintiff's fall and injury were given to the defendant as required by law.

9. The injuries and damages sustained by the plaintiff Michelle Iturralde were the proximate result of the negligence of defendant Brewster Green as follows:

a. Defendant negligently failed to maintain or repair, or adequately maintain or adequately repair said property;

b. Defendant negligently failed to inspect or adequately inspect said property;

c. Defendant negligently failed to keep said property in a reasonably safe condition;

d. Defendant negligently permitted to exist and/or created a dangerous condition and negligently failed to correct said condition or remove the causes thereof from the premises, although defendant knew, or in the exercise of ordinary care should have known, of the presence of said defective condition;

e. Defendant failed to warn of the presence of the dangerous condition of said premises, although defendant knew, or in the exercise of

reasonable care should have known, of the presence of said condition; and

f. Defendant negligently failed to exercise reasonable care for the safety of lawful visitors to its property, including the plaintiff.

10. As a direct and proximate result of the negligence of defendant Brewster Green, the plaintiff was caused to suffer severe and permanent physical injuries. She has suffered and will continue to suffer great pain of body and mind, has suffered and will continue to suffer lost wages, has suffered and will continue to suffer a diminution of her earning capacity, has incurred and will continue to incur hospital and medical expenses, and has had her ability to enjoy life and engage in her usual and customary activities permanently and adversely affected.

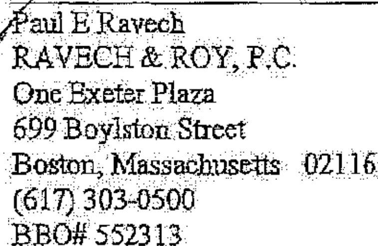
DEMAND FOR RELIEF

WHEREFORE, the plaintiff Michelle Iturralde demands judgment against the defendant Brewster Green Interval Owner's Association, Inc. in an amount to be determined together with interest and costs of this action.

JURY CLAIM

PLAINTIFF DEMANDS TRIAL BY JURY.

Plaintiff,
By her attorneys,



Paul E Ravech
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EXHIBIT 2

1 are clean. We have a Weber grill on each patio. We
2 have to make sure that those are emptied and
3 cleaned. Usually the last thing we do on a Friday
4 is go around and blow the decks off, again because
5 of the pine needles and things of that nature, any
6 dust, but we do that every single week. We also
7 make sure that they're -- in inclement weather, that
8 they're cleared.
9 Q. When you say "inclement weather," are you
10 talking snow?
11 A. Mm-hmm. Snow, ice, things of that nature.
12 Q. And is it the job of the maintenance
13 inspectors to make sure that these decks and patios
14 are free of any snow and ice?
15 A. That's my responsibility and the
16 maintenance department's responsibility. Like I
17 said, I'm a very hands-on manager.
18 Q. But it is the policy or practice of
19 Brewster Green to make certain that these decks are
20 free of any snow and ice; is that correct?
21 A. Correct.
22 Q. How does the association, and whatever
23 employees you use, how do you go about making sure
24 that these decks and patios are free of snow and

1 A. I met her -- what he described as her
2 boyfriend.
3 Q. When did you meet him?
4 A. It was on either Monday or Tuesday.
5 Q. How did that meeting come about?
6 A. He was sitting in a chair on the front of
7 the unit smoking a cigarette, and I introduced
8 myself. I asked how Michelle was.
9 Q. What day of the week did the incident take
10 place?
11 A. On a Saturday, February 6.
12 Q. What caused you to go over to that area of
13 the property on that Monday?
14 A. I had obviously learned of the incident,
15 and I wanted to inspect the area myself.
16 Q. And what time of day was that?
17 A. I believe 10:30.
18 Q. And so when -- did you drive over or walk
19 over?
20 A. Probably drove.
21 Q. And when you got out, you saw her boyfriend
22 sitting in the chair?
23 A. Yes.
24 Q. And what did you --

1 noticed -- freeze/thaw doesn't always occur when the
2 sun goes down. You can have it at 10:00, 11:00 in
3 the morning. If there was any accumulation of
4 moisture on a walkway that any of the staff saw,
5 they would report it to the front desk for
6 communication to maintenance to be addressed.
7 Q. And the way they would address it in a
8 freeze/thaw cycle is to apply this ice melt; is that
9 correct?
10 A. Correct.
11 Q. That would apply not only to the walkways
12 but to the patios and decks?
13 A. Yes.
14 MR. ROY: Please mark this as Exhibit 6.
15 (Marked, Exhibit 6, registration card
16 and general release form.)
17 Q. I'm showing you a document which has been
18 marked as Exhibit No. 6, and ask you if you're
19 familiar with that?
20 A. Yes, I am.
21 Q. What is it?
22 A. The top section is the registration card,
23 and the bottom section is the general release form.
24 Q. What do you use the top section for?

1 A. To verify who's checking in. We have to
2 keep a record of everyone that's checked into the
3 resort.
4 Q. Now, is that card and release form on the
5 same piece of paper, just the back and front, or is
6 it two separate pieces?
7 A. Two sides.
8 Q. And what do you use the general release
9 form for?
10 A. It's just a general release that the
11 registered guest acknowledges their responsibility,
12 that they would agree to abide the rules of the
13 resort. And anyone in their party basically acts
14 responsibly.
15 Q. And --
16 A. And abide by the pool rules as well.
17 Q. Is there any contention that Ms. Iturralde
18 violated any of the rules of the resort?
19 A. No.
20 Q. Is there any contention that she did
21 anything that would trigger the release form that's
22 marked as Exhibit 6?
23 MR. CAIN: Objection. You can answer.
24 A. No. The only thing I would like to point

1 out in that general release form, "The undersigned
2 and their party agree to hold harmless the Resort,
3 Vacation Resorts International, agents and
4 contractors from any and all liability, costs and
5 damages resulting from their use of any resort
6 facility."
7 Q. Did you intend to have her release you from
8 any negligence on the part of the resort, or was
9 this something for release for her violation of the
10 rules or some misuse of the resort?
11 MR. CAIN: Objection. You can answer.
12 A. Can you repeat that?
13 Q. I don't think I can.
14 MR. ROY: Can we read it back.
15 (Question read.)
16 A. I still don't understand it.
17 Q. Okay. Let me try to break it down a little
18 bit. Where did you get this language?
19 A. From VRI, from the management company.
20 Q. And when you -- who incorporated this
21 language into the Brewster Green Resort packet of
22 materials that you would have signed?
23 A. The management company would have made that
24 part of the registration process.

EXHIBIT 3

ROOM				
041	.00	8	02-05-10	.00 EX

NAME (LAST, FIRST)
ITURRALDE, MICHELLE — BGR 82189

STREET ADDRESS
4 WOODDUCK — *32CH

CITY — STATE — ZIP
SANDOWN — NH — 03873

978 201 3617

MY SIGNATURE BELOW ... ANY MISSING OR BROKEN ... WITHIN ONE HOUR AFTER CHECKIN. I ACCEPT FULL RESPONSIBILITY FOR ... I AGREE THAT MY LIABILITY ... WAIVED AND I AGREE TO BE HELD PERSONALLY LIABLE FOR THE FULL AMOUNT ...

CREDIT CARD #
SIGNATURE M. Iturralde — 02-12-10 DATE

VEHICLE IDENTIFICATION #

Brewster Green Resort

General Release Form

The undersigned, as a guest of Brewster Green Resort (hereafter referred to as the "Resort"), acknowledges and agrees to abide by the rules of the Resort, and that I/my party uses said facilities at our own risk.
Further, the undersigned and their party agree to hold harmless the Resort, Vacation Resorts International; Resort and VRI employees, agents and contractors from any and all liability, costs, and damages resulting from their use of any Resort facilities, including but not limited to: swimming pools, hot tub, sauna, game courts, horseshoe pits, children's play area, and other amenities and common areas of the Resort.
I/my party agree to abide by the Pool Rules as published in the guest information provided upon check-in, and as posted in the pool area.

M. Iturralde ___/___/___
Guest Signature — Date

Reservation # 82189 Unit # 41 Week# 5

ITURRALDE

EXHIBIT 4

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS.

SUPERIOR COURT
DEPARTMENT OF THE
TRIAL COURT
C.A. No.: ESCV2011-01030-A

MICHELLE ITURRALDE,)
Plaintiff)
)
V.)
)
BREWSTER GREEN INTERVAI,)
OWNER'S ASSOCIATION, INC.,)
Defendant)

AFFIDAVIT

I, Michelle Iturralde, after being duly sworn, depose and say the following:

1. I am the plaintiff in the above captioned civil action.

2. On February 6, 2010, in exchange for a fee, I was a guest at the Brewster Green Resort in Brewster, Massachusetts. Brewster Green is a timeshare vacation ownership property which offers units for short term rental.

3. I am a member of Resort Condominium International, a timeshare membership organization, and arranged for my rental of the unit at Brewster Green through that entity.

4. I had rented the unit for one week beginning on February 5, 2010 through February 12, 2010.

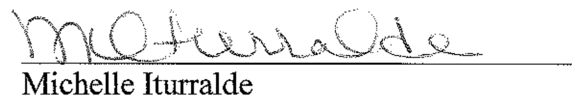
5. I arrived at the resort on February 5, 2010 and registered at the front desk and obtain the key. During that time, I was asked to sign a registration slip and form indicating that I and the members of my party would agree to abide by the rules of the resort. Based on my conversation with the registration clerk, I actually thought I was signing a paper stating that I

would accept responsibility if any pots and pans or other items were missing once I left or any damage was done to the unit while we were there.

6. When I signed the form, I did not intend to release the defendant from liability for its negligence during the course of my stay on their property. I intended and expected that the resort would exercise reasonable care over the areas under its control, and that it was not seeking to be held harmless for its own conduct.

7. Had I known the form might be construed to release the defendant from its negligence, I certainly would not have signed it.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 25TH DAY OF APRIL, 2012.



Michelle Iturralde

EXHIBIT 5

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Exhibits: 1-7

COMMONWEALTH OF MASSACHUSETTS

Essex County Superior Court

MICHELLE ITURRALDE,

Plaintiff

v. Docket No. ESCV2011-01030-A

BREWSTER GREEN INTERVAL OWNERS'

ASSOCIATION, INC.,

Defendant

RULE 30(b)(6) DEPOSITION OF BREWSTER GREEN INTERVAL OWNERS' ASSOCIATION, INC. by THOMAS L. WARREN, JR.

Wednesday, January 18, 2012, 10:08 a.m.

Ravech & Roy, P.C.

One Exeter Plaza

699 Boylston Street

Boston, Massachusetts

--Reporter: Kathleen Mullen Silva, RPR, CRR--

K.L. GOOD & ASSOCIATES

Post Office Box 367

Swampscott, Massachusetts 01907

781.598.6404 Fax 781.598.0815

1 A. To verify who's checking in. We have to
2 keep a record of everyone that's checked into the
3 resort.
4 Q. Now, is that card and release form on the
5 same piece of paper, just the back and front, or is
6 it two separate pieces?
7 A. Two sides.
8 Q. And what do you use the general release
9 form for?
10 A. It's just a general release that the
11 registered guest acknowledges their responsibility,
12 that they would agree to abide the rules of the
13 resort. And anyone in their party basically acts
14 responsibly.
15 Q. And --
16 A. And abide by the pool rules as well.
17 Q. Is there any contention that Ms. Iturralde
18 violated any of the rules of the resort?
19 A. No.
20 Q. Is there any contention that she did
21 anything that would trigger the release form that's
22 marked as Exhibit 6?
23 MR. CAIN: Objection. You can answer.
24 A. No. The only thing I would like to point

1 out in that general release form, "The undersigned
2 and their party agree to hold harmless the Resort,
3 Vacation Resorts International, agents and
4 contractors from any and all liability, costs and
5 damages resulting from their use of any resort
6 facility."
7 Q. Did you intend to have her release you from
8 any negligence on the part of the resort, or was
9 this something for release for her violation of the
10 rules or some misuse of the resort?
11 MR. CAIN: Objection. You can answer.
12 A. Can you repeat that?
13 Q. I don't think I can.
14 MR. ROY: Can we read it back.
15 (Question read.)
16 A. I still don't understand it.
17 Q. Okay. Let me try to break it down a little
18 bit. Where did you get this language?
19 A. From VRI, from the management company.
20 Q. And when you -- who incorporated this
21 language into the Brewster Green Resort packet of
22 materials that you would have signed?
23 A. The management company would have made that
24 part of the registration process.

1 Q. In having folks sign these, did you intend
2 for them to -- strike that.
3 I don't know how to ask this in a good
4 way.
5 In having customers sign this form
6 marked as Exhibit 6, were you expecting to minimize
7 your duty to maintain the premises in a safe
8 condition?
9 A. No.
10 Q. You understood that you had that obligation
11 to maintain the premises?
12 A. Right. Yes.
13 Q. And if somebody was injured as a result of
14 your negligence, you didn't intend for this release
15 to absolve you, did you?
16 MR. CAIN: Objection.
17 A. I think "negligence" is too strong a word.
18 We would never purposely be negligent in our
19 responsibility to the guests. I treat every guest
20 as if they were coming to my house. That's how I've
21 managed the property for ten years. If you're
22 coming to my house, my house is going to be
23 maintained properly. If during the course of the
24 winter, you know, there's events that are caused by

1 nature, we can't control everything. But it's not
2 our purpose to be negligent in any function of
3 managing the property.
4 Q. But if you are found to be negligent, it
5 wasn't your intention in having her sign this
6 release to absolve yourself from any responsibility
7 for that negligence, was it?
8 MR. CAIN: Objection.
9 A. Again, it wasn't our intention or it's
10 never been our intention to be negligent.
11 Q. But were you intending to attempt to
12 release yourself from your own negligence?
13 MR. CAIN: Objection.
14 A. I would refer that to an attorney.
15 Q. What did you intend by putting this in
16 front of customers?
17 A. That the person signing in is responsible
18 for themselves, their guests, their behavior, and to
19 accept responsibility for being on the property.
20 Q. But were you intending to hold them
21 responsible for Brewster Green's behavior?
22 MR. CAIN: Objection.
23 A. Again, I think that's a question for some
24 kind of legal counsel.

1 Q. Well, I'm trying to get a sense from you --
2 A. From me?
3 Q. -- as the person who put it in front of a
4 customer to sign, what your intention is.
5 A. I guess the intention is to --
6 MR. CAIN: I have to object. I don't
7 see any ambiguity here. I mean --
8 MR. ROY: That's the issue that should
9 be left to the lawyers and the judge, to see if
10 there's an ambiguity. To the extent that there may
11 be, I think I'm fairly entitled to an answer to that
12 question.
13 MR. CAIN: I think it's the other way
14 around. I think if there's a ruling at some point,
15 because obviously I intend to bring a motion --
16 MR. ROY: Anticipated.
17 MR. CAIN: -- then, you know, you could
18 have at it again, I suppose, but I think the
19 document speaks for itself.
20 Q. Can you answer that question about what you
21 intended in putting this in front of people?
22 MR. CAIN: Same objection. I also think
23 it's been asked and answered.
24 A. I think that it's a release form with

1 respect to not only actions of the registered guest,
2 but the physical conditions of the property. You
3 know, if you step off of a sidewalk and you twist an
4 ankle. You shouldn't dive in the shallow end of the
5 pool. If you fall off your bicycle and skin your
6 knee. There's an acceptance of responsibility.
7 Q. And that's --
8 A. And this is a general release form for
9 that.
10 Q. So if I understand you correctly, you
11 expect the individual to release you from any of
12 their conduct which causes the injury; is that fair?
13 MR. CAIN: Objection.
14 A. It's expecting the guest to act in a manner
15 as any adult would in any home environment.
16 Q. But to the extent that Brewster Green's
17 negligence caused or contributed to this injury, you
18 did not intend that release to absolve Brewster
19 Green from any responsibility; is that what you're
20 saying?
21 MR. CAIN: Objection.
22 A. Again --
23 MR. CAIN: That's not what he said.
24 Q. Well, I'm trying to get an understanding of

1 what he's saying.
2 A. Right.
3 MR. CAIN: I believe it was asked and
4 answered. We can read it back, but I thought he
5 said the intent was to release Brewster Green from
6 anything resulting from the physical condition of
7 the property.
8 MR. ROY: Well, I heard you to say that
9 if the --
10 MR. CAIN: I heard him use examples.
11 MR. ROY: He used examples that went to
12 the conduct of the individual.
13 MR. CAIN: No.
14 THE WITNESS: No.
15 Q. I'm trying to get an understanding of --
16 Brewster Green, to the extent that Brewster Green
17 fails to maintain its property in a reasonably safe
18 condition, is it your expectation that somebody
19 signing Exhibit 6 would absolve you from any
20 responsibility in that regard?
21 MR. CAIN: Objection.
22 A. That's not my interpretation.
23 Q. Okay. Fair enough. Thank you.
24 MR. CAIN: While we're still on the

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS.

ESSEX SUPERIOR COURT
Civil Action No. ESCV2011-01030-A

MICHELLE ITURRALDE, Plaintiff	)
v.	)
BREWSTER GREEN INTERVAL OWNER'S ASSOCIATION, INC., Defendant	)

DEFENDANT BREWSTER GREEN INTERVAL OWNER'S ASSOCIATION, INC.'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

I. STATEMENT OF THE CASE

Plaintiff, Michelle Iturralde ("Plaintiff"), claims that she suffered injuries as a result of a slip and fall on February 6, 2010 at Brewster Green Resort located at 203 Lund Farm Way, Brewster, Barnstable County, Massachusetts ("Defendant"). Plaintiff alleges that her fall was caused by Defendant's negligence in failing to maintain a safe premises by failing to remove ice from her rental unit.

During the rental process, Plaintiff signed the Brewster Green Resort General Release Form, agreeing to hold Defendant harmless from liability, costs and damages resulting from her use of the resort's facilities. Based on this release, Defendant contends that Plaintiff has failed to make out her prima facie case of negligence, and thus Defendant is entitled to Summary Judgment as a matter of law.

II. STANDARD FOR SUMMARY JUDGMENT

Pursuant to Mass.R.Civ.P. 56, Summary Judgment is granted when the moving party shows that there is no genuine issue as to any material fact and that the moving party is entitled to

summary judgment as a matter of law. Mass.R.Civ.P. 56; Cassesso v. Commissioner of Correction, 390 Mass. 419, 422 (1983). Inferences from the evidentiary materials are to be drawn in a light most favorable to the party opposing the motions. Attorney General v. Bailey, 386 Mass. 367, 371 (1982). When the party moving for summary judgment does not have the burden of proof at trial that party may show the absence of a triable issue by proof that the element is unlikely to be forthcoming at trial. Flesner v. Technical Communications Corp., 410 Mass. 805, 809 (1991), Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991).

In order to defeat the motion for summary judgment where the moving party establishes the absence of a triable issue, the opposing party must respond by alleging specific facts that would establish a genuine issue of material fact. Pederson v. Time, 404 Mass. 14, 16 (1989). The non-moving party may not rest on their pleadings and mere assertions of disputed facts to defeat the motion for summary judgment, but rather, must establish the existence of at least one question of fact that is both genuine and material, in that a jury could return a verdict for the non-moving party on the basis of the proffered evidence. LaLonde v. Eissner, 404 Mass. 207, 209 (1989); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "A fact is 'material' if it might affect the outcome of the suit under the governing substantive law." Id.

III.ARGUMENT

In order to make out a claim of negligence, the Plaintiff must demonstrate: 1) a legal duty owed by the defendant to the plaintiff; 2) breach of that duty; 3) proximate or legal cause; and 4) actual damage or injury. Verge v. U.S. Postal Service, 965 F. Supp. 112, 117 (D. Mass 1996). In order to prevail at trial, the Plaintiff has the burden of establishing by preponderance of the evidence each of the four elements. Bui v. Vazquez, 1999 Mass.App.Div. 5, 1999 WL 24565 *1 (1999)(citing Cannon v. Sears Roebuck & Co., 374 Mass. 739, 742 (1978)). Because the Plaintiff is unable to meet

its burden under at least one of these elements, Defendant is entitled to Summary Judgment as a matter of law.

Plaintiff agreed in writing to hold Defendant harmless from "liability, costs and damages resulting from [Plaintiff's] use of the Resort." Brewster Green Resort's General Release Form, Signed by Michelle Iturralde. A party may "make a valid contract exempting the defendant from liability to her for injuries resulting from the negligence of himself or of his agent or employee." Barrett v. Conragan, 302 Mass. 18, 32-33 (1938)(citing Clarke v. Ames, 267 Mass. 44, 47 (1929); Ortolano v. U-Dryvit Auto Rental Co., Inc., 296 Mass., 439 (1937)).

Under Massachusetts law, waivers are enforceable provided that they are not contrary to public policy. Federal Ins. Co. v. CBT/Childs Bertman Tseckares, Inc., 2007 WL 1630687 (Mass. Super. 2007) (citing Henry v. Mansfield Beauty Acad., Inc., 353 Mass. 507, 510-11 (1968); Barrett v. Conragan, 302 Mass. at 34; Gonsalves v. Commonwealth, 27 Mass.App.Ct. 606, 608 n. 2 (1989); Zavras v. Capeway Rovers Motorcycle Club, Inc., 44 Mass.App.Ct. 17, 18-19 (1997).

Under Federal Ins. Co., liability may not be waived in contravention of public policy, and more specifically, where a statute imposes a duty. Id. In Federal Ins. Co., the Court found no waiver where a statute required certain duties under the building codes. Federal Ins. Co. v. CBT/Childs Bertman Tseckares, Inc., 2007 WL 1630687. In the present case there is no statute or public policy that imposes a duty on the Defendant. The waiver of liability signed by Plaintiff should, therefore be held valid.

Accordingly, there being a valid waiver of liability, Defendant did not owe a duty to Plaintiff. Plaintiff's case therefore fails on the first and second elements of the claim, Defendant had no duty to the Plaintiff and Defendant did not breach any duty owed to the Plaintiff.

IV. CONCLUSION

Even viewing the facts in the light most favorable to Plaintiff, the Plaintiff has failed to make out an claim against the Defendant. Plaintiff, having signed a general release, has agreed to hold Defendant harmless. There being no other duty imposed by statute, Defendant did not owe a duty to Plaintiff. Where Defendant did not owe a duty to the Plaintiff, there is no claim for negligence. Therefore, the Court should grant Defendant's motion for summary judgment.

Respectfully submitted,

Brewster Green Interval Owner's Assoc., Inc.

By its attorney,

David R. Cain
Law Offices of Brown & Black
200 Berkeley Street
16th Floor
Boston, MA 02116
617-236-1900
BBO # 558903

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS.

ESSEX SUPERIOR COURT
Civil Action No. ESCV2011-01030-A

MICHELLE ITURRALDE,
Plaintiff

v.

BREWSTER GREEN INTERVAL OWNER'S ASSOCIATION, INC.,
Defendant

MOTION OF DEFENDANT, BREWSTER GREEN INTERVAL OWNER'S ASSOCIATION, INC., FOR SUMMARY JUDGMENT

NOW COMES the defendant, Brewster Green Interval Owner's Association Inc., and respectfully requests that this Honorable Court grant its motion for summary judgment in the above-captioned matter pursuant to Mass. R. Civ. P. 56(c). As grounds for this motion, the defendant states that there is no dispute as to any material facts and it is entitled to judgment as a matter of law. In support of this motion, the defendant submits the attached memorandum of law.

WHEREFORE, the defendant, Brewster Green Interval Owner's Association, Inc., respectfully requests this Court grant its motion for summary judgment.

Respectfully submitted,
Brewster Green Interval Owner's Assoc., Inc.
By its attorney,

David R. Cain, Esquire
Law Offices of Brown & Black
200 Berkeley Street
16th Floor
Boston, MA 02116
617-236-1900
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