

<b>Lopez v Bell Sports, Inc.</b>
2020 NY Slip Op 33207(U)
September 9, 2020
Supreme Court, Kings County
Docket Number: 502465/14
Judge: Carolyn E. Wade
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At an IAS Term, Part 3 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 9th day of September, 2020.

PRESENT:

HON. CAROLYN E. WADE,  
Justice.

-----X  
CYNTHIA IMMACULADA LOPEZ,

Plaintiff,

- against -

Judgement, Order, & Decision  
Index No. 502465/14  
Mot. Seq. No. 13, 14, 15

BELL SPORTS, INC., EASTON-BELL SPORTS, BELL  
HELMET, CORP., BELL-HELMET, INC., THE TOWN  
OF SOUTHAMPTON, MATTHEW STEVENS and  
ISABEL STEVENS,

Defendants.

-----X  
THE TOWN OF SOUTHAMPTON,

Third-Party Plaintiff,

-against-

BICYCLE SHOW U.S. and GLENN GOLDSTEIN,

Third-Party Defendants.

-----X  
BICYCLE SHOW U.S. LTD s/h/a "BICYCLE SHOWS U.S."  
and GLENN GOLDSTEIN,

Second Third-Party Plaintiffs,

-against-

SUFFOLK COUNTY WATER AUTHORITY,

Second Third-Party Defendant.

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-----X  
THE TOWN OF SOUTHAMPTON,

Third Third-Party Plaintiff,

-against-

SUFFOLK COUNTY WATER AUTHORITY,

Third Third-Party Defendant.

-----X

The following efiled papers read herein:

Papers Numbered

Notice of Motion and Affidavits (Affirmations) Annexed

400-401; 436-437;

458-459, 465-466

Opposing Affidavits (Affirmations)

468, 473, 475, 476;

477, 479; 482-483,

485, 489

Reply Affidavits (Affirmations/Affidavits)

491, 494, 497, 498;

502; 500

Upon the foregoing papers, third-party defendants/second third-party plaintiffs Bicycle Shows U.S. LTD s/h/a Bicycle Shows U.S. ("Bicycle Shows") and Glen Goldstein ("Mr. Goldstein") move, pursuant to CPLR 3212, in motion sequence number 13, for an order granting summary judgment dismissing defendant/third-party plaintiff/third third-party plaintiff the Town of Southampton's (Southampton) third-party claims, as well as all cross-claims and counterclaims asserted against Bicycle Shows and Mr. Goldstein. Alternatively, Bicycle Shows and Mr. Goldstein move, pursuant to CPLR 3212 (g) and CPLR 3211, for an order limiting issues to be addressed at the time of trial, and dismissal of any and all claims asserted by Southampton against Mr. Goldstein.

Second third-party defendant/third third-party defendant Suffolk County Water Authority ("Water Authority") moves, pursuant to CPLR 3212, in motion sequence number 14, for an order granting summary judgment dismissing all third-party complaints and crossclaims against it.

Southampton moves, pursuant to CPLR 3212, in motion sequence number 15, for an order granting summary judgment dismissing the complaint and all cross-claims asserted against it.<sup>1</sup>

### *Background*

Plaintiff Cynthia Immaculada Lopez ("Ms. Lopez") commenced this action with the filing of a summons and complaint on March 21, 2014.<sup>2</sup> Ms. Lopez alleges that on June 1, 2013, she suffered injuries when her bicycle struck a defective condition on South Country Road in Southampton while participating in Ride to Montauk 2013, an event organized by Bicycle Shows. Various other actions were commenced, which were eventually consolidated, and joined for trial under the instant index number. Additionally, multiple third-party actions were instituted, after the commencement of Ms. Lopez's action, resulting in the instant case.

The claims of import for resolution of the instant motions are as follows: (1) Ms. Lopez seeks recovery of damages against Southampton, among others, asserting that it negligently maintained South Country Road; (2) Southampton, in turn, asserts claims

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<sup>1</sup> In the substance of the motion, Southampton fails to ever address or raise any arguments concerning any potential crossclaims. As such, to the extent such crossclaims may exist, this judgment, order, and decision does not resolve any such claims.

<sup>2</sup> Plaintiff initially commenced separate actions, which were eventually consolidated under the instant index number.

sounding in contractual indemnification, common law indemnification, contribution, and breach of contract against Bicycle Shows and Mr. Goldstein; (3) Southampton also commenced a third-party action against Water Authority sounding in common law indemnification and contribution; and (4) Bicycle Shows and Mr. Goldstein then commenced its third-party action against Water Authority asserting causes of actions for common-law indemnification and contribution.

As aforementioned, Bicycle Shows and Mr. Goldstein now move for an order granting summary judgment, dismissing all causes of actions asserted against them by Southampton, or in the alternative, dismissing those causes of actions asserted against Mr. Goldstein, individually. Water Authority moves for summary judgment seeking dismissal of all claims against it. Southampton moves for an order seeking dismissal of the complaint.

### *The Parties' Positions*

#### *Bicycle Shows and Mr. Goldstein's Motion for Summary Judgment*

Bicycle Shows and Mr. Goldstein's core position is principally twofold: first, the underlying action against Southampton commenced by Ms. Lopez must be dismissed as Southampton did not receive prior written notice of the alleged defect nor did it create the defect or maintain special use over the area; thus, Southampton's claims against them cannot survive; and second, Southampton's claims for indemnification, breach of contract, and contribution are untenable, as Bicycle Shows complied with the contract, and was not negligent in any capacity, which would warrant the imposition of liability against it. Further, Bicycle Shows and Mr. Goldstein argue that regardless of either of these

contentions, there are no allegations which would warrant piercing the corporate veil subjecting Mr. Goldstein to individual liability.

In support of these arguments, Bicycle Shows and Mr. Goldstein proffer the deposition testimonies of: (1) Southampton's Superintendent of Highways and Commissioners of Public Works, Alexander Gregor (Superintendent Gregor); (2) Southampton's Town Clerk, Sundry Schermeyer (Clerk Schermeyer); (3) Southampton's Labor Crew Leader, Nathaniel Roach (Crew Leader Roach); (4) Mr. Goldstein; (5) Water Authority Construction Maintenance Administrator, Frederick Berg (Administrator Berg); and (6) Southampton's Assistant Crew Leader, Craig Carpenter (Assistant Crew Leader Carpenter).

Bicycle Shows and Mr. Goldstein specifically note that Superintendent Gregor attests that he performed a search for prior written notices received by Southampton reporting any defects on South Country Road and found none. Further, they contend that Superintendent Gregor also testified that Southampton had performed no work on the roadway at least ten years prior to Ms. Lopez's accidents; however, Superintendent Gregor uncovered documents and information that Water Authority filed permits, and performed work at the subject location relating to a water main in 1999, some fourteen years prior to Ms. Lopez's accident. Thus, Bicycle Shows and Mr. Goldstein argue that Southampton is entitled to summary judgment, dismissing Ms. Lopez's claims, as it neither received prior written notice of the alleged defect nor did it create the alleged defect. As such, they argue such a finding necessitates dismissal of all claims against them, as Southampton's claims are dependent on a finding of liability against it.

Alternatively, they posit that regardless of any culpability on Southampton's part, any claims against Bicycle Shows and Mr. Goldstein, nevertheless, must be dismissed. Critically, they argue that they did not have any duty, authority, or ability to maintain the alleged defect which caused Ms. Lopez's injuries. Additionally, they argue that the mere issuance of a parade permit did not constitute any special use of the roadway or place upon them any additional exposure to liability for property defects. Thus, the contribution and common law indemnification claims must be dismissed.

With respect to contractual indemnification, Bicycle Shows and Mr. Goldstein argue the exhibited indemnity agreement is a contract of adhesion, is ambiguous, and must be read against the interests of Southampton. Addressing the breach of contract claim, Bicycle Shows and Mr. Goldstein contend that such a claim is wholly unfounded, as the sole basis for such a claim is Bicycle Shows alleged failure to name Southampton as an additional insured. Supporting their position, Bicycle Shows and Mr. Goldstein proffer certain insurance documents, which demonstrate that Bicycle Shows' insurer accepted Southampton as an additional insured and tendered a defense of it in the instant action.

Finally, Bicycle Shows and Mr. Goldstein assert that all causes of action as asserted against Mr. Goldstein must be dismissed, as there is no basis to pierce the corporate veil. They proffer various documents demonstrating that Bicycle Shows was duly incorporated in the State of New York, and that Southampton issued the permit to Bicycle Shows, not to Mr. Goldstein as an individual. In this regard, Bicycle Shows and Mr. Goldstein assert that Southampton's third-party complaint fails to allege any facts which are sufficient to pierce the corporate veil.

Southampton submits partial opposition, contending that Bicycle Shows is neither entitled to dismissal of its common law and contractual indemnifications claims nor its contribution claims. It maintains that dismissal of these causes of action are premature, as questions of fact remain as to Bicycle Shows' duty to protect participants involved in the Ride to Montauk 2013, as the event organizer. Southampton also argues that the parade permit requires that Bicycle Shows indemnifies it for any liability that it was exposed to as a result of the event. Specifically, Southampton references portions of Mr. Goldstein's testimony wherein he attests to the various measures and responsibilities Bicycle Shows undertook in preparation, and during the course of the event. Southampton argues that such evidence raises questions of fact that must be resolved by the jury. Further, Southampton stresses that, contrary to Bicycle Shows contentions, the indemnity agreement is neither ambiguous nor does it constitute a contract of adhesion. It maintains that such agreements are routinely enforced, and that if it is found liable for damages owed to Ms. Lopez, the contract requires Bicycle Shows to indemnify it for any potential judgment.

Ms. Lopez, in opposition, argues that questions of fact remain preventing dismissal of her claims against Southampton. Supporting her position, Ms. Lopez proffers the expert affidavit of Nicholas Bellizzi, P.E. Ms. Lopez asserts that Mr. Bellizzi's opines that Southampton's actions created a dangerous condition, which led to the injuries she sustained. Thus, Ms. Lopez argues that such expert evidence precludes the granting of summary judgment in Southampton's favor.

Additionally, Ms. Lopez asserts the testimony of Crew Leader Roach demonstrates that, even if there was not prior written notice, Southampton had actual notice of the defect, as its employees routinely inspected the area, and would have observed the condition of the subject location. Ms. Lopez maintains that this fact prevents the dismissal of her action against Southampton. Ms. Lopez also asserts that Bicycle Shows and Mr. Goldstein's arguments concerning the indemnity agreement are unfounded. Ms. Lopez argues the indemnity language is unambiguous and clear, requiring Bicycle Shows to indemnify Southampton should it be found liable for injuries resulting from Ride to Montauk 2013.

In reply, Bicycle Shows and Mr. Goldstein reassert their various contentions raised in their initial moving papers. They maintain that since Southampton did not oppose the branches of their motion seeking dismissal of all claims as asserted against Mr. Goldstein, and dismissal of the breach of contract claim, such relief must be granted as unopposed. Addressing Ms. Lopez's opposition, Bicycle Shows and Mr. Goldstein principally argue that she does not have standing to oppose its motion to the extent it seeks dismissal of the causes of action sounding in contractual indemnification, common-law indemnification, and contribution. As to her position that Southampton is not entitled to summary judgment in its favor, Bicycle Shows and Mr. Goldstein assert that Mr. Bellizzi's expert affidavit is of no evidentiary value as it is wholly speculative. Likewise, they assert Mr. Bellizzi's affidavit does not provide sufficient evidence rebutting the deposition testimony demonstrating that Southampton did not create the alleged defect, as Mr. Bellizzi failed to establish that the defect was created by Southampton's affirmative acts.

*Water Authority's Motion for Summary Judgment*

Water Authority argues that there is no legal basis to impute a duty on it to indemnify either Bicycle Shows, Mr. Goldstein, or Southampton nor did any of its conduct constitute a negligent act contributing to Ms. Lopez's injuries, warranting the survival of the third-party plaintiffs' contributions claims. Proffering the aforementioned deposition testimonies, Water Authority contends that though it performed work at the subject site fourteen years prior to Ms. Lopez accident, such work was completed appropriately as evidenced by Southampton's approval of the work; and the fact that it received no written notices identifying any defects regarding its work. Further, it argues it had no duty to maintain the roadway, as the sole entity with authority to maintain South Country Road is Southampton. Additionally, Water Authority contends that its work at the subject location, and maintenance of a water main in the vicinity does not constitute special use of the area, which would subject it to liability for injuries at the subject location.

Supporting these contentions, Water Authority specifically highlights Administrator Berg's deposition testimony, wherein he describes the work Water Authority completed in 1999. Similarly, Water Authority highlights Crew Leader Roach's deposition testimony, wherein he provided that an employee of Southampton inspected the Water Authority's jobsite; specifically, the paving of South Country Road, and approving of the completed job. Thus, Water Authority argues that there is no basis to find it was negligent; thus, its third-party plaintiffs' contribution claims and indemnification claims must be dismissed.

Ms. Lopez opposes the motion, asserting that Water Authority failed to establish its prima facie case entitling it to summary judgment. Ms. Lopez asserts that Water Authority

failed to proffer evidence demonstrating that it properly sealed the pavement and failed to demonstrate it properly restored South Country Road for safe use. She also maintains that Water Authority may not simply use the duration of time as evidence that it did not engage in neglect; as precedent establishes that the mere passing of time alone does not constitute evidence that a public entity's work did not create a defective condition.

Alternatively, Ms. Lopez presents Mr. Bellizzi's affidavit, and argues that there are triable issues of fact precluding the granting of summary judgment to the Water Authority. Specifically, Ms. Lopez asserts Mr. Bellizzi's affidavit attests to a defect identified as scale, which immediately caused the unravelling of South Country Road, and led to her injuries. Thus, even if the Court is to find Water Authority established its prima facie case, Mr. Bellizzi's affidavit creates triable issues of fact as to whether Water Authority contributed to Ms. Lopez's injuries. Further, she argues that in circumstances, as here, where it is unclear precisely when and where repairs were made, and whether the repairs were negligently performed, the granting of a summary judgment in favor of an entity that may have contributed to the occurrence of the accident is improper.

In reply, Water Authority contends that Ms. Lopez does not have standing to challenge its motion for summary judgment. In this regard, Water Authority maintains that controlling precedent provides that a plaintiff is not aggrieved by a third-party action; therefore, he/she does not have standing to challenge a third-party defendant's motion for summary judgment seeking dismissal of the third-party complaint. Water Authority further asserts that contrary to Ms. Lopez's position, it is not arguing that the mere passage of time demonstrates that its work was performed in a non-neglect manner, but rather highlights

the numerous inspections, and observations in the roadway that never identified any defect. Additionally, Water Authority submits that Ms. Lopez's expert, Mr. Bellizzi, supports its position that its work was completed in an appropriate, non-negligent manner. Thus, Water Authority contends that its motion must be granted as unopposed, or alternatively, Ms. Lopez's opposition fails to defeat its prima facie entitlement to summary judgment.

*Southampton's Motion for Summary Judgment*

In support of its motion for summary judgment, Southampton proffers, among other evidence, the affidavits of Clerk Schermeyer and Superintendent Gregor, and the deposition testimony of Administrator Berg. Southampton argues that as it enacted a prior written notice statute, it may only be held liable for injuries resulting from a defective condition where it received prior written notice concerning the alleged defect, unless an exception exists, and it is properly alleged. Southampton posits that the only theories of liability Ms. Lopez asserts against it are that it (a) received prior written notice, and/or (b) affirmatively created the defect through an act of negligence which immediately resulted in the subject defect. It contends that the affidavits and deposition testimony clearly demonstrate that Southampton never received any prior written notice of any alleged defect at the subject location, and that it had not performed any work which caused the defective condition. It argues that the evidence produced only demonstrates that Water Authority performed work at the subject location some fourteen years prior to the accident, but that Southampton was not actively involved in that project. Thus, Southampton maintains it has demonstrated its entitlement to summary judgment dismissal of Ms. Lopez's complaint against it.

In opposition, Ms. Lopez principally raises issues of spoliation, arguing that Crew Leader Roach testified to inspecting the roadway on numerous occasions, taking notes, but discarded them after a period of time. Ms. Lopez contends that such conduct precludes the granting of summary judgment in Southampton's favor, as there must be a negative inference drawn based upon the destruction of potential evidence which may demonstrate Southampton had actual notice of the defect or written acknowledgement of the defect. Additionally, Ms. Lopez again proffers Mr. Bellizzi's expert affidavit, which she maintains, creates questions of fact that precludes an accelerated judgment. Water Authority submits partial opposition to Southampton's motion to the extent that it seeks to impute liability against it. It asserts that no evidence has been proffered to demonstrate that it performed its work negligently in 1999.

In reply, Southampton wholly rejects Ms. Lopez's contention that the lack of records impute a negative inference suggesting actual notice of the defect. Southampton argues that even if it had actual notice of the alleged defect, it would be of no consequence, as actual notice does not satisfy the prior written notice requirements or constitutes an exception to the prior written notice statute. Addressing Mr. Bellizzi's expert affidavit, Southampton asserts that he fails to establish that any alleged defect was immediately created by it. Further, it argues that Mr. Bellizzi's conclusions are wholly speculative, and are not supported by any evidence or scholarly basis. Thus, Southampton argues that it is entitled to summary judgment, dismissing Ms. Lopez's complaint.

### Discussion

On a motion for summary judgment the court's function is issue finding, not issue determination (see *Trio Asbestos Removal Corp. v Gabriel & Sciacca Certified Pub. Accountants, LLP*, 164 AD3d 864, 865 [2d Dept 2018] [internal citations omitted]). "A party moving for summary judgment must demonstrate that 'the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment' in the moving party's favor" (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014], quoting CPLR 3212 [b]). "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Id.*, citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1986]). In other words, "plaintiff need only raise a triable issue of fact regarding the element or elements on which the defendant has made its prima facie showing" (*McCarthy v Northern Westchester Hosp.*, 139 AD3d 825, 826 [2d Dept 2016] [internal quotation marks omitted]).

"In determining a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party" (*Santiago v Joyce*, 127 AD3d 954, 954 [2d Dept

2015] [Internal citations omitted]). “To grant summary judgment it must clearly appear that no material and triable issue of fact is presented” (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957] [internal citation omitted]). Further, “[s]ummary judgment is a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues” (*Stukas v Stretter*, 83 AD3d 18, 23 [2d Dept 2011] [internal citation omitted]; see also *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]).

“Generally, where . . . a municipality has enacted a prior written notice statute, ‘it may not be subjected to liability for injuries caused by an improperly maintained street or sidewalk unless it has received written notice of the defect’” (*Weinstein v County of Nassau*, 180 AD3d 730, 731 [2d Dept 2020], quoting *Cimino v. County of Nassau*, 105 AD3d 883, 884 [2d Dept 2013]). Neither constructive notice nor actual notice of an alleged defect is sufficient to impute liability where a municipality has a prior written notice statute (see *Charles v City of Long Beach*, 136 AD3d 634, 635 [2d Dept 2016]; *Factor v Town of Islip*, 136 AD3d 634, 635 [2d Dept 2015]; *Chirco v City of Long Beach*, 106 AD3d 941, 943 [2d Dept 2013]).

However, “[t]wo exceptions to the prior written notice requirement have been recognized, namely, where the locality created the defect or hazard through an affirmative act of negligence and where a special use confers a special benefit upon the locality” (*Nigro v Vil. of Mamaroneck*, 184 AD3d 842, 842 [2d Dept 2020] [internal quotation marks and citations omitted]). “The affirmative negligence exception is limited to work by the [municipality] that immediately results in the existence of a dangerous condition” (*Lewak v Town of Hempstead*, 147 AD3d 919, 920 [2d Dept 2017] [internal quotations marks and

citations omitted]). Evidence that a dangerous condition developed over time, even where negligence is attributed to a municipality, is insufficient to impose liability under the affirmative negligence exception (see *Yarborough v City of New York*, 10 NY3d 726, 728 [2008]). Whereas “[t]he special use exception is reserved for situations where a municipality derives a special benefit from the property unrelated to the public use” (*Budoff v City of New York*, 164 AD3d 737, 739 [2d Dept 2018] [internal citations omitted] [wherein the court found the municipalities’ installation of bicycle lanes did not constitute a special use]).

Section 287-1 of Southampton’s Town Law provides:

*“No civil action shall be maintained against the Town of Southampton or the Town Superintendent of Highways for damages or injuries to person or property sustained by reason of any highway, bridge or culvert being defective, out of repair, unsafe, dangerous or obstructed unless written notice of such defective, unsafe, dangerous or obstructed condition of such highway, bridge or culvert was actually given to the Town Clerk or Town Superintendent of Highways and there was a failure or neglect within a reasonable time after the giving of such notice to repair or remove the defect, danger or obstruction complained of; and no such action shall be maintained for damages or injuries to person or property sustained solely in consequence of the existence of snow or ice upon any highway, bridge or culvert unless written notice thereof, specifying the particular place, was actually given to the Town Clerk or the Town Superintendent of Highways and there was a failure or neglect to cause such snow or ice to be removed or to make the place otherwise reasonably safe within a reasonable time after the receipt of such notice”* (emphasis added).

Thus, Southampton may only be subject to liability for injuries sustained by Ms. Lopez if it received prior written notice of such defect or if its affirmative negligence immediately

created the alleged defective condition in South Country Road, as these are the only bases of liability alleged by Ms. Lopez (*see Beiner v Village of Scarsdale*, 149 AD3d 679, 680 [2d Dept 2017]; *see also* NY St Cts Elec Filing [NYSCEF] Doc No. 460 at 27-31 [wherein Ms. Lopez does not allege the special use exception]). Stated conversely, Southampton is entitled to accelerated judgment dismissing Ms. Lopez's claims against it, if it demonstrates that it had no prior written notice of the alleged defect; and did not immediately create the alleged defective condition through an affirmative act of negligence (*see Marshall v City of New York*, 52 AD3d 586, 586-587 [2d Dept 2008] [wherein Second Department affirmed dismissal of plaintiff-bicyclist's action alleging injuries after striking a pothole when defendant City established it did not have prior written notice and did not commit an affirmative negligent act immediately creating the defective condition]).

In the instant case, Southampton established its prima facie entitlement to judgment as a matter of law, dismissing Ms. Lopez's negligence action against it, by proffering sufficient evidence demonstrating it neither received prior written notice of the alleged defect which caused her injuries nor did it take any affirmative negligent actions which immediately created the alleged defective condition. Southampton's prior written notice statute requires that the Town Clerk or the Town Superintendent of Highways receive actual written notice of the alleged defect (*see* Southampton Town Law § 287-1). The testimonies of Clerk Schermeyer and Superintendent Gregor reflect that both individuals reviewed and searched for relevant records maintained by Southampton, and the records reflected the absence of it, specifically the Town Clerk and Town Superintendent of Highways, being in receipt of any written notices of defects in the subject area prior to Ms.

Lopez's accident (*see* Clerk Schermeyer deposition tr at 56, lines 4-17, at ; Superintendent Gregor deposition tr at 15, lines 8-16). Moreover, the various depositions proffered by the parties, and the affidavits presented in support of Southampton's motion demonstrate that no conduct by it resulted in the immediate creation of a defect (Superintendent Gregor deposition tr at 32, lines 8-16; Assistant Crew Leader Carpenter deposition tr at 10, lines 4-8; aff Superintendent Gregor at 2, para 2 [wherein all individuals attest to Southampton performing no work at the subject location]). Thus, Southampton demonstrated its prima facie entitlement to accelerated judgment.

In response, the burden shifts to Ms. Lopez to produce evidence demonstrating a triable issue of fact defeating Southampton's prima facie showing (*see Zuckerman*, 49 NY2d at 562). Ms. Lopez failed to raise a triable issue of fact. Ms. Lopez's contention that the absence of written notes and reports of internal employees of Southampton require a negative inference is of no consequence, as even the existence of such internal notes and reports would constitute actual notice, but would nonetheless fail to satisfy Southampton's prior written notice statute (*see Charles*, 136 AD3d at 635; *Factor*, 136 AD3d at 635; *Chirco*, 106 AD3d at 943). Ms. Lopez's reliance on *Bruni v City of New York* (2 NY3d 319), which she argues stands for the proposition that a departmental written acknowledgement of a defect satisfies the prior written notice requirement, is unfounded. In *Bruni*, the Court of Appeals interpreted a specific statute which included a provision concerning "written acknowledgment" of defects by the New York City Department of Transportation. Such precedent is of no consequence in the instant action, as Southampton's prior written notice statute does not contain a like provision. Thus, the

general principles that neither actual nor constructive notice satisfy a prior written notice statute apply in the instant matter (*Charles*, 136 AD3d at 635; *Factor*, 136 AD3d at 635; *Chirco*, 106 AD3d at 943).

Addressing Mr. Bellizzi's expert affidavit, such proffered evidence fails to raise triable issues of fact. Contrary to Ms. Lopez's assertion, Mr. Bellizzi's expert opinion does not provide evidence that Southampton's negligence immediately resulted in the defect which caused her injuries. Mr. Bellizzi's affidavit specifically opines that Southampton's acts resulted in a defect and "that the defect constituted 'scale,' which probably occurred when a work crew cut open the road, which 'caused or hastened the unraveling' of the overlay of the roadway" (aff Mr. Bellizzi at 3, para 5 [emphasis added]). While Mr. Bellizzi attests that such defect, that is scale, "immediately creat[ed] a hazard," he qualifies this opinion, by further averring that the scale "caused the unraveling of the overlay of the roadway" (*id.* at 4, para 7). Thus, while Mr. Bellizzi's expert evidence suggests that Southampton was negligent in some capacity, its negligence did not immediately create the defective condition which caused Ms. Lopez's injuries, rather this defective condition developed over a period of time when the roadway unraveled (*see Wilson v Incorporated Vil. of Hempstead*, 120 AD3d 665, 666-667 [2d Dept 2014]; *Diaz v City of New York*, 56 AD3d 599, 600-601 [2d Dept 2008] ["even if a municipality performs negligent pothole repair, where the defect develops over time with environmental wear and tear, the affirmative negligence exception is inapplicable"]). Accordingly, Southampton's motion for summary judgment dismissing Ms. Lopez's claims against it is granted.

As summary judgment dismissing all claims against Southampton is granted, Southampton's third-party claims against Water Authority, Bicycle Shows and Mr. Goldstein sounding in common-law indemnification and contribution are likewise dismissed. Such claims are preconditioned upon a finding of liability against Southampton; thus, do not survive (*see Curren v Heritage Prop. Inv. Trust, Inc.*, 48 AD3d 505, 507 [2d Dept 2008] ["[t]he principle of common-law, or implied, indemnification permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party"]; *see also* CPLR 1401 ["persons who are subject to liability for damages . . . may claim contribution"] [emphasis added]). Accordingly, those branches of Water Authority, Bicycle Shows and Mr. Goldstein's motions seeking dismissal of these causes of action are granted.

Addressing Southampton's remaining claims for breach of contract and contractual indemnification against Mr. Goldstein, individually, such claims are also hereby dismissed. Southampton's third-party complaint makes no allegations that Mr. Goldstein "exercised complete dominion and control over the corporation and used such dominion and control to commit a fraud or wrong against" it (*Flushing Plaza Assoc. #2 v Albert*, 102 A.D.3d 737, 738 [2d Dept 2013]). In addition, Mr. Goldstein proffers sufficient evidence demonstrating that he never engaged with Southampton in his individual capacity. The evidence reveals that he only engaged with Southampton in his corporate capacity as principal of Bicycle Shows (*see generally Maggio v Becca Constr. Co.*, 229 AD2d 426 [2d Dept 1996]). Specifically, Mr. Goldstein proffers, among other evidence, a personal affidavit attesting that "I signed the permit application and 'Indemnity Agreement' as

President of Bicycle Shows, not [sic] in my individual capacity” (aff Mr. Goldstein at 4, para 21). Further, Southampton proffers correspondence and the permit, which likewise demonstrates that it dealt with Mr. Goldstein only in his corporate capacity (NY St Cts Elec Filing [NYSCEF] Doc No. 469)). Thus, those causes of action are dismissed against Mr. Goldstein.

Finally, Southampton’s causes of action sounding in contractual indemnification and breach of contract as against Bicycle Shows are likewise dismissed. Bicycle Shows established its entitlement to summary judgment, dismissing these causes of action by proffering certain insurance documents demonstrating that it procured insurance for Southampton, as required by the permit, and that Southampton accepted the tender of coverage, and did not incur fees (*see* NY St Cts Elec Filing [NYSCEF] Doc No. 433)).<sup>3</sup>

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<sup>3</sup> The indemnification agreement between Bicycle Shows and Southampton provides:

In consideration of issuance by [Southampton] of a Parade Permit, [Bicycle Shows] voluntarily agrees to indemnify and hold [Southampton] and its officers, employees, and agents harmless from and against any and all losses, liabilities, damages, or costs sustained by any persons for personal injury, death, or property damage arising out of, or as a consequence to the Parade.

[Bicycle Shows] further agrees to indemnify and hold harmless [Southampton] and its officers, employees, and agents from and against any and all losses, liabilities, damages, or costs which may be imposed upon, incurred by or asserted against [Southampton] by reason of any act of omission of [Bicycle Shows], which result in damage or injury of any kind to any person or any property and which arises out of or is any way connected with the event permitted by this permit” (NYSCEF Doc No. 469).

Thus, as Bicycle Shows procured insurance naming Southampton as an additional insured, and such insurance tendered the policy, and provided representation for Southampton, Bicycle Shows wholly satisfied its contractual requirements.

Accordingly, Bicycle Shows' motion for summary judgment dismissing Southampton's claims for contractual indemnification and breach of contract is granted.

To the extent not specifically addressed herein, parties' remaining contentions have been considered and found to be either meritless and/or moot. Accordingly, it is

**ORDERED** that Bicycle Shows and Mr. Goldstein's motion for summary judgment is granted and it is further;

**ORDERED** that Water Authority's motion for summary judgment is granted and it is further;

**ORDERED** that Southampton's motion for summary judgment is granted;

This constitutes the decision, order and judgment of the court.

Honorable Carolyn E. Wade  
Acting Supreme Court Justice

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KINGS COUNTY CLERK