To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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ELISA MERCURIO,

Plaintiff,

-against-

THE CITY OF WHITE PLAINS, 24-46 MAMARONECK AVENUE ASSOCIATES, LLC a/k/a 24-46 MAMARONECK AVENUE LLC., SILVERMAN REALTY GROUP, INC., and IVY GLOBAL USA, INC. d/b/a IVY GLOBAL,

Defendants.

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DECISION AND ORDER
Motion Sequence Nos. 1 - 2
Index No. 69362/2018

RUDERMAN, J.

The following papers were considered in connection with the motion of defendant the City of White Plains for an order pursuant to CPLR 3211 and 3212 dismissing plaintiff's complaint and all cross claims against it (sequence 1); and the motion of defendants 24-46 Mamaroneck Avenue Associates, LLC a/k/a 24-46 Mamaroneck Avenue LLC and Silverman Realty Group, Inc. for an order pursuant to CPLR 3212 dismissing plaintiff's complaint and all cross claims against them and granting conditional summary judgment on their cross claims against defendant Ivy Global USA, Inc. (sequence 2):[1]

Papers – Sequence 1	Numbered
Notice of Motion; Statement of Material Facts; Affirmation, Exhibits A - Q; Memorandum of Law, Exhibits R - T	1
Affirmation in Opposition, Exhibits A - F	2
Affirmation in Reply	3

Papers – Sequence 2	Numbered
Notice of Motion; Statement of Material Facts; Memorandum of Law, Exhibits A - R	4
Ivy's Affirmation in Partial Opposition; Counter Statement of Material Facts	5
Plaintiff's Affirmation in Opposition	6
Affirmations in Reply	7

[1] Although motion sequence 2 was filed before motion sequence 1, it was labeled as motion sequence 2 on the Court's docket due to a clerical error.

This personal injury action arises out of plaintiff Elisa Mercurio's trip and fall on the sidewalk alongside 187 Martine Avenue in White Plains, New York on March 23, 2018. Mercurio alleges that she tripped on a defective portion of the sidewalk and fell, sustaining injuries. At the time of the incident, defendant Ivy Global USA, Inc. d/b/a Ivy Global (Ivy) occupied 187 Martine Avenue. The complaint alleges that both 24-46 Mamaroneck Avenue Associates, LLC a/k/a 24-46 Mamaroneck Avenue LLC. and Silverman Realty Group, Inc. (collectively "the Silverman defendants") owned and operated 187 Martine Avenue.

Plaintiff further alleges that each defendant negligently repaired the subject sidewalk prior to March 23, 2018 and that each defendant had a duty to maintain the area and breached that duty. Additionally, plaintiff claims that all defendants were on actual and constructive notice of the alleged sidewalk condition, and that defendant City of White Plains (White Plains) had prior written notice of it. Each defendant has filed cross claims against each of its co-defendants, seeking indemnification.

White Plains' Motion (sequence 1)

Defendant White Plains moves to dismiss plaintiff's complaint and all cross claims against it pursuant to CPLR 3211 and 3212 on grounds that it that it neither created the condition nor had prior written notice of it as required by section 277 of the City of White Plains code of ordinances. White Plains also argues that plaintiff's claim must be dismissed because the condition was open and obvious and because the other defendants were responsible for maintaining the subject sidewalk.

In support of its motion, White Plains submits the affidavits of Tracy Muhlfeld, secretary to the commissioner of the White Plains Department of Public Works (DPW), and Vincent Perez, a crew leader in the blacktop department of the DPW.

In her affidavit, Muhlfeld indicated that, since October 2015, she has been responsible for receiving and recording all written notices of defective or dangerous sidewalks in need of repair that are submitted to the commissioner of public works. Muhlfeld explained that all such notices are recorded in a prior written notice log, which she searched and found no records of a defective or dangerous condition at or near 187 Martine Avenue.

White Plains also relies on the deposition testimony of Richard Stangerone, the highway superintendent for White Plains, who testified that he reviewed the records for his department and found no prior complaints related to the sidewalk in the subject area.

Perez indicated in his affidavit that he is responsible for overseeing all work involving filling potholes, tree wells, and streets with asphalt whenever necessary, and that he is personally familiar with the work performed at the subject location. Perez explained that he and several crew members removed a tree from the sidewalk at the subject location and then patched the sidewalk by filling the vacant tree well with asphalt. He also indicated that, when their work was complete, the asphalt was perfectly smooth and level with the surrounding sidewalk. Perez did not provide a specific date for when he and his crew performed this work; he asserted only that it was "years earlier."

Perez further indicated that he reviewed several photographs that purportedly depict the subject location as it existed on March 23, 2018, the date of the incident. He observes that these pictures show that the asphalt is raised above the sidewalk around the entire perimeter of the former tree well, but asserts that these photographs do not depict the area as it appeared following his patchwork "years earlier." Perez also reviewed two photographs from Google maps dated September 2016, which he indicates more accurately reflect the work he performed in the area because those photographs show perfectly smooth and even asphalt. Perez opined that the condition of the subject tree well changed over time.

White Plains also submits the deposition testimony of Richard Hope, the commissioner of public works for White Plains, although it does not cite or refer to any specific portion of the transcript.

In opposition, plaintiff argues that White Plains created the dangerous condition at issue. Plaintiff submits the affidavit of Terence Murphy, a professional engineer licensed in the state of New York. Murphy indicates that he reviewed photographs of Martine Avenue from 2007, 2012, 2014, 2016, and 2018, as well as the depositions and affidavits submitted in connection with this action, from which he drew conclusions to a reasonable degree of engineering certainty.

Murphy explained that the initial tree removal and asphalt patchwork was performed in 2007, and that the asphalt used to fill in the tree wells was not designed for long term use in this application because it was subject to wear over time. He opined that concrete would have been a

preferable material because it would have created a harder, more permanent surface that requires less maintenance.

Additionally, Murphy observed, based on the photographs that he reviewed, that the asphalt deteriorated over time and required multiple repairs. According to Murphy, the photographs show that on two to three separate occasions, an additional layer of asphalt was applied to the subject tree well, and that each added layer created an immediately dangerous condition by increasing the height difference between the asphalt and the surrounding concrete. Murphy further opined that, since the area is part of a public sidewalk, the work was most likely performed by White Plains. Murphy also cites the deposition testimony of Richard Hope, who indicated that White Plains performed the repair work at the subject location. Plaintiff does not submit any evidence that White Plains had prior written notice of the allegedly dangerous condition.

In reply, White Plains observes that plaintiff failed to submit a response to its statement of material facts as required by 22 NYCRR 202.8-g, and argues that, as a result, plaintiff has admitted that White Plains did not have prior written notice, that it did not create the subject condition, and that it was not responsible for maintaining the subject area, among other facts. White Plains also contends that plaintiff's opposition is based solely on speculation, citing a portion of her opposition in which plaintiff concedes that it is unclear which defendant repaired the sidewalk. White Plains maintains that its work on the subject sidewalk did not result in an immediate danger. Specifically, White Plains points to Murphy's determination that the condition of the tree well changed over time, and argues that its work did not immediately result in a dangerous condition.

The Silverman Defendants' Motion (sequence 2)

The Silverman defendants move for summary judgment dismissing plaintiff's complaint and all cross claims against them on grounds that the laws of White Plains do not charge them with any duty toward plaintiff. The Silverman defendants argue that, absent a statute that specifically imposes tort liability, an abutting landowner is only liable for defects in the public sidewalk if it caused the condition or if it made special use of the sidewalk and the special use was the proximate cause of the incident.[2]

[2] The Silverman defendants also argue that the doctrine of res ipsa loquitur is inapplicable, although plaintiff raises no such claim.

Additionally, the Silverman defendants contend that they are entitled to contractual indemnity from Ivy pursuant to the lease between them, and they seek conditional summary judgment on their cross claims against Ivy on that basis. In support of their motion, defendants submit the May 5, 2021 affidavit of Maggie Stern, the director of management and construction for defendant Silverman Realty Group, Inc. (Silverman).

Stern explains that the building located at 183-187 Martine Avenue is owned by defendant 24-46 Mamaroneck Avenue Associates, LLC a/k/a 24-46 Mamaroneck Avenue LLC (24-46 Mamaroneck) and managed by Silverman; 24-46 Mamaroneck leased a portion of that building, 187 Martine Avenue, to Ivy. She also indicated that 24-46 Mamaroneck and Ivy executed a standard form lease, effective February 29, 2016, for a term beginning on March 1, 2016 and ending on July 31, 2023. Stern further explained that a search of Silverman's records revealed no written notice concerning any defects to the subject sidewalk, nor notices of violations from any governmental agency related to the sidewalk. Stern asserted that neither of the Silverman defendants repaired the sidewalk or directed any third party to do so.

In opposition, plaintiff concedes that the Silverman defendants did not make special use of the sidewalk. However, plaintiff argues that it is clear that some party negligently repaired the sidewalk, and the motion for summary judgment must be denied because a triable issue of fact exists as to which defendant performed the negligent repair.

Plaintiff refers to photographs of the subject area purportedly taken in 2014, 2016, and 2018, and argues that a dangerous condition existed in 2014 and that someone had attempted to repair the defect before the 2016 photograph was taken. Plaintiff contends that only the Silverman defendants or White Plains could have made such a repair. Plaintiff further asserts that the 2018 photograph shows a worse condition than the 2016 photograph. As plaintiff discusses these photographs only in her attorney's affirmation in opposition, she explains that no expert is necessary because a lay person can review the images and determine that the work was negligently performed.

Plaintiff also cites to Stern's February 7, 2020 deposition transcript, in which she explained that Silverman uses a computer program called "Angus Anywhere" to maintain reports of issues related to the properties that it manages. At the time of her deposition, Stern testified that she had not searched the Angus Anywhere software for reports related to this matter. Plaintiff argues,

therefore, that the Silverman defendants have failed to establish that they did not perform the repairs that resulted in plaintiff's injury.[3]

Additionally, Ivy partially opposes the Silverman defendants' motion to the extent that it relates to the cross claims between them. Ivy opposes summary judgment on the Silverman defendants' cross claim against it, but does not argue against dismissal of its own cross claim seeking indemnification from the Silverman defendants. Significantly, Ivy does not cite any contract provision, or make any argument, in favor of its cross claim for indemnity from the Silverman defendants.

Ivy acknowledges that the "Repairs" section of the lease indicates that it is responsible for maintaining the sidewalks. However, Ivy argues that this section specifically refers to "non-structural" repairs, and that 24-46 Mamaroneck was responsible for making structural repairs. Moreover, Ivy points to paragraph six of the lease entitled "Requirements of Law, Fire Insurance," which provides that "nothing herein shall require Tenant to make structural repairs or alterations." Ivy further contends that repairing a cracked or broken sidewalk amounts to a structural repair, and that its responsibilities only included keeping the sidewalk clean and clear.

Ivy also cites the deposition testimony of Maggie Stern, who indicated that a tenant would not be responsible for repairing a broken sidewalk. Stern further testified that upon receiving a report of a structural issue on a sidewalk, she, as a representative of Silverman, would contact the White Plains DPW; Ivy highlights the fact that Stern would not contact the tenant with such an issue. Ivy also notes that Stern stated that the only portion of the sidewalk that Ivy may be responsible for was the entry vestibule, which is a small portion of the sidewalk that ends with the building line and is not near the area where plaintiff tripped.

Additionally, Ivy submits the deposition testimony of its own witness, Raymond Song, the director of finance at Ivy, who testified that Ivy had no responsibility for structural sidewalk repairs. He also testified that it was his understanding that Ivy was only responsible for clearing the entry vestibule area of the sidewalk.

Moreover, Ivy contends that if the terms of the lease are ambiguous as to which party is responsible for structural repairs to the sidewalk, the lease must be interpreted against 24-46 Mamaroneck, as the drafter of the lease, under the theory of contra proferentem. However, Ivy

[3] Plaintiff does not address the May 5, 2021 affidavit in which Stern indicates that she performed such a search and determined that the Silverman defendants neither repaired the sidewalk or had notice of the alleged defect.

maintains that the lease is not ambiguous and clearly requires 24-46 Mamaroneck to make all structural repairs, and that it was negligent for failing to do so. Ivy also argues that 24-46 Mamaroneck's contractual indemnity claims against them are prohibited by General Obligations Law § 5-321. Finally, Ivy contends that the lease's mandatory arbitration clause requires denial of the motion.

In reply, the Silverman defendants observe that plaintiff did not oppose their position that the White Plains code of ordinances does not impose tort liability for damaged sidewalks on abutting landowners. Additionally, they argue that plaintiff did not submit any evidence in admissible form since she only submitted her attorney's affirmation in opposition, which was not based on any personal knowledge of the events at issue.

The Silverman defendants also submitted a separate reply to Ivy's partial opposition, in which they maintain that Ivy is obligated to defend and indemnify them with respect to plaintiff's alleged injuries, and they contend that Ivy is responsible for all structural repairs to the sidewalk. The Silverman defendants also argue that plaintiff's reliance on General Obligations Law § 5-321 is misplaced because courts have held that the statute was not intended to prohibit contractual indemnity clauses. Finally, the Silverman defendants argue that the lease's arbitration clause is not triggered because Ivy failed to submit service of a notice of dispute as required by the terms of the lease.

Analysis

White Plains' Motion (sequence 1)

Pursuant to White Plains' prior written notice law, no action may be maintained against the city for personal injuries sustained on a sidewalk "unless written notice thereof relating to the particular place and condition was actually given to the commissioner of public works or filed in his office prior to such damage or injury and there was a failure or neglect within a reasonable time after the receipt of such notice to repair or remedy the condition" (White Plains Code of Ordinances § 277). "Where, as here, a municipality has enacted a prior written notice law, it cannot be held liable absent proof of the requisite notice or an exception to that requirement" (*Holmes v Town of Oyster Bay*, 82 AD3d 1047, 1048 [2d Dept 2011] [citation omitted]).

Proof that a search of the relevant records was conducted covering a period of two years prior to the date of the accident, and disclosed no written notice of the defect, has been found to

establish a lack of prior written notice (*see Pallotta v City of New York*, 121 AD3d 656 [2d Dept 2014]). White Plains has established a lack of prior written notice through the Muhlfeld affidavit, which indicated that her search of all records stored in the prior written notice log dating back to October 2015 revealed no results related to the sidewalk near 187 Martine Avenue.

"Once a municipality establishes that it lacked prior written notice of an alleged defect, the burden shifts to the plaintiff to demonstrate that a question of fact exists as to one of the exceptions to the prior written notice requirement, either that the municipality affirmatively created the alleged hazardous condition or that a special use of the area in question conferred a special benefit upon the municipality" (*Cruzate v Town of Islip*, 162 AD3d 853, 854 [2d Dept 2018]). Only the "affirmative creation" exception has any relevance here; plaintiff has not alleged, and there is no evidence to suggest, that White Plains was engaged in a special use of the sidewalk in question. The affirmative creation exception is "limited to work done by a municipality that immediately results in the existence of a dangerous condition" (*Wolin v Town of N. Hempstead*, 129 AD3d 833, 834 [2d Dept 2015]). The Second Department has held that the exception also applies where the municipality exacerbated a preexisting dangerous condition (*see Urquhart v Town of Oyster Bay*, 85 AD3d 899 [2d Dept 2011]).

Initially, White Plains' reliance on *Oboler v City of New York* (8 NY2d 888 [2007]) is unavailing. In *Oboler*, the Court ruled in favor of the defendant because plaintiff failed to submit evidence that defendant paved the roadway in question and created the defective condition (*id.* at 889). Conversely, here, the deposition testimony of Richard Hope indicates that White Plains performed the subsequent repairs to the asphalt patchwork that Murphy discussed in his affidavit.[4]

Although Murphy opined that the asphalt used to fill in the tree well was not designed for that purpose, and its application resulted in premature deterioration over time, that is not the basis for this Court's decision. Rather, denial of White Plains' motion is required based on Murphy's determination that, on multiple occasions, additional layers of asphalt were applied to the subject location in an attempt to remedy the patch's premature deterioration, each additional layer of which increased the height differential between the asphalt and the surrounding concrete, immediately creating a tripping hazard.

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[4] White Plains' position that plaintiff's failure to submit a statement of material facts pursuant to 22 NYCRR 202.8-g amounts to an implicit admission and warrants summary judgment, is unavailing. White Plains' assertion in its statement of material facts – that it did not create the subject sidewalk defect – cannot stand in the face of its own witness' contrary testimony (*see* White Plains' mem of law, exhibit R, Richard Hope deposition tr at 51, lines 14-21).

Therefore, plaintiff has raised a triable issue of fact as to whether White Plains created an immediately dangerous condition through the Murphy affidavit and Hope's deposition testimony. For the same reason, White Plains is also not entitled to dismissal of the cross claims against it, and its motion for summary judgment must be denied in its entirety.

The Silverman Defendants' Motion (sequence 2)

"Absent the liability imposed by statute or ordinance, an abutting landowner is not liable to a passerby on a public sidewalk for injuries resulting from defects in the sidewalk unless the landowner either created the defect or caused it to occur by special use" (*Meyer v City of New York*, 114 AD3d 734, 735 [2d Dept 2014]). Here, it is undisputed that no statute or ordinance imposes tort liability on the Silverman defendants.[5] Additionally, plaintiff concedes that the Silverman defendants were not engaged in a special use of the sidewalk. Therefore, the only remaining issue is whether the Silverman defendants created the alleged defect.

The Silverman defendants have established a prima facie case for summary judgment against plaintiff through the May 5, 2021 Stern affidavit. Stern indicated that she reviewed Silverman's records and determined that neither of the Silverman defendants performed work on the sidewalk abutting 187 Martine Avenue or had notice of its alleged defective condition. Plaintiff has failed to raise a material issue of fact in opposition.

Initially, plaintiff's reliance on Stern's February 7, 2020 deposition testimony is misplaced, as the points to which they cite are overshadowed by her subsequent May 5, 2021 affidavit. Specifically, although Stern had not searched Silverman's relevant records at the time of her deposition, she later did so and reported her findings in the affidavit. While plaintiff made a passing reference to the May 5, 2021 Stern affidavit in her opposition to this motion, she completely ignored its substance. Additionally, the assertion of plaintiff's attorney that some party must have repaired the sidewalk is insufficient to raise a question as to whether one of the Silverman defendants were responsible for such a repair. Indeed, as discussed above, a witness for White Plains, Richard Hope, testified at his deposition that White Plains performed the work in question. The branch of the Silverman defendants' motion seeking summary judgment dismissing plaintiff's complaint against them is granted.

[5] Although section 153 of the White Plains code of ordinances requires property owners to maintain abutting sidewalks, neither section 153 nor any other statute or ordinance imposes tort liability for a breach of such duty (*see generally O'Toole v City of Yonkers*, 107 AD3d 866, 867 [2d Dept 2013]).

Upon dismissal of plaintiff's complaint against the Silverman defendants, their cross claims against Ivy and White Plains become moot, and need not be discussed further here. Additionally, the branch of the Silverman defendants' motion seeking dismissal of Ivy's cross claims against them is granted as unopposed. Ivy's partial opposition did not address the branch of the Silverman defendants' motion seeking dismissal of Ivy's cross claims against them. Although Ivy's cross claims seek indemnification from the Silverman defendants, Ivy's partial opposition only addresses whether the Silverman defendants are entitled to indemnification from Ivy.

Finally, since White Plains did not oppose the Silverman defendants' motion, and no statute or ordinance imposes tort liability on the Silverman defendants for breach of a duty to maintain the public sidewalk abutting their property, as discussed above, the branch of their motion seeking dismissal of defendant White Plains' cross claims against them is granted as unopposed.

Based upon the foregoing, it is hereby,

ORDERED that White Plains' motion (sequence 1) is denied; and it is further

ORDERED that the Silverman defendants' motion (sequence 2) is granted; and it is further

ORDERED that the remaining parties are directed to appear in the Compliance Conference Part on a date and in a manner of which they will be notified by that Part.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
October 15, 2021

Terry Jane Ruderman
HON. TERRY JANE RUDERMAN, J.S.C.