To commence the statutory time period
of 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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DAVID K. WASHINGTON,

Plaintiff,

-against-

DECISION AND ORDER
Motion Seq. No. 001-003

CITY OF MOUNT VERNON, 120 EAST PROSPECT AVENUE, LLC, and LIAN REALTY, INC.,

INDEX NO. 55649/11

Defendants.

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DIBELLA, J.

The following papers have been read and considered on these motions for summary judgment by defendants City of Mount Vernon and Lian Realty, Inc. and plaintiff David K. Washington:

1) Notice of Motion (seq. 001); Affirmation of Jennifer Ratan, Esq.; Exhibits A–I;
2) Affirmation in Opposition of Daniel S. Finger, Esq.; Affidavit in Opposition of David K. Washington; Exhibits A–F; Memorandum of Law in Opposition;
3) Reply Affirmation of Jennifer Ratan, Esq.;
4) Notice of Motion (seq. 002); Affirmation of Alvin J. Thomas, Esq.; Exhibits A–H;
5) Affirmation in Opposition of Daniel S. Finger, Esq.; Exhibits A–B; and
6) Notice of Motion (seq. 003); Affirmation in Support of Daniel S. Finger, Esq.; Affidavit in Support of David K. Washington; Exhibits A–D.

In this personal injury action, defendant City of Mount Vernon moves for summary judgment dismissing the complaint, pursuant to CPLR 3212. In a separate motion, defendant Lian Realty, Inc. also moves for summary judgment dismissing the complaint against it. Plaintiff opposes both motions. In motion sequence number 003, plaintiff moves for default judgment against defendant 120 East Prospect Avenue, LLC for its failure to timely appear or answer, pursuant to CPLR 3215. No opposition has been filed with regard to this motion. These three motions are considered and consolidated for

disposition herein. For the reasons set forth below, the motions are denied.

The instant action seeks damages for personal injuries allegedly sustained by plaintiff David K. Washington as a result of a trip and fall accident on a sidewalk at, around or between 118 and 120 East Prospect Avenue in Mount Vernon, New York, near the Laila Deli & Grocery in front of a construction site, on October 19, 2010.

Summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law. *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986). However, it should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining. *Zuckerman v. City of New York*, 49 NY2d 557, 560 (1980). "Moreover, the motion court should draw all reasonable inferences in favor of the nonmoving party in determining whether to grant summary judgment." *F. Garofalo Elec. Co. v. New York Univ.*, 300 AD2d 186, 188 (1st Dep't 2002). In deciding such a motion, the court's role is "issue-finding, rather than issue-determination." *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957) (internal quotations omitted).

In motion sequence number 001, defendant City of Mount Vernon moves for summary judgment dismissing the complaint against it, pursuant to CPLR 3212, based on lack of prior written notice of the allegedly dangerous or unsafe condition that the plaintiff alleges to have caused his injuries as required by section 265 of the Charter of the City of Mount Vernon. Defendant City of Mount Vernon contends that it did not have prior written notice of any defective condition for that particular location in this case. Defendant further

contends that plaintiff cannot state with certainty where he allegedly tripped and fell, as his description of the location varies in his testimony, the Notice of Claim, the Summons and Complaint, and the Bill of Particulars.

Plaintiff opposes the motion and contends that there was prior written notice to the City of Mount Vernon, which precludes the granting of summary judgment in said defendant's favor.

As a general matter, liability for injuries sustained as a result of a dangerous condition or negligent maintenance of a dangerous condition related to a public sidewalk is placed on the municipality and not the abutting landowner. *See Morelli v. Starbucks Corp.*, 107 AD3d 963 (2d Dep't 2013). It is well settled in New York that:

> An abutting landowner will not be liable to a pedestrian injured on a public sidewalk unless that landowner created the defective condition complained of or caused the defect to occur because of some special use, or a local ordinance or statute casts a duty upon him or her to maintain and repair the sidewalk and imposes liability for injuries resulting from a breach of that duty.

Farmer v. City of New York, 25 AD3d 649, 649 (2d Dep't 2006). Here, the City of Mount Vernon has adopted a local ordinance imposing the responsibility of sidewalk maintenance on the owner of the abutting premises. *See* City Code of Mount Vernon § 227-56.

In this motion, however, the City of Mount Vernon is not arguing that it is not liable for the alleged defect in the sidewalk.[1] Instead, this motion is based on the City of Mount

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[1] Defendant's witness Anthony Amiano testified at his deposition that, because the alleged defect in the sidewalk appeared to be caused by a tree lifting the sidewalk

Vernon's contention that it did not receive prior written notice of the alleged defect. Section 265 of the Charter of the City of Mount Vernon provides, in relevant part, that:

> No civil action shall be maintained against the City for damages or injuries to person or property sustained in consequence of any . . . sidewalk . . . being defective, out of repair, unsafe, dangerous or obstructed unless, previous to the occurrence resulting in such damages or injury, written notice of the defective, unsafe, dangerous or obstructed condition of said . . . sidewalk . . . was actually given to the Commissioner of Public Works and that there was a failure or neglect within a reasonable time after the receipt of such notice to repair or remove the defect, danger or obstruction complained of.

"A municipality that has enacted a prior written notice law is excused from liability absent proof of prior written notice or an exception thereto." *Regan v. Town of North Hempstead*, 66 AD3d 863, 864 (2d Dep't 2009). A party maintaining an action against the city for damages related to a defective sidewalk must establish prior written notice as a condition precedent and the failure to do so warrants dismissal of the action. *See Vertsberger v. City of New York*, 34 AD3d 453 (2d Dep't 2006); *Cassuto v. City of New York*, 23 AD3d 423 (2d Dep't 2005). The Court of Appeals has recognized only two exceptions to the requirement of prior written notice—when either the municipality created the defect through an affirmative act of negligence or when it has made a special use of the area. *See Yarborough v. City of New York*, 10 NY3d 726 (2008); *Amabile v. City of Buffalo*, 93 NY2d 471 (1999). Actual or constructive notice, absent prior written notice, has been held insufficient. *See Amabile*, 93 NY2d at 471; *Berner v. Town of Huntington*, 304

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slab, the City of Mount Vernon would be responsible for repairing it.

AD2d 513 (2d Dep't 2003).

The City of Mount Vernon's motion for summary judgment is denied. There are issues of fact that preclude the granting of summary judgment in this case. As indicated above, the function of the Court on a motion for summary judgment is issue-finding, not issue-determination. *Sillman*, 3 NY2d at 404.

First, the City of Mount Vernon argues that plaintiff has not identified the exact location of the alleged defect. Such argument is unavailing. Plaintiff has provided a location for the alleged defect and any alleged discrepancy arises from the fact that plaintiff asserts the defect is at the border or between two properties. Plaintiff has consistently asserted that he fell on the sidewalk where there is a "big tree with a hump attached" near the deli and the construction site. Further, defendant's own witness indicated that by the Notice of Claim submitted by plaintiff, he was able to determine where the alleged defect was and it was repaired. There did not appear to be any confusion as to the location alleged by plaintiff.

As stated above, there are issues of fact that preclude summary judgment in this case. One issue of fact is whether there was sufficient prior written notice to the City of Mount Vernon as required by section 265 of the Charter of the City of Mount Vernon. City of Mount Vernon contends that there were no adequate prior written notices of the alleged defect. Plaintiff, on the other hand, refers to two prior written notices of claim that were served on the City of Mount Vernon. The first written notice was from 2007. With regard to this notice, defendant contends that such defect was repaired and, in any event, it is too

remote in time and location to constitute sufficient notice. The second written notice was received by the City of Mount Vernon several months before plaintiff's accident for an alleged defect at 120 East Prospect Avenue. Defendant contends that, since the 2010 notice of claim was for an alleged defect at 120 East Prospect Avenue and not 118 East Prospect Avenue, it is insufficient to constitute notice of a different particular defect.

As stated above, plaintiff has sufficiently described the location of the alleged defect. The fact that it may be on the border or between two property lines provides some explanation for why plaintiff's description of the location has varied slightly in his testimony and pleadings. Further, plaintiff did not just list the various addresses without more of a description. Instead, he indicated that he tripped on the portion of the sidewalk where there was a large tree with a hump attached, that was near a construction site adjacent to Laila Deli & Grocery (which is 118 East Prospect Avenue). It is evident from the photos submitted that the exact street address is difficult to discern but that the area where plaintiff fell is readily apparent.

Here, there is an issue of fact as to whether the alleged defect in the prior written notice and the defect alleged by plaintiff are one in the same, in other words, "whether the [prior] written notice proffered by plaintiff . . . reasonably encompasses the particular patent defect alleged to have caused the subject accident." *Rosell v. City of Kingston*, 92 AD3d 1123, 1124 (3d Dep't 2012); *see also Svartz v. Town of Fallsburg*, 241 AD2d 799 (3d Dep't 1997). Thus, the City of Mount Vernon's motion for summary judgment dismissing the complaint is denied.

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In motion sequence number 002, defendant Lian Realty Inc. moves for summary judgment dismissing the complaint against it, pursuant to CPLR 3212. Lian Realty Inc. is the owner of 116-118 East Prospect Avenue in Mount Vernon, New York. It contends that judgment as a matter of law dismissing the complaint is appropriate because it did not have a duty to repair the location of the alleged dangerous or unsafe condition that caused the plaintiff to sustain his injuries pursuant to section 227-56 of the Mount Vernon City Code.

Defendant contends that plaintiff alleged in his notice of claim that he fell in front of a construction site near Laila Deli & Grocery, but that there is no construction site associated with 116-118 East Prospect Avenue. Moreover, defendant relies on testimony of Anthony Amiano wherein he stated that he inspected the area, determined that a tree was causing the defect, and that it was the City of Mount Vernon's responsibility to maintain the sidewalk where the tree was located.

Defendant Lian Realty Inc.'s motion for summary judgment is denied as there are issues of fact remaining, including on which property the alleged defect is located and whether defendant had a duty to repair it. As to the location of the alleged defect, as indicated above, there is an issue of fact in light of plaintiff's allegations that he fell on the sidewalk between 118 and 120 East Prospect Avenue. Defendant Lain Realty Inc. failed to present any clear evidence that the location where plaintiff fell was not abutting property that it owns.

If it is determined at trial that plaintiff fell on a portion of the sidewalk which abuts Lian Realty Inc.'s property, then there also is a question of fact as to whether this

defendant had a duty to maintain and repair it. The City of Mount Vernon has enacted a local ordinance imposing the responsibility of sidewalk maintenance on the owner of the abutting premises. Section 227-56 of the City Code of Mount Vernon states, in relevant part:

> Every owner or lessee of any premises abutting on any street shall keep the contiguous sidewalks free from dirt, filth, weeds or other obstructions or encumbrances and shall also maintain the contiguous sidewalk in good condition, free from any defects or other dangerous conditions, and perform all repairs necessary thereto.

Defendant Lian Realty Inc. has not conclusively established as a matter of law that it is not responsible for the maintenance and repair of the portion of the sidewalk at issue and, thus, summary judgment is inappropriate.

In motion sequence number 003, plaintiff moves for default judgment against defendant 120 East Prospect Avenue, LLC for its failure to timely appear or answer, pursuant to CPLR 3215. The motion, however, is denied. By plaintiff's own admission with regard to the other motions, there is a question of fact as to the location of the alleged defect and, thus, who the owner of the abutting property is and who has the responsibility to repair any defects.

Accordingly, it is

ORDERED that defendant The City of Mount Vernon's motion (seq. no. 001) is denied; and it is further

ORDERED that defendant Lian Realty Inc.'s motion (seq. no. 002) is denied; and it is further

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ORDERED that plaintiff's motion (seq. no. 003) is denied; and it is further

ORDERED that counsel are directed to appear for a settlement conference on July 29, 2014 at 9:30 AM in the Settlement Conference Part, Courtroom 1600 of the Westchester County Courthouse in White Plains, New York.

This is the Decision and Order of the Court.

Dated: June 18, 2014
White Plains, New York

Hon. Robert DiBella, JSC

To: Nichelle A. Johnson, Esq.
Corporation Counsel
City of Mount Vernon
Via e-file

Finger & Finger, a Professional Corporation
Via e-file

Alvin J. Thomas, Esq.
Via e-file

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