To commence the 30-day statutory time period for appeals as of right under 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
----------X
ROBERT SHKRELI,

Plaintiff,

-against-

CARLTON HOUSE AT LARCHMONT, CARTON HOUSE CONDOMINIUMS, RMR RESIDENTIAL REALTY, LLC and TOWN OF MAMARONECK,

Defendants.
----------X

Index No. 62318/15
Motion Sequence No. 001
Decision and Order

EVERETT, J.

The following papers were read on the motion:
Notice of Motion/Affirmation in Supp/Memorandum of Law/Exhibit docs 44-75
Affirmation in Opp/Ettari Affidavit/Exhibit docs 82-148
Reply Affirmation/Exhibit doc 150

Defendant Town of Mamaroneck (Town) moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint and cross claims against it. Plaintiff Robert Shkreli (Shkreli) submits opposition to the motion. Upon the foregoing papers, the motion is granted.

The following facts are taken from the pleadings, motion papers, affidavits, documentary evidence and the record, and are undisputed unless otherwise indicated.

Plaintiff commenced the instant action by filing a summons and complaint in the Office of the Westchester County Clerk on July 24, 2015, to recover damages for physical injuries he allegedly sustained when, between approximately 10:30 a.m. and 11:00 a.m., on January 18, 2015, he was caused to slip, trip and fall due to snow and ice, and due to a defective portion of

public sidewalk located in the Town, and abutting premises on New Jefferson Street with a street address of 35 North Chatsworth Avenue, Larchmont, New York, known as Carlton House Condominiums. The complaint sounds in negligence and charges all defendants with owning, and/or being the entities responsible for, installing, repairing and maintaining the subject sidewalk on New Jefferson Street in a safe condition.

Issue was joined by service of defendants Carlton House at Larchmont Condominium (Carlton House), s/h/a Carlton House at Larchmont and Carlton House Condominiums, and RMR, with affirmative defenses and a cross claim against the Town, on or about November 25, 2015, and by service of the Town's answer with affirmative defenses and counter claims, on or about December 1, 2015. The parties engaged in a course of discovery during which Shkreli was produced for deposition, and questioned in greater detail than he had been during his pre-action General Municipal Law § 50-h hearing.

During his General Municipal Law § 50-h hearing and his court-ordered deposition, Shkreli explained that his accident occurred while he was walking on New Jefferson Street, from Madison Avenue toward North Chatsworth Avenue. He testified that his right foot suddenly slipped, and that, when he tried to regain his balance, his right foot became caught in a raised portion of pavement at that location, causing him to fall and sustain injuries to his arm (Shkreli 50-h tr at 21, 22l Shkreli dep tr at 45, 47). In response to questions posed, Shkreli stated after he fell, he observed black thin ice and snow, as well as raised and broken pavement, on the portion of sidewalk where he slipped and tripped (*id.* 50-h tr at 67, 68; dep tr at 17, 51). Shkreli did not, however, recall snow, ice or rain precipitation at that time (*id.*; *id.* dep tr at 14), nor did he recall noticing any salt on the sidewalk (*id.* dep tr at 60).

After defendants produced multiple witnesses for deposition, and the parties completed their exchange of discovery, on March 13, 2017, plaintiff filed a note of issue and certificate of readiness, after which the Town served the instant motion for summary judgment.

It is well settled that:

> "[t]o obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor (CPLR 3212, subd [b]), and he must do so by tender of evidentiary proof in admissible form. . . . [O]ne opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient"

(*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [internal quotation marks and citations omitted]).

The Town, which does not meaningfully dispute that Shkreli slipped and fell on the subject sidewalk on the morning of January 18, 2015, asserts that it is entitled to summary judgment, because it has no ownership interest in the subject sidewalk, as the sidewalk belongs to the Carlton House. The Town further asserts that, even if it did own the sidewalk, it would be entitled to summary judgment, because: it did not receive the requisite prior written notice of either a defect in the pavement, or the presence of a dangerous snow and ice condition; and/or the alleged snow and ice condition resulted from a weather event that was in progress at the time of Shkreli's accident; and/or maintaining the sidewalk is the responsibility of the abutting property owner, Carlton House.

The Town supports its motion with, among other things, copies of: the pleadings; meteorologic records; the affidavit of a forensic meteorologist; a photograph of the subject

location; affidavits prepared by the Town Clerk, the Town Superintendent of Highways, a former Town engineer; Shkreli's General Municipal Law § 50-h hearing transcript and deposition transcript; the deposition transcripts of a Town engineer, the Town Administrator, the Town Code Enforcement Officer, and a Town skilled laborer; the deposition transcripts of the Carlton House superintendent, and the president of RMR; Town Law § 65-a; and Town Municipal Code § 187-13.

According to the Town, its lack of an ownership interest in the subject sidewalk is established through David Goessl (Goessl), who, until December 2016, had been the Town engineer, and through Louis Martirano (Martirano), the Town Superintendent of Highways. Goessl both testified and confirmed in his affidavit that his review of Town documents, including the June 2000 land survey for that specific part of the Town (*see* notice of motion, exhibit Z), reveals, among other things, that the subject sidewalk abutting the Carlton House, and owned by the Carlton House since 1985, lies solely within the boundaries of Carlton House property, and not the Town. Goessl asserts further that the Town did not design, construct or otherwise create or contribute to the subject sidewalk, and that neither it, nor any of its employees or agents, were responsible for its existence, maintenance or condition on January 18, 2015 (notice of motion, exhibits Q, U). Martirano also confirms that subject sidewalk is not located on Town property, and denies receiving any notification about, nor did it perform, any work, maintenance, or repairs on the subject sidewalk, or any snow and ice removal on the subject sidewalk for a period of five years prior to January 18, 2015 (notice of motion, exhibit P). Martirano also avers that the Town is not the recipient of any special use benefits by virtue of the subject sidewalk, and that the Town's snow removal efforts on New Jefferson Street do not involve removing or treating snow

and ice on the subject sidewalk. Martirano asserts that the Town's street plowing is done in a manner to ensure that the snow is placed by the curb on the road, and not onto the sidewalk (*id.*).

At the deposition of John Karras, the Carlton House superintendent, it was confirmed that Carlton House employees handle snow now and ice removal on the subject sidewalk (Karras tr at 33, 35-37).

Under New York law, "[l]iability for a dangerous condition on property is generally predicated upon ownership, occupancy, control or special use of the property. Where none of these factors is present, a party cannot be held liable for injuries caused by the allegedly defective condition" (*Mitchell v Icolari*, 108 AD3d 600, 601 [2d Dept 2013] [internal quotation marks and citations omitted]). Through its evidence, the Town has made a prima facie showing that it has no ownership interest in the property, and that it is not responsible for the sidewalk condition that allegedly caused Shkreli's accident and injuries.

In opposition, Shkreli tries to raise a question of fact as to ownership by questioning the admissibility of the Town's evidence, the clarity of the survey's configuration, and the lack of a certified deed. Shkreli also submits the affidavit of Vincent Ettari, P.E. (Ettari) (aff in opp, exhibit A), who asserts that the absence of wire mesh and steel rebar in the construction of the sidewalk pavement permitted the pavement to become unlevel over time, and he cites regulations requiring wire mesh and/or steel rebar in sidewalk pavement. Ettari also questions whether the pavement surface was adequately slip resistant. Based on this information, Shkreli asserts that the Town, in approving the plans for the sidewalk, which did not include the use of wire mesh and steel rebar, was negligent by failing to ensure that it was properly constructed.

In reply, the Town asserts that its documentary proof meets New York's admissibility

criteria (*see Clark v New York City Tr. Auth.*, 174 AD2d 268, 272-273 [1st Dept 1992]; CPLR 4518), and it submits the affidavit of John McManus (McManus), an independent licensed professional engineer, who, among other things, explains why the regulations cited by Ettari are inapplicable. According to McManus, the manner of construction used at the time the sidewalk was fabricated in 1988 – a four inch slab of concrete set on a six inch crushed stone base – was in conformance with the applicable standards at that time for sidewalks, such as this, which were not used for egress. McManus states that the unleveling of the sidewalk pavement slab did not occur as a result of an inherent weakness in the slab, due to a lack of wire mesh, steel rebar or otherwise. Rather, the unleveling occurred at an expansion joint in the sidewalk and came about due to the forces of nature and the environment over the course of time. McManus also states that Ettari's reference to slip resistant surface regulation is inapplicable, not only because New York did not adopt the specific regulation cited by Ettari, but because the concrete used to fabricate the sidewalk is slip resistant by nature.

A review of the evidence reveals that the Town does not own the subject sidewalk, and Shkreli's attempt to place responsibility on the Town for the condition of particular portion of pavement on January 18, 2015, is unavailing. Ettari's affidavit notwithstanding, Shkreli fails to raise a question of fact on the questions of ownership, occupancy, control or special use of the subject sidewalk.

Furthermore, even if it did have an ownership interest in the sidewalk, the undisputed lack of prior written notice to the Town, either as to its portion of unlevel, raised pavement, or as to the alleged the snow and ice condition at the time of the accident, requires a summary dismissal of the complaint as against it.

As a condition precedent to a suit sounding in tort liability, the Town requires prior written notice of a defect on its property, and there is no evidence that plaintiff has met the condition precedent with respect to the subject sidewalk.

It is well settled that:

> "in derogation of the common law, a locality may avoid liability for injuries sustained as a result of defects or hazardous conditions on its sidewalks if it has not been notified in writing of the existence of the defect or hazard at a specific location. This rule comports with the reality that municipal officials are not aware of every dangerous condition on its streets and public walkways, yet imposes responsibility for repair once the municipality has been served with written notice of an obstruction or other defect, or liability for the consequences of its nonfeasance, as the case may be"

(Amabile v City of Buffalo, 93 NY2d 471, 474 [1999] [internal quotation marks and citations omitted]).

The Town's prior written notice legislation is set forth in Town Law § 65-a (2), which provides:

> "[n]o civil action shall be maintained against any town or town superintendent of highways for damages or injuries to person or property sustained by reason of any defect in its sidewalks or in consequence of the existence of snow or ice upon any of its sidewalks, unless such sidewalks have been constructed or are maintained by the town or the superintendent of highways of the town pursuant to statute, nor shall any action be maintained for damages or injuries to person or property sustained by reason of such defect or in consequence of such existence of snow or ice unless written notice thereof, specifying the particular place, was actually given to the town clerk or to the town superintendent of highways, and there was a failure or neglect to cause such defect to be remedied, 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."

To demonstrate that it did not have prior written notice, defendants submit the affidavit of Christina Battalia (Battalia), who states that, as Town Clerk, she is aware that the Town maintains a record of the written notices it receives regarding the existence of unsafe, defective,

dangerous or obstructed conditions upon any Town sidewalk, and that the record of any such notice is maintained for a period of six years (notice of motion, exhibit O). Battalia avers that she performed a search of the Town's written notice record for the six years prior to January 18, 2015, and that she "found no written notice of either any defective sidewalk condition or snow and ice condition" (*id.*).

In response to the Town's evidence that it did not have the required notice, Shkreli argues that the recognized exception to the prior written notice requirement, that of affirmative negligence, is made out by the Town's negligent failure to ensure that the subject sidewalk was constructed with wire mesh and steel rebar. However, this exception, which, again, would only be relevant if the Town had an ownership interest in the subject sidewalk, is unsupported by the evidence. Given the lack of evidence that the Town took any action with respect to the subject sidewalk, and its purported failure, back in or about 1988, to ensure that it be constructed with wire mesh and steel rebar, is not only irrelevant, but too remote in time to meet the immediacy criteria for this exception (*see San Marco v Village/Town of Mount Kisco,* 16 NY3d 111, 116 [2010]; *Yarborough v City of New York*, 10 NY3d 726, 728 [2008]).

Next, the Town asserts the storm in progress defense and references New York case law, which states, in relevant part, that: "a municipality is not liable in negligence for injuries sustained by a pedestrian who slips and falls on an icy sidewalk unless a reasonable time has elapsed between the end of the storm giving rise to the icy condition and the occurrence of the accident" (*Valentine v City of New York*, 86 AD2d 381, 383 [1st Dept 1982]; *see also Mandel v City of New York*, 44 NY2d 1004, 1005 [1978]). According to the Town, even if it were responsible for the condition of subject sidewalk on January 18, 2015, it cannot be held liable for

Shkreli's accident and injuries, because it was precipitating rain and freezing rain, both before, and at the time of, his accident. To show that there was precipitation falling at the time of Shkreli's accident, the Town submits meteorologic records and the affidavit of forensic meteorologist Steven Roberts, C.C.M. (Roberts) (notice of motion, exhibits L, M, N). In his affidavit, Roberts states that the relevant climatological data for January 18, 2015, causes him to conclude that the light to moderate rain and freezing rain, which were falling in the subject vicinity, began falling between 6:20 a.m. and 7:30 a.m., and continued to fall during the time he alleges he slipped and fell, that being between 9:30 a.m. and 11:00 a.m. Roberts then explains that freezing rain creates a slippery condition, and that glaze ice was occurring and/or was present on the subject sidewalk at the time of his alleged accident (*id.*). Shkreli does not offer opposition to this aspect of the Town's motion.

Next, the Town argues that, even if the sidewalk was Town-owned and/or located on Town property, it would be Carlton House's responsibility, and not its own responsibility, to maintain it in a safe condition and to keep it clear of snow and ice. For this proposition, the Town relies on Town Code § 187-13, which states, in relevant part:

> "[e]very owner . . . or other person having charge or control of any building . . . abutting upon any street or public place where the sidewalk is flagged, concreted or otherwise paved or laid shall, within 24 hours after the snow ceases to fall, remove the snow and ice from such sidewalk so as to provide a continuous passageway. In case the snow and ice on the sidewalk shall be frozen so hard that it cannot be removed without injury to the pavement, the owner, lessee, tenant, occupant or other person hereby charged with the duty to remove the same shall, within the time specified above, cause the sidewalk to be strewn with ashes, sand and/or some other abrasive substance and, thereafter as the weather shall permit, shall thoroughly clean said sidewalk."

Shkreli does not dispute the applicability of Town Code § 187-13, given the sidewalk's

placement on New Jefferson Street alongside Carlton House. What he continues to argue, despite the Town's prima facie evidence, is that there remain questions of fact as to whether the Town is an owner of the subject sidewalk, whether an exception exists with respect to the prior written notice requirement, and whether the Town was negligent in approving plans for the construction of the sidewalk in the manner it was fabricated. However, for the reasons set forth above, the Town is entitled to summary judgment based on its lack of an ownership interest in the subject sidewalk. Furthermore, even if the Town did have an interest, the lack of prior written notice, the fact that the precipitation was ongoing when the accident occurred, and that Town Municipal Code places responsibility on Carlton House, as the abutting property owner, to maintain the sidewalk in a structurally sound, as well as snow and ice free condition, mandates a dismissal of the complaint as against the Town.

Accordingly, it is

ORDERED that defendant Town of Mamaroneck's motion for summary judgment is granted and the complaint is dismissed as against defendant Town of Mamaroneck with costs and disbursements to said defendant as taxed by the Clerk upon the submission of an affirmed bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of defendant Town of Mamaroneck accordingly; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that counsel for the remaining parties appear shall appear in the Settlement Conference Part in room 1600, on Tuesday, November 28, at 9:15 a.m., to schedule a date for trial.

This constitutes the decision and order of the Court.

Dated: White Plains, New York
October 27, 2017

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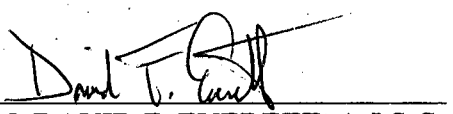

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