At an IAS Term, Part 10 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 15th day of June, 2020.

P R E S E N T:

HON. LORNA J. MCALLISTER,
Justice.

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VLADIMIR LIPKIN,

Plaintiff,

- against -

IRREVOCABLE TRUST OF RACHEL ZYMAN, JACK ZYMAN INDIVIDUALLY and as Trustee of RACHEL ZYMAN, ABE ZYMAN Individually and as Trustee of RACHEL ZYMAN, CHANIE BRACH Individually and as Trustee Of RACHEL ZYMAN, LILIA ZELMANOVICH,

Defendants.

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Index No. 512188/2018

Mot. Seq. Nos. 1- 2

The following e-filed papers read herein:	NYCEF#
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2, 3-4
Opposing Affidavits (Affirmations)	5
Reply Affidavits (Affirmations)	6
Other Papers: Memorandum of Law	7

Upon the foregoing papers, in this action in which the plaintiff Vladimir Lipkin (plaintiff) seeks to recover damages for personal injuries, defendant Lilia Zelmanovitch (Ms. Zelmanovitch)

moves under motion sequence (mot. seq.) number one, pursuant to CPLR 3212, for an order awarding summary judgment and a dismissal of the claim as well as all cross claims. Defendants Irrevocable Trust of Rachel Zyman, Jack Zyman individually and as trustee of Irrevocable Trust of Rachel Zyman, Abe Zyman individually and as trustee of Irrevocable Trust of Rachel Zyman, and Chanie Branch individually and as trustee of Irrevocable Trust of Rachel Zyman (collectively, the Zyman defendants) cross-move, under mot. seq. number two, pursuant to CPLR 3212, for an order granting summary judgment and a dismissal of all cross claims.

Facts and Procedural Background

On Saturday, December 30, 2017, at approximately 9:25 a.m., plaintiff was walking on the public sidewalk between 1934 East 18th Street (the 1934 East 18th Street property) and 1930 East 18th Street, Brooklyn, New York (the 1930 East 18th Street property) when he slipped and fell on the sidewalk abutting the driveway located between the two properties. Plaintiff asserts that he slipped and fell on snow and ice located underneath the snow on the sidewalk. According to plaintiff, the ice condition was about four-feet wide which was the width of his body, two yards long, and 3/4 of an inch thick. Plaintiff allegedly did not see any portion of the large thick sheet of ice prior to his accident, which was covered by an eighth to a quarter of an inch layer of snow. Plaintiff sustained fractures to his left hip and left fourth finger as a result of his fall and was hospitalized for three weeks.

The Irrevocable Trust of Rachel Zyman owns the 1930 East 18th Street property, and the Zyman defendants are the trustees of that trust. The driveway between the two properties is part of the 1930 East 18th Street property and is owned by the Irrevocable Trust of Rachel Zyman.

Rachel Zyman lived at the 1930 East 18th Street property, which property was used solely for residential purposes. Abe Zyman is Rachel Zyman's son, and he maintained the 1930 East 18th Street property which included performing snow removal on that property.

Ms. Zelmanovitch owned the 1934 East 18th Street property since 1977, a one-family residential home, wherein she resided with her husband, Zindel Zelmanovitch (Mr. Zelmanovitch). Ms. Zelmanovitch did not own the driveway between the two properties, and neither she nor Mr. Zelmanovitch performed any snow removal on the driveway.

On June 13, 2018, plaintiff filed this action against the Zyman defendants and Ms. Zelmanovitch. On July 19, 2018, the Zyman defendants filed their answer and asserted a cross claim against Ms. Zelmanovitch for indemnification and contribution. On September 20, 2018, Ms. Zelmanovitch filed her answer and asserted cross claims against the Zyman defendants for indemnification and contribution.

Plaintiff served a bill of particulars dated October 24, 2018, wherein the plaintiff alleges that the occurrence was the result of defendants' negligence in maintaining their properties and the adjacent sidewalk, in installing and maintaining their houses' downspouts and gutters, in creating a more dangerous condition by causing storm water to drain and empty onto the abutting sidewalk, and in failing to remove snow and ice from the sidewalk. Discovery was completed, which included conducting the depositions of the plaintiff, as well as Ms. Zelmanovitch, Mr. Zelmanovitch, Abe Zyman, and Susan Greenberg, a second-floor tenant of the 1930 East 18th Street property. On October 14, 2019, a note of issue was filed on behalf of the plaintiff. On or about December 13, 2019, the motion to dismiss was filed on behalf of Ms. Zelmanovitch. On

December 24, 2019, the Zyman defendants filed a cross motion which has been objected to as being untimely.

Discussion

Initially, the court notes that while the Zyman defendants' cross motion is untimely as it was filed more than 60 days after the filing of plaintiff's note of issue pursuant to the court's directive, "an untimely cross motion for summary judgment may be considered by the court where . . . a timely motion for summary judgment was made on nearly identical grounds" (*Snolis v Clare*, 81 AD3d 923, 925 [2d Dept 2011], *lv denied* 17 NY3d 702 [2011]; *see also Lennard v Khan*, 69 AD3d 812, 814 [2d Dept 2010]; *Grande v Peteroy*, 39 AD3d 590, 592 [2d Dept 2007]). "In such circumstances, the issues raised by the untimely cross motion are already properly before the court and thus, the nearly identical nature of the grounds may provide the requisite good cause [under CPLR 3212 (a)] to review the merits of the untimely cross motion" (*Snolis*, 81 AD3d at 925-926; *see also Grande*, 39 AD3d at 592). Thus, since Ms. Zelmanovitch timely filed her motion and the Zyman defendants' cross motion is based on nearly identical grounds, the court may properly consider the Zyman defendants' cross motion.

In addressing Ms. Zelmanovitch's motion and the Zyman defendants' cross motion, the court notes that "[a] property owner will be held liable for a slip-and-fall accident involving snow and ice on its property . . . when it created the dangerous condition which caused the accident or had actual or constructive notice thereof" (*Olivieri v GM Realty Co., LLC*, 37 AD3d 569, 569 [2d Dept 2007]). Ms. Zelmanovitch and the Zyman defendants, in support of their motion and cross motion, each assert that they had no duty to clean the sidewalk based upon the "storm in progress"

rule, pursuant to which liability will not be imposed on a property owner where an accident occurred as a result of the accumulation of snow and ice on its property "until an adequate period of time has passed following the cessation of the storm to allow the owner an opportunity to ameliorate the hazards caused by the storm" (*Marchese v Skenderi*, 51 AD3d 642, 642 [2d Dept 2008], *lv denied* 11 NY3d 705 [2008]).

Ms. Zelmanovitch and the Zyman defendants in support of their motions have not submitted the affidavit of a meteorologist or certified meteorological records, establishing that it was snowing at the time of the occurrence. Instead, they rely upon plaintiff's deposition testimony that at the time of the accident, there was mild and light snow falling, that snow had been falling since around 8:50 a.m., and that about one-half inch of snow had accumulated on the ground that morning (see plaintiff's EBT pg. 8-10). Based upon plaintiff's deposition testimony, they contend that they were entitled to a reasonable period of time after the cessation of the falling snow to perform snow removal, and that since snow was still falling, they should be absolved of liability under the "storm in progress" rule.

Ms. Zelmanovitch argues that the active snowfall was the cause of plaintiff's slipping and falling and the reason that he did not see the ice hidden underneath the half inch of snow as it was actively falling. The Zyman defendants argue that there is no evidence that the ice patch on which plaintiff fell was present prior to the storm in progress.

The Zyman defendants point to the fact that while plaintiff testified that he observed the ice patch after he fell, plaintiff did not observe it prior to his fall (see plaintiff's EBT pg. 26-27). The Zyman defendants further point to Abe Zyman's deposition testimony that there was snow falling "on and off" all week prior to the day of plaintiff's accident (see Abe Zyman's EBT pg. 44-

45). Abe Zyman, who did not live at the 1930 East 18th Street property, testified at his deposition, that he undertook the sole responsibility for maintaining the 1930 East 18th Street property, and that he personally performed snow removal during the week prior to December 30, 2017 (see *Abe Zyman EBT pg.* 45, 48). He further testified that he did not perform any snow removal on December 30, 2017 (*see Abe Zyman EBT pg.* 48), that the last time that he performed snow removal prior to December 30, 2017 was sometime during the week prior (Monday to Saturday), and that he believed that he went to the 1930 East 18th Street property twice that week to shovel snow (*see Abe Zyman EBT pg.* 48-49). He stated that when he would shovel the snow at the 1930 East 18th Street property, he would shovel the sidewalk at the driveway in between the 1930 East 18th Street property and the 1934 East 18th Street property, and that he would use a shovel and salt (*see Abe Zyman EBT pg.* 49-50, 53). He also testified that he had never seen water pooling in the area of plaintiff's fall prior to December 30, 2017 (*see Abe Zyman EBT pg.* 102).

In opposition, plaintiff asserts that the Zyman defendants and Ms. Zelmanovitch have failed to satisfy their prima facie burden of showing that the ice patch did not exist prior to the December 30, 2017 morning snowfall. The Zyman defendants and Ms. Zelmanovitch have not submitted any meteorological data regarding the prior storms, and Abe Zyman at his deposition failed to specifically state the last date of his inspection of the 1930 East 18th Street property and whether there was any later snowfall. Plaintiff states that the local climatological data shows that the temperature remained below freezing from December 25, 2017 until after the date of the accident. Plaintiff further states that it snowed on and off throughout December 2017. Plaintiff also points to the fact that the ice on which he fell was thick and large. Thus, the Zyman defendants' and Ms. Zelmanovitch's reliance on the "storm in progress" rule is unavailing since

there is a material issue of fact as to whether plaintiff's fall was caused by an ice condition which had formed prior to plaintiff's accident, and whether they had a reasonable time to remedy it before the accident (*see Herrera v Vargas*, __ AD3d __, 2020 NY Slip Op 03082, *1 [1st Dept 2020]; *Cartolano v Cornwell Ave. Elementary School*, __ AD3d __, 2020 NY Slip Op 02758, *1 [2d Dept 2020]; *Bagnoli v 3GR/228 LLC*, 147 AD3d 504, 505 [1st Dept 2017]; *Womble v NYU Hosps. Ctr.*, 123 AD3d 469, 470 [1st Dept 2014]; *Massey v Newburgh W. Realty, Inc.*, 84 AD3d 564, 568 [1st Dept 2011]; *Walters v Costco Wholesale Corp.*, 51 AD3d 785, 786 [2d Dept 2008]; *Rivas v New York City Hous. Auth.*, 261 AD2d 148, 148 [1st Dept 1999]).

Ms. Zelmanovitch further contends that she had no duty to maintain the sidewalk at issue. She asserts that she did not undertake any efforts to clean, maintain, or ameliorate the snow or ice condition which led to plaintiff's accident, and therefore did not create or exacerbate a hazardous condition. She points to the fact that she did not own the 1930 East 18th Street property and that the accident occurred on the sidewalk abutting that property.

Plaintiff contends however that the ice was formed because Ms. Zelmanovitch, who lived at the 1934 East 18th Street property, had actual and constructive notice of a clog and leak in the drain line connected to her storm leader at the 1934 East 18th Street property, which caused water to flow onto the driveway and then onto the sidewalk. Plaintiff points to the deposition testimony of Abe Zyman, in which he testified that he observed a back flow of water at the bottom of the gutter downspout of Ms. Zelmanovitch's 1934 East 18th Street property and that it looked like the gutter downspout was clogged (see Abe Zyman's EBT pg. 80-83, 107). Abe Zyman testified that he had observed the excess water exiting the downspout of the 1934 East 18th Street property and onto his driveway (*see Abe Zyman EBT pg.* 82-84). Abe Zyman testified that he observed the

pooling of water "just enough to cover the sidewalk" (see Abe Zyman EBT pg. 114). He further testified that he attempted to notify Ms. Zelmanovitch by leaving messages on her answering machine, and that he also rang her bell, but no one answered (*see Abe Zyman EBT pg.* 83-85).

According to Ms. Zelmanovitch, the white downspout or drainpipe located on the side of her house was a part of a drainage and gutter replacement project which took place in 2009. This occurred when the Zelmanovitch's converted their property from a two-family house to a one-family house (Mr. Zelmanovitch's EBT pg. 70-71). While Mr. Zelmanovitch testified at his deposition that the gutter and drainage system was maintained once a year in or around the fall season, and that the sewer system was maintained three to four times per year, he did not provide any proof of this or the names of the individuals who maintained them (*see Mr.* Zelmanovitch EBT pg 73-78). Although Ms. Zelmanovitch denied that she observed any water emanating from the drainpipe onto the neighbor's property, this was in contrast to Abe Zyman's deposition testimony as to his observation of the water leakage (see Ms. Zelmanovitch EBT pg. 50-51).

Plaintiff further contends that the ice formed because the Zyman defendants' storm leader at the 1930 East 18th Street property was affirmatively constructed to drain directly onto their driveway and was negligently designed so as to conduct water onto the sidewalk. Plaintiff points to Mr. Zelmanovitch's deposition testimony that the gutter downspout located at the front of the Zyman defendants' 1930 East 18th Street property terminated directly above the driveway and spilled water into the driveway, as opposed to into a sewer system (see Mr. Zelmanovitch's EBT pg. 45, 81). Mr. Zelmanovitch testified that he personally observed water pooling at the end of the driveway towards the sidewalk during events of precipitation and that this would occur after rain or snow, and that the pooling water would turn to ice (see Mr. Zelmanovitch's EBT pg. 35-

36, 39). He stated that this was a recurring water pooling condition at the 1930 East 18th Street property (see Mr. Zelmanovitch's EBT pg. 45).

Mr. Zelmanovitch explained that the gutter was spilling water directly into the pool of water at the front of the 1930 East 18th Street property (see Mr. Zelmanovitch's EBT pg. 44). He testified that the ice would end up on the sidewalk and that this was a safety issue because someone could slip and fall on the sidewalk (see Mr. Zelmanovitch's EBT pg. 55). He further testified that he observed the ice on more than one occasion prior to December 30, 2017 and that the ice would sometimes extend beyond the driveway to half of the sidewalk or more (see Mr. Zelmanovitch's EBT pg. 61, 62). Plaintiff also points out that the driveway was sloped, and Abe Zyman was aware that some built up and melted snow could flow down the driveway and stop by the sidewalk (see Abe Zyman's EBT pg. 74-75).

In addition, plaintiff has submitted the expert affidavit of Richard Robbins (Mr. Robbins), an architect duly licensed in New York. On January 24, 2020, Mr. Robbins issued an inspection report based upon an inspection which he had conducted on December 25, 2019. Mr. Robbins opines, within a reasonable degree of architectural certainty, that the defective icy condition which caused plaintiff's fall occurred as result of defendants' actions and omissions as detailed in his inspection report.

In his inspection report, Mr. Robbins notes that the driveway is pitched towards its center and towards the street. He asserts that there was a leak due to a clog in the drain line at Ms. Zelmanovitch's 1934 East 18th Street property. He sets forth that Ms. Zelmanovitch failed to maintain the storm leader and drain at the 1934 East 18th Street property, and that this failure to do so allowed additional water to accumulate and then freeze on the surface of the sidewalk. He

explains that during the winter months, the water would freeze overnight. Mr. Robbins also notes that a video submitted by plaintiff shows a large volume of water coming out of the leader, where the joint is present. He opines that this leak depicted in the video was due to the clog in the drain line.

Mr. Robbins also asserts that one of the storm leaders on the 1930 East 18th Street property is incorrectly positioned, and that as a result, it drains directly onto the driveway which abuts the sidewalk. He states that the leader's draining directly onto the driveway and then flowing onto the public sidewalk was a violation of the Building Code. He points out that this storm leader was not part of the original construction. He opines that this storm leader should have been placed further towards the rear of the dwelling so that it could drain into the existing sewer line. He states that the Zyman defendants failed to tie the leader into the 1930 East 18th Street property's storm drain.

It is well established that "[i]f water from abutting private property is permitted to flow by artificial means onto a public street where it freezes, the private landowner may be held liable for creating a dangerous icy condition on the adjacent public property" (*Griffin v 19-20 Indus. City Assoc., LLC*, 37 AD3d 412, 412-413 [2d Dept 2007]; *see also Roark v Hunting*, 24 NY2d 470, 475 [1969]; *Fitzgerald v Adirondack Tr. Lines, Inc.*, 23 AD3d 907, 908 [3d Dept 2005]). "Such liability may arise where the private property is negligently designed so as to conduct water onto a public street . . . *or* where the landowner has actual or constructive notice of a defect on his or her premises causing a water discharge and icy condition onto public property" (*Griffin v 19-20 Indus. City Assoc., LLC*, 37 AD3d at 412-413 [emphasis added]; *see also Tremblay v Harmony Mills*, 171 NY 598, 600-601 [1902]; *Patterson v New York City Tr. Auth.*, 5 AD3d 454, 455-456

[2d Dept. 2004]; *Coppola v City of New York*, 17 AD2d 649, 649 [2d Dept. 1962]; *Herbert v Rodriguez*, 191 AD2d 887, 887 [3d Dept. 1993]).

In reply to plaintiff's opposition papers, Ms. Zelmanovitch points to the fact that Mr. Robbins inspected the 1934 East 18th Street property over one year after plaintiff's accident. She argues that there is no evidence that the leak observed by Mr. Robbins and Abe Zyman existed prior to plaintiff's accident so as to afford her constructive notice of it. However, Ms. Zelmanovitch has failed to show, prima facie, that she did not have constructive notice of the alleged dangerous condition (*see Williams v Island Trees Union Free Sch. Dist.*, 177 AD3d 936, 938 [2d Dept. 2019]; *Massey v Newburgh W. Realty, Inc.* 84 AD3d at 567).

"A defendant has constructive notice of a hazardous condition on property when the condition is visible and apparent and has existed for a sufficient length of time prior to the accident to afford the defendant a reasonable opportunity to discover and remedy it" (*Williams v Island Trees Union Free Sch. Dist.*, 177 AD3d at 938; *Gordon v. American Museum of Natural History*, 67 NY 2d 836, 837-838 [1st Dept. 1986]). In order to meet her burden on the issue of constructive notice, Ms. Zelmanovitch was required to offer evidence as to when the drain line was last inspected relative to the time when plaintiff fell (*see Malloy v Montefiore Med. Ctr.*, __ AD3d __, 2020 NY Slip Op 02921, *1 [2d Dept May 20, 2020]; *Nsengiyumva v Amalgamated Warbasse Houses, Inc.*, 180 AD3d 799, 800 [2d Dept 2020]; *Rodriguez v New York City Hous. Auth.*, 169 AD3d 947, 948 [2d Dept 2019]; *Quinones v Starret City, Inc.*, 163 AD3d 1020, 1022 [2d Dept 2018]). Ms. Zelmanovitch has not provided any evidence that the drain line had been inspected and found to not have any leak prior to plaintiff's accident, and Mr. Zelmanovitch's general testimony that there was maintenance, while failing to name any specific date or company which

performed this maintenance, is patently insufficient to satisfy this burden (*see Nsengiyumva v Amalgamated Warbasse Houses, Inc.*, 180 AD3d at 800).

Ms. Zelmanovitch has failed to offer any evidence to show that this alleged defect did not exist at the time of plaintiff's accident (*see Herbert v Rodriguez*, 191 AD2d at 887). Ms. Zelmanovitch has also failed to make a prima facie showing that the alleged defect in her drain line and the alleged pooling of water that allegedly caused plaintiff to fall would not have been visible and apparent, and would not have been noticed upon a reasonable inspection of the area (*see Malloy v Montefiore Med. Ctr.*, 2020 NY Slip Op 02921, *1; *Rivera v Tops Mkts., LLC*, 125 AD3d 1504, 1506 [4th Dept. 2015]). Moreover, the evidence submitted by plaintiff raises genuine issues of fact as to whether whether Ms. Zelmanovitch created the alleged dangerous condition which caused plaintiff to fall (*see Harkins v Tuma*, 182 AD3d 678, 678 [3d Dept 2020]; *Malik v Style Mgt. Co. Inc.*, 168 AD3d 536, 536 [1st Dept 2019]).

With respect to the Zyman defendants, plaintiff has raised material and triable issues of fact as to whether they caused or created the ice upon which plaintiff fell by their defectively designing and constructing the storm leader at the 1930 East 18th Street property so as to have it drain directly onto their driveway and conduct water onto the sidewalk. In addition, based upon Mr. Zelmanovitch's deposition testimony and Mr. Robbins' expert inspection report and affidavit, plaintiff has raised triable issues of fact as to whether the Zyman defendants had constructive notice that this allegedly defective condition caused a recurring ice condition on the sidewalk (*see Zelaya v Breger*, 43 AD3d 437, 439 [2d Dept. 2007]).*Vincent v Landi*, 123 AD3d 1183, 1185 [3d Dept. 2014]).

Ms. Zelmanovitch and the Zyman defendants contend that they must nevertheless be absolved of liability on the basis that there were no artificial means used by them to conduct the water onto the sidewalk. They both rely upon *Minton v Richmond Bennett Corp.* (24 AD2d 604, 604 [2d Dept 1965], *affd* 17 NY2d 879 [1966]), where, after a trial, the Appellate Division, Second Department, reversed a jury's verdict in favor of the plaintiff therein, upon the basis that the plaintiff had failed to establish that ice on the sidewalk, upon which he fell, resulted from water artificially diverted onto the sidewalk from the abutting premises. Such reliance by defendants on *Minton* is misplaced since *Minton* merely stands for the proposition that the plaintiff therein did not carry his burden in that case and *Minton* did not hold that a defectively designed drainpipe or a clogged drain line does not constitute artificial means of conducting water (*Minton v Richmond Bennett Corp, 24 AD2d at* 604).

It has been held that a drainpipe or a gutter downspout constitutes "artificial means" of causing surface rainwater to be diverted (*see Biaglow v Elite Prop. Holdings, LLC*, 140 AD3d 814, 815 [2d Dept 2016], *lv dismissed* 28 NY3d 1059 [2016]; *Moone v Walsh*, 72 AD3d 764, 765 [2d Dept 2010]). Moreover, plaintiff does not merely claim that surface rain water naturally flowed onto the sidewalk, but claims that the water was diverted due to Ms. Zelmanovitch's alleged negligence in not maintaining the drain line and the Zyman defendants' alleged negligence in designing the drain pipe so as to ultimately cause the water to flow onto the sidewalk. An owner of property must generally take measures to prevent their improvements to the property from causing accumulations of water to enter a sidewalk (*see Griffin v 19-20 Indus. City Assoc., LLC*, 37 AD3d at 412-413). Thus, under these circumstances, there is an issue of fact as to whether liability may be imposed upon the defendants.

Contrary to defendants' argument, the water emanating from their properties need not pour directly onto the sidewalk for them to be held liable. It is enough that a defendant created a dangerous condition by a negligent design of the property or a leak from a drainpipe so as to cause water to be conducted onto the sidewalk (*see Williams v Esor Realty Co.*, 117 AD3d 480, 481 [1st Dept. 2014]; *Griffin v 19-20 Indus. City Assoc., LLC*, 37 AD3d at 412-413; *Patterson*, 5 AD3d at 455-456). Furthermore, liability may alternatively be premised upon constructive notice of a defect on his or her premises, which caused a water discharge and icy condition onto a sidewalk (*see* Williams v Esor Realty Co., 117 AD3d at 481). Therefore, inasmuch as there are material triable issues of fact in this regard, Ms. Zelmanovitch's motion and the Zyman defendants' cross motion for summary judgment dismissing plaintiff's complaint and all cross claims as against them is denied.

Conclusion

Accordingly, Ms. Zelmanovitch's motion and the Zyman defendants' cross motion for summary judgment dismissing plaintiff's complaint as well as the cross claims are denied.

This constitutes the decision and order of the court.

Dated: June 15, 2020

ENTER

HON. Lorna J. McAllister
A.J.S.C.