SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. RICHARD G. LATIN** **PART** **46M**

Justice

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ROYA JENSEN,

Plaintiff,

- v -

CITY OF NEW YORK, RESTANI CONSTRUCTION CORP.

Defendant.

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INDEX NO. 154390/2019

MOTION DATE 11/09/2023, 11/09/2023

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 57, 58, 61, 62, 63, 69, 71

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 59, 64, 65, 66, 67, 68, 70

were read on this motion to/for JUDGMENT - SUMMARY.

Motion sequence numbers 001 and 002 are consolidated for disposition.

Plaintiff Roya Jensen ("plaintiff") commenced this action to recover damages for personal injuries she sustained while crossing a public street milled by defendant Restani Construction Corporation ("Restani") under its contract with the City of New York ("the City").

Presently before this court are the City's and Restani's summary judgment motions pursuant to CPLR 3212. For the reasons stated below, the City's motion is granted in part and denied in part and Restani's motion is denied.

BACKGROUND FACTS AND PROCEDURAL HISTORY

This case involves the intersection of 181st Street and Wadsworth Avenue in Manhattan that was being milled by Restani pursuant to its contract with the City.

Plaintiff's Accident

On August 7, 2018, at approximately 1:30 p.m., plaintiff and her daughter were walking from their apartment to a restaurant in their neighborhood (NYSCEF Doc No. 27, Marino affirmation, exhibit G, plaintiff's deposition tr at pp. 17, 19, 21). Specifically, plaintiff and her daughter walked to Broadway and 186th Street and made a right down to 181st Street (*id.*, p. 21). Plaintiff explained that she had walked along this route less than 10 times prior to the incident (*id.*, pp. 21-22). She testified that the lighting conditions were "very bright," and it was a hot day (*id.*, p. 17).

When plaintiff and her daughter reached the intersection of 181st Street and Wadsworth Avenue, they stopped due to a red light (*id.*, p. 22). Plaintiff testified that once the walk signal illuminated, she and her daughter started walking across Wadsworth Avenue when plaintiff tripped on a manhole cover that was in the middle of the crosswalk and was "elevated" two- to three-inches above the surrounding roadway (*id.*, pp. 23, 25, 28). Plaintiff fell forward on to her hands and knees (*id.*, pp. 31, 33).

Although plaintiff saw the manhole right before she tripped, she testified that the manhole was not "noticeable" from afar because the manhole cover and the road were the same dark gray color and there were no white painted lines on the crosswalk (*id.*, pp. 23-26, 28). She explained that she was looking straight ahead while traversing the crosswalk, and there were other pedestrians around her (*id.*, pp. 23, 25). Plaintiff was not talking to her daughter or to any other pedestrians at the time of the fall (*id.*, p. 34).

As a result of the trip and fall, plaintiff testified that she was bleeding from the wounds on her hands and knees and was later diagnosed with a fractured left elbow (*id.*, pp. 34, 39). Plaintiff testified that she continues to experience chronic pain on her right hand (*id.*, pp. 53-53).

Plaintiff was shown photographs of the subject manhole cover (marked as exhibits B and C) during her deposition and testified that they were a fair and accurate depiction of the crosswalk and the subject manhole cover where she tripped and fell (*id.*, pp. 28-33).

The City's Milling Contract with Restani

The City and Restani entered into a contract, bearing number HW2CR18B, where Restani agreed to mill designated public roads in the Bronx and Manhattan "by grinding" them in preparation to be resurfaced by others (NYSCEF Doc No. 48, Comiskey affirmation, exhibit J, the contract[1], pp. 5, 7, 53). Restani was also expected to complete the preparation work for resurfacing after milling the roads (*id.*, p. 53). Preparation work was defined in the contract to consist of "adjustment of City hardware . . . providing temporary ramps around street hardware for the pedestrian ramps; mechanical sweeping; etc." (*id.*).

The contract between the City and Restani included an indemnification clause, which provides in relevant part:

> "To the fullest extent permitted by law, the Contractor shall defend, indemnify, and hold the City, its employees, and officials (the 'Indemnitees') harmless against any and all claims (including but not limited to claims asserted by any employee of the Contractor and/or Subcontractors) and costs and expenses of whatever kind . . . allegedly arising out of or in any way related to the operations of the Contractor and/or its Subcontractors in the performance of this Contract or from the Contractor's and/or its Subcontractor's failure to comply with any of the provisions of this Contract or of the Law. . . The parties expressly agree that the indemnification obligation hereunder contemplates (1) full indemnity in the event of liability imposed against the Indemnitees without negligence and solely by reason of statute, operation of Law or otherwise; and (2) partial indemnity in the event of any actual negligence on the part of Indemnitees either causing or contributing to the underlying claims (in which case, indemnification will be limited to any liability imposed over and above that percentage attributable to actual fault

[1] Because the page numbers in this document are not consistent and the document consists of 368 pages in total (including the exhibit page), the court will refer to the specific page numbers out of those 368 pages when citing the document for purposes of this motion.

> whether by statute, by operation of Law, or otherwise). Where partial indemnity is provided hereunder, all costs and expenses shall be indemnified on a pro rata basis" (*id.*, p. 110).

The City, through the New York City Department of Transportation ("DOT"), issued task orders to Restani indicating that the milling work was to start on July 30, 2018 and end by August 5, 2018 (NYSCEF Doc No. 47, Comiskey affirmation, exhibit I, DOT Task Order[2], p. 5). DOT specifically instructed Restani to mill two inches curb to curb and the milling project included all the intersections in Wadsworth Avenue and West 173rd to 182nd Street in Manhattan (*id.*, p. 6). Restani completed the milling project at this specific location on August 3, 2018, including the intersection where plaintiff' accident occurred (*id.*, p. 38).

Ralston Burnett ("Burnett"), an area supervisor for DOT and highway repair supervisor during the relevant time, testified that DOT provides guidelines and procedures for subcontractors to follow when performing milling work, including on how to handle manholes (NYSCEF Doc No. 31, Marino affirmation, exhibit K, Burnett's deposition tr at pp. 10-11, 16-17). Burnett explained that milling the road consists of removing the existing asphalt for re-pavement (*id.*, p. 18). Contractors are also required to make the milled road safe for pedestrians and motor vehicles by ramping the road using asphalt (*id.*, pp. 18, 46). Burnett explained that the process of constructing a ramp meant that "asphalt is laid where it's been shoveled, racked out and road tapered" (*id.*, p.19). As to manhole covers, Burnett testified that they are also ramped by applying asphalt to make them safe (*id.*, pp. 19-20, 54).

Burnett emphasized that DOT employees oversee the work performed by contractors, such as Restani, to ensure that they are following the City's guidelines and regulations (*id.*, p. 41). When

[2] Because the page numbers in this document are not consistent and the document consists of 40 pages in total (including the exhibit page), the court will refer to the specific page numbers out of those 40 pages when citing the document for purposes of this motion.

asked about a summary sheet prepared by DOT inspectors regarding Restani's work at the intersection of 181st Street and Wadsworth Avenue during the relevant time, Burnett testified that Restani's work was marked "satisfactory" (*id.*, pp. 42-43).

Burnett was also shown a photograph that plaintiff testified fairly and accurately represented the condition of the subject manhole on the date and time of the accident (*id.*, p. 54; *see also* NYSCEF Doc No. 29). He testified that the manhole depicted in the photograph was ramped, but in his "experience" it was not ramped "enough" (*id.*, pp. 54-55). He believed that the area around the manhole cover in the photograph could have used more asphalt around it, but also believed that traffic could have affected the ramping by removing some asphalt (*id.*, pp. 55-56). Burnett further testified that generally the asphalt used for the ramping should last longer than a week if ramped properly (*id.*, pp. 56-57).

Michael Calderone ("Calderone"), a Restani general superintendent, testified that he oversees the construction work performed by Restani (NYSCEF Doc No. 49, Comiskey affirmation, exhibit K, Calderon deposition tr at pp. 9-10). Calderone explained that Restani was hired by DOT to "mill the roadway, curb to curb, intersection to intersection from a depth between an inch and a half to two inches" (*id.*, p. 15). He defined milling of the road as "the removal of the top asphalt overlay" (*id.*). Calderone further testified that the milling project included the intersection of 181st Street and Wadsworth Avenue (*id.*).

Calderone explained that DOT inspectors onsite oversaw Restani's milling work to ensure that it was performed properly and based on DOT's specifications (*id.*, pp. 16-18, 41). Calderone emphasized that prior to DOT taking over the City's milling operations, the New York City Department of Design and Construction ("DDC") hired engineering firms to oversee the City's contracts with milling contractors, such as Restani (*id.*, p. 18). DOT, however, uses its own

inspectors to oversee milling contracts (*id.*). In fact, Calderone testified that Restani could not open the roadways to vehicles and pedestrians after milling was performed without a DOT inspector's approval (*id.*, pp. 17, 44). For instance, if DOT inspectors believed that Restani needed to perform more ramping around manholes, they would require Restani to complete that work before opening the roads to the public (*id.*, pp. 22-23).

When milling and ramping manhole covers, Calderone testified that Restani would remove asphalt from around the casting at the depth required by DOT and then ramp it with mixed asphalt around the casting to tamp down the plate (*id.*, p. 16, 23-24). Calderone explained that the color of the asphalt is usually the same as that of the road (*id.*, 23-24). He testified that Restani was only responsible for maintaining the manhole ramping for fifteen days after milling and before DOT paved the road (*id.*, pp. 29-31). DOT maintained the ramping after the road is paved (*id.*).

When Calderone was shown a photograph that plaintiff testified fairly and accurately represented the condition of the subject manhole on the date and time of the accident (*id.*, p. 31; *see* also NYSCEF Doc No. 29), he testified that although the manhole casting appeared higher than the asphalt ramp around it, the ramping appeared proper and safe (*id.*, p. 32).

Procedural Posture

Plaintiff filed this action only against the City on April 29, 2019. Plaintiff then filed a supplemental summons and amended complaint naming Restani as an additional defendant. The note of issue was filed by plaintiff on March 9, 2023 after the parties conducted discovery. Defendants then filed the instant motions for summary judgment.

DISCUSSION

A party moving for summary judgment under CPLR 3212 "must make 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]). The "facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp*., 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the moving party has met this prima facie burden, the burden shifts to the non-moving party to furnish evidence in admissible form sufficient to raise a material issue of fact (*Alvarez*, 68 NY2d at 324). The moving party's "[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*id.*).

I. The Negligence Claim

"Historically, the maintenance of roads and highways was performed by both private entities and local governments, with each subject to the ordinary rules of negligence" (*Wittorf v City of New York*, 23 NY3d 473, 479 [2014] [citations omitted]; *see also Turturro v City of New York*, 28 NY3d 469, 479 [2016]).

To prevail on a negligence claim, a plaintiff must show "(1) the existence of a duty on defendant's part as to plaintiff; (2) a breach of this duty; and (3) injury to the plaintiff as a result thereof" (*Akins v Glens Falls City School Dist.*, 53 NY2d 325, 333 [1981] [citations omitted]; *see also Solomon v City of New York*, 66 NY2d 1026, 1027 [1985]).

"To impose liability upon a defendant for a plaintiff's injuries, there must be evidence showing the existence of a dangerous or defective condition, and that the defendant either created the condition or had actual or constructive notice of it and failed to remedy it within a reasonable time" (*Winder v Executive Cleaning Services, LLC*, 91 AD3d 865, 865 [2d Dept 2012]). "[T]o constitute constructive notice, a defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and

remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986] [citations omitted]).

A. Prior Written Notice

The City argues that it lacked prior written notice (or any other notice) of the alleged condition. The City further contends that it did not create the alleged condition because Restani performed the milling of the road days before plaintiff's accident. Restani emphasizes that although they milled the road where plaintiff slipped and fell, DOT inspectors oversaw their milling work. Plaintiff opposes and argues that there are issues of material fact as to whether the City had prior written notice and notwithstanding the City's argument that Restani performed the milling work, the City inspectors oversaw Restani's work.

"It is well established that a municipality is under a continuing duty to maintain its public roadways in a reasonably safe condition . . . and that such duty is independent of its duty not to create a defective condition" (*Kiernan v Thompson*, 73 NY2d 840, 842 [1988]). "Administrative Code of the City of New York § 7–201(c) limits the City's duty of care over municipal streets and sidewalks by imposing liability only for those defects or hazardous conditions which its officials have been actually notified exist at a specified location" (*Katz v City of New York*, 87 NY2d 241, 243 [1995]). "Prior written notice of a defect is a condition precedent which plaintiff is required to plead and prove to maintain an action against the City, in the absence of a recognized exception" (*Smith v City of New York*, 228 AD3d 472, 473 [1st Dept 2024] [citations omitted]; *see also Martin v City of New York*, 191 AD3d 152, 153 [1st Dept 2020]). "[C]onstructive notice of a defect may not override the statutory requirement of prior written notice of a sidewalk defect." (*Amabile v City of Buffalo*, 93 NY2d 471, 475-76 [1999]; *see also San Marco v Village/Town of Mount Kisco*, 16 NY3d 111, 116 [2010] [citations omitted]).

The two "recognized exceptions to the prior written notice requirement involve situations in which the municipality created the defect or hazard through an affirmative act of negligence or where a special use confers a benefit upon the municipality" (*Smith*, 228 AD3d at 473 [citations omitted]).

"The affirmative negligence exception is limited to work which immediately results in the existence of a dangerous condition" (*id.*). "The development of a dangerous condition as a result of wear and tear does not constitute an affirmative act of negligence" (*Cron v City of New York*, 55 Misc 3d 1219[A], 2017 NY Slip Op 50658[U], *5 [Sup Ct, New York County 2017] [citations omitted]). "[W]hile the eventual emergence of a dangerous condition as a result of wear and tear and environmental factors does not constitute an affirmative act of negligence . . . where the allegedly dangerous condition would have been immediately apparent, the affirmative creation exception applies" (*Martin v City of New York*, 191 AD3d 152, 154 [1st Dept 2020]). "Furthermore, '[t]he ... failure to maintain or repair a roadway constitutes an act of omission rather than an affirmative act of negligence'" (*Rosenblum v City of New York*, 89 AD3d 439, 440 [1st Dept 2011]).

"At the outset, on a motion for summary judgment dismissing the complaint against the City alleging personal injury due to a roadway defect or hazard, the City has the initial burden of establishing that it lacked prior written notice of the defect or hazard under the Pothole Law" (*Bania v City of New York*, 157 AD3d 612, 612 [1st Dept 2018] [citations omitted]). The Court of Appeals has held that the City can show that it lacked prior written notice by submitting deposition testimony of a DOT employee testifying that "no complaints or maintenance and repair records existed for the subject location for two years prior to and one year subsequent to the date of the incident" (*Yarborough v City of New York*, 10 NY3d 726, 727 [2008]). The City can also submit

affidavits from an employee of the City Department of Environmental Protection ("CDEP") stating that no records or complaints existed "for this location during the same time period" (*id*). Further, "[m]aps prepared by Big Apple Pothole and Sidewalk Protection Committee, Inc. and filed with the Department of Transportation serve as prior written notice of defective conditions depicted thereon" (*Katz*, 87 NY2d at 243; *see also Sondervan v City of New York*, 84 AD3d 625 [1st Dept 2011]). The Court of Appeals has also held recently that the "SeeClickFix" application, an online reporting system "maintained by the City that allows users to report, through a software application or website, 'anything that they see that should be addressed by any city department,'" (*Calabrese v City of Albany*, 2024 NY Slip Op 06289, *2 [2024]), may satisfy the prior written notice requirement (*id.*, *3).

Applying the law to the facts at hand, the City failed to meet its prima facie burden that it lacked prior written notice. The City did not submit any deposition testimony or any affidavits from a DOT or CDEF employee stating that no records or complaints existed regarding the subject manhole cover at the intersection of 181st Street and Wadsworth Avenue. While the City submitted a document reflecting roadway search responses for the relevant date and location indicating that the search yielded two Big Apple maps (NYSCEF Doc No. 32, Marino affirmation, exhibit L, City's response to case management order, pp. 4-6, 118-120), the City failed to show that these maps did not depict the alleged defect of the subject manhole cover. Instead, the City reversed the burden of proof by arguing that it is plaintiff's burden to make a showing that the City received a written notice under the Pothole Law. The City is moving for a motion for summary judgment, however, so "the City has the initial burden of establishing that it lacked prior written notice of the defect or hazard under the Pothole Law" (*Bania*, 157 AD3d at 612). For these reasons, the City has failed to show that it lacked prior written notice.

"Where the City establishes that it lacked prior written notice under the Pothole Law, the burden shifts to the plaintiff to demonstrate the applicability of one of two recognized exceptions to the rule—that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality" (*Yarborough,* 10 NY3d at 728; *Vega v City of New York*, 88 AD3d 497, 497 [1st Dept 2011]). Because the City fails to meet its initial burden of showing that it lacked prior written notice, the burden does not shift to plaintiff to demonstrate that the two recognized exceptions to the written rule apply.

B. Triviality of the Condition

Defendants argue that their motion for summary judgment should be granted on the grounds that the manhole cover in question constituted a trivial and non-actionable defect. Plaintiff opposes and argues that there are issues of material fact on whether the condition of an elevated manhole cover was trivial and non-actionable because the circumstances in the case heightened the dangers of the manhole cover.

"[T]here is no 'minimal dimension test' or per se rule that a defect must be of a certain minimum height or depth in order to be actionable" (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 77 [2015] [citations omitted]). Instead, courts consider "the facts presented, including the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury" (*id*. [citations and quotations omitted]; *see also Flores v New York City Tr. Auth.*, 147 AD3d 553, 554 [1st Dept 2017]). "Photographs which fairly and accurately represent the accident site may be used to establish that a defect is trivial and not actionable" (*Snyder v AFCO Avports Mgt.*, LLC, 219 NYS3d 360, 365 [2d Dept 2024] [citations omitted]).

"A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically

insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses. Only then does the burden shift to the plaintiff to establish an issue of fact" (*Arpa v 245 E. 19 Realty LLC*, 188 AD3d 479, 480 [1st Dept 2020] [citations omitted]).

Defendants fail to establish as a matter of law that the alleged subject manhole cover defect was trivial and not actionable under the circumstances. While Restani was required to mill the road from a depth between an inch and a half to two inches (NYSCEF Doc No. 35, p. 15), there is no quantifying evidence of the difference in height between the subject manhole cover casting and the milled road to determine whether the manhole cover was a tripping hazard and posed a danger to pedestrians crossing the street. While plaintiff testified that the manhole cover casting was elevated by two to three inches (NYSCEF Doc No. 27, p. 25), the elevation of the subject manhole cover casting depicted in the photographs in evidence show different height differentials depending on the distance and angle in which the photograph was taken, making it difficult to ascertain the extent of the elevation. Additionally, plaintiff testified that the gray color of the manhole cover and the milled road were the same, making the manhole cover difficult to detect. Under these circumstances, the no color differential between the subject manhole cover and the road may have "magnified the risk," (*Arpa*, 188 AD3d at 479), of the subject manhole cover to constitute a tripping hazard.

B. Open and Obvious and Not Inherently Dangerous Condition

Defendants raise the defense that the subject manhole cover was open and obvious and not inherently dangerous. In response, plaintiff argues that whether a condition is open and obvious only relieves the City of its duty to warn, not from its duty to maintain the premises in a safe condition. Plaintiff further argues that open and obvious argument, at best, goes toward plaintiff's comparative negligence.

"Although property owners have a duty to maintain their property in a reasonably safe condition, and to warn of latent hazards of which they are aware . . . they have no duty to protect or warn, and a court is not precluded from granting summary judgment, where the condition complained of was both open and obvious and, as a matter of law, not inherently dangerous" (*Boyd v New York City Hous. Auth.*, 105 AD3d 542, 542-543 [1st Dept 2013] [citations omitted]). "In such circumstances, the condition which caused the accident cannot fairly be attributed to any negligent maintenance of the property," (*id.,* p. 543 [citations and quotations omitted]), and the court is not "precluded from granting summary judgment" (*Powers v 31 E 31 LLC*, 123 AD3d 421, 422 [1st Dept 2014] [citations omitted].

"[T]he question of whether a condition is open and obvious is generally a jury question, and a court should only determine that a risk was open and obvious as a matter of law when the facts compel such a conclusion" (*Westbrook v WR Activities-Cabrera Markets*, 5 AD3d 69, 72 [1st Dept 2004] [citing *Tagle v Jakob*, 97 NY2d 165, 169 [2001]). "Whether an asserted hazard is open and obvious cannot be divorced from the surrounding circumstances" (*Mauriello v Port Auth. of NY and NJ*, 8 AD3d 200, 200 [1st Dept 2004] [citations omitted]). "A finding that a condition is open and obvious requires that the condition be of a nature that could not reasonably be overlooked by anyone in the area whose eyes were open" (*Soto v 2780 Realty Co., LLC*, 114 AD3d 503, 503 [1st Dept 2014] [citations and quotations omitted]). Even though "some hazards may be 'technically visible,' if their 'nature or location' makes them 'likely to be overlooked,' then the facts do not compel the conclusion that such hazards or conditions are open and obvious" (*id.*). Additionally, while a condition may be "ordinarily apparent to a person making reasonable use of his senses may be rendered a trap for the unwary where the condition is obscured by crowds or the plaintiff's attention is otherwise distracted" (*Mauriello*, 8 AD3d at 200).

Here, factual issues exist as to whether the manhole cover was "an open and obvious condition that could not reasonably be overlooked" (*Juoniene v H.R.H. Const. Corp.*, 6 AD3d 199, 200 [1st Dept 2004]). Plaintiff testified that she tripped and fell on the manhole cover during daylight, when it was bright and sunny. The photographs submitted show that the subject manhole cover was visible and there is no dispute that the manhole cover was in the middle of the cross walk. While plaintiff saw the manhole cover right before she tripped, however, she also explained that she could not see the manhole cover from afar because the gray colored manhole cover was camouflaged with the surrounding gray colored milled pavement, making it difficult to detect (*see Hutson v Regis High Sch.*, 226 AD3d 478, 601 [1st Dept 2024] ["The photographs and video evidence raise an issue of fact as to whether jutting branches from the trees were not clearly visible, and . . . might be overlooked by a pedestrian under the circumstances allegedly confronted by plaintiff, including . . . that the branches were almost the same color as the sidewalk"]). She further testified that she was looking straight ahead while crossing the street because she had to pay attention to what was in front of her and the traffic. Plaintiff's need to look straight ahead for traffic when crossing the street coupled with the fact that plaintiff could not see the manhole cover from afar using her senses, as there was no color contrast between the manhole cover and the milled road, raises factual questions on whether manhole cover was likely to be overlooked. "The location of the depression in a heavily traveled pedestrian walkway renders observation of the defect less likely" (*Argenio v Metropolitan Transp. Auth.*, 277 AD2d 165, 166 [1st Dept 2000] [citations omitted]; *see also Westbrook*, 5 AD3d at 72 ["The nature or location of [the defect], while . . . technically visible, make [it] likely to be overlooked"]).

Further, in view of plaintiff's testimony that she did not see the manhole cover from afar, "an issue of fact exists as to whether" the manhole cover was an open and obvious condition

(*Burgdoerfer v CLK/HP 90 Merrick LLC*, 170 AD3d 427, 427-28 [1st Dept 2019]). "In any event, the degree to which a dangerous condition is open and visible goes to the issue of comparative fault" (*Centeno v Regine's Originals, Inc.*, 5 AD3d 210, 211 [1st Dept 2004] [citations omitted]).

Even if the manhole cover was open and obvious, defendants failed to meet their burden of showing that the alleged manhole cover was not inherently dangerous. "[W]hether a condition is not inherently dangerous, or constitutes a reasonably safe environment, depends on the totality of the specific facts of each case'" (*Powers*, 123 AD3d at 422), and it "is generally a jury question" (*Hutson*, 226 AD3d at 601 [citations omitted]). Courts in this jurisdiction have looked at different factors in determining whether a condition is inherently dangerous, including the frequency of inspections of the condition (*see Abraido v 2001 Marcus Ave.*, LLC, 126 AD3d 571, 571-572 [1st Dept 2015]), photographs of the condition (*id.*), lighting conditions of the area (*Burke v Canyon Rd. Rest.*, 60 AD3d 558, 559 [1st Dept 2009]), prior complaints (*Abraido*, 126 AD3d at 571-57) or prior accidents involving the condition (*Burke*, 60 AD3d at 559), code violations or repairs related to the condition (*id.*), and expert testimony (*Julianne Oldham-Powers v Longwood Cent. Sch. Dist.*, 123 AD3d 681, 683 [2d Dept 2014]).

While defendants offer evidence showing that the DOT employees inspected Restani's milling work at the intersection of 181st Street and Wadsworth Avenue and marked it satisfactory, there is no other evidence, including an expert affidavit, to show whether the casting of the subject manhole cover was done pursuant to the City's specifications and that it was not inherently dangerous. In fact, conflicting testimonies exist as to whether the subject manhole cover casting was sufficient or whether it needed more asphalt. When Calderon was shown a photograph that plaintiff testified fairly and accurately represented the condition of the subject manhole on the date and time of the accident (NYSCEF Doc No. 27, pp. 28-30), he testified that in his opinion the

ramping of the subject manhole cover looked proper and safe even though the metal casting of the manhole appeared elevated. On the other hand, when Burnett was shown the same photograph, he testified that although the photograph depicted a ramped manhole, in "his experience" it was not ramped "enough." This raises issues of credibility for a trier of fact to resolve (*Best v 1482 Montgomery Estates*, LLC, 114 AD3d 555, 556 [1st Dept 2014]). Additionally, while defendants submit a DOT roadway search report indicating that there were two complaints related to the intersection of 181st Street and Wadsworth Avenue during the relevant time (NYSCEF Doc No. 32, pp. 118-120), no evidence was submitted to show whether those complaints were not regarding the subject manhole cover.

Further, as indicated above, the photographs of the subject manhole cover that were submitted do not sufficiently show the precise difference in height between the manhole cover and the milled road to ascertain whether the elevation of the manhole cover was a tripping hazard. In fact, the photographs show that the color of the manhole cover and the milled road were of the same gray color, potentially making it hard to see.

For all these reasons, defendants' motion for summary judgment on the grounds of open and obvious and not inherently dangerous is denied.

D. Vicarious Liability

To the extent that the City could be found liable, the City argues that it would only be based on vicarious liability because Restani performed the milling work. Plaintiff opposes and argues that the City breached its duty during its significant oversight and control over Restani's milling project.

"Generally, a party who retains an independent contractor, as distinguished from a mere employee or servant, is not liable for the independent contractor's negligence" (*Tytell v Battery*

Beer Distrib., Inc., 202 AD2d 226, 226 [1st Dept 1994]). There are, however, exceptions to this rule: "where the employer is negligent in selecting, instructing or supervising the contractor, where the contractor is employed to do work that is inherently dangerous or where the employer bears a specific nondelegable duty" (*id.*, pp. 226-227).

Here, the City's "has the nondelegable duty of maintaining its roads and highways in a reasonably safe condition" (*Stiuso v City of New York*, 87 NY2d 889, 891 [1995]). The court thus agrees with the City that at minimum, the City can be held vicariously liable for plaintiff's injuries. Because there are issues of fact, however, as to whether the subject manhole cover was inherently dangerous, the court cannot determine based on the evidence presented that the City is vicariously liable at this juncture.

II. **The Cross-Claims For Indemnification And Contribution Among The Defendants**

The City has also moved for conditional summary judgment on its cross-claim for contractual indemnity against Restani and for dismissal of Restani's common-law indemnification and contribution cross-claims. Similarly, Restani has moved for summary judgment against the City's cross-claim for contractual indemnification.

A. City's Cross-Claim for Contractual Indemnification

"The right to contractual indemnification depends upon the specific language of the contract" (*DiBuono v Abbey, LLC*, 95 AD3d 1062, 1066 [2d Dept 2012]). "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]); *see also Needham & Co., LLC v UPHealth Holdings, Inc.*, 212 AD3d 561, 561 [1st Dept 2023]).

The City is entitled to conditional contractual indemnification from Restani except for its own negligence. In the agreement between Restani and the City, Restani agreed to indemnify the City, its employees and officials against

> "any and all claims . . . ***allegedly arising out of or in any way related to the operations of [Restani]*** and/or its Subcontractors in the performance of this Contract or from the Contractor's and/or its Subcontractor's failure to comply with any of the provisions of this Contract or of the Law"

(NYSCEF Doc No. 48, pp. 160-161) (emphasis added). The indemnification provision in the contract between the City and Restani is broad and it "contains no language limiting the scope of that obligation" if the claims arise out of or are in any way related to Restani's operations and or its subcontractors in the performance of the contract (*Urbina v 26 Ct. St. Assoc., LLC*, 46 AD3d 268, 274 [1st Dept 2007] [citations omitted]). Further, Restani performed the milling work of the intersection where plaintiff tripped and fell. The parties thus cannot argue that the accident was not "in any way related" to Restani's milling operation for the City.

Notwithstanding Restani's argument, "plaintiff's accident triggered the broadly worded" contractual indemnification provision, (*Padron v Granite Broadway Dev. LLC*, 209 AD3d 536, 537 [1st Dept 2022]), even if "there is no evidence of negligence" (*Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 178 [1990]).

For all these reasons, the branch of the City's summary judgment related to their contractual indemnification is conditionally granted.

C. Restani's Cross-Claim for Common Law Contribution

CPLR 1402 provides as follows:

> "The amount of contribution to which a person is entitled shall be the excess paid by him over and above his equitable share of the judgment recovered by the injured party; but no person shall be required to contribute an amount greater than his equitable share. The equitable

> shares shall be determined in accordance with the relative culpability of each person liable for contribution" (CPLR 1402).

"The issue[s] of fact as to [Restani and City's] negligence precludes summary judgment on . . . contribution claims" (*Weidtman v Tremont Renaissance Hous. Dev. Fund Co., Inc.*, 224 AD3d 488, 492 [1st Dept 2024]). Therefore, the branch of the City's summary judgment against Restani's cross-claim regarding contribution is denied.

The court has considered the parties' remaining contentions and finds them unavailing.

CONCLUSION and ORDER

Accordingly, it is

ORDERED that the motion by defendant City of New York for summary judgment is granted to the extent of granting said defendant conditional summary judgment on its contractual indemnification cross-claim against defendant Restani Construction Corp. and the balance of the motion is otherwise denied; and it is further

ORDERED that defendant Restani Construction Corp.'s motion for summary judgment is denied.

12/20/2024
DATE

RICHARD G. LATIN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE