SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 16
(Dept 16 is now hearing cases that were formerly in Dept 2)
Honorable Amber Rosen, Presiding

Felicia Samoy, Courtroom Clerk
191 North First Street, San Jose, CA 95113
Telephone: 408.882.2270

DATE: 03-28-24 TIME: 9 A.M.

All those intending to speak at the hearing are requested to appear in person or by video. Parties are asked NOT to appear by telephone only.

To contest the ruling, call (408) 808-6856 before 4:00 P.M.
Make sure to let the other side know before 4:00 P.M. that you plan to contest the ruling, in accordance with California Rule of Court 3.1308(a)(1) and Local Rule 8.E.
The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

TO CONTEST THE RULING: Before 4:00 p.m. today you must notify the:

(1) Court by calling (408) 808-6856 and
(2) Other side by phone or email that you plan to appear and contest the ruling
(California Rule of Court 3.1308(a)(1) and Local Rule 8.E.)

TO APPEAR AT THE HEARING: The Court will call the cases of those who appear in person first. If you appear virtually, please use video. To access the link, click on the below link or copy and paste into your internet browser and scroll down to Department 16.
https://www.scscourt.org/general_info/ra_teams/video_hearings_teams.shtml. You must use the current link.

TO SET YOUR NEXT HEARING DATE: You no longer need to file a blank notice of motion to obtain a hearing date. You may make an online reservation to reserve a date before you file your motion. If moving papers are not filed within 5 business days of reserving the date, the date will be released for use in other cases. Go to the Court's website at www.scscourt.org to make the reservation.

FINAL ORDERS: The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

COURT REPORTERS: The Court no longer provides official court reporters. If any party wants a court reporter, the appropriate form must be submitted. See court website for policy and forms.

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LINE #	CASE #	CASE TITLE	RULING

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LINE 1	17CV314151 Hearing: Claim of Exemption	Gabriel Rodriguez vs Eusebia Sainz	The maximum allowable wage garnishment is the lesser of 20% of disposable earnings or 40% of the amount by which the judgment debtor's earnings exceed a multiple of the minimum wage. Code of Civil Procedure section 706.050(a). Judgment debtor reports net monthly earnings of $5,281.76. See Exhibit I, financial statement at 2.e. For wages paid on a monthly basis, the multiple for the minimum wage is 208 hours. Code of Civil Procedure section 706.050(b)(4). The current minimum wage in California is $16.00 per hour. This amounts to $3,328.00. Judgment debtor's disposable earnings of $5,281.76 exceed the minimum wage figure by $1,953.76. Forty percent of that is $781.50. This is less than 20% of the reported disposable earnings which would be more than $1,000 per month. As such the maximum allowable wage garnishment amount is $781.50. Despite this, debtor claims she can pay no amount of money. Debtor has failed to show that she is not able to pay any part of the judgment. Debtor is obligated to pay $300 per pay period to judgment creditor. Plaintiff shall submit the final order.

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The prevailing party shall prepare the order unless otherwise ordered. (See California Rule of Court 3.1312.)

LINE 2	20CV366822 Hearing: Return of Warrant	Wilver Castillo vs Russell Stone et al	Parties shall appear at 9 a.m. in Dept 16.
LINE 3	21CV383546 Motion: Summary Judgment/Adjudication	Jan Miller vs City of San Jose et al	See Tentative Ruling. Court will prepare the final order.
LINE 4	22CV398188 Motion: Compel	New Vision Construction et al vs Baron Construction & Remodeling Corp.	See Tentative Ruling. Plaintiff shall submit the final order within 10 days.
LINE 5	22CV398188 Motion: Compel	New Vision Construction et al vs Baron Construction & Remodeling Corp.	See Tentative Ruling. Plaintiff shall submit the final order within 10 days.
LINE 6	22CV398188 Motion: Compel	New Vision Construction et al vs Baron Construction & Remodeling Corp.	See Tentative Ruling. Plaintiff shall submit the final order within 10 days.
LINE 7	23CV410152 Motion: Withdraw as attorney	Gary Bozzo vs Msalam Sara, MD et al	Unopposed motion to withdraw is GRANTED and will be effective upon the filing of the proof of service of the signed order of the court. Mr. Bravo is therefore required to file the proof of service.
LINE 8	23CV412023 Motion: Order Pre Judgment Possession	SANTA CLARA VALLEY TRANSPORTATION AUTHORITY vs GOLDROCK HOLDINGS, LLC et al	The matter is off calendar due to the stipulation of the parties and the Court will sign the proposed orders.
LINE 9			
LINE 10			
LINE 11			

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LINE 12			
LINE 13			
LINE 14			
LINE 15			
LINE 16			
LINE 17			

- oo0oo -

Calendar Line 3
Case Name: *Miller v. City of San Jose, et al.*
Case No.: 21CV383546

City of San Jose ("the City" or "Defendant") moves for summary judgment, or, in the alternative, summary adjudication, as to the operative Complaint filed by Jan Melanie Miller, an individual ("Plaintiff,") and the cross-complaint filed by Morris Kindig, individually as successor trustee of the Eunice Louise Kindig Revocable Trust ("Cross-Complainant" or "Kindig.")

I. Background

A. Factual

According to the allegations of the Complaint, on July 28, 2020[1], Plaintiff tripped and fell on broken, raised and/or uneven pavement on the sidewalk located in front of 1904 Serge Ave., San Jose, California ("Subject Premises,") sustaining serious injuries. (Complaint, ¶¶ 9, 13-14, 19.) Plaintiff asserts that her injuries were the result of Defendant City's acts and omissions (Complaint, ¶ 10) and cross-complainant Kindig's[2] negligent failure to maintain, inspect, repair, and warn of the dangerous condition of the subject property. (Complaint, ¶¶ 29-33.)

B. Procedural

On December 17, 2020, Plaintiff presented a claim for damages with the City in compliance with the Government Claims Act (Government Code section 911.2). The City rejected Plaintiff's claim. (Complaint, ¶ 22.)

On June 3, 2021, Plaintiff filed the operative Complaint against City and Kindig (collectively, "Defendants.") Plaintiff contends that when she tripped and fell on a raised, city-owned sidewalk, she suffered bodily injury. Plaintiff asserts the following causes of action:

1) Dangerous Condition of Public Property pursuant to Government Code section 835 – against the City; and

2) Negligence – against Kindig

On May 12, 2022, Kindig filed a cross-complaint against the City, asserting the following causes of action: (1) apportionment of fault; (2) equitable indemnity; (3) contribution; and (4) declaratory relief.

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[1]The operative Complaint alleges Plaintiff's injury occurred in 2019 and in 2020. (See Complaint, ¶¶ 8-10, 13-14.) But, the Plaintiff's deposition testimony and opposition both indicate that the incident occurred in 2020. The court will assume the alleged injury occurred in 2020.

[2]At the time of Plaintiff's alleged injury, title to the Subject Premises was held by Kindig as a successor trustee of a revocable trust.

On September 9, 2023, the City filed a motion for summary judgment ("MSJ") as to both Plaintiff and Kindig. Plaintiff opposed the motion on March 14, 2024. The City filed a reply on March 21, 2024.

II. Evidentiary Matters

A. Plaintiff's Objections to Evidence in City's MSJ

Plaintiff objects to the following:

1) The Declaration of Jeremiah Stagi, in its entirety, on several grounds including hearsay, lack of foundation, and lack of personal knowledge. The objections are OVERRULED. First, an objection on the ground of a lack of foundation is not a proper objection because the term "foundation," a colloquial term used to describe a wide variety of admissibility requirements, is too broad and indefinite. (*People v. Porter* (1947) 82 Cal.App.2d 585, 588; *People v. Modell* (1956) 143 Cal.App.2d 724, 729-730.) Second, declarations filed in support of a motion for summary judgment "shall be made by a person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavits or declarations." (Code Civ. Proc., § 437c, subd. (d); see also Evid. Code, § 702, subd. (a) ["[T]he testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter"].) Mr. Stagi is a Principal Construction Inspector for the Trees and Sidewalk Division of the Department of Transportation ("DOT"); he affirms he has personal knowledge of the facts in his declaration. ((See Declaration of Jeremiah Stagi, in support of Motion for Summary Judgment ("Stagi Decl., ¶ 2.").)

   According to Evidence Code section 1200, hearsay evidence is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200.) Plaintiff objects to the entirety of Mr. Stagi's declaration as hearsay but there is an exception to the hearsay rule for declarations in support of a motion for summary judgment. (*Windigo Mills v. Unemployment Ins. Appeals Bd*. (1979) 92 Cal.App.3d 586, 597 (*Windigo*) [hearsay is made specially admissible in connection with motions in general and summary judgment motions in particular]; see also Code Civ. Proc., § 437c, subds. (b)(1) & (2), (d).) This special authorization implies a hearsay exception, so that in the situations specified by statute, otherwise admissible testimony may be given by declaration, provided it is under oath. (*Pajaro Valley Water Management Agency v. McGrath* (2005) 128 Cal.App.4th 1093, 1107.)

   Since Plaintiff does not indicate any specific portion of the declaration that contains more than one layer of hearsay, the objection is overruled.

   In sum, Plaintiff's objections on the grounds of a lack of foundation, lack of personal knowledge, and hearsay, are without merit. Accordingly, the objections are OVERRULED.

2) Declaration of Jeremiah Stagi, paragraph 9, on the same grounds alleged above. The court declines to rule on this objection because it is not material to the outcome of the motion. (See Code of Civ. Proc., § 437c, subd. (q) ["In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review."].)

3) Declaration of Jeremiah Stagi, paragraph 10, on the same grounds alleged above. The objection is OVERRULED. Paragraph 10 states, "[i]t is my *professional opinion* that the uplift of the sidewalk at 1904 Serge Avenue was caused by a root from a large tree located close to the sidewalk. The root went underneath the sidewalk, causing the uplift. The uplift was not caused in any way by the City." (Stagi Decl., ¶ 10.) Here, Mr. Stagi's statement is not hearsay, Paragraph 10 does not contain legal conclusions, but rather his opinion as to what caused the uplift based on his personal knowledge and his background as a principal construction inspector for the DOT. (See Stagi Decl., ¶¶ 1-2.) With respect to the hearsay objection, as discussed above, there is an exception to the hearsay rule for declarations in support of a motion for summary judgment. (See *Windigo, supra,* 92 Cal.App.3d at p. 597.) Again, Plaintiff does not contend that paragraph 10 contains multiple hearsay. Consequently, Plaintiff's objection lacks merit.

Accordingly, the objections are OVERRULED.

III. Motion for Summary Judgment

Pursuant to Code of Civil Procedure section 437c, the City moves for summary judgment, or, in the alternative, summary adjudication, as to Plaintiff's Complaint and Kindig's cross-complaint.

A. Legal Standard

Any party may move for summary judgment. (Code of Civ. Proc., § 437c, subd. (a); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) The motion "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code of Civ. Proc., 437c, subd. (c); *Aguilar, supra*, at p. 843.) The object of the summary judgment procedure is "to cut through the parties pleading" to determine whether trial is necessary to resolve the dispute. (*Aguilar, supra*, at p. 843.) Summary adjudication works the same way, except it acts on specific causes of action or affirmative defenses, rather than on the entire complaint. (§ 437c, subd. (f).) … Motions for summary adjudication proceed in all procedural respects as a motion for summary judgment.'" (*Hartline v. Kaiser Foundation Hospitals* (2005) 132 Cal.App.4th 458, 464.)

"A defendant seeking summary judgment must show that at least one element of the cause of action cannot be established, or that there is a complete defense to the cause of action…The burden then shifts to the plaintiff to show there is a triable issue of material fact on that issue." (*Alex R. Thomas & Co. v. Mutual Service Casualty Ins. Co.* (2002) 98 Cal.App.4th 66, 72 (internal citations omitted; emphasis added).)

When a defendant moves for summary judgment, "its declarations and evidence must either establish a complete defense to plaintiff's action or demonstrate the absence of an essential element of plaintiff's case. If plaintiff does not counter with opposing declarations showing there are triable issues of fact with respect to that defense or an essential element of its case, the summary judgment must be granted." (*Gray* v. *America West Airlines, Inc*. (1989) 209 Cal.App.3d 76, 81.

If the moving party makes the necessary initial showing, the burden of production shifts to the opposing party to make a prima facie showing of the existence of a triable issue of material fact. (Code of Civ. Proc., 437c, subd. (c); *Aguilar, supra*, at p. 850.) A triable issue of material fact exists "if, and only if, the evidence would allow of reasonable trier of fact to find the underlying facts in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra*, at p. 850, fn. omitted.) If the party opposing summary judgment presents evidence demonstrating the existence of a disputed material fact, the motion must be denied. (*Id*. at p. 843.)

Throughout the process, the trial court "must consider all of the evidence and all of the inferences drawn therefrom." (*Aguilar, supra*, 25 Cal.4th at p. 856.) The moving party's evidence is strictly construed, while the opponent's is liberally construed. (*Id*. at 843.)

B. Merits of the Motion

In moving for summary judgment, the City makes the following arguments against Plaintiff: (1) there is no evidence that the City had actual or constructive notice of the alleged dangerous condition; and (2) there is no evidence that a negligent or wrongful act or omission of a City employee (acting within the scope of their employment) created the dangerous condition. (Memorandum of Points and Authorities in Support of the City's MSJ ("MPA,") p. 2).)

The City argues with respect to Kindig's cross-complaint, there can be no indemnity against the City without an initial finding of liability against the City on Plaintiff's claim.

i. Plaintiff's Complaint: Dangerous Condition of Public Property

The Complaint asserts a single cause of action against the City for statutory liability for a dangerous condition of public property pursuant to Government Code section 835. (Complaint, ¶¶ 14-22.)

Government Code section 835 provides:

> Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:
>
> (a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or

(b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

Thus, in order to succeed on this cause of action, Plaintiff must establish either, that a City employee acting in his or her scope of employment created the condition or that the City had actual or constructive notice of the dangerous condition a sufficient time prior to the injury to have protected against the dangerous condition.

Here, the City argues summary judgment is warranted because Plaintiff is unable to demonstrate the existence of a triable issue of material fact. Specifically, the City contends there is no evidence that a City employee acting within the scope of their employment created the dangerous condition or that City had actual notice or constructive notice of the dangerous condition, i.e., elevated sidewalk. (MPA, pp. 6-7.)

1. No Evidence that a City Employee Caused the Dangerous Condition

At the outset, it must be noted that Plaintiff does not argue that the City caused the dangerous condition, and the City has presented evidence in the form of a declaration by its Principal Construction Inspector for the Trees and Sidewalk Division of the DOT, Jeremiah Stagi ("Stagi Decl.") that the dangerous condition was caused by a tree root. (Stagi Decl., ¶ 10.) Plaintiff provides no evidence that the City was directly responsible for causing the dangerous condition. (See *Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal. App. 4th 507, 529 [failure to challenge a contention in a brief results in the concession of that argument].) As a result, Plaintiff fails to demonstrate the existence of a triable issue of material fact as to whether a City employee negligently caused the subject sidewalk "uplift," within the scope of their employment.

2. Actual Notice of the Purported Dangerous Condition

"A public entity is liable for injury proximately caused by a dangerous condition of its property if the dangerous condition created a reasonably foreseeable risk of the kind of injury sustained, and the public entity had actual or constructive notice of the condition a sufficient time before the injury to have taken preventive measures." (*Cornette v. Dept. of Transportation* (2001) 26 Cal.4th 63, 66, citing Gov. Code, § 835, subd. (b).) In other words, before the City can be subjected to liability, it must be shown that its employees had either actual or constructive notice of the dangerous condition in sufficient time to effectuate a remedy. (*State v. Sup. Ct. of San Mateo County* (1968) 263 Cal.App.2d 396, 399 (*San Mateo*).)

Government Code section 835.2, subd. (a) states that "[a] public entity had actual notice of a dangerous condition within the meaning of subdivision (b) of [Government Code] Section 835 if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character." (Gov. Code, § 835.2, subd. (a), emphasis added.) To establish actual notice, "[t]here must be some evidence that the employees had knowledge of the particular dangerous condition in question." (*San Mateo, supra,* 263 Cal.App.2d at p. 399.)

Here, the City contends it did not have actual notice of the sidewalk's alleged "dangerous" condition prior to the lawsuit. (MPA, p. 7.) In support, the City presents both Plaintiff and Kindig's deposition testimony in which they state they never called the City to report the subject sidewalk as being in need of repair both before and after Plaintiff's fall. (Undisputed Material Fact ("UMF") Nos. 9-10, 12, 16.)

In his declaration, Mr. Stagi explains "the City relies upon citizen complaints about sidewalk conditions prior to sending a DOT employee out to inspect a particular piece of sidewalk… [or] if a DOT or other City employee is out conducting City business and notices a particular piece of sidewalk in repair, that employee will also notify the Trees and Sidewalk Division of that particular piece of sidewalk needing repair." (Stagi Decl., ¶ 3.) After a review of the City's records of the Sidewalk Section's database of citizen complaint and other reports of sidewalk conditions for any records related to 1904 Serge Avenue, Mr. Stagi found two reports of sidewalk conditions related to the Subject Premises back in 1999 and 2007, respectively. The City's records indicate repairs related to the 2007 report were completed as of May 2007. (See Stagi Decl., ¶ 6, UMF No. 24.) The City did not receive any complaints or accident reports related to the subject sidewalk where plaintiff fell, between May 2007 to the date of the incident. (MPA, p. 8; UMF Nos. 9-10, 16, 20, 25; Stagi Decl., ¶¶ 6-7.)

Based on the evidence proffered by the City, it has sufficiently met its initial burden. The City demonstrates it did not have actual notice of the alleged dangerous condition. Thus, the burden shifts to Plaintiff to establish there is a triable issue of material fact as to actual notice.

In opposition, Plaintiff fails to demonstrate the existence of a triable issue of material fact as to the City's actual knowledge. Plaintiff states the subject sidewalk defect existed for "well over 6 years." (Plaintiff's Additional Material Facts ("PAMF,") No. 47.)[3] Plaintiff argues that "City should have known of the dangerous character of the sidewalk…[because] defendant was present in the area to reconstruct sections of the sidewalk frequently over the years…this is actual evidence of the City being within feet of the uplift consistently over the last 10 years." (Memorandum of Points and Authorities in Opposition to the City's MSJ ("Opp.,") p. 4).) Plaintiff concludes these facts demonstrate City employees and engineers were in the vicinity of the subject sidewalk frequently prior to the subject incident. (*Ibid.*)

It is noteworthy that even using Plaintiff's own AMF, none of them indicates that inspections occurred within the last 10 years. The alleged injury occurred in 2020 and, according to Plaintiff's own evidence the last sidewalk inspection at neighboring properties occurred in 2010. (PAMF No. 43.) The deposition testimony of Plaintiff's neighbor, Behrouz Behrouzian ("Behrouzian Depo,)" demonstrates that City inspectors were last seen in the subject area and street "maybe 2008 or [2009] roughly" where they "properly inspected" and marked the sidewalk that needed repairs. (Behrouzian Depo. pp. 18-19:1-4; 22:21-25; 23:1-12; Reply, p. 2.) The City does not dispute Plaintiff's AMF that it had been in the neighborhood between 2008 and 2010 to install ramps for the sidewalks. (PAMF No 43.)

The City further concedes that it had inspectors in the area as recently as 2016, when inspectors repaired the sidewalk in front of a neighboring house, but the City inspectors did not see the subject sidewalk defect at the time, which was four years before the alleged injury.

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[3] The City disputes this fact. But, the court will assume its truth for discussion purposes.

(MPA, p. 9:21-27; UMF No. 30; PAMF Nos. 42-43.) But the City has shown that there were no incident or accident reports relating to the subject sidewalk defect after the May 2007 repairs made by the City. (MPA, p. 8; Stagi Decl., ¶¶ 6-7; UMF Nos. 24-25. Thus, although inspectors frequented the subject areas during the years discussed above, the City did not receive any reports during these inspection periods.

Plaintiff fails to demonstrate that the City had actual knowledge about the defect. Based on the evidence proffered by Plaintiff, in opposition, she has not met her burden. Consequently, Plaintiff fails to establish there is a triable issue of material fact as to actual notice. Nonetheless, because either actual or constructive notice is sufficient to meet the notice element of a dangerous condition of property claim, the court will go on to discuss constructive notice.

3. Constructive Notice of the Purported Dangerous Condition

Government Code section 835.2, subdivision (b) states that "[a] public entity had constructive notice of a dangerous condition within the meaning of subdivision (b) of Section 835 only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character."

Constructive notice may be imputed if it can be shown that an obvious danger existed for an adequate period of time before the accident to have permitted the City, in the exercise of due care, to discover and remedy the situation had they been operating under a reasonable plan of inspection. (*San Mateo, supra,* 263 Cal.App.2d at p. 400.) "The primary and indispensable element of constructive notice is a showing that the *obvious condition existed a sufficient period of time before the accident*." (*Id.,* pp. 400-401, italics in original.) "Where there is no evidence of actual notice, the city is charged with constructive notice if the defects have *existed for such length of time* and are of such conspicuous character that a reasonable inspection would have disclosed them." (*Ibid*, emphasis added; *Lorraine v. Los Angeles* (1942) 55 Cal.App.2d 27, 30-31 ["It is well settled that constructive notice can be shown by the long continued existence of the dangerous or defective condition. . . ."].)

The California Supreme Court has stated that "in order to charge the city with constructive notice under these principles, some element of conspicuousness or notoriety so as to put the city authorities upon inquiry as to the existence of the defect or condition and its dangerous character" is required. (*Nicholson v. Los Angeles* (1936) 5 Cal.2d 361, 364-365 (*Nicholson*); see also *Heskel v. City of San Diego* (2014) 227 Cal.App.4th 313, 317 (*Heskel*) [stating that obviousness of an alleged dangerous condition is established through evidence that it is "substantial enough and so readily apparent from public thoroughfares as to support an inference that its danger was known"].)

Nicholson, supra, further states, "[i]t is well settled that a municipality is not an insurer of its public ways and is not bound to keep them so as to preclude the possibility of injury or accident… [i]t is a matter of common knowledge that no sidewalk is perfect, and that certain irregularities and inequalities in the surface of such sidewalks exist, not only in the city and county of San Francisco, but in all cities… [i]n many instances a wooden or concrete pavement will terminate, and the sidewalk then consist of the surface of the street, and there will be a step of a few inches depression from the artificial sidewalk to the earth… [i]n many cases there is,

even in paved sidewalks, a drop of a few inches in the surface… [i]n fact, the drop from the curb or outer edge of almost every sidewalk is from three to four inches, or several inches, and it is not usual for the surface to be on a level with the surface of the street… [w]hile a municipality is required to exercise vigilance in keeping its streets and sidewalks in a reasonably safe condition for public travel, it is by no means an insurer against accidents, nor can it be expected to keep the surface of its sidewalks free from all irregularities… [t]he doctrine of constructive notice cannot be so applied as to effect a change in the substantive obligations of the city." (*Nicholson, supra,* 5 Cal.2d at pp. 364-365.)

In another California Supreme Court opinion, *Whiting v. National City* (1937) 9 Cal.2d 163, 166 (*Whiting*), the Court reversed judgment in favor of plaintiff based on a finding of constructive notice, stating that "[t]he city is not an insurer of its public ways and is not bound to keep them so as to preclude the possibility of injury or accident therefrom… in order to hold the city because of such defect there must also be notice of the dangerous character of such defect before the duty imposed by the statute is created… [where there is] no element of conspicuousness or notoriety showing any dangerous character in the *slight rise of a portion of a sidewalk*, which would put the city authorities upon inquiry or place upon them the duty of remedying the defect or condition pursuant to the provisions of the statute… [it is] insufficient to impose liability upon the city for injuries resulting therefrom." (*Whiting, supra,* emphasis added.)

In *Van Dorn v. San Francisco* (1951) 103 Cal.App.2d 714, the First District Court of Appeal reiterated the general principle that:

> There must be shown, in order to charge the city with constructive notice …some element of conspicuousness or notoriety so as to put the city authorities upon inquiry as to the existence of the defect or condition and its dangerous character. It is equally clear, we think, that where the city is charged with constructive notice on the basis of a duty to inspect, it must be made to appear that a reasonable inspection would have disclosed the defect or dangerous condition; that is, that had there been no neglect of duty there would have been actual notice on the part of the city officers.

(*Id*. at p. 717.)

Here, as to constructive notice, the City argues Plaintiff cannot prove the condition of the sidewalk was "so obvious" that the City should have noticed it. (MPA, p. 9.) To support their argument, the City proffers Plaintiff's deposition testimony, in which she states she did not see the elevated sidewalk, it was covered in debris, i.e., "leaves," "round, ball-like things with spikes," on the day of the fall, and the sidewalk abutting Kindig's property is typically in disrepair. (MPA, p. 9; see Exhibit A in Support of Opp.; see Miller Deposition ("Miller Depo,") pp.13:20-25-14:1-4.) Kindig also testified he did not maintain the subject sidewalk because he did not believe there was any "maintenance required," and that "no one had ever fallen on any sidewalk abutting his property." (MPA, p. 8; UMF Nos. 2, 4, 12, 16.)

The City also proffers Plaintiff's deposition testimony regarding her familiarity with the subject sidewalk location. Plaintiff testified that she "lived across the street" from the Subject Premises for years, and she walked her dog, by the Subject Premises, at least twice a day. (UMF Nos. 4, 5, 6.) The City asserts that if Plaintiff herself was unable to notice the subject

sidewalk defect until her alleged fall, she cannot expect the City to have constructive notice of the defect either. (MPA, p. 9:10-19.)

From the above summary, the City meets its initial burden to demonstrate that the purported dangerous condition was not so conspicuous or obvious for any period of time prior to the incident that it gave constructive notice to City. The burden now shifts to Plaintiff to establish a triable issue of material fact.

Plaintiff argues, the City's prior repairs and inspections of the same block of sidewalk, where the defect was, should have put City on constructive notice. (Opp., p. 6.) As to whether the condition existed for such a period of time as to be considered obvious, Plaintiff argues it is undisputed that the defective sidewalk condition existed well over six years. (Opp., pp. 5:23-28-6:1-2.)[4] Plaintiff further asserts the City presented "zero" evidence that the sidewalk had ever been in a safe condition. (*Ibid.*) But, even assuming the sidewalk had been in a defective condition for six years, the defect would still need to be obvious enough to observe in the absence of any reports in order to establish constructive notice. As evidence, Plaintiff submits a single Google Earth image dated January 2014, of the subject sidewalk, to demonstrate that the condition existed since then. (See Declaration of Brent Griffith in Support of Opp. to MSJ ("Griffith Decl.", ¶ 5, Exh. D, p. 35; PAMF No. 47.) Given that it was a single image from January 2014, which was not the injury date, and it is unclear where the "uplift" of the subject sidewalk is located in that image, the proffered evidence does not support Plaintiff's claim the defect was "obvious." The image itself is not marked with the location of the alleged defect. Plaintiff has not shown that the defect was so "obvious" as to have put the City on constructive notice based on a plain viewing of the Google Earth image.

In *Heskel*, the plaintiff tripped over a short, metal pole protruding from a sidewalk and initiated an action against the defendant city. (*Heskel*, *supra*, 227 Cal.App.4th 313*,* at p. 315.) The defendant filed a motion for summary judgment, which the court granted because the plaintiff had not proven there was a triable issue of material fact as to whether the defendant city had actual or constructive notice of the defect. (*Id.* at p. 316.) As to whether the condition was obvious, the defendant submitted evidence reflecting its employees had been in the area and had not seen the defect, and there were no reports from pedestrians as to its existence. (*Id.* at pp. 318-319.) The Court of Appeal concluded the plaintiff did not present sufficient testimony as to the obviousness of the condition. (*Id.* at p. 320.) The court emphasized there was no testimony stating the condition could be viewed from the street or describing its size. (*Ibid.*) In fact, the court observed the photographs submitted by the plaintiff revealed it was not substantial in size or readily apparent from the street. The photographs only revealed a condition that was a few inches in height. (*Ibid.*) Based on that evidence, it concluded the condition was not obvious. (*Ibid.*)

Similarly, here, none of the evidence reflects the offset is obvious. In fact, the evidence submitted by Plaintiff tends to prove the opposite. In the single Google Earth image, it is not clear where the offset is because it is not marked and, even if the offset is visible in the photo, that is insufficient to demonstrate that it was of such a size and visibility that it could be seen from the street. (See *Heskel*, *supra*, 227 Cal.App.4th at p. 321 [evidence showing "condition was above ground and visible" "does not demonstrate that it was of a substantial size or so visible from public thoroughfares that the City, in the exercise of due care, should have become

[4] As mentioned above, the City disputes this fact.

aware of it and taken corrective action to cure it"].) Further, the testimony of both Plaintiff and Kindig themselves demonstrate none of them saw the offset prior to Plaintiff's fall, which tends to prove the defect was not obvious to even those walking next to it.

The City persuasively maintains, in its reply, that both Plaintiff and Kindig's deposition testimony demonstrate the subject sidewalk was "typically covered in debris/leaves" and this was acknowledged by Kindig. (Reply, p. 5:3-13.) Plaintiff disputes the City's proffered evidence, UMF Nos. 7 and 8, on grounds that "Plaintiff made no comments about what the sidewalk looks like" and "does not say it was obstructed at the time of the fall." She cites to the same portion of the testimony proffered by the City. (Opp. to Separate Statement of Undisputed Facts, pp. 3-4, Nos. 7-8.) The relevant portion of Plaintiff's testimony, states, as follows:

> Q. And the indent or this – I'm just going to describe it as the indented sidewalk. Was that how the sidewalk looked *on the date of the fall?*
>
> A. No. It had -- it was covered with debris, leaves, round, ball-like things with spikes. Morri [sic] *didn't keep up his yard, and there was stuff all over the sidewalk*.
>
> Q. I see.
>
> A. Which is why *I walk on the street a lot*.

(Plaintiff Depo., pp. 13:20-25-14:1-3; Exh. 1, emphasis added.)

Further, Plaintiff later stated in her deposition, referring to the defect in the sidewalk, "As I said it was – *it was usually covered*. You could see leaves and things. I don't remember seeing it." (Miller Depo, p. 16:7-11.)[5]

Given her own testimony on sidewalk conditions, namely, that the subject sidewalk was covered in tree debris, and Kindig's testimony that he did not maintain the sidewalk, Plaintiff cannot demonstrate a triable issue of material fact as to constructive notice.

ii. Kindig's Cross-Complaint

City argues that given Plaintiff's sole statutory cause of action against it should be dismissed, Kindig's claims should also be dismissed, as there can be no equitable relief on the part of the City without liability as to Plaintiff. (See *GEM Developers v. Hallcraft Homes of San Diego, Inc.* (1989) 213 Cal.App.3d 419, 426; *Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, 114 ["Indemnity . . . is premised on a joint legal obligation to another for damages"]; *Miller v. American Honda Motor Co*. (1986) 184 Cal.App.3d 1014; *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79.) In other words, given

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[5] Although the City does not point to this portion of the transcript in support of UMF Nos. 7 and 8, Plaintiff has highlighted it in support of her own argument. (See Griffith Decl., Exh. A, p. 16:9-11.)

the City is not liable for Plaintiff's injury, Kindig's equitable relief claims arising from Plaintiff's injury must also fail.

Kindig does not oppose the City's motion as to his cross-complaint.

Accordingly, the City's motion for summary judgment is GRANTED as to Kindig's cross-complaint.

IV. Conclusion

The motion for summary judgment is GRANTED as to Plaintiff's complaint and Kindig's cross-complaint.

The Court will prepare the Final Order.

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Calendar lines 4-6
Case Name: *Alwardat dba New Vision Construction v. Baron Construction & Remodeling Corp.*
Case No.: 22CV398188

According to the allegations of the first amended complaint ("FAC"), on July 13, 2021, plaintiff Nayef M. Alwardat dba New Vision Construction ("Plaintiff") entered into a written agreement with defendant Baron Construction & Remodeling Corporation ("Baron") in which Plaintiff was to provide subcontractor services for general contractor Baron. (See FAC, first cause of action, ¶ BC-1, exh. A.) Baron did not pay amounts owed pursuant to the contract and Plaintiff thus suffered contractual damages and additionally seeks interest. (See FAC, first cause of action, ¶¶ BC-2-BC-5, second cause of action, ¶¶ CC-1-CC-3, third cause of action, ¶¶ BC-1-BC-5, fourth cause of action, ¶¶ CC-1-CC-4.)

On December 5, 2022, Plaintiff filed the FAC against Defendant, asserting causes of action for:

1) Breach of contract;
2) Common counts;
3) Breach of contract; and,
4) Common counts.

On August 16, 2023, Defendant propounded form interrogatories ("FIs"), special interrogatories ("SIs"), requests for production of documents ("RPDs") and requests for admission ("RFAs") on Plaintiff. On October 20, 2023, Defendant's counsel, M. Jonathan Robb Jr., sent a single letter by mail and by email to nick.alwardat@gmail.com notifying Plaintiff that he had yet to receive any discovery responses from Plaintiff and that responses were due on September 20, 2023 and thus, objections were waived. On October 25, 2023, Plaintiff responded by email from the email address nhvacsystem@gmail.com that he had not received any discovery from his office, the email address nick.alwardat@gmail.com has been closed for over two years, his attorney was Michael Tsivyan and was reachable at (408) 887-6739, and that his correct email address was nhvacsystem@gmail.com. On October 26, 2023, Mr. Robb responded that the discovery was delivered by mail to Plaintiff's address of record and demanded that Plaintiff serve discovery responses by October 30, 2023. Later that day, Plaintiff's counsel emailed Mr. Robb, stating that: he was representing Plaintiff; Plaintiff did not receive the discovery requests; Plaintiff told Mr. Robb that he did not receive the discovery requests; Mr. Robb served the discovery requests on October 26, 2023 and extended the deadline to respond to October 30, 2023 so that Plaintiff's counsel had two business days to provide responses; and, Plaintiff's counsel asked for an extension to respond to November 17, 2023 since he was just substituting in on the case. On October 27, 2023, Mr. Robb refused to provide an extension, directed Mr. Tsivyan to file an appearance in the action, that he would hold off on a motion to compel through Monday and that responses should be full and complete and without objections. On October 30, 2023, Mr. Robb indicated that he had yet to hear from Mr. Tsivyan and that he would file a motion to compel and sanctions if he did not hear from him. Mr. Tsivyan indicated that he mistakenly believed that Mr. Robb was going to provide an extension, but that since Mr. Robb did not agree to provide such an extension, that he would have to file a motion for relief from the waiver and gave notice that he would provide responses by November 17, 2023 with all pertinent objections and would file a motion for relief from the waiver; however, rather than waste the court's and their time on the motion, he

recommended that Mr. Robb voluntarily extend the deadline as requested. Mr. Robb responded that Mr. Tsivyan needed to file an appearance in order to discuss further.

It appears that counsel for the parties need to be reminded of the Santa Clara County Bar Association Code of Professionalism. Section 10 states that "[a] lawyer should conduct discovery in a manner designed to ensure the timely, efficient, cost-effective, and just resolution of a dispute." (Santa Clara County Bar Association Code of Professionalism, § 10 ("Discovery").) "A lawyer should engage in a meaningful and good faith effort to resolve discovery disputes and should only bring discovery issues to the court for resolution after these efforts have been unsuccessful." (*Id*., §§ 10, 11 ("Motion practice") (stating that "Motions should be filed or opposed only in good faith and when the issue cannot be otherwise resolved… [a] lawyer should engage in a good faith effort to resolve the issue before filing a motion").) "In particular, civil discovery motions should be filed sparingly." (*Id*. at § 11.) "A lawyer should agree to reasonable requests for extensions of time or continuances without requiring motions or other formalities." (*Id*. at § 4 ("Continuances and Extensions of Time").) "Unless time is of the essence, a lawyer should agree as a matter of courtesy to first requests for reasonable extensions of time, even if the counsel requesting it previously refused to grant an extension." (*Id*.)

Here, Mr. Robb, after being informed that Plaintiff did not receive the discovery requests by mail and emailed those requests to a non-working email address, continued to demand responses, insisting that objections were waived. Despite Mr. Tsivyan's representation that he was Plaintiff's counsel, Mr. Robb refused to discuss the substance of the discovery dispute because Mr. Tsivyan had yet to file an appearance. Mr. Robb further refused to offer Plaintiff an extension despite Plaintiff's counsel's valid argument that the issue would be a waste of resources as he could merely file a motion for relief from waiver which would in all likelihood be granted. Mr. Robb again conditioned any further conversation on the filing of an appearance. This does not constitute the engagement in a good faith effort to resolve a discovery dispute. Moreover, Mr. Robb refused to agree to a reasonable extension of time without requiring a motion, instead filing Baron's motion on November 17, 2023. In fact, Baron's counsel's conduct is sanctionable behavior; however, Plaintiff has not requested any sanctions.

Baron's motion to compel response to FIs, SIs, RPDs, and RFAs is DENIED in its entirety.

Plaintiff shall submit a proposed order within 10 days.

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