To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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PHILIP NEIDER,

Plaintiff,

-against-

ENDRIT KRYEZIU,

Defendant.

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DECISION and ORDER

Motion Sequence Nos. 1 & 2
Index No. 61375/2018

RUDERMAN, J.

The following papers were considered in connection with the motion by defendant for summary judgment dismissing the complaint, and the cross-motion by plaintiff for summary judgment on liability:

Papers	Numbered
Notice of Motion, Affirmation, Exhibits A - H	1
Notice of Cross-Motion, Affirmation in Opposition and Support, Exhibit A	2
Affirmation in Reply and Opposition to Cross-Motion	3
Reply Affirmation on the Cross-Motion	4

This is an action for personal injuries allegedly sustained in a trip and fall accident which occurred on February 14, 2018, at approximately 6:00 p.m., on a portion of the public sidewalk abutting defendant's premises located at 131 Franklin Avenue in New Rochelle, New York. Plaintiff claims that there was a dangerous condition on the sidewalk consisting of signficantly uneven flags of pavement, causing him to trip on the raised portion, and that the failure to maintain the sidewalk in a safe condition constituted a breach of the owner's obligation pursuant to section 197 of the New Rochelle Charter and Code.

In moving for summary judgment dismissing the complaint, defendant initially contends that he has no liability because, while a New Rochelle statute imposes a duty on property owners to maintain the sidewalk, that statute does not impose tort liability for the violation of that duty, citing *Palazzo v City of New Rochelle* (236 AD2d 528, 528-529 [2d Dept 1997]). However, although in 1997 the Court in *Palazzo v City of New Rochelle* characterized the New Rochelle Charter and Code § 197 as not imposing tort liability for the breach of the duty of abutting landowners to maintain and repair sidewalks (*see id.* at 528-529), the law has been amended since the issuance of that decision, and its current form includes a provision imposing liability on owners of adjoining property who fail to maintain sidewalks:

> "any owner of any occupied or unoccupied lot or piece of land or any part thereof within the City of New Rochelle shall fail to maintain the sidewalks and curbs adjoining his or her lot or piece of land as required by Subsection (a) and (b) above, whether the failure be determined though the procedure of Subdivision (c) above or otherwise, said owner shall be liable to any persons injured as a result of such failure and the City of New Rochelle shall not be liable" (City of New Rochelle Charter and Code, Article XXII, § 197 [j]).

Accordingly, defendant's first basis for his claimed right to summary judgment is rejected.

Defendant next contends that the claimed defective condition was open and obvious and not inherently dangerous. Importantly, the assertion that an alleged defect is "open and obvious" does not in itself present grounds for dismissal of claim; it is merely relevant to a claim of the plaintiff's comparative negligence (*see Cupo v Karfunkel*, 1 AD3d 48, 52 [2d Dept 2003]). Regardless of how obvious it may be, a duty to protect against an open and obvious condition is avoided only when the condition, "as a matter of law, is not inherently dangerous" (*see Mucciariello v A & D Hylan Blvd. Assoc., LLC*, 133 AD3d 726, 727 [2d Dept 2015]). "[T]he determination of whether a condition is not inherently dangerous . . . depends on the totality of the specific facts of each case" (*Graffino v City of New York*, 162 AD3d 990, 991 [2d Dept

2018]).

In contrast to the types of conditions deemed not inherently dangerous in cases such as *Graffino* and *Mucciariello* – a utility box recessed into the sidewalk in *Graffino*, and a line of decorative stone along the sides of a paved walkway in *Mucciariello* – sidewalk flags that are significantly uneven are frequently treated as defective conditions, even where the claims are dismissed on other grounds (*see e.g. Fleisher v City of New York*, 120 AD3d 1390 [2d Dept 2014]; *Martens v County of Suffolk*, 100 AD3d 839 [2d Dept 2012]; *Elkman v Consolidated Edison of N.Y.*, 71 AD3d 817 [2d Dept 2010]).

Considering such factors as the "width, depth, elevation, irregularity and appearance of the claimed defect (*Trincere v County of Suffolk*, 90 NY2d 976, 978 [1997]), its physical appearance and how it is situated (*see Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 72 [2015]), in this instance a question of fact is presented as to whether the claimed defect constitutes an actionable dangerous condition. Based on this question of fact, plaintiff's cross-motion for summary judgment on the issue of liability is denied; the assertion that the complained-of condition constitutes a dangerous or defective condition cannot be decided as a matter of law here.

Finally, defendant contends that he did not create or have notice of the condition, since he purchased the property in December 2017, did not start moving in until mid-January 2018, and did not reside there until mid-February 2018. However, a property owner has constructive notice of any defective condition that is visible and apparent and in existence for a sufficient length of time prior to the accident to permit it to be discovered and remedied (*Knack v Red Lobster 286, N & D Rests., Inc.*, 98 AD3d 473, 473 [2d Dept 2012]). Defendant's delay in moving in does not alter the constructive notice analysis. The appearance of the sidewalk, as

depicted in the submitted photographs, is enough to provide a possible basis for a finding that the condition was present for a sufficient length of time to establish constructive notice (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838 [1986]).

In view of the foregoing, it is hereby

ORDERED that defendant's motion for summary judgment dismissing the complaint is denied, and it is further

ORDERED that plaintiff's cross-motion for summary judgment on the issue of liability is denied, and it is further

ORDERED that all parties are directed to appear at 9:15 a.m. on Tuesday, March 17, 2020, in the Settlement Conference Part, room 1600 of the Westchester County Courthouse located at 111 Dr. Martin Luther King Jr. Boulevard, White Plains, New York, 10601, to schedule a trial.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
February 3, 2020

HON. TERRY JANE RUDERMAN, J.S.C.