

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D25571
Y/prt

_____AD3d_____

Argued - November 24, 2009

MARK C. DILLON, J.P.
FRED T. SANTUCCI
ANITA R. FLORIO
L. PRISCILLA HALL, JJ.

2009-00998

DECISION & ORDER

Eugeniusz Przywalny, appellant, v New
York City Transit Authority, respondent.

(Index No. 18936/05)

Dinkes & Schwitzer, P.C., New York, N.Y. (Beth Diamond and Naomi Skura of
counsel), for appellant.

Wallace D. Gossett, Brooklyn, N.Y. (Anita Isola of counsel), for respondent.

In an action to recover damages for personal injuries, the plaintiff appeals from an
order of the Supreme Court, Kings County (Rothenberg, J.), dated November 21, 2008, which
granted the defendant's motion for summary judgment dismissing the complaint.

ORDERED that the order is reversed, on the law, with costs, and the defendant's
motion for summary judgment is denied.

On December 20, 2001, the plaintiff allegedly was injured when he tripped on a
defective step at the 59th Street subway station in Brooklyn.

A defendant owner or entity who is responsible for maintaining a premises who moves
for summary judgment in a slip-and-fall or trip-and-fall case involving the property has the initial
burden of making a prima facie showing that it neither created the hazardous condition nor had actual
or constructive notice of its existence for a sufficient length of time to discover and remedy it (*see*
Arzola v Boston Prop. Ltd. Partnership, 63 AD3d 655; *see also* *Brak v Razag, Inc.*, 60 AD3d 715).
To provide 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 the defendant's employees to discover and remedy it (see *Gordon v American Museum of Natural History*, 67 NY2d 836, 837). "To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" (*Braudy v Best Buy Co., Inc.*, 63 AD3d 1092, 1092, quoting *Birnbaum v New York Racing Assn., Inc.*, 57 AD3d 598, 599). Here, the defendant failed to submit any evidence demonstrating when the subject step was last inspected. Thus, the Supreme Court should have denied the defendant's motion for summary judgment dismissing the complaint without regard to the sufficiency of the plaintiff's opposition papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851).

DILLON, J.P., SANTUCCI, FLORIO and HALL, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court