

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 24-01566

PRESENT: WHALEN, P.J., LINDLEY, MONTOUR, NOWAK, AND KEANE, JJ.

MAWUNYO ATATSI, CLAIMANT-RESPONDENT,

V

MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(CLAIM NO. 138680.)

LEWIS JOHS AVALONE AVILES, LLP, ISLANDIA (AMY E. BEDELL OF COUNSEL),
FOR DEFENDANT-APPELLANT.

CHERYL KITTON, P.C., BELLMORE (CHERYL H. KITTON OF COUNSEL), FOR
CLAIMANT-RESPONDENT.

Appeal from an order of the Court of Claims (J. David Sampson, J.), entered August 23, 2024, in a personal injury action. The order denied the motion of defendant for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the claim to the extent that it alleges that defendant had actual notice of the allegedly dangerous condition and as modified the order is affirmed without costs.

Memorandum: Claimant, a student at the University at Buffalo (University), commenced this personal injury action seeking damages for injuries that she allegedly sustained when she slipped and fell on an accumulation of water located on an interior stairwell in her dormitory. Defendant moved for summary judgment dismissing the claim, and the Court of Claims denied that motion. Defendant appeals, and we modify.

" 'In seeking summary judgment dismissing the [claim], defendant had the initial burden of establishing that it did not create the alleged dangerous condition and did not have actual or constructive notice of it' " (*King v Sam's E., Inc.*, 81 AD3d 1414, 1414-1415 [4th Dept 2011]). We agree with defendant that it met its initial burden with respect to the issue of actual notice by submitting evidence that it was not aware of the allegedly dangerous condition, and claimant failed to raise a triable issue of fact in opposition (*see Quigley v Burnette*, 100 AD3d 1377, 1378 [4th Dept 2012]). We therefore conclude that the court erred in denying the motion to that extent, and we modify the order accordingly.

Contrary to defendant's contention, however, it failed to meet

its initial burden on the motion with respect to the issue of constructive notice. It is well established that, "[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]). Here, the evidence submitted by defendant demonstrated that the University's custodial staff did not keep records regarding when the stairwell was last cleaned or inspected (see *Salvania v University of Rochester*, 137 AD3d 1607, 1609 [4th Dept 2016]), and while defendant adduced evidence as to the University's general cleaning practices, it did not submit any evidence that those general practices were followed on the date of the accident (see *King*, 81 AD3d at 1415; *Johnson v Panera, LLC*, 59 AD3d 1118, 1118 [4th Dept 2009]).

Defendant further contends that it met its initial burden with respect to the issue of proximate cause by establishing that claimant could not identify the cause of her fall without engaging in undue speculation (see *Rinallo v St. Casimir Parish*, 138 AD3d 1440, 1441 [4th Dept 2016]; *Dixon v Superior Discounts & Custom Muffler*, 118 AD3d 1487, 1487 [4th Dept 2014]). We reject that contention. Here, defendant submitted claimant's deposition testimony, wherein she testified that, although she did not observe any water on the stairs before her fall, she felt a "slippery substance" under her feet, which she "assumed" was water because of the snowy weather. However, defendant also submitted the deposition testimony of claimant's friend, who observed claimant moments after the fall. The friend testified that she observed water on the stairs, which "looked like it was melted snow," and that claimant's pants were wet after her fall. That testimony, together with claimant's testimony, renders any other cause of the fall "sufficiently remote or technical to enable the [factfinder] to reach [a] verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence" (*Artesa v City of Utica*, 23 AD3d 1148, 1148 [4th Dept 2005] [internal quotation marks omitted]; see *Alexander v State of New York*, 193 AD3d 1328, 1330 [4th Dept 2021]; *Paternostro v Advance Sanitation, Inc.*, 126 AD3d 1376, 1377 [4th Dept 2015]).

Inasmuch as defendant failed to meet its initial burden with respect to the issues of constructive notice and causation, the motion must be denied to that extent without regard to the sufficiency of claimant's opposing papers (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Rivera v Rochester Gen. Health Sys.*, 173 AD3d 1758, 1760 [4th Dept 2019]).