

Short Form Order

NEW YORK SUPREME COURT -QUEENS COUNTY

PRESENT: ORIN R. KITZES

PART 17

Justice

-----X

**JOSE MARTINEZ and MILAGROS MARTINEZ,
Plaintiff,**

**Index No.: 6504/05
Motion Date: 4/9/08
Calendar Number: 41**

-against-

**123-16 LIBERTY AVENUE REALTY CORP. and
EUN JEA LEE, individually and doing business
as NEW GOLDEN MANGO and GOLDEN MANGO,
Defendants.**

-----X

The following papers numbered 1 to 9 read on this motion by defendant 123-16 LIBERTY AVENUE REALTY CORP, (hereinafter, "Liberty") for an order pursuant to CPLR 3212 directing summary judgment in its favor and dismissing the complaint as against Liberty.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Partial Opposition.....	5-6
Affirmation in Opposition-Exhibits.....	7-9

Upon the foregoing papers it is ordered that defendant Liberty’s motion for an order pursuant to CPLR 3212 directing summary judgment in its favor and dismissing the complaint and all cross-claims as against it, is granted for the following reasons.

In an order dated, December 18, 2006, this court granted the motion by defendants EUN JEA LEE, individually and doing business as NEW GOLDEN MANGO and GOLDEN MANGO and cross-motion by defendant 123-16 LIBERTY AVENUE REALTY CORP, for an order pursuant to CPLR 3212 directing summary judgment in their favor and dismissing the complaint and all cross-claims, as against them. In a decision and order of the Appellate Division, Second Department, dated January 29, 2008, this court’s December 18, 2006 order was reversed. [Martinez v. 123-16 Liberty Ave. Realty Corp, 47 A.D.3d 901 (2d Dept 2008.)] The Second Department’s decision and order reads as follows:

“The motion for summary judgment submitted by the defendant Eun Jea Lee was supported by transcripts of deposition testimony of the plaintiff Jose Martinez and Bong Kwan Chang, the principal of the defendant 123-16 Liberty Avenue Realty Corp. (hereinafter Liberty), and by her own deposition testimony. None of the deposition transcripts was signed or attested to

by the respective deponents. The motion also was supported by an affidavit of Lee's husband, Joon Young Lee. That affidavit had been translated from Korean to English by Mr. Lee's daughter, Hannah Lee. The affidavit was not accompanied by the requisite translator's attestation (see CPLR 2101[b]). The cross motion for summary judgment submitted by Liberty was supported by an affirmation of counsel, which referenced the deposition testimony submitted by the defendant Lee.

To establish prima facie entitlement to judgment as a matter of law, a movant for summary judgment must come forward with evidentiary proof, in admissible form, demonstrating the absence of any triable issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 N.E.2d 572, 508 N.Y.S.2d 923; *Zuckerman v City of New York*, 49 NY2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595). The failure to make such showing requires the denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 476 N.E.2d 642, 487 N.Y.S.2d 316; *McDonald v Mauss*, 38 AD3d 727, 832 N.Y.S.2d 291).

The defendants failed to show that the unsigned deposition transcripts of the various witnesses, submitted in support of the defendant Lee's motion and relied upon by Liberty in its cross motion, previously were forwarded to the relevant witnesses for their review pursuant to CPLR 3116(a). The transcripts did not constitute admissible evidence. The translated affidavit that lacked the translator's attestation also did not constitute admissible evidence (see CPLR 2101[b]). Accordingly, the defendants failed to establish their entitlement to summary judgment (*see McDonald v Mauss*, 38 AD3d 727, 832 N.Y.S.2d 291; *Pina v Flik International*, 25 AD3d 772, 808 N.Y.S.2d 752; *Scotto v Marra*, 23 AD3d 543, 806 N.Y.S.2d 603; *Santos v Intown Associates*, 17 AD3d 564, 793 N.Y.S.2d 477)."

Defendant Liberty now moves for summary judgment on the same grounds as raised in the first summary judgment motion. Liberty claims that, due to inadvertence, the first motion omitted the transmittal letter pursuant to CPLR 3116 (a), that is annexed to the instant motion. This letter, coupled with plaintiff's failure to send a signed copy of the transcript to Liberty renders plaintiff's transcript testimony admissible. Liberty has also submitted signed copies of both co-defendants' transcript testimony. These items were not part of the Record on Appeal. Initially, the court notes that, contrary to plaintiffs' contentions, this motion is properly before this court given the circumstances that prevented Liberty from submitting plaintiff's transcripts in admissible form.

Regarding the merits of the motion, it is axiomatic that the Summary Judgment remedy

is drastic and harsh and should be used sparingly. The motion is granted only when a party establishes, on papers alone, that there are no material issues and the facts presented require judgment in its favor. It must also be clear that the other side's papers do not suggest any issue exists. Moreover, on this motion, the court's duty is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist. *See, Barr v County of Albany*, 50 NY2d 247 (1980); *Miceli v. Purex*, 84 AD2d 562 (2d Dept. 1981); *Bronson v March*, 127 AD2d 810 (2d Dept. 1987.) Finally, as stated by the court in *Daliendo v Johnson*, 147 AD2d 312, 317 (2d Dept. 1989), "Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied."

The action herein stems from plaintiff Martinez' slipping and falling while shopping at the premises located at 123-16 Liberty Avenue, Queens, New York, on January 24, 2005. The premises are owned by defendant 123-16 LIBERTY AVENUE REALTY CORP. and leased to defendant Golden Mango, which operated a grocery store at the location. As a result of his fall, he suffered injuries and brought this action to recover damages. Milagros Martinez brought claims that injuries to her husband, Jose Martinez, caused her to lose his services. Defendant Liberty now move for an order pursuant to CPLR 3212 directing summary judgment in its favor and dismissing the complaint and all cross-claims as against Liberty on the grounds that, *inter alia*, they did not create the condition which caused plaintiff's accident and they did not have actual or constructive notice of the alleged condition which plaintiff claims caused his accident, and co-defendants, as tenants were responsible for maintaining the premises. Plaintiffs and co-defendants oppose this motion.

It is well settled that in order to prove a prima facie case of negligence in a slip and fall case, a plaintiff is required to show that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the condition. *Pollio v Nelson Cleaning Company*, 269 AD2d 512, (2d. Dept. 2000.) On a motion for summary judgment to dismiss the complaint based upon lack of notice, the defendant is required to make a prima facie showing affirmatively establishing the absence of notice as a matter of law. *See, Colt v. Great Atlantic & Pacific Tea Company, Inc.* 209 AD2d 294 (1st. Dept. 1994.) .

Liberty relies upon plaintiff's deposition testimony which indicates he was in the store walking around with a shopping basket and when he tried to get an orange, he slipped and fell down the pedestrian ramp located near the entrance to the store. His deposition also indicates that when he fell, his left foot was on a carpet and he did not see any snow, ice or wetness on top of the ramp before he fell. In fact, it is unclear if plaintiff at any point identified any snow, ice, or wetness on the ramp. It is clear that plaintiff did not claim to have slipped due to any

slope or structural problem with the ramp and he did not attempt to reach for a handrail during his fall. Finally, plaintiff had been at the store in the past many times and he never saw a defect or dangerous condition on the ramp or the area near the oranges and had never made a complaint about the ramp or area to any person at the store.

This court is satisfied that defendant Liberty has made a prima facie showing of entitlement to judgment as a matter of law. Its submitted evidence establishes that plaintiff did not see what actually caused him to fall either before or after the accident. Manning v 6638 18th Avenue Realty Corp, 28 AD3d 434 (2d Dept 2006.) This evidence also shows that Liberty neither created the condition nor had actual or constructive notice of the condition. Pollio v Nelson Cleaning Company, 269 AD2d 512 (2d Dept 2000.) The burden thus shifted to the opponents of this motion, to show that Liberty created the condition or had actual or constructive knowledge of the hazardous condition which caused plaintiff to fall and that defendant had a reasonable time to correct the condition. *See*, Brown v. Johnson, 241 AD2d 829 (3rd Dept. 1997.)

Plaintiffs and co-defendants oppose the motion by claiming, inter alia, that Liberty has not met its burden to show entitlement to summary judgment since questions of fact exist regarding the ramp and the area by the oranges being in a defective condition that defendant knew about. Plaintiff has submitted an affidavit of Daniel S. Burdett, an engineer, who examined the premises and the ramp area on November 30, 2005. His findings included that the ramp had a slope greater than allowed by Section 27-377(c)(2) of the New York City Building Code and there were no guards, handrails, or non-slip surface on the ramp as required by Section 27-377(c)(5) & (6) of the New York City Building Code. Plaintiff has also submitted his affidavit where he intimates that the downward slope of the ramp and the lack of handrails contributed to his fall.

Plaintiffs and co-defendants have submitted no evidence that suggests plaintiff knew what caused him to slip and at best, they offer only speculation that his fall was caused by the condition of the ramp and the carpet. This is insufficient to raise a triable issue of fact because “the trier of fact would be required to base a finding of proximate cause upon nothing more than speculation.” *Id.* Based upon the testimony, it is just as likely that the accident could have been caused by some other factor, such as a misstep or loss of balance, rather than ice, liquid or any structural condition of the ramp. Manning v 6638 18th Avenue Realty Corp, 28 AD3d 434 (2d Dept 2006.) Plaintiff’s affidavit adds little information regarding the cause of his fall and to the extent it does, it presents a feigned issue of fact designed to avoid the consequences of his earlier deposition testimony. *See* Bongiorno v Penske Auto. Ctr., 289 AD 2d 520, (2

Dept 2001.)

Any reliance on the Engineer's report is also misplaced since the expert's affidavit regarding his opinion that the condition of the ramp caused the fall is pure speculation given the lack of such clear assertion by plaintiff. Grob v Kings Realty Associates, LLC, 4 AD3d 394 (2d Dept 2004.) Any code violation regarding handrails is not relevant since plaintiff never claimed to have attempted to reach out for the handrail to stop his fall *Compare*, Cruz v. Lormet Hous. Dev. Fund Corp., 7 A.D.3d 660 (2d Dept 2004.) Similarly, alleged violations regarding the slope of the ramp are not relevant since plaintiff did not claim to fall due to such. Additionally, plaintiff's testimony indicates he slipped on a carpeted area of the ramp, thus the expert's claim that there was a violation due to a non-slip surface is not relevant. Moreover, the fact that snow had fallen on the day does nothing to suggest a wet condition was present on the ramp when plaintiff fell or that it was present for such an extensive period of time as to permit an inference that the defendants had constructive notice of the condition. *See*, Kershner v Pathmark Stores, Inc. 280 AD2d 583 (2d. Dept 2001.) Accordingly, plaintiffs and co-defendants have not met their burdens and Liberty's motion for summary judgment is granted and the complaint and any cross-claims are dismissed against Liberty.

DATED: April 9, 2008

ORIN R. KITZES, J.S.C.