At an IAS Term, Part 21 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 4th day of June, 2007.

P R E S E N T:

HON. LAURA LEE JACOBSON

Justice.

----------X

BARBARA THOMAS,

Plaintiff,

- against -

Index No. 19348/03

1006-22 REALTY LLC , et ano.,

Defendants.

----------X

The following papers numbered 1 to 6 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2
Opposing Affidavits (Affirmations)	3-5
Reply Affidavits (Affirmations)	6
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, defendants 1066-22 Realty LLC and Martin Baumel (defendants) move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff Barbara Thomas' (plaintiff) complaint.

According to the complaint, on May 27, 2000, at approximately 11:00 P.M., plaintiff sustained various injuries when she slipped and fell on the staircase of an apartment building located at 1006 East 36th Street in Brooklyn, New York (the building). At the time of the

accident, defendants were the owners of the building and plaintiff resided as a tenant therein. According to plaintiff, immediately before the accident, she was descending the building's staircase when she encountered some newspapers strewn on the steps between the building's lobby and a platform/landing midway between the lobby and the second floor of the building. As plaintiff attempted to step over these papers, her left foot slipped on a greasy/oily substance on the stairs. As a result, plaintiff fell and sustained various injuries.

By summons and complaint dated May 23, 2003, plaintiff brought the instant negligence action against defendants seeking to recover damages for the injuries she sustained in the accident. On August 16, 2004, plaintiff served a verified bill of particulars upon defendants which listed several witnesses to the accident. On August 26, 2005, plaintiff appeared for a deposition. During the course of her deposition, plaintiff testified that the tenant living in apartment 3-K of the building, a Ms. Evelyn Arias, told plaintiff that she complained to the building superintendent about the newspaper and oil/grease on the staircase "early in the morning" on the day of the accident. Ms. Arias was not one of the witnesses listed in plaintiff's aforementioned bill of particulars.

On June 29, 2006, Wayne Lewis, the building's superintendent, appeared for a deposition wherein he testified that he was not notified of the slippery condition on the staircase until after the accident. Mr. Lewis also specifically denied that Ms. Arias notified him of this condition on the morning of the accident.

On September 1, 2006, plaintiff served an amended verified bill of particulars upon defendants in which it was alleged that the accident occurred on May 26, 2000. The amended bill of particulars also alleged that Ms. Arias notified Mr. Lewis of the slippery substance on the staircase at 7:00 A.M. on May 26, 2000, some 16 hours before the accident.[1] On September 13, 2006, plaintiff filed a note of issue.

Defendants now move for summary judgment dismissing the complaint. In so moving, defendants argue that they did not create or otherwise have constructive or actual notice of the slippery condition on the staircase that caused the accident. In support of this argument, defendants note that plaintiff testified that she did not observe the dangerous condition on the stairway until the time of the accident. Defendants further point to the deposition testimony of the building superintendent, Mr. Lewis, wherein he stated that he did not observe any problems with the staircase on May 27, 2000 when he mopped the building, and that he was only advised of the dangerous condition after plaintiff's accident. Under the circumstances, defendants reason that the slippery substance could have been placed on the stairs minutes or seconds before the accident. In opposition to defendants motion, plaintiff submits a sworn affidavit by Ms. Arias in which she avers that, at approximately 7:45 A.M. on May 26, 2000, she encountered a slippery/greasy substance and newspapers on the stairway leading to the lobby of the building which almost caused her to fall. Ms. Arias

---

[1]All previous pleadings, as well as plaintiff's deposition testimony, allege that the accident took place on May 27, 2000. It is unclear whether plaintiff is now claiming that the accident actually took place on May 26, 2000, or whether this change in the accident date is an inadvertent mistake.

further alleges that she encountered Mr. Lewis outside the building immediately thereafter and informed him of this dangerous condition. According to Ms. Arias "Wayne Lewis listened to me and then he proceeded to get into a blue four door car." Finally, Ms. Arias maintains that, in her 22 years as a resident in the building, she never observed Mr. Lewis mop the floors of the premises. According to plaintiff, Ms. Arias' affidavit raises a clear issue of fact as to whether defendants had actual notice of the dangerous condition that caused the accident. Consequently, plaintiff maintains that defendants' motion must be denied.

In reply to plaintiff's opposition papers, defendants argue that the court may not consider Ms. Arias' affidavit inasmuch as she was not identified as a notice witness in plaintiff's bill of particulars and discovery in this matter is now closed.

"To impose liability upon a defendant in a slip-and-fall action, there must be evidence that a dangerous or defective condition existed, and that the defendant either created the condition or had actual or constructive notice of it" (*Rubin v Cryder House*, 39 AD3d 840 [2007] *citing Penn v Fleet Bank*, 12 AD3d 584 [2004]; *Christopher v New York City Tr. Auth.*, 300 AD2d 336 [2002]). Here, the evidence submitted by defendants in the form of Mr. Lewis' deposition testimony is sufficient to make a prima facie showing that they did not create or have actual or constructive notice of the greasy/oily substance on the stairs that caused plaintiff to fall. Accordingly, the burden shifts to plaintiff to produce evidence

demonstrating the existence of an issue of fact as to the matters of causation and/or notice (*Rivas v 525 Building Co. LLC*, 306 AD2d 337 339 [2003]).

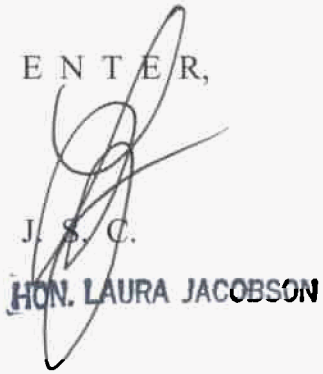
In determining whether plaintiff's evidence is sufficient to defeat defendants' summary judgment motion, the court must first address the issue of whether or not it may consider Ms. Arias' affidavit. As defendants point out, generally, a court may not consider the affidavit of a notice witness submitted in opposition to a summary judgment motion when the witness was not previously identified in the plaintiff's discovery responses (*Muniz v New York City Hous. Auth.*, 38 AD3d 628 [2007]; *Shvartsberg v City of New York*, 19 AD3d 578, 579 [2005]). However, here, although Ms. Arias was not identified as a notice witness in plaintiff's original bill of particulars, she was identified as such in the amended bill of particulars which pre-dated the filing of the note of issue. Perhaps more importantly, over one year before the filing of the note of issue, plaintiff testified at her deposition that Ms. Arias complained to Mr. Lewis about the dangerous condition on the stairs before the accident. Plaintiff also provided defendants with Ms. Arias' address at this time. Thus, defendants had ample opportunity to investigate the veracity of and circumstances surrounding Ms. Arias' alleged notice to Mr. Lewis while the discovery process was still ongoing (*see Para v 167 Allison Meat Corp.*, 7 AD3d 451 [2004]). Under the circumstances, the court will consider Ms. Arias' affidavit in ruling on the instant motion.

As noted above, Ms. Arias states in her affidavit that she informed the building superintendent of the oil and newspapers on the stairway long before the accident occurred

and that the superintendent failed to remedy this problem. This evidence is clearly sufficient to raise a triable issue of fact as to whether or not defendants had actual notice of the dangerous condition on the stairs that caused the accident (*Mitchell v Argus Realty Co.*, 8 AD3d 18, 19 [2004]).[2]

Accordingly, defendants' motion for summary judgment is denied.

This constitutes the decision and order of the court.



The fact that Ms. Arias states in her affidavit that she informed Mr. Lewis of the condition on the morning of August 26, 2000 (as opposed to August 27, 2000) is irrelevant for purposes of this motion since, in either case, notice was provided before the accident.