Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 22**
Justice

ROSA CAMPOVERDE,
Plaintiff,

-against-

NEW YORK CITY TRANSIT AUTHORITY,
Defendant.

Index No. 2108/05

Motion
Date August 14, 2007

Motion
Cal. No. 1

Motion
Sequence No. S003

The following papers numbered 1 to 9 read on this motion by defendant for an Order pursuant to CPLR 3212 granting the defendant summary judgment and dismissing the Complaint of the plaintiff.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1-4
Affirmation in Opposition.....	5-7
Reply Affirmation.....	8-9

Upon the foregoing papers it is ordered that this motion is determined as follows:

Defendant, New York City Transit Authority ("NYCTA") moves for summary judgment and dismissal of plaintiff, Rosa Campoverde's Complaint pursuant to CPLR 3212, arguing that defendant did not create the purported condition or had no actual or constructive notice of an alleged dangerous condition. On December 20, 2005, plaintiff was allegedly injured after she tripped and fell on the staircase "S1" staircase leading out of the "M" line subway station on Palmetto Street and Seneca Avenue, County of Kings, City and State of New York.

Defendant argues that it cannot be held liable for plaintiff's injuries, as it had no notice of, nor did it create, a dangerous condition causing plaintiff's accident. Defendant contends that there was no significant snow fall or precipitation in the ten days prior to the alleged occurrence and it attaches

to its moving papers an uncertified, and hence, inadmissible Climatological Data Report issued by the United States Department of Commerce which Report allegedly indicates that there was virtually no precipitation in the ten days preceding the alleged incident. Defendant maintains that a dusting of snow occurred in proximity to the time of the alleged fall by the plaintiff and that even if the NYCTA had actual notice of an icy condition, the NYCTA is still not responsible if they have not been provided a reasonable time to treat or remedy the condition. Defendant also submits a portion of a "Snow Book" (which details all snowfall activity), maintained by the defendant, in which it states that the only prior snowfall which occurred prior to the date of the subject accident, was on Sunday, December 19, 2004, which report noted that at 1900 hours "snow flurries started falling. No accumulations," and the next entry in the Snow Book was about a month later. Finally, defendant maintains that plaintiff gave conflicting testimony at her Statutory Hearing, Notice of Claim, at the Examination Before Trial regarding the location of the accident, as well as to what caused her to fall (ie. snow and/or ice).

Plaintiff asserts that there are triable issues of fact precluding summary judgment. Plaintiff attaches, *inter alia*, an affidavit of Senior Consulting Meteorologist, Mark Kramer, who states that any snow or ice on the steps of the subway stairs at the time of the accident was a result of the precipitation that had started the night before, that there were only traces of precipitation until the snow ended at 5:30 A.M., and that even the traces of precipitation had ended by 5:30 A.M. Plaintiff maintains that defendant had a reasonable opportunity to remedy the condition, and failed to properly act upon it. In plaintiff's own affidavit as well as in her deposition testimony, she asserts that she slipped on ice on the staircase and she further affirms that the steps were not "sanded, salted, or shoveled."

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue. (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 Ad2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]).

The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (*see, Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

For defendant to be liable, plaintiff must prove that defendant either created or had actual or constructive notice of a dangerous condition (*Gordon v. American Museum of Natural History*, 67 NY2d 836 [1986]; *Ligon v. Waldbaum, Inc.*, 234 AD2d 347 [2nd Dept 1996]). To constitute constructive notice, a defect must be visible and apparent and exist for a sufficient period of time prior to the accident to permit defendant to discover and remedy it. (*See id.*).

Defendant's motion for summary judgment is denied. The Court notes that the Climatological Data Sheet submitted by defendant is uncertified, and therefore, inadmissible proof on the instant motion (*see, Sangiacomo v. State of New York*, 2006 NY Slip Op 52362U [Ct. of Cl., 2006]; *see also,* CPLR 4540), and the portion of the "Snow Book" submitted by defendant is also inadmissible, inasmuch as no one with personal knowledge of defendant's practices and procedures has laid a proper foundation for the admission of said document as a business record exception to the hearsay rule (*see, Capri Medical, PC v. Allstate Ins. Co.*, 15 Misc.3d 129A [App. Term, 2d and 11th Jud. Dists. 2007]; *Dan Medical, PC, v. New York Central Mutual Fire Ins. Co.*, [App. Term, 2d Dept 2006])(citing to *Midborough Acupuncture, PC v. New York Central Mutual Fire Ins. Co.*, 13 Misc 3d 132A [App Term, 2d and 11th Jud Dists 2006], where the Court held that an affirmation of an attorney who lacked personal knowledge was not sufficient to lay a foundation for a determination that his clients' documents were admissible as business records). However, even in the absence of the aforementioned evidence, defendant established its *prima facie* entitlement to summary judgment by showing that it neither created an unsafe condition nor had actual or constructive notice thereof, by raising issues relating to plaintiff's credibility *(see, Rajgopaul, et. al. v. Toys "R" Us*, 297 AD2d 728 [2nd Dept 2002]; *Cruz v. Otis Elevator Company*, 238 AD2d 540 [2nd Dept 1997]). Plaintiff presented sufficient evidentiary proof in admissible form to establish a triable issue of fact. There are triable issues of fact in connection with, *inter alia*, whether defendant had any notice of, or created a defective condition causing plaintiff's accident,

what caused plaintiff's accident (ie. snow and/or ice), whether there was a sufficient opportunity to clear ice from the stairs, and whether defendant acted reasonably under the circumstances. On these issues, a trial is needed and the case may not be disposed of summarily. As there remains issues of fact in dispute, defendant's motion for summary judgment is denied.

The foregoing constitutes the decision and order of this Court.

Dated: August 17, 2007

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Howard G. Lane, J.S.C.