At an IAS Term, Part 18 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, Brooklyn, New York, on the 3rd day of July 2008.

P R E S E N T:

HON. BERNADETTE BAYNE

Justice.

CAROLYN CRAPANZANO,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 21164/05

BALKON REALTY CO.,

Defendant.

The following papers numbered 1 to 3 read on this motion:	Papers Numbered
Notice of Motion/	
Affidavits (Affirmations) Annexed	1
Affirmations in Opposition	2
Reply Affirmations	3

On September 11, 2002, the plaintiff in the instant action was involved in a "slip and fall" type accident at a building owned by the defendant located at 350 St. Mark's Place in Staten Island, New York. The movant makes a point of informing the Court that the City of New York is the largest tenant in the aforementioned building, however, they are not a party to this action, and as such, their tenancy is irrelevant to this Court. The plaintiff claims that she visited the

subject building in order to obtain a medicaid card, and that while in the midst of traversing a set of stairs that led from the main level to a lower level, she was caused to slip and fall as a result of a "wet condition" that was allegedly present on one step.

The defendant now moves this Court for an Order pursuant to CPLR § 3212, granting them summary judgment and dismissing the plaintiff's action on the grounds that the plaintiff cannot prove that the defendant either created the condition or had actual or constructive notice of the condition that allegedly caused the plaintiff's accident.

The plaintiff, in opposition, argues that the defendant has not met its' burden of establishing entitlement to summary judgement and further argues that the defendant's motion is premature and that further discovery is required in order for the plaintiff to better oppose the within motion.

In reply to the plaintiff's opposition, the defendant argues that the deposition testimony of their witness, James Breazile, who was the assistant superintendent of the subject building on the date of the plaintiff's accident, when read in conjunction with the plaintiff's deposition testimony clearly establishes that the defendant did not have any notice, actual or constructive, of the condition that caused the plaintiff to fall. The defendant further argues that the plaintiff has essentially narrowed the issue to constructive notice alone, owing to the fact that the plaintiff did not dispute the defendant's contention that they neither created the condition, nor had actual notice of the condition, and only argue about constructive notice in their opposition papers. Lastly, the defendant argues that by filing her note of issue and certificate of readiness in December of 2007, the plaintiff has demonstrated that her contention that the summary judgement motion is premature because further discovery is required is not only false, but is

intentionally disingenuous.

Summary judgment standard

The proponent of summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. *See* Alvarez v Prospect Hospital, 68 NY2d 320, 324 (1986); Zuckerman v City of New York, 49 NY2d 557, 562 (1980); Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 (1957). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. Matter of Redemption Church of Christ v Williams, 84 AD2d 648, 649 (3d Dept 1981); Greenburg v Manlon Realty, 43 AD2d 968, 969 (2d Dept 1974); Winegrad v New York University Medical Center, 64 NY2d 851 (1985).

CPLR § 3212 (b) requires that for a court to grant summary judgment the court must determine if the movant's papers justify holding as a matter of law, "that the cause of action or defense has no merit." The evidence submitted in support of the movant must be viewed in the light most favorable to the non-movant. Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co., 168 AD2d 610 (2d Dept 1990). Summary judgment shall be granted only where there are no issues of material fact and the evidence requires the court to direct judgment in favor of the movant as a matter of law. Friends of Animals, Inc., v Associated Fur Mfrs., 46 NY2d 1065 (1979).

Discussion

It is well settled in New York State that a landowner has a duty to keep the land reasonably safe for persons on the land, Basso v. Miller, 40 N.Y.2d 233, 386 N.Y.S.2d 564, 568,

352 N.E.2d 868 (1976). For a landowner to be liable to a person on the land for an injury caused by a condition on the land, the plaintiff must establish three basic elements (aside from causation and injury): a dangerous condition existed on the land; the owner created or had notice of the condition; and the owner failed to take reasonable measures to protect persons on the land from the condition. A landowner's duty regarding dangerous conditions on the land exists regardless of the cause or nature of the condition. Liability may attach to a landowner whether the danger is posed by a man-made structure or device on the land, or arises from such commonplace circumstances as the spilling of liquid, or the accumulation of debris. See generally, Drake v. State, 97 Misc.2d 1015, 416 N.Y.S.2d 734, (Ct.Cl.1979), aff'd on the opinion below, 75 A.D.2d 1017, 432 N.Y.S.2d 676 (4th Dept., 1980); Buckowski v. Smith, 185 A.D.2d 556, 586 N.Y.S.2d 386, (3rd Dept., 1992); Schechtman v. Lappin, 161 A.D.2d 118, 554 N.Y.S.2d 846, (1st Dept., 1990); Goslin v. La Mora, 137 A.D.2d 941, 525 N.Y.S.2d 66, (3rd Dept., 1988); Piacquadio v. Recine Realty Corp., 84 N.Y.2d 967, 622 N.Y.S.2d 493, 646 N.E.2d 795 (1994); Downey v. R.W. Garraghan, 198 A.D.2d 570, 603 N.Y.S.2d 222, (3rd Dept., 1993); Farina v. A.R.A. Servs., Inc., 151 A.D.2d 456, 542 N.Y.S.2d 246, (2nd Dept., 1989); Gordon v. American Museum of Natural History, 67 N.Y.2d 836, 501 N.Y.S.2d 646, 492 N.E.2d 774 (1986).

Of course, the mere fact that a dangerous condition exists on a piece of property does not automatically make the owner liable for injury caused by the condition. A property owner is not an insurer of the safety of those on the land. Thus, in light of the owner's duty to exercise only reasonable care, liability normally attaches only where the owner had actual or constructive notice of the dangerous condition. *See* Barnaby v. Rice, 75 A.D.2d 179, 428 N.Y.S.2d 973, (3rd Dept., 1980); Piacquadio v. Recine Realty Corp., 622 N.Y.S.2d at 494; Gordon v. American

Museum of Natural History, 501 N.Y.S.2d at 647; Santoni v. Bertelsmann Property, Inc., 21 A.D.3d 712, 800 N.Y.S.2d 676 (1st Dept., 2005); Zanki v. Cahill, 2 A.D.3d 197, 768 N.Y.S.2d 471 (1st Dept., 2003); Katz v. Seminole Realty Corp., 10 A.D.3d 386, 780 N.Y.S.2d 778 (2nd Dept., 2004). A landowner has constructive knowledge of a dangerous condition only where the condition is "visible and apparent" and existed for a sufficient period of time so that the owner should have discovered it, Gordon v. American Museum of Natural History, 501 N.Y.S.2d at 647. However, a property owner's general awareness that a dangerous condition may exist does not constitute notice of a particular dangerous condition, Piacquadio v. Recine Realty Corp., 622 N.Y.S.2d at 494; Gordon v. American Museum of Natural History, supra.

Even where a property owner has no actual or constructive notice of a dangerous condition on the land, the owner is liable for injuries caused by the condition where the owner's negligence, or the negligence of another person acting for the owner, created the condition, Russell v. New York City Housing Authority, 194 A.D.2d 505, 599 N.Y.S.2d 576, (1st Dept., 1993); Lewis v. Metropolitan Transportation Authority, 99 A.D.2d 246, 472 N.Y.S.2d 368, (1st Dept., 1984); *see also* Gordon v. American Museum of Natural History, supra.

Where a landowner has a duty to take measures with respect to a dangerous condition and that duty is based on actual or constructive notice of the condition, the owner must act within a reasonable time of receiving the notice. Whether the time interval is reasonable depends on such factors as how soon someone on the land is likely to encounter the danger, and how serious a resulting injury is apt to be; Gordon v. American Museum of Natural History, 501 N.Y.S.2d at 647.

As with landowners generally, shopkeepers and purveyors of other commercial

establishments have a duty to keep the premises reasonably safe for persons on it. For example, they have the duty to keep floors clear of slippery substances. Very frequently, cases involving the violation of that duty involve supermarkets and other food stores. A store owner is not liable for injuries to a person who slips on a floor unless the plaintiff establishes that the owner or its employees caused the slippery condition, or that the owner had actual or constructive knowledge of the condition. Berzon v. D'Agostino Supermarkets, Inc., 15 A.D.3d 600, 792 N.Y.S.2d 94, (2nd Dept., 2005). *See* also Cochetti v. Wal-Mart Stores, Inc., 24 A.D.3d 852, 804 N.Y.S.2d 857, (3rd Dept., 2005) where a customer slipped and fell on a clear substance on the floor of an aisle in the defendant's store. The court ruled that the defendant did not have constructive notice of the substance; it was not visible or apparent, there were no footprints or tracks in it to indicate that it had been present for a sufficient period of time to permit discovery, and the defendant had inspected the area one-half hour before the incident.

In addition to testimony that a store employee was actually aware of the specific dangerous condition that caused the injury, actual notice may be established by proof that an accident was the result of a recurring dangerous condition of which the store employees were aware. Erikson v. J.I.B. Realty Corp., 12 A.D.3d 344, 783 N.Y.S.2d 661 (2nd Dept., 2004). A plaintiff unable to secure the favorable testimony of anyone else in the store is usually relegated to relying on a constructive knowledge theory. An owner has constructive knowledge of a condition only if the condition is visible and apparent and existed for a sufficient length of time prior to the accident that the owner or its employees should have discovered and cured it. Collins v. Grand Union Co., 201 A.D.2d 852, 608 N.Y.S.2d 335, (3rd Dept., 1994); Edwards v. Terryville Meat Co., 178 A.D.2d 580, 577 N.Y.S.2d 477, (2nd Dept., 1991); Benware v. Big V

Supermarkets, Inc., 177 A.D.2d 846, 576 N.Y.S.2d 461, (3rd Dept., 1991). Thus, there are three essential components to a constructive knowledge case—visibility, time, and presence of an employee—and it is often very difficult for a plaintiff to establish all three.

The mere fact that a floor contains a slippery liquid substance does not establish that the substance was visible and apparent. The fact that, after a slip and fall, the plaintiff closely examines the floor and discovers the substance does not indicate that the substance was visible and apparent. In fact, the plaintiff's slipping on the substance and discovering it only after the fall is often an indication that the condition was not apparent. Collins v. Grand Union Co., supra; Edwards v. Terryville Meat Co., supra; Benware v. Big V Supermarkets, Inc., supra. Similarly, even if the plaintiff establishes that the substance was visible, the mere fact that one or more employees of the owner were in the vicinity of the substance before the accident does not establish constructive knowledge. Unless the plaintiff also demonstrates that the substance was already on the floor when the employees were in the area, liability is not established. Torri v. Big V of Kingston, Inc., 147 A.D.2d 743, 537 N.Y.S.2d 629, (3rd Dept., 1989); Tyrrell v. Wal-Mart Stores Inc., 97 N.Y.2d 650, 737 N.Y.S.2d 43, 762 N.E.2d 921 (2001); Benware v. Big V Supermarkets, Inc., supra.

In Moss v. JNK Capital Ltd., 85 N.Y.2d 1005, 631 N.Y.S.2d 280, 655 N.E.2d 393 (1995), aff'g, 211 A.D.2d 769, 621 N.Y.S.2d 679, (2nd Dept., 1995), the plaintiff allegedly slipped and fell on a half-eaten plum which was on the floor of the respondent's store. The plaintiff contended that because two employees of the respondent were working in the vicinity of the plum, they must have known or should have known that it was there, and failed to remedy the dangerous condition. The Court stated:

> "Contrary to the plaintiff's contention, there was no evidence that the respondent had created the allegedly dangerous condition, or had actual notice of it prior to the accident. Any finding that the plum had been on the floor for any appreciable period of time would be mere speculation. It is well settled that without evidence that the respondent created the dangerous condition or had actual notice of it, and absent a showing of evidentiary facts from which a jury can infer constructive notice from the amount of time that the dangerous condition existed, the complaint must be dismissed."

The evidence presented in this case demonstrates that the plaintiff cannot prove, as a matter of law, that the defendant either created, or had actual or constructive notice of the condition that she fell upon. The plaintiff's deposition testimony makes it explicitly clear that she neither knows where the liquid that she fell upon came from, nor does she know for how long a period of time the condition was present prior to her accident. The defendant's witness, James Breazile, testified very clearly that he conducted hourly inspections of the premises starting at 9:00 a.m., and that he never observed any liquid on the subject stairwell prior to the time that the plaintiff fell, which was at approximately 10:00 a.m. Plaintiff's attempt to create questions of fact by including a carefully crafted affidavit from the friend that she testified was with her when the accident occurred will not serve to create questions of fact that would defeat a summary judgement motion. Duncan v. Toles, 21 A.D.3d 984, 801 N.Y.S.2d 359, (2nd Dept., 2005); Israel v. Fairharbor Owners, Inc., 20 A.D.3d 392, 798 N.Y.S.2d 139, (2nd Dept., 2005); Sosna v. American Home Products, 298 A.D.2d 158, 748 N.Y.S.2d 548, (1st Dept., 2002); Harty v. Lenci, 294 A.D.2d 296, 743 N.Y.S.2d 97, (1st Dept., 2002).

The plaintiff testified that her friend, Josephine Lippert, was walking behind her when she fell. Ms. Lippert's assertion that "a brownish ring around the pool of liquid" that the plaintiff fell upon "clearly shows that it was there for an extended period of time" is simply the witnesses'

opinion and amounts to nothing more than conjecture and speculation. To this Court's knowledge, Ms. Lippert has no expertise or training in any field that would be qualified to offer an opinion as to how long the liquid that the plaintiff fell upon was present prior to her fall. Moreover, the plaintiff admits that the liquid that she fell upon was clear and that, despite the fact that multiple people were traversing the subject stairwell, both in front of her and behind her, none of the other people in the stairwell noticed the condition, and the plaintiff never noticed it until after she fell.

Interestingly, despite the fact that the plaintiff testified that she obtained the names of the people who were in the stairwell when she fell, and that she provided those names to her attorney, no affidavits, affirmations or non-party deposition transcripts are annexed from any of those people that might tend to prove or at least bolster the plaintiff's claims. Although the plaintiff's friend, Josephine Lippert, makes reference to and attributes statements to security guards who allegedly worked in the building where the plaintiff fell, again, affidavits, affirmations and/or non-party deposition testimony from those individuals are conspicuously absent, and the statements that were allegedly made to either the plaintiff or Ms. Lippert are hearsay, and as such, have no probative value.

The Court also agrees with the defendant and finds the plaintiff's argument that the within summary judgement motion is premature and that further discovery is required is completely disingenuous. The plaintiff filed a note of issue and certificate of readiness in December of 2007 and in doing so, certified that all discovery was complete and that the case was ready for trial. The plaintiff's claim that further discovery is required is viewed by this Court as nothing more than a desperate attempt by the plaintiff to stave off the dismissal of her

action.

Despite a thorough recitation of the law on premises liability, the plaintiff has only offered speculation and conjecture in opposition to the defendant's motion, and as no proof has been offered that proves that the within defendant either created or had actual or constructive notice of the condition upon which the plaintiff fell, the defendant's motion must be granted.

Conclusion

Accordingly, it is

ORDERED, that the defendant's motion for summary judgement and dismissal of the instant action, pursuant to CPLR § 3212, on the grounds that plaintiff has failed to establish a prima facie case of negligence as against the defendant, is granted.

This constitutes the Decision and Order of the Court.

E N T E R

Bernadette Bayne

HON. BERNADETTE BAYNE
J. S. C.