[* 1]

SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS **PART** 21

Justice

CASTILLO, JOSE

Plaintiff,

-v-

NEW YORK CITY TRANSIT AUTHORITY, et. al.,
Defendant.

INDEX NO. 110092/04

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL NO.

The following papers, numbered 1 to 4 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1+4
Answering Affidavits– Exhibits	2
Replying Affidavits	3

CROSS-MOTION: ____ YES ✓ NO

Upon the foregoing papers, it is ordered that this motion is:

FILED
NOV 12 2008
COUNTY CLERK'S OFFICE
NEW YORK

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION

Dated: 11/5/08

J.S.C.

Check one: ____ FINAL DISPOSITION ✓ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 21

----------X

JOSE CASTILLO,

Plaintiff,

INDEX NO.
110092/04

-against-

NEW YORK CITY TRANSIT AUTHORITY, THE MINISTER, ELDERS AND DEACONS OF THE REFORMED PROTESTANT DUTCH CHURCH OF THE CITY OF NEW YORK and COLLEGIATE CHURCH CORP.,

Defendants.

----------X

DONNA M. MILLS, J.:

Defendants New York City Transit Authority ("Transit") and The Ministers, Elders and Deacons of the Reformed Protestant Dutch Church of the City of New York and Collegiate Church Corp. (collectively "the Church") move for an order (i) granting summary judgment dismissing the complaint and (ii) directing plaintiff not to file a note of issue without leave of this court.

This is an action for damages based on personal injuries allegedly sustained by plaintiff on January 4, 2004 when he slipped and fell in a puddle of water on the arcade level of a subway passageway. The passageway is owned by the Church. By Indenture dated May 7, 1942 the Church granted an easement over the passageway to the City of New York. In 1953 Transit became the City's successor in interest (to the extent applicable, the City will hereinafter be

referred to as Transit). The Indenture provided in pertinent part that the Church would construct an "Approach" to the passageway (see defendants' exhibit D, ¶ Second) and maintain the Approach and keep it clean (*id.*, ¶ Fifth). The Indenture provided further that the Church would indemnify, hold harmless and defend Transit for all claims arising "on account of any injury to persons or damage to property arising out of or in connection with, the use of said Approach by passengers, intending passengers, employees or licensees of [Transit] and all other persons" (*id.*, ¶ Sixth). In his supporting affidavit Frank Malensek, the Assistant Vice President for the Church's real estate operations, states that the Church was the owner of the property where plaintiff allegedly fell and that Transit "did not inspect, maintain, clean or repair the alleged incident location" because such activities were the responsibility of the Church (see Malensek supporting affidavit, ¶¶ 4, 6).

In support of their motion defendants contend that "[b]ased on documentary evidence ... and the uncontroverted testimony of Frank Malensek, [Transit] is entitled to summary judgment dismissing the instant action against them[sic] because [Transit] did not own the property where plaintiff fell nor did [Transit] have any duty to inspect, maintain and/or repair the location. Thus, [Transit] had no duty to plaintiff and plaintiff's claims against [Transit] should be dismissed" (see Demas supporting affirmation, ¶ 13).

Defendants then contend that the Church is entitled to summary judgment dismissing plaintiff's claims against it because plaintiff testified at his examination before trial that he tried to avoid the puddle and surrounding debris by skipping, rather than walking, around the puddle with the result that plaintiff was the sole cause of his accident. Defendants add that "[p]laintiff has presented no notice of a defective condition that the Church had notice of and/or was under a

duty to remedy" (*id.*, ¶ 28).

The court finds that defendants' motion should be denied. To succeed herein defendants must establish their defense sufficiently to warrant judgment in their favor as a matter of law and they must do so by tender of proof in admissible form (see Zuckerman v. City of New York, 49 NY2d 557, 562 [1980]). Defendants' attorney states that plaintiff, whose original action was against Transit alone, added the Church as a defendant in September 2006 and that at approximately the same time Transit requested the Church to defend and indemnify it pursuant to the indemnity provision in the Indenture (see Demas supporting affirmation, ¶¶ 3-4). Apparently Transit's request was granted and the Church chose to be represented by Transit's attorney. As a result, Transit's attorney seeks to impose liability on the Church even though the Church is also his client and the Church seeks to move liability along by blaming plaintiff for causing his own injury by skipping.

It is well established that summary judgment should not be granted if there is any doubt as to the existence of a triable issue (see Rotuba Extruders, Inc. v. Ceppos, 46 NY2d 223, 231 [1978]). Defendants' arguments do little to remove certain of the court's doubts. For example, the court doubts that Transit has no duty or obligation to maintain a safe subway passageway for its customers. The court also has doubts with respect to the exact location of plaintiff's accident which are not resolved by the papers and photographs before it. The location is significant because according to the Indenture (to the extent that it is legible) the Church constructed and is responsible for the Approach to the passageway, rather than the passageway itself (see *supra*). In this connection the court notes that the passageway was constructed by Transit (see Indenture, defendants' exhibit D, p 3). Although the court's function on motion for summary judgment is to

ascertain if issues exist and not to determine credibility (see S.J. Capelin Associates, Inc. v. Globe Manufacturing Corporation, 34 NY2d 338, 341 [1974]), this court has reservations about Mr. Malensek's statements that the Church is the owner of the property where plaintiff fell, that Transit had no responsibilities with respect thereto, and that the maintenance, cleaning and repairing of the passageway was the responsibility of the Church (see Malensek supporting affidavit, ¶¶ 3-6). No one disputes that the Church is the owner of the passageway. The statement that Transit had no responsibilities for maintaining the passageway is an unsupported factual and legal conclusion. According to Mr. Malensek's supporting affidavit he is still employed by the Church (*id.*, ¶ 1). His statement that the Church had sole responsibility for maintaining the passageway where plaintiff fell is also an unsupported factual and legal conclusion which is suspect because it is volunteered and clearly against his employer's interest.

The Church's contention that plaintiff was the sole cause of his accident because he skipped is a half-truth and begs the question. At his 50-h hearing plaintiff testified that he slipped and stumbled (see plaintiff's exhibit B, p 11). At his subsequent examination before trial he testified that he skipped (see defendants' exhibit E, pp 20-21). In his current affidavit he states "I did not mean that I 'skipped' like a child would skip, but rather that I attempted to side step around, or avoid, this area which caused me to slip and fall" (see plaintiff's exhibit A, ¶ 4). The slipping or skipping issue, to the extent (if any) that it is relevant, should properly be addressed at trial. Defendants' attempt to impose a notice requirement on subway passengers vis-a-vis the Church with respect to puddles and debris in a subway passageway borders on ludicrous. "If a movant, in preparation of a motion for summary judgment, cannot assemble sufficient proof to dispel all questions of material fact, the motion should simply not be

submitted" (Ritt v. Lenox Hill Hospital, 182 AD2d 560, 562 [1st Dept 1992]).

Finally, defendants have offered no arguments with respect to the second branch of their motion which concerns plaintiff's note of issue.

Accordingly, it is hereby

ORDERED that defendants' motion is denied.

This constitutes the decision and order of the court.

DATED: 11/5/, 2008

J.S.C.

DONNA M. MILLS, J.S.C