Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

SAMMY LUNA, an infant under the age of 18 years by his mother and natural guardian, JAQUELINE LUNA and JAQUELINE LUNA, individually,
Plaintiffs,

-against-

THE NEW YORK CITY TRANSIT AUTHORITY,
Defendant.

Index No. 16852/06

Motion Date October 14, 2008

Motion Cal. No. 16

Motion Sequence No. 1

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1-4
Opposition.....	5-7

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiff commences this action seeking to recover damages for injuries sustained during an alleged slip and fall on a staircase at the 74th street - Roosevelt Avenue subway station in the County of Queens, New York. Plaintiff brought suit against the New York City Transit Authority ("NYCTA") alleging a defective condition in the form of debris, amongst other things, existed on the stairway which caused plaintiff to fall. Specifically, plaintiff alleges that he tripped on a plastic bag that was on the seventh step from the bottom of the staircase.

Defendant NYCTA now moves pursuant to CPLR 3212 for an order granting summary judgment and dismissing the action. Defendant contends that the NYCTA did not create any alleged hazardous condition or have actual or constructive notice of the existence of any purported hazardous condition. Defendant argues that as an owner or possessor of land, liability may only attach if the hazardous condition causing the incident was in fact created by the NYCTA, or in the alternative that the NYCTA had actual or constructive notice of the dangerous conditions. Defendant further argues that there was no evidence of actual notice being

given to the NYCTA, and any reliance on a constructive notice theory by plaintiff is without sufficient basis as plaintiff has not put forward a showing that the plastic bag, which allegedly caused the accident, was present on the staircase for an unreasonable period of time. Further, defendant contends that evidence put forward to establish regular, routine, and continuous cleaning of the subject station forecloses the possibility of any long standing debris.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e. with the proponent of the issue. Thus "if the evidence on the issue is evenly balanced, the party that bears the burden must lose." (*Director, Office of Workers Compensation Programs v. Greenwich Collieries*, 512 U.S. at 272; *300 East 34th Street Co. v. Habeeb*, 248 AD2d 50 [1st Dept 1997]). A party moving for summary judgment is obliged to prove through admissible evidence that the movant is entitled to judgment as a matter of law (*Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

The court's function on this motion for summary judgment is issue finding rather than issue determination (*Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1978]). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied (*Stone v. Goodson*, 8 NY2d 8 [1960]; *Sillman v. Twentieth Century Fox Film Corp.*, *supra*).

The role of the court is to determine if bona fide issues of fact exist, and not to resolve issues of credibility. As the Court stated in *Knepka v. Tallman* (278 AD2d 811 [4th Dept 2000]):

> Supreme Court erred in resolving issues of credibility in granting defendants' motion for summary judgment dismissing the complaint (*see, Mickelson v, Babcock*, 190 AD2d 1037; *see, generally, Black v. Chittenden*, 69 NY2d 665;

> *Capelin Assocs. v. Globe Mfg. Corp.*, 34 NY 2d 338). Any inconsistencies between the deposition testimony of plaintiffs and their affidavits submitted in opposition to the motion present credibility issues for trial (*see, Schoen v. Rochester Gas & Elec.*, 242 AD2d 928; *Mickelson v. Babcock, supra*); *see also, Yaziciyan v. Blancato*, 267 AD2d 152 [1st Dept 1999] ["The deponent's arguably inconsistent testimony elsewhere in his deposition merely presents a credibility issue properly left for the trier of fact."]).

Nevertheless, summary judgment is properly granted when the opponent of the motion raises only feigned issues of fact (*see, Perez v. Bronx Park South Associates*, 285 AD2d 403 [1st Dept 1999], in which the Court held that the submission of a one-page affidavit from a neighbor, which was in conflict with plaintiff's deposition testimony, was insufficient to raise an issue of fact; (*Glick & Dullock v. Tri-Pac Export Corp.*, 22 NY2d 439, 441 ["feigned" issues do not raise question of fact]; *Singh v. Kolcaj Realty Corp.*, 283 AD2d 350 [1st Dept 2001] [plaintiff's expert's opinion that illegally parked car was proximate cause of accident twas a legal conclusion which was of no consequence, and could not defeat defendant' s motion for summary judgment]; *Phillips v. Bronx Lebanon Hospital*, 268 AD2d 318 [1st Dept 2000] ["self-serving affidavits submitted by plaintiff in opposition clearly contradict plaintiff's own deposition testimony and can only be considered to have been tailored to avoid the consequences of her earlier testimony...."]).

It is well settled that "a landowner is under a duty to maintain its property in a reasonably safe condition under the extant circumstances, including the likelihood of injuries to others, the potential for any such injuries to be of a serious nature and the burden of avoiding the risk. This duty is, of course, tempered by the necessity that a party, as a prerequisite for recovering damages, must establish that the landlord created or had either actual or constructive notice of the hazardous condition that precipitated the injury and by the rule that, to constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the owner's employees to discover and remedy it. While this burden is a significant one, it is clear that plaintiff may satisfy it by evidence that an ongoing and recurring dangerous condition existed in the area of the accident which was routinely left unaddressed by the landlord" (*O'Connor-Miele v. Barhite & Holzinger, Inc.*, 234 AD2d 106 [1st Dept 1996]).

Further, a prima facie case of negligence based on an unsafe condition can only be established by a demonstration by the plaintiff that the defendant had either actual or constructive notice of the condition if the defendant did not create the unsafe condition (*see*, *Rosario v. New York City Transit Auth.*, 215 AD2d 364 [2D Dept 1995]; *Gordon v. American Museum of Natural History*, 67 NY2d 836 [1986]; *Herman v. State of New York*, 63 NY2d 822 [1984]; *Edwards v. Terryville Meat Co.*, 178 AD2d 580 [2d Dept 1991]; *Paolucci v First Natl. Supermarket Co.*, 178 AD2d 636 [2d Dept 1991]).

In addition, the landowner must have had actual or constructive notice of the unsafe condition for such a period of time that, in the exercise of reasonable care, he should have remedied it (*see*, *Putnam v. Stout*, 38 NY2d 607 [1976]; *see also*, *Gordon v. American Museum of Natural History*, 67 NY2d 836 [1986]; *Herman v. State of New York*, 63 NY2d 822 [1984]; *Preston v. State of New York*, 59 NY2d 997 [1983]; *Franqui v. City of New York*, 152 AD2d 482 [1st Dept 1989]; *Tobar v City of New York*, 146 AD2d 694 [2d Dept 1989].

"Neither a general awareness that litter or some other dangerous condition may be present nor the fact that a plaintiff observes other papers on another portion of the steps approximately 10 minutes before his fall is legally sufficient to charge a defendant with constructive notice of the paper he falls on" (*Gordon v. American Museum of Natural History*, 67 NY2d 836 [1986])

In the instant action, it is undisputed that defendant NYCTA did not create the unsafe condition which led to plaintiff's fall and injury. Also, it has not been argued by plaintiff that the defendant had actual notice of the hazardous condition on the staircase. Plaintiff relies on constructive notice as a basis for liability grounded in a theory of a dangerous and frequently unremedied recurring condition that defendant NYCTA allowed in the station. Plaintiff's reliance on this theory stems from cases that stand for the proposition that a triable issue of fact has been raised when sufficient evidence is produced showing an ongoing and recurring dangerous condition existing in the area of the accident (*see, Irizarry v. 15 Mosholu Four, LLC*, 24 AD3d 373 [1st Dept 2005]; *Bido v. 876-882 Realty, LLC*, 41 AD3d 311 [1st Dept 2007]). However, the distinction that is made in these cases are where the recurring condition is left "unremedied" and "routinely left unaddressed" (*see*, *Irizarry v. 15 Mosholu Four,*

LLC, id; *Bido v. 876-882 Realty, LLC.*, id). That distinguishing fact is not present in this case.

Defendant NYCTA has submitted evidence in admissible form to establish routine and continuous cleaning of the subject station. In support of its motion, defendant has submitted, *inter alia*, testimony from two employed Station Cleaners that were assigned to clean the subject station including the staircase involving the accident. The first of the Station Cleaners whose shift ended at 12:00 A.M., approximately 30 minutes before the accident took place, stated that they had cleaned the subject staircase and found no defects or hazards. The second of the Station Cleaners whose shift began at approximately 12:00 A.M. stated that he clean all of the staircases including the subject staircase and likewise found no hazards or defects. In view of this testimony establishing routine cleaning, plaintiff has not put forward any evidence indicating that the defendant NYCTA was notified of the debris that morning or that the plastic bag was "present for a sufficient period of time that defendant's employees had an opportunity to discover and remedy the problem" (*see, Rivera v. 2160 Realty Co., L.L.C.*, 4 NY3d 837, 838 [2005]; cf *Feldmus v. Ryan Food Corp.*, 29 AD3d 940 [2d Dept 2006] [store manager's conclusory affidavit failed to state the frequency of inspections, nor did it indicate when prior to the accident the store was last inspected]).

In the present case, summary judgment is proper where, in the absence of evidence of defendant creating or causing a hazardous condition, or having actual notice of the condition, plaintiff has failed to make a showing of constructive notice (*see, Torres v. Washington Heights Bus. Improvement Dist. Mgmt.*, 2008 NY Slip Op 9442 [1st Dept 2008] [held summary judgment was proper where plaintiff did not make a showing of constructive notice, and general awareness of litter was insufficient to raise a triable issue of fact as to whether defendant had constructive notice of the plastic bag that caused plaintiff's fall]). Plaintiff has not established or submitted any forward evidence to show the plastic bag was present for an unreasonable time; plaintiff merely asserts when asked why he believed the bag was present for a significant period of time, that the "bag did not move" and had "sticky stuff" around it. As in *Rivera v. 2160 Realty Co., L.L.C.*, 4 NY3d 837, 838 (2005), "[o]n the evidence presented, the [plastic bag] that caused plaintiff's fall could have been deposited there only minutes or seconds before the accident and any other conclusion would be pure speculation."

Defendant NYCTA have sustained their burden of proving the absence of triable issues of fact, and entitlement to judgment as a matter of law. Defendant has established that it neither created nor caused the hazardous condition, and did not have actual or constructive notice of the dangerous condition. Accordingly, the motion for summary judgment is granted.

The foregoing constitutes the decision and order of this Court.

Dated: January 12, 2009

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Howard G. Lane, J.S.C.