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

PRESENT: Carol Edmead PART 35
Justice

Grace Lyons

INDEX NO. 112081/07

MOTION DATE 10/24/08

- v -

MOTION SEQ. NO. 001

Metropolitan Transportation Auth. and Metro-North Commuter Railroad

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits

Answering Affidavits — Exhibits

Replying Affidavits

FILED
JAN 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Based on the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of the motion by defendants Metropolitan Transportation Authority and Metro-North Commuter Railroad Company for summary judgment dismissing the complaint against Metro-North Commuter Railroad Company is denied; and it is further

ORDERED that the branch of the motion by defendants Metropolitan Transportation Authority and Metro-North Commuter Railroad Company for summary judgment dismissing the complaint against the Metropolitan Transportation Authority is granted, and the complaint against said defendant is dismissed; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon all partics within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: 1/20/09

HON. CAROL EDMEAD J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------X

GRACE LYONS,

Plaintiff,

Index No. 112081/2007

Sequence No. 001

-against-

METROPOLITAN TRANSPORTATION AUTHORITY and METRO-NORTH COMMUTER RAILROAD COMPANY,

Defendants.

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HON. CAROL EDMEAD, J.S.C.

MEMORANDUM DECISION

In this personal injury action, plaintiff Grace Lyons ("plaintiff") alleges that she tripped and fell in defendants' premises on a mat situated at the exterior door leading from East 42nd Street to Grand Central Terminal (Vanderbilt Hall), New York, New York.

Defendants Metropolitan Transportation Authority (the "MTA") and Metro-North Commuter Railroad Company ("Metro-North") now move for summary judgment dismissing plaintiff's complaint.

Defendants' Motion

Defendants argue that as to Metro-North, the evidence fails to establish the existence of an issue of fact as to whether the mat that allegedly caused plaintiff's fall was out of position and against the saddle prior to the accident or whether it was out of position as a consequence of the fall itself. The evidence also fails to establish the existence of an issue of fact as to whether Metro-North had constructive notice of the alleged defect. Nor does the evidence establish that Metro-North was aware of the condition for any appreciable length of time prior to the accident. General awareness that the floor mats occasionally moved out of position would be insufficient

by itself to constitute notice of a dangerous condition. In addition, plaintiff cannot demonstrate that the alleged dangerous condition was the proximate cause of her injury. A fair reading of plaintiff's testimony establishes that it was just as likely that the mat was in a safe position prior to plaintiff's fall and was moved out of position only as a result of the fall. Plaintiff's claim regarding proximate cause is therefore based on surmise, conjecture and speculation, which are without probative value. Therefore, Metro-North is also entitled to summary judgment.

As to the MTA, Metro-North has admitted in its Answer that it controlled, supervised, and maintained the area and/or rubber mat in question, and was charged with operating, maintaining, repairing and supervising the area where plaintiff's fall allegedly occurred. MTA, on the other hand, denies "these elements" of plaintiff's cause of action or that it has any responsibility with reference to the day-to-day operation of the area. Further, Metro-North is a subsidiary of the MTA. Therefore, since Metro-North is a subsidiary of the MTA, MTA may not be held liable for the alleged torts committed by its subsidiary arising out of the operations of the subsidiary corporation. Thus, plaintiff's claim against the MTA must be dismissed.

In support of its motion, defendants submit the following:

Plaintiff's Testimony[1]

On March 1, 2007, plaintiff was on her lunch break returning to work on Park Avenue from a 99 Cent store near Grand Central Terminal. Plaintiff walked toward the Vanderbilt Hall entrance to Grand Central Terminal. (Hearing, p. 15).

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[1] The following testimony is taken from the transcripts of plaintiff's Public Authorities Hearing and Examination Before Trial, as noted.

When asked what happened when she went through the entrance door, plaintiff stated:

> From what I can recall, I opened it with my left hand and I walked through . . . I went with my right foot in and then something just stopped me dead, stopped me dead, I just couldn't go any further and I just went straight, completely straight down. Flat." (Hearing, pp. 23:19-24:3; EBT, p. 19:9-11).

When asked whether her foot came into contact with anything, plaintiff stated:

> . . . I believe it was my left foot caught onto something, I believe it was the mat because that was the only thing that was there after I went down and looked around to see what, you know, what happened. I saw that the mat was sticking up over part of this threshold, I call it a threshold, I don't know what it's called, and - - . . . And that's all I could see that could have caught onto my foot, because it just stopped me, I didn't even get a chance to go anywhere, it just stopped and put me off balance.
> (Hearing, pp. 25:16-26:7; EBT, pp. 21-22).

Plaintiff later agreed to use the term "saddle" to refer to the threshold. (Hearing, p. 26:12-16; EBT, pp. 22-23). "The saddle was the length of one side of the open door to the other. . . ." (EBT, p. 23).

In reference to a photograph marked as Exhibit B, taken 38 days after the accident, the plaintiff was asked whether the saddle depicted therein was different in any way on the date of the accident. In response, plaintiff stated:

> I don't think so, no. The only thing that is difficult is that there was something over - - it's like a lip here (indicating), and the mat was up onto this lip, from what I can remember. When I sat on the floor and looked, there was a piece sticking up on this lip-type of thing. . . .
> (Hearing, pp. 26-27:4-11; EBT, p. 28).

Plaintiff also testified that the mat was black, rectangular, and covered "more than the doorway." (Hearing, pp. 27-28). It was "at least five feet wide and maybe five-foot" in length. (Hearing, p. 28).

When questioned as to when plaintiff noticed the mat any time, she replied, "It was only

after I fell. . . . The only distortion that I saw was that it was up on the lip, you know, as I said sticking up over the lip of the saddle . . . part of the mat" was on the saddle. (Hearing, pp. 29; EBT, pp. 21:12-15; 24). When asked if she saw the mat before she fell, she replied, "No. When I opened the door, you know, I looked straight ahead, I don't normally look down, so I don't know if I saw it or just knew that it was there unconsciously. No I would have to say no." (Hearing, p. 30:4-11; EBT, p. 21).

Plaintiff did not know how long the mat was in the alleged position. (EBT, pp. 20:24-21:8; 17:6-8; 24:1-25). Further, the mat was "up against" the saddle, approximately "half an inch" above the saddle. (EBT, p. 24:1-25). However, plaintiff "didn't really look at the saddle . . ." as she was walking. Other people witnessed the accident, but plaintiff did not know their names. (Hearing, p. 16:16-20).

When asked if the mat moved when her right foot stepped onto it, plaintiff replied, "No, it did not." (EBT, p. 29). When asked if the mat moved at all during the course of plaintiff's fall and when she landed, plaintiff replied, "No, it didn't." (EBT, p. 29).

Metro-North's Station Manager

Salvatore Lupi ("Mr. Lupi") is the general station manager for Metro-North, responsible for safety and the overall operation of the Grand Central Terminal. (p. 23). Metro-North is a subsidiary of the MTA. (p. 7). The mat at issue has "rubber on the bottom and the top" was "carpet-like" "almost like an astro turf." (pp. 16-17). The mat was approximately "half an inch" high, with the "rubber part" approximately an "eighth of an inch" high. (pp. 16-17). The edges or border of the mat was rubber, approximately an eighth of an inch. (pp. 17-18).

The general foreman or lead custodian instructs the custodians on how to place the mats

in front of the doors. (p. 25). The custodians are instructed to place the edge of the mat approximately six inches beyond the "saddle." (p. 26). On a typical day, "hundreds of thousands" of people go through the terminal. (pp. 27-28). Mr. Lupi occasionally saw mats out of position due to "people just walking across them, I mean, people rolling, just rolling luggage. . . . (p. 28). As the station manager, he "usually put it back in place or have somebody else do it. But normally, I do it myself, right then and there." (p. 28).

The type of mat which was used inside the Grand Central Terminal present on the date of plaintiff's accident had been used by Metro-North for approximately one and one-half years prior to March 1, 2007. (p. 28). The mats were not affixed to the floor in any way at the time of plaintiff's fall. (p. 23). Mr. Lupi would occasionally see those mats in positions different from the position that they were supposed to be placed. (pp. 28-29). When asked if the MTA or Metro-North ever considered having the mats affixed when placed, Mr. Lupi stated "Maybe after six months that we had them that they did a trial period of it." (p. 30). The custodians placed the mats in the same locations and "would tape them all around" on "all four sides" but "it didn't work the way they planned." (p. 30). Mr. Lupi also stated, "We have looked into it. But sometimes, we just don't do it, Because if this surface is already wet, try to affix it with tape or something, it's just going to create more problems that it's worth. Because the tape would come up and it will be a tripping hazzard [sic]." (29). Mr. Lupi continued, "The only way we try to affix them is by tape. They actually never put, permanently put them. . . . (pp. 29-30). When asked if the mats would move as frequently as without the tape, Mr. Lupi replied, "Yes." (P. 31).

Metro-North's Safety Coordinator

In her affidavit, Linda Dick ("Ms. Dick"), a Safety Coordinator with Metro-North's Safety Department, states that she supervised a search for records of accidents involving carpets, mats or rugs for a period of March 1, 2002 through March 1, 2007. The search revealed one incident other than plaintiff's, which involved a person named Frederick Reddy and a "mat" on January 4, 2006.

MTA Police Department Report

Defendants also submit an MTA Police Department report of the incident involving Frederick Reddy at "29 GCT" inside the "Graybar Passageway." According to the accident report, while exiting the "414 Lexington Avenue doors" Frederick Reddy "tripped over the mat that is on the ground after the first set of doors."

Plaintiff's Opposition

Plaintiff argues that defendants failed to set forth a *prima facie* case based on evidence in admissible form and that summary judgment should be denied without reaching the issue of whether there are material issues of fact in dispute. Moreover, even had defendants set forth a *prima facie* entitlement to summary judgment, evidence submitted by plaintiff in admissible form demonstrates material issue of fact in dispute.

Plaintiff contends that the affirmation of defendants' attorney, who does not claim to have personal knowledge of the facts, lacks probative value and fails to constitute evidence in admissible form. Thus, the affirmation of defendants' counsel must be disregarded. Further, the unsigned transcript of the deposition of Mr. Lupi is not evidence in admissible form and may not be considered by the court.

With respect to the MTA, said defendant has not submitted any proof that it did not own, operate, control, supervise, maintain, inspect, manage, repair and/or clean either the location of the occurrence or the mat in question. There is no proof that MTA did not cause or create the dangerous condition which caused plaintiff's fall. With respect to Metro-North, there is no proof in admissible form that Metro-North did not cause or create the dangerous condition which caused plaintiff's fall, or that Metro-North did not have actual or constructive notice of the dangerous condition. Even if defendants attempt to cure these defects in a reply by submitting new evidence, such as a signed transcript, the reply must be ignored and the defendants' motion denied since a failure to establish a prima facie case cannot be cured in a reply.

In any event, Metro-North controls, supervises, and maintains the area and mat in question, and the MTA admits in its Answer that it is a lessor, a licensor and lessee of the subject location. Photographs depicting the location that were annexed to the Notices of Claim sent to defendants do not depict the mat, as the mat was not always present inside the entrance to the terminal, and obviously was not present when the photographs were taken. However, Mr. Lupi acknowledges that the mat was present at the time of plaintiff's fall.

Plaintiff contends that contrary to defendants' contention that they did not create the dangerous condition. Defendants also acknowledge a prior incident involving a mat at Grand Central Terminal. Thus, defendants had more than a "general awareness," but specific awareness and actual notice of an ongoing and recurring dangerous condition inside the entrance doors to Grand Central Terminal, which they failed to remedy. As it is foreseeable that a mat may end up with its edge on the saddle, creating the exact danger Mr. Lupi was concerned about, defendants should be charged with constructive notice of such dangerous condition. One year prior to

plaintiff's fall, Metro-North tried taping down the mats so as to keep them from moving, but this did not work. Despite this failed attempt to remedy the known dangerous condition, defendants never considered or discussed permanently affixing a mat or using a different size or weight mat to keep the mat from moving.

Further, plaintiff's testimony clearly established that the cause of her fall was the edge of the mat. In further support, plaintiff submits the deposition testimony of Police Officer Michael Anthony DeFrancesco of the MTA, wherein he stated that after her fall, plaintiff told him that she tripped over a carpet upon entering Grand Central Terminal. (pp. 21-22). Plaintiff also submits an affidavit, attesting to the manner in which she was caused to fall.

That plaintiff did not see the condition prior to her fall is not fatal to her claim. Further, that the mat may have ended up on the saddle as a result of her fall is ridiculous; if the mat were going to move, it would have moved forward, further into Grand Central Terminal, and not backward toward the door. In any event, plaintiff testified that the mat did not move as she was falling.

Analysis

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390(U) [NY Sup Ct 2003]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing

sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002] [defendant not entitled to summary judgment where he failed to produce admissible evidence demonstrating that no triable issue of fact exists as to whether plaintiff would have been successful in the underlying negligence action]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212[b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]). On a defendant's motion for summary judgment, the evidence should be liberally construed in a light most favorable to the plaintiff (*Kesselman v Lever House Rest.*, 29 AD3d 302, 816 NYS2d 13 [1st Dept 2006] *citing Goldman v Metropolitan Life Ins. Co.*, 13 AD3d 289, 290, 788 NYS2d 25 [1st Dept 2004]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d

546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

To establish a *prima facie* case of negligence in a slip and fall case, a plaintiff must demonstrate that the defendant created the dangerous condition which caused the accident or that the defendant had actual or constructive notice of that condition and failed to remedy it within a reasonable time (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 501 NYS2d 646 [1986]; *see also Segretti v Shorenstein Company, East, LP*, 256 AD2d 234, 682 NYS2d 176 [1st Dept 1998]; *Weiss v Gerard Owners Corp.*, 22 AD3d 406 [1st Dept 2005]; *O'Rourke v Williamson, Picket, Gross, Inc.*, 260 AD2d 260, 688 NYS2d 528 [1st Dept 1999]). Thus, a defendant, as the proponent of a summary judgment motion, when attempting to make its requisite *prima facie* showing, must submit evidence in admissible form that shows it did not create or have actual or constructive notice of the dangerous condition (*see Colt v Great Atlantic & Pacific Tea Company, Inc.*, 209 AD2d 294, 618 NYS2d 721 [1st Dept 1994]; *see also Giuffrida v Metro North Commuter Railroad Company*, 279 AD2d 403, 720 NYS2d 41 [1st Dept 2001]; *Gordon v Waldbaum, Inc.*, 231 AD2d 673, *supra*).

To constitute constructive notice, a dangerous condition must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit the defendant to

discover and remedy the condition (*see Gordon v American Museum of Natural History*, 67 NY2d 836, *supra*; *see also Segretti*, 256 AD2d 234, *supra*; *Lemonda v Sutton*, 268 AD2d 383, 702 NYS2d 275 [1st Dept 2000]; *Guttierez v Lenox Hill Neighborhood House, Inc.*, 4 AD3d 138, 771 NYS2d 513 [1st Dept 2004]; *Budd v Gotham House Owners Corp.*, 17 AD3d 122, 793 NYS2d 340 [1st Dept 2005]). A defendant/property owner may also be charged with constructive notice of a dangerous condition where there is evidence that the dangerous condition was ongoing and recurring in the area of the accident, and such condition was left unaddressed (*see Gordon v American Museum of Natural History*, 67 NY2d 836, *supra*; *see also O'Connor-Miele v Barhite & Holzinger, Inc.*, 234 AD2d 106, 650 NYS2d 717 [1st Dept 1996]; *Colt*, 209 AD2d 294, *supra*). Where a defendant "has actual knowledge of the tendency of a particular dangerous condition to recur, he or she is charged with constructive notice of each specific recurrence of that condition" (*Solazzo v New York City Tr. Auth.*, 21 AD3d 735, 735-736 [1st Dept 2005]). By contrast, a mere general awareness of the presence of some dangerous condition is legally insufficient to establish constructive notice (*see Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 622 NYS2d 493 [1994]; *see also Gordon v American Museum of Natural History*, 67 NY2d 836, *supra*; *Segretti*, 256 AD2d 234, *supra*).

Metro-North

As to Metro-North, it is uncontested that Metro-North controlled, maintained, and supervised the area and mat in question, and was charged with the duty of operating, maintaining, inspecting, repairing, cleaning, supervising and/or controlling the location of the alleged occurrence.

Contrary to Metro-North's contention, it cannot be said that there is no evidence that the

mat was "out of position and against the saddle prior to" her accident, as opposed to as a consequence of her fall (Defendants' Motion, ¶34). Based on a liberal reading of plaintiff's collective testimony, plaintiff states that as she opened the exterior door to Grand Central Terminal, her left foot came into contact with a black, rubber mat, the edge of which was over the "saddle" or threshold of the doorway. At the point of contact, plaintiff's left foot became caught by the mat, which stopped plaintiff from proceeding further, causing her to fall. Plaintiff also testified that the mat did not move at the time her left foot came into contact with it, or during the course of her eventual fall. Therefore, in contrast to defendants' contention that the mat could have been placed over the saddle or threshold as a result of plaintiff's accident, there is testimonial evidence indicating otherwise.

The cases on which Metro-North relies are factually distinguishable and do not warrant a finding that there is no evidence that a dangerous condition existed at the time of plaintiff's accident (*see Christopher v New York City Trans. Auth.*, 300 AD2d 336 [2d Dept] [where plaintiff tripped when her foot became hooked on a floor mat, plaintiff's testimony that she did not look at the mat either before or after her fall, and that she was unable to describe any defect in the mat which caused her foot to become hooked, demonstrated that she did not know what caused her foot to become hooked on the floor mat; in the absence of such evidence, a jury would be required to speculate as to whether there was a defect in the mat which caused the plaintiff's fall]; *Brown-Phifer v Cross County Mall Multiplex*, 282 AD2d 564 [2d Dept 2001] [where plaintiff repeatedly stated at her deposition that she did not know what caused her foot to get stuck on the carpet, summary judgment warranted since a jury would be required to speculate as to the cause of the plaintiff's fall]; *Visconti v 110 Huntington Assoc.*, 272 AD2d 320 [2d Dept

2000] [where plaintiff was unable to identify or describe the condition which caused her fall and, instead, speculated that she must have slipped on food residue, plaintiff may not recover]). Although plaintiff herein did not observe the mat prior to her accident, unlike the plaintiffs noted above, plaintiff observed the condition of the mat immediately *after* she landed and saw that a part of the mat "was sticking up over part of this threshold" or saddle of the doorway.

For these same reasons, it cannot be said that defendants established, as a matter of law, that the mat was in a safe position prior to plaintiff's fall and that therefore, plaintiff cannot demonstrate that the alleged dangerous condition of the mat was the proximate cause of her injury (Defendants' Motion, ¶35).

Further, defendants failed to establish that it lacked constructive notice of the alleged dangerous condition as a matter of law.

That there is no evidence that anyone observed the mat's specific position over the saddle or threshold of the doorway prior to plaintiff's injury is not fatal to plaintiff's claim. Plaintiff repeatedly testified that she fell due to the presence of a portion or edge of a mat placed over the threshold or "saddle" of the entranceway door to Grand Central Door. Mr. Lupi testified that mats, including the subject mat, are placed inside Grand Central Terminal, six inches in front of the saddle during inclement weather, and that he had observed on prior occasions that the mats were inadvertently moved due to the rolling of pedestrians' luggage over the mats. As the General Station Manager, Mr. Lupi would "usually put it [the mat] back in place or have somebody else do it." (Mr. Lupi EBT, p. 28:15-19). According to Mr. Lupi, Metro-North attempted to affix the mats by tape prior to the date of plaintiff's accident, to no avail. More importantly, when asked why it was important that the mat remain in place, Mr. Lupi replied,

> Somebody's walking in from the, walking in and they hit the carpet and it does move or if somebody comes in with a roll cart or something of that nature and fix it up. Somebody comes in right behind them, because of the volume we have in there, create like a bubble, so to speak, in the carpet. Somebody might trip over that.
> (Mr. Lupi EBT, p. 32:8-17)

Additionally, defendants' argument that the mat could have moved as a result of plaintiff's fall, further demonstrates its awareness that the mat is subject to inadvertent repositioning by pedestrians entering and exiting Grand Central Terminal. Metro-North's placement of the mat in close proximity to the saddle, with knowledge that the mats were occasionally moved, coupled with prior attempts to tape the mat to prevent it from moving, is sufficient evidence from which a reasonable jury may conclude that Metro-North was aware that mats moved on several occasions in the past so as to create the tripping hazard at issue, *i.e.*, the edge of the mat upon the saddle or threshold, which allegedly caused plaintiff's fall (*see Camizzi v Tops Inc.*, 244 AD2d 1002, 664 NYS2d 964 [4th Dept 1997] [evidence that plaintiff "tripped on a three-inch-high buckle in the floor mat placed on the tile floor at the entrance to the supermarket; that the mat buckled on several occasions each day as customers entered the store and as employees pushed shopping carts into the store; and that the store manager was aware that the mat buckled each day and that the buckling constituted a tripping hazard that could cause injury," sufficient to establish the existence of a recurrent dangerous condition and that defendants had constructive notice of that condition]).

Although a general awareness that floor mats occasionally bunch is insufficient by itself to constitute notice of a dangerous condition (*Hughes v Carrols Corp.*, 248 AD2d 923, 670 NYS2d 610 [3d Dept 1998] [evidence that the floor mat was prone to becoming bunched insufficient] *citing Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969, 622 NYS2d 493, *Van*

Winkle v Price Chopper Operating Co., 239 AD2d 692, 693, 657 NYS2d 236, 237, and *Hamilton v Rite Aid Pharmacies*, 234 AD2d 778, 650 NYS2d 887]), the record contains sufficient evidence to support the claim that Metro-North had constructive notice of the dangerous condition that allegedly caused plaintiff's fall (*see generally*, *Gitlin v David Storch, Inc.*, 262 NY 553, 188 NE 61 [1933] [affirming judgment in favor of plaintiff where there was testimony that the mat over which plaintiff tripped "had been allowed for several months to rest in close proximity" to the door, in a curled-up position, "so that the door, when opened, would catch on the mat, rolling it up higher as the door opened, with the result that the advancing foot of an entrant would come in contact with it; and that tenants of the apartment house had complained to the janitor of this condition]).

Further, that the prior accident in 1996 involving a mat occurred at a different entrance to Grand Central Terminal does not render such prior accident immaterial on the issue of constructive notice (*see Armstrong v Ogden Allied Facility Mgt. Corp.*, 281 AD2d 317, 318, 722 NYS2d 503 [2001] [constructive notice could be found based upon knowledge of a "similar hazardous condition that was known to have existed for at least two years elsewhere in the building"]). Therefore, as it cannot be said, as a matter of law, that Metro-North lacked constructive knowledge of the condition which allegedly caused plaintiff's fall, summary judgment on such ground is unwarranted.

As issues of fact exist as to whether the alleged dangerous condition of the mat proximately caused plaintiff's fall, and as to whether Metro-North had constructive notice of the such dangerous condition, the branch of defendants' motion seeking summary dismissal of the complaint against Metro-North is denied.

The MTA

As to the MTA, the MTA is not liable for the torts committed by one of its subsidiaries when the same arose from the operation of the subsidiary (*Noonan v Long Island Railroad,* 158 AD2d 392 [1st Dept 1990]; *see also Wenthen v Metropolitan Transp. Auth.,* 95 AD2d 852 [2d Dept 1983] [Long Island Railroad is a subsidiary of MTA, and thus, complaint dismissed as to MTA]; *Bujosa v Metropolitan Transp. Auth.*, 44 AD2d 849 [2d Dept 1974] [complaint seeking to recover damages from the MTA for the alleged negligence of LIRR dismissed after court took "judicial notice of the fact that MTA took over ownership of all the stock of LIRR under the powers granted to it by title 11 of article 5 of the Public Authorities Law" and noting that as a general rule, a parent corporation will not be held liable for the torts of its subsidiary corporation, notwithstanding the former's complete ownership of the latter's stock]; *see also Hampton v State*, 168 Misc 2d 1036, 646 NYS2d 66 [N.Y.Ct.Cl. 1995] [acknowledging that Metro-North is a subsidiary of the MTA]).

The Court notes that in its Answer, the MTA denies ownership of the premises, but admits that it was a lessee and lessor and/or licensor (Answer, ¶ 2). However, the MTA also denies that it had any operation, control, supervision, and maintenance, inspecting, repairing, cleaning or any duty to keep the subject area reasonably safe (Answer, ¶ 3). The MTA also denied ownership, operation, control, supervision, and maintenance of the subject mat (Answer, ¶ 3). Metro-North also denies ownership of the subject premises, and likewise admits that it was the lessee and lessor and/or licensor of the subject premises (Answer, ¶ 6). However, Metro-North admits that it operated, maintained, inspected, managed, repaired, cleaned the subject premises and had a duty to maintain the subject premises in a reasonably safe condition (Answer,

¶¶ 5-6). Metro-North also admitted in its Answer that it owned, used, operated, controlled, supervised and maintained the mat in question (Answer ¶). According to the testimony of Mr. Lupi of Metro-North, Metro-North, and not the MTA,[2] determined whether to affix the mat, and controlled Grand Central Terminal (Mr. Lupi EBT, 45-46). As Metro-North's General Station Manager, he was responsible for overseeing the operations of and safety at Grand Central Terminal, including placing the subject mat inside the doorways during inclement weather. That defendants' Answer is unverified is insufficient to overcome Mr. Lupi's testimony to the effect that Metro-North is a subsidiary of the MTA (*see also Petroccitto v Metro North Commuter R.R.*, 140 AD2d 682, 529 NYS2d 328 [2d Dept 1988] [stating that various courts have recognized that Metro-North"is, in fact, a subsidiary of the Metropolitan Transportation Authority"]; *Candelario v MTA Bus Co.*, Slip Copy, 2008 WL 5330524 [N.Y. Sup. 2008] [stating that the MTA delegates the operation, control and maintenance of its facilities to its subsidiaries, and its duties do not include the operation, maintenance, and control of any facility] *citing Cusick v Lutheran Medical Center,* 105 AD2d 681 [2d Dept 1984]).

That the MTA is a lessee, lessor or licensee of the subject premises is insufficient to overcome defendants' showing of entitlement to dismissal of the action against the MTA (*see Gibbs v Port Auth. of New York*, 17 AD3d 252, 794 NYS2d 320 [1st Dept 2005] [in the absence of any authority to maintain or control the area in question, or to correct any unsafe condition, licensee, with no access to custodial supplies such as mats, and whose employees were not permitted to bring their own cleaning supplies, owed no duty of care with respect to any unsafe

[2] Contrary to plaintiff's contention, the deposition transcripts of Mr. Lupi was notarized. It appears that plaintiff overlooked the errata page, which contains Mr. Lupi's notarized signature, along with handwritten changes to the transcript.

condition on premises]).

Therefore, the branch of defendants' motion for summary judgment dismissing the complaint against the MTA is granted.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of the motion by defendants Metropolitan Transportation Authority and Metro-North Commuter Railroad Company for summary judgment dismissing the complaint against Metro-North Commuter Railroad Company is denied; and it is further

ORDERED that the branch of the motion by defendants Metropolitan Transportation Authority and Metro-North Commuter Railroad Company for summary judgment dismissing the complaint against the Metropolitan Transportation Authority is granted, and the complaint against said defendant is dismissed; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: January 20, 2009

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD