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

PRESENT: HAROLD BEELER J.S.C. PART 21

Justice

Index Number : 108192/2007

RIVERA,ESTHER

VS.

TRANSIT AUTHORITY

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

) this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

is denied as per attached decision and order

FILED
MAY 08 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 5/6/09

HAROLD BEELER 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

At IAS Part 21 of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, 71 Thomas Street, New York, New York on the 6th of May, 2009.

PRESENT: HON. HAROLD B. BEELER, JSC

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RIVERA, ESTHER

Plaintiff,

DECISION / ORDER

- against-

Index No. **108192/2007**
Motion Seq. 002

NEW YORK CITY TRANSIT AUTHORITY

Defendant.

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Defendant New York City Transit Authority ("NYCTA") moves for summary judgment dismissing the entire action. Plaintiff opposes, arguing that there are triable issues of fact with respect to defendant's actual or constructive notice, and proximate cause. For the reasons discussed herein, defendant's motion is denied.

Plaintiff alleges that on February 24, 2007, at approximately 6:00 P.M., she descended the staircase at the Brooklyn Bridge/City Hall Station. She held her stroller, with her two-year-old inside, with her right hand, and held onto the railing with her left hand. As she descended towards the second step, the right heel of her sneaker became stuck. At the time, she could not see what trapped her foot. She struggled to get her sneaker out, removing her arm so that she could hold on to the stroller, and fell down the rest of the staircase. Although her child was apparently not hurt, plaintiff was injured.

After her fall, she looked up at the staircase and noticed a chip in the riser in the

approximate spot where she fell. She also noticed the identification "P-6A" on the staircase, and wrote it on her hand.

A month later, plaintiff visited the subject area with a photographer, and took photographs of the staircase, including close-ups of the alleged defect and the "P-6" marking. At her deposition, the plaintiff stated that these photographs reflected the condition of the staircase on the day of her fall.

Defendant's station manager testified as to the maintenance and repair records for the subway station. He testified that there were no entries regarding stairs in the maintenance records and service call reports. No defects were reported, investigated, or repaired at the location in the year immediately prior to the incident.

The station supervisor testified that she would go to the Brooklyn Bridge station on a daily basis, sometimes twice a day, to inspect the station, and that she had not seen the defective condition depicted in the photographs. However, if she had seen the defect, she would have reported it so that it could be repaired.

Discussion

Defendant argues that the testimony demonstrates there is no evidence of actual or constructive notice. In a slip and fall case, where the defendant has not created the hazardous condition, the initial burden is on the moving defendant to establish the absence of actual or constructive notice. *See South v. K-Mart Corp.*, 24 A.d.3d, 807 N.Y.S.2d 133 (2d Dept 2005). Once defendant has made out a prima facie case, the burden then falls upon the non-movant to establish a material issue of fact with respect to notice. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 560, 404 N.E.2d 718, 427 N.Y.S.2d 595, 596 (1980).

Constructive notice is found where the defect is visible and apparent, and the condition has been there for so long that the defendant is presumed to have seen it, or to have been negligent in failing to see it. *Gordon v. Am. Museum of Natural History*, 67 N.Y.2d 836, 492 N.E.2d 774, 501 N.Y.S.2d 646 (1986).

Defendants have met their initial burden in demonstrating the absence of actual or constructive notice. The station manager testified that there were no reports or complaints of a defective condition at the accident location. Additionally, the station supervisor testified that she would be present at the location at least once a day, and that she did not see a defect on the stairs.

However, defendant incorrectly argues that summary judgment must be granted where a defendant has shown that no defect was reported, investigated or repaired at the location. In this respect, defendant's reliance on *D'ambra v. N.Y.C. Transit Auth.* is misplaced. 16 A.D.3d 101, 790 N.Y.S.2d 120 (1st Dept 2004). In *D'ambra*, the First Department held that defendant had *met its initial burden* by providing maintenance records and testimony demonstrating that no defect was reported, investigated, or repaired. *Id. But see George v. N.Y.C. Transit Auth.*, 306 A.D.2d 160, 161, 761 N.Y.S.2d 182, 183 (1st Dept 2003) (finding defendant had not met its initial burden of establishing absence of notice where it indicated that it received no complaints of accidents in the location within a year prior to accident, but did not provide proof that inspections had been conducted or that accidents had not been reported prior to that time). With the burden shifted, plaintiff was unable to identify the defect that allegedly caused her injury, or even the existence of a defect. *D'ambra*, 16 A.D.3d 101, 790 N.Y.S.2d 101. Thus, summary judgment in favor of defendant was appropriate. *Id.* Such weaknesses do not exist in the instance case, where the defect is depicted in clear photographs and identified by plaintiff as the

cause of her injuries.

Plaintiff has met her burden in demonstrating a triable issue of fact regarding notice. A party may use photographs to demonstrative constructive notice, so long as they are taken reasonably close in time to the accident, and there is testimony that the condition in the photographs was the condition at the time of the accident. *Karten v. City of New York*, 109 A.D.2d 126, 127, 490 N.Y.S.2d 503, 504 (1st Dept 1985). Photographs submitted by plaintiff, taken shortly after the accident, depict a substantial chip in the concrete. Plaintiff testified that the condition depicted in the photograph was the same as what she saw following the accident (indeed, recent photographs taken by plaintiff depict the same defect). The defect depicted is not the type which is likely to immediately or suddenly arise. *George*, 306 A.D.2d at 361, 761 N.Y.S.2d at 183. A jury can infer from the irregularity, depth, and appearance of the defect that it was there for a sufficient amount of time that defendant should have been aware of its existence. *Taylor v. N.Y.C. Transit Auth.*, 48 N.Y.2d 903, 904, 400 N.E.2d 1340, 1341, 424 N.Y.S.2d 888, 889 (1979); see also *Hecker v. N.Y.C. Housing Auth.*, 245 A.D.2d 131, 665 N.Y.S.2d 660 (1st Dept 1997) (finding that a jury could reasonably infer that a large chip missing from steps "came into being over a sufficient period of time such that defendant should have acquired knowledge thereof and corrected it").

Defendant also argues that plaintiff cannot demonstrate that the chip in the concrete was the cause of her fall. According to defendant, plaintiff's foot could not be in contact with the riser as she was walking down the stairs, and her feet could only touch the metal stair tread.

This court cannot say that as a matter of law that defendant's fall was not the result of the defect in the stairs, because there is sufficient evidence for a jury to determine otherwise.

Although she could not see the crack as she descended the stairs, plaintiff testified that her heel got stuck on the second step as she descended the staircase. She also testified that after her fall, she looked up and saw the defective step, which is clearly depicted in the photographs. Defendant's own witness, upon observing these photographs, testified that it is a condition that should be reported and repaired. A jury can therefore reasonably infer that plaintiff's injury was caused by the defect on the staircase, and that her fall was caused by defendant's negligence in failing to make repairs. *See Polo v. N.Y.C. Housing Auth.*, 303 A.D.2d 238, 239, 757 N.Y.S.2d 9, 10 (1st Dept 2003) (holding that plaintiff's testimony that she tripped on steps, together with photographs depicting the defective step, is sufficient evidence for jury to infer that the step caused her fall); *Hecker v. N.Y.C. Housing Auth.*, 245 A.D.2d at 131, 665 N.Y.S.2d at 660 (holding that plaintiff's testimony that she slipped on the stairs, and subsequently noticed that a large chip was missing, was sufficient evidence for a jury to infer that the chipped step caused her fall).

Accordingly, defendant's motion for summary judgment is denied.

DATE: **May 6, 2009**

E N T E R :

HAROLD B. BEELER, J.S.C.

HAROLD BEELER
J.S.C.