SHORT FORM ORDER

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x **TRIAL TERM PART: 45**

GRAZIELA BRUNETTI-HUNEKE,

INDEX NO.: 12033/09

Plaintiff,

MOTION DATE:3-15-10
-against- **SUBMIT DATE:4-26-10**
SEQ. NUMBER - 001

LONG ISLAND UNIVERSITY,

Defendant.

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The following papers have been read on this motion:

Notice of Motion, dated 2-5-10.....1
Affidavit in Opposition, dated 2-25-10.....2
Affidavit, dated 3-23-10.....3
Memorandum of Law, undated.....4
Reply Affirmation, dated 4-22-10.....5
Letter, dated April 27, 2010.....6

This motion by defendant for an order pursuant to CPLR §3212 granting summary judgment dismissing the compliant is denied.

This is an action to recover damages for personal injuries based upon a slip and fall by the plaintiff, on October 14, 2008, at approximately 9:10 p.m. in the parking lot in front of Tilles center, in Nassau County, New York. The plaintiff alleges that the defendant was negligent in its maintenance of the aforesaid premises, and this caused her to slip and fall in a pothole.

Defendant's motion is supported by an affirmation of defendant's attorney who does not profess to have any personal knowledge, the oral depositions of the plaintiff and a

representative of the defendant and an affidavit from the same representative. It is well settled that an attorney's affirmation that is not based on personal knowledge or supported by documentary evidence is of no probative value. *Warrington v. Ryder Truck Rental, Inc.*, 35 AD3d 152 (2d Dept. 2006); *Sampson v. Delaney*, 34 AD3d 349 (1st Dept. 2006); *cf Davey v. Dolan*, 46 AD3d 854 (2d Dept. 2007). Here, defendant's attorney does not profess to possess personal knowledge of any facts asserted and has not employed his affirmation as a vehicle to refer to other competent evidence. Defendant's representative testified and avers that there were no prior complaints about potholes before the accident, that he never inspected the location of the accident and has no specific recollection of passing the area within six months prior. He does contend that there is lighting in the area without however, stating the distances of the lighting from the pothole or the quality of the illumination. He states that there were no prior reports of lighting problems but does not offer any personal knowledge or other records of inspections prior to the accident.

Photographs of the pothole have been submitted albeit there is a dispute as to whether they were taken before or after the accident with defendant contending that they were taken after. It is not necessary for this fact to be determined for summary judgment purposes since defendant's contention that the photographs were taken post accident supports its statements of not having previously inspected the area.

Defendant contends that if a defective condition existed it did not have constructive or actual notice thereof.

It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. *Sillman v*

Twentieth Century-Fox Film Corp., 3 NY2d 395 (1957); *Bhatti v. Roche*, 140 AD2d 660 (2d Dept. 1988). It is nevertheless an appropriate tool to weed out meritless claims. *Lewis v. Desmond*, 187 AD2d 797 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N. A.*, 82 AD2d 168 (3d Dept. 1981). Even where there are some issues in dispute in the case which have not been resolved, the existence of such issues will not defeat a summary judgment motion if, when the facts are construed in the nonmoving party's favor, the moving party would still be entitled to relief *Brooks v. Blue Cross of Northeastern New York, Inc.*, 190 AD2d 894 (3d Dept.1993).

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v Farrell Lines,* 64 NY2d 1092 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgrditchian v. Donato*, 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are

insufficient (*Zuckerman v. City of New York, supra*), and the defending party must do more than merely parrot the language of the complaint or bill of particulars. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v. Harvey Hutter & Co., Inc.*, 207 A.D.2d 380 (2d Dept. 1994); *Toth v. Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993). If a party defends a motion by resort to CPLR 3212(f), that is, the party has a defense sufficient to defeat the motion but that the facts cannot yet be stated, that party must be able to make some showing that such facts do in fact exist; mere hope that discovery may reveal those facts is insufficient. *Companion Life Ins. Co. v All State Abstract Co.*, 35 AD3d 519 (2d Dept. 2006). Nor can mere speculation serve to defeat the motion. *Pluhar v Town of Southhampton,* 29 AD3d 975 (2d Dept. 2006); *Ciccone v Bedford Cent. School Dist.*, 21 AD3d 437 (2d Dept. 2005).

However, the court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 (2d Dept. 1995). The role of the court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist. *Dyckman v. Barrett*, 187 AD2d 553 (2d Dept. 1992); *Barr v County of Albany*, 50 NY2d 247, 254 (1980); *James v. Albank*, 307 AD2d 1024 (2d Dept. 2003); *Heller v. Hicks Nurseries,* Inc., 198 AD2d 330 (2d Dept. 1993).

The Court need not, however, ignore the fact that an allegation is patently false or that an issue sought to be raised is merely feigned. *See Village Bank v Wild Oaks Holding, Inc.*, 196 AD2d 812 (2d Dept. 1993); *Barclays Bank of N.Y. v Sokol,* 128 AD2d 492 (2d Dept. 1987), such as when the affidavit in opposition clearly contradicts earlier deposition

testimony. *Central Irrigation Supply v Putnam Country Club Assocs., LLC,* 27 AD3d 684 (2d Dept. 2006).

In order for a defendant to successfully move for summary judgment in a slip and fall case it "has the initial burden of making a *prima facie* showing that it neither created the hazardous condition nor had actual or constructive notice." *Joachim v. 1824 Church Ave., Inc.* 12 AD3d 409 (2nd Dept. 2004); *Valdez v. Aramark Servs.*, 23 AD3d 639, (2nd Dept. 2005). Actual notice may be found where the defendant created the condition, or was aware of its existence prior to the accident. *Pianforini v. Kelties Bum Steer*, 258 AD2d 634, 635 (2nd Dept. 1999). 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 a defendant's employees to discover and remedy it." *Gordon v. American Museum of Natural History,* 67 NY2d 836, (1986). A defendant may satisfy its burden of showing that it had no notice of a dangerous condition if there is proof of regular inspection of the area in question and "any remedial action just prior to the incident." *Hagin v. Sears,* 61 AD3d 1264, 1266 (3rd Dept. 2009).

To satisfy the burden on the issue of lack of constructive notice, the moving defendant must provide evidence when the area was last inspected relative to the time of the injured plaintiff's accident. *Gerbi v. Tri-Mac Enterprises of the Stony Brook, Inc.*, 34 AD3d 732, 733 (2nd Dept. 2006); *Birnbaum v. New York Racing Ass'n, Inc.*, 57 AD3d 598, 598-99 (2nd Dept. 2008). In *Yioves v. T.J. Maxx, Inc.*, 29 AD3d 572-73 (2nd Dept. 2006), the Court held that defendant did not make a *prima facie* showing that it neither created the dangerous condition nor had actual or constructive notice of the defect because the defendant failed to introduce evidence that the puddle at issue was not visible and apparent.

The foregoing rule has been applied to accidents in parking lots and it has been held that a defendant's burden on a summary judgment motion cannot be satisfied merely by pointing out gaps in a plaintiff's case. *Totten v. Cumberland Farms, Inc.*, 57 AD3d 653 (2d Dept. 2008); *See also Musachio v. Smithtown Central S.D.*, 68 AD3d 959 (2d Dept. 2009); *cf Cerkowski v. Price Chopper Operating Co.*, 68 AD3d 1382 (3d Dept. 2009).

It is only after the moving defendant has satisfied the threshold burden of proving a *prima facie* case that the Court will examine the sufficiency of the plaintiff's opposition. *Fox v. Kamal Corp.*, 271 AD2d 485 (2nd Dept. 2000). Moreover, "merely pointing out gaps in the plaintiff's case" will not satisfy the defendant's burden of proving that it did not have notice and did not create the condition. *DeFalco v. BJ's Wholesale Club, Inc.*, 38 AD3d 824 (2nd Dept. 2007).

Here, the defendant did not meet its burden of establishing a *prima facie* showing that a dangerous condition did not exist or if so that it did not create the dangerous condition, nor have actual or constructive notice. Defendant's deposition, testimony and affidavits do not provide any information demonstrating that there was no pothole at any time prior to the accident, that there was any inspection or inspection routine or that someone who was familiar with the area on or shortly prior to the date of the fall did not observe any deficiencies..

Accordingly, the Court finds that the defendant, as the movant, has not met its initial burden of establishing that it did not create the condition, or had no notice thereof. Even if defendant can be said to have made a *prima facie* showing of entitlement to relief, plaintiff's submission of an affidavit of a graduate student is sufficient to raise issues of fact

concerning whether and for how long potholes existed in the area for a trier of fact to conclude that defendant had either constructive or actual notice of the condition.

The defendant's motion for summary judgment therefore is denied.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: May 10, 2010

HON. DANIEL PALMIERI
Acting Supreme Court Justice

TO: **Agoglia, Holland & Agoglia, P.C.**
Attorneys for Plaintiff
500 North Broadway, Ste. 237
Jericho, NY 11753

Law Office of Vincent D. McNamara
By: Anthony Marino, Esq.
Attorney for Defendant
Tower Square
1045 Oyster Bay Road Ste. 1
East Norwich, NY 11732