SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN PART 21
Justice

Index Number : 105199/2010
GONZALEZ, DEMETRIO
vs.
NEW YORK CITY TRANSIT
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. 105199/10
MOTION DATE 10/10/13
MOTION SEQ. NO. 003

The following papers, numbered 1 to 10 were read on this motion for summary judgment

Notice of Motion —Affidavit of Service; Affirmation — Exhibits A-N, O [Affidavit], P-R, S [Affidavit], T-W	No(s). 1-2; 3-5
Affirmation in Opposition — Exhibits-A-F —Affidavit of Service	No(s). 6-7
Reply Affirmation — Affidavit of Service	No(s). 8-9
Affidavit of Service — Weather Report	No(s). 10

Upon the foregoing papers, it is ordered that this motion by defendant 4761 Broadway Associates, LLC is decided in accordance with the annexed memorandum decision and order.

HON. MICHAEL D. STALLMAN

FILED

MAR 18 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3/14/14
New York, New York

_____, J.S.C.

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

1. Check one:..... ■ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. Check if appropriate:..... MOTION IS: ☐ GRANTED ☐ DENIED ■ GRANTED IN PART ☐ OTHER
3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

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DEMETRIO GONZALEZ,

Plaintiff,

- against -

NEW YORK CITY TRANSIT AUTHORITY and 4761 BROADWAY ASSOCIATES, LLC,

Defendants.

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Index No. 105199/2010

Decision and Order

HON. MICHAEL D. STALLMAN, J.:

In this action, plaintiff alleges that, on Monday, February 8, 2010, at 10:35 A.M., he slipped and fell while descending the staircase designated as O2A leading into the subway station at Dyckman Street and Broadway in Manhattan.

Defendant 4761 Broadway Associates, LLC, the owner of the premises located at 4761-79 Broadway, moves for summary judgment dismissing the action as against it, or in the alternative, for leave to amend to assert a cross claim for common-law indemnification and contribution against its co-defendant New York City Transit Authority (NYCTA), and for summary judgment in its favor on the newly added cross claim against the NYCTA, based on collateral estoppel. (Motion Seq. No. 003). The New York City Transit Authority separately moves for summary judgment dismissing the action as against it, or in the alternative, for leave to amend to assert a cross claim for contractual indemnification against 4761 Broadway Associates (Motion Seq. No.

004). Plaintiff opposes both motions, and this decision address both motions.

BACKGROUND

Plaintiff testified at his deposition that he entered the Dyckman Street subway station for the A train at the entrance on Broadway, "[k]ind of like in the corner of the northwest-bound side of the entrance." (Fippinger Affirm., Ex J [Gonzalez EBT], at 25.) Plaintiff stated that he descended the stairs, holding onto a rail on his right side with his right hand. (*Id.* at 29.) When asked about the condition of the stairs, plaintiff testified as follows:

> "Yeah, there was kind of, like there was like rock salt, pebbles or slimy, it was kind of wet. It was like debris, some I don't know, leaves or something, but it was slimy and wet, and some – I don't know, something just, just wet and slimy, like the rock pebbles, some white stuff on the floor.
>
> Q. If you could just clarify for me, because my understanding of rock salt would be that it was hard pebbles, so maybe I'm misunderstanding. Are we talking two different things, a hard thing and a wet thing, or was the rock salt wet?
>
> A. No, just – it wasn't rock salt, it's like the white calcium pellets or something.
>
> Q. Okay. And are those wet?
>
> A. Yes.
>
> Q. So those were wet.
>
> A. They were like kind of dissolved or something."

(*Id.* at 30.) According to plaintiff, he had seen the staircase in this condition "Friday or during the course of the weekend." (*Id.* at 31.) Later in the deposition, plaintiff described the debris on the steps as follows: "Like, just the leaves, just garbage, rock salt or calcium pellets, the white little pellets or something, but there wasn't – there was a few, but there was like garbage." (*Id.* at 63-64.)

Plaintiff stated, "as I got to the second or third step before the landing, I slipped, my foot slipped." (*Id.* at 32.) Plaintiff testified that his left foot slipped "kind of like forward, and I lost my grip. Just went forward and to the left." (*Id.*) Plaintiff allegedly fell to the left, and he "wound up at the landing of the bottom of the steps." (*Id.* at 33.) According to plaintiff, he was lying there for about five minutes, tried to call for help, and then he called 911 from his cell phone (*Id.* at 36, 38.) Plaintiff testified that two male police officers arrived, and that he was transported by ambulance to New York-Presbyterian Hospital. (*Id.* at 39, 43.)

Plaintiff was asked a series of questions as to whether a coffee cup or coffee lid, or any other type of garbage, or leaves caused him to slip. (*Id.* at 64.) Plaintiff answered, "I don't recall." Plaintiff was then asked, "Did the slimy substance that you indicated earlier cause you to slip?" (*Id.* at 65.) Plaintiff answered, "Yes." (*Id.*)

The bill of particulars alleges that the subject staircase was designated as "O2A." (Fippinger Affirm., Ex F.) In addition, according to the bill of particulars and

plaintiff's testimony at the statutory hearing before the NYCTA, the incident occurred on February 8, 2010, at approximately 10:35 A.M. (Fippinger Affirm., Exs F, I.) However, plaintiff apparently testified at his deposition that the incident occurred on January 8, 2010 (Gonzalez EBT, at 23), and that January 8th was a Monday.[1] (*Id.* at 31.) According to 4761 Broadway Associates, February 8, 2010 appears on the ambulance call report and emergency room triage records (which were not submitted on these motions). (Fippinger Affirm. ¶ 21.)

DISCUSSION

The standards for summary judgment are well-settled.

> "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. Summary judgment is a drastic remedy, to be granted only where the moving party has tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact, and then only if, upon the moving party's meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action. The moving party's [f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers."

(*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal citations and quotation marks omitted].)

4761 Broadway Associates LLC asserts not only that it did not maintain

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[1] The Court takes judicial notice that January 8, 2010 fell on a Friday, and that February 8, 2010 fell on a Monday.

staircase O2A, but also that the NYCTA, as a common carrier, had a duty to maintain the staircase under *Bingham v New York City Transit Authority* (8 NY3d 176 [2007]) and that the NYCTA did, in fact, maintain the staircase.

In support of its assertion that it did not maintain staircase O2A, and that the NYCTA maintained the subject staircase, 4761 Broadway Associates, LLC relies upon the deposition testimony of Tommy Torres. (Fippinger Affirm., Ex L.) Torres testified that he is employed by SW Management, and that has been a managing agent for the building at 4761 Broadway for 17 years. (*Id.* at 7.) According to Torres, he goes to the buildings three to four times a week. (*Id.*) Torres testified that he took photographs marked as plaintiff's exhibits 1 and 2 at the deposition, which Torres testified depicted two MTA employees changing a light fixture in the staircase on Broadway leading into the Dyckman Street subway station. (*Id.* at 17, 19-20.) 4761 Broadway Associates, LLC also submits video surveillance footage from an investigator depicting a woman wearing an orange vest bearing the NYCTA insignia and logo, who is cleaning and sweeping around staircase O2A. (Fippinger Affirm., Ex S.) Finally, 4761 Broadway Associates, LLC cites the deposition testimony of Willie Johnson, a NYCTA cleaner. (Fippinger Affirm, Ex P [Johnson EBT].)

When asked if the work that he did on the stairways at Dyckman station included work on staircase O2A, Johnson answered, "Well, this staircase in particular

and there's another one as well that my understanding was that it wasn't actually part of my duties as though these staircases, as it is my understanding, didn't belong to the Transit Authority." (Johnson EBT, at 17.) When asked if he performed any maintenance, cleaning or repairs of either the O2A or the other stairway, Johnson stated,

> "Well, I never did repairs but, in fact, as the area directly below the stairwell was my responsibility, in passing through I would just say we have a term scrap, we do a light scrapping as opposed to sweeping the staircase, what I'm responsible for, I would do that because the debris would end up where I was responsible for anyway."

(*Id.* at 18.)

4761 Broadway Associates, LLC also argues that, even if it had a duty to maintain staircase O2A, the presence of calcium chloride on the staircase was open and obvious and not inherently dangerous as a matter of law, citing *Rivers v Villford Realty Corp.* (106 AD3d 492 [1st Dept 2013].) Like 4761 Broadway Associates, LLC, the NYCTA similarly argues that the action should be dismissed in light of *Rivers*.

As a threshold matter, plaintiff fails to demonstrate that the NYCTA's motion for summary judgment was untimely. Plaintiff filed the note of issue on January 31, 2013. According to the affirmation of service, the NYCTA's motion was served on

May 31, 2013, exactly 120 days after the note of issue was filed.[2] Contrary to plaintiff's argument, "[a] motion is 'made' when the notice of motion is served." (*Gazes v Bennett*, 38 AD3d 287, 288 [1st Dept 2007]; *Derouen v Savoy Park Owner, L.L.C.*, 109 AD3d 706 [1st Dept 2013] [court erred in ruling summary judgment motion was untimely because it incorrectly used the date movant filed its motion, not the date movant served it].)

Turning to the merits, the Court of Appeals held in *Bingham v New York City Transit Authority* (8 NY3d 176, *supra*):

> "Courts have long recognized that the duty of care imposed on a common carrier with respect to its passengers requires not only that it keep the transportation vehicle safe, but also that it maintain a safe means of ingress and egress for the use of its passengers. This duty has been applied to those areas owned and maintained by others if 'constantly and notoriously' used by passengers as means of approach.
>
> * * *
>
> Where . . . a stairwell or approach is primarily used as a means of access to and egress from the common carrier, that carrier has a duty to exercise reasonable care to see that such means of approach remain in a safe condition or, where appropriate, to take such precautions or give such warnings as would protect those using such area against unforeseen danger. Whether those means of ingress or egress are used primarily for that purpose would generally be a question of fact."

(*Bingham*, 8 NY3d at 180-181.) Here, the deposition testimony and video surveillance footage is not inconsistent with 4761 Broadway LLC's assertion that the

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[2] This Court's deadline for summary judgment motion is 120 days after the filing of the note of issue.

NYCTA believed it had a duty to maintain staircase O2A.

However, *Bingham* does not stand for the proposition that the duty of care imposed on a carrier relieves the owner of the approach of any duty to maintain the approach in a reasonably safe condition. Thus, the possibility that NYCTA would owe a duty to plaintiff to maintain staircase O2A under *Bingham* would not displace or exclude any duty of care that 4761 Broadway Associates, LLC, as the alleged owner of staircase O2A, would independently owe to plaintiff.

Notwithstanding the above, 4761 Broadway Associates, LLC and the NYCTA have demonstrated that *Rivers v Villford Realty Corp.* (106 AD3d 492, *supra*) applies here. In *Rivers*, the plaintiff slipped on calcium chloride, a substance used to treat and prevent ice conditions, while exiting her apartment building. The Appellate Division, First Department affirmed the lower court's decision, which granted defendants summary judgment dismissing the action. The Appellate Division stated,

> "Plaintiff slipped on calcium chloride, a substance used to treat and prevent ice conditions, while exiting her apartment building. She admitted observing the calcium chloride pellets before her fall. The record shows that the presence of the calcium chloride was open and obvious and not inherently dangerous. Defendant's safety consultant established that using calcium chloride to combat snow and ice conditions was a good, accepted, and safe practice, consistent with industry standards, and that there were no standards that required removing "ice melt" when ice was not present. The expert opined that the calcium chloride would have been soft and pliable and would not have been slippery at the time of the accident, and thus, not hazardous."

(*Rivers*, 106 AD3d at 493.)

Here, plaintiff testified that he had seen the presence of "white calcium pellets or something" on Friday or during the course of the weekend before his alleged slip and fall. (Gonzalez EBT, at 30-31.) 4761 Broadway LLC's expert, Stanley Fein, submits an affidavit stating verbatim what the defendants' safety consultant had stated in *Rivers*, that "The use of calcium chloride to combat snow and ice conditions is a good, accepted and safe practice, consistent with industry standards" and "There are no standards that require removing 'ice melt' when ice is not present." (Fippinger Affirm., Ex O [Fein Aff.] ¶¶ 8-9].) Like the defendants' safety consultant in *Rivers*, Fein opines verbatim that "the calcium chloride pellets would have been soft and pliable and would not have been slippery at the time of plaintiff's accident, and thus, not hazardous." (*Id.* ¶ 10.) Defendants have therefore met their prima facie burden of summary judgment as a matter of law.

Plaintiff's arguments do not raise a triable issue of fact warranting denial of summary judgment. Although Fein's affidavit did not originally contain the weather reports that he claimed were annexed to his affidavit, a weather report for February 2010 was served and submitted pursuant to this Court's interim order dated

September 10, 2013.[3] The weather report bears the certification that it is an official publication of the National Oceanic and Atmospheric Administration (NOAA). As such, the NOAA weather report is self-authenticating and would have been admissible at trial. (CPLR 4528.)

Plaintiff's counsel fails to raise a triable issue of fact as to whether plaintiff slipped upon something else other than calcium chloride pellets. Plaintiff did not testify that he slipped upon leaves or coffee cups. Rather, he stated,

> "Yeah, there was kind of, like there was like rock salt, pebbles or slimy, it was kind of wet. It was like debris, some I don't know, leaves or something, but it was slimy and wet, and some – I don't know, something just, just wet and slimy, like the rock pebbles, some white stuff on the floor."

(*Id.* at 30 [emphasis supplied].) Although plaintiff did not definitively identify the white substance as calcium *chloride* pellets, plaintiff did testify, "it's like the white *calcium pellets* or something." (*Id.* at 30 [emphasis supplied].) When asked if he was using "white calcium pellets" interchangeably with "rock salt and pebbles," plaintiff answered, "Correct." (*Id.* at 65.)

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[3] The NOAA weather report for February 2010 indicates no precipitation on Monday, February 8, 2010, for the hours ending 10 A.M. and 11 A.M., but trace amounts of precipitation for the hours ending 10 P.M., 11 P.M. and 12 A.M.

The weather report also indicates that on Saturday, February 6, 2010 (two days before plaintiff's alleged slip and fall), there were trace amounts of precipitation from the hours ending at 4 A.M. through 8 A.M. and from the hours ending 10 A.M. through 11 A.M. The precipitation on February 6, 2010 was in the form of snow.

Plaintiff's objection to Fein's qualifications–that he is not a chemical expert–goes to the weight and not the admissibility of his opinion. (*Solano v Ronak Medical Care*, 114 AD3d 592 [1st Dept 2014].) The Court rejects plaintiff's argument that Fein's affidavit was inadequate to establish that ice melting pellets were not inherently dangerous. Fein's affidavit mirrored, verbatim, the opinion of the defendants' safety consultant in *Rivers*.

Plaintiff's remaining arguments are without merit. 4761 Broadway Associates, LLC and the NYCTA were not required to demonstrate that they did not have actual or constructive notice of the allegedly dangerous condition on staircase O2A to meet their prima facie burden for summary judgment. Summary judgment was sought not on the ground of lack of notice, but on the ground that the condition itself–calcium chloride pellets on a staircase–was open and obvious and not inherently dangerous as a matter of law. Finally, plaintiff failed to show that res ipsa loquitur applied to the circumstances of plaintiff's alleged slip and fall (*Morejon v Rais Constr. Co.*, 7 NY3d 203, 209 [2006]), thereby warranting denial of summary judgment.

Therefore, 4761 Broadway LLC and the NYCTA are granted summary judgment dismissing the action.

In light of the Court's decision granting defendants summary judgment, the Court does not reach the alternative relief sought in defendants' motions, i.e., leave

to amend to assert cross claims against each another and summary judgment in 4761 Broadway LLC's favor against the NYCTA on the former's cross claim.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion by defendant 4761 Broadway Associates, LLC (Motion Seq. No. 003) and the motion by defendant New York City Transit Authority (Motion Seq. No. 004) are both granted in part to the extent that both defendants are granted summary judgment dismissing the action, and the complaint is dismissed with costs and disbursements to both defendants as taxed by the Clerk upon the submission of an appropriate bill of costs, and the motions are otherwise denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: March 14, 2014
New York, New York

ENTER:

J.S.C.