SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: PAUL WOOTEN J.S.C. PART 7

Justice

ARGENTINA CRISOSTOMO,

Plaintiff,

INDEX NO. 150218/11

- against -

MOTION SEQ. NO. 004

THE CITY OF NEW YORK and NEW YORK CITY HOUSING AUTHORITY,

Defendants.

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits— Exhibits _____ No(s). _____

Replying Affidavits — Exhibits _____ No(s). _____

Cross-Motion: ☐ Yes ☐ No

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

This is a personal injury action commenced by Argentina Crisostomo (plaintiff) on June 29, 2011 to recover damages for injuries allegedly sustained on January 31, 2011 at approximately 3:00 p.m. when plaintiff slipped and fell on a patch of ice on the sidewalk abutting the property at 1539 Lexington Avenue, New York, New York. Now before the Court is a motion by the New York City Housing Authority (NYCHA), pursuant to CPLR 3212, for summary judgment dismissing the complaint. Discovery in this matter is complete and the Note of Issue has been filed.

DISCUSSION

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Meridian Management Corp. v*

Cristi Cleaning Service Corp., 70 AD3d 508, 510 [1st Dept 2010], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]; CPLR 3212[b]).

It is well established that a "defendant who moves for summary judgment in a slip and fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence" (*Smith v Costco*

Wholesale Corp., 50 AD3d 499, 500 [1st Dept 2008]; *Tkach v Golub Corp.*, 265 AD2d 632, 632 [3d Dept 1999]). In order to constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length or time prior to the accident to allow the defense to discover and remedy it (*see Perez v Bronx Park South Assoc.*, 285 AD2d 402, 403 [1st Dept 2001]). "Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof" (*Smith,* 50 AD3d at 500). It is well settled, however, that "rank speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material face" (*Castore v Tutto Bene Restaurant Inc.*, 77 AD3d 599, 599 [1st Dept 2010]).

The Court finds that NYCHA has failed to meet its *prima facie* showing of entitlement to summary judgment as a matter of law, of demonstrating that it neither had actual or constructive notice of any hazardous conditions prior to the plaintiff's accident (*see Deluna-Cole v Tonali, Inc.*, 303 AD2d 186 [1st Dept 2003]). The evidence submitted by NYCHA fails to demonstrate that the defendants lacked constructive notice (*see Baptiste v 1626 Meat Corp.*, 45 AD3d 259 [1st Dept 2007]). Furthermore, NYCHA fails to submit an affidavit or testimony based on personal knowledge regarding the last time the grounds were checked prior to the accident for snow and ice, the actions of the NYCHA employees on the date of the accident (*see Baptiste*, 45 AD3d at 259; *Porco v Marshalls Depart. Stores er al.*, 30 AD3d 284 [1st Dept 2006]), or whether any snow clearing work was done on the date of the accident. NYCHA's reliance on the EBT testimony and affidavit of Allen Scott, the Supervisor of Caretakers, in support of their motion is misplaced as it does not provide "evidence regarding any particularized or specific inspection or cleaning procedure in the area of plaintiff's fall on the date in question" (*Schiano v Mijul, Inc.*, 79 AD3d 726, 727 [2d Dept 2010]). Accordingly, NYCHA's motion for summary judgment dismissing the complaint is denied.

CONCLUSION

For these reasons and upon the foregoing papers, it is,

ORDERED that NYCHA'S motion, pursuant to CPLR 3212, seeking summary judgment dismissing of the complaint is denied; and it is further,

ORDERED that counsel for plaintiff Argentina Crisostomo is directed to serve a copy of this Order with Notice of Entry upon NYCHA.

This constitutes the Decision and Order of the Court.

Dated: 9-18-14

PAUL WOOTEN J.S.C.

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