At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 10th day of May, 2019.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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DWAYNE HORSLEY,

Plaintiff,

- against -

548 LEFFERTS, LLC DBA FAYE'S LAUNDRY CENTER,

Defendants.

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Index No.: 510315/2016

DECISION AND ORDER

Motions Sequence #2

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

	Papers Numbered
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	1/2,
Opposing Affidavits (Affirmations)	3,
Reply Affidavits (Affirmations)	4,

Upon the foregoing papers, and after oral argument, the Court finds as follows:

The instant action results from an incident that occurred on February 3, 2016. The Plaintiff Dwayne Horsley (hereinafter "the Plaintiff") alleges in his complaint that he was injured while using the sink in the restroom of the premises known as 548 Lefferts Avenue, Brooklyn, NY (hereinafter "the Premises"). The Plaintiff also alleges in his complaint that his injuries were the result of the negligence of Defendant 548 Lefferts, LLC d/b/a Faye's Laundry Center (hereinafter "Defendant Lefferts"). In the Plaintiff's Verified Bill of Particulars, the Plaintiff states that "[s]aid sink did fall while the Plaintiff was using it and did break and the Plaintiff did fall upon it sustaining lacerations."

Defendant Lefferts now moves (motion sequence #2) for an order restoring the prior application made pursuant to CPLR 3212, and upon restoration, granting summary judgment and dismissing the complaint of the Plaintiff. Defendant Lefferts contends that the motion should be restored as the parties had stipulated to an adjournment, filed that stipulation, but failed to confirm the Court's receipt of that stipulation and inquire whether an appearance was required. Defendant Lefferts contends that there would be no prejudice to the Plaintiff in restoring the motion and that it has proffered a reasonable excuse for its failure to appear. As to the application made pursuant to CPLR 3212, Defendant Lefferts contends that summary judgment should be granted because there is no evidence that the Defendant Lefferts caused the alleged defective condition or that it had actual or constructive notice of the same. Also, Defendant Lefferts contends that the doctrine of *res ipsa loquitor* does not apply here given that the sink at issue was located in a restroom that customers had access to during the course of the day.

The Plaintiff opposes the motion and argues that it should be denied. First, the Plaintiff contends that the application to restore should be denied as the prior motion was "marked off" six months prior to the date of the instant motion to restore and without any explanation for the delay.[1] As to the underlying application for summary judgment, the Plaintiff argues in his Affirmation in Opposition (Paragraph 10) that the application should be denied as there is a genuine issue of material fact as to whether Defendant Lefferts was negligent in the "'constructing, designing, repairing and maintaining the bathroom sink of said premises' warranting denial of the instant application."

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[1] As an initial matter, the Court grants Defendant Lefferts' application to restore the motion and to hear the underlying application on the merits. Defendant Lefferts provided a reasonable excuse regarding its failure to appear and a copy of the Stipulation between the parties. The Plaintiff was unable to show how he would be prejudiced by permitting the restoration sought. *See Levine v. Agus*, 28 A.D.3d 719, 720, 814 N.Y.S.2d 215, 216 [2nd Dept, 2006].

"Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff,* 14 AD3d 493 [2nd Dept, 2005], *citing Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; *see Menzel v. Plotnick,* 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

Turning to the merits of Defendant Lefferts' application for summary judgment, the Court finds that Defendant Lefferts has not provided sufficient evidence to meet its *prima facie* burden. This is because Defendant Lefferts fails to provide any evidence regarding when the accident site was last cleaned or inspected prior to the Plaintiff's injury, sufficient to establish that they lacked constructive notice of the alleged defective condition. See *James v. Orion Condo-350 W. 42nd St., LLC*, 138 A.D.3d 927, 30 N.Y.S.3d 216, 217 [2nd Dept, 2016], *quoting Mehta v. Stop & Shop*

Supermarket Co., LLC, 129 A.D.3d 1037, 12 N.Y.S.3d 269 [2nd Dept, 2015]. In support of its motion Defendant Lefferts relies on the deposition testimony of the Plaintiff, and the deposition testimony and affidavit of David Koren, store manager for Defendant Lefferts. When asked how long after he leaned on the sink did it fall to the floor, the Plaintiff testified (Defendant Lefferts Motion, Exhibit D, Page 22) that "[i]t had to be two seconds." When asked what part of his body was touching the sink at the time, he testified (Page 22) "[m]y forearms, leaning on the sink while I was scrubbing." When asked again to describe the incident the Plaintiff testified that "[w]ell, the sink was on, and the sink bent and went down quickly."

When Mr. Koren was asked whether the sink had been repaired since it had been installed, he answered (Page 18) that "[t]he sink wasn't repaired, no". When Mr. Koren was asked whether the sink was an ADA compliant sink he answered (Page 19) "[y]es." In his affidavit, Mr. Koren stated that "[a]t no time prior to the date of the subject incident was I, or any employees of the laundromat, ever aware of any problems, complaints or prior accidents involving the sink in the customer restroom." Further, Mr. Koren stated that "at no time prior to the time of the subject incident did I or anyone on behalf of 548 LEFFERTS LLC DBA FAYE'S LAUNDRY CENTER ever perform any type of repair to the sink in question, nor was any repair needed." Such a statement does provide the Court with some indication that Defendant Lefferts did not cause or create the condition at issue, and that it did not have actual notice of a defect as a result of prior accidents or complaints. However, Defendant Lefferts failed to provide any evidence as to the condition of the bathroom sink at issue prior to the Plaintiff's accident based upon some routine inspection, and as a result Defendant Lefferts has failed to meet its *prima facie* burden. *See Taub v. JMDH Real Estate of Garden City Warehouse, LLC*, 150 A.D.3d 1301, 1303, 56 N.Y.S.3d 220, 222 [2nd Dept, 2017]; *McGough v. Cryan, Inc.*, 111 A.D.3d 900, 901, 976 N.Y.S.2d 135, 137 [2nd

Dept, 2013]. In so far as the Defendant failed to make a *prima facie* showing, we need not address the sufficiency of the plaintiff's opposition papers. *See Schacker v. Cty. of Orange*, 33 A.D.3d 903, 904, 822 N.Y.S.2d 777, 778 [2nd Dept, 2006]. Accordingly, the motion by Defendant Lefferts is denied.

Based on the foregoing, it is hereby ORDERED as follows:

The motion by the Defendant Lefferts (motion sequence #2) is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino
J.S.C.