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

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RICHARD GONTAREK,

Plaintiff,

-against-

THE NEW YORK CITY TRANSIT AUTHORITY, and THE METROPOLITAN TRANSIT AUTHORITY,

Defendant.

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Index No.: 158222/2013

Mot. Seq. 6

DECISION AND ORDER

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

Papers	Numbered	NYCEF #
Defendant's Motion/ Affirmations/Memo of Law	1	131-141
Plaintiff's Opposition and Cross-Motion	2	146-152
Defendant's Reply and Opposition to Cross-Motion	3	153-158

LISA A. SOKOLOFF, J.

This case involves an unreported trip and fall on March 12, 2013 at approximately 6:30 p.m. in which Plaintiff's foot allegedly became trapped in an area of cracked tile on the landing above the S-11 stairway while entering the 59th Street and Lexington Avenue subway station at the northeast corner of 60th Street and 3rd Avenue in Manhattan.

Defendants New York City Transit Authority (Transit) and Metropolitan Transportation Authority (MTA) moved for summary judgment pursuant to CPLR § 3212 seeking dismissal of Plaintiff's claim against MTA as an improper party and dismissing Plaintiff's claim in its entirety because Defendants did not have notice of the allegedly defective condition. Plaintiff opposed and cross-moved that Defendants' summary judgment be denied as untimely, and for sanctions for a frivolous motion.

At oral argument on February 21, 2019, the portion of Defendants' motion seeking to dismiss the complaint against MTA was granted on consent of both parties and Plaintiff's cross-motion seeking sanctions was withdrawn.

Turning first to the timeliness issue, pursuant to CPLR § 3212(a), a summary judgment motion, to be timely, must be made within 120 days of the filing of the note of issue unless the court has set a shorter deadline of not less than 30 days. Plaintiff argues that since a note of issue was filed in this case on March 23, 2016, the within motion, filed on August 30, 2018, is well beyond the permissible time frame.

However, Plaintiff misstates the procedural history of this case by failing to mention that the March 23, 2016 note of issue was vacated by the TAP Judge Judith McMahon "in the interests of justice" by order dated February 26, 2018 due to Defendant's failure to produce discovery. By order dated April 24, 2018, Plaintiff was instructed to file a new note of issue by May 11, 2018 and did in fact file a new note of issue on May 10, 2019.

While Plaintiff is correct that the 120-day limit imposed by CPLR § 3212(a) applies to a case that has been stricken from the trial calendar where the 120-day period had expired before the case was struck (*Valentin v MTA/New York City Transit Authority*, 108 AD3d 421 [1st Dept 2013]), and where a case is removed and then restored to the trial calendar without any reference to a new deadline for dispositive motions (*Kampf v Bank of New York*, 259 AD2d 439 [1st Dept 1999]), where, as here, a note of issue is vacated and a party is ordered to file a new note of issue, with a new deadline for dispositive motions, the service and filing of the second note of issue in the case constitutes a new note of issue, restarting the 120-day period within which to move for summary judgment (*Id.* at 440; *Slane v Kalache*, 7 Misc3d 717 (Sup Ct, Bronx Co 2005]). Therefore, the within motion was timely filed.

Regarding the condition of the subway landing, Defendant Transit claims that it did not have actual or constructive notice of the defective condition that allegedly caused Plaintiff's injury. Defendant's structural maintenance employee, Vincent Moschello, testified that his station maintenance department receives calls daily from station supervisors in the field and the information is collected in a service call report. Repairs performed at a station, corresponding to the service calls, are collected in a production report. Mr. Moschello testified that all service calls and repairs regarding the middle landing of the S-11 stairway would be reflected in the service call and production logs. In in response to service calls, repairs were made to the S-11 staircase or landing on July 11, 2011, September 4, 2012 and October 7, 2012, after which no further service calls were logged.

Plaintiff claims that Defendant's motion should fail for two reasons. First, because Mr. Moschello did not demonstrate that he possessed personal knowledge of the facts set forth in Transit's service records. Second, because Defendant failed to show when the subject stairway and landing were last inspected prior to the date of Plaintiff's accident. Plaintiff further alleges that Defendant in fact had actual knowledge of the defect that caused Plaintiff's accident because, as evidenced in the maintenance logs submitted with Defendant's motion papers, the missing, cracked and/or loose tiles were a recurrent condition with the last of successive repairs as recently as five months prior to Plaintiff's accident.

Summary judgment will be granted if it is clear that no triable issue of fact exists (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].) The burden is on the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law (*Id.*). Failure to make such showing requires denial of the motion, regardless of the

sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of a triable issue of fact (*Id.*) Mere conclusions, unsubstantiated allegations or expressions of hope are insufficient to defeat a summary judgment motion (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In deciding a summary judgment motion, a court must view the evidence in the light most favorable to the non-moving party, here Plaintiff, affording it the benefit of every favorable inference which can be drawn from the evidence (*Hasley v Abels*, 84 AD3d 480 (1st Dept 2011]).

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 (*Rosario v Prana Nine Properties, LLC*, 143 AD3d 409 [1st Dept 2016]). Transit argues that Plaintiff failed to show that Transit had actual or constructive notice of the alleged hazardous condition. However, it is not Plaintiff's burden in opposing the motion to establish that Defendant had actual or constructive notice of the hazardous condition. Rather, it is the defendants' burden to establish the lack of notice as a matter of law (*Giuffrida v Metro North Commuter R. Co.*, 279 AD2d 403, 404 [1st Dept 2001]).

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 to discover and remedy it (*Hill v Lambert Houses Redevelopment Co.*, 105 AD3d 642 [1st Dept 2013] citing *Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]). To meet its burden that it lacked constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned and inspected relative to the time when the

plaintiff fell (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419 [1st Dept 2011] [summary judgment denied where employee who testified on bank's behalf "was not familiar with the Bank's sidewalk maintenance and did not offer any testimony concerning maintenance of the sidewalk prior to and contemporaneous with the incident"]; *Sabalza v Salgado*, 85 AD3d 436 [1st Dept 2011]).

Here, while Defendant has purported to include maintenance and repair records for the subject subway station, the records are silent as to when the stairway was last inspected or what its condition was on the date of the inspection. The deposition testimony of Mr. Moschello is insufficient to demonstrate that Defendant lacked constructive notice of the cracked tile because he lacked personal knowledge as to when the stairwell and landing were last inspected or their condition before the accident (3212[b]; *Vargas v Cadwalader Wickersham & Taft, LLP*, 147 AD3d 551 [1st Dept 2017]; *Ron v New York City Housing Authority*, 262 AD2d 76 [1st Dept 1999]).

The First Department has recognized that a plaintiff's burden of establishing constructive notice of a particular condition which caused a fall may be met by evidence of an ongoing and recurring dangerous condition in the area of the slip and fall which was routinely left unaddressed (*Bido v 876-882 Realty, LLC*, 41 AD3d 311 [1st Dept 2007 [plaintiff's testimony that accumulated refuse on stairwell was a daily problem as a result of tenants taking their garbage bags downstairs for disposal]; *Irizarry v 15 Mosholu Four, LLC*, 24 AD3d 373 [1st Dept 2005]; *O'Connor-Miele v Barhite & Holzinger, Inc.*, 234 AD2d 106 [1st Dept 1996] [Plaintiff offered evidence, supported by affidavit of neighbor, that fall in stairwell of Defendant's building caused by accumulation of debris, particularly of soap powder which was frequently present due to spillage by tenants moving from floor to floor to find an available washing machine]).

Plaintiff also submits four photographs which he attests accurately depict the defective conditions which existed at the time, date and location of his accident. The photos reflect a visible and apparent condition that could only have developed over a period of time sufficient for defendants to both discover and remedy said condition.

Although Defendant here has demonstrated that service calls of loose, broken or cracked tiles were promptly addressed, given the condition of the worn tiles on the S-11 stairway landing, and the five-month period between the last reported tile defect and Plaintiff's accident, Plaintiff raises a triable issue of fact whether the defective condition was visible and apparent for a sufficient period of time prior to the accident to permit Defendant to discover it and take corrective action (*Irizarry v 15 Mosholu Four, LLC*, 24 AD3d 373, 374 [1st Dept 2005]). The court therefore finds that Defendant failed to demonstrate that it did not have actual or constructive notice of the defective condition that caused Plaintiff's fall.

Accordingly, it is

ORDERED, that Defendant Transit's motion for summary judgment is denied; and

ORDERED, that Plaintiff's action against MTA, only, is dismissed with prejudice.

Any requested relief not expressly addressed has nonetheless been considered and is expressly rejected.

Dated: April 15, 2019
New York, New York

ENTER:

Lisa A. Sokoloff, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED	[X]	DENIED	[X]	NON-FINAL DISPOSITION	
	[ ]	GRANTED			[ ]	GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ]	SETTLE ORDER			[ ]	SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN			[ ]	FIDUCIARY APPOINTMENT	[ ] REFERENCE