SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK **PART** IAS MOTION 52EFM

Justice

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WILLIAM FRIBERG,

Plaintiff,

- v -

THE CITY OF NEW YORK, LESAGA LLC

Defendant.

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INDEX NO. 159850/2014

MOTION DATE 08/14/2019, 08/14/2019

MOTION SEQ. NO. 003 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 101, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 125, 127, 128

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 102, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 126, 129

were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff brings this action as a result of injuries allegedly sustained on July 2, 2014. Plaintiff alleges that he slipped and fell as a result of "worn or slippery stairs" in front of Manhattan South Task Force located at 524 West 42nd Street, in the County, City and State of New York. The City now moves for summary judgment on the grounds that the stairs were not defective, there was a storm in progress and that plaintiff was retired at the time of the incident thus not subject to the protections of Labor Law Section 27-a(3)and GML Section 250-e.[1] Co-defendant, Lesaga LLC, also moves for summary judgment on the grounds that there was not

[1] Plaintiff does not oppose this portion of the City's motion, as such the portion of the City's motion that seeks dismissal of all causes of action pursuant to Labor Law and GML 250-e, are granted without opposition.

notice of a defective or dangerous condition. For the reasons set forth below, both motions for summary judgment are granted and the complaint is dismissed in its entirety.[2]

Legal Standard

It is well settled that absent proof that a defendant actually created the dangerous condition or, had actual or constructive notice of the same, there can be no liability on a claim for premises liability (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]; *Bogart v F.W. Woolworth Company*, 24 NY2d 936, 937, [1969]; *Armstrong v Ogden Allied Facility Management Corporation*, 281 AD2d 317 [1st Dept 2001]; *Wasserstrom v New York City Transit Authority*, 267 AD2d 36, 37 [1st Dept 1999]; *Allen v Pearson Publishing*, 256 AD2d 528, 529 [2d Dept 1998]; *Kraemer v K-Mart Corporation*, 226 AD2d 590 [2d Dept 1996]).

A defendant is charged with having constructive notice of a defective condition when the condition is visible, apparent, and exists for a sufficient length of time prior to the happening of an accident to permit the defendant to discover and remedy the same (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). The notice required must be more than general notice of any defective condition (*id.* at 838; *Piacquadio* at 969). Instead, notice of the specific condition alleged at the specific location alleged is required and, thus, a general awareness that a dangerous condition may have existed, is insufficient to constitute notice of the particular condition alleged to have caused an accident (*Piacquadio* at 969). The absence of evidence demonstrating how long a condition existed prior to a plaintiff's accident constitutes a failure to establish the existence of constructive notice as a matter of law (*Anderson v Central Valley Realty Co.*, 300 AD2d 422, 423 [2d Dept. 2002]. *lv denied* 99 NY2d 509 [2008]; *McDuffie v Fleet Fin. Group*, 269 AD2d 575 [2000]). Alternatively, a defendant may be charged with constructive

[2] It should be noted that this Court does not reach the issues of indemnification and other provisions of the lease between the City and Lesaga.

notice of a hazardous condition if it is proven that the condition is one that recurs and about which the defendant has actual notice (*Chianese v Meier*, 98 NY2d 270, 278 [2002]; *Uhlich v Canada Dry Bottling Co. Of NY*, 305 AD2d 107 [2003]). If such facts are proven, the defendant can then be charged with constructive notice of the condition's recurrence (*id.; Anderson* at 422).

Generally, on a motion for summary judgment a defendant establishes prima facie entitlement to summary judgment when the evidence establishes the absence of actual or constructive notice (*Hughes v Carrols Corporation*, 248 AD2d 923, 924 [3d Dept 1998]; *Edwards v Wal-Mart Stores, Inc.*, 243 AD2d 803 [3d Dept 1997]; *Richardson-Dorn v. Golub Corporation*, 252 AD2d 790 [3d Dept 1998]). If defendant meets its burden it is then incumbent on plaintiff to tender evidence indicating that defendant had actual or constructive notice (*Strowman v Great Atlantic and Pacific Tea Company, Inc.*, 252 AD2d 384, 385 [1st Dept 1998]).

In addition to the foregoing, a defendant seeking summary judgment on grounds that it had no constructive notice of a dangerous condition, specifically a transitory one, must produce "evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell" (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421[1st Dept 2011]).

City's Motion for Summary Judgment

In support of its motion for summary judgment the City argues that wet exterior steps caused by a rainfall do not constitute a dangerous condition as a matter of law and the City had no duty to continuously take precautionary measures outside the building when rain continues to fall. Further the City argues that it did not have actual or constructive notice of the allegedly worn out steps. The City did not receive any complaints pertaining to the alleged condition and that such condition existed for a sufficient length of time prior to the incident.

To establish lack of notice of any defect on the stairs the City produced Officer Anthony Lendemann for an examination before trial. Officer Lindeman's job responsibilities include, in relevant part, managing contracts for the New York City Police Department properties. The City provided a Work Order Summary for the subject location, Officer Ledemann, who searched for the records, testified that there was no Work Order pertaining to the front entrance steps outside the Building.

The City also produced Syreeta Cotton, custodial assistant employed by NYPD since 1999 at the subject location. Ms. Cotton's job responsibilities include sweeping, mopping, and any cleaning duties in the Building. Ms. Cotton testified that she had not received any complaint pertaining to the alleged conditions of the steps outside the Building prior to the incident date.

In opposition to the City's motion, plaintiff alleges that the City has not met its initial burden of showing the absence of constructive notice of the defects at issue because it has not introduced any evidence regarding when the area where the plaintiff fell was last inspected prior to his fall. Further, plaintiff contends that testimony, with respect to the issue of notice, merely raises an issue of fact regarding the credibility of the witness which cannot be resolved as a matter of law. However, in support of this argument plaintiff cites to cases where solely the testimony of witnesses is being offered to establish a lack of notice, that is not the case here.

It is well established that on a motion for summary judgment the defendant's burden on the issue of notice "is met if he demonstrates the absence of a material issue of fact on the question" (*Strowman* 252 AD2d 384, 385). The City conducted a search for documents regarding complaints and maintenance of the subject stairs, this search did not yield any relevant records.

Plaintiff's cite an abundance of case law with facts that are distinguishable to the instant action. Those cases involve notice of foreign substances in supermarkets, not precipitation on exterior stairs of a building. For example, in *Porco v Marshalls Department Stores*, 30 AD3d 284 [1st Dept 2006], cited by the plaintiff, the plaintiff in the case was injured when she slipped and fell on a clear liquid substance in an aisle of the defendants' store. There the witnesses were unable to testify to a specific schedule or routine with respect to its inspections of the store to alleviate the question of notice. Here, it is undisputed that ongoing precipitation was the cause of the wet condition on the stairs were plaintiff fell.

Plaintiff's contention that City's failure to provide evidence of when the stairs were last inspected or cleaned is sufficient to deny the City's motion is without merit. Whether the City inspected or cleaned the stairs immediately prior to plaintiff's accident is not dispositive. Unlike the cases cited by plaintiff, the issue here is not a foreign substance or a slip and fall on debris, it was raining at the time plaintiff slipped and fell, and there is no dispute that is where the liquid that caused the stairs to become slippery is from. There is no amount of inspection or cleaning that would have prevented the exterior stairs of the subject location from being wet.

The Court is not persuaded by plaintiff's allegation that the City did not establish lack of notice with respect to a structural defect in the stairs. Plaintiff testified that as he stepped onto the second step, he slipped and fell. Following the fall, Plaintiff testified that he noticed that he had stepped into a puddle of water on the second step, and he did not observe the condition before he fell. This is especially true because plaintiff himself testifies that he stepped into a puddle, during a rainstorm, and that caused his fall.

Lesaga's Motion for Summary Judgment

In support of its motion Lesaga argues that the stairs in question are not defective and alternatively Lesaga did not have notice of a defective condition on the stairs. Lesage also argues, that contrary to plaintiff's assertions, handrails were not required to be installed on the stairs.

Lesaga produced Mr. Scott Alchech for an examination before trial. Mr. Alchech testified that Lesage maintained responsibility for the sidewalk which includes the three exterior stairs abutting the building, the location of the subject accident. Lesage argues that the statutes plaintiff relies upon are not applicable to the stairs in question.

Plaintiff opposes Lesaga's motion on the same basis he opposes the City's motion. For the reasons stated above, the Court rejects those arguments. In opposition plaintiff asserts that the statutes are in fact applicable to the location of the incident. Plaintiff explains further that those statutes require the stairs to be reasonably safe. However, plaintiff does not cite one case where allegedly worn stairs are unsafe, dangerous or defective as a matter of law.

Plaintiff attempts to place an obligation on Lesaga that is not required by law, installing handrails.[3] During oral argument, plaintiff's counsel stated that his expert was able to tell just by looking at the stairs that there had been hand rails there at some point. This speculative statement is unsupported by any document in the record.

In *Montero v S. Blvd. LP*, when an employee entered the premises, where her employer was a tenant of the defendant's property, she was caused to fall due to a crack in the step. (73 AD3d 568 [1st Dept 2010].) The plaintiff neither testified that she had noticed the alleged defect

[3] It must be noted that while the expert report of Thomas R. Turkel cites the 1938 and 2008 New York City Building Codes, it does not say that those building codes were applicable to the building in question. Moreover, Mr. Turkel attaches the original Certificate of Occupancy from the building from 1917.

in the step, nor was aware of any witness who had, and the court affirmed the lower court's decision that the circumstances create no trial issue of fact as to whether any hazardous condition existed sufficient to impose liability, or "whether defendant had constructive notice of any visible or apparent defect existing for a sufficient length of time prior to the accident to permit its discovery." *id.* at 568 (*citing Gordon v Am. Museum of Natural History*, 67 NY2d 836 [1986]).

The City cites *Reyes v 83 Post Ave. Assoc., L.L.C.,* 168 AD3d 607 [1st Dept 2019], where the court granted the summary judgment for the defendant where defendant's witness testified that there had been no complaints about the alleged defective steps prior to plaintiff's incident, no repairs had been done to the steps, and that no building code violations had been issued regarding the steps. *Reyes* is analogous to the instant action. *See also Richards v Realty Corp.*, 114 AD3d 475 [1st Dept 2014]; *Savio v Rose Flower Chinese Rest., Inc.*, 103 AD3d 575 [1st Dept 2013] (granting defendant's summary judgment's motion since defendant established lack of prior complaints or injuries relating to step and lack of any claimed structural defect).

Moreover, plaintiff fails to raise a triable issue of fact where plaintiff had never previously noticed the alleged condition and there is no evidentiary support that the alleged condition existed for a sufficient length of time prior to the incident to permit its discovery and repair.

Based on the foregoing, defendants have established their entitlement to judgment as a matter of law. Accordingly, it is hereby

ORDERED, that the motions for summary judgment by the City and Lesaga are granted in their entirety and the complaint and all cross-claims are dismissed; and it is further

ORDERED, that the Clerk enter judgment accordingly.

8/26/2019
DATE

LYLE E. FRANK, J.S.C.

HON. LYLE E. FRANK J.S.C.

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