SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

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WALTER COX,

Plaintiff,

-against-

NEW YORK CITY TRANSIT AUTHORITY,

Defendant.

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DECISION & ORDER

Index No. 158125/2012

Motion Sequence No. 1

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

Papers	Numbered	NYSCEF #
Defendant 's Motion/ Affirmations/Memo of Law	1	16-29
Plaintiff's Affirmation in Opposition	2	38-39
Defendant's Reply Affirmation	3	40-41

HON. LISA A. SOKOLOFF, J.S.C.:

This is an action for personal injuries allegedly sustained by plaintiff Walter Cox on July 13, 2012, when he slipped and fell due to debris on a stairway located at the Second Avenue subway station in New York City. Defendant, New York City Transit Authority, moves, pursuant to CPLR 3211 and 3212, for an order granting it summary judgment dismissing the complaint.

BACKGROUND

Plaintiff testified that he was walking down the steps at the entrance of the Second Avenue subway station located at Houston Street and First Avenue (premises) at approximately 3:00 p.m. or 4:00 p.m. when the alleged incident occurred (plaintiff's deposition, New York St Cts Elec Filing System [NYSCEF] Doc No. 27 at 22, 33). Plaintiff stepped on a water bottle, which rolled, causing him to lose his balance and fall down the steps (*id.*). He stated that, in addition to the plastic water bottle, there was also a significant amount of debris on the steps (*id.* at 41). He further testified that he did not

see the bottle that caused him to slip prior to his accident, nor had he seen bottles in the vicinity when he visited the same location a week or two prior to the accident (*id.* at 36, 38).

Luis Aviles (Aviles) testified that he is employed by NYCTA as a cleaner (defendant's deposition, NYSCEF Doc No. 28 at 6). Aviles stated that he was unsure what time period he was assigned to work at the premises (*id.* at 6-10). His schedule was often varied and he was assigned multiple subway stations to clean at one time (*id.*). Aviles further testified that, as a cleaner, his duties included sweeping and taking out the garbage according to a schedule that cleaners follow (*id.* at 10). He recalled that he was probably at the premises once a week for approximately two hours (*id.* at 9, 30).

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once the movant has made a prima facie showing, the burden shifts to the opposing party to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Casper v Cushman & Wakefield*, 74 AD3d 669, 669 [1st Dept 2010], *lv dismissed* 16 NY3d 766 [2011] [internal quotation marks and citation omitted]). If an issue of fact exists, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8, 12 [1960], *rearg denied* 8 NY3d 934 [1960]).

In premises liability actions, a defendant moving for summary judgement 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" for a sufficient length of time to discover and

remedy it (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008]). "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 defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 838 [1986] [citations omitted). When a defendant seeks summary judgment on grounds that it had no constructive notice of a dangerous condition, specifically a transitory one, it 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]).

Here, defendant has failed to submit sufficient evidentiary proof to satisfy its initial burden that it did not have constructive notice of the alleged dangerous condition. While defendant asserts that the premises was cleaned shortly before plaintiff's accident, the testimony of Aviles is inconclusive (defendant's affirmation in support, NYSCEF Doc No. 17 ¶ 13). Aviles testified as to a general routine that was admittedly varied, and while defendant's counsel argues that a fixed schedule of cleaning was followed, Aviles' testimony does not support this contention (NYSCEF Doc No. 28 at 10, 21, 22). Defendant's unauthenticated submission of a general cleaning schedule is insufficient (*see Oldham v City of New York*, 155 AD3d 477, 478 [1st Dept 2017]). Furthermore, Aviles' testimony has not established that he was present on the date of plaintiff's accident, since he only worked at the station once a week, for approximately two hours (*see Griffin v PMV Realty, LLC,* 181 AD3d 912, 913 [2d Dept 2020] ["While the affidavit of the building superintendent referenced general inspection and cleaning practices, the defendant failed to submit evidence regarding specific cleaning or inspection of the area in question relative to the time when the plaintiff's accident occurred"]).

Accordingly, defendant's motion for summary judgment is denied regardless of the sufficiency of the opposing papers (*Winegrad*, 64 NY2d at 853).

CONCLUSION

Based upon the foregoing, it is

ORDERED that defendant New York City Transit Authority's motion for summary judgment (motion sequence number 1) is denied in its entirety.

Dated: May 28, 2020

ENTER:

Hon. Lisa A. Sokoloff A.J.S.C.

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