At an I.A.S. Part 95 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York on the 19th day of October 2020.

PRESENT:
Honorable Reginald A. Boddie
Justice, Supreme Court

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BRITTANIA NICHOLSON,

Plaintiff,

Index No. 524688/2017
Cal. No. 19 MS 1

-against-

DECISION AND ORDER

LANDSBERG REALTY LLC and NORMAN LANDSBERG,

Defendants.

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

Papers	Numbered
MS 1	Doc # 19-29

Upon the foregoing cited papers, defendants' motion for summary judgment, pursuant to CPLR 3212, is decided as follows:

Plaintiff commenced this action to recover for personal injuries she allegedly sustained on September 11, 2017, when she slipped and fell on a wet condition on the exterior concrete steps at her apartment building at 225 East 25th Street, Brooklyn, New York. Plaintiff alleged she observed the wet condition when she left her apartment at 7:00 PM, and slipped and fell on it when she returned around 11:00 PM.

Defendants owned and managed the building and employed Rene Rivera as a resident superintendent to routinely clean the premises. Defendants moved for summary judgment, pursuant to CPLR 3212, on the grounds that plaintiff was unable to identity what caused her to fall, they lacked notice of and did not create the alleged condition. Plaintiff opposed.

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). A party moving for summary judgment must make a prima facie showing of entitlement as a matter of law sufficient to demonstrate the absence of any material issues of fact, but once a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require trial of the action (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853; *Zuckerman*, 49 NY2d at 562).

A defendant who moves for summary judgment in a slip and fall case has the initial burden of making a prima facie showing that it did not create the hazardous condition which allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it (*Campbell v New York City Tr. Auth.*, 109 AD3d 455, 456 [2d Dept 2013]).

To constitute a lack of actual notice, defendants must proffer evidence sufficient to demonstrate that it lacked awareness of the hazardous condition prior to the accident (*see LoSquadro v R.C. Archdiocese of Brooklyn*, 253 AD2d 856, 857 [2d Dept 1998]). Testimony defendant did not receive prior complaints serves as evidence defendant was not aware of the condition (*see Rosa v Food Dynasty*, 307 AD2d 1031, 1031-1032 [2d Dept 2003]).

Here, defendants established they lacked actual notice. Mr. Rivera testified that he did not receive any prior complaints about the condition of the stairs on the day of plaintiff's accident. Plaintiff, in opposition, did not produce evidence to the contrary and therefore failed to raise a triable issue as to actual notice.

A defendant has constructive notice of a hazardous condition on property when the condition is visible and apparent, and has existed for a length of time sufficient to afford the

defendant a reasonable opportunity to discover and remedy it (*Goodyear v Putnam/Northern Westchester Bd. of Coop. Educ. Servs.*, 86 AD3d 551, 552 [2d Dept 2011], citing *see Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). "To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" (*Goodyear*, 86 AD3d at 552; quoting *Birnbaum v New York Racing Assn., Inc.*, 57 AD3d 598, 598-599 [2008]; *see Schiano v Mijul, Inc.*, 79 AD3d 726, 726-727 [2010]; *Farrell v Waldbaum's, Inc.*, 73 AD3d 846, 847 [2010]; *Ames v Waldbaum, Inc.*, 34 AD3d 607 [2006]). Here, Mr. Rivera testified that he cleaned and mopped the subject stairs between 8:00 AM and 10:00 AM on the day of the accident prior to the plaintiff's fall at 11:00 PM.

In opposition, plaintiff argued that the wet condition existed on the stairs for a sufficient amount of time for defendant to discover and remedy it. "To provide 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' " (*Ferro v 43 Bronx River Road*, 139 AD3d 897, 897 [2d Dept 2016], citing *Kulchinsky v Consumers Warehouse Ctr., Inc.*, 134 AD3d 1068, 1069 [2d Dept 2015], quoting *Gordon*, 67 NY2d at 837; *see Farren v Board of Educ. of City of N.Y.*, 119 AD3d 518, 519 [2d Dept 2014] ["Defendant has 'constructive notice' of a defect, for purposes of a negligence claim arising from a slip-and-fall incident, when it is visible and apparent, and has existed for a sufficient length of time before the accident that it could have been discovered and corrected"]).

Here, plaintiff testified that she observed the wet condition on which she fell when she left the building. She further testified that she first observed the wet condition at 7:00 PM, approximately four hours prior to her fall. Defendant failed to submit evidence to establish that the alleged wet condition at issue was not visible and apparent or that the length of time it existed

was insufficient for them to discover and remedy it (*see Yioves v T.J. Maxx*, 29 Ad3d 572, 573 [2d Dept 2006], citing *cf. Cantalupo v Anthony's Water Cafe*, 281 AD2d 382 [2d Dept 2001]). Therefore, there are questions of fact as to whether defendant had constructive notice.

Defendants argued they did not cause or create the condition by proffering Mr. Rivera's testimony that he cleaned the subject stairs between 8:00 AM and 10:00 AM that day. However, defendants have not provided sufficient proof regarding their knowledge of the condition or its source (*see Brown v Outback Steakhouse*, 39 AD3d 450, 451 [2d Dept 2007]). Therefore, defendants have failed to establish that they did not cause or create the condition and denial of the motion on these grounds is warranted regardless of the sufficiency of plaintiff's opposition (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Further, contrary to defendants' contention, they did not establish their prima facie entitlement to summary judgment on the grounds that plaintiff was unable to identify the cause of her fall without resorting to speculation (*see Coelho v S & A Neocronon, Inc.*, 178 AD3d 662, 663 [2d Dept 2019]). Plaintiff testified that she slipped on the building's wet concrete steps. Therefore, plaintiff's testimony contradicts defendants' contention that she had no knowledge of what caused her to fall. Accordingly, defendant's motion for summary judgment is denied.

ENTER:

HON. REGINALD A. BODDIE J.S.C.

Hon. Reginald A. Boddie
Justice, Supreme Court

KINGS COUNTY CLERK FILED 2020 OCT 29 AM 10:34