

<b>Olaya v 517 53rd St. Inc.</b>
2020 NY Slip Op 34394(U)
September 14, 2020
Supreme Court, Kings County
Docket Number: 522987/2016
Judge: Richard Velasquez
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At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 14<sup>th</sup> day of September, 2020

P R E S E N T:  
HON. RICHARD VELASQUEZ  
Justice.

-----X

JOSE OLAYA,

Plaintiff,

Index No.: 522987/2016  
Decision and Order

-against-

517 53<sup>RD</sup> Street Inc. and BAY SHINE MANAGEMENT INC.,

Defendants,

-----X

The following papers NYSCEF Doc #'s 7 to 21 read on this motion:

<u>Papers</u>	<u>NYSCEF DOC NO.'s</u>
Notice of Motion/Order to Show Cause	
Affidavits (Affirmations) Annexed_____	81-91
Opposing Affidavits (Affirmations)_____	93-94
Reply Affidavits_____	95-97

After having heard Oral Argument on SEPTEMBER 14, 2020 and upon review of the foregoing submissions herein the court finds as follows:

Defendants, 517 53RD Street Inc. and BAY SHINE MANAGEMENT INC. move pursuant to CPLR 3212 for summary judgment. (MS#5) Plaintiff opposes the same.

This constitutes the Decision/Order of the court.

**Arguments**

Defendant argues they had no actual or constructive notice of the alleged

condition. Plaintiff opposes and contends they gave notice to owner but such notice was not in writing.

### Analysis

It is well established that a motion for summary judgment will be granted “if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing the judgment in favor of any party”. CPLR §3212 (b). The “motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.” *Id.* The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. The moving party must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law. (*Zuckerman v. City of New York*, 49 NY2d 557 [1990].) Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial (*Kosson v. Algaze*, 84 NY2d 1019 [1995]). Where the moving papers are insufficient, there is no necessity for an opposing party to respond with evidentiary proof. *Fabbricatore v. Lindenhurst*, 259 AD2d 659 (2d Dept. 1999). When deciding a motion for summary judgment, the court must “view the evidence in the light most favorable to the plaintiff, as the nonmoving party, and afford him the benefit of every favorable inference. Moreover, a motion for summary judgement should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility,” *Leblanc v. Skinner*, 103 AD3d 202, 211-12 (2 Dept. 2012).

“Ordinarily, a defendant moving for summary judgment in a trip-and-fall case has the burden of establishing that it did not create the hazardous condition that 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. (*Ash v City of New York*, 109 AD3d 854, 855 [2013] [citations omitted]; see *Kudrina v 82-04 Lefferts Tenants Corp.*, 110 AD3d 963, 964 [2013]).

Here, the defendants have failed to establish prima facie entitlement to judgment because they fail to submit any proof of inspections or customs and practices done by the janitor which show when the area in question was last cleaned or inspected relative to the time when the plaintiff fell (see *Perez v new York City Housing Authority*, 75 AD3d 629 (2d Dep’t 2010); *Porco v Marshalls Dept. Stores*, 30 AD3d 284, 285, 817 NYS2d 268 (2d Dep’t 2006); *Feldnus v Ryan Food Corp.*, 29 AD3d 940, 941, 818 NYS2d 98 (2d Dep’t 2006); *Ash v City of New York*, 109 AD3d at 855-856; *Peluso v Red Rose Rest., Inc.*, 106 AD3d 972 (2d Dep’t 2013); *Santos v City of New York*, 73 AD3d 900 (2d Dep’t 2010); *Costantino v Webel*, 57 AD3d 472 (2d Dept 2008)). Additionally, there are issues as to credibility as well, plaintiff has testified that he orally gave notice to owner of the condition, the owners state they had no notice of any conditions, which creates an issue of fact regarding notice. Clearly a he said he said situation. Moreover, all of these contentions raise questions of fact as to both parties’ credibility. Credibility is solely for the jury (*Sorokin v. Food Fair Stores*, 51 AD2d 592, 593, 378 NYS2d 492, 493; *Pertofsky v. Drucks*, 16 AD2d 690, 227 NYS2d 508; *Ellis v. Hoelzel*, 57 AD2d 968, 968, 394 NYS2d 91, 93 (1977)). As such, issues of fact and credibility of the parties remain and are best left for a jury.

Accordingly, defendant's Motion for Summary Judgment is hereby denied, for the reasons stated above. (MS#5).

Dated: Brooklyn, New York  
SEPTEMBER 14, 2020

  
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HON. RICHARD VELASQUEZ