At an IAS Term, Part 81 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 3rd day of August, 2021.

PRESENT:

CARL J. LANDICINO, J.S.C.

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TERRIA RAY,

Plaintiff,

Index No.: 505967/2019

DECISION AND ORDER

-against-

THE BROOKLYN HOSPITAL CENTER,

Motion Sequence #3

Defendants.

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

Papers Numbered (NYSCEF)	
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	33-38,
Opposing Affidavits (Affirmations)	41-43,
Reply Affidavits (Affirmations)	44

After a review of the papers and oral argument the Court finds as follows:

The instant action concerns an alleged slip and fall incident that occurred on August 23, 2017. On that day the Plaintiff, Terria Ray (hereinafter "the Plaintiff") allegedly injured herself inside the emergency room area of the Brooklyn Hospital Center located at 121 DeKalb Avenue, Brooklyn, New York (hereinafter "the Premises").

Defendant, The Brooklyn Hospital Center (hereinafter the "Defendant" or the "Hospital") now moves (motion sequence #3) for an order pursuant to CPLR 3212 granting summary judgment and dismissing the complaint. The Defendant argues that the instant matter should be dismissed because it did

not create the slippery condition that purportedly caused the Plaintiff's accident nor did it have actual or constructive notice of the alleged dangerous condition.

In opposition, the Plaintiff argues that the Defendants have not met their *prima facie* burden regarding whether the Defendants had actual or constructive notice of the alleged dangerous condition. In the alternative, the Plaintiff contends that assuming the Court finds that the Defendants have met their *prima facie* showing, the Plaintiff has raised sufficient material issues of fact necessary for the denial of the motion.

"Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.' " *Kolivas v. Kirchoff*, 14 AD3d 493 [2d Dept 2005], *citing Andre v. Pomeroy*, 35 NY2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The party seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2d Dept 2004], *citing Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Rous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick*, 202 AD2d 558, 558-559, 610 N.Y.S.2d 50 [2d Dept 1994].

Generally, in a trip and fall case, a defendant makes a *prima facie* showing of its entitlement to summary judgment by presenting sufficient evidence to show that they neither created nor had actual or constructive notice of the allegedly dangerous condition. *See Hackbarth v. McDonalds Corp.*, 31 AD3d 498, 499, 818 N.Y.S.2d 578 [2d Dept 2006] *Curtis v Dayton Beach Park No. 1 Corp.*, 23 AD3d 511, 512 [2d Dept 2005]. The movant can meet this burden by submitting testimony concerning when the area in question was last cleaned or inspected, or by submitting evidence as to whether any complaints had been received between the time the area was cleaned or inspected and the time of the alleged incident. *See Perez v. New York City Hous. Auth.,* 75 AD3d 629, 630, 906 N.Y.S.2d 299 [2d Dept 2010]; *Williams v SNS Realty of Long Is., Inc.*, 70 AD3d 1034 [2d Dept 2010]; *Rios v New York City Hous. Auth.*, 48 AD3d 661, 662 [2d Dept 2008].

Turning to the merits of the instant motion, the Defendant (motion sequence #3) has failed to sufficiently show by testimony or other evidence that it "neither created the allegedly dangerous condition" ... nor "...had actual or constructive notice of it." *Hudlin v. Epicurean Deli*, 46 AD3d 752, 847 N.Y.S.2d 479 [2d Dept 2007]. In support of its motion, the Defendant relies primarily on the deposition of the Plaintiff and the deposition of Frankie Goldsberry, the Defendant's Assistant Director for Environmental Services, who testified that he did not know whether he was present at the Hospital at or around the time of the occurrence. Mr. Goldsberry stated during his deposition that the cleaning of the emergency room waiting area is done multiple times a day and if a staff person sees a spilled liquid on the floor the policy is to call him or one of his staff members to address it. Goldsberry indicated that he did not do the cleaning. This deposition testimony concerned the policies and procedures put in place regarding cleaning spills in the area in question but did not provide any specific testimony relating to the day at issue or other supporting documentation such as logbooks which would have shown what areas were cleaned and when those areas were cleaned on that day. (See Defendant's Motion, Exhibit C).

A motion will fail if it merely presents testimony regarding general cleaning and inspection procedures and fails to provide evidence regarding when the area in question was last cleaned or inspected relative to when the Plaintiff's injury occurred. *See Piotrowski v. Texas Roadhouse, Inc.,* 192 AD3d 1147, 1148, 141 N.Y.S.3d 350 [2d Dept 2021]; *Johnson v. 101-105 S. Eighth St. Apartments Hous. Dev. Fund Corp.,* 185 AD3d 671, 124 N.Y.S.3d 852 [2d Dept 2020]; *Ansari v. MB Hamptons, LLC*, 137 AD3d 1174, 28 N.Y.S.3d 397 [2d Dept 2016]; *Williams v. New York City Hous. Auth.*, 119 AD3d 857, 990 N.Y.S.2d 549 [2d Dept 2014]; *Farrell v. Waldbaum's, Inc.,* 73 AD3d 846, 847, 900 N.Y.S.2d 453, 454 [2d Dept 2010]. In light of a lack of specificity by someone with knowledge, the Court cannot determine whether the period of time the alleged condition existed prior to the accident constituted a reasonable period of time to establish constructive notice. *See Babb v. Marshalls of MA, Inc.,* 78 AD3d 976, 911 N.Y.S.2d 640 [2d Dept 2010]; *Yearwood v. Cushman & Wakefield, Inc.*, 294 AD2d 568, 742 N.Y.S.2d 661 [2d Dept 2002]. In addition, the Defendant's attempt to raise the issue of whether the Plaintiff sufficiently identified the alleged dangerous condition was improper, as it was first raised in the Defendant's reply papers. See *Bednoski v. Cty. of Suffolk*, 67 AD3d 616, 616, 886 N.Y.S.2d 912, 913 [2d Dept 2009]; *Haggerty v. Quast*, 48 AD3d 629, 852 N.Y.S.2d 357 [2d Dept 2008].

The Defendant's reliance upon *Armijos v. Vrettos Realty Corp.*, 106 AD3d 847, 965 N.Y.S.2d 536 [2d Dept 2013] and *Mavis v. Rexcorp Realty, LLC*, 143 AD3d 678, 679, 39 N.Y.S.3d 190, 192 [2d Dept 2016] is mislaid. In these cases, the person testifying to the routine practices were the individuals who actually performed the inspections and/or cleaning. This was not the case in relation to Goldsberry's role at the Hospital. Further, both *Armijos* and *Mavis* stress that the particular circumstances in those cases [a superintendent who mopped daily and specific inspections made by a contractor's employee] are exceptions to the rule that evidence of general cleaning practices are insufficient. Although Goldsberry stated that he would perform at least three inspections a day, he did not specify when. "It varies. I know

the morning time and then everything varies. I try to do one morning time, one mid shift, one before I exit." (Defendant's Motion, Exhibit C, Page 51).

"Since the defendant did not meet its burden of establishing its prima facie entitlement to judgment as a matter of law, it is not necessary to consider the sufficiency of the plaintiff's opposition papers." *Rogers v. Bloomingdale's, Inc.,* 117 AD3d 933, 934, 985 N.Y.S.2d 731, 732 [2d Dept 2014]. Accordingly, the Defendant's motion is denied.

Based on the foregoing, it is hereby ORDERED as follows:

Defendant's motion (motion sequence #3) for summary judgment is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.

KINGS COUNTY CLERK
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