At an IAS Term, Part 9 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 16th day of September, 2022.

P R E S E N T:

HON. DEBRA SILBER,
Justice.

- X

ALBERTO FONTANEZ,
Plaintiff,
- against -

MILL 653 LLC,
Defendant.

- X

DECISION/ORDER
Index No. 512419/18
Motion Seq. # 1

The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion and Affidavits (Affirmations) Annexed	22-35
Opposing Affidavits (Affirmations)	37-44
Reply Affidavits (Affirmations)	45

Upon the foregoing papers, plaintiff moves for summary judgment (in motion sequence [mot. seq.] one) on the issue of liability in this action which arises from a slip and fall accident.

Background

On June 15, 2018, plaintiff Antonio Fontanez (Fontanez) commenced this action against defendant MILL 653 LLC by filing a summons and a complaint. The complaint alleges that on January 12, 2018, Fontanez suffered personal injuries due to a slippery substance which was on the interior stairs at the premises at 653 Miller Avenue, Brooklyn,

NY. At the time of the accident, Fontanez was a residential tenant at the premises, which is a six-family walk-up apartment building. He supports his motion with the pleadings, the EBT transcripts for himself, his wife, a neighbor, and the superintendent of the building who was produced for deposition by the defendant. He also submits an affidavit from the non-party neighbor, photos, and a video. The video could not be considered, if it has any probative value, as plaintiff did not file anything in NYSCEF other than a piece of paper that says "Exhibit D" on it. In order for the court to watch a video submitted as evidence for a motion, counsel must e-file Form EFM-4 "Notice of Hard Copy Filing" to describe the item which is not electronically filed, and then actually give the video to the court. Plaintiff did neither (see *Amezquita v RCPI Landmark Props.*, 194 AD3d 475 [1st Dept 2021]).

In essence, plaintiff claims that there was a slippery substance on the stairs which caused him to slip and fall. The stairs are made of wood. The landings are tile. He testified that before his accident, he noticed that there was a slippery substance on the stairs. He called the superintendent a week before the accident to complain about it and to ask him to come and clean it, and when it was still there, he called again three days before the accident [Doc 26 Page 48]. Nothing was done. He was asked [Page 59] if prior to his accident he had "looked at the bottom of his sneakers to see if that greasy substance was on the bottom of your sneakers?" and he answered "Yes, I saw it." He said this was a day or two before his accident.

He left for work on the day of his accident, from his apartment on the third floor of the building, and he was wearing his work uniform and sneakers. He slipped after descending a few steps to the first landing, turned to go down the next staircase and slipped as he pivoted on the landing, reached for the handrail but could not grab it, and fell down the stairs. He also

testified that the staircase was not well lit: "the staircase has no light. So it's very hard to look."

Plaintiff testified that his neighbor came out of his apartment after he fell. He asked him to call an ambulance. He did not move until they came. He was taken to the emergency room at Brookdale Hospital.

Plaintiff next submits the EBT transcript of Shane Modeste, the superintendent of the building. It is at Document 28, and states it was held on June 21, 2019. The court notes that a superintendent need not live at the building if it has fewer than eight apartments. Mr. Modeste testified that he is, and was on the date of the plaintiff's accident, a superintendent for five buildings in the East New York neighborhood, and is employed by a company called Capstone, which manages apartment buildings. He was asked about his duties with regard to the subject property. He testified that he mopped the floors in the public areas on Mondays [Page 15], and he took the garbage out to the curb on Mondays and Thursdays. Asked if those were the only days he went to the building, he said "if need, I will pass every day to make sure everything is --every morning-- to make sure the front of the building is kept clean, so I don't get a ticket for it, and once a day, I also look inside still to make sure everything is kept up to par." He said he went from building to building by car, and needed to check the sidewalks before 8:30 a.m. so he did not get a Sanitation ticket. The mop, the broom, and other supplies were kept in his car. Mr. Modeste was next asked if he was also responsible for removing snow and ice from the sidewalks in front of the buildings, and he said "yes." He also said his "general checks" were at 4:30 or 5:00 p.m. every day [Page 20]. At that time, he said he just drove by and did not go inside. However, it seems he also needed to "bag the trash

up and take it out to the bin" [Page 21]. He did not say how often that needed to be done, or why the tenants did not put their trash in the garbage cans.

Mr. Modeste said his cell phone number is posted in the lobby, and authenticated a photo of the notices in the lobby for who to contact, as is required by NYC HPD. He was next asked "what would you do specifically to clean the floors and the stairs of the inside of the building?" and he answered [Page 29] "Hot water, soap and a degreaser I put in the water." He said he purchased the cleaning supplies from a hardware store and did not know the brand names of them. One was a soap, and one was a degreaser. It was on account, so he did not pay for them or get a receipt. He said the cleaning supplies are stored in the basement of one of the buildings [Page 30]. He used a mop and a bucket. He was not asked where he obtained hot water from in the subject building.

Mr. Modeste testified that the stairs are wood, and the landings are ceramic tile. He said no changes have been made to the stairs since he started as superintendent for this building in 2017. He was asked if "Prior to January12, 2018, are you aware of any tenant making complaints, regarding the condition of the interior of the hallways? [Page 36] and he said "No." He was then asked, "Are you aware of receiving any phone calls from any tenants, regarding the slippery condition of the ceramic tiles in the hallways or landings of that building, at any time before January 12, 2018" and he said "no." He was then asked the same question with regard to text messages, and he said "no." Mr. Modeste was then asked if he knew plaintiff, and he said yes. He was next asked "And what about phone ca1ls or texts from either Mr. or Mrs. Fontanez, at any time before the accident which occurred on January 12th, 2018, do you recall getting any phone calls or texts from either of them?" [Page 40] and

he answered, "About issues in the apartment, yes" and "they had a problem with a light in the bathroom" [Page 41] and "with the thermostat" [Id]. Mr. Modeste was then asked if plaintiff or any other tenant "ever make a complaint to you about the condition of the tiles in the hallway and landing outside their apartments?" [Page 43] and he answered "no". He went on to say that after plaintiff's accident, he received a call from plaintiff's wife to tell him about the accident [Page 49].

Mr. Modeste was then asked about record-keeping, and he testified that depending on the nature of the complaint, he might send the management office a text, such as if they had to contact the tenant and set up an appointment for a tradesperson, and he did not need to contact the management office for every complaint. He was asked if he kept any records of his maintenance work, such as mopping, and he said he did not keep records. It was his general practice to mop on Mondays. He was then told that the plaintiff's accident was on a Friday. He was asked if he had any specific recollection of the Monday before the plaintiff's accident. He said "That day I – I swept it, because it was a rainy day. So when it rains, I don't mop" [Page 45]. He was asked if he had any specific recollection about the day of plaintiff's accident, and he responded "in the morning of the incident, it was snowing" [Page 45]. He was then asked, "So is it fair to say that the floor had not been mopped that week at all before the incident, and he said "Yes".

Mr. Modeste testified that he contacted the management office after the call from Mrs. Fontanez, and his supervisor met him at the building a half hour later. They went to look at the stairs and landing where plaintiff said he fell. He was asked "And on the staircase itself, did you notice any slippery condition?" and he responded "yes" [Page 55]. He was asked

"where was the slippery condition?" and he answered "on each step" [Page 56]. He was next asked "did you feel that slippery condition on the steps themselves?" and he responded "on the landing" [Page 56]. He was then asked, "did you continue to walk that entire hallway, when you went there?" and he said "yes" and "did you continue to observe and feel a slippery, greasy condition?" and he said "yes" [Page 60] and that the condition extended all the way to plaintiff's apartment. He did not try to touch or feel it, and did not try to wipe it off. He said "myself and the manager was trying to figure what it was" [Page 61]. He said the same condition existed on the ceramic tiles on the other floors as well. He then "mopped it with hot water and soap" and "it went away" [Page 62]. Counsel then asked Mr. Modeste "is it fair to say that when you inspected it, that entire area was greasy?" and he answered: "Not the entire area; but the tile and the landing and part of the stairs." This was followed by "So it's fair to say that the tiles in the hallway, the landing immediately adjacent to it and some of the stairs were greasy?" and he said "Yes" [Page 68].

In opposition to the motion, defendant provides an attorney's affirmation, the same EBT transcripts, plaintiff's Bill of Particulars, and a memorandum of law. Counsel avers that the court should find that plaintiff has failed to make a prima facie case for summary judgment. He asserts that plaintiff's claim of notice to the superintendent was "directly contradicted by the deposition testimony of" the super. He continues "the plaintiff does not know the date and time when the condition was created. The plaintiff does not know the identity of the person who caused or created the condition." In addition, he states "when plaintiff was asked if he ever learned at any time what the substance was that was on the stairs, he responded that he did not know."

Standards for Summary Judgment

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus 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]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). However, a motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law (CPLR 3212 [b]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]) and the party opposing the motion for summary judgment fails to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Zuckerman*, 49 NY2d at 562).

"[T]he 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 demonstrate the absence of any material issues of fact" (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez*, 68 NY2d at 324; *see also Zuckerman*, 49 NY2d at 562; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The motion should be granted only when it is clear that no material and triable issue of fact is presented (*Di Menna & Sons v City of New York*, 301 NY 118 [1950]). If the existence of an issue of fact is even arguable, summary judgment must be denied (*Phillips v Kantor & Co.*, 31 NY2d 307 [1972]; *Museums at Stony Brook v Vil. of Patchogue Fire Dept.*, 146 AD2d 572 [2d Dept 1989]). Also, parties

opposing a motion for summary judgment are entitled to every favorable inference that may be drawn from the pleadings, affidavits and competing contentions (*Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept 2003]; *see also Akseizer v Kramer*, 265 AD2d 356 [2d Dept 1999]; *McLaughlin v Thaima Realty Corp.*, 161 AD2d 383, 384 [1st Dept 1990]; *Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 [1st Dept 1987]; *Strychalski v Mekus*, 54 AD2d 1068, 1069 [4th Dept 1976]). Furthermore, in determining the outcome of the motion, the court is required to accept the opponents' contentions as true and resolve all inferences in the manner most favorable to opponents (*Pierre-Louis v DeLonghi America, Inc.*, 66 AD3d 859, 862 [2d Dept 2009], citing *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept 2003]; *Henderson v City of New York*, 178 AD2d 129, 130 [1st Dept 1991]; *see also Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105-106 [2006]). Moreover, a party seeking summary judgment has the burden of establishing prima facie entitlement to judgment as a matter of law by affirmatively demonstrating the merit of a claim or defense and not by simply pointing to gaps in the proof of an opponent (*Nationwide Prop. Cas. v Nestor*, 6 AD3d 409, 410 [2d Dept 2004]; *Katz v PRO Form Fitness*, 3 AD3d 474, 475 [2d Dept 2004]; *Kucera v Waldbaums Supermarkets*, 304 AD2d 531, 532 [2d Dept 2003]). Lastly, "[a] motion for summary judgment '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'" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]; *see also Benetatos v Comerford*, 78 AD3d 750, 751-752 [2d Dept 2010]; *Lopez v Beltre*, 59 AD3d 683, 685 [2009]; *Baker v D.J. Stapleton, Inc.*, 43 AD3d 839 [2d Dept 2007]).

Discussion

In order to establish liability in a slip and fall case, the plaintiff must demonstrate that the defendant either created the dangerous condition complained of, or had actual or constructive notice of it *(see, Mercer v City of New York*, 223 AD2d 688, *affd* 88 NY2d 955; *Nedd v Associated Hosp. Servs.*, 236 AD2d 455).

Here, the plaintiff claims he provided notice to the defendant by contacting the superintendent to notify him about the slippery condition on the hallway and stairs. Plaintiff alleges in his Bill of Particulars that defendant had both actual and constructive notice. Plaintiff also contends that the condition complained of was caused and created by defendant's agents. And that defendant had constructive notice because it existed for several days and defendant knew or should have known that such condition existed. The superintendent denied that plaintiff or anyone else in the building contacted him to complain about this alleged condition, and that he thus did not have notice. The testimony of plaintiff's wife cannot tip the balance, nor can the testimony of plaintiff's neighbor, as issues of credibility cannot be decided by the court.

The law in New York is clear. Specifically, "in order for a plaintiff to establish a prima facie case of negligence, he or she must show that the oil or foreign substance was "present under circumstances sufficient to charge the defendant with responsibility therefor" (*Goodman v 78 W. 47th Corp.*, 253 AD2d 384, 386, 677 NYS2d 116 [1998] [internal quotation marks and citations omitted]; *see Lewis v Metro. Transp. Auth.*, 99 AD2d 246, 250, 472 NYS2d 368 [1984], *affd* 64 NY2d 670, 474 NE2d 612, 485 NYS2d 252 [1984]). In other words, we have required proof that the defendant either had actual or constructive knowledge

of the dangerous condition or proof that defendant caused the condition to be created. Thus, we have rejected mere speculation as inadequate to sustain the cause of action (*Segretti v Shorenstein Co., E.*, 256 AD2d 234, 682 NYS2d 176 [1998]).” (See *Acevedo v York Intl. Corp.*, 31 AD3d 255, 256 [1st Dept 2006].)

In a similar case, where a plaintiff claimed he slipped on cooking grease at LaGuardia Airport, the Second Department dismissed his complaint, finding that there was no evidence that the substance upon which he fell was cooking grease. The court also stated that the waste disposal area and ramp where he fell was not used exclusively by the defendant corporation's employees, so employees of another entity could have caused the slippery substance on the ramp (*Vinicio v Marriott Corp.*, 217 AD2d 656, 656 [2d Dept 1995]).

Here, plaintiff has not made a prima facie case that the defendant property owner, through its employee, the superintendent, had actual notice of the condition, or that it caused or created the slippery condition which plaintiff claims caused him to fall. There is no evidence that the superintendent caused the condition. On the issue of actual notice, the contradictory testimony of plaintiff and his wife that they had complained about the condition before the day of the accident, and the testimony of the superintendent that they did not complain, raises an issue of credibility which the court cannot decide. On the issue of constructive notice, it has not been established when the slippery, greasy condition first was present, so as this is plaintiff’s motion and not defendant’s, it cannot be said that, as a matter of law, defendant had sufficient time to clean the floor and stairs after the substance was first on the floor and stairs such that failure to do so was negligent.

In considering a summary judgment motion, the court is required to view the evidence in the light most favorable to the nonmoving party, and afford him/it the benefit of every favorable inference (*see Ruiz v Griffin*, 71 AD3d 1112, 1115, 898 NYS2d 590 [2010]) As the Second Department explains in *LeBlanc v Skinner*, 103 AD3d 202, 211-212 [2d Dept 2012], "a motion for summary judgment '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' (*Ruiz v Griffin*, 71 AD3d at 1115, quoting *Scott v Long Is. Power Auth*., 294 AD2d 348, 348, 741 NYS2d 708 [2002]). Resolving questions of credibility, determining the accuracy of witnesses, and reconciling the testimony of witnesses are for the trier of fact (*Gille v Long Beach City School Dist*., 84 AD3d 1022, 1023, 923 NYS2d 649 [2011]; *see Republic Long Is., Inc. v Andrew J. Vanacore, Inc*., 29 AD3d 665, 815 NYS2d 163 [2006]; *Harty v Kornish Distribs*., 119 AD2d 729, 501 NYS2d 142 [1986])."

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is denied.

This constitutes the decision and order of the court.

E N T E R,

Hon. Debra Silber, J.S.C.