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 20th day of March, 2023.

PRESENT:

CARL J. LANDICINO, J.S.C.

JOSELYN FELIZ,

Plaintiff,

-against-

JIMS REALTY EEC, and DIRA REALTY EEC,

Defendants.

Index No.: 508779/2019

DECISION AND ORDER

Motion Sequence #5

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	112-133, 136,
Opposing Affidavits (Affirmations)	141-149,
Reply Affidavits (Affirmations)	150, 152-153

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

The instant action results from a slip and fall incident that allegedly occurred on August 10, 2018. On that day the Plaintiff Joselyn Feliz (hereinafter "the Plaintiff") was allegedly injured inside of the premises located at 451 Kingston Avenue, Brooklyn, New York (hereinafter "the Premises"). In her Bill of Particulars, the Plaintiff contended that the incident occurred when she slipped and fell on a negligently maintained staircase.

Defendants Jims Realty LLC and Dira Realty LLC (hereinafter referred to individually or collectively as the "Defendants") now move (motion sequence #5) for an order pursuant to CPLR §3212 granting summary judgment and dismissal of the complaint. The Defendants argue that the instant matter should be dismissed because the water on the stairs was open and obvious and was

not an inherently dangerous condition. The Defendants also argue that the condition did not exist for a period of time long enough for them to have actual or constructive notice of the alleged water condition.

In opposition, the Plaintiff argues that the Defendants have not met their *prima facie* burden that the Defendants had actual or constructive notice of the alleged dangerous condition. The Plaintiff argues that the Defendants failed to provide sufficient evidence regarding when the steps at issue had last been cleaned or inspected. In the alternative, the Plaintiff contends that even assuming that the Defendants had met their *prima facie* showing, the Plaintiff has raised sufficient issues of fact to defeat Defendants' summary judgment motion. Specifically, the Plaintiff points to deposition testimony relating to whether the water condition was on the stairway for a sufficient period of time that would permit a finding that the Defendants had constructive notice of the condition at issue.

"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 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853; *see also Akseizer v. Kramer,* 265 A.D.2d 356 [2d Dept 1999]. Moreover, the proponent 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 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 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]. Moreover, as the Court of Appeals made clear in *Andre v. Pomeroy* "when there is no genuine issue to be resolved at trial, the case should be summarily decided, and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated." *Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]; *see also McElwain v. Olashansky*, 220 A.D.2d 394, 395, 6 631 N.Y.S.2d 886, 886 [2d Dept 1995].

In a slip 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 A.D.3d 498, 499, 818 N.Y.S.2d 578 [2nd Dept, 2006] *Curtis v Dayton Beach Park No. 1 Corp.*, 23 AD3d 511, 512 [2nd Dept, 2005]. The movant can meet this burden by submitting testimony showing 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 A.D.3d 629, 630, 906 N.Y.S.2d 299 [2nd Dept, 2010]; *Williams v SNS Realty of Long Is., Inc.*, 70 AD3d 1034 [2nd Dept, 2010]; *Rios v New York City Hous. Auth.*, 48 AD3d 661, 662 [2nd Dept, 2008].

The Plaintiff sat for deposition on December 16, 2020, and April 28, 2021 (NYSCEF Doc. 123, 124). The Plaintiff stated that the accident occurred at the Premises at 9:40 a.m. (Page 37). When asked if the incident occurred while she was walking up the stairs or down, the Plaintiff stated, "[g]oing down." When asked where she was going when the fall occurred, the Plaintiff

stated, "I was going to look for the medications and the food for my patient." (Page 38). Plaintiff stated that she arrived at the Premises at 8:20 a.m. on the day of the accident. When asked if there were any issues with the stairs when she first arrived at the building on the day of the accident, the Plaintiff stated, "[t]here was some liquid and it was dirty." When asked where she saw the water, the Plaintiff stated, "[i]n the platform on the second floor." When asked to specify, the Plaintiff stated, "I'm talking about the landing between the first and the second floor." (Pages 42- 44). When asked if there was water anywhere else, the Plaintiff stated, "[t]here were four steps with water," "[b]etween the landing and the second floor." (Page 44). She stated that she did not see any leaks. When asked how long she believed the condition had been there, the Plaintiff stated, "[f]rom the time that I went up to the time that I went down, it was there." (Pages 46-47). When asked whether there were dry steps to walk on, the Plaintiff stated, "[n]o, correct." (Page 50). She stated that after walking up the stairs through the water, she did not notify anyone of the condition. (Page 64). She stated that when she left the apartment and went down the stairs, the water was still there and she fell down the stairs. (Page 74) She stated that she held the banister while going down, "a little tighter." (Page 77).

Richard Joseph's deposition was conducted on February 11, 2021 (NYSCEF Doc. 125). When asked if he was employed by Defendant Dira Realty, Mr. Joseph stated "[y]es." (Page 19). When asked if he was the building superintendent, Mr. Joseph stated "[y]es." When asked how long he had been in that position, Mr. Joseph stated, "[a]bout 20 years." (Page 23). When asked what his duties were, Mr. Joseph stated, "[s]upervise the whole building. I would get up, check the boilers, walk up the stairs, check the building." (Pages 29-30). When asked whether he kept records or a log of complaints received, Mr. Joseph said "[n]o." (Page 29). When asked what the porters' responsibilities were, Mr. Joseph stated, "[c]leaning and doing the same, make sure there's no

hazard on the floor on their side." (Page 51). When asked whether there were any written policies or manuals related to inspecting the building, Mr. Joseph said "[n]o." (Page 52). When asked if there is a fixed schedule for inspections, Mr. Joseph stated, "[n]o." When asked how often the building was inspected, Mr. Joseph stated, "I would say every day." (Page 55). When asked if the inspections were his responsibility or that of the porters, Mr. Joseph stated that "I still inspect the building, but it's the duty to just make sure the floors and the garbage and the place stay clean and safe." (Page 56). When asked how often he inspected, Mr. Joseph stated, "[e]very day." When asked how many times a day he inspects, Mr. Joseph stated, "[p]robably twice for the day." (Page 56). When asked to specify, Mr. Joseph stated, "[w]ell, first duty is in the morning time and then later in the evening time to make sure that before they go home, make sure everything is okay." He stated that it takes about 30 minutes to inspect the entire building. (Page 57). When asked wheteher he knew if the stairs at issue were inspected before the Plaintiff's fall, Mr. Joseph stated, "I don't know." (Page 58). When asked if there were any records that would show if the stairs were inspected before the Plaintiff's fall, Mr. Joseph stated, "I don't know." (Page 59). When asked when the stairs were last cleaned before the Plaintiff's fall, Mr. Joseph stated, "I don't know." When asked if there were any records that would show when the stairways were last cleaned before the accident, Mr. Joseph stated, "I don't know." (Page 62).

Carlo Zuniga's deposition was conducted on September 22, 2021 (NYSCEF Doc. 126). When asked who he was employed by, Mr. Zuniga stated, "Dira Company." When asked what his position was, Mr. Zuniga stated, "[p]orter." (Page 16). When asked how long he had worked for Dira Company at the Premises, Mr. Zuniga stated, "[a]pproximately ten years." (Page 17) When asked what his work schedule generally was, Mr. Zuniga stated, "Sunday to Friday." When asked what his working hours were, Mr. Zuniga stated, "9:00 to 5:00 in the afternoon." (Page 21). When

asked who was responsible before 9:00 am, Mr. Zuniga stated, "[i]t would be the super." (Page 32). When asked how often the stairway is mopped, Mr. Zuniga stated, "[t]wo days a week completely, and afterwards on the days that I don't do a complete mopping, I go up and down, if there's any kind of stain or liquid, I need to clean that up specifically." (Page 33). When asked if he had any memory of the condition of the steps on the day of the Plaintiff's incident, Mr. Zuniga stated, "[n]o." (Page 47). When asked when the stairway was last cleaned before the Plaintiff's fall, Mr. Zuniga stated, "Thursday." When asked how he knew when the stairway was last cleaned, Mr. Zuniga stated, "[b]ecause I clean Tuesdays and Thursdays." (Pages 54-55).

Sanford Reid's deposition was conducted on November 9, 2021 (NYSCEF Doc. 128). When asked if he was employed by Defendant Dira Realty, Mr. Reid stated, "[y]es, sir." (Page 18). Mr. Reid stated, "I'm a janitor." (Page 19). When asked what his duties were, Mr. Reid stated, "I clean the building." (Page 24). When asked how often he checks for spills or other problems on the floor, Mr. Reid stated, "[s]ometimes three times a day, because I sweep that building three times a day." (Page 32). When asked why he inspects so often, Mr. Reid stated, "[b]ecause there's a lot of people that hang out in the building and they make a lot of mess." (Page 33). He stated that he typically starts work at 7:00a.m. (Page 45). When asked if he had any memory of the condition of the stairs at issue on the day of the Plaintiff's accident, Mr. Reid stated, "[n]o." (Pages 52-53). When asked if he witnessed the Plaintiff's incident, Mr. Reid stated, "[n]o, I didn't witness the incident. When I hear her scream, I go and check with her." (Page 56). When asked what he observed at that time, Mr. Reid stated, "I think it was the fourth step going up to the second floor." (Page 57). When asked if he observed a wet condition on the stairs, Mr. Reid stated, "[n]o." (Page 57). When asked if he knew when the stairway at issue was last inspected prior to the Plaintiff's fall, Mr. Reid stated, "[n]o." (Page 144).

Turning to the merits of the instant motion, the Court finds that there is an issue of fact regarding whether the Defendants "created the allegedly dangerous condition" ... or "...had actual or constructive notice of it." *Hudlin v. Epicurean Deli*, 46 A.D.3d 752, 847 N.Y.S.2d 479 [2nd Dept, 2007]. The deposition testimony of Richard Joseph, Carlo Zuniga, and Sanford Reid reflects that they did not know when the stairs had last been cleaned prior to the Plaintiff's accident. They made reference to their general cleaning practices. Moreover, the Defendants presented no documentary evidence such as log-books or sign in sheets relating to cleaning and/or inspections. "[R]eference to general cleaning practices is insufficient to establish a lack of constructive notice in the absence of evidence regarding specific cleaning or inspection of the area in question." *Quinones v. Starret City, Inc.*, 163 A.D.3d 1020, 1021–22, 81 N.Y.S.3d 184, 185–86 [2d Dept 2018], *quoting Rong Wen Wu v. Arniotes*, 149 AD3d 786, 787, 50 N.Y.S.3d 563, 564 [2d 2017].

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 Ansari v. MB Hamptons, LLC*, 137 A.D.3d 1174, 28 N.Y.S.3d 397 [2nd Dept, 2016]; *Williams v. New York City Hous. Auth.*, 119 A.D.3d 857, 990 N.Y.S.2d 549 [2nd Dept, 2014]; *Farrell v. Waldbaum's, Inc.*, 73 A.D.3d 846, 847, 900 N.Y.S.2d 453, 454 [2nd Dept, 2010]. In light of this lack of specificity by someone with knowledge, the Court cannot determine, 1) whether Defendants caused the alleged condition, 2) whether the Defendants had actual notice of the alleged condition, or 3) whether the period of time the alleged condition existed was sufficient to impute constructive notice to the Defendants. *See Babb v. Marshalls of MA, Inc.*, 78 A.D.3d 976, 911 N.Y.S.2d 640 [2nd Dept, 2010] and *Yearwood v. Cushman & Wakefield, Inc.*, 294 A.D.2d 568, 742 N.Y.S.2d 661 [2nd Dept, 2002].

Additionally, there is an issue of fact regarding whether the condition at issue was open and obvious and not inherently dangerous. As stated above, the Plaintiff stated that she slipped on a liquid substance as she walked down the stairs. The Plaintiff also stated in her affidavit that "[o]n August 10, 2018, I slipped and fell in Defendants building because there was liquid on the stairs." The Plaintiff stated in her affidavit that she had few options other than to walk down the wet stairs. The Plaintiff stated in her affidavit that "[o]n that morning, I saw and heard some young men hanging out on the stairs in the back of the building, blocking the pathway. I was afraid to interact or walk through them and risk having a problem so I did not walk down the stairs in the back after leaving my patient's apartment." The Plaintiff further stated that "[w]hen I was walking to the wet staircase from my patient's apartment, I saw people waiting for the elevators, before they ultimately walked away." The Plaintiff then stated that "[e]ven if the elevators were working, I was scared they would break down while I'm inside and trap me, or that someone would come in and hurt me, rob me or worse." Plaintiff indicates that she had limited options and chose the stairs as her safest, notwithstanding the known hazard. Whether the condition was inherently dangerous and/or open and obvious under these circumstances is a question of fact. The Court cannot determine whether Plaintiff's use of the stairs knowing that they were wet resulted in her being the sole proximate cause of the accident based on the evidence proffered. "Whether a dangerous condition exists on real property so as to create liability on the part of the landowner depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury." *Fasano v. Green-Wood Cemetery*, 21 AD3d 446, 446, 799 N.Y.S.2d 827, 828 [2d Dept 2005]; see also *Bissett v. 30 Merrick Plaza, LLC*, 156 AD3d 751, 752, 67 N.Y.S.3d 268, 269 [2d Dept 2017].

The Court notes that Defendants provided purported 911 call records in relation to the time of the accident in their reply papers. The Court did not consider this material, as it was improperly proffered in reply. See *Rengifo v. City of New York*, 7 AD3d 773, 776 N.Y.S.2d 865 [2d Dept 2004] *and Pena v. Geisinger Cmty. Med. Ctr.*, 209 AD3d 663, 174 N.Y.S.3d 873 [2d Dept 2022].

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

Defendants' motion (motion sequence #5) for summary judgment is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.