At an IAS Term, Part 83 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 11th day of March, 2025.

P R E S E N T: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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MANAL AKLAN,

Plaintiff,

-against-

JJS REAL ESTATE 315, LLC,

Defendants.

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Index No.: 531310/2022

DECISION AND ORDER

Mot. Seq. No. 1

The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Affirmation in Support/Affidavits/Exhibits/ Memorandum of Law.....	14 , 16 – 27
Affirmation in Opposition.....	35
Reply Affirmation.....	36

Plaintiff Manal Aklan ("Plaintiff") commenced this action seeking damages for personal injuries allegedly sustained on September 29, 2022, around 10:30AM, when she fell due to alleged dangerous conditions of the interior stairway at the premises located at 315 Bay Ridge Avenue in Brooklyn, New York (the "Premises"), which is owned by defendant JJS Real Estate 315, LLC ("Defendant"). Specifically, in her Bill of Particulars, Plaintiff contends that Defendants were negligent in, inter alia, allowing (a) a defective and loose step to become and remain at the stairway, (b) the stairway to become and remain worn, unstable, wobbly, improperly sloped, cracked and excessively slippery, and (c) violating Section 28-301.1 of the New York City Building and Construction Code.

Defendant now moves for an order granting it summary judgment and dismissing Plaintiff's complaint on the grounds that (a) it did not create the alleged defect, (b) it did not have

actual or constructive notice of the alleged defect, and (c) the alleged defect was trivial and otherwise nonactionable (Mot. Seq. No. 1). Plaintiff opposes the motion.

In its motion, Defendant asserts that Plaintiff testified she was caused to fall because the top step of the second-floor staircase was unsecure and moved. Since Plaintiff testified that she never complained about the subject step or noticed the subject step being loose prior to her accident, Defendant contends that Plaintiff is unable to establish either constructive or actual notice. In addition, Defendant notes that Plaintiff's parents Abdulla Aklan and Aziza Abdulla testified that they were unaware of any complaints being made. Further, Victor Sismanoglou, Defendant's managing agent, provided an affidavit in which he asserts that there is no record of a complaint regarding the subject step being in a defective condition. In further support of its motion, Defendant submits the deposition transcript and affidavit of Salmir Barjraktarevic, the superintendent. Mr. Barjraktarevic testified that he mopped and inspected the stairwells at least twice a month. In his affidavit, Mr. Barjraktarevic avers that prior to September 29, 2022, he did not observe any defective condition on the subject step. Moreover, Defendant relies on a video taken by Mr. Barjraktarevic approximately 10 hours after the accident. Mr. Barjraktarevic asserts that he filmed his mother stepping on the subject step and observed that it did not move. In his affidavit, Mr. Barjraktarevic states that no work was performed on the subject step between the time of the accident and the time the video was taken. Though Plaintiffs' parents Abdulla Aklan and Aziza Abdulla testified that the subject step was shaking and loose for a long time, Defendant argues that their testimony is contradicted by the video. Thus, Defendant asserts that they had no actual or constructive notice.

Moreover, Defendant claims that the alleged defect was de-minimis and thus, non-actionable. Defendant argues that the video shows that the step did not move even when being "forcefully stepp[ed] on" (NYSCEF Doc No. 27). Accordingly, Defendant maintains that "any movement of the step which clearly cannot be appreciated in the video or by [Mr. Barjraktarevic's] direct observations, must be so de minimis and trivial as to make the defect non actionable as a matter of law" (*id.*).

In opposition, Plaintiff argues that there is an issue of fact as to constructive notice because of her parents' testimonies and photographs of the stairwell. At his deposition, Abdulla Aklan testified that the steps are always shaking and that he first noticed the shaking a long time ago. At her deposition, Aziza Abdulla also testified that the stairs have shook for a long time, but never

complained about it to anyone. Based on two photographs, Plaintiff asserts that there is a crack in the area where she tripped and fell and white markings that "can be inferred by a jury that work had been performed" (NYSCEF Doc No. 35, ¶ 16). In addition, Plaintiff argues that Defendants have not submitted any records to show inspections were done and Mr. Barjraktarevic was not at the Premises on the morning of the accident. Plaintiff requests that Mr. Barjraktarevic's video not be considered by the Court. Moreover, Plaintiff contends that there is an issue of fact as to whether the alleged defect is trivial.

In his reply, Defendant argues that Plaintiff's opposition failed to address Mr. Barjraktarevic's statement that at no time prior to the accident did he notice the condition complained of. Defendant further argues that it is immaterial whether Mr. Barjraktarevic documented his findings. In addition, Defendant argues that the testimonies of Abdulla Aklan and Aziza Abdulla do not raise a legitimate question of fact. For example, Defendant asserts that Plaintiff's parents' testimonies were not specific "as to the step they were referencing and as to the time period at issue" (NYSCEF Doc No. 36). Moreover, Defendant asserts that her parents indicated that no complaints were made to Defendant.

"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, 493 [2d Dept 2005], citing *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *see Sucre v Consolidated Edison Co. of N.Y., Inc.*, 184 AD3d 712, 714 [2d Dept 2020]). "The proponent for the 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" (*Sanchez v Ageless Chimney Inc.*, 219 AD3d 767, 768 [2d Dept 2023], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat a motion for summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Where, as here, a plaintiff's action is based on a trip-and-fall accident, the defendant's entitlement to summary judgment is contingent on establishing that it "maintained the premises in a reasonably safe condition and that [it] did not create a dangerous or defective condition on [its] property or have either actual or constructive notice of a dangerous or defective condition for a sufficient length of time to remedy it" (*Villano v Strathmore Terrace Homeowners Ass'n, Inc.*, 76

AD3d 1061, 1061 [2d Dept 2010]). A defendant has constructive notice if the defect (1) is visible and apparent and (2) existed for a sufficient length of time before the accident to allow the defendant to discover and remedy it (*see Gordon v Am. Museum of Nat. Hist.*, 67 NY2d 836, 837 [1986]). "To meet its initial burden on the issue of lack of constructive notice, the defendant must offer evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" (*Williams v Is. Trees Union Free Sch. Dist.*, 177 AD3d 936, 938 [2d Dept 2019]). Mere testimony of general practices is insufficient to establish lack of constructive notice (*see Buffalino v XSport Fitness*, 202 AD3d 902, 903 [2d Dept 2022]; *Goodyear v Putnam/N. Westchester Bd. of Co-op. Educ. Servs.*, 86 AD3d 551, 552 [2d Dept 2011]; *Birnbaum v New York Racing Ass'n, Inc.*, 57 AD3d 598, 599 [2d Dept 2008]).

Here, though Mr. Barjraktarevic testified that the steps were inspected when they were cleaned twice a month, he did not state when was the last time that he inspected the subject stairwell (*compare Pena v Pep Boys-Manny, Moe & Jack of Delaware, Inc.*, 216 AD3d 809, 810 [2d Dept 2023] [testimony of manager's regular practice to inspect area multiple times a day is insufficient where there is no evidence as to when the area was last inspected on date of plaintiff's accident], *with Williams v SNS Realty of Long Island, Inc.*, 70 AD3d 1034, 1036 [2d Dept 2010] [defendants established lack of constructive notice through testimony of employee who walked through same area about 20 minutes prior to plaintiff's fall and did not observe the alleged defect]). Therefore, Defendant has failed to establish lack of constructive notice.

The Court next considers the portion of Defendant's motion arguing that the alleged defect is trivial. "Generally, the issue of whether a dangerous or defective condition exists depends on the particular facts of each case, and is properly a question of fact for the jury . . . However, a property owner may not be held liable in damages for trivial defects, not constituting a trap or nuisance, over which a pedestrian might merely stumble, stub his or her toes, or trip" (*Schenpanski v Promise Deli, Inc.*, 88 AD3d 982, 983 [2d Dept 2011]). "A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses. Only then does the burden shift to the plaintiff to establish an issue of fact" (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 79 [2015]). "Photographs which fairly and accurately represent the accident site may be used to establish that a defect is trivial and not actionable" (*Green v NY City Hous. Auth.*, 137 AD3d

748, 749 [2d Dept 2016]). "In determining whether a defect is trivial as a matter of law, the court must examine all of the facts presented, including the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury" (*Snyder v AFCO Avports Mgt., LLC*, 232 AD3d 209, 213 [2d Dept 2024] [internal quotation marks and citations omitted]).

With respect to the photographs submitted, the Court notes that there is a crack the entire depth of the subject step. Plaintiff's claim is that the step became loose and moved. Thus, "it is impossible to ascertain or to reasonably infer the extent of the defect from the photographs submitted" (*Abreu v Pursuit Realty Group, LLC*, 232 AD3d 751, 753 [2d Dept 2024]). While Defendant also relies on video of Mr. Barjraktarevic's mother going down the steps, the Court finds it is inconclusive and insufficient to meet Defendant's burden. First, the quality of the video is poor in that it is overexposed, and the brightness does not allow for a clear perspective. Second, while Mr. Barjraktarevic asserts the subject step did not move under his mother's weight, this would only raise an issue of fact giving the deposition testimonies of Plaintiff and her parents as to the condition of the step.

After consideration of the evidence submitted, the Court finds that Defendant failed to establish, prima facie, that it did not have constructive notice or that the alleged defect was trivial. Since Defendant failed to meet its initial burden, the Court need not consider the sufficiency of Plaintiff's opposition (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Accordingly, it is hereby

ORDERED, that Defendant's motion (Mot. Seq. No. 1) for summary judgment dismissing Plaintiff's complaint is denied.

All other issues not addressed herein are without merit or moot.

This constitutes the decision and order of the Court.

HON. INGRID JOSEPH, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice