Clapper v Schultz Vestal Serv. Ctr., Inc.
2024 NY Slip Op 32191(U)
June 26, 2024
Supreme Court, Broome County
Docket Number: Index No. EFCA2021001019
Judge: Eugene D. Faughnan
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At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Broome County Courthouse, Binghamton, New York, on the 5th day of April 2024.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : COUNTY OF BROOME

PHILIP CLAPPER,

Plaintiff,

DECISION AND ORDER

vs.

Index No. EFCA2021001019

SCHULTZ VESTAL SERVICE CENTER, INC.,

Defendant.

APPEARANCES:

Counsel for Plaintiff:

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EUGENE D. FAUGHNAN, J.S.C.

This matter is before the Court upon the motion of Defendant Schultz Vestal Service Center, Inc. (hereinafter "Defendant" or "Schultz Service Center") for summary judgment pursuant to CPLR 3212. The motion has been opposed by Plaintiff Philip Clapper (hereinafter "Plaintiff" or "Clapper"). Oral argument was conducted on April 5, 2024 and counsel for both parties were present. After due deliberation, this constitutes the Court's Decision and Order with respect to the pending motion.[1]

BACKGROUND FACTS

Plaintiff worked for an auto parts distributor, and his job duties included making deliveries from the warehouse to local auto body shops and service centers. On or about March 17, 2020, Plaintiff was making a delivery to Schultz Service Center and suffered a trip and fall accident. He had made deliveries to this location very many times previously. Plaintiff alleges that he tripped over a cinder block outside the door where he was making the delivery, and sustained injuries. Plaintiff commenced this action on April 30, 2021, to which Defendant filed an Answer. Plaintiff filed an Amended Complaint on December 22, 2021, and Defendant filed a Verified Answer to the Amended Complaint, also raising numerous affirmative defenses. The parties engaged in discovery, including testimony of Plaintiff and Jerry Schultz, owner of Schultz Service Center.

In support of the motion for summary judgment, Defendant submitted an attorney affirmation of Christopher F. DeFrancesco, Esq., dated December 2, 2023, with Exhibits and a Memorandum of Law. Defendant advances three main arguments: 1) Plaintiff's allegation concerning what made him trip is mere speculation because he did not see any obstacle before he fell, as he was carrying boxes of auto parts; 2) the cinderblock, if present, would have been an open and obvious condition; and 3) Defendant did not have actual or constructive notice of the alleged defect.

[1] All the papers filed in connection with the motion are included in the NYSCEF electronic case file and have been considered by the Court.

Plaintiff submitted an attorney affirmation in opposition, from Mariam Farag, Esq., dated March 13, 2024, with Exhibits. Plaintiff claims that although he did not see the cinderblock before he fell, he saw it immediately after and there is no speculation as to what caused him to trip. He also disputes that the condition was open and obvious, because it could be anticipated that the person making deliveries may have their hands full and not see something in their path. Even if it was "open and obvious", Defendant must still maintain the premises in a reasonably safe condition. Lastly, Plaintiff claims that Defendant either created the hazardous condition, or it existed for a sufficient period of time that Defendant should have discovered and corrected the condition.

Thereafter, Defendant submitted a reply affirmation on March 29, 2024. That reply consisted of further argument supporting the original motion for summary judgment.

LEGAL DISCUSSION AND ANALYSIS

When seeking summary judgment, "the movant must establish its prima facie entitlement to judgment as a matter of law by presenting competent evidence that demonstrates the absence of any material issue of fact." *Lacasse v. Sorbello*, 121 AD3d 1241, 1241 (3rd Dept 2014) *citing Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986) and *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985) (other citation omitted); *see Amedure v. Standard Furniture Co.*, 125 AD2d 170 (3rd Dept. 1987); *Bulger v. Tri-Town Agency, Inc.*, 148 AD2d 44 (3rd Dept. 1989), *app dismissed* 75 NY2d 808 (1990). Such evidence must be tendered in admissible form. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Friends of Animals, Inc. v. Associated Fur Mfrs.*, 46 NY2d 1065, 1067-1068 (1979). Once this obligation is met, the burden shifts to the respondent to establish that a material issue of fact exists. *Dugan v. Sprung*, 280 AD2d 736 (3rd Dept. 2001); *Sheppard-Mobley v. King*, 10 AD3d 70, 74 (2nd Dept. 2004) *aff'd as mod.* 4 NY3d 627 (2005); *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324; *Winegrad v. N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853. "When faced with a motion for summary judgment, a court's task is issue finding rather than issue determination *(see, Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]) and it must view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference and ascertaining whether there exists any triable issue of fact." *Boston v. Dunham,* 274 AD2d 708, 709 (3rd Dept.

2000) (citation omitted); *American Food & Vending Corp. v. Amazon.com, Inc.*, 214 AD3d 1153 (3rd Dept. 2023). The motion "should be denied if any significant doubt exists as to whether a material factual issue is present or even if it is arguable that such an issue exists." *Haner v. De Vito*, 152 AD2d 896, 896 (3rd Dept. 1989) (citation omitted); *Lacasse v. Sorbello*, 121 AD3d 1241; *Asabor v. Archdiocese of N.Y.*, 102 AD3d 524 (1st Dept. 2013). It "is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact." *Vega v. Restani Constr. Corp.*, 18 NY3d 499, 505 (2012) (citation omitted); *Black v. Kohl's Dept. Stores, Inc.*, 80 AD3d 958 (3rd Dept. 2011).

Landowners have "a duty to exercise reasonable care in maintaining their property in a reasonably safe condition under the circumstances." *Powers v. 31 E 31 LLC*, 24 NY3d 84, 94 (2014) (internal brackets and ellipses omitted), *quoting Galindo v. Town of Clarkstown*, 2 NY3d 633, 626 (2004); *see Basso v. Miller*, 40 NY2d 233, 241 (1976). In a premises liability action, recovery "is predicated on 'ownership, occupancy, control or special use of [a] property' where a dangerous or defective condition exists." *Martuscello v. Jensen*, 134 AD3d 4, 8 (3rd Dept. 2015) *quoting Seymour v. David W. Mapes, Inc.*, 22 AD3d 1012, 1013 (3rd Dept. 2005); *Wisdom v. Reoco, LLC*, 162 AD3d 1380 (3rd Dept. 2018); *Semzock v. State of New York*, 97 AD3d 1012 (3rd Dept. 2012). The imposition of a duty "is premised on the landowner's exercise of control over the property, as 'the person in possession and control of property is best able to identify and prevent any harm to others.'" *Gronski v. County of Monroe*, 18 NY3d 374, 379 (2011), *quoting Butler v. Rafferty*, 100 NY2d 265, 272 (2003).

In a slip/trip and fall case, ordinarily a defendant "who moves for summary judgment has the initial burden of making a prima facie showing that it neither created the allegedly dangerous or defective condition nor had actual or constructive notice of its existence." *Deutsch v. Green Hills (USA), LLC*, 202 AD3d 909, 910 (2nd Dept. 2022) (citations omitted); *Bovee v. Posniewski Enters., Inc.*, 206 AD3d 1112 (3rd Dept. 2022); *Godfrey v. Town of Hurley*, 68 AD3d 1527 (3rd Dept. 2009); *Mokszki v. Pratt*, 13 AD3d 709 (3rd Dept. 2004). Additionally, a Defendant "can also demonstrate 'entitlement to judgment as a matter of law by establishing that the plaintiff cannot identify the cause of his or her fall without engaging in speculation.'" *Farrell v. Ted's Fish Fry, Inc.*, 196 AD3d 893, 894 (3rd Dept. 2021), *quoting Mulligan v. R&D Props. of N.Y. Inc.*, 162 AD3d 1301, 1301 (3rd Dept. 2018); *Deutsch v. Green Hills (USA), LLC*, 202 AD3d 909; *Pascucci v. MPM Real Estate, LLC*, 128 AD3d 1206 (3rd Dept. 2015); *Penovich v. Schoeck*,

252 AD2d 799 (3rd Dept. 1998). The "'failure to prove what actually caused a plaintiff to fall in a situation where there could be other causes is fatal to a plaintiff's cause of action.'" *Martin v. Wilson Mem'l Hosp., Inc.*, 2 AD3d 938, 939 (3rd Dept. 2003), *quoting Dapp v. Larson*, 240 AD2d 918, 919 (3rd Dept. 1997); *Henry v. Cobleskill-Richmondville Cent. Sch. Dist.*, 13 AD3d 968 (3rd Dept. 2004); *see, Chang v. Marmon Enters., Inc.*, 172 AD3d 678, 679 (2nd Dept. 2019).

1. Has Plaintiff adequately identified what caused him to fall, or is it mere speculation?

Defendant's first argument is that it is entitled to summary judgment because Plaintiff's claim is based on speculation. Defendant claims that Plaintiff did not see the cinderblock before he fell, and that he is only able to guess what made him fall. It was only after he had fallen to the ground that he looked back and observed a cinderblock (Clapper deposition 9/15/22 at p.54). Furthermore, there were no other witnesses, surveillance video, or even post-fall pictures of the area showing the cinderblock. Defendant, therefore, contends that it is only speculation as to what caused Plaintiff to fall.

In a trip and fall case, "direct evidence of causation is not necessary" (*Jones-Barnes v. Congregation Agudat Achim*, 12 AD3d 875, 877 [3rd Dept. 2004] [citations omitted]), but "proximate cause may be inferred from the facts and circumstances underlying the injury." *Silva v. Village Square of Penna, Inc.*, 251 AD2d 944, 945 (3rd Dept. 1998). Certainly, the mere fact that a plaintiff suffered a trip or fall on a defendant's premises is not enough, in and of itself, to impose liability. If plaintiff cannot ascribe the accident to some defect and can only speculate as to the reason from the trip and fall, then summary judgment for defendant is appropriate. Thus, "[w]here it is just as likely that some other factor, such as a misstep or loss of balance, could have caused a trip and fall accident, any determination by the trier of fact as to causation would be based upon sheer speculation." *Ash v. City of New York*, 109 AD3d 854, 855 (2nd Dept. 2013) (citations omitted); *see e.g. Lucas v. Genting N.Y., LLC*, 2024 NY App. Div. LEXIS 2567 (2nd Dept., May 8, 2024) (decedent had testified that she did not know if she had tripped or slipped and did not know what caused her to fall); *Dennis v. Lakhani*, 102 AD3d 651 (2nd Dept. 2013) (plaintiff could not identify the cause of his fall); *Revesz v. Carey*, 86 AD3d 821 (3rd Dept. 2011) (plaintiff could not identify how she fell or what caused her to trip).

On the other hand, "even when a plaintiff is unable to identify the cause of a fall with certainty, a case of negligence based wholly on circumstantial evidence may be established if the plaintiff shows facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred." *Bovee v. Posniewski Enters., Inc.*, 206 AD3d at 1113, *quoting Brumm v. St. Paul's Evangelical Lutheran Church*, 143 AD3d 1224, 1227 (3rd Dept. 2016); *Benjamin v. Court Jester Athletic Club, Ltd.*, 217 AD3d 1206 (3rd Dept. 2023). The issue is not whether Plaintiff can exclude all factors other than Defendant's negligence, but rather, if the evidence makes the other explanations less likely than Defendant's negligence. *See, Brumm v. St. Paul's Evangelical Lutheran Church*, 143 AD3d 1224; *Rinallo v. St. Casimir Parish & Catholic Diocese of Buffalo*, 138 AD3d 1440 (4th Dept. 2016); *Oliveira v. County of Broome*, 5 AD3d 898 (3rd Dept. 2004); *see also, Weed v. Erie County Med. Ctr.*, 187 AD3d 1568 (4th Dept. 2020). Here, even though Clapper may not have seen the cinderblock before he fell, his testimony showed that after he fell to the ground, he looked back and saw the cinderblock. He also testified that his right leg struck the cinderblock before he fell (Clapper deposition at p. 32). The visual observation made by the Plaintiff immediately after he fell, together with his testimony that his right leg hit the cinderblock, is more than adequate to establish that his claim is not based on mere speculation. *See, e.g. Brumm* (plaintiff fell on sidewalk, and later inspection revealed cracked areas in the sidewalk which she claims caused her fall); *Rinallo* (plaintiff testified that she fell due to her shoe becoming caught on a crack in a step, which was revealed in later photos). This is not a case based on speculation, which generally involves a Plaintiff not being able to reasonably identify the cause of a slip or trip, but rather is a case where Plaintiff did not see the obstacle before he fell, but he felt it when his leg hit it and immediately looked and saw what the cause of his fall. Therefore, the Court concludes that Defendant has failed to meet its initial burden on the motion that Plaintiff's claim is based on mere speculation.

2. Was the alleged defect open and obvious?

Defendant claims that the cinderblock, if present, would have been an "open and obvious" condition such that the summary judgment motion should be granted. Essentially, Defendant seeks to avoid liability on the basis that Plaintiff should have seen the cinderblock and

avoided tripping on it. That argument is also unavailing, as the duty to warn (or the lack of a duty to warn of an "open and obvious condition") is distinguishable from a landowner's duty to maintain the premises in a reasonably safe condition.

It is well established "that a landowner has no duty to warn of an open and obvious danger." *Tagle v. Jakob*, 97 NY2d 165, 169 (2001); *McQuillan v. State of New York*, 218 AD3d 864 (3rd Dept. 2023). The basic rationale for that rule is that there would be little need, or benefit, to require a warning when the presence of the condition was readily observable, and "the condition is a warning in itself." *Tarricone v. State*, 175 AD2d 308, 309 (3rd Dept. 1991); *MacDonald v. City of Schenectady*, 308 AD2d 125 (3rd Dept. 2003). "[F]or a condition to be open and obvious as a matter of law, it must be one that could not be overlooked by any observer reasonably using his or her ordinary senses." *Arsenault v. State of New York*, 96 AD3d 97, 102 (3rd Dept. 2012) (internal quotation marks, emphasis and citation omitted). However, that fact that a condition is open and obvious does not eliminate "a landowner's duty to maintain [the] property in a reasonably safe condition." *MacDonald v. City of Schenectady*, 308 AD2d at 127; *Wolfe v. Staples, Inc.*, 224 AD3d 1126 (3rd Dept. 2024); *Mister v. Mister*, 188 AD3d 1334 (3rd Dept. 2020); *Valentin v. New Docs, LLC*, 186 AD3d 1570 (2nd Dept. 2020). Instead, whether a condition is open and obvious "is more appropriately considered in apportioning fault for the accident." *Streit v. Katrine Apts. Assoc., Inc.*, 212 AD3d 957, 961 (3rd Dept. 2023); *Everett v. CMI Servs. Corp.*, 206 AD3d 620 (2nd Dept. 2022). Here, the evidence suggests that the cinderblock was readily observable, and not concealed or hidden in any manner. Nonetheless, that fact is not sufficient to grant summary judgment to Defendant.

There is a degree of interconnectedness between the concepts of "open and obvious", "inherently dangerous" and "maintaining property in a reasonably safe condition". Those considerations do not exist in a vacuum. "The determination of whether an asserted hazard is open and obvious cannot be divorced from the surrounding circumstances, and whether a condition is not inherently dangerous, or constitutes a reasonably safe environment, depends on the totality of the specific facts of each case." *Catman v. Back Water Grille LLC*, 2024 NY App Div LEXIS 1205, *2 (3rd Dept. 2024) (internal bracket omitted), *quoting Osterhoudt v. Acme Mkts., Inc.*, 214 AD3d 1181, 1181 (3rd Dept. 2023); *Streit v. Katrine Apts. Assoc., Inc.*, 212 AD3d at 959.

The testimony in this case showed that the door being utilized by the Plaintiff was regularly used for deliveries, so it would not be uncommon for a person to be carrying things, and potentially not be able to see something that was on the ground, like a cinderblock. Further, although the testimony from the witnesses differed concerning the size of the cinderblock, with Plaintiff describing it as two inches by two inches-almost like a brick or two bricks (Clapper deposition at pp. 55-57), and Schultz describing it as a standard cinderblock maybe a foot tall (Schultz deposition at p. 58), the obstruction was not *de minimis*, and the presence of the cinderblock could have created a tripping hazard and an unsafe condition. *See e.g. Barley v. Robert J. Wilkins, Inc.,* 122 AD3d 1116 (3rd Dept. 2014) (plaintiff fell descending a single step riser that she described as "very high"); *MacDonald v. City of Schenectady*, 308 AD2d 125 (plaintiff tripped on a crack in a sidewalk). Schultz also agreed that this door was the one primarily used for deliveries (Schultz deposition at p.24). Schultz also testified that the shop has three cinderblocks that are used to prop up vehicles that are missing tires (Id. at pp. 27-30), but they are not routinely used in the area where Plaintiff fell. Notably, however, Schultz also admitted that from time to time, the cinderblocks might be used to proper open that delivery door. It is also significant that Schultz's testimony did not deny that the cinderblock was outside the door when Plaintiff fell, nor did Defendant submit any affidavits to that effect. Instead, Defendant relies upon the attorney affirmation (which does not have any first-hand knowledge of the facts), and the deposition of Schultz which is devoid of testimony on whether the cinderblock was present on this occasion.

The Court concludes that Defendant has failed to show a *prima facie* entitlement to summary judgment on the basis that the condition was open and obvious. As previously noted, even if the cinderblock was open and obvious, that would go to the issue of Plaintiff's own negligence and possible apportionment. Further, Defendant still has a duty to maintain the premises in a reasonably safe condition, based on the totality of the circumstances. Viewing the evidence in the light most favorable to the Plaintiff as the nonmoving party, Defendant has not shown as a matter of law that it has no liability. Given that this door was the primary delivery entrance, it could be anticipated that a person using that entrance might be carrying, pushing or pulling some auto parts and his or her vision might be limited. *See, Osterhoudt v. Acme Mkts., Inc.*, 214 AD3d 1181; *cf. Catman v. Back Water Grille LLC*, 2024 NY App Div LEXIS 1205 (Plaintiff actually saw the obstruction, which was a kayak paddle, and was injured when he tried

to move it). The presence of a cinderblock, measuring between 4 inches and 12 inches, in a pathway, could be an unsafe condition for a delivery entrance. Additionally, Defendant has not met its burden to show that the cinderblock was not an inherently dangerous condition. The determination of whether a condition is inherently dangerous "is dependent on the totality of the surrounding circumstances, including the proximity of the [cinderblock] to the [delivery entrance]." *Osterhoudt v. Acme Mkts., Inc.*, 214 AD3d at 1182-1183 (citations omitted); *see, Wolfe v. Staples, Inc.*, 224 AD3d 1126. In *Osterhoudt*, plaintiff was pulling a bulk cart backwards up a ramp to the defendant's receiving area, when he tripped over the forks of a pallet jack near the doorway. While a person simply standing in that vicinity might have easily seen the pallet jack, the Court denied summary judgment to the defendant, noting that plaintiff's familiarity with the premises and "his decision to enter the doorway walking backwards are factors that may be considered with respect to plaintiff's comparative negligence, but do not establish that defendant was free from fault as a matter of law." *Id.* at 1182. In that case, the Third Department also concluded that defendant had failed to establish that the pallet jack was not inherently dangerous. Similar facts and considerations lead to the same result in this case. Defendant has failed to show that the cinderblock was "open and obvious" to a person making deliveries; or that Defendant maintained its premises in a reasonably safe condition and/or that the cinderblock could not have been inherently dangerous.

3. Actual or constructive notice of the alleged defect

A defendant seeking summary judgment in a trip and fall case must "'establish that its property has been maintained in a reasonably safe condition and that it did not create a dangerous condition that caused the plaintiff's fall or have actual or constructive notice of that condition.'" *Mister v. Mister*, 188 AD3d at 1334 (internal bracket omitted), *quoting Maurer v. John A. Coleman Catholic High School*, 91 AD3d 1168, 1168 (3rd Dept. 2012).

Defendant failed to meet is burden that it did not create the condition or have actual or constructive notice of the condition. If the defendant created the dangerous condition, then the notice requirement is not applicable. *See, Osterhoudt v. Acme Mkts., Inc.*, 214 AD3d 1181; *see also, Payne v. Sole Di Mare, Inc.*, 216 AD3d 1339 (3rd Dept. 2023). It must be recalled that Defendant did not submit an evidentiary affidavit on this motion, and instead relied only on the

depositions, which are silent as to how the cinderblock came to be in front of the door. Thus, "Defendant did not submit any affirmative evidence that the allegedly dangerous condition was not of its own creation" [*Barley v. Robert J. Wilkins, Inc.*, 122 AD3d at 1118], nor did it provide sufficient evidence with respect to constructive notice. Defendant has completely failed to provide any evidence that the cinderblock got to that location through any action other than Schultz or onw of one of the employees. Any other explanation seems implausible, but Defendant has not offered any alternative. In fact, Mr. Schultz acknowledged that sometimes the workers would place the cinderblocks to hold the door open, so it certainly seems likely that someone connected with the business placed this cinderblock in proximity to the door. In addition to not excluding its own culpability in placing the cinderblock, Defendant has also not shown a lack of constructive notice of the defective condition. "'Constructive notice, in contrast to actual notice, requires that the defect be visible and apparent and has existed for a sufficient period of time prior to the accident to permit a defendant to discover it and take corrective action.'" *Mister v. Mister*, 188 AD3d at 1334 (bracket omitted), *quoting Torgersen v. A&F Black Creek Realty, LLC*, 158 AD3d 1042, 1042, 71 NYS3d 672 (3rd Dept. 2018); *Moons v. Wade Lupe Constr. Co., Inc.*, 24 AD3d 1005 (3rd Dept. 2005). In order to show a lack of constructive notice, the Defendant must provide some evidence as to when the area was last inspected and found to be free of defects, and "[m]ere reference to general ... inspection practices is insufficient to establish a lack of constructive notice." *Lloyd v. 797 Broadway Group, LLC*, 216 AD3d 1290, 1292 (3rd Dept. 2023), *quoting Miller v. Terrace City Lodge No. 1499, Improved Benevolent Prot. Order of the Elks of the World of Yonkers, N.Y.*, 197 AD3d 643, 644 (2nd Dept. 2021).

Schultz testified that he did not receive any prior complaints about the cinderblock and had no knowledge of anyone falling prior to this accident. He also testified that he walked around the building daily to see if anything needed to be picked up (Schultz deposition at pp. 45-46), but Defendant has failed to present any evidence as to when the premises had last been inspected prior to Plaintiff's accident. Defendant asserts that Plaintiff cannot state how long the alleged defect had been present, and therefore, cannot establish that Defendant had constructive notice. However, this is Defendant's motion for summary judgment, and the burden is on Defendant to show an absence of constructive notice. Without any proof as to when the

premises had last been inspected, Defendant has not made a *prima facie* showing of lack of constructive notice.

CONCLUSION

Defendant has failed to make a *prima facie* showing that it is entitled to summary judgment. The issues of whether the cinderblock was an "open and obvious" condition is dependent of the totality of the circumstances, which in this case, involves consideration of the fact that this door was used regularly for deliveries and whether a person making a delivery might not be able to see the ground in front of him. Further, even if it was "open and obvious", Defendant must still maintain the premises in a reasonably safe condition. Defendant has failed to establish that the presence of a cinderblock near a delivery entrance did not constitute an inherently dangerous condition. Lastly, Defendant has failed to provide evidence to show that Defendant (or an employee of Defendant) did not place the cinderblock in that location, or when the premises had last been inspected for the presence of any unsafe conditions.

Based on the foregoing, and after due deliberation, it is hereby

ORDERED, Defendant's motion for summary judgment is DENIED, and it is further

ORDERED, that the attorneys for both parties are directed to appear for a pre-trial conference on **AUGUST 13, 2024 AT 3:30 PM TO BE CONDUCTED BY MICROSOFT TEAMS.** Chambers will provide the link to join the conference.

THIS CONSTITUTES THE DECISION AND ORDER OF THIS COURT.

Dated: June 26, 2024
Binghamton, New York

HON. EUGENE D. FAUGHNAN
Supreme Court Justice