

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE IAS PART 22
Justice

| | |
|----------------------------------|------------------------|
| ----- | Index No. 23465/04 |
| HERMAN SCOTT, | Motion |
| Plaintiff, | Date February 27, 2007 |
| -against- | |
| | Motion |
| NEW YORK CITY TRANSIT AUTHORITY, | Cal. No. 11 |
| Defendant. | |
| ----- | Motion |
| | Sequence No. S002 |

The following papers numbered 1 to 9 read on this motion by defendant, New York City Transit Authority for summary judgment and to dismiss the complaint of plaintiff, Herman Scott pursuant to CPLR 3212.

| | <u>PAPERS NUMBERED</u> |
|---|----------------------------|
| Notice of Motion-Affidavits-Exhibits..... | 1-4 |
| Answering Affirmation..... | 5-7 |
| Reply Affirmation..... | 8-9 |

Upon the foregoing papers it is ordered that this motion is determined as follows:

Defendant, New York City Transit Authority ("NYCTA") moves for summary judgment and dismissal of plaintiff, Herman Scott's Complaint pursuant to CPLR 3212, arguing that defendant did not create the purported condition and had no notice of an alleged dangerous condition. On March 12, 2004, plaintiff was allegedly injured after he tripped and fell at the M4B stairway, third flight of steps from the street, in the E Train Station, near to the top of the steps on the northeast corner of Parsons Boulevard and Archer Avenue, Jamaica, County of Queens, City and State of New York.

Defendant argues that it cannot be held liable for plaintiff's injuries, as the defendant did not create the purported condition or have actual or constructive notice of the condition. Defendant attaches as exhibits plaintiff's Statutory

Hearing testimony, and Deposition transcript testimony which allegedly set forth that the reason plaintiff fell was due to flyers or debris. Additionally, defendant attaches the deposition transcript testimony of Ms. Angela Grant, a Station Cleaner for defendant. Ms. Grants does not indicate that defendant had actual or constructive notice of any flyers on the stairway in question. Defendant argues that the record is devoid of any evidence that such condition existed on the staircase, or for how long the purported condition existed on the staircase prior to plaintiff's alleged fall (see *Taylor v. New York City Transit Authority*, 266 AD2d 384 [2d Dept 1999]; *Williams v. New York City Transit Authority*, 248 AD2d 462 [2d Dept 1998]).

Plaintiff asserts that there are triable issues of fact precluding summary judgment. Plaintiff maintains that plaintiff testified that he slipped on debris on the steps of stairway MB4, and that thereafter as he was in the process of trying to gather himself his right foot caught in the drainage groove in the middle of the staircase causing his right quadricep tendon to tear. Plaintiff also additionally includes the unsworn expert report of Herbert W. Braunstein, P.E., P.A., a Consulting Engineer who states that the drainage groove is a hazardous and unsafe condition and that "[t]he debris on the staircase is also a contributing factor that led to the accident."

Defendant submits an affirmation in reply in which it argues that plaintiff is now claiming in its opposition papers that the drainage groove was the cause of his fall, and therefore actionable, whereas, defendant maintains the cause of plaintiff's fall was the debris on the ground, not the drainage groove that plaintiff fell into after slipping on the debris on the ground.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue. (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against. (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]).

The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce

competent evidence in admissible form to establish the existence of a triable issue of fact (see *Zuckerman v. City of New York*, 49 NY2d 557 [1980].)

For defendant to be liable, plaintiffs must prove that defendant either created or had actual or constructive notice of a dangerous condition (*Gordon v. American Museum of Natural History*, 67 NY2d 836 [1986]; *Ligon v. Waldbaum, Inc.*, 234 AD2d 347 [2nd Dept 1996]). To constitute constructive notice, a defect must be visible and apparent and exist for a sufficient period of time prior to the accident to permit defendant to discover and remedy it. (See *id.*).

Defendant's motion for summary judgment is denied. Defendant established its *prima facie* entitlement to summary judgment by showing that it neither created an unsafe condition nor had actual or constructive notice thereof (see *Rajgopaul, et. al. v. Toys "R" Us*, 297 AD2d 728 [2nd Dept 2002]; *Cruz v. Otis Elevator Company*, 238 AD2d 540 [2nd Dept 1997].) However, plaintiff presented sufficient evidentiary proof in admissible form to establish a triable issue of fact. There are triable issues of fact in connection with, *inter alia*, what actually caused plaintiff to fall and whether defendant had any notice of a defective condition. On these issues, a trial is needed and the case may not be disposed of summarily. As there remains issues of fact in dispute, defendant's motion is denied.

Therefore, an issue of fact exists as to "whether defendant had constructive notice of the defect by virtue of it having been 'visible and apparent and [in existence] for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it'". (*George v. New York City Transit Authority*, 306 AD2d 160 [1st Dept 2003]).

Accordingly, defendant's motion is denied.

The foregoing constitutes the decision and order of this Court.

Dated: March 12, 2007

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Howard G. Lane, J.S.C.