SHORT FORM ORDER
NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE SIDNEY F. STRAUSS IA PART 11
Justice

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RONALD KILLEN,

Plaintiff,

-against-

ST. JOHN'S UNIVERSITY,

Defendant.
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Index No.: 4854/2011

Motion Date: April 19, 2013

Seq. No.: 3

The following papers numbered 1 to 6 were read on the plaintiff's motion seeking an order pursuant to CPLR 2221, for leave to reargue this court's decision of January 25, 2013.

	PAPERS NUMBERED
Notice of Motion - Affirmation - Exhibits - Memo.....	1 - 4
Opposition Affirmation.....	5
Reply Affirmation.....	6

A motion to reargue allows a party to establish that the court "overlooked or misapprehended the relevant facts" or "misapplied any controlling principle of law." (*Foley v Roche*, 68 AD2d 558 [1st Dept. 1979].) The underlying action involves a trip and fall that occurred in an interior stairwell of a building located on the defendant's campus. The defendant in this instance argues that the Court did not reference the affidavit of former Safety Officer Robert Fromm ("Fromm"), and that such affidavit establishes the timing of the last inspection prior to the happening of the underlying incident. Defendant also alleges that the testimony of Sargent Eric Johnson confirmed that the Public Safety Officers were required to walk the entire building looking for, and subsequently reporting on, any problems, defects or safety hazards, including the defect plaintiff alleges caused him to trip and fall. Finally, defendant asserts that the plaintiff's own duties as a handyman included observing and reporting of any defective conditions such as the one that allegedly caused the underlying accident. The defendant asserts

that plaintiff admitted that he did not see the alleged defect in the bullnose of the steps immediately prior to his accident or on any other prior occasion.

The plaintiff's motion to reargue is granted and upon such reargument the court's decision dated January 25, 2013 is vacated and the following is substituted in its place and stead:

Plaintiff, a handyman/porter working on the campus of St. John's University, alleges he tripped and fell due to a loose bullnose on the stair tread of a stairwell in Lavelle Hall. He alleges that not only did the defendant create the condition, but that it had constructive notice of the condition. Furthermore, plaintiff asserts that the defendant violated Chapter 3 of the Administrative Code of the City of New York, and Sections 1009.3.2 and 1009.5.1 of said Building Code with regard to the repair and maintenance of the subject strairwell.

Defendant seeks summary judgment contending that the plaintiff failed to establish notice of the alleged dangerous condition. Defendant submits the testimony of non-party witnesses Sargent Eric Johnson ("Johnson"), Day Tour Supervisor, the Public Safety Department and Public Safety Officer Amelia Porto, whose duties included monitoring the overall safety of the campus, including reporting any safety issues, and the affidavit of Robert Fromm ("Fromm"), a Public Safety Officer. According to Sgt. Johnson's testimony, the duties of a public safety officer were "to look at the overall safety of the campus community." More specifically, he stated that "[we would] try to prevent or deter crime, but it's overall safety of the campus community." He also testified that the custom and practice of the Safety Department was "from time to time, take complaints about defects or problems with the campus such as spills or something being broken." He also stated that "some things . . . you would do an incident report," but for other issues, such as a spill, "you can verbally ask somebody to clean up." According to his testimony, a safety officer could either call it in to the maintenance department, or, if "[he] was passing a maintenance person, [he] might ask them to address it." The maintenance department was specifically identified by Sgt. Johnson as the "Facilities Department."

The affidavit of Fromm, a security officer for the Public Safety Department of the defendant at the time of the accident, was also submitted on behalf of the defendant. He stated that "[i]t was my custom and practice to carry a notebook where I memorialized amongst other things, any dangerous or other reportable conditions I may have observed and any incidents I responded to." He further attested that he had walked the length of the building, and not noted any defect therein. He did state that after the incident he inspected the subject staircase, and noted the "vinyl stair cover had separated . . ." He testified that he had never previously observed the condition complained of, or a similar condition in the subject staircase in during his last tour of the building, two and a half hours earlier than the occurrence, or the approximately two years that the building had been part of his tour.

The defendant also submits the command log for the date of the incident, which indicated that the premises had been inspected for safety issues, problems or violations, twice per shift in the two shifts prior to plaintiff's fall, and once during the time period that the incident occurred. No issues were reported. All evidence offered on behalf of the defendant confirmed defendant's

argument that it had had no notice of the defect where plaintiff fell prior to the actual incident. The plaintiff testified that he had not observed any alleged condition prior to the incident, nor had he ever made or heard of, any complaints with regard to the staircase in question.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. (see, *Zuckerman v City of New York*, 49 NY2d 557[1980].) A defendant owner or entity responsible for maintaining premises who moves for summary judgment in a trip-and-fall case involving the property has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (see, *Bloomfield v Jericho Union Free School Dist*, 80 AD3d 637 [2d Dept. 2011]; *Arzola v Boston Props. Ltd. Partnership*, 63 AD3d 655 [2d Dept. 2009]; *Bruk v Razag, Inc*., 60 AD3d 715 [2d Dept. 2009]).

The evidence offered in support of defendant's motion is insufficient to demonstrate lack of constructive notice. It is clear from the testimony proffered by the defendant that the safety officers' official duties involved the safety of the "campus community," not the care and maintenance of the grounds of the defendant university. Safety Officer Fromm attested to his own personal custom and practice, and Sgt. Johnson averred that it was the job of the public safety department to prevent or deter crime, and further, that if a safety officer were to observe a hazardous condition, he could either call it in, or if he saw a maintenance worker, tell him that there was a problem that needed attending. It is clear that as to the physical condition of the property, there were no formal requirements for the reporting and correcting of hazardous conditions on the part of the safety officers.

This court finds that proof that the premises was monitored for overall safety is insufficient as to whether an actual inspection for defects and or hazardous conditions was conducted. (see, *Baratta v Eden Roc NY, LLC*, 95 AD3d 802 [2d Dept. 2012]). The testimony proffered confirms that it was the responsibility and the duty of the Facilities Department to deal with the physical condition of the campus. Further, the court notes that no evidence was introduced to establish that the safety officers were qualified, or, for that matter, required, to perform the tasks associated as belonging to the Facilities Department. The evidence submitted on behalf of the defendant is insufficient to establish proof of a particularized or specific inspection of the stairway located within the subject building as opposed to evidence of general daily inspections on defendant's campus. (see, *Birnbaum v New York Racing Assn., Inc*., 57 AD3d 598 [2d Dept. 2008]). The command log itself indicates that the primary notations concerned safety and security issues such as lost keys or students requiring medical assistance.(see e.g., *Baratta v Eden Roc NY, LLC*, supra, [the defendant offered no evidence as to when the mat was last inspected prior to the accident as opposed to the last time its superintendent walked over it].) "To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell." (see, *Levine v Amverserve Assn., Inc.*, 92

AD3d 728 [2d Dept. 2012], quoting, *Birnbaum v New York Racing Assn., Inc.*, 57 AD3d 598, 598-599 [2008];see also, *Pryzywalny v New York City Tr. Auth.*, 69 AD3d 598 [2d Dept. 2010].)

The defendant also alleges that the testimony of Ms. Christine DeBianchi ("DeBianchi"), a graduate student working in the building at the time of the accident, and submitted on behalf of the plaintiff, clearly indicates that she had never noticed anything particular about the stair tread's condition prior to the date of the accident. However, she testified specifically that "I had stated that I never really use those stairs often. So I cannot accurately answer that question," in response to the question "Prior to the time [plaintiff's] accident happened, had you ever noticed anything about the condition of those stairs?" The Court finds that Ms. DeBianchi's testimony as to what she observed immediately post-accident, was close enough in time to consider her statements with regard to the open and obvious condition of the stair tread at the moment plaintiff tripped. Such testimony sufficiently "raised triable issues of fact as to whether the visible and apparent condition existed for a sufficient length of time for [the defendant] to have discovered and remedied the defect (see, *Minor v 1265 Morrison, LLC*, 96 AD3d 1024 [2d Dept. 2012]; *Bravo v. 564 Seneca Ave. Corp.,* 83 AD3d 633 [2d Dept. 2011].) However, statements made with regard to the length of time the condition may have existed prior to the accident are speculative, and accordingly, without probative value.

With regard to defendant's assertion that the fact that the plaintiff himself was a handyman whose duties included observing and reporting hazardous conditions, the Court finds that although such facts may be subject to a finding of comparative fault at trial, it does not warrant summary judgment in favor of the defendant. (see, *Sokolovsky v Mucip, Inc.*, 32 AD3d 1011 [2d Dept. 2006]; *Rios v Johnson V.B.C.*, 17 AD3d 654 [2d Dept. 2005]; *O'Neill v Mildac Properties,*162 AD2d 441 [2d Dept. 1990]; see also, *Alexander v St. Mary's Institute*, 78 AD3d 1745 [3d Dept. 2010].) Such issues are best suited to a determination at trial. The Court also notes that contrary to the defendant's assertions, plaintiff testified that he had never repaired stairs in any of the campus buildings; that he had only been on the particular stairs in question ten times in the prior year, and not at all in the six weeks leading up to the accident. Plaintiff also testified that on the date in question he had entered the building using the stairs in the front of the building, only using the subject stairs as he was attempting to leave.

Additionally, not only did defendant fail to establish lack of constructive notice, it also failed to make a prima facie showing that it did not create the allegedly dangerous condition that caused plaintiff to trip. (see, *Levine v Amverserve Assn., Inc*., 92 AD3d 728 [2d Dept. 2012].) Plaintiff submits the affidavit of Rudolph J. Rinaldi, an engineer, which specifically contradicts the findings of the defendant's expert engineer, Mr. Vincent A. Ettari, as to the responsibilities of the defendant pursuant to applicable New York City Code. He states that "the assertion by Mr. Ettari . . . 'Finally nowhere in the entirety of Chapter 3 of the [2008] New York City Building Code are there any requirements or standards which specifically pertain to, or regulate, the maintenance of stairways' is simply not true." Mr. Rinaldi argues that the applicable code provisions required the "defendant to maintain the stairs in question in a safe condition and good working order even though they may have been constructed in a manner that would not be in compliance with the 2008 Code." At a minimum, the existence of conflicting expert opinions

raise issues of fact with regard to maintenance and repair of the subject staircase, and whether it was a proximate cause of the underlying accident. (see generally, *Espinal v Jamaica Hosp. Medical Center*, 71 AD3d 723 [2d Dept. 2010].)

Accordingly, upon reargument, the Court adheres to its original determination that the defendant's motion for summary judgment is denied.

Dated: April 30, 2013

SIDNEY F. STRAUSS, J.S.C.