SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN **PART 21**
Justice

Index Number : 111124/2008
LEE, DAPHNE E.
vs.
NEW YORK CITY TRANSIT
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. 111124/08
MOTION DATE 4/10/14
MOTION SEQ. NO. 003

The following papers, numbered 1 to 4, were read on this motion for summary judgment

Notice of Motion; Affirmation in Support — Exhibits A-L	No(s). 1; 2
Affirmation in Opposition — Exhibits A-H	No(s). 3
Reply Affirmation	No(s). 4

Upon the foregoing papers, this motion is decided in accordance with the annexed memorandum decision and order.

HON. MICHAEL D. STALLMAN

Dated: 6/19/14
New York, New York

_____, J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

1. Check one:..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. Check if appropriate:..... MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

----------X

DAPHNE E. LEE,

Plaintiff,

- against -

Index No. 111124/08

NEW YORK CITY TRANSIT AUTHORITY,

Defendant.

Decision and Order

----------X

NEW YORK CITY TRANSIT AUTHORITY,

Third-Party Plaintiff,

- against -

CITY UNIVERSITY OF NEW YORK and DORMITORY AUTHORITY OF THE STATE OF NEW YORK,

Third-Party Defendants.

----------X

HON. MICHAEL D. STALLMAN, J.:

In this personal injury action, defendant New York City Transit Authority (NYCTA) moves for summary judgment dismissing the plaintiff's complaint as against it.

BACKGROUND

Plaintiff alleges that, on October 29, 2007 at approximately 6:45p.m.,

she slipped and fell on a banana peel on a staircase leading to the Lexington Avenue and East 68th Street subway station in Manhattan. Plaintiff testified,

"I slipped on a banana peel."

Q: Did you see the banana peel before you slipped on it?

A: No, sir.

Q: After you slipped on the banana peel, did you see it?

A: Yes.

* * *

Q: Did anything obstruct your view of the stairs as you were walking down?

A: No sir.

Q: Did one or both of your feet come into contact with the banana peel?

A: One.

Q: Which one?

A: The right one.

(Coffey Affirm. Ex. I [Lee EBT], at 13-14.)

DISCUSSION

The standards for summary judgment are well-settled.

"On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. Summary

> judgment is a drastic remedy, to be granted only where the moving party has tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact, and then only if, upon the moving party's meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action. The moving party's [f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers."

(*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal citations and quotation marks omitted].)

Defendant NYCTA moves for summary judgment on the grounds that the NYCTA does not control the area where plaintiff allegedly fell and defendant did not have actual or constructive notice of the alleged condition. In support of its motion, the NYCTA submits the deposition testimony of Mohammed Hamid, a station supervisor for the NYCTA; Carmelite Cadet, a civil engineer for the NYCTA; and Edward Wagner, a senior project manager for the Dormitory Authority for the State of New York (DASNY). Hamid testified that he was not quite sure about who was responsible for the safety of customers using the stairway to get to the 68th street subway station platform in October 2007, but that it was his understanding that it was a Hunter College stairway. (Coffey Affirm. Ex. J [Hamid EBT], at 34.) Cadet testified that, "stairway 04 and 02 are not maintained by the [NYCTA], therefore they would not have any records of

maintenance of these stairways" and that she believed the City University of New York and Hunter College were responsible for maintaining the subject stairway. (Coffey Affirm. Ex. K [Cadet EBT], at 12.) When asked whether DASNY hired contractors that performed the work involved in constructing the 68th street subway station entrances, Wagner testified,

> "I can't – I wasn't around at the time, so it's hard for me – I don't exactly know who agreed to what. Who agreed to build what at the time.
>
> Q: Based on your reading of this Exhibit, Third-Party Plaintiff Exhibit 1 for identification, does it indicate any other entity involved in constructing these two subway entrances other than the [DASNY]?
>
> [colliloquy omitted]
>
> A: From what I read it makes it sound like the DASNY was the one that it says replaced them."

(Coffey Affirm. Ex. L [Wagner EBT], at 25-26.)

Plaintiff opposes the motion arguing that the NYCTA had the responsibility to maintain the subject stairway in question because under *Bingham v New York City Transit Authority* (8 NY3d 176 [2007]), a common carrier has a duty to maintain a safe means of ingress and egress for the

use of its passengers. Plaintiff also argues that there is a question of fact as to whether the NYCTA had notice of the alleged condition on the stairway and the alleged inadequate lighting. (Slavit Opp. Affirm. Ex. H [Complaint], ¶ 9.) Plaintiff submits the deposition testimony of Elizabeth Hicks, a NYTCA cleaner and the cleaner's accident report noting the cleaning schedule for the date of the alleged incident. (Slavit Opp. Affirm. Ex. E [Hicks EBT], Ex. C.) According to Hicks's deposition and the cleaner's accident report, on the date of the alleged incident, Hicks swept and cleaned the part of the station including the subject stairway at approximately 5:40 p.m. and again at 7:00 p.m., and it was "clean" and "litter free." (Hicks EBT at 17-18, Slavit Opp. Affirm. Ex. C.) Hicks also testified that she did not remember the nature of the lighting on the date of the alleged incident and she was not aware whether there was a change of lighting between her cleanings of the subject area. (*Id.* At 29.)

"A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence." (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008].) "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to

the accident to permit defendant's employees to discover and remedy it." (*Gordon v Am. Museum of Natural History*, 67 NY2d 836, 837 [1986] [citations omitted].) 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." (*Granillo v Toys "R" US, Inc.*, 72 AD3d 1024 [2d Dept 2010] [citations omitted]; *Moser v BP/CG Ctr. I, LLC*, 56 AD3d 323, 324 [1st Dept 2008].)

The Court need not reach the issue of whether the NYCTA had the responsibility of maintaining the subject stairway because assuming arguendo that the NYCTA had such responsibility, the NYCTA met its prima facie burden of establishing lack of actual or constructive notice by plaintiff's submission of the cleaner's accident report. According to the report, Hicks swept and cleaned the subject location at 5:40 p.m. before the plaintiff allegedly fell. (Slavit Opp. Affirm. Ex. C.)

Plaintiff fails to raise a triable question of fact as to notice. Plaintiff's argument that defendant has not established lack of notice because defendant failed to rebut plaintiff's allegations of inadequate lighting lacks merit. Plaintiff, herself, admitted that she slipped on a banana peel and nothing obstructed her view as she descended the stairs. (Lee EBT at 13-

14.) Moreover, the area was cleaned at 5:40 p.m. before plaintiff allegedly fell and was "clean" and "litter free." (Slavit Opp. Affirm. Ex. C.) Thus, the Court need not reach the issue of inadequate lighting.

CONCLUSION

Accordingly, it is hereby

ORDERED that the defendant NYCTA's motion for summary judgment is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and all cross claims against this defendant are dismissed, and the Clerk is directed to enter judgment accordingly in favor of said defendant.

Dated: June 19, 2014
New York, New York

ENTER:

J.S.C.