Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

ANA ROSARIO,

Plaintiff,

-against-

NEW YORK CITY HOUSING AUTHORITY and THE CITY OF NEW YORK,

Defendants.

Index No. 710234/15

Motion Date May 10, 2017

Motion Cal. No. 133

Motion Seq. No. 1

	Papers Numbered
Notice of Motion-Affidavits-Exhibits...	HC A
Opposition.....	HC B
Reply.....	HC C

Upon the foregoing papers it is ordered that the motion by defendant, the City of New York ("the City") for summary judgment pursuant to CPLR 3212 dismissing the plaintiff's Complaint and all cross claims against the City is hereby denied.

At the outset, the Court notes that after submission, the Court accepted opposition and reply papers.

The action is one for personal injuries allegedly sustained by plaintiff, Ana Rosario, on or about March 6, 2015, when she allegedly slipped and fell on the entrance/exit ramp for the premises located at 34-41 Linden Place, Queens, New York. Plaintiff maintains that she sustained serious personal injuries due to the negligence of defendants.

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]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v. Tallman*, 278 AD2d 811 [4th Dept 2000]).

For defendants to be liable, plaintiff must prove that defendants 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 [2d 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.*).

To establish a prima facie case of negligence, a plaintiff must establish the existence of a duty, a breach of the duty, and that said breach was the proximate cause of their injuries (*see, Gordon v. Muchnick*, 180 AD2d 715 [2d Dept 1992]). However, absent a duty of care, there is no breach and no liability *(Id.; see also, Marasco v. C.D.R. Electronics Security & Surveillance Systems Co., et. al.*, 1 AD3d 578 [2d Dept 2003]).

It is well settled that "liability for a dangerous or defective condition on property is generally predicated upon ownership, occupancy, control or special use of the property * * * Where none is present, a party cannot be held liable for injuries caused by the dangerous or defective condition of the property" (*Minott v City of New York*, 230 AD2d 719, 720, 645 NYS2d 879, quoting *Turrisi v Ponderosa, Inc.*, 179 AD2d 956, 578 NYS2d 724; *see also, James v Stark*, 183 AD2d 873, 584 NYS2d 137;

Balsam v Delma Eng'g Corp., 139 AD2d 292, 532 NYS2d 105).

Moving defendant presented via, inter alia, the affidavit of Principal Title Examiner with the New York City Law Department, Frank Engoron, a prima facie case that there are no triable issues of fact. Defendant established that the City does not own, operate, or maintain the subject property where plaintiff was allegedly caused to slip and fall, and that a title search revealed that the owner and operator of the subject premises is co-defendant, New York City Housing Authority ("NYCHA"). As co-defendant, NYCHA has not opposed the instant motion, such is undisputed. Accordingly, the City established a prima facie case.

In opposition, plaintiff failed to raise any triable issues of fact. Plaintiff asserts that the motion is premature because plaintiff is entitled to seek discovery from the City of a witness "with knowledge as to City's actual dealings or involvement with the subject premises[...]." However, plaintiff filed a Note of Issue, and attached to it an attorney affirmation which indicates that the deposition of defendant, the City of New York has been completed. Furthermore, the Court finds that the plaintiff's allegation that the City may have "dealings or involvement with the subject premises" is speculative. Plaintiff has failed to demonstrate that facts essential to oppose the motion may exist but cannot then be stated. "Mere hope that somehow [a party] will uncover evidence that will prove a case provides no basis pursuant to CPLR 3212(f) for postponing a determination of a summary judgment motion." (*Plotkin v. Franklin*, 179 AD2d 746 [2d Dept 1992][internal citations omitted]).

As there are no triable issues of fact, a trial is unnecessary regarding defendant, the City.

Accordingly, the City's motion for summary judgment pursuant to CPLR 3212 is granted.

This constitutes the decision and order of the Court.

Dated: June 12, 2017

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HOWARD G. LANE, J.S.C.