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

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JOSE FERRER

Plaintiffs,

DECISION AND ORDER

Index No.: 156153/2015

Mot. Seq. 1

-against-

NEW YORK CITY TRANSIT AUTHORITY,

Defendants.

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered	NYCEF #
Defendant's Motion/ Affirmations/Memo of Law	1	21-35
Plaintiff's Memo of Law in Opposition	2	37-39
Defendant's Reply	3	41

LISA A. SOKOLOFF, J.

In this personal injury law suit initiated by Plaintiff Jose Ferrer, the Defendant New York City Transit Authority (Transit) moves for summary judgment pursuant to CPLR §3212 on the issue of liability, seeking to dismiss Plaintiff's complaint as a matter of law.

Plaintiff claims that on July 10, 2014 at approximately 1p.m., he sustained personal injuries when he allegedly slipped and fell on a wet area on the subway station escalator. Plaintiff commenced this action against Defendant Transit, which operates and maintains the "D" subway station located at West 145th Street and Nicholas Avenue, New York, NY where the accident occurred. Defendant contends that it had neither actual nor constructive notice of the allegedly unsafe condition, while Plaintiff argues that the liquid on the escalator was there for some time and therefore Defendant was on notice of the wet condition.

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*, 35 NY2d 361 [1974]). The proponent of a motion for summary judgment has the burden of establishing that there are no material issues of fact in dispute (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The burden is on the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the movant demonstrates its entitlement to summary judgment, the burden shifts to the opposing party to present facts, in admissible form, demonstrating that genuine, triable issues exist precluding summary judgment (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Vega v Restani Const. Corp.*, 18 NY3d 499 [2012]).

A landowner has a duty to maintain its property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to a third party, the potential that such injury would be of a serious nature, and the burden of avoiding such risk (*Basso v Miller*, 40 NY2d 233, 241 [1976]; *Alexander v New York City Transit*, 34 AD3d 312 [1st Dept 2006]). A common carrier like Transit has an obligation to its riders to provide safe access (*O'Hara v New York City Transit Authority*, 248 AD2d 138 [1st Dept 1998]) and must use ordinary care with respect to approaches, station platforms, halls and stairways, in order to keep its stations free from dangerous conditions (*Lewis v Metropolitan Transp. Auth.*, 99 AD2d 246, 248 [1st Dept 1984]).

As the proponent of the summary judgment motion, Transit must establish, *prima facie*, that it neither created, nor had actual or constructive notice of the hazardous condition alleged (*Briggs v Pick Quick Foods, Inc.*, 103 AD3d 526 [1st Dept 2013]). 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 a defendant to discover and remedy it (*Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]). "The mere existence of [a] puddle on the floor is insufficient to impute notice to the defendant," or constructive notice, where there is no evidence that the puddle had been present for any length of time (*Kane v Human Serv. Ctr., Inc.*, 186 AD2d 539, 539 [2nd Dept 1992]).

Here, Transit argues that it had neither actual nor constructive notice of the wet condition on the escalator. Defendant has sustained its burden by presenting evidence, including Plaintiff's testimony that the cause of the fall was unclear due to other aggravating factors such as crowds and pushing, as well as the Station Cleaner's testimony that she had cleaned the station according to the posted schedule.

Plaintiff argues that Transit failed to maintain the station and remedy the allegedly dangerous condition and presents the affidavit of a witness, Walter Martinez, who claims that he noticed wetness on the escalator 30 minutes before Plaintiff's fall. Curiously, the witness does not explain the circumstance of his presence on the subway escalator just a short while earlier.

Contrary to Plaintiffs' opposing argument, the Court does not find any significant triable issues of fact to support that Defendant had notice -- actual or constructive -- of the wet condition that caused injury here. According to the deposition testimony of Station Cleaner Urica Page, she conducted a cleaning of the subway station on the date of the accident from 7 a.m. to 11 a.m. Her duties included a sweep of all street and mezzanine stairways; "scrap" of mezzanine and platform areas; disinfection of all urine areas; emptying and disinfection of all trash receptacles; dusting of all ledges; and removal of all gum, stains, spills and drag marks from floor areas. The same cleaning was conducted at the alleged time of Plaintiff's accident, beginning at 12:30 p.m. The Station Cleaner further testified that if there were any issue with the

escalator, she would have reported it to her supervisor, the event would have been recorded, and the escalator would have been taken out of service.

Defendant has demonstrated that it has a reasonable method of maintaining the subway premises based on the station cleaning schedule, which provides for two time frames daily for cleaning. The second cleaning had commenced just before the accident occurred. Where "a reasonable cleaning routine was established and followed, liability cannot be imposed" and the "court cannot impose a duty upon a municipal authority to alter its cleaning schedule or hire additional cleaners without a showing that the established scheduled is manifestly unreasonable" (*Harrison v New York City Transit Authority*, 94 AD3d 512 [1st Dept 2012]). Because the earlier scheduled cleaning was completed prior to the first spotting of the condition, the later one had just commenced, and there is nothing in the record to suggest that the escalator was taken out of service, Plaintiff has failed to provide any evidence that Transit had notice of the condition or breached their duty of reasonable care.

Plaintiff is also unable to recall the exact source of his fall. Speculation as to the cause of a fall is insufficient to maintain a cause of action (*Acunia v New York City Dept. of Educ.*, 68AD3d 631 [2009]). Plaintiff recalled that there were, "a lot of people; there was so many people getting out. I knew that it was wet… I couldn't tell you for sure what it was; water, pee. I don't know if they had been mopping or what but it was just wet. There was so many people pushing, too." Plaintiff is also unable to accurately recall the distance between the train and the escalator and admitted that he saw the water before he made contact with it. Additionally, Plaintiff was wheeling a large suitcase behind him, which could have also contributed to causing his fall. Viewing the evidence in the light most favorable to Plaintiff, including the presence of liquid at the foot of the escalator for 30 minutes, Plaintiff has failed to raise a question of fact as to constructive notice or other material issue that requires a trial.

Accordingly, it is ordered that Defendants' motion for summary judgment is granted and Plaintiff's complaint is dismissed.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: July 23, 2018
New York, New York

ENTER:

Lisa A. Sokoloff, J.C.C.

CHECK ONE:	X	CASE DISPOSED		NON-FINAL DISPOSITION			
	X	GRANTED	☐ DENIED	GRANTED IN PART		☐ OTHER	
APPLICATION:		SETTLE ORDER		SUBMIT ORDER			
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT		☐ REFERENCE	