SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY

PRESENT: HON. PAUL WOOTEN PART 97
Justice

SKENDER KASTRATI,

Plaintiff,

- against -

INDEX NO. 509329/2016
MOT. SEQ. 1

THE GLADYS K. LEWIS FAMILY LIMITED PARTNERSHIP,

Defendant.

The following papers, numbered 1 to 4, were read on this motion by defendant for dismissal and summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	1, 2
Answering Affidavits — Exhibits (Memo)	3
Replying Affidavits (Reply Memo)	4

This is a personal injury action commenced by Skender Kastrati (plaintiff) on June 3, 2016 via Summons and Verified Complaint to recover monetary damages for injuries sustained on November 30, 2015. Plaintiff alleges that he tripped and fell as a result of a loosened, dislodged and moveable tread of and upon the first step above the ground floor of the inner stairway he was descending in the residential building owned by defendant The Gladys K. Lewis Family Limited Partnership (defendant) located at 8420 20th Avenue Brooklyn, New York (the Building).

Before the Court is a motion by defendant for an Order, pursuant to CPLR 3126, dismissing the action in its entirety based upon plaintiff's spoliation of evidence. Defendant also moves for an Order, pursuant to CPLR 3212, granting defendant summary judgment dismissing

the Verified Complaint. Plaintiff is in opposition to the motion and defendant submits a reply.

In support of its motion, defendant submits, *inter alia*, the pleadings; plaintiff's deposition transcript, the deposition of defendant via Selman Rexha (Mr. Rexha), superintendent of the Building; the affidavit of Robert Malek, the managing agent of Malek Management which manages the Building; and photos exchanged by plaintiff at the deposition of Mr. Rexha.

Defendant maintains that its motion for spoliation should be granted since plaintiff's counsel admits to retaining Accurate Building Inspectors and that the inspectors "lifted up" the tread nearly two months after the accident. According to defendant, as a result of the inspection, defendant cannot test plaintiff's allegation that the step was not in the proper position on the date of the accident. Defendant contends that as a result of plaintiff's conduct, defendant is unable to demonstrate that the step/tread was properly affixed to the staircase and not the cause of plaintiff's accident, thus prejudicing defendant in defending this action.

Moreover, defendant maintains that not only did plaintiff alter key evidence, the step/tread, but the building inspectors trespassed on defendant's property by entering the Building without defendant's knowledge or permission. As to the branch of its motion for summary judgment, defendant asserts that it did not create the alleged condition nor did it have notice of any defect with the step in question. Specifically, defendant notes that plaintiff never noticed a problem with the subject step even though he walked up the same staircase twenty to thirty minutes prior to his accident, Mr. Rexha looked at the staircase immediately following the accident and failed to notice a problem with any of the steps, and Mr. Rexha never received any prior complaints. Moreover, defendant contends that plaintiff cannot identify the cause of his fall which requires dismissal of the action.

In opposition, plaintiff submits the affidavit of Zamira Kastrati, plaintiff's daughter, along with photographs she allegedly took on the date of the accident; and the affidavit of Alvin Ubell, a building inspector hired by plaintiff to inspect the stair where plaintiff fell, along with

photographs taken during his inspection on January 28, 2016.

Plaintiff asserts that the branch of defendant's motion seeking spoliation should be denied as the building inspectors neither trespassed nor destroyed evidence. Plaintiff asserts that there is no evidence that the inspectors altered the scene in any way, let alone destroyed anything. According to plaintiff, Alvin Ubell's affidavit sets forth what he and his colleague did and that he avers that they left the stair in the condition they found it. Plaintiff maintains that the only testimony upon which defendant bases its conclusion is the testimony by Mr. Rexha that he never saw the gap between the tread and the risers before the inspectors were there. In regard to the branch of defendant's motion for summary judgment, plaintiff contends that defendant's arguments focus on lack of actual notice - i.e., complaints of the condition, but that defendant does not present evidence of the time of the last inspection and the condition of the stairway prior to the accident, which fails to eliminate triable issues of fact regarding constructive notice.

DISCUSSION

A. Branch of Defendant's Motion to Dismiss Pursuant to CPLR 3126

"A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a 'culpable state of mind,' and 'that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense'" (*Heins v Public Stor.*, 164 AD3d 881, 882 [2d Dept 2018], quoting *Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543 [2015]). "Where evidence has been intentionally or willfully destroyed, its relevance is presumed (*see id.* at 547). "However, where evidence has been destroyed negligently, the party seeking spoliation sanctions must establish that the destroyed evidence was relevant to the party's claim or defense" (*see Heins*, 164 AD3d at 883; *Pegasus Aviation I, Inc.*, 26 NY3d at 547-548).

The Supreme Court is empowered with "broad discretion in determining the appropriate sanction for spoliation of evidence" (*Utica Mut. Ins. Co. v Berkoski Oil Co.*, 58 AD3d 717, 718 [2d Dept 2009]; *Hillman v Sinha*, 77 AD3d 887, 888 [2d Dept 2010]; *Ortega v City of New York*, 9 NY3d 69, 76 [2007]). The Supreme Court has broad discretion, and "may, under appropriate circumstances, impose a sanction even if the destruction occurred through negligence rather than wilfulness, and even if the evidence was destroyed before the spoliator became a party, provided the party was on notice that the evidence might be needed for future litigation" (*Samaroo v Bogopa Serv. Corp.*, 106 AD3d 713, 714 [2d Dept 2013], quoting *DiDomenico v C & S Aeromatik Supplies*, 252 AD2d 41, 53 [2d Dept 1998]).

"The nature and severity of the sanction depends upon a number of factors, including, but not limited to, the knowledge and intent of the spoliator, the existence of proof of an explanation for the loss of the evidence, and the degree of prejudice to the opposing party" (*Samaroo*, 106 AD3d at 714). However, Courts must exercise prudence because "striking a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct [and, thus, the courts] must consider the prejudice that resulted from the spoliation to determine where such drastic relief is necessary as a matter of fundamental fairness" (*Utica Mut. Ins. Co.*, 58 AD3d at 718, quoting *Iannucci v Rose*, 8 AD3d 437, 438 [2d Dept 2004]; *see Morales v City of New York*, 130 AD3d 792, 794 [2d Dept 2015). "When the moving party is still able to establish or defend a case, a less severe sanction is appropriate" (*Morales*, 130 AD3d at 794; *McDonnell v Sandaro Realty, Inc.*, 165 AD3d 1090 [2d Dept 2018]; *Iannucci*, 8 AD3d 437 at 438).

The Court finds that granting defendant's motion, pursuant to CPLR 3126, dismissing the Complaint for spoliation of evidence is too drastic a sanction (*see McDonnell*, 165 AD3d at *4). Although defendant demonstrated that plaintiff hired Accurate Building Inspectors to come inspect the staircase in question on January 28, 2016 and although it is undisputed that Mr.

Ubell and his colleague lifted the tread of the stair at issue, defendant failed to demonstrate that plaintiff's conduct rose to the level of being intentional or willful (*see Smith v Cunningham*, 154 AD3d 681 [2d Dept 2017]; *Heins*, 164 AD3d at 883; *Morales*, 130 AD3d at). Nevertheless, as in *Smith*, the Court finds it is undisputed that the evidence, the step and marble tread, are relevant to defendant's ability to present its defense that there was no defective condition on the step at the time of plaintiff's fall. Under the circumstances herein, where plaintiff's inspectors came onto the premises without the knowledge or consent of defendant, and having lifted the tread, perhaps altering the condition of the tread and the step as they existed at the time of plaintiff's fall, the Court believes an appropriate remedy for the spoliation is an adverse inference charge at trial against plaintiff with respect to the condition of the step and tread at the time of the subject accident (*see Smith*, 164 AD3d at 683; *Morales*, 130 AD3d at 795; *McDonnell*, 165 AD3d at * 3).

B. Branch of Defendant's Motion for Summary Judgment Pursuant to CPLR 3212

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Winegrad v NY Univ. Medical Cntr.*, 64 NY2d 851, 853 [1985]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Alvarez*, 68 NY2d at 324; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]; *Qlisanr, LLC v Hollis Park Manor Nursing Home, Inc.*, 51 AD3d 651, 652 [2d Dept 2008]; *Greenberg v Manlon Realty*, 43 AD2d 968, 969 [2d Dept 1974]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of

fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of NY*, 49 NY2d 557, 562 [1980]).

"A landowner has a duty to maintain its premises in a reasonably safe condition" (*Van Dina v St. Francis Hosp., Roslyn, N.Y.*, 45 AD3d 673, 674 [2d Dept 2007]; *see Basso v Miller*, 40 NY2d 233, 241 [1976]). A defendant who moves for summary judgment in a slip-and-fall or a trip-and-fall case has the initial burden of making a prima facie showing that it did not create the hazardous condition which allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it (*Barron v Eastern Athletic, Inc.*, 150 AD3d 654, 655 [2d Dept 2017]; *Levine v G.F. Holding, Inc.*, 139 AD3d 910 [2d Dept 2016]; *Pryzywalny v New York City Transit Authority*, 69 AD3d 598 [2d Dept 2010]; *Tsekhanovskaya v Starrett City, Inc.*, 90 AD3d 909 [2d Dept 2011]). "Only after the movant has satisfied this threshold burden will the court examine the sufficiency of the plaintiff's opposition" (*Birnbaum v New York Racing Assn., Inc.*, 57 AD3d 598, 598 [2d Dept 2008]).

"'A defendant has constructive notice of a defect when it is visible and apparent, and has existed for a sufficient length of time before the accident that it could have been discovered and corrected'" (*Farren v Board of Educ. of City of N.Y.*, 119 AD3d 518, 519 [2d Dept 2014], quoting *Williams v SNS Realty of Long Is., Inc.*, 70 AD3d 1034, 1035 [2d Dept 2010]). "To meet its burden on the issue of constructive notice, a defendant is required to offer some evidence as to when the accident site was last cleaned or inspected prior to the plaintiff's fall" (*Pryzywalny*, 69 AD3d at 599; *Giantomaso v T. Weiss Realty Corp.*, 142 AD3d 950, 951 [2d Dept 2016]; *see Schwartz v Gold Coast Rest. Corp.*, 139 AD3d 696 [2d Dept 2016]; *Birnbaum*, 57 AD3d at 598-599). "[R]eference to general cleaning practices is insufficient to establish a lack of constructive notice in the absence of evidence regarding specific cleaning or inspection of the area in question" (*Schwartz*, 139 AD3d at 697 [internal quotation marks omitted]; *Giantomaso*, 142 AD3d at 951).

The Court finds that defendant has failed to satisfy its initial burden to demonstrate that it lacked constructive notice of any hazardous condition (*see Korn v Parkside Harbors Apartments, LLC*, 134 AD3d 769 [2d Dept 2015]; *Williams v New York City Hous. Auth.*, 119 AD3d 857 [2d Dept 2014]). Here, while the evidence submitted in support of the branch of defendant's motion may have demonstrated, prima facie, that it did not create the alleged condition on the step or have actual notice thereof, it failed to demonstrate, prima facie, that it did not have constructive notice of same. Specifically, the evidence submitted on defendant's motion, including transcripts of plaintiff's and its own deposition testimony, failed to demonstrate when the subject staircase was last inspected relative to plaintiff's accident on November 30, 2015 (*see Hanney v White Plains Galleria, LP*, 157 AD3d 660 [2d Dept 2018]; *see Torre v Aspen Knolls Estates Home Owners Assn, Inc.*, 150 AD3d 789, 789 [2d Dept 2017]; *DeFelice v Seakco Constr. Co., LLC*, 150 AD3d 677, 678 [2d Dept 2017]; *James v Orion Condo–350 W. 42nd St., LLC*, 138 AD3d 927 [2d Dept 2016]; *Korn*, 134 AD3d at 770).

Defendant's reliance on Mr. Rexha's deposition testimony in support of its motion is misplaced as he specifically stated he does not do inspections of the building, which are usually done by defendant's insurance company (*see* Notice of Motion, exhibit E [Rexha Tr.] at 13). He testified that at the time of the incident he worked part time, but it was his job to make sure the stairways were safe and clear of debris (*see id.* at 14, 17). He testified that in order to do that, he "sweep [sic] like twice a week and [he] mop [sic] once a week. Or if [he] see [sic] something that needs to be taken care of" (*id.* at 18). Mr. Rexha's testimony does not provide evidence regarding any "particularized or specific inspection or cleaning procedure" in the stairway where plaintiff's fall occurred (*Schiano v Mijul, Inc.*, 79 AD3d 726, 727 [2d Dept 2010]). Thus, these vague references to the general cleaning and/or inspection practices at the Building are insufficient to establish a lack of constructive notice of the alleged loose step (*see Santos v 786 Flatbush Food Corp.*, 89 AD3d 828 [2d Dept 2011]; *Schiano*, 79 AD3d at 726-727). Therefore,

in the absence of any evidence as to when defendant last inspected the staircase prior to the accident, defendant fails to establish, prima facie, that it lacked constructive notice of the allegedly defective condition of the step (*see Pryzywalny*, 69 AD3d at 598; *Bruk v Razag, Inc.*, 60 AD3d 715 [2d Dept 2009]).

Moreover, the Court finds defendant's contention that plaintiff could not identify the source of his fall unavailing. "In a premises liability case, a plaintiff's inability to identify the cause of the fall is fatal to the cause of action because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation" (*Steed v MVA Enterprises, LLC*, 136 AD3d 793, 794 [2d Dept 2016]; *see Deputron v A & J Tours, Inc.*, 106 AD3d 944 [2d Dept 2013]; *O'Connor v Metro Mgt. Dev., Inc.*, 130 AD3d 698 [2d Dept 2015]; *Defino v Interlaken Owners, Inc.*, 125 AD3d 717 [2d Dept 2015]; *Trapani v Yonkers Racing Corp.*, 124 AD3d 628 [2d Dept 2015]). "Where it is just as likely that some other factor, such as a misstep or a loss of balance, could have caused a slip and fall accident, any determination by the trier of fact as to causation would be based upon sheer conjecture" (*Deputron*, 106 AD3d at 945, quoting *Dennis v Lakhani*, 102 AD3d 651, 652 [2d Dept 2013]). "That does not mean that a plaintiff must have personal knowledge of the cause of his or her fall. Rather, it means only that a plaintiff's inability to establish the cause of his or [her] fall - whether by personal knowledge or by other admissible proof -is fatal to a cause of action based on negligence" (*Pol v Gjonbalaj*, 125 AD3d 955, 955-956 [2d Dept 2015], quoting *Izaguirre v New York City Tr. Auth.*, 106 AD3d 878, 878 [2d Dept 2013]).

Here, in viewing the evidence in the light most favorable to plaintiff as the nonmovant, the Court finds that defendant failed to establish, prima facie, that plaintiff was unable to identify the cause of his trip and fall going down the stairs (*see Lamour v Decimus*, 118 AD3d 851 [2d Dept 2014]; *Morales v New York City Hous. Auth.*, 125 AD3d 619 [2d Dept 2015]; *Buitrago v Gutman Mgt. Co., Inc.*, 133 AD3d 698, 699 [2d Dept 2015]). In support of its motion, defendant

submitted the transcript of plaintiff's deposition, at which he clearly testified that he was going down the stair and was on the last step when he tried to move his left foot, but something tripped him and he fell (*see* Notice of Motion, exhibit D [Plaintiff EBT Tr.] at 25). Upon being asked if he noticed what tripped him at any time before or after the accident, he testified that after he fell and was stuck on the floor he looked to see what tripped him and he noticed that the stair was not on its usual place (*see id.* at 26-27). He also clearly testified that there was nothing on the lobby floor which would have caused his foot to trip (*see id.* at 29). Thus, the deposition testimony of plaintiff, which was submitted by defendant in support of the motion, demonstrated the existence of a triable issue of fact as to whether the injured plaintiff tripped and fell as a result of a loosened, dislodged and moveable tread of and upon the first step above the ground floor of the Building's inner stairway (*see Davidoff v First Development Corp.*, 148 AD3d 773 [2d Dept 2017]; *Davis v Sutton*, 136 AD3d 731 [2d Dept 2016]; *Gotay v New York City Housing Authority*, 127 AD3d 693 [2d Dept 2015]; *Baldasano v Long Is. Univ.*, 143 AD3d 933 [2d Dept 2016]).

As defendant failed to demonstrate its prima facie entitlement to judgment as a matter of law, this Court need not review the sufficiency of plaintiff's opposition papers (*see Hanney*, 157 AD3d at 662; *Pryzywalny*, 69 AD3d at 599; *Giantomaso*, 142 AD3d at 951; *Santos,* 89 AD3d at 830; *Amendola v City of New York*, 89 AD3d 775 [2d Dept 2011]).

CONCLUSION

For these reasons and upon the foregoing papers, it is,

ORDERED that the branch of defendant The Gladys K. Lewis Family Limited Partnership's motion, pursuant to CPLR 3126, is denied to the extent that it sought dismissal of the Verified Complaint for spoliation of evidence. However in the exercise of its discretion, the Court imposes a sanction, pursuant to CPLR 3126, in the form of an adverse inference charge at trial against plaintiff with respect to the condition of the step and tread at the time of the subject accident; and, it is further,

ORDERED that the branch of defendant The Gladys K. Lewis Family Limited Partnership's motion, pursuant to CPLR 3212, seeking summary judgment dismissing the Verified Complaint is denied; and, it is further,

ORDERED that counsel for defendant is directed to serve a copy of this Order with Notice of Entry upon plaintiff and upon the Justice of the Court presiding over the trial.

This constitutes the Decision and Order of the Court.

Dated: 11/29/18

PAUL WOOTEN ***J.S.C.***