At a term of the IAS Part of the Supreme Court of the State of New York, held in and for the County of Orange, at 285 Main Street, Goshen, New York 10924 on the 25th day of October, 2018.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

NIKAIYA STEELE,

PLAINTIFF,

-AGAINST-

SAMARITAN FOUNDATION, INC. and SAMARITAN DAYTOP FOUNDATION, INC.,

DEFENDANTS.

To commence the statutory time for appeals of right (CPLR 5513[a], you are advised to serve a copy of this order, with notice of entry, on all parties.

DECISION & ORDER
INDEX #EF002214/2016
Motion Date: 08/20/18
Motion Seq.# 2

VAZQUEZ-DOLES, J.S.C.

The following papers numbered 1 to 6 were read on the motion by Defendants for summary judgment dismissing the complaint:

PAPERS	NUMBERED
Notice of Motion/Affirmation (Rutherford)/ Exhibits A - F/ Memorandum of Law	1 - 4
Affirmation in Opposition (DelDuco III) Exhibits 1 - 3	5
Reply Affirmation (Rutherford)	6

In this personal injury action, plaintiff alleges that she injured her right knee when she slipped and fell on the defendants' premises on May 8, 2013. On the date of the accident, plaintiff was a resident of the defendants' residential facility where she was receiving treatment for substance abuse. Plaintiff was completing the Samaritan Village Rehabilitation Program. Plaintiff had been residing at defendants' facility for approximately eight days prior to her fall. The plaintiff testified that at some time mid-day on May 8, 2013 she entered the kitchen area to get her food which was stored in the refrigerator. She was standing a little to the left of the

refrigerator as the door opened to the right, she opened the door and as she reached for her food inside the refrigerator, she slipped and fell. She did not see any liquid on the floor prior to her fall or after her fall but states that her pants were wet after she fell. Plaintiff had been in the kitchen on a daily basis and never noticed any liquid on the floor in the kitchen before her alleged slip and fall. Plaintiff does not dispute that each resident was assigned chores on a daily basis which included washing their own dishes and cleaning the kitchen area. Each resident was responsible for making their own food and then cleaning up after themselves.

Defendants move for summary judgment claiming that they lacked notice of the condition and that plaintiff did not know what caused her to slip. In order for a plaintiff to establish a prima facie case of negligence, the plaintiff must demonstrate that the defendant created the condition which caused the accident, or that the defendant had actual or constructive notice of the condition (*see, Capitelli v King Kullen Grocery Co.*, 207 AD2d 325 [2d Dept 1994]; *Batiancela v Staten Is. Mall*, 189 AD2d 743 [2d Dept 1993]). 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 American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

Summary judgment is a drastic remedy that "should not be granted where there is any doubt as to the existence of a triable issue" (citations omitted). In its analysis of such a motion, a court must construe the facts in a light most favorable to the nonmoving party so as not to deprive that person his or her day in court (citations omitted). *Russell v A. Barton Hepburn Hosp.* 154 AD2d 796, 797 (3d Dept 1989), *See also, Mascots v Oarlock*, 23 AD2d 943, 944 (3d Dept. 1965).

While summary judgment is an available remedy in some cases, its dire effects preclude its use except in "unusually clear" instances. *Stone v Aetna Life Ins. Co.*, 178 Misc. 23, 25 (Sup. Ct., New York County,1941). "A remedy which precludes a litigant from presenting his evidence for consideration by a jury, or even a judge, is necessarily one which should be used sparingly, for its mere existence tends to alter our jurisprudential concept of a 'day in court.' " *Danger v Zea*, 45 Misc2d 93, 94, (Sup. Ct., Albany County, 1965), aff'd 26 AD2d 729 (3rd Dept. 1966). Given the fact that summary judgment is the procedural equivalent of a trial, granting summary judgment requires that no material or triable issues of fact exist. When doubt exists or where an issue is arguable, or "fairly debatable," summary judgment must be denied. *Bayesian v HF Horn*, 21 AD2d 714 (1st Dept. 1964); *Jones v County of Herkimer*, 51 Misc2d 130, 135 (Sup. Ct., Herkimer County, 1966); *Town of Preble v Song Mountain, Inc.*, 62 Misc2d 353, 355 (Sup. Ct., Courtland County, 1970); *See also, Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 404 (1957). The drastic remedy of summary judgment is rarely granted in negligence cases since the very question of whether the defendant's conduct was indeed negligent is a jury question except in the most glaring cases. (*See, Johannsdottir v Kohn*, 90 AD2d 842 (2nd Dept. 1982)).

Courts are not authorized to try issues in a case, but rather to determine whether there is an issue to be tried. *Esteve v Abad,* 271 AD2d 725, 727 (1st Dept. 1947). "Issue-finding, rather than issue-determination, is the key to the procedure. If and when the court reaches the conclusion that a genuine and substantial issue of fact is presented, such determination requires the denial of the application for summary judgment." *Id.; Sillman*, 3 NY2d at 404.

According to the Court of Appeals, "the proponent of a summary judgment motion must

make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [citations omitted]. Failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the opposing papers [citations omitted]." *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985); *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993); *Finkelstein v Cornell University Medical College*, 269 AD2d 114, 117 (1st Dept. 2000).

"In moving for summary judgment, the defendant [bears] the initial burden of establishing that it maintained its premises in a reasonably safe condition, had no actual or constructive knowledge of the [condition] and did not create the allegedly dangerous condition." *Petrell v Victory Markets, Inc.*, 283 AD2d 955 (4th Dept. 2001); *Grant v Radamar Meat*, 294 AD2d 398, 398 (2nd Dept. 2002); *Atkinson v Golub Corporation Company*, 278 AD2d 905, 906 (4th Dept. 2000). The moving party's failure to meet this burden of proof "requires denial of the motion, regardless of the sufficiency of the opposing papers", for the burden in that event never shifts to the opponent to demonstrate the existence of a material issue of fact. *Winegrad v New York University Medical Center, supra*, 64 NY2d at 853. The Second Department has repeatedly affirmed that the movant's failure in the first instance to demonstrate entitlement to the drastic relief of summary judgment mandates denial of the motion regardless of the sufficiency of the opposing papers. *See, e.g., Miccoli v Kotz,* 278 AD2d 460, 461 (2nd Dept. 2000); *Karras v County of Westchester*, 272 AD2d 377, 378 (2nd Dept. 2000); *Fox v Kamal Corporation*, 271 AD2d 485 (2nd Dept. 2000); *Gstalder v State of New York*, 240 AD2d 541, 542 (2nd Dept. 1997); *Lamberta v Long Island Railroad*, 51 AD2d 730, 730-731 (2nd Dept. 1976); *Greenberg v Manlon Realty, Inc.*, 43 AD2d 968, 969 (2nd Dept. 1974).

In *Salas v Town of Lake Luzerne*, 265 AD2d 770, 770 (3rd Dept. 1999), the Court held that the attorney's affirmation in support of a motion for summary judgment is insufficient when the attorney has no personal knowledge of the facts. *See also, Wright v Rite-Aid of NY, Inc.*, 249 AD2d 931, 932 (4th Dept. 1998); *Hodgson, Russ, Andrews, Woods & Goodyear v Roth*, 186 AD2d 1001, 1002 (4th Dept. 1992). In brief, the motion must be supported by an affidavit of a person having knowledge of the facts, together with a copy of the pleadings and other available proof." *S.J. Capelin Associates, Inc. v Globe Manufacturing Corp.*, 34 N.Y.2d 338, 341 (1974). The defendant's failure to do so requires that its motion be denied regardless of any proof submitted by plaintiff.

As the initial proponent of summary judgment, defendants were obligated to demonstrate that it lacked actual or constructive notice of the precipitating condition or that it did not create the condition. There is no question that defendants did not create the condition and that the residents themselves were responsible for maintenance of the area at issue as part of their chores and that the house manager was responsible for making sure that chores were being properly performed. Defendants failed to submit an affidavit of anyone with personal knowledge of the facts of this case. Defendants attempted to submit the transcript of Eileen Hughes, Assistant Director of Operations for Samaritan Foundation, but same was inadvertently missing from defendants' motion papers. As plaintiff included same in her opposition, the Court shall consider it for purposes of this motion.

Although Ms. Hughes did testify that the procedure in place at the time of the accident was for the house manager on duty to perform hourly inspections of the entire premises to make sure that chores were being done by the residents, no documentation was provided to establish

that the policy was followed on the day of the plaintiff's accident, nor could she recall who the house manager on duty was at the time of the accident. Further, Ms. Hughes had no personal knowledge of the incident, whether the inspections actually occurred, when they occurred, or whether the floor was wet at the time of the accident. Ms. Hughes was neither present on the day of the accident nor did she inspect the premises at the time just prior to or subsequent to the accident. In fact, although plaintiff was transported to the hospital, Ms. Hughs was not made aware of the incident until after plaintiff commenced suit. Consequently, defendants failed to establish that the alleged condition was not present for sufficient length of time to permit an employee to discover and remedy the condition.

Defendants' application is devoid of any admissible evidence from anyone, that they lacked actual or constructive notice of the condition. All the defendants did was state in an attorney's affirmation and via defendant's principal who had no knowledge of the maintenance protocols actually employed by the employees on that day, that it had no notice of the defective condition, such a statement being wholly insufficient. *See, Salas*, 265 AD2d at 770; *Wright,* 249 AD2d at 932; *Hodgson, Russ*, 186 AD2d at 1002. This glaring deficiency in the defendants' proof precludes a finding that the defendants lacked constructive notice as a matter of law. *See, Mancini v Quality Markets, Inc.*, 256 AD2d 1177 (4th Dept. 1998); *Edwards v Wal-Mart Stores Inc.*, 243 AD2d 803 (3rd Dept. 1997); *Van Steenburg v Great Atlantic & Pacific Tea Company Inc.*, 235 AD2d 1001 (3rd Dept. 1997). In all of these cases, the defendant proffered its employees' testimony on this score and still failed to meet its initial burden of proof on the motion for summary judgment.

As such, defendants' motion must be denied in its entirety without regard to the

sufficiency of plaintiff's proof in opposition.

Accordingly, it is hereby

ORDERED that **defendants' motion for summary judgment is denied**; and it is further

ORDERED that the parties **shall appear for a pre-trial conference on December 18, 2018 at 10:30a.m., at 285 Main Street, Court Room 5, Goshen, New York 10924.**

The foregoing constitutes the Decision and Order of this Court.

Dated: October 25, 2018
Goshen, New York

ENTER:

HON. MARIA S. VAZQUEZ-DOLES, J.S.C.

To: Counsel of Record via NYSCEF.