At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 1st day of May, 2019.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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ANGEL CABAN,

Plaintiff,

- against -

HICKS 136, LLC and BRONSTEIN PROPERTIES, LLC,

Defendants.

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Index No.: 510747/2016

DECISION AND ORDER

Motion Sequence #7

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

	Papers Numbered
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	1/2,
Opposing Affidavits (Affirmations)	3,
Reply Affidavits (Affirmations)	4,

Upon the foregoing papers, and after oral argument, the Court finds as follows:

The instant action results from a slip and fall incident that allegedly occurred on October 26, 2015. The Plaintiff Angel Caban (hereinafter "the Plaintiff") allegedly injured himself on a flight of stairs inside the premises located at 136 Hicks Street, Brooklyn, New York (hereinafter "the Premises"). The Premises are apparently owned by Defendant Hicks 136, LLC and managed by Defendant Bronstein Properties, LLC (hereinafter collectively referred to as "the Defendants"). In his Verified Bill of Particulars, the Plaintiff states (Paragraph 6) that the incident occurred while the Plaintiff was "attempting to descend the steps to the basement of said premises, when suddenly and without any notice or warning he was caused to fall and sustain severe personal injuries due to the unsafe, broken, cracked, disintegrated, crumbling, uneven,

defective and dangerous condition of the steps and stairway which lacked adequate and proper handrails, lacked adequate and proper lighting, and had irregular step geometry and were not uniform."

Defendants now move (motion sequence #7) for an order pursuant to CPLR 3212 granting summary judgment and dismissing the complaint of the Plaintiff. The Defendants contend that the Plaintiff cannot accurately identify what caused him to fall on the stairs without resorting to speculation.[1] What is more, the Defendants contend that it was the Plaintiff's hand truck that caused him to fall, and not any defect in the stairs. In opposition, the Plaintiff argues that the Defendants have failed to meet their *prima facie* burden and the motion should be denied. The Plaintiff argues that the Defendants' initial argument that statements made by the Plaintiff is one of credibility that is properly determined by a jury and not by means of a summary judgment application. In addition, the Plaintiff argues that the Defendants have not met their *prima facie* burden regarding whether the Defendants had actual or constructive notice of the alleged condition of the flight of stairs given that the testimony they rely on to support their position is insufficient as a matter of law.

"Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff,* 14 AD3d 493 [2nd Dept, 2005], *citing Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law,

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[1] As part of the Defendant's Affirmation in Support, the Defendant makes the additional argument that summary judgment should be granted given that Plaintiff is allegedly unable to make his *prima facie* case as to damages as a matter of law. However, the burden as part of the instant application is on the Defendant and pointing to gaps in the Plaintiff's proof is not sufficient for the movant to meet its *prima facie* burden. *See Jiann Hwa Fang v. Metro. Transp. Auth.*, 148 A.D.3d 791, 792, 48 N.Y.S.3d 758, 759 [2nd Dept, 2017]. Defendants have not separately moved for additional discovery as a part of this motion.

tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; *see Menzel v. Plotnick,* 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

Generally, in a trip and fall case, a defendant makes a *prima facie* showing of its entitlement to summary judgment by presenting sufficient evidence to show that they neither created nor had actual or constructive notice of the allegedly dangerous condition. *See Hackbarth v. McDonalds Corp.*, 31 A.D.3d 498, 499, 818 N.Y.S.2d 578 [2nd Dept, 2006] *Curtis v Dayton Beach Park No. 1 Corp.*, 23 AD3d 511, 512 [2nd Dept, 2005]. The movant can meet this burden by submitting testimony showing when the area in question was last cleaned or inspected, or by submitting evidence as to whether any complaints had been received between the time the area was cleaned or inspected and the time of the alleged incident. *See Perez v. New York City Hous. Auth.,* 75 A.D.3d 629, 630, 906 N.Y.S.2d 299 [2nd Dept, 2010]; *Williams v SNS Realty of Long Is., Inc.*, 70 AD3d 1034 [2nd Dept, 2010]; *Rios v New York City Hous. Auth.*, 48 AD3d 661, 662 [2nd Dept, 2008]. What is more, "a defendant may establish its prima facie entitlement to judgment as a matter of law by submitting evidence that the plaintiff cannot identify the cause of

his or her fall." *Baldasano v. Long Island Univ.*, 143 A.D.3d 933, 933, 40 N.Y.S.3d 175, 176 [2nd Dept, 2016].

Turning to the merits of the instant motion, the Defendants have failed to meet their *prima facie* burden.[2] The Defendants contend that the Plaintiff is unable to identify what defect in the stairs caused his injury and that it was his own incautious behavior that was the cause of his injuries. However, a review of the testimony of the Plaintiff shows that he has sufficiently detailed how the accident occurred and identified the defect at issue. In support of their position, the Defendants rely primarily on the deposition testimony of the Plaintiff and the deposition testimony of Anila Carku, the superintendent for the Premises. In his deposition testimony, when asked how he was injured the Plaintiff testified (Motion, Exhibit D, Page 41) that "he fell down some steps." When asked how the accident occurred, the Plaintiff testified (Page 46) that "it's a heavy load so I'm coming down the steps slowly and when I went to the last step, my hand truck, it went forward like fast, like at a fast pace and I let go and I fell backward." When asked what caused him to fall he testified (Page 62) that "it was a step missing, a complete step missing." When asked (Page 62) where he was located when the incident occurred he stated that "I would say like two steps up, remember, I am coming down like this, so I am leaning back forward with the hand truck, so the hand truck have to touch the steps first before I touch it."

This testimony, taken together in a light most favorable to the Plaintiff as the nonmoving party, sufficiently establishes "the location of his fall and the condition that allegedly caused it." *Belton v. Gemstone HQ Realty Assocs.*, LLC, 145 A.D.3d 840, 841, 43 N.Y.S.3d 499, 501 [2nd Dept, 2016]; see also *Davis v. Sutton*, 136 A.D.3d 731, 732, 26 N.Y.S.3d 100, 102 [2nd Dept,

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[2] The Court also notes that the Defendants did not sufficiently show through testimony or other evidence that they "neither created the allegedly dangerous condition" ... or "...had actual or constructive notice of it." *Hudlin v. Epicurean Deli*, 46 A.D.3d 752, 847 N.Y.S.2d 479 [2nd Dept, 2007]. *See Farrell v. Waldbaum's, Inc.*, 73 A.D.3d 846, 847, 900 N.Y.S.2d 453, 454 [2nd Dept, 2010].

2016]*See Gotay v. New York City Hous. Auth.*, 127 A.D.3d 693, 693, 7 N.Y.S.3d 311, 312 [2nd Dept, 2015]. What is more, the Court makes this finding in part given that a court may not grant summary judgment based upon a determination of a party's credibility. *See Gaither v. Saga Corp.*, 203 A.D.2d 239, 240, 609 N.Y.S.2d 654, 655 [2nd Dept, 1994]. Moreover, "[a]ll of the evidence must be viewed in the light most favorable to the plaintiff, as the opponent of the motion for summary judgment, and all reasonable inferences must be resolved in [his] favor." *Boyd v. Rome Realty Leasing Ltd. P'ship*, 21 A.D.3d 920, 921, 801 N.Y.S.2d 340, 341 [2nd Dept, 2005].

The Court also notes that the Defendants failed to meet their *prima facie* burden in showing that the accident at issue was the result of the Plaintiff's own conduct given that the Defendants rely solely on the Plaintiff's deposition testimony which was insufficient to show as a matter of law that the Plaintiff acted incautiously or that the injury was a foreseeable hazard of his employment. *See Kolari v. Whitestone Const. Corp.*, 138 A.D.3d 1070, 1072, 31 N.Y.S.3d 525, 526 [2nd Dept, 2016] . As a result of the above, we need not address the sufficiency of the plaintiff's opposition papers. *See Schacker v. Cty. of Orange*, 33 A.D.3d 903, 904, 822 N.Y.S.2d 777, 778 [2nd Dept, 2006].

Based on the foregoing, it is hereby ORDERED as follows:

The Defendants' motion (motion sequence #7) is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino
J.S.C.