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 25th day of November, 2019

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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VIKTORIYA PALKIN,
Plaintiff,

Index No.: 508338/2017

DECISION AND ORDER

- against -

CHIEF ENERGY CORPORATION,
Defendants.

Motion Sequence #3

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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 November 4, 2016. On that day the Plaintiff Viktoriya Palkin (hereinafter "the Plaintiff") allegedly injured herself after tripping over a hose that was owned and being utilized by Defendant Chief Energy Corporation (hereinafter "the Defendant"). The Defendant apparently placed the hose across the sidewalk on Emmons Avenue in Brooklyn, fronting"Brooklyn VI" Pier.

The Defendant now moves (motion sequence #3) for an order pursuant to CPLR 3212 granting summary judgment and dismissing the complaint. The Defendant contends that the matter should be dismissed as the Plaintiff cannot properly identify the cause of her fall, the hose which allegedly caused the Plaintiff's fall was open and obvious and not inherently dangerous,

and that the Plaintiff's own reckless conduct was the proximate cause of her injuries. In opposition, the Plaintiff argues that the motion is untimely.[1] The Plaintiff further contends that the motion should be denied as the Plaintiff did identify the hose as the cause of her fall and there are questions of fact regarding 1) whether the condition was open and obvious and not inherently dangerous and, 2) the issue of comparative negligence.

"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, 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].

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[1] As an initial matter, the Court finds that the Defendant has provided good cause for its delay in making the instant motion. *See Brill v. City of New York*, 814 N.E.2d 431 [2003]; *Armentano v. Broadway Mall Properties, Inc.*, 48 A.D.3d 493, 852 N.Y.S.2d 266 [2nd Dept, 2008].

Turning to the merits of the instant motions, the movant has failed to meet its *prima facie* burden. The Defendant contends that the Plaintiff is unable to identify the defect that caused her injury, and that "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]; *see also Matadin v. Bank of Am. Corp.*, 163 A.D.3d 799, 799, 80 N.Y.S.3d 439, 440 [2nd Dept, 2018]; *Razza v. LP Petroleum Corp.*, 153 A.D.3d 740, 741, 60 N.Y.S.3d 325 [2nd Dept, 2017]. However, a review of the testimony of the Plaintiff shows that she has sufficiently detailed how the accident occurred and has sufficiently identified the alleged defect at issue. At her deposition, when asked what caused her fall, the Plaintiff stated "I tripped on it, I fell, I felt pain, I looked back, saw the hose, and that's it." When asked whether she felt the hose make contact with her body, the Plaintiff answered "I snagged my foot on the hose." (See Defendant's Motion, EBT Testimony of Plaintiff, Attached as Exhibit H, Page 33).

This testimony, taken in a light most favorable to the Plaintiff, as the nonmoving party, sufficiently establishes "the location of [her] 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, 2016]; *Gotay v. New York City Hous. Auth.*, 127 A.D.3d 693, 693, 7 N.Y.S.3d 311, 312 [2nd Dept, 2015]. The Court also makes this finding in that, as stated, the 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]. Generally, "[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 finds that the Defendant has failed to provide sufficient evidence to meet its *prima facie* burden regarding its contention that the condition at issue was open and obvious and therefore not inherently dangerous as a matter of law. In support of its position the Defendant relies on the testimony of the Plaintiff and an image of the hose. "A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a *prima facie* showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses. Only then does the burden shift to the plaintiff to establish an 'issue of fact'" *Padarat v. New York City Transit Auth.*, 137 A.D.3d 1095, 1096, 27 N.Y.S.3d 686, 687 [2nd Dept, 2016], *quoting Hutchinson v. Sheridan Hill House Corp.*, 26 N.Y.3d 66, 41 N.E.3d 766 [2nd Dept, 2015]. "Whether a dangerous condition exists on real property so as to create liability on the part of the landowner depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury." *Fasano v. Green-Wood Cemetery*, 21 A.D.3d 446, 446, 799 N.Y.S.2d 827, 828 [2nd Dept, 2005]. In the instant proceeding, the Defendant does not sufficiently establish that the hose was open and obvious and not inherently dangerous as a matter of law so as to meet its *prima facie* burden.

Finally, the Court finds that the Defendant has not provided sufficient evidence that the Plaintiff's own reckless conduct was the proximate cause of her injuries. "A defendant's negligence qualifies as a proximate cause where it is 'a substantial cause of the events which produced the injury.'" *Mazella v. Beals*, 27 N.Y.3d 694, 706, 57 N.E.3d 1083, 1090 [2016], quoting *Derdiarian v. Felix Contracting Corp.*, 51 N.Y.2d 308, 414 N.E.2d 666 [1980]. However, the question of whether a particular act of negligence is a substantial cause of the Plaintiff's injuries is one to be made by the jury. *See Hain v. Jamison*, 28 N.Y.3d 524, 529, 68 N.E.3d 1233, 1237 [2016]. In the instant proceeding, the Defendant has not provided sufficient

evidence to show that the Plaintiff's actions were, as a matter of law, the sole substantial cause of her own injuries. Accordingly, the Defendant's motion is denied.

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

The Defendant's motion (motion sequence #3) is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.