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 14th day of December, 2020.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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MOSES GLUCK,

Plaintiff,

- against -

NEW YORK CITY HOUSING AUTHORITY

Defendants.

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Index No.: 513497/2017

DECISION AND ORDER

Motions Sequence #3

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

	Papers Numbered (NYSCEF)
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	39-53
Opposing Affidavits (Affirmations)	56
Reply Affidavits (Affirmations)	57-58

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

The instant action results from an alleged trip and fall incident that occurred on August 25, 2016. Plaintiff Moses Gluck (hereinafter "the Plaintiff") allegedly injured himself after tripping, while walking up exterior stairs at the premises known as 225 Division Avenue, in Brooklyn, New York (the "Premises"). As part of his Notice of Claim the Plaintiff alleges that Defendant New York City Housing Authority (hereinafter the "Defendant") was negligent in as much as "[s]aid steps were of such an unusually low height, and were of such a uniform color as to make the unusually low height differential difficult to discern, constituting a trap and a snare."

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 summary judgment should be granted as the steps at issue were not inherently dangerous, and that the Defendant did not have actual or constructive notice of any alleged defective condition in relation to the stairwell. The

Plaintiff opposes the motion and argues that it should be denied. Specifically, the Plaintiff contends that the Defendant has failed to meet its *prima facie* burden in as much as the Defendant has failed to show whether the steps at issue were designed in a safe manner and whether defendant created the dangerous condition or had actual or constructive notice of its existence.

It has long been established that "[s]ummary 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 [2d Dept 2005], *citing Andre v. Pomeroy,* 35 NY2d 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 [2d Dept 2004], *citing Alvarez v. Prospect Hospital*, 68 NY2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.,* 64 NY2d 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 [2d 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 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick,* 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept, 1994].

Generally, in a trip and fall action, 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 AD3d 498, 499, 818 N.Y.S.2d 578 [2d Dept 2006]; *Curtis v Dayton Beach Park No. 1 Corp.*, 23 AD3d 511, 512 [2d Dept 2005]. However "[w]hile a landowner has a duty to maintain its premises in a

reasonably safe manner (see Basso v. Miller, 40 N.Y.2d 233, 241, 386 N.Y.S.2d 564, 352 N.E.2d 868), a landowner has no duty to protect or warn against an open and obvious condition that is not inherently dangerous." *Nelson v. 40-01 N. Blvd. Corp.*, 95 AD3d 851, 852, 943 N.Y.S.2d 216, 217 [2d Dept 2012]; see also *Dillman v. City Cellar Wine*, 123 AD3d 758, 758, 996 N.Y.S.2d 545 [2d Dept 2014].

Turning to the merits of the instant motion, the Court finds that the Defendant has not met its *prima facie* burden. In support of its application, the Defendant primarily relies on the deposition of the Plaintiff and the affidavit of Jeffrey J. Schwalje, P.E. The Plaintiff states that as he was walking up the first step outside of the Premises. He stated that "[t]here was a lip coming out of the step and my shoe got caught underneath the lip." (See Defendant's Motion, Exhibit F, Page 20). During his statutory (50-h) hearing, when asked whether the steps matched the same color of the area immediately before the steps that lead to the steps, he answered "[y]eah." (See Defendant's Motion, Exhibit B, Page 22) As part of his affidavit, Jeffrey J. Schwalje, P.E. states that he inspected the stairs and concludes that "[t]he subject stair was safely designed, constructed and maintained." Mr. Schwalje also stated that "[t]here is no code violation relating to the subject single tread, two riser step arrangement." (See Defendant's Motion, Exhibit "H", Paragraphs 20 and 27). However, the affidavit from Mr. Schwalje fails to state what code applies to such stairs, and how these stairs purportedly comply with it. Moreover, while Mr. Schwalje does state that he was retained to inspect the stairs and that he based his conclusion on the site inspection conducted, he does not state when he inspected the stairs or that the stairs were in the same condition as they were on the date of the occurrence. Further, he did not point to any applicable codes or regulations that would support his conclusion, and does not address those reflected in the Plaintiff's Bill of Particulars. *See Calderon v. 88-16 N. Blvd, LLC*, 135 AD3d 681, 683, 24 N.Y.S.3d 135, 136 [2d Dept 2016]. "[W]hether a dangerous or defective condition exists ... is generally a question of fact for the jury." *Burch v. Vill. of Hempstead*, 139 AD3d 778, 779, 32 N.Y.S.3d 247, 248 [2d Dept, 2016], *quoting Trincere v. Cty. of Suffolk*, 90 N.Y.2d 976, 688 N.E.2d 489 [1997]. The Court finds that "[t]he affidavit of the defendants' expert was speculative, conclusory, and lacked a proper foundation." *Wass v. Cty. of Nassau*, 166 AD3d 1052, 1053, 87 N.Y.S.3d 310, 312 [2d Dept 2018].

The Court also finds that the Defendant does not adequately address the issues raised by the Plaintiff, that the stairs in question posed a hazard given their uniformity of color. *See Ross v. Bretton Woods Home Owners Ass'n, Inc.*, 151 AD3d 774, 775, 55 N.Y.S.3d 417, 419 [2d Dept 2017]; *Gubitosi v. Pulte Homes of New York, LLC*, 81 AD3d 690, 691, 916 N.Y.S.2d 516 [2d Dept 2011]. The color and position of a step can create optical confusion. *See Buonchristiano v. Fordham Univ.*, 146 A.D.3d 711 [1st Dept 2017]. The Court believes that *Masker v. Smith*, NY Slip Op 06519, 2020 NY App. Div. Lexis 6739, [2d Dept 2020] is distinguishable with this matter. In this matter the Plaintiff stated that he had not remembered being at the premises previously, and that the color of the stairway was uniform. *See Matheis v. Hunt Country Furniture, Inc.*, 140 AD3d 713, 714, 30 N.Y.S.3d 883 [2d Dept 2016]. Moreover, the fact that a hazard may be open and obvious does not mean that a landowner cannot be found negligent, and may merely relate to the Plaintiff's comparative negligence. *See Cupo v. Karfunkel*, 1 AD3d 48, 52, 767 N.Y.S.2d 40, 43 [2d Dept 2003]. Finally, the digital images provided by the Defendant also support the Plaintiff's allegations.

Since the Defendants failed to meet their *prima facie* burden, we need not consider the sufficiency of the Plaintiff's opposition papers. *See Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 476 N.E.2d 642, 643 [1985]; *Ortiz v. Town of Islip*, 175 AD3d 699, 700, 107 N.Y.S.3d 394, 395 [2d Dept 2019].

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

The motion by the Defendant (motion sequence #3) is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.