SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYLE E. FRANK** **PART** **11M**

Justice

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ROBERT BOLSON,

Plaintiff,

- v -

UJA-FED PROPERTIES, INC.,R & R SCAFFOLDING, LTD., A.W. & S. CONSTRUCTION CO. INC.

Defendant.

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INDEX NO. 155010/2016

MOTION DATE 06/10/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER .

Plaintiff commenced this action to recover for alleged personal injuries he suffered on January 16, 2016, when he claims he tripped and fell at 130 East 59th Street, New York, New York.

Defendants, UJA-FED Properties, Inc. and A.W. & S. Construction Co. Inc. move for summary judgment[1] on the grounds that neither had actual or constructive notice of the alleged defect and that immediately preceding the accident there was not a readily apparent defective condition. For the reasons set forth below, both motions for summary judgment are granted and the complaint is dismissed in its entirety.

It is a well-established principle that the "function of summary judgment is issue finding, not issue determination." *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 544 [1st Dept 1989]. As

[1] The Court notes that a cross motion against a non-moving party is improper, however as plaintiff has had the opportunity to oppose both motions and did not raise the issue, in an exercise of judicial economy the Court will entertain the cross motion.

such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320, 501 [1986]; *Winegrad v New York University Medical Center*, 64 NY 2d 851 [1985]. Courts have also recognized that summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted.

It is well settled that absent proof that a defendant actually created the dangerous condition or, had actual or constructive notice of the same, there can be no liability on a claim for premises liability (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]; *Bogart v F.W. Woolworth Company*, 24 NY2d 936, 937, [1969]; *Armstrong v Ogden Allied Facility Management Corporation*, 281 AD2d 317 [1st Dept 2001]; *Wasserstrom v New York City Transit Authority*, 267 AD2d 36, 37 [1st Dept 1999]; *Allen v Pearson Publishing*, 256 AD2d 528, 529 [2d Dept 1998]; *Kraemer v K-Mart Corporation*, 226 AD2d 590 [2d Dept 1996]).

A defendant is charged with having constructive notice of a defective condition when the condition is visible, apparent, and exists for a sufficient length of time prior to the happening of an accident to permit the defendant to discover and remedy the same (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). The notice required must be more than general notice of any defective condition (id. at 838; *Piacquadio* at 969). Instead, notice of the specific condition alleged at the specific location alleged is required and, thus, a general awareness that a dangerous condition may have existed, is insufficient to constitute notice of the particular condition alleged to have caused an accident (*Piacquadio* at 969). The absence of evidence demonstrating how long a condition existed prior to a plaintiff's accident constitutes a

failure to establish the existence of constructive notice as a matter of law (*Anderson v Central Valley Realty Co.*, 300 AD2d 422, 423 [2d Dept 2002]. lv denied 99 NY2d 509 [2008]; *McDuffie v Fleet Fin. Group*, 269 AD2d 575 [2000]). Alternatively, a defendant may be charged with constructive notice of a hazardous condition if it is proven that the condition is one that recurs and about which the defendant has actual notice (*Chianese v Meier*, 98 NY2d 270, 278 [2002]; *Uhlich v Canada Dry Bottling Co. of NY*, 305 AD2d 107 [2003]). If such facts are proven, the defendant can then be charged with constructive notice of the condition's recurrence (id.; *Anderson* at 422).

Generally, on a motion for summary judgment a defendant establishes prima facie entitlement to summary judgment when the evidence establishes the absence of actual or constructive notice (*Hughes v Carrols Corporation*, 248 AD2d 923, 924 [3d Dept 1998]; *Edwards v Wal-Mart Stores, Inc., 243 AD2d 803* [3d Dept 1997]; *Richardson-Dorn v Golub Corporation*, 252 AD2d 790 [3d Dept 1998]). If defendant meets its burden it is then incumbent on plaintiff to tender evidence indicating that defendant had actual or constructive notice (*Strowman v Great Atlantic and Pacific Tea Company, Inc.*, 252 AD2d 384, 385 [1st Dept 1998]).

The Court finds the First Department's decision in *Montero v S. Blvd. LP* 73 AD3d 568 [1st Dept 2010], instructive. In *Montero*, when an employee entered the premises, where her employer was a tenant of the defendant's property, she was caused to fall due to a crack in the step. *Id*. The plaintiff neither testified that she had noticed the alleged defect in the step, nor was aware of any witness who had. In that instance, the court affirmed the lower court's decision that the circumstances create no trial issue of fact as to whether any hazardous condition existed sufficient to impose liability, or "whether defendant had constructive notice of any visible or

apparent defect existing for a sufficient length of time prior to the accident to permit its discovery." *id*. at 568 (*citing Gordon v Am. Museum of Natural History*, 67 NY2d 836 [1986]).

Here, the Court finds that defendants have established that neither had actual or constructive notice of the alleged defect. Moreover, plaintiff testified that he did not see any abnormalities with the Masonite, nor did he know of anyone who previously noticed or complained of any defect. Moreover, plaintiff has just traversed the location of the fall just prior to his fall. As such based on the precedent discussed above, the defendants have made out *prima facie* entitlement to judgment as a matter of law. *See* NYSCEF Doc. 82, pg. 78.

Moreover, for the reasons indicated above, the Court is not persuaded by plaintiff's arguments that defendants are simply burden shifting; rather the Court finds that defendants have met their burden which was not sufficiently overcome by plaintiff. Accordingly, it is hereby

ORDERED that the motions for summary judgment are granted and the complaint is dismissed in its entirety; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly.

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9/14/2022
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE