NEW YORK APPELLATE DIGEST

PRACTICE PAMPHLET No. 1 **2016**

SLIP AND FALL

LIABILITY OF PROPERTY OWNERS AND TENANTS AS GLEANED FROM DEFENSE MOTIONS FOR SUMMARY JUDGMENT

HOW THE APPELLATE COURTS ANALYZE AND APPLY THE LAW RE:

(1) CREATION OF THE DANGEROUS CONDITION; AND

(2) NOTICE OF THE DANGEROUS CONDITION

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SLIP AND FALL

The case summaries here, collected over the past couple of years, identify proof problems which appear again and again at the appellate level, (perhaps) an indication the issues are not well understood.

This Practice Pamphlet addresses an issue which crops up with astonishing regularity in slip and fall cases: What does a defendant have to demonstrate to warrant summary judgment in a slip and fall case?

The question is also addressed in a section of the "Summary Judgment" Practice Pamphlet because the cases illustrate the very deliberate and consistent way appellate courts analyze summary judgment motions.

In the context defense motions for summary judgment in slip and fall cases, the papers must affirmatively prove the property owner or tenant (1) did not create the dangerous condition (by clearing snow for example) and (2) did not have actual or constructive notice of the dangerous condition (specific proof the area was recently cleaned or inspected, for example). If the moving papers don't adequately address those two issues, the motion will fail without any need for the court to consider the plaintiff's opposing papers.

It is not clear to me why these apparently simple proof requirements reach the appellate courts so often. But the cases provide a checklist of what the elements of a slip and fall case are, what a plaintiff must be prepared to prove, and what a defendant must prove to defeat the action.

By reading through the summaries of the most recent cases, you will be able to identify the issues pertinent to your case and understand how the courts analyze them, before it is too late.

FROM THE EDITOR

This is the 1st Practice Pamphlet---a compilation of summaries of recent New York State appellate decisions which address two evidentiary issues central to slip and fall practice, i.e., whether property owners or tenants (1) created or (2) had notice of the dangerous condition.

These issues generally reach the appellate courts after a defense motion for summary judgment. But the black letter law which emerges from the decisions fleshes out the (apparently) elusive elements of proof in this context. **These decisions, therefore, should be consulted before drafting a complaint, answering a demand for a bill of particulars, or preparing for an examination before trial.**

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CLICK ON ANY TABLE OF CONTENTS ENTRY TO GO DIRECTLY TO THE CASE SUMMARY

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SNOW/ICE REMOVAL; STORM IN PROGRESS; PROPERTY OWNER: Failure to Affirmatively Demonstrate Snow Removal Efforts Did Not Create the Dangerous Condition in a Slip and Fall Case Precluded Summary Judgment Pursuant to the "Storm in Progress" Doctrine

In a slip and fall case, the Second Department determined defendant was not entitled to summary judgment pursuant to the "storm in progress" doctrine because it did not affirmatively demonstrate it did not create the dangerous condition by engaging in snow removal during the storm. The court explained the relevant law:

> "Under the storm in progress' rule, a property owner will not be held responsible for accidents caused by snow or ice that accumulates on its premises during a storm until an adequate period of time has passed following the cessation of the storm to allow the owner an opportunity to ameliorate the hazards caused by the storm'" ... . "However, once a property owner elects to engage in snow removal activities, the owner must act with reasonable care so as to avoid creating a hazardous condition or exacerbating a natural hazard created by the storm" ... .
>
> Here, the defendant failed to establish, prima facie, that it was entitled to judgment as a matter of law dismissing the complaint based on the storm in progress rule. In support of the motion, the defendant failed to submit evidence sufficient to demonstrate that it did not engage in any snow removal work while the snow was falling and that it did not create the alleged hazardous condition that proximately caused the plaintiff to fall ... . The defendant could not satisfy its initial burden as the movant for summary judgment merely by pointing to gaps in the plaintiff's case ... . **Harmitt v Riverstone Assoc, 2014 NY Slip Op 09105, 2nd Dept 12-31-14**

SNOW/ICE REMOVAL; STORM IN PROGRESS; PROPERTY OWNER: Because Property-Owner-Defendants Undertook Snow Removal Efforts, Their Failure to Affirmatively Demonstrate Those Efforts Did Not Created the Hazardous Condition Required Denial of Their Motion for Summary Judgment

The Second Department noted that, although a property owner is under no duty to remove snow and ice during a storm, if snow removal efforts are made, in moving for summary judgment, the property owner (here Chestnut Oaks) must affirmatively demonstrate the snow removal efforts did not create a hazardous condition. Chestnut Oaks' failure to so demonstrate required denial of the motion:

> As the proponents of a motion for summary judgment, the Chestnut Oaks defendants had the burden of establishing, prima facie, that they neither created the ice condition nor had actual or constructive notice of the condition ... . "Under the so-called storm in progress' rule, a property owner will not be held responsible for accidents occurring as a result of the accumulation of snow and ice on its premises until an adequate period of time has passed following the cessation of the storm to allow the owner an opportunity to ameliorate the hazards caused by the storm" ... . A person responsible for maintaining property is not under a duty to remove ice and snow until a reasonable time after the cessation of the storm ... . However, if a storm is ongoing, and a property owner elects to remove snow, it must do so with reasonable care or it could be held liable for creating or exacerbating a natural hazard created by the storm ... . In such an instance, a property owner moving for summary judgment in a slip and fall case must demonstrate in support of its motion that the snow removal efforts it undertook neither created nor exacerbated the allegedly hazardous condition which caused the injured plaintiff to fall ... . **DeMonte v Chestnut Oaks at Chappaqua, 2015 NY Slip Op 08800, 2nd Dept 12-3-15**

SNOW/ICE REMOVAL; STORM IN PROGRESS; TENANT: Defendant Seeking Summary Judgment Under the Storm in Progress Rule Must Demonstrate It Did Not Undertake Snow Removal During or Immediately After the Storm and Did Not Create or Exacerbate the Dangerous Condition

The Second Department, in denying defendant's (Happy Nails') motion for summary judgment, explained the analytical criteria for the "storm in progress" defense to a slip and fall case. Here the defendant failed to demonstrate it did not undertake snow removal efforts and did not create or exacerbate the dangerous condition during or immediately after the storm:

> Under the storm-in-progress rule, a property owner or tenant in possession will not be held responsible for accidents caused by snow or ice that accumulates on its premises during a storm, or on an abutting public sidewalk that it has a statutory duty to clear, " until an adequate period of time has passed following the cessation of the storm to allow the owner an opportunity to ameliorate the hazards caused by the storm'" ... . However, once a landowner or a tenant in possession elects to engage in snow removal, it is required to act with "reasonable care so as to avoid creating a hazardous condition or exacerbating a natural hazard created by the storm" ... . Thus, New Happy Nails may be held liable for the allegedly hazardous condition on the sidewalk if it undertook snow and ice removal efforts during or immediately after the storm that made the naturally occurring condition more hazardous ... .
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> Here, New Happy Nails failed to establish its prima facie entitlement to judgment as a matter of law. New Happy Nails failed to demonstrate that it did not undertake to remove snow and ice during or immediately after the storm, and failed to show that any such efforts on its part did not create or exacerbate the alleged icy condition ... . **Fernandez v City of New York, 2015 NY Slip Op 01410, 2nd Dept 2-18-15**

SNOW/ICE REMOVAL; PROPERTY OWNER: Question of Fact Whether Defendant's Snow Removal Efforts Created Dangerous Condition (Black Ice)

The Second Department determined there was a question of fact whether the defendant had created the dangerous condition (black ice) on its property by its snow removal efforts:

> A real property owner or a party in possession or control of real property will be held liable for injuries sustained in a slip-and-fall accident involving snow and ice on its property only when it created the alleged dangerous condition or had actual or constructive notice of it ... . Thus, a defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing, inter alia, that it did not create the alleged hazardous condition ... .
>
> In support of its motion, the defendant failed to eliminate all triable issues of fact as to whether the patch of black ice upon which the plaintiff allegedly slipped and fell was created by its snow removal efforts in the days prior to the accident ... . **Smith v New York City Hous Auth, 2015 NY Slip Op 00355, 2nd Dept 1-14-15**

SNOW/ICE REMOVAL; SIDEWALK; PROPERTY OWNER: Although Defendant Was Not Responsible for the Pedestrian Ramp, There Was a Question of Fact Whether Defendant's Snow Removal (from the Ramp) Created the Dangerous Condition

The Second Department determined a question of fact had been raised about whether defendant is liable for a slip and fall on a pedestrian ramp. Although, by virtue of a city regulation, defendant was not responsible for the ramp, there was a question whether defendant's snow-removal created the dangerous condition (black ice):

> ...[T]he defendant established, prima facie, that the area in which the plaintiff alleged that she slipped and fell was part of a pedestrian ramp, for which it was not responsible (see Administrative Code of City of NY § 7-210). However, a property owner that elects to engage in snow removal activities must act with reasonable care so as to avoid creating a hazardous condition or exacerbating a natural hazard created by a storm ... . Here, the defendant failed to eliminate all triable issues of fact as to whether the black ice condition upon which the plaintiff allegedly slipped and fell was created by its snow removal efforts ... . **Herskovic v 515 Ave I Tenants Corp, 2015 NY Slip Op 00334, 2nd Dept 1-14-15**

SNOW/ICE REMOVAL/SIDEWALK; PROPERTY OWNER: Defendant Property Owner Did Not Demonstrate a Lack of Constructive Notice of Snow and Ice on the Sidewalk and Did Not Demonstrate He Did Not Create the Hazard by Snow Removal, Summary Judgment Should Not Have Been Granted

The Second Department, reversing Supreme Court, determined defendant property-owner should not have been granted summary judgment in this sidewalk slip and fall case. Under the NYC Administrative Code the property owner had a duty to keep the sidewalk clear of ice and snow. The evidence submitted by defendant did not demonstrate a lack of constructive notice of the snow and ice or that he did not create the hazard by efforts to remove snow and ice:

> Administrative Code of the City of New York § 7-210 imposes a duty upon property owners to maintain the sidewalk adjacent to their property, and shifts tort liability to such owners for the failure to maintain the sidewalk in a reasonably safe condition, including the negligent failure to remove snow and ice ... . However, Administrative Code of the City of New York § 7-210 does not impose strict liability upon the property owner, and the injured party has the obligation to prove the elements of negligence to demonstrate that an owner is liable ... . Thus, to prevail on his summary judgment motion, the defendant was required to establish that he neither created the alleged hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it ... .
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> Here, in support of his motion, the defendant submitted evidence which included his own deposition testimony. The defendant's deposition testimony indicated that while he regularly cleared snow from the sidewalk in front of his building during the winter months, he had no specific recollection of what days it snowed during February 2013, or what snow removal efforts he undertook during that month. **Kabir v Budhu, 2016 NY Slip Op 06682, 2nd Dept 10-12-16**

SNOW/ICE REMOVAL; SIDEWALK; TENANT: The Defendants, Lessees of the Property Abutting the Sidewalk, Demonstrated in their Summary Judgment Motion that there Was No Statute or Ordinance Imposing Liability on Lessees for Failure to Clear Snow and Ice from the Sidewalk, But the Defendants Did Not Affirmatively Demonstrate They Did Not Make the Condition More Hazardous by their Snow Removal Efforts---Therefore the Summary Judgment Motion Must Be Denied Without Reference to the Answering Papers

The Second Department determined defendants, who leased the premises abutting a sidewalk in Brooklyn, were not entitled to summary judgment dismissing a "snow and ice" slip and fall complaint. The defendants demonstrated that there was no statute or ordinance imposing tort liability. However the defendants failed to affirmatively demonstrate that their snow removal efforts did not make conditions more hazardous (another example of the need for a defendant bringing a summary judgment motion to address every possible theory of liability):

> " The owner or lessee of property abutting a public sidewalk is under no duty to remove ice and snow that naturally accumulates upon the sidewalk unless a statute or ordinance specifically imposes tort liability for failing to do so'" ... . "In the absence of a statute or ordinance imposing tort liability on the lessee, it can be held liable only if it, or someone on its behalf, undertook snow and ice removal efforts which made the naturally-occurring conditions more hazardous" ... .
>
> Here, the ... defendants, as lessees of the property, established that no statute or ordinance imposed tort liability on them (cf. Administrative Code of City of NY 7-210 [applicable to owners of real property]). However, they failed to make a prima facie showing that there were no efforts to clear the sidewalk on the date of the injured plaintiff's accident or that any snow and ice removal efforts undertaken by them or by persons on their behalf did not exacerbate the hazardous condition which allegedly caused the injured plaintiff to fall ... . **Forlenza v Miglio, 2015 NY Slip Op 05639, 2nd Dept 7-1-15**

SNOW/ICE REMOVAL; SIDEWALK; TENANT: To Prevail on a Motion For Summary Judgment, Lessee Must Show Both (1) the Absence of a Statute or Ordinance Imposing Tort Liability for Failure to Remove Ice and Snow from a Sidewalk and (2) the Lessee Did Not Create or Exacerbate the Condition by Its Snow Removal Efforts

The Second Department noted that defendant-lessee's motion for summary judgment in a sidewalk slip and fall case was properly denied. Although the lessee (Valley) demonstrated no statute or ordinance imposed a duty to remove snow and ice from the sidewalk, it did not demonstrate that it was free from negligence by showing it did not create or exacerbate the condition with snow removal efforts:

> The owner or lessee of property abutting a public sidewalk is under no duty to remove ice and snow that naturally accumulates upon the sidewalk unless a statute or ordinance specifically imposes tort liability for failing to do so'" ... . "In the absence of a statute or ordinance imposing tort liability on the lessee, it can be held liable only if it, or someone on its behalf, undertook snow and ice removal efforts which made the naturally-occurring conditions more hazardous" ... .
>
> ... Valley, as lessee, established that no statute or ordinance imposed tort liability on it. However ... Valley failed to make a prima facie showing that it was free from negligence. Valley did not show that it made no efforts to clear the sidewalk on the date of the injured plaintiff's accident or that any snow and ice removal efforts undertaken by it, or by persons on its behalf, did not exacerbate the hazardous condition which allegedly caused the injured plaintiff to fall ... . **Bleich v Metropolitan Mgt., LLC, 2015 NY Slip Op 07808, 2nd Dept 10-28-15**

SNOW/ICE REMOVAL; TENANT: Tenant Has Duty to Keep Premises Reasonably Safe

The Second Department noted that a tenant (TJX) has an obligation to keep the premises safe even if the landlord agreed in the lease to keep the premises in good repair. Here it was alleged that water dripping from a fire escape resulted in an icy area on the abutting sidewalk where plaintiff fell:

> "A tenant has a common-law duty to remove dangerous or defective conditions from the premises it occupies, even though the landlord may have explicitly agreed in the lease to maintain the premises and keep them in good repair" ... . Here, TJX failed to establish, prima facie, that it had no duty to maintain the fire escape in a reasonably safe condition ... . **Sellitti v TJX Cos., Inc., 2015 NY Slip Op 02748, 2nd Dept 4-1-15**

SNOW/ICE REMOVAL; OUT OF POSSESSION LANDLORD: Failure to Submit Lease to Show No Contractual Obligation to Remove Ice And Snow Precluded Summary Judgment to Defendant Out-of-Possession Landlord---Evidence First Submitted in Reply Papers Properly Not Considered

The Second Department determined defendant out-of-possession landlord was not entitled to summary judgment in a slip and fall case because it did not submit the lease and therefore did not demonstrate the absence of any obligation to remove ice and snow. The court noted that it could not consider evidence presented for the first time in reply papers:

> An out-of-possession landlord can be held liable for injuries that occur on its premises only if the landlord has retained control over the premises and if the landlord is contractually or statutorily obligated to repair or maintain the premises or has assumed a duty to repair or maintain the premises by virtue of a course of conduct" ... . Here, the plaintiff did not allege that the landlord's duty was statutory or based on a course of conduct. Thus, to prevail on its motion, [defendant] was required to demonstrate, prima facie, that it had not retained control over the premises, or that it had no contractual duty to remove snow and ice from the area where the plaintiff allegedly slipped and fell. [Defendant] failed to sustain this burden because it failed to submit a copy of the lease between it and the entity that was the tenant of the subject premises at the time of the accident ... . **Poole v MCPJF, Inc., 2015 NY Slip Op 03142, 2nd Dept 4-15-15**

SNOW/ICE REMOVAL; PROPERTY OWNER (RARE SUCCESSFUL DEFENSE MOTION): Rare Case Where Defendant Submitted Sufficient Evidence to Demonstrate Snow Removal Efforts Did Not Create or Exacerbate a Dangerous Condition;, Defendant's Motion for Summary Judgment Should Have Been Granted

The First Department, reversing Supreme Court, determined defendant (Sailsman) was entitled to summary judgment in a slip and fall case. Defendant demonstrated that his snow removal efforts did not create or exacerbate a dangerous condition. [This case is noteworthy because the vast majority of defendants' motions for summary judgment in similar cases are denied for failure to present the necessary evidence.]:

> Sailsman made a prima facie showing that his property is a two-family home in which he resides, not subject to liability pursuant to Administrative Code of City of NY § 7-210 (b), and that his voluntary snow removal efforts did not create or exacerbate the alleged hazardous condition on the sidewalk ... . Sailsman testified that the day before the accident, he removed the snow and ice from the sidewalk and applied enough salt to completely melt the ice, and provided a neighbor's affidavit confirming that the sidewalk was clear and safe to walk on, as well as photographs taken shortly after the accident. **Montiel v Sailsman, 2015 NY Slip Op 08968, 1st Dept 12-8-15**

CLEANING-INSPECTION PRACTICES: Defendant Did Not Demonstrate the Absence of Constructive Notice of the Condition Alleged to Have Caused Plaintiff to Fall—No Evidence When Area Last Cleaned or Inspected

The Second Department determined defendant in a slip and fall case was not entitled to summary judgment because it did not demonstrate its lack of constructive notice of the condition (glass debris):

> A defendant moving for summary judgment in a slip-and-fall case has the burden of establishing, prima facie, that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it ... . "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 [the] defendant's employees to discover and remedy it" ... . "To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" ... .
>
> Here, the defendants did not proffer any evidence demonstrating when the area where the plaintiff fell was last cleaned or inspected prior to the plaintiff's accident and, thus, failed to eliminate all triable issues of fact with regard to their contention that they lacked constructive notice of the glass debris ... . The defendants' failure to establish their prima facie entitlement to judgment as a matter of law required the denial of their motion, regardless of the sufficiency of the plaintiff's opposition papers ... . **Santiago v HMS Host Corp, 2015 NY Slip Op 01437, 2nd Dept 2-18-15**

CLEANING-INSPECTION PRACTICES: No Specific Evidence When Area Last Cleaned or Inspected

The Second Department, reversing Supreme Court, again stated the summary-judgment proof requirements for a defendant in a slip and fall case:

> In a slip-and-fall case, a defendant moving for summary judgment has the initial burden of making a prima facie showing that it did not create the condition on which the plaintiff slipped, and did not have actual or constructive notice of that condition ... . To constitute constructive notice, a dangerous condition must be visible and apparent and must exist for a sufficient length of time before the accident to permit the defendant to discover and remedy it ... . To meet its burden on the issue of constructive notice, a defendant "must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" ... . Mere reference to general cleaning practices, with no evidence regarding any specific cleaning or inspection of the area in question, is insufficient to establish a lack of constructive notice ... . **Arcabascia v We"re Assoc Inc, 2015 NY Slip Op 01595, 2nd Dept 2-25-15**

CLEANING-INSPECTION PRACTICES: Proof of General Cleaning Procedures Not Sufficient for Summary Judgment to Defendant in a Slip and Fall Case

In a slip and fall case, reversing Supreme Court, the Second Department explained (once again) that proof of general cleaning procedures (as opposed to proof when the area in question was last inspected or cleaned) is not sufficient to warrant summary judgment to the defendant:

> A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it did not create the hazardous condition which allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it ... . To meet their burden on the issue of lack of constructive notice, the defendants were required to offer some evidence as to when the accident site was last cleaned or inspected prior to the injured plaintiff's fall ... . "Mere reference to general cleaning practices, with no evidence regarding any specific cleaning or inspection of the area in question, is insufficient to establish a lack of constructive notice" ... . Here, the affidavit of the Safety and Security Manager for the subject IKEA store, which was submitted in support of the defendants' motion, only provided information about the store's general cleaning and inspection procedures concerning the promenade, and did not show when the subject area had last been inspected or cleaned prior to the happening of the accident ... . Thus, the defendants failed to establish, prima facie, that they lacked constructive notice of the allegedly dangerous condition ... . Furthermore, the defendants failed to establish, prima facie, that the alleged condition was too trivial to be actionable, or was open and obvious and not inherently dangerous as a matter of law. **Barris v One Beard St., LLC, 2015 NY Slip Op 02083, 2nd Dept 3-18-15**

CLEANING-INSPECTION PRACTICES: Evidence of General Cleaning Practices, As Opposed to Evidence When the Area of the Slip and Fall Was Last Inspected and Cleaned, Is Not Sufficient to Demonstrate the Absence of Constructive Notice of the Dangerous Condition

The Second Department determined the lessee's motion for summary judgment in a slip and fall case was properly denied. The lessee, Ban Do, was responsible for snow and ice removal in the area of the fall. In support of its motion for summary judgment, Ban Do presented only evidence of its general cleaning practices and did not specifically demonstrate when the area was last inspected and cleaned. Therefore Ban Do was unable to demonstrate the absence of constructive notice of the icy condition:

> Ban Do failed to make a prima facie showing that it lacked constructive notice of the ice condition alleged by the plaintiff. Ban Do failed to present evidence establishing when it had last cleaned or inspected the area of the walkway where the plaintiff slipped and fell, relative to the time of the accident ... . The affidavit of Ban Do's principal established nothing more than Ban Do's general cleaning practices in relation to the walkway at the rear entrance to its store, which was insufficient to demonstrate that it lacked constructive notice of the ice condition on which the plaintiff allegedly slipped and fell ... . **Sartori v JP Morgan Chase Bank, N.A., 2015 NY Slip Op 03516, 2nd Dept 4-29-15**

CLEANING-INSPECTION PRACTICES: Failure to Affirmatively Demonstrate When the Area Where the Slip and Fall Occurred Was Last Inspected and Failure to Affirmatively Demonstrate the Condition Was a "Latent Defect" Precluded Summary Judgment---Defendants Failed to Affirmatively Demonstrate the Absence of Constructive Notice of the Condition

The Second Department determined Supreme Court properly denied defendants' motion for summary judgment in a slip and fall case, in another illustration of the need to eliminate every possible theory of recovery in order to be awarded summary judgment. Here it was alleged plaintiff slipped and fell on a loose piece of slate. Defendants demonstrated the absence of actual notice, but did not present evidence of when the area was last inspected prior to the fall and did not demonstrate the defect was "latent" (which would have demonstrated the absence of constructive notice):

> "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 [the defendants] to discover and remedy it" ... . "When a defect is latent and would not be discoverable upon a reasonable inspection, constructive notice may not be imputed" ... . In demonstrating that it lacked constructive notice of a visible and apparent defect, "the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff" slipped and fell ... .
>
> Here, the deposition testimony ... established, prima facie, that the defendants did not create or have actual notice of the allegedly loose piece of slate on the slate stone landing which allegedly caused the plaintiff Patrick Bergin to fall ... . However, in the absence of any evidence as to when the defendants last inspected the landing before the accident ..., or that the allegedly loose piece of slate on the landing was a latent defect that could not have been discovered upon a reasonable inspection ... , the defendants failed to establish, prima facie, that they lacked constructive notice of the allegedly loose piece of slate on the landing ... . **Bergin v Golshani, 2015 NY Slip Op 06103, 2nd Dept 7-15-15**

CLEANING-INSPECTION PRACTICES: Defendant Failed to Demonstrate the Absence of Constructive Notice; Proof of Cleaning Schedule Not Enough

The First Department, over an extensive dissent, determined proof of a janitorial cleaning schedule was not sufficient to demonstrate defendant's lack of notice of a dangerous condition. Defendant's motion for summary judgment should not have been granted:

> Defendant building owner moved for summary judgment solely on the basis that it had neither actual nor constructive notice of the alleged dangerous condition, a missing drain cover in the building's laundry room. Defendant failed to meet its initial burden of demonstrating that it did not have constructive notice ... . Although the building superintendent testified that he routinely swept the laundry room every morning at 8:00 a.m. and performed daily inspections of the building, including the laundry room, at 11:00 a.m. and 8:00 p.m. each day, mere proof of a set janitorial schedule does not prove that it was followed on the day of the accident, or eliminate the issue of constructive notice in this case ... . The superintendent could not recall whether he had checked the laundry room on the day of the accident or offer any other evidence regarding the last time he inspected the laundry room prior to the accident ... . He explicitly stated that he did know whether the allegedly defective condition existed on that date. **Dylan P. v Webster Place Assoc., L.P., 2015 NY Slip Op 07600, 1st Dept 10-20-15**

CLEANING-INSPECTION PRACTICES: Tracked In Water, Failure to Demonstrate When Area Last Inspected Precluded Summary Judgment

The Second Department, reversing Supreme Court, determined defendant's failure to demonstrate when the area where the slip and fall occurred was last inspected precluded summary judgment in defendant's favor. Evidence of general cleaning procedures is not enough to demonstrate a lack of constructive notice of an alleged dangerous condition (tracked in water here):

> While a "defendant [is] not required to cover all of its floors with mats, nor to continuously mop up all moisture resulting from tracked-in rain" ... , a defendant may be held liable for an injury proximately caused by a dangerous condition created by water tracked into a building if it either created the hazardous condition, or had actual or constructive notice of the condition and a reasonable time to undertake remedial action ... .
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> To meet its burden on the issue of lack of constructive notice, a defendant is required to offer some evidence as to when the accident site was last cleaned or inspected prior to the plaintiff's fall ... .
>
> Here, the defendant failed to establish, prima facie, that it did not have constructive notice of the alleged hazardous condition. Neither the affidavit of the defendant's operations manager, nor the deposition testimony of the defendant's asset protection manager established when the area where the plaintiff fell, or any of the entrances to the store, were last inspected in relation to the plaintiff's fall. **Milorava v Lord & Taylor Holdings, LLC, 2015 NY Slip Op 08390, 2nd Dept 11-18-15**

CLEANING-INSPECTION PRACTICES: Defendant's Failure to Demonstrate When the Area Was Last Inspected and Cleaned Required Denial of Defendant's Motion for Summary Judgment

Reversing Supreme Court, the Second Department determined defendant transit authority did not demonstrate a lack of constructive notice of a slip and fall hazard because it did not present evidence of when the area was last cleaned and inspected or what the area looked like prior to the slip and fall:

> A defendant property owner who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence ... . " To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell'" ... .
>
> Here, viewing the evidence in the light most favorable to the plaintiff, as the nonmoving party, the defendant failed to establish its prima facie entitlement to judgment as a matter of law ... . The defendant failed to set forth when the subject platform was last inspected or what it looked like prior to the accident, and it failed to establish, prima facie, that it did not have constructive notice of the alleged hazardous condition ... . **Roman v New York City Tr. Auth., 2015 NY Slip Op 08820, 2nd Dept 12-2-15**

CLEANING-INSPECTION PRACTICES: Defendant Did Not Demonstrate Plaintiff Did Not Know the Cause of Her Fall and Did Not Demonstrate a Lack of Constructive Notice of the Dangerous Condition; No Evidence When Area Last Cleaned or Inspected

The Second Department determined defendant's motion for summary judgment in a slip and fall case should not have been granted. Plaintiff's testimony she "felt" liquid on the floor was sufficient evidence plaintiff was aware of the cause of her fall. And defendant failed to demonstrate a lack of constructive notice of the dangerous condition:

> Although the defendant presented evidence that it neither created, nor had actual notice of, the alleged condition, it failed to demonstrate that it did not have constructive notice of the alleged condition, as the defendant failed to tender any evidence establishing when the subject area was last inspected and cleaned prior to the accident ... . **Korn v Parkside Harbors Apts., 2015 NY Slip Op 09071, 2nd Dept 12-9-15**

CLEANING-INSPECTION PRACTICES: Failure to Demonstrate When Area Was Last Cleaned or Inspected Required Denial of Defendants' Motion for Summary Judgment

The Second Department, reversing Supreme Court, determined summary judgment should not have been granted to defendants in a slip and fall case. The plaintiff alleged she slipped on a patch of oil in a parking lot. The defendants failed to demonstrate when the area had last been inspected or cleaned:

> To meet its burden on the issue of lack of constructive notice, a defendant is required to offer some evidence as to when the accident site was last cleaned or inspected prior to the accident ... . "Mere reference to general cleaning practices, with no evidence regarding any specific cleaning or inspection of the area in question, is insufficient to establish a lack of constructive notice" ... .
>
> In support of their motion, the defendants failed to demonstrate, prima facie, a lack of constructive notice of the allegedly hazardous condition that caused the subject accident, as they failed to submit any evidence as to when, prior to the accident, the area of the parking lot where the alleged slip and fall occurred, was last inspected or cleaned relative to the accident ... . **Bruni v Macy's Corporate Servs., Inc., 2015 NY Slip Op 09238, 2nd Dept 12-16-15**

CLEANING-INSPECTION PRACTICES (RARE SUCCESSFUL DEFENSE MOTION): Defendant Entitled to Summary Judgment--No Notice of Wet Condition Where Plaintiff Fell

Reversing Supreme Court, the Second Department determined the defendant was entitled to summary judgment in a slip and fall case. The defendant demonstrated it did not have actual or constructive notice of the condition (wet floor). An affidavit by a member of the maintenance crew stated that the area where plaintiff fell had been inspected 10 to 15 minutes before the fall and there had been no complaints about a wet condition. The court explained the relevant law:

> The owner or possessor of property has a duty to maintain his or her property "in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" ... . A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it did not create the hazardous condition which allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it ... . To meet its burden on the issue of lack of constructive notice, a defendant is required to offer some evidence as to when the accident site was last cleaned or inspected prior to the plaintiff's fall ... . "Mere reference to general cleaning practices, with no evidence regarding any specific cleaning or inspection of the area in question, is insufficient to establish a lack of constructive notice" ... .
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> The defendant established its prima facie entitlement to judgment as a matter of law by submitting evidence demonstrating that it neither created nor had actual or constructive notice of the condition alleged by the plaintiff to

have caused the accident. In support of its motion, the defendant relied upon, among other things, the affidavit of Charles Barber, a member of the maintenance crew at the subject store on the date of the accident. Barber averred that he had inspected the area where the plaintiff alleged that she fell approximately 10 to 15 minutes prior to the accident and observed no water in the area at that time. He further averred in his affidavit that at no point prior to the accident did he ever receive any complaints of any kind concerning the area where the plaintiff allegedly fell. **Mehta v Stop & Shop Supermarket Co., LLC, 2015 NY Slip Op 05450, 2nd Dept 6-24-15**

CLEANING-INSPECTION PRACTICES (RARE SUCCESSFUL DEFENSE MOTION): Defendants Demonstrated Lack of Notice of Turned Up Carpet

The First Department, over a dissent, determined defendants were entitled to summary judgment in this slip and fall case. Plaintiff alleged he tripped over the upturned corner of a rug:

> The doorman on duty testified that he observed the carpet, used when there was inclement weather, in its usual location between the door and the elevator less than an hour before the accident and that he did not notice any part of the carpet that was not lying perfectly flat in the area of the elevators ... . He also testified that he did not remember having ever seen a carpet whose corners were not lying flat to the floor at any time during January 2011. Nor did he ever see anyone use tape to keep the corners of the carpet down. Defendants also pointed to plaintiff's testimony that the first time he saw a portion of the carpet raised was when the doorman helped him after he fell ... . **Reeves v 1700 First Ave. LLC, 2016 NY Slip Op 06050, 1st Dept 9-15-16**

CLEANING-INSPECTION PRACTICES (RARE SUCCESSFUL DEFENSE MOTION): Storm in Progress Rule Relieved Defendants of Responsibility for Tracked in Water; Evidence of Routine Maintenance Schedule Coupled With Plaintiff's Observation Sufficient to Demonstrate Lack of Actual or Constructive Notice

The First Department determined the storm in progress rule relieved defendants of responsibility for tracked in water during a snow storm. With respect to a second accident alleged in the complaint (slipping on urine on the building floor) the court held that evidence of the daily maintenance routine, coupled with plaintiff's testimony she did not see urine on the floor on the afternoon of the accident (which occurred at 6:30 or 7 pm), demonstrated the defendants did not have constructive notice of the condition:

> Here, plaintiff testified that ten or fifteen minutes before her first accident, she saw that it was snowing. Thus, any issue concerning whether defendants made reasonable efforts to remedy the wet condition on the steps of the entry vestibule was beside the point since they had no duty to correct the ongoing problem of pedestrians tracking water into the vestibule, until a reasonable time after the storm ended ... .
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> With respect to plaintiff's second accident in the building, the court properly concluded that defendants demonstrated prima facie the absence of actual or constructive knowledge of urine on the second floor platform based on the testimony of the superintendent that he inspected daily, mopped three times a week, and swept the stairs every day. Plaintiff also testified that she did not see the urine on the afternoon before her 6:30 p.m. or 7 p.m. accident, and was unaware of any complaints of a recurring moisture condition on the platform... . **Rosario v Prana Nine Props., LLC, 2016 NY Slip Op 06431, 1st Dept 10-4-16**

CLEANING-INSPECTION PRACTICES (RARE SUCCESSFUL DEFENSE MOTION): “Specific” Evidence of Cleaning Practices Deemed Sufficient Proof of Lack of Notice Under the Circumstances of this Case

Although the facts were not explained, the Second Department determined proof of "specific," as opposed to "general," cleaning practices, "under the circumstances," was sufficient to meet defendant's burden demonstrating the absence of constructive notice of the condition which caused plaintiff to fall (not specified in the decision). In addition, because plaintiff did not allege any of the "Espinal" exceptions, proof the plaintiff was not a party to the building owner's contract with the cleaning contractor was sufficient to warrant summary judgment in favor of the contractor:

> A defendant has constructive notice of a hazardous condition on property when the condition is visible and apparent and has existed for a sufficient length of time to afford the defendant a reasonable opportunity to discover and remedy it ... . To meet its initial burden on the issue of lack of constructive notice, the defendant is required to offer some evidence as to when the accident site was last cleaned or inspected prior to the plaintiff's fall ... . Although submission of evidence as to the defendant's general cleaning practices is generally insufficient to meet the defendant's burden on the issue of lack of constructive notice, specific evidence as to cleaning practices may be adequate, depending on the circumstances of the case ... .
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> Here, the owner satisfied its prima facie burden through submission of the deposition testimony of an employee of the contractor and the building concierge employed by the owner. The testimony of the building concierge, and the testimony of the contractor's employee regarding the frequency of the employee's inspections of the area where the injured plaintiff fell, established, prima facie, that the owner did not have constructive notice of the allegedly dangerous condition ... . **Mavis v Rexcorp Realty, LLC, 2016 NY Slip Op 06476, 2nd Dept 10-5-16**