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*New York County Clerk's Index No. 153970/2019*
*Appellate Division, First Department Case No. 2022-01770*

# Court of Appeals

STATE OF NEW YORK

GREGORY MORRISON,

*Plaintiff-Appellant,*

*against*

NEW YORK CITY HOUSING AUTHORITY,

*Defendant-Respondent.*

## BRIEF ON BEHALF OF THE DEFENSE ASSOCIATION OF NEW YORK, INC. AS *AMICUS CURIAE*


THOMAS E. LIPTAK
*President of the Defense Association of New York, Inc.*

*Defense Association of New York, Inc. as* Amicus Curiae

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## Corporate Disclosure Statement for DANY

The Defense Association of New York, Inc. is a not-for-profit corporation which has no parent companies, subsidiaries or affiliates.

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## Preliminary Statement

This brief is respectfully submitted on behalf of the Defense Association of New York, Inc. (hereinafter "DANY") as *amicus curiae* in relation to the appeal which is before this Court in the above-referenced action.

DANY is a specialty bar association created to promote continuing legal education, diversity and justice for all in the civil justice system.

In this slip-and-fall incident, DANY respectfully submits where a defendant owner submits evidence of habit, such as employment if a routine practice of deliberate and repetitive inspection and maintenance, that satisfies its burden of proving a lack of constructive notice of the alleged condition. Respectfully, to hold otherwise will expose defendant owners in this State to insurer-type liability.

Additionally, where a defendant owner demonstrates that it reasonably maintained its property, did not create any dangerous condition, and did not have notice of it, the complaint against it should be dismissed.

DANY respectfully submits that, for the foregoing reasons, as well as the further arguments that are set forth in this brief, there should be an affirmance.

## Statement of Facts

***Plaintiff's varying testimony regarding his accident.***

Plaintiff alleges he was injured in May 2018 in a building owned by The New York City Housing Authority ("NYCHA" and "the Building") (R.43-46, 170-171, 185). Plaintiff testified that he went to the Building to visit a friend who lived in an apartment on the sixth floor (R.75 [19:17-25] - 76 [20:2-22], 516 [4-6], 538 [15-25] – 539 [2-5]). He used the elevator to get from the first floor to the sixth floor (R.78 [22:20-25], 80 [24:3-7], 541 [54:2-19]). Upon reaching the sixth floor, he learned that his friend no longer lived in the Building and then used the staircase to walk down from the sixth floor (R.76 [20:15-25] – 77 [21:2-10], 79 [23:12-20], 80 [24:25 – 25:2-21], 82 [26:2-25] – 85 [2-13], 542 [55:4-25 – 60:2], 550 [63:10-25], 555 [68:5-25] – 557 [70:2-13]).

Plaintiff testified that the lights in the stairwell were working when he began to walk down the stairs to leave the Building (R.98 [42:17-25 – 43:2-12]). He testified the lights "were on enough for [him] to see (R.560 [73:18-21]). Plaintiff claimed he was holding onto the railing and walking down the stairs before his alleged accident happened (R.109 [53:2-21], 561 [74:25 – 75:2-16]). He testified that he did not see any liquids or slippery substances on the stairs or landing immediately before his alleged accident (R.106:22-25 – 51:2-25] – 109 [53:2-10]; 563 [76:4-25]).

Plaintiff testified at his November 2, 2018 deposition that he slipped while stepping off the landing and attempting to step down with his left leg (R.101 [45:5-25 – 46:2-22], 103 [48:2-8]).

At his September 16, 2020 deposition, however, Plaintiff claimed that as soon as he put his hand on the railing and took his first step with his right foot off the landing, his leg "slipped and gave way" (R.562 [75:4-25 – 76:2-3], 567 [80:2-12]). He claimed that the slippery substance was on the first step going down from the sixth-floor landing (R.566 [79:15-24]). Plaintiff testified that his right foot contacted the first step off the sixth-floor landing and then he slipped and slid down the staircase (R.101 [45:5-25 – 47:2-18], 567 [80:16-25 – 81:2-12], 570 [83:25 – 84:2-4]). More specifically, Plaintiff testified that he slid down the staircase from the sixth-floor landing to the landing between the fifth and sixth floor (R. 562 [75:4-16], 567 [80:16-25 – 81:2-24]).

And at the General Municipal Law § 50-h hearing, Plaintiff contradicted himself as to whether he saw liquid or a slippery substance on the landing or stairs:

> Q. Where did you see liquid?
> A. On the top of the stairs. . . [A]s soon as I got to take that landing to walk on the stairs that's when it automatically just gave way, like, came from underneath me.
> Q. Was there any liquid on the – on the platform above the first step?
> A. Not that I noticed, no.
> Q. Was there any liquid on the first step below that platform?
> A. Not that I noticed, no.

Q. Where did you see liquid?
A. Like I said, I don't know – like I said, right there when – for my leg to give way, it was something slippery as soon as I stepped. And by then it was too late because I tried to grab the stairs but by then I'm already sliding down the stairs.
Q. So if you did not see any liquid anywhere, how do you know that there was something slippery on the stairs?
A. Because my leg gave way. It gave up from underneath me. That's common sense. You know if fall and you know if you fall on something. That's common sense. Other than that, I wouldn't have fell. It was something slippery, wet, or whatever.
Q. Did you have liquid on any of your clothes?
A. No. Not at all."

(R.108 [52:2-25] – 109 [53:2-10]).

Plaintiff testified that the stairs are made of metal and painted gray (R.561 [74:6-16]). He did not photograph the stairs that evening when he allegedly fell.

***NYCHA's lack of notice of any alleged condition.***

Amados Santos—a Caretaker "J" for the Building—said his job duties as a caretaker included cleaning the Building (R.689 [10:8-10]). Notably, Santos testified that he would "thoroughly" clean the stairs in the Building every Tuesday and Wednesday and also "everyday if they were wet or something" (R.694 [15:21-25] – 695 [16:2-12]). Santos testified that the Building had two staircases and that, typically, he would clean one of the staircases on Tuesdays and the other staircase on Wednesdays, from approximately 1:00 p.m. to 3:30 p.m. on those days (R.705 [26:8-25] – 706 [27:2-8]). He used a mop to clean and dry the stairs, using warning signs to indicate a wet floor (R.695 [16:13-25] – 696 [17:2-9]).

Santos also attested in an affidavit that he followed the NYCHA Janitorial Schedule for the Baruch Housing development:

> I have reviewed the janitorial schedule for the Baruch Houses that was in effect in May 2018, which is attached to my affidavit. The schedule directs Caretakers to deck brush and mop their buildings' stairwells, including steps and landings, from the roof to the first floor each Wednesday afternoon from 12:45 p.m. until 2:30 p.m. [T]he janitorial schedule as directs Caretakers to perform walk-downs of the buildings each day from 8:00 a.m. until 8:15 a.m. The walk-down includes checking the stairwells from the roof to the first floor for any hazardous conditions, which are reported to our supervisors. The Caretakers are directed [to] perform another walk-down of the buildings, including the stairwells, from 3:30 p.m. until 4:15 p.m. each day. I followed this janitorial schedule when I cleaned the stairwells of [the Building] on Wednesday, May 16, 2018, from 8:00 a.m. until 8:15 a.m. and from 12:30 p.m. until 2:30 p.m. (R.726-727).

The NYCHA janitorial schedule for the development where the Building was located directed the caretakers to clean the staircases of the Building each Wednesday afternoon from 12:45 p.m. until 2:30 p.m. (R.455). The caretakers were also directed to conduct walk downs of the buildings that included looking for hazardous conditions, each day from 8:00 a.m. until 8:15 a.m. and from 3:30 p.m. until 4:15 p.m. (R.455).

The Supervisor of Caretakers logbooks for the day of the alleged incident as well as the year before it and the Building Inspection Reports and Work Orders for the two years before the incident showed no evidence of liquids on the subject stairs where Plaintiff's alleged incident happened (R.263-486).

***NYCHA's summary-judgment motion.***

NYCHA moved for summary judgment to dismiss Plaintiff's complaint in its entirety (R.10-733). NYCHA argued that the evidence showed that Plaintiff did not know (1) how the transient condition was created, or (2) how long the transient condition existed before his alleged accident (R.34-37). NYCHA noted that Plaintiff (1) did not see the alleged condition before the alleged accident, and (2) had not been inside the Building for at least a year before the accident (R.34-37).

NYCHA also argued that it showed that the Building was properly maintained and NYCHA did not have notice of any alleged transient condition where Plaintiff claims the alleged accident happened (R.37-39). NYSHA relied on Santos, who had testified (1) he routinely cleaned the Building's two staircases every Tuesday and Wednesday from 1:00 p.m. to 3:30 p.m., (2) he would "thoroughly" clean the stair every day if the stairs were wet, (3) he would clean the stairs until they were dry, and (4) no one worked in the Building at night (R.37). NYCHA also relied on the janitorial schedule for the development where the Building was located because the schedule directs the caretakers to clean the Building's staircases each Wednesday afternoon from 12:45 p.m. until 2:30 p.m. (R.38). The schedule also directed the caretakers to conduct walk downs of the Building, including looking for hazardous conditions each day from 8:00 a.m. until 8:15 a.m. and from 3:30 p.m. until 4:15 p.m. (R.38). Based on the schedule, NYCHA argued that Santos would have mopped

the subject staircase on either Tuesday or Wednesday afternoon and would have performed a walk down of both staircases on the day of the accident before leaving the Building at the end of his shift at 4:30 p.m. (R.39). NYCHA noted that Plaintiff's incident occurred nearly four hours after Santos left the Building, with no workers working in the Building at night (R.38-39).

NYCHA also submitted the Supervisor of Caretakers logbooks for the year before the alleged incident and the Building Inspection Reports and Work Orders for the two years before the incident (R.39). NYCHA argued that the logbooks, reports, and orders showed that there was no evidence of liquids on the subject stairs where Plaintiff claimed the alleged accident happened (R.39). It also relied on the logbooks, reports, and orders to show that NYCHA had a reasonable and consistent maintenance program in place to address transient conditions and that it had no notice of any transient water condition in the staircases between the sixth and fifth floors of the Building (R.30). NYCHA maintained,

> Not only were there no complaints of liquids in the stairwells between the 6th and 5th floors of the subject building prior to Plaintiff's alleged incident, but a NYCHA caretaker patrolled the staircase in the afternoon before Plaintiff's alleged incident, and did not observe or report any leaks or transient water conditions on the stairs (R.39).

NYCHA concluded that it demonstrated its entitlement to judgment as a matter of law on its lack of notice, actual and constructive, of the alleged transient condition (R.40).

In opposition to NYCHA's motion for summary judgment, Plaintiff argued that NYCHA failed to meet its burden on the motion for three reasons. First, that multiple NYCHA Building Inspection Reports before the alleged accident showed NYCHA's actual knowledge and acknowledgement that the subject stairs had unsatisfactory treads (R.764-765). Plaintiff relied on four entries, one of which was 14 days before the alleged accident, that indicate Santos identified unsatisfactory treads on the subject stairs (R.765). Plaintiff claimed NYCHA failed to reconcile the reports of unsatisfactory tread with its claim that there are no triable issues of fact regarding NYCHA's notice of the condition with the subject stairs (R.765).

Second, Plaintiff argued that Santos' affidavit was inadmissible because his affidavit was in English and did not contain a certification that it was interpreted or that he understood the affidavit's contents (R.765). Plaintiff pointed out that Santos used an interpreter to testify during his deposition and concluded that his affidavit upon which NYCHA relied to establish its last inspection or cleaning of the subject stairs, was not evidence in admissible form (R.765).

Finally, Plaintiff argued that the subject stairs tread had "inadequate wet coefficient of friction" (R.767). Based on a post-accident inspection Plaintiff's consultant, Stanley H. Fein, P.E., conducted of the subject stairs and opined that "it would have been difficult for [Plaintiff] to appreciate the slippery substance against the backdrop of metal nodules and dirty gray pain[t]" (R.767). Plaintiff argued that

his consultant's inspection and opinion demonstrated that the NYCHA caused or created the alleged dangerous condition (R.766-767).

Plaintiff also attached Fein's affidavit to the motion papers (R.776-779). In the affidavit, Fein attested that four prior Building Inspection reports written prior to the accident confirmed the existence of the unsatisfactory tread condition at the location where Plaintiff claim he fell (R.777). Fein attested that the "NYCHA's acknowledged unsatisfactory treads is entirely consistent with finding from [his] inspection" (R.777). He opined that NYCHA's alleged lack of maintaining the stairway caused the subject tread on the stairway to have an "inadequate static coefficient of friction because of longstanding paint on the treads in violation of ASTM and UL standards" (R.778). Fein opined:

> NYCHA was negligent in allowing their stairway to be dangerously slippery by having inadequate coefficient of friction because of the application of paint, as acknowledged by [Plaintiff] and NYCHA's witness, in violation of the referenced industry standards. . . . Furthermore, from a human factors' standpoint, the moisture on the treads would be difficult for a person walking the stairway [to] appreciate because of the dirty gray appearance of the paint and the metal nodules. The two, together, create a busy floor surface that camouflage moisture rendering it a trap that would be difficult for someone like [Plaintiff] to appreciate. NYCHA's aforementioned negligence was a competent produce [sic] cause of [Plaintiff's] May 16, 2018 accident (R.778).

In reply, NYCHA argued four points in further support of its motion for summary judgment. First, NYCHA argued that Fein's opinion based on his inspection approximately two years after the alleged accident was not a theory

Plaintiff set forth in the notice of claim. Therefore, Plaintiff did not comply with Public Housing Law § 157(2), depriving it adequate notice to investigate the newly-asserted claim.

Second, NYCHA argued Plaintiff could not add new claims in his bill of particulars that were not included in his original notice of claim (R.788). NYCHA noted that Plaintiff did not assert new theories of liability in his bill of particulars but asserted them solely in opposition to NYCHA's motion for summary judgment (R.788-795). NYCHA relied on the Appellate Division, First Department's holding in *Rosado v New York City Hous. Auth.*, 194 A.D.3d 586 (1st Dep't 2020), which concerned a similar accident (R.789-790). Moreover, plaintiff in *Rosado* relied on the same theory of liability regarding painted stairs and retained Fein to opine on the new theory (R.789-790).

Third, NYCHA argued that Plaintiff's reliance on the May 2, 2018 Building Inspection Report was misplaced. NYCHA maintained that the Report merely showed a general awareness of dirt on the stair treads. NYCHA concluded a general awareness is insufficient to demonstrate notice of a transient condition of a wet or slippery substance (R.795-796).

Finally, NYCHA argued that Santos' affidavit constituted admissible evidence because he spoke English and Spanish. Santos elected to testify in Spanish at his deposition because while Spanish was his native language, he communicated

sufficiently in English, noting that NYCHA's counsel had an in-person meeting with Santos and spoke with him in English to discuss the contents of his supporting affidavit (R.796). NYCHA claimed that Santos understood the information contained in his affidavit and it was true to the best of his knowledge (R.796). NYCHA argued that, in any event, Santos' affidavit confirmed his previous deposition testimony about following the janitorial schedule from the development in the course of his employment and that he inspects and cleans the staircases and hallways of the Building (R.797). NYCHA also argued that "a copy of the NYCHA janitorial schedule for [the development] in English is attached to Mr. Santos' affidavit and the janitorial schedule confirms the caretaker's duties and responsibilities" (R.797). Thus, NYCHA concluded that Plaintiff's objection to Santos' affidavit was meritless (R.797).

***The Supreme Court's Order.***

Supreme Court, New York County, granted NYCHA's motion for summary judgment and dismissed the complaint (R.9). The court concluded that NYCHA met its prima facie burden regarding lack of notice and Plaintiff did not create an issue of fact "because he improperly tried to introduce a new theory of liability through the opinion of his expert" (R.9).

***The Appellate Division, First Department's Order affirming dismissal.***

The Appellate Division, First Department, unanimously affirmed Supreme Court's Order (209 A.D.3d 588 [2022]). The First Department concluded that NYCHA demonstrated that on the day of the alleged accident, NYCHA "had a proper and reasonable inspection and cleaning routine in place to address such conditions" (*id.* at 588). Concluding that Plaintiff failed to raise a triable issue of fact, the First Department stated that the building inspection report "neither indicate specific staircases or floors with unsatisfactory conditions nor set forth the specific nature of the unsatisfactory condition (*id.*). The First Department concluded that the expert "failed to raise an issue of fact to rebut [NYCHA's] prima facie showing that it neither created nor had notice of the transient condition of a wet or slippery substance at the specific incident location and that it followed a proper and reasonable inspection and cleaning schedule" (*id.*).

This Court granted Plaintiff leave to appeal. *Morrison v. NYCHA*, 39 N.Y.3d 909 (2023).

## Legal Argument

### The Supreme Court and Appellate Division, First Department correctly applied the law to dismiss Plaintiff's complaint, and this Court should affirm.

Every motion and appeal begins with establishing the standard of review for the respective courts. DANY submits the Supreme Court and Appellate Division, First Department correctly applied the standard of review in considering NYCHA's summary-judgment motion and dismissed Plaintiff's complaint. DANY asks this Court to affirm and that this Court to consider the evidence of habit that was presented in the Supreme Court that further bolsters the dismissal orders.

Defendants in New York State that own, possess, and control property should be permitted to rely upon evidence of habit as NYCHA has done in this case to support summary-judgment motions in premises-liability cases. In many instances, maintenance personnel either are not available when lawsuits are commenced, or they are asked to testify about their actions for a specified time on a single day from years prior. When a defendant presents habit evidence as NYCHA has done in this case, courts should find that they have satisfied their burden of proof, and DANY asks this Court to affirm.

A party moving for summary judgment motion satisfies its burden when it tenders "sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). This showing

must address the "factual relationship to the alleged injury." *Id*. A moving defendant's burden is circumscribed by the allegations in the complaint and bill of particulars. *Ileiwat v. PS Marcato El. Co., Inc.*, 178 A.D.3d 517, 518 (1st Dep't 2019). A defendant is not required to negate claims that have not been asserted and preserved in the complaint and bill of particulars. *Foster v. Herbert Slepoy Corp.*, 76 A.D.3d 210, 214 (2d Dep't 2010).

A property owner owes a duty to keep its property in a reasonably safe condition under the circumstances. *Basso v. Miller*, 40 N.Y.2d 233, 241 (1976); *Galindo v. Town of Clarkstown*, 2 N.Y.3d 633, 636 (2004). But a landowner is not the insurer of the safety of its tenants or visitors to the building. *See Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d 507, 519 (1980). The duty does not require owners to maintain their premises 24-hours a day. *Pfeuffer v. New York City Hous. Auth.*, 93 A.D.3d 470 (1st Dep't 2012). Instead, the property owner owes a duty to establish a reasonable cleaning routine. *Thomas v. Sere Hous. Dev. Fund Corp.*, 175 A.D.3d 1129 (1st Dep't 2019); *Harrison v. New York City Tr. Auth.*, 94 A.D.3d 512, 514 (1st Dep't 2012) ("The court cannot impose a duty upon a municipal authority to alter its cleaning schedule or hire additional cleaners without a showing that the established scheduled is manifestly unreasonable"). In a slip-and-fall case, a moving defendant's burden requires submission of evidence that it did not have actual or

constructive notice or a reasonable time to cure or warn about the condition's presence. *Piacquadio v. Recine Realty Corp.*, 84 N.Y.2d 967, 969 (1994).

According to the Notice of Claim, Plaintiff slipped and fell because "of a dangerous, unsafe and hazardous condition located at the above location consisting of liquid on the steps, including but not limited to water and other liquids" (R.44). He alleged that NYCHA was negligent "in having a floor without an adequate coefficient of friction" (R.45). Plaintiff subsequently commenced an action against NYCHA, which omitted any allegation that the floor had an inadequate coefficient of friction (R.169-81).

Amongst his numerous claims, Plaintiff's bill of particulars alleged that NYCHA was negligent causing or permitting "dangerous, defective, and hazardous conditions to exist at and upon the stairwells" premises; in failing to prevent the property's stairwells from being and remaining in dangerous, defective, and hazardous conditions; in causing and permitting "liquid to accumulate at and upon the stairwells within the premises; in failing to prevent liquid from accumulating at and upon the stairwells within the premises"; in causing and permitting "plaintiff to slip and fall on liquid that had accumulated in a stairwell at the premises"; and failing to prevent plaintiff from slipping on liquid that had accumulated in a stairwell (R.231-232). Plaintiff identified the dangerous condition as "an accumulation of slippery liquid on the stairs in the aforementioned stairwell…" (R.234). With respect

to notice, Plaintiff alleged, "[t]he exact length of time that said condition existed, and the names of the persons who had constructive notice of same, would be in the exclusive knowledge of the defendant, its agents, servants, and/or employees at this time" (R.234). Plaintiff never specifically identified any statute, ordinance, rule, or regulation NYCHA was alleged to have violated (R.197, 243). Nor did Plaintiff ever amend his bill of particulars (R.244). Plaintiff verified all pleadings. *See* CPLR 105(u).

### A. Evidence of habit satisfies a defendant's burden of showing it did not have notice of a dangerous condition.

In finding that evidence of habit was admissible, this Court defined "habit" in *Halloran v. Virginia Chems., Inc.*, 41 N.Y.2d 386, 389, 392 (1977) as a routine practice of an organization that is a deliberate and repetitive practice by a person or organization in complete control of the circumstances under which the practice occurs. While *Halloran* was decided over 45 years ago, this was not a novel holding. Since common-law, because one who has demonstrated a consistent response under given circumstances is more likely to repeat that response when the circumstances arise again, evidence of habit was generally admissible to prove conformity on specified occasions. *See*, e.g., *Miller v. Hackley*, 5 Johns 375, 384 (1810); 1 Wigmore, Evidence [3d ed], § 92; Richardson, Evidence [10th ed], § 185. Thus, evidence of an individual or entity's "habit" can be admissible to prove that they acted in conformity with that habit on a particular occasion.

Here, NYCHA submitted evidence of the habit of Santos and NYCHA of following cleaning and inspection procedures. And evidence of a person's habit or an organization's routine practice is admissible to prove that the habit or routine practice was followed on the occasion in issue. *See*, *Viviane Etienne Med. Care, P.C. v. Country-Wide Ins. Co.*, 25 N.Y.3d 498, 508-09 (2015) (billing company's regular office practices and procedures in handling no-fault claims to prove claims had been mailed); *Rivera v. Anilesh*, 8 N.Y.3d 627, 635-36 (2007) (dentist's pre-extraction injection procedure that would not vary from patient to patient constituted admissible habit evidence as the record established it was a "'deliberate and repetitive practice'—the mundane administration of a local anesthetic prior to a relatively routine tooth extraction—by a trained, experienced professional 'in complete control of the circumstances.'"); *Beakes v. DaCunha*, 126 N.Y. 293, 298 (1891) (habit of being home on a specific day of the month to transact a specified business); *Matter of Kellum*, 52 N.Y. 517, 519-20 (1873) (attorney's routine practice regarding execution of wills to prove proper execution of will.).

This Court initially appeared to reject habit evidence in negligence cases. *See*, *Eppendorf v. Brooklyn City & Newton R.R. Co.*, 69 N.Y. 195, 197 (1877) (evidence of a plaintiff's habit of jumping on streetcars was not admissible to prove he was negligent on the day of the accident); *Zucker v. Whitridge*, 205 N.Y. 50, 58-66 (1912) (proof that the deceased usually looked both ways before crossing railroad tracks

was not admissible to establish his care on the particular occasion). In *Halloran*, this Court held, "statement that evidence of habit or regular usage is never admissible to establish negligence is too broad." *Id.*, 41 N.Y.2d at 392.

Five years later in *Ferrer v. Harris*, 55 N.Y.2d 285, 294 (1982), this Court echoed *Halloran* and noted it "indicated support for less dogmatic adherence" to the exclusion of habit evidence in negligence cases. Rather, *Halloran* explained, "where the issue involves proof of a deliberate and repetitive practice, a party should be able, by introducing evidence of such habit or regular usage, to allow the inference of its persistence, and hence negligence on a particular occasion. Far less likely to vary with the attendant circumstances, such repetitive conduct is more predictive than the frequency (or rarity) of jumping on streetcars or exercising stop-look-and-listen caution in crossing railroad tracks." *Id.*, 41 N.Y.2d at 392 (citations omitted).

The facts in *Halloran* involved a products-liability action brought by a mechanic who sustained an injury in the use of the product. This Court authorized evidence of plaintiff's habit in the use of that product which permitted an inference that he was negligent in its use. And 30 years later in *Rivera* in a dental-malpractice action, this Court permitted the dentist to offer habit evidence relating to her "routine procedure for administering injections of anesthesia" to show that she had not committed malpractice. *Id.*, 8 N.Y.3d at 635.

Here, NYCHA provided Santos' testimony and affidavit and its cleaning and inspection schedules to prove the procedures were followed and that there was no evidence of notice of the alleged condition. Therefore, a defendant under similar circumstances can rely upon such evidence to support its summary-judgment motion that compliance with habit on the date of the accident proved a lack of notice.

### B. NYCHA demonstrated that it did not have notice of a dangerous condition.

Regardless of the condition, notice is the linchpin of liability in a common-law negligence case. *Gordon v. Am. Museum of Nat. History*, 67 N.Y.2d 836, 837 (1986). Actual notice of a dangerous condition may be found when the defendant created the condition or was aware of its existence. *Arnold v. New York City Hous. Auth.*, 296 A.D.2d 355 (1st Dep't 2002). A plaintiff relying on actual notice must provide evidence that sufficient notice was given to defendants as to the specific hazard, including an exact location before the accident. *See Simmons v. Metropolitan Life Ins. Co.*, 84 N.Y.2d 972 (1994). When relying on 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 defendant's employees to discover and remedy it." *Gordon*, 67 N.Y.2d at 837. A moving party may rely on affidavits, pleadings, depositions, written admissions and any other available proof. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325 (1986); CPLR 3212(b).

Plaintiff's verified bill of particulars identified the offending condition as "an accumulation of slippery liquid on the stairs in the aforementioned stairwell…" (R.234). NYCHA submitted evidence that it did not have notice of that condition, relying on Plaintiff's verified bill of particulars, which was devoid of the necessary proof of actual or constructive notice (R.234). *See Sanchez v. Natl. R.R. Passenger Corp.*, 21 N.Y.3d 890, 891 (2013) ("CPLR 105(u) allows the verified complaint and bill of particulars to be considered as affidavits"); *Charley v. Goss*, 12 N.Y.3d 750, 751 (2009). Plaintiff did not identify any person to whom notice was given and did not quantify the length of time the condition existed.

NYCHA also relied on Santos' deposition testimony (R.680-725). According to Santos, he worked at the 13-story, residential building Monday through Friday from 8:00 a.m. until 4:30 p.m. (R.690, 692). None of the caretakers worked in the evening and a superintendent did not reside in the building (R.706, 727).

The Building had an elevator and two identical staircases (R.690-691, 692). Santos inspected the staircases at the beginning of his workday between 8:00 a.m. and 8:15 a.m. (R.697). The inspection took between 20 and 30 minutes (R.697-698). He also performed an afternoon inspection of the Building and staircases between 3:30 p.m. and 4:15 p.m. (R.456). During his inspections, he walked from the top to the bottom of the staircases (R.697). Santos cleaned the two staircases by cleaning one on Tuesday and the other on Wednesday from 1:00 to 3:30 p.m. (R.695, 696).

The stairs were mopped and dried with the mop (R.696). Warning signs were posted after mopping while the floor was wet (R.696). He cleaned the stairs as needed when inspections revealed that they were wet (R.727).

Plaintiff's accident occurred on Wednesday, May 16, 2018, at approximately 8:00 p.m. (R.231). Because his accident occurred after hours, NYCHA relied on Santos' deposition transcript and his affidavit to which he attached the cleaning schedule and attested that he worked on May 16, 2018 and followed his cleaning and inspection schedule during his working hours (R.726-730, 727). *Armijos v. Vrettos Realty Corp*., 106 A.D.3d 847, 848 (2d Dep't 2013), *lv. den'd* 22 N.Y.3d 856 (2013); *Raposo v. New York City Hous. Auth*., 94 A.D.3d 533, 533 (1st Dep't 2012). This evidence demonstrated that NYCHA did not have actual or constructive notice of the slippery liquid condition that allegedly caused Plaintiff's accident. *Armenta v. AAC Cross County Mall, LLC*, 219 A.D.3d 790 (2d Dep't 2023) (to prove lack of constructive notice, a defendant must offer some evidence as to when the accident site was last cleaned or inspected before the accident). NYCHA kept detailed records that it submitted in support of the motion (R.255-487). The records demonstrated that NYCHA had no notice of a slippery condition in the Building before Plaintiff's accident.

**C. Plaintiff failed to raise a triable issue of fact**.

At the outset, Plaintiff claimed that Santos' affidavit should be rejected because it was in English and not accompanied by a translator's affidavit. The deficiency was not on NYCHA's part, but rather, on Plaintiff. At his deposition, Plaintiff failed to ascertain whether Santos spoke, read, or understood English. Plaintiff's counsel merely stated: "I don't know if you understand any English at all…" (R.688). *See* CPLR 2101(b); *Peralta-Santos v. 350 W. 49th St. Corp.*, 139 A.D.3d 536, 537 (1st Dep't 2016) ("[P]laintiff testified he neither spoke, read nor wrote in English, yet his affidavit was unaccompanied by a translator's affidavit attesting to its accuracy, as required by CPLR 2101(b)").

In contrast, during the deposition NYCHA's counsel advised that he "informed the witness that the accident allegedly occurred in the staircase. That's what he was told" (R.691-692). At no time did counsel indicate that this conversation was held in Spanish. Counsel, who subsequently notarized the affidavit, also met with Santos on November 4, 2021, at which time he spoke with Santos in English (R.728, 796). *See Ortiz v. Food Mach, of Am., Inc*., 125 A.D.3d 507 (1st Dep't 2015) (A translator's affidavit was not required where counsel advised that the witness communicated in English about the contents of the affidavit). Thus, Plaintiff's failure to ascertain Santos' competence is not a basis to reject the English affidavit.

In a marked departure from his deposition testimony and verified pleadings, which identified a slippery liquid as the cause of his fall, in opposition, Plaintiff argued, "NYCHA has avoided the actual theory of Morrison's case: NYCHA painted the treads that caused them to have inadequate friction when wet based on an inspection from Morrison's engineer in violation of safety standards enunciated by the renowned American Society for Testing and Materials and Underwriters Laboratories" (R.761). While the First Department rejected the contention that this was not a new theory first raised in opposition, it should not be overlooked without further consideration.

The purpose of Article 31 of the CPLR, and discovery in general, is to prevent trial by ambush. *Spectrum Sys. Intern. Corp. v. Chem. Bank*, 78 N.Y.2d 371, 376 (1991). Plaintiff's discovery demands gave no indication that his "actual theory" would be related to the paint on the staircase (R.255-262). Indeed, during Santos' deposition, Plaintiff's counsel only asked three questions related to the paint: (1) How often is the metal [staircase] painted?; (2) What color are they painted?; and (3) Do you know if the stairs were painted since 2018? (R.701-702, 706). Plaintiff never alleged a violation of any ordinance, rule, or regulation related to the paint in his bill of particulars (R.1971, 243). Thus, even if the claim was not subsumed by the pleadings, it was abandoned in discovery.

1 At ¶ 24.

Nevertheless, Plaintiff's alternate theory is insufficient to obviate his requirement to demonstrate notice. The courts of this state have consistently held that proof that a floor is 'inherently slippery,' standing alone, is insufficient to support a claim of negligence. *Kline v. Abraham*, 178 N.Y. 377, 381 (1904); *Murphy v. Conner*, 84 N.Y.2d 969, 972 (1994); *Caicedo v. Sanchez*, 116 A.D.3d 553 (1st Dep't 2014); *Flynn v. Haddad*, 109 A.D.3d 1209 (4th Dep't 2013); *Fallon v. Duffy*, 95 A.D.3d 1416, 1418 (3d Dep't 2012); *Rajwan v. 109-23 Owners Corp*., 82 A.D.3d 1199, 1200 (2d Dep't 2011).

In *Murphy*, plaintiff slipped and fell on one of two types of tile in the defendant's shopping mall. *Murphy*, 84 N.Y.2d at 971. Relying on plaintiff's expert, who opined that the coefficient of friction of the tiles where plaintiff fell failed to conform to industry standards, the Supreme Court denied the defendants' summary judgment. *Id*. The Appellate Division reversed, finding that "plaintiffs' expert's opinion was essentially that plaintiff fell because the floor was too slippery." *Id*.

On appeal to this Court, plaintiff argued that the surface on which the plaintiff "fell was inherently dangerous." *Id*. This Court affirmed the dismissal holding, "[p]laintiff offers no evidence of the reason for her fall other than the tiles being smooth." This was insufficient.

The rule of law that has developed demonstrates "that absent competent evidence of a defect in the surface or some deviation from relevant industry

standards, the mere fact that a plaintiff has fallen on a floor that is inherently smooth, and thus slippery, will impose no liability." *Portanova v. Trump Taj Mahal Assocs.*, 270 A.D.2d 757, 758 (3d Dep't 2000), *lv. den'd* 95 N.Y.2d 765 (2000); *Palermo v. R.C. Diocese of Brooklyn*, 20 A.D.3d 516, 517 (2d Dep't 2005) (noting that the tiles were slippery due to their smoothness was not an actionable defect).

The Appellate Division, Second Department expounded on these concepts in *Rodriguez v. Kimco Centereach 605, Inc.*, 298 A.D.2d 571, 571 (2d Dep't 2002), where plaintiff slipped and fell while exiting defendant's store on a rainy day. Plaintiff alleged defendant was negligent "in creating an inherently dangerous condition when it painted over a cement-based epoxy surface located at the store's exit." *Id*. The Second Department held that plaintiff's expert's opinion that the floor's coefficient of friction fell below the standard for a slip-proof floor constituted "nothing more than a claim that the application of the paint to the epoxy surface rendered the area inherently slippery, which is insufficient as a matter of law, without more, to establish liability against the defendants." *Id*. at 571-572. *Ford v. Domino's Pizza, LLC*, 67 A.D.3d 633, 635 (2d Dep't 2009) (accord); *Larussa v. Shell Oil Co.*, 283 A.D.2d 403, 403 (2d Dep't 2001) (accord); *Martinez-Waszak v. City of New York*, 142 A.D.3d 1053, 1054 (2d Dep't 2016) (accord).

Plaintiff's claims are no different, and the Appellate Division's ruling should be affirmed. To the extent that Plaintiff argues that the creation of a dangerous

condition requires no proof of notice, in this instance, he is wrong. In *Walsh v. Super Value, Inc.*, 76 A.D.3d 371 (2d Dep't 2010), plaintiff slipped and fell on a painted curb as she exited defendant's gas station convenience store. *Id.* at 373. She sued the property owner, lessee, and contractors who performed work at the gas station. *Id*. Defendants successfully relied on the general proposition "that a property owner's application of wax, polish, or paint to a floor, making the floor slippery, will not support a negligence action unless the manner of application was itself negligent." *Id*. at 374. In considering the claim of the negligent application of paint, the Second Department held "defendants' knowledge—actual, constructive, or imputed—lies at the very heart of the issues presented in this case, and, more broadly, at the core of most cases involving premises liability." *Id*. at 374-375. The court continued, "[i]t is possible, even for a reasonable person acting reasonably, to create a dangerous or defective condition without realizing it, and to remain ignorant of it for a period of time." *Id.* at 376. The Appellate Division held that "an owner should be held liable for the creation of a dangerous or defective condition on property if a reasonable person in the owner's position would have known, or would have had reason to know, of the danger created, or would have had such knowledge imputed by operation of law." *Id.* In other words, notice that a dangerous condition has been created is still necessary.

In making his argument regarding the coefficient of friction, Plaintiff's claim falls short. Santos testified that he had walked on the stairs while they were wet (R.708). The stairs were not slippery when he walked on them while wet (R.708). Further, Santos had never received reports of anyone slipping on the staircase (R.704). *See Hernandez v. BP Am., Inc.*, 123 A.D.3d 1095, 1096 (2d Dep't 2014) ("Evidence submitted in support of the motion showed that the line had been painted about three months prior to the accident and that, prior to the accident, the plaintiff, who visited the premises two or three days a week, never found the painted line to be slippery"); *Flynn*, 109 A.D.3d at 1209 (accord). Thus, Santos' testimony established lack of notice as to this surprise claim.

NYCHA addressed several deficiencies in Fein's affidavit, including the fact that he first conducted his inspection nearly two-and-a-half years after Plaintiff's accident; the location of the inspection may not have been correct given Plaintiff's inability to identify the location of his fall; and the fact that Plaintiff could not identify the slippery liquid that caused the incident. *See* NYCHA Br. at pp. 9, 24; *Hambsch v. New York City Tr. Auth.*, 63 N.Y.2d 723, 726 (1984). But it bears noting that the regulations on which Fein relied are inapplicable.

A UL classification or certification is given to a manufacturer following testing. *New York City Off-Track Betting Corp. v. Safe Factory Outlet, Inc.*, 28 A.D.3d 175, 177 (1st Dep't 2006). UL 410 in particular, allows manufacturers to

have their floor covering materials tested to demonstrate the slip resistance of their products.2 There is no evidence that NYCHA is the paint's manufacturer particularly where NYCHA had the paint applied by a third party (R.702). Plaintiff relies on ASTM D2047-04 to demonstrate a deficient coefficient of friction advises, but it provides, "test method is not intended for use on 'wet' surfaces."3 Yet, it is the wetness on which Fein relies. And ASTM F 1637 applies to, *inter alia* "short flight stairs" that are defined as three or fewer risers.4 Thus, it is inapplicable here where the staircase was not a short flight (R.779). Even if the provision is broadly read to include walking surfaces that are painted, the cross-cut pattern and texture of the staircase renders it compliant.5

Finally, Plaintiff argues that NYCHA failed to satisfy its burden of showing that it lacked notice of a dangerous condition because the records it submitted showed three occasions, over the course of two years, in which the stair treads were deemed unsatisfactory during an inspection. A party cannot fail to avail itself to discovery and rely on that failure to preclude summary judgment. Here, the maintenance records were turned over in discovery (R.263-486). Even though Plaintiff restricted his concerns to three reports, he failed to take any discovery

2 https://www.ul.com/services/slip-resistance-testing-and-certification-floor-materials
3 https://www.astm.org/d2047-04.html at Scope 1.1
4 https://www.comitzlaw.com/wp-content/uploads/2014/12/safe-walking-surface.pdf at ¶ 6.2.
5 https://www.comitzlaw.com/wp-content/uploads/2014/12/safe-walking-surface.pdf at ¶ 4.1.3.

related to them (R.772-775). Thus, the fact that Plaintiff had questions about the records post-Note of Issue does not demonstrate that NYCHA failed to satisfy its burden or that there were issues of fact. The records did not provide details regarding why the treads were unsatisfactory. Further, they do not undermine Santos' testimony and affidavit advising that he cleaned the stairs, either the day of or the day before Plaintiff's accident and last inspected the stairs mere hours before the accident. Thus, other than speculation, there is no evidence that the unsatisfactory condition documented in the records was present when Santos last inspected the staircase.

## Conclusion

For the foregoing reasons, the order appealed from should be affirmed.

Dated: Garden City, New York
December 21, 2023

Respectfully submitted,

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**Certification Pursuant to §500.13(c)(1)**

**Court of Appeals**

I hereby certify pursuant to §500.13(c)(1) that the foregoing brief was prepared on a computer.

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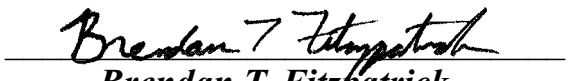

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