To Be Argued By:
DIANA NEYMAN, ESQ.
Time Requested: 15 Minutes

STATE OF NEW YORK
COURT OF APPEALS

GREGORY MORRISON,

Plaintiff-Appellant,

-*against*-

NEW YORK CITY HOUSING AUTHORITY,

Defendant-Respondent.

Court of Appeals No. APL-2023-00045

BRIEF FOR DEFENDANT-RESPONDENT, NEW YORK CITY HOUSING AUTHORITY

APPELLATE COUNSEL:

CULLEN AND DYKMAN LLP
Attorneys for Defendant-Respondent
NEW YORK CITY HOUSING AUTHORITY
One Battery Park Plaza, 34th Floor
New York, New York 10004
Tel: (212) 732-2000
Fax: (212) 742-1219
dneyman@cullenllp.com
kbuffaloe@cullenllp.com

PULVERS, PULVERS & THOMPSON, LLP
Attorneys for Plaintiff-Appellant
950 Third Avenue, 11th Floor
New York, New York 10022
(212) 355-8000
shadar@pulversthompson.com

APPELLATE COUNSEL:

WIESE & AYDINER PLLC
Attorneys for Plaintiff-Appellant
141 Willis Avenue
Mineola, New York 11501
(212) 471-5108
si@walawny.com

Appellate Division, First Department Docket No.: 2022-01770
Supreme Court, New York County, Index No.: 153970/2019

Printed on recycled paper
Brief Completed on July 28, 2023

STATEMENT AS TO THE STATUS OF RELATED LITIGATION

There is no related pending litigation in connection with the present matter.

This matter has been marked dismissed and disposed in the Lower Court, pursuant to the Decision and Order of April 20, 2022, by Hon. Paul A. Goetz.

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES .... ii-iv

PRELIMINARY STATEMENT 1-2

COUNTER STATEMENT OF QUESTIONS PRESENTED.............................. 3-4

COUNTER STATEMENT OF FACTS 5-12

ARGUMENT 13-28

POINT I: THE APPELLATE DIVISION PROVIDENTLY AFFIRMED THE LOWER COURT'S HOLDING THAT NYCHA MET ITS PRIMA FACIE BURDEN ON SUMMARY JUDGMENT AND APPELLANT FAILED TO DEMONSTRATE A TRIABLE ISSUE OF FACT BASED ON BUILDING INSPECTION REPORTS……………………………..………………………13-17

POINT II: THE APPELLATE DIVISION AND THE LOWER COURT PROVIDENTLY REJECTED APPELLANT'S ARGUMENT THAT MR. SANTOS' AFFIDAVIT IS INADMISSIBLE BECAUSE HE PROPERLY EXECUTED IT IN ENGLISH AND IT IS CONSISTENT WITH MR. SANTOS' DEPOSITION TESTIMONY ……………………..………….18-22

POINT III: THE APPELLATE DIVISION CONSIDERED AND PROVIDENTLY FOUND THAT APPELLANT FAILED TO RAISE AN ISSUE OF FACT TO REBUT NYCHA'S PRIMA FACIE SHOWING THAT IT NEITHER CREATED NOR HAD NOTICE OF THE ALLEGED TRANSIENT CONDITION…………………………………………………22-28

CONCLUSION..29

PRINTING SPECIFICATIONS STATEMENT PURSUANT TO 22 NYCRR § 500.13(c)(3) ……………………………………………...30

ATTORNEY CERTIFICATION PURSUANT TO 22 N.Y.C.R.R. 130.1-1A……………………………………………………….31

TABLE OF AUTHORITIES

Cases: .... **Pages**

Caputo v. Amedeo Hotels LP,
2011 NY Slip Op 32935(U) (Sup Ct., New York Cty, 2011) 27

Cuevas v. City of New York et al.,
32 A.D.3d 372, 821 N.Y.S.2d 37 (1st Dep't., 2006) 25

Durney v. New York City Transit Authority,
249 A.D.2d 213, 671 N.Y.S.2d 262 (1st Dep't., 1998) 16

Eustaquio v. 860 Corland Holdings, Inc.,
95 A.D.3d 548, 944 N.Y.S.2d 78 (1st Dept., 2012) 20

Gahn v. Community Props.,
33 Misc 3d 1213(A) (Sup Ct., Nassau Cty, 2011) 26

Gettas v. 332-336 East 77th St. Assoc.,
2005 NY Slip Op 30483(U) (Sup Ct., New York Cty, 2005) 26-27

Greco v. Pisaniello,
2014 NY Slip Op 33257(U) (Sup Ct., Bronx Cty, 2014) 26

Hambsch v. New York City Transit Authority,
63 N.Y.2d 723, 480 N.Y.S.2d 195 (1984) 25

Ifill-Colon v. 153 E. 149th Realty Corp.,
2015 NY Slip Op 31898(U) (Sup Ct., Bronx Cty, 2015) 26

Jones v. City of New York,
32 A.D.3d 706, 821 N.Y.S.2d 548 (1st Dep't., 2006) 25

Julia D. v. New York City Housing Authority,
181 A.D.3d 409, 121 N.Y.S.3d 235 (1st Dep't., 2020) 15-16

Lara v. Delta International Machinery Corp,
174 F.Supp.3d 719, 738 (E.D.N.Y. 2016) 26

Leon-Vazquez v. Benjamin, Denise, et al.
Supreme Court, Nassau County, Index No.: 603750/2015……………………….20

Mejia v. ERA Realty Co.,
2008 NY Slip Op 31543(U) (Sup Ct., Nassau Cty, 2008) 26

Ortiz v. Food Machinery of America, Inc.,
125 A.D.3d 507, 5 N.Y.S.3d 8 (1st Dep't., 2015), ...18,19, 20

Pagan v. New York City Housing Authority,
172 A.D.3d 888, 101 N.Y.S.3d 168 (2d Dep't., 2019)...16

Parker v. Board of Governors,
2015 NY Slip Op 32036(U) (Sup Ct., New York Cty, 2015) 26

Parris v. Jewish Bd. of Family & Children Services, Inc.,
2020 NY Slip Op 31068(U) (Sup Ct., New York Cty, 2015) 27

Reyes v. Arco Wentworth Mgt. Corp.,
83 A.D.3d 47, 919 N.Y.S.2d 44 (2d Dep't., 2011).....................................19, 20, 22

Rosenberg v. City of Long Beach,
2009 NY Slip Op 30931(U) (Sup Ct., Nassau Cty, 2009) 27

Samuels v. Lee,
2016 NY Slip Op 31023(U) (Sup Ct., New York Cty, 2016) 27

Science Applications International Corporation v.
Environmental Risk Solutions, LLC,
37 Misc. 3d 1202(A), 964 N.Y.S.2d 62 (Sup. Ct., Albany, 2012) 25

Serrano v. Haran Realty Co.,
234 A.D.2d 86, 650 N.Y.S.2d 236 (1st Dep't.,1996) 16

Smith v. Town of Brookhaven,
45 A.D.3d 567, 846 N.Y.S.2d 203 (2d Dep't., 2007) 25

Tanton v. Lefrak SBN Ltd. Partnership,
2013 NY Slip Op 30126(U) (Sup Ct., New York Cty, 2013) 27

Torres v. Nine-O-Seven Holding Corp.,
2014 NY Slip Op 31465(U) (Sup Ct., Nassau Cty, 2014) 27-28

Statutes:...**Pages**

CPLR Rule 2101……………………………..……………………………....18

CPLR 3212...1, 3

ASTM D-2047 ....9, 23

ASTM F-1637 ....9, 23

Underwriters Laboratories (UL) 410 ....9, 23

PRELIMINARY STATEMENT

The Appellate Division, First Department, providently affirmed the Lower Court's decision and order granting Respondent's New York City Housing Authority's (hereinafter "NYCHA" or "Respondent") motion for summary judgment pursuant to CPLR 3212, where NYCHA met its *prima facie burden* in establishing that it had a reasonable inspection and cleaning protocol for the staircase subject to Appellant's alleged accident, that it adhered to that protocol on the date of the alleged accident, and that NYCHA did not have actual or constructive notice of the alleged transitory condition of a slippery substance on a step, alleged to have occurred hours after NYCHA's personnel left for the day.

In addition, the Appellate Division, First Department, providently held that Appellant failed to raise a triable issue of fact in response to NYCHA's *prima facie* showing based on the Building Inspection Reports, which did not indicate the specific staircases or floors and did not set forth the specific nature of the unsatisfactory condition. The Appellate Division, First Department, also providently rejected Appellant's cause-or-create argument through submission of a conclusory and speculative expert affidavit. Finally, the Appellate Division providently rejected Appellant's argument in relation to NYCHA's submission of Caretaker Amado Santos' affidavit in English, where Mr. Santos was an English speaker, capable of understanding and affirming the contents of his affidavit in English, and where the

contents of Mr. Santos' affidavit matched his prior testimony at his deposition, conducted through a Spanish interpreter.

COUNTER STATEMENT OF QUESTIONS PRESENTED

I. Whether the Appellate Division, First Department, providently affirmed the Lower Court's decision and order granting NYCHA's motion for summary judgment pursuant to CPLR 3212, where Respondent met its *prima facie* burden and established its entitlement to summary judgment by submitting evidence that it inspected and cleaned the staircase in question pursuant to a Janitorial Schedule and did not have actual or constructive notice of the transitory condition of a slippery substance on a step, alleged to have occurred after NYCHA's personnel had left for the day?

This question must be answered in the affirmative.

II. Whether the Appellate Division, First Department, providently affirmed the Lower Court's decision and order granting NYCHA's motion for summary judgment, when it found that Appellant failed to raise an issue of fact through NYCHA's Building Inspection Reports, which did not specify staircases or floors, much less the scene of the alleged accident, nor specify the nature of the unsatisfactory condition, and thus, did not constitute notice of the specific condition to NYCHA?

This question must be answered in the affirmative.

III. Whether in affirming the Lower Court's order, the Appellate Division, First Department, providently rejected Appellant's argument that the affidavit of

NYCHA's witness, Mr. Amado Santos, was inadmissible because it was executed in English, where Mr. Santos speaks English and the contents of his affidavit matched his deposition testimony given in Spanish, which Appellant had a full opportunity to probe and Appellant does not contest as inadmissible?

This question must be answered in the affirmative.

IV. Whether the Appellate Division, First Department, providently held that Appellant failed to raise an issue of fact in opposition to Respondent's motion for summary judgment through his expert affidavit, where the Appellate Division did consider Appellant's cause-and-create theory based on purported insufficient coefficient of friction of the paint on the steps and found it lacking because the expert's affidavit posed unreliable and speculative findings lacking in probative value?

This question must be answered in the affirmative.

COUNTER STATEMENT OF FACTS

Appellant's Notice of Claim, served prior to the commencement of this action, and his Verified Bill of Particulars, both alleged that he sustained personal injuries when he slipped and fell on May 16, 2018, at approximately 8:00 p.m., while walking down the stairs from the 6th floor to the 5th floor in the building located at 120 Baruch Drive, New York, New York 10002. [R 43-44, 231]. Although Appellant alleged NYCHA had actual and constructive notice of the condition, he provided no specifics about the purported notice, such as its form, content, or timing. [R 234]. Appellant never supplemented his Bill of Particulars to allege any details concerning the critical issue of notice.

On the issue of negligence, Appellant's Bill of Particulars repeated allegations identical to those contained in the Notice of Claim, except Appellant no longer alleged the existence of "a floor without an adequate coefficient of friction" and thereby abandoned any cause-or-create cause of action, which his earlier vague and overbroad allegations could not support. [R 44-45, 231-33]. Appellant did not allege any statutory violations in his Bill of Particulars either. [R 243].

At a statutory hearing pursuant to GML § 50-h held on November 2, 2018 as well as at a deposition on September 16, 2020, Appellant testified that on May 16, 2018, at approximately 8:00 p.m., he came to the building of 120 Baruch Drive, New

York, New York to visit a friend named "Ricky" who resided in Apartment 6B or 6D, on the 6th floor of the building. [R 75-76, 516, 539].

At the statutory hearing, Appellant testified that he had never been inside the subject building before May 16, 2018. [R 78, 559-60]. When Appellant arrived at the subject building that evening, he took the elevator to the 6th floor, where "Ricky's" apartment was located. [R 78, 541]. When he arrived at "Ricky's" apartment door, an unknown male down the hall told him that "Ricky" had moved out. [R 75-76, 79, 541]. After that, Appellant decided to exit the building, but he did not want to wait for the elevator and instead proceeded to the stairs. [R 86, 541, 550].

Appellant further testified that the lights in the staircase were working on May 16, 2018 and they were sufficient for him to see where he was walking. [R 98-99, 558, 560].

Appellant also testified that 120 Baruch Drive is a 13-floor building with two stairwells, leading from the top floor down to the lobby [R 83-85, 538-39, 555].

Appellant also acknowledged that as he started to descend the steps from the 6th floor, he did not observe any liquids on the subject stairs before he fell despite looking forward. [R 107, 561, 563-64, 567].

He testified that after he fell, he assumed the cause was something slippery because his foot "gave way" and "other than that, I wouldn't have fell." [R 101, 106, 108-09, 563-64, 571]. Appellant also testified that he first observed an unidentified

slippery condition after he fell and saw it only on one step but did not know on which step. [R 107-09]. Appellant also testified that other than that one step, there was nothing of a slippery nature on either the 6th floor landing or on any other step leading from the 6th floor to the 5th floor landing. [R 108-09]. Further, he did not have any liquid on any of his clothes after the fall. [R 109].

On November 19, 2019, NYCHA served a Response to Appellant's combined discovery demands, containing (1) copies of the Supervisor of Caretakers logbooks for the subject building for the period from May 2017 through May 2018; (2) a copy of the Janitorial Schedule in effect on May 16, 2018; (3) the Monthly Building Inspection Reports for the subject building for the period of July 2016 through May 2018; and (4) Work Orders for the subject building for the period of September 2016 through May 2018. [R 255-486]. None of these records, spanning a two-year period prior to the alleged accident, contained any mention of, complaints of, or any evidence of liquids or any slippery substance on the subject staircase. [R 255-486].

On March 4, 2021, Caretaker "J"[1] Amado Santos appeared and testified on behalf of NYCHA at a deposition conducted by Appellant. Mr. Santos testified that he has been employed by NYCHA for the past 30 years and was assigned to work at the Baruch Houses as a Caretaker in 2018 and as of May 2018, he was assigned to the building in question of 120 Baruch Drive. [R 688-89, 690-91]. Mr. Santos

1 "J" in the Caretaker's title refers to "Janitorial".

testified that he worked five days a week from 8:00 a.m. until 4:30 p.m. [R 692]. He also testified that as part of his job duties as a Caretaker "J" he walked and inspected the building including the stairs, every day, and thoroughly cleaned the stairs in the subject building every Tuesday and Wednesday, from 1:00 p.m. to 3:30 p.m., and also "everyday if they were wet or something." [R 689, 694-96, 705-06]. Mr. Santos testified that he would use a mop to clean and dry the subject stairs, and he would put out warning signs indicating a wet floor. [R 694, 696].

Mr. Santos also testified that there were no NYCHA workers in the subject building in the evenings. [R 706].

Mr. Santos' testimony was corroborated by NYCHA's Janitorial Schedule for Baruch Houses. [R 455-56]. The Janitorial Schedule directed caretakers to conduct walk downs of each stairwell from the roof to the lobby each day starting from 8:00 a.m. to 8:15 a.m., and to immediately report any hazardous conditions to a supervisor. [R 455]. Caretakers use a deck brush and a mop to clean the stairwell landings and the steps from the roof to the 1st floor landing each Wednesday from 12:30 p.m. to 2:30 p.m. [R 456]. Caretakers also conducted another walk down of the buildings each day from 3:30 p.m. to 4:15 p.m., before the end of the workday. [R 456].

In addition to the deposition testimony, NYCHA also submitted an Affidavit executed by Mr. Santos in support of its motion for summary judgment, attesting to

the Janitorial Schedule and reiterating that he followed the NYCHA Janitorial Schedule for Baruch Houses by mopping the stairwells and inspecting the staircases twice a day, with the last inspection between 3:30 p.m. and 4:15 p.m. each day before leaving for the day. [R 726-27].

In opposition to NYCHA's summary judgment motion, for the first time since commencing the action, Appellant introduced a cause-or-create theory of liability, vaguely noted in his pre-litigation notice of claim but thereafter abandoned when Appellant did not include it in his pleadings or Verified Bill of Particulars. In a purported expert affidavit, Mr. Stanley Fein stated that he had inspected steps on October 12, 2020 (nearly two and a half years after the alleged accident) and opined that unknown and unspecified gray paint on the steps under unknown and unspecified "wet conditions" created by Mr. Fein, caused a low coefficient of friction, making the steps slippery and in violation of ASTM D-2047 and F-1637 and Underwriters Laboratories (hereinafter "UL") 410 standards. [R 777]. Mr. Fein's affidavit failed to set forth the nature or type of paint he observed two and a half years after the alleged accident and failed to specify what "wet conditions" he created for purposes of the purported testing. [R 571].

In opposition to NYCHA's motion for summary judgment, Appellant also relied on NYCHA's monthly Building Inspection Reports, spanning approximately two years prior to the alleged accident date, some of which indicated that steps &

treads were “unsatisfactory”. The reports refer to general condition; do not identify a specific condition, much less whether it was structural or transitory; and do not identify a specific staircase or specific location within this 13-story building containing two stairwells. [R 457-84].

Finally, Appellant argued in opposition that the affidavit submitted by Caretaker “J” Santos in support of NYCHA’s motion for summary judgment was inadmissible because it was executed in English, while Mr. Santos testified through a Spanish interpreter during his deposition. [R 765-766].

NYCHA responded to Appellant’s arguments and did not make any new argument on reply, having submitted sufficient admissible evidence to satisfy its *prima facie* burden within its motion papers.

Specifically, NYCHA argued that the Building Inspection Reports evidenced nothing more than a “general awareness” of a condition of the steps and treads and did not establish notice of the transitory condition alleged by Appellant, that is a slippery substance on an unidentified step within one stairwell of the building in question. NYCHA also argued that Mr. Santos’ affidavit was not required to be executed in Spanish, as Mr. Santos spoke both Spanish and English and was able to communicate effectively with his counsel in English sufficiently to understand the information contained in the affidavit and was able to affirm that it was true to the best of his knowledge. [R 796]. In addition, Mr. Santos’ affidavit did not contain any

new information. Mr. Santos' affidavit was consistent with the testimony he gave at his deposition where Appellant had ample opportunity to pose questions and follow up on Mr. Santos' answers on topics including his performance of his daily duties in compliance with the Janitorial Schedule for inspecting and cleaning stairs. [R 688-89, 690, 694-96, 705-06].

The Lower Court granted NYCHA's motion for summary judgment on liability, as it correctly found that NYCHA met its *prima facie* burden with respect to lack of notice of the alleged transitory condition which arose after NYCHA's personnel had left for the day, and that Appellant failed to raise a triable issue of fact. [R 9].

The Appellate Division, First Department, reviewed the parties' submissions and the Lower Court's decision *de novo*, and agreed with the Lower Court that NYCHA established entitlement to judgment as a matter of law by submitting evidence demonstrating that it did not have actual or constructive notice of the alleged condition, and that NYCHA had a proper and reasonable inspection and cleaning routine in place as of the date of the alleged accident to address such conditions. [R 870].

The Appellate Division, First Department, guided by well-established principles also held that the Building Inspection Reports on which Appellant relied failed to raise an issue of fact because they did not specify the staircases or floors

with unsatisfactory conditions or the nature of any unsatisfactory condition. [R 870].

Contrary to Appellant's representation, the Appellate Division, First Department, did consider Appellant's cause-or-create theory of liability based on a purported low coefficient of friction, holding that Appellant's expert failed to raise an issue of fact to "rebut defendant'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." [R 870].

Based on the arguments and legal precedents submitted herein, the Lower Court and the Appellate Division, First Department, correctly found that NYCHA was entitled to summary judgment and that Appellant failed to raise any triable issue of fact in opposition. The Appellate Division, First Department, after review of the Lower Court's submissions *de novo*, correctly affirmed the Lower Court's decision, finding that NYCHA satisfied its *prima facie* burden in establishing that it did not have notice of the alleged slippery condition or cause or create the alleged condition, and that Appellant's submissions in opposition, failed to raise an issue of fact to rebut NYCHA's showing. In rendering its decision, the Appellate Division, First Department, properly followed the well-established precedents, which were factually identical to the circumstances of this case and dictated a similar outcome.

ARGUMENT

POINT I

THE APPELLATE DIVISION PROVIDENTLY AFFIRMED THE LOWER COURT'S HOLDING THAT NYCHA MET ITS PRIMA FACIE BURDEN ON SUMMARY JUDGMENT AND APPELLANT FAILED TO DEMONSTRATE A TRIABLE ISSUE OF FACT BASED ON BUILDING INSPECTION REPORTS

Appellant argues that NYCHA failed to meet its *prima facie* burden on summary judgment because its Building Inspection Reports pre-dating the accident noted an "unsatisfactory" condition of steps and treads, for the *specific* location in the staircase between the 6th and 5th floors where Appellant alleges his accident occurred. *See,* Appellant's Brief, at page 10, Point II.

Appellant misstates the record and the applicable law. The Building Inspection Reports are not site or condition specific and as a matter of law reflect nothing more than general awareness of a condition, insufficient to defeat summary judgment in NYCHA's favor.

Appellant at his statutory hearing and at his deposition testified that the building of 120 Baruch Drive has 13 floors and two staircases designated "A" and "B" leading from the top floor down to the lobby. [R 538-39, 555].

The Building Inspection Reports, however, do not contain any reference to specific staircase(s) or floor(s) within the subject building. Therefore, there is no

indication that the notations regarding "unsatisfactory" steps and treads contained in those reports pertain to any specific staircase or floors within the building.

Similarly, the Building Inspection Reports do not describe a specific condition noted to be "unsatisfactory" but only indicate a general condition.

Notwithstanding, Appellant's conclusion that "[t]he specific stairwell was, of course, *implicated* because of [Appellant's] discovery demand and NYCHA's response" (*see,* Appellant's Brief, at page 10; emphasis added), NYCHA produced the Building Inspection Reports in response to Appellant's broad demands for "copies of any and all … written records related to inspection, cleaning, maintenance… *on the stairwells* between the 5th and 6th floors." [R 260]. Appellant failed to tailor his demands to the specific stairwell or the steps in question or the condition in question, despite his knowledge that the subject building has two stairwells and 13 floors. Thus, these broad demands generated a response from NYCHA which went beyond the alleged accident location and included inspection reports, which pertained to the building in general and did not specify any unsatisfactory condition. Having made such broad discovery demands, Appellant cannot now argue that these Building Inspection Reports are location or condition specific, especially considering that on their face the Building Inspection Reports do

not indicate a specific stairwell, specific steps, or a specific condition.[2]

Further, in his brief, Appellant concedes that the Building Inspection Reports are not specific as to the condition of the stairs claimed to have been involved in the alleged accident, when he sets forth that "there is no notation on the actual Building Inspection Reports providing a basis, express or inferential, to conclude that the unsatisfactory condition of the treads was 'dirt' or otherwise a transient condition." *See,* Plaintiff-Appellant's Brief, at page 12.

Therefore, the Appellate Division, First Department, correctly found that the Building Inspection Reports "neither indicated specific staircases or floors with unsatisfactory conditions nor set forth the specific nature of the unsatisfactory condition." [R 870].

The notations within the Building Inspection Reports at most reflected a "general awareness" of an unsatisfactory condition of steps and/or treads, but not of the specific transitory slippery condition involved in the alleged accident. A general awareness of a condition is insufficient to constitute notice of the transient condition of the "wet" or "slippery" substance alleged herein where, as here, a reasonable and consistent cleaning schedule was implemented. *See,* <u>Julia D. v. New York City</u>

---

2 Because the Building Inspection Reports speak for themselves and on their face are not location or condition specific, there was no need, as Appellant contends, for NYCHA to argue in its moving papers or reply below "that its Building Inspection Reports were for different (or irrelevant) floors or staircases." *See,* Appellant's Brief, at page 10.

Housing Authority, 181 A.D.3d 409, 121 N.Y.S.3d 235 (1st Dep't., 2020) (the affidavit of the infant's grandmother that she complained of urine on the steps and that she saw urine in stairwell A between 10th and 11th floors for two or three days prior to the accident demonstrated only that the defendant had a general awareness of the problem and no evidence was presented that the puddle of urine that caused plaintiff's fall was the same condition that her grandmother observed, given the caretaker's testimony of a reasonable cleaning schedule); *see also,* Serrano v. Haran Realty Co., 234 A.D.2d 86, 650 N.Y.S.2d 236 (1st Dep't., 1996); Durney v. New York City Transit Authority, 249 A.D.2d 213, 671 N.Y.S.2d 262 (1st Dep't., 1998) (holding that the Transit Authority did not have constructive notice of urine puddles in a subway station, on which the plaintiff was caused to slip and fall, simply because the Transit Authority was aware of homeless people occupying and frequenting the station); Pagan v. New York City Housing Authority, 172 A.D.3d 888, 101 N.Y.S.3d 168 (2d Dep't., 2019) (affirming the lower court's grant of NYCHA's motion for summary judgment where plaintiff did not present any evidence that NYCHA was aware of a recurring dangerous condition of urine on the steps in the specific area of the stairwell where she fell, only that NYCHA had a general awareness that urine was frequently in that stairwell). As the Building Inspection Reports contain no information concerning notice of the specific slippery condition alleged herein, NYCHA did not need to rely on these documents to meet its *prima facie* burden in

establishing entitlement to summary judgment as a matter of law and, thus, did not have to "reconcile its own findings in the Building Inspection Reports," or address them prior to NYCHA's reply as Appellant argues. *See,* Appellant's Brief, at page 11.

It was Appellant who sought to rely on the Building Inspection Reports in opposition to NYCHA's underlying motion. NYCHA simply responded to Appellant's argument in its reply, establishing that the Building Inspection Reports were insufficient to raise an issue of fact as a matter of law as found by the Lower Court and the Appellate Division.

NYCHA submitted other evidence including the testimony and affidavit of Caretaker "J" Amado Santos and the building Janitorial Schedule to establish lack of notice of the specific alleged condition and that NYCHA followed a reasonable cleaning and inspection schedule for the building, including the staircase in question on the date of the alleged accident, and that the alleged slippery condition would not have been left unaddressed while NYCHA's personnel was on duty and before leaving for the day. [R 455-56, 689, 695].

Therefore, it is respectfully submitted that the Appellate Division providently affirmed the Lower Court's finding that NYCHA met its *prima facie* burden on summary judgment and established that it had no notice of the alleged condition as a matter of law, and that Appellant failed to raise an issue of fact.

POINT II

THE APPELLATE DIVISION AND THE LOWER COURT PROVIDENTLY REJECTED APPELLANT'S ARGUMENT THAT MR. SANTOS' AFFIDAVIT IS INADMISSIBLE BECAUSE HE PROPERLY EXECUTED IT IN ENGLISH AND IT IS CONSISTENT WITH MR. SANTOS' DEPOSITION TESTIMONY

The Appellate Division, First Department, and the Lower Court correctly rejected Appellant's argument that the affidavit of Mr. Santos submitted in support of NYCHA's underlying motion for summary judgment was inadmissible where Mr. Santos spoke and understood English and his affidavit was consistent with his sworn deposition testimony and NYCHA's other evidentiary support for its motion, all establishing NYCHA's entitlement to summary judgment as a matter of law.

NYCHA's submission of Mr. Santos' affidavit was proper pursuant to Ortiz v. Food Machinery of America, Inc., 125 A.D.3d 507, 5 N.Y.S.3d 8 (1st Dep't., 2015), where the Appellate Division held that an affidavit submitted by third-party defendant La Minerva in support of its motion to dismiss was admissible and properly executed in English, where La Minerva's counsel represented that the witness, an Italian citizen, spoke English, and communicated with counsel in English concerning the drafting of the affidavit.

The holding in Ortiz and the case at bar are consistent with CPLR Rule 2101. Here, although Mr. Santos requested a Spanish interpreter for purposes of his

deposition because Spanish is his native language, he also speaks and understands English, and thus was able to affirm his affidavit in English. Moreover, here as in Ortiz, counsel for NYCHA represented that he met with Mr. Santos on November 4, 2021 and conveyed to him in English the contents of his affidavit. At that meeting, Mr. Santos communicated in English and demonstrated he understood the information contained in his affidavit and that the same was true to the best of his knowledge. [R 796-97].

The present matter is distinguishable from the facts in Reyes v. Arco Wentworth Mgt. Corp., 83 A.D.3d 47, 919 N.Y.S.2d 44 (2d Dep't., 2011) and other cases relied upon by Appellant. Review of appellate papers submitted in connection with underlying motion practice in Reyes revealed that the plaintiff could not speak or read English and the contested affidavit submitted in opposition to the defendant's motion should have been translated into Spanish and a translator's affidavit should have been annexed. *See,* Reyes v. Arco Wentworth Mgt. Corp., 83 A.D.3d 47, 919 N.Y.S.2d 44 (2d Dep't., 2011), at footnote 8, 2011 WL 1841419 (N.Y.A.D. 2 Dep't.) (Appellate Brief). In this matter, the record establishes that, while Mr. Santos testified at his deposition in Spanish, he does communicate in English and understood the contents of his affidavit in English. Thus, he was able to affirm the contents of his affidavit. [R 796].

Appellant also relies on other decisions which are readily distinguished from

this case. In Eustaquio v. 860 Corland Holdings, Inc., 95 A.D.3d 548, 944 N.Y.S.2d 78 (1st Dep't., 2012), the statement by the foreman of plaintiff's non-party employer was prepared by a private investigator, and the private investigator's affidavit stated that the foreman's daughter had translated the statement from Greek to English. However, the statement was not accompanied by an attestation from the daughter setting forth her qualifications and the accuracy of the translation.

Thus, unlike this case, in Eustaquio and Reyes,[3] the affidavits were provided from witnesses who could not speak or read English, and thus could not affirm, the contents of their affidavits in English. Thus, unlike Mr. Santos, they required a translation, which should have been accompanied by an attestation from the translator.

As noted above, Mr. Santos' affidavit did not require a translator's attestation because counsel discussed the contents of his affidavit with him in English and Mr. Santos understood and affirmed in English without needing a Spanish translator. This was appropriate, regardless of Mr. Santos' choice to speak at a deposition through a Spanish interpreter. *See,* Ortiz v. Food Mach, of Am., Inc., 125 A.D.3d 507, 5 N.Y.S.3d 8 (1st Dep't., 2015) (translator's affidavit not required where "the

3 Appellant's reliance on the decision in Leon-Vazquez v. Benjamin, Denise, et al., Supreme Court, Nassau County, Index No.: 603750/2015 is misplaced as it is a decision of a lower court, unreported, and contains no factual detail sufficient to determine its applicability to the facts herein. Therefore, that decision is not governing law before this Honorable Court and is not instructive on the issues herein.

witness's affidavit is in English, and counsel represents that the witness, an Italian citizen, speaks English, and communicated with counsel in English concerning the drafting of the affidavit").

Further, Appellant fails to mention that the information contained in Mr. Santos' affidavit simply reiterates and confirms the information that he had previously provided during his sworn deposition testimony, which Appellant does not, and cannot, contend is inadmissible. As he did during his deposition, Mr. Santos affirmed in his affidavit that he acted in accordance with and followed the Janitorial Schedule for Baruch Houses and that he inspected and cleaned the staircases of the subject building pursuant to that schedule twice a day, including on the day of the alleged accident, with the last time being shortly before he left for the day, at 4:30 p.m. [R 455-56, 689, 692-93, 694-95, 697]. As such the affidavit reiterates Mr. Santos' earlier sworn deposition testimony and confirms the other evidence submitted by NYCHA in support of its underlying motion, including but not limited to the Janitorial Schedule and the Supervisor of Caretakers' Logbook.[4] Therefore, as the statements in Mr. Santos' affidavit are set forth elsewhere in the record, irrespective of whether or not the Lower Court or the Appellate Division considered

4 Appellant argues that "testimonial evidence, in either its written or spoken forms, should remain consistent in order to ensure the accuracy of the witness's underlying contentions." *See,* Appellant's Brief, at page 14. Accuracy is not an issue here as both Mr. Santos' affidavit and his deposition testimony are consistent with each other and other evidence that NYCHA submitted in support of its motion.

Mr. Santos' affidavit, the outcome of NYCHA's motion for summary judgment would not have changed and NYCHA would still be entitled to summary judgment.

In this regard, the holding in Reyes is instructive. Therein the Appellate Division found that although the plaintiff's English-language affidavit in opposition was not admissible, the plaintiff's translated deposition transcript was admissible and in fact, the lower court did not rely on the plaintiff's affidavit at all. Similarly, Mr. Santos' translated deposition testimony was admissible and without the benefit of his affidavit, sufficient to satisfy NYCHA's *prima facie* burden on summary judgment, along with other admissible evidence including the Janitorial Schedule and the Supervisor of Caretakers' Logbook. Thus, Appellant's argument that without Mr. Santos' affidavit NYCHA cannot establish its cleaning and inspection practice is without basis and not supported by the record herein.

POINT III

THE APPELLATE DIVISION CONSIDERED AND PROVIDENTLY FOUND THAT APPELLANT FAILED TO RAISE AN ISSUE OF FACT TO REBUT NYCHA'S PRIMA FACIE SHOWING THAT IT NEITHER CREATED NOR HAD NOTICE OF THE ALLEGED TRANSIENT CONDITION

Appellant misrepresents that the Appellate Division improvidently focused on notice of the transient condition and failed to discuss the "tread paint as a causative factor." *See,* Appellant's Brief, at page 17.

Contrary to Appellant's contention, the Appellate Division explicitly stated in

its decision that it did in fact consider Appellant's cause-or-create theory, when it held that "the expert nonetheless failed to raise an issue of fact to rebut defendant's *prima facie* showing that it *neither created* nor had notice of the transient condition of a wet or slippery substance…." [R 871].

Appellant submitted the affidavit of an engineer, Mr. Stanley Fein, prepared specifically in opposition to NYCHA's motion for summary judgment, alleging negligence based on a purported insufficient coefficient of friction allegedly created by the paint on unspecified steps, within unspecified staircase, and violations of ASTM D-2047 and F-1637 or UL 410 standards, the theory of liability that Appellant never asserted in his pleadings or the Verified Bill of Particulars. [R 232-33, 243].

In considering this argument, the First Department correctly found that the affidavit of Mr. Stanley Fein failed to raise an issue of fact to rebut Respondent's *prima facie* showing that it did not create the condition or have notice of the alleged slippery substance that caused him to fall. Mr. Fein's affidavit lacked probative value, as it contained unreliable, speculative conclusory findings, that the First Department found insufficient. [R 871].

In his affidavit, Mr. Fein averred that he inspected a staircase two and a half years after the alleged accident. He allegedly inspected this staircase between the sixth and the fifth floors and "specifically the first step down from the sixth floor

landing." [R 777]. However, the photograph annexed to Mr. Fein's affidavit purportedly depicting the area that he inspected does not reflect the first step down from the 6th floor landing but shows a part of an unknown and unidentified staircase. There is no indication that the photograph depicts the first step from the 6th floor landing, in the specific staircase that Appellant allegedly used on the date of the alleged accident, at the premises in question. [R 779]. Therefore, there is no indication that Mr. Fein tested the alleged accident location, especially considering that Appellant did not know the specific step on which his alleged accident occurred or the specific step where the alleged slippery condition was located. [R 107-09].

In addition, Mr. Fein affirmed that he tested the staircase under "wet condition[s]." [R 777] However, he does not set forth what those wet conditions were and did not provide any information as to conditions that he purportedly created in order to reach his coefficient of friction conclusion. Indeed, Mr. Fein may have created a hydroplane condition on the steps, which would have artificially lowered the coefficient of friction of any floor. Moreover, it would have been impossible for Mr. Fein to simulate the "wet condition" that allegedly existed at the time of the alleged accident at all, as Appellant himself did not know the nature of the "slippery" condition purportedly involved in his fall. [R 107].

Similarly, Mr. Fein did not identify the type of "gray paint" that he observed on the steps, much less opine how that "gray paint" rendered the coefficient of

friction lower than allegedly required. Other than the paint was "gray", Mr. Fein's affidavit offers no other detail as to the nature of the paint he observed.

Further, Mr. Fein failed to address the issues created by the passage of time and wear and tear on the steps from years of use since the alleged accident date and how, if at all, he accounted for that in reaching his conclusion.

These conclusory and speculative statements and findings, combined with the fact that Appellant himself did not know the precise location of his accident or what type of slippery substance was involved, rendered Mr. Fein's findings completely unreliable and without probative value. *See,* Hambsch v. New York City Transit Authority, 63 N.Y.2d 723, 480 N.Y.S.2d 195 (1984); Smith v. Town of Brookhaven, 45 A.D.3d 567, 846 N.Y.S.2d 203 (2d Dep't., 2007); Cuevas v. City of New York et al., 32 A.D.3d 372, 821 N.Y.S.2d 37 (1st Dep't., 2006); Science Applications International Corporation v. Environmental Risk Solutions, LLC, 37 Misc. 3d 1202(A), 964 N.Y.S.2d 62 (Sup. Ct., Albany Co., 2012).

Appellate and other courts in New York State frequently have rejected Mr. Fein's affidavits and testimony as unreliable and speculative, without any evidentiary support or scientific basis. *See,* Jones v. City of New York, 32 A.D.3d 706, 707, 821 N.Y.S.2d 548 (1st Dep't., 2006) (appellate division reversed denial of summary judgment, finding that "Fein did not offer any supporting data ..., nor did he identify any particular professional or industry standard to substantiate his

assertion" of negligence); Parker v. Board of Governors, 2015 NY Slip Op 32036(U) (Sup Ct., New York Cty, 2015) (summary judgment granted to defendant where Mr. Fein's affidavit found to be inadmissible speculation that failed to raise a question of fact); Lara v. Delta International Machinery Corp, 174 F.Supp.3d 719, 738 (E.D.N.Y. 2016) (in rejecting Mr. Fein's affidavit, the court described it as "bottomed upon nothing more than mere speculation and guesswork" with "sweeping conclusions"); Gahn v. Community Props., 33 Misc. 3d 1213(A) (Sup Ct., Nassau Cty, 2011) (summary judgment granted to defendant where the court found Mr. Fein's affidavit to have mischaracterized a compilation of reference standards); Mejia v. ERA Realty Co., 2008 NY Slip Op 31543(U) (Sup Ct., Nassau Cty, 2008) (summary judgment granted to defendant where Mr. Fein's affidavit was found to contain "bare conclusory allegations" that were "insufficient to raise a triable issue of fact"); Ifill-Colon v. 153 E. 149th Realty Corp., 2015 NY Slip Op 31898(U) (Sup Ct., Bronx Cty, 2015) (summary judgment granted in favor of defendant where Mr. Fein's affidavit was found to be based upon mere conjecture and without any probative value); Greco v. Pisaniello, 2014 NY Slip Op 33257(U) (Sup Ct., Bronx Cty, 2014) (summary judgment granted in favor of defendant where Mr. Fein's opinions were found to be unsupported by any outside sources and lacking in evidentiary foundation, and where he failed to identify any particular section, guideline, or standard for his assertions); Gettas v. 332-336 East 77th St.

Assoc., 2005 NY Slip Op 30483(U) (Sup Ct., New York Cty, 2005) (summary judgment granted in favor of defendant where Mr. Fein provided no authority for his conclusion that the underlying floor should have a minimum "measured coefficient of friction," and he provided insufficient evidence for his conclusion that defendant possessed notice of a hazard); Parris v. Jewish Bd. of Family & Children Services, Inc., 2020 NY Slip Op 31068(U) (Sup Ct., New York Cty, 2015) (summary judgment granted to defendant where Mr. Fein's affidavit contained no supporting measurements and failed to cite a controlling statute or code); Rosenberg v. City of Long Beach, 2009 NY Slip Op 30931(U) (Sup Ct., Nassau Cty, 2009) (summary judgment granted to defendant, and Mr. Fein's opinion rejected as "pure speculation," where he neither inspected the location of the accident, nor provided any supporting empirical data); Caputo v. Amedeo Hotels LP, 2011 NY Slip Op 32935(U) (Sup Ct., New York Cty, 2011) (summary judgment granted to defendants where Mr. Fein's affidavit was found to be unsupported by any data and otherwise amounted to bare conclusory assertions); Tanton v. Lefrak SBN Ltd. Partnership, 2013 NY Slip Op 30126(U) (Sup Ct., New York Cty, 2013) (summary judgment, along with costs and disbursements, awarded to defendant where Mr. Fein's affidavit found to be built upon guesswork and speculation); Samuels v. Lee, 2016 NY Slip Op 31023(U) (Sup Ct., New York Cty, 2016) (summary judgment granted to defendant where Mr. Fein's opinion lacked probative value); Torres v. Nine-O-

Seven Holding Corp., 2014 NY Slip Op 31465(U) (Sup Ct., Nassau Cty, 2014) (summary judgment, along with costs and disbursements, awarded to defendant where Mr. Fein's opinion was found to constitute "unsupported and unsubstantiated speculation").

Mr. Fein's affidavit in this case amounts to nothing more than a statement that the steps were painted gray and they were slippery when Mr. Fein made them wet. Such a broad statement has no evidentiary value and, as the Appellate Division found, fails 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 incident location and that it followed a proper and reasonable inspection and cleaning schedule.

Therefore, this is not a case where the First Department failed to consider Appellant's cause-or-create theory, but one where Appellant submitted nothing more than a speculative expert affidavit which lacked any probative value which the Appellate Division found insufficient to demonstrate the presence of a triable issue of fact.

Based on controlling case law and facts discussed above, the Appellate Division, First Department, properly searched the record and held that Appellant failed to rebut NYCHA's *prima facie* showing of entitlement to summary judgment through the affidavit of Stanley Fein.

CONCLUSION

The Appellate Division, First Department, properly affirmed the Lower Court's decision and order granting NYCHA's motion for summary judgment, where NYCHA met its *prima facie* burden and established that it did not create or have notice of the alleged slippery condition and had a reasonable inspection and cleaning routine in place to address such conditions. In opposition, Appellant only asserted feigned issues related to NYCHA's Building Inspection Reports and the affidavit of NYCHA's Caretaker and submitted an unreliable, vague, and speculative affidavit of an engineer. Based on the foregoing, the Appellate Division's decision affirming grant of NYCHA's motion for summary judgment must be upheld in its entirety.

Dated: New York, New York
July 28, 2023

Respectfully Submitted,

CULLEN AND DYKMAN LLP

BY:

DIANA NEYMAN, ESQ,
Attorneys for Respondent,
NEW YORK CITY
HOUSING AUTHORITY
One Battery Park Plaza, 34th Floor
New York, New York 10004
(212) 732-2000

PRINTING SPECIFICATIONS STATEMENT PURSUANT TO 22 NYCRR § 500.13(c)(3)

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

Name of Typeface:	Times New Roman
Point Size:	14
Line Spacing:	Double

The total number of words in the Brief, inclusive of point headings and footnotes, and exclusive of pages containing statement of status of the related litigation, the table of contents, the table of cases and authorities, the questions presented, certification, and Certificate of Compliance, is 5,929.

CERTIFICATION

Pursuant to 22 N.Y.C.R.R. 130.1-1a, the undersigned, an attorney admitted to practice in the Courts of the State of New York, certifies that, upon information and belief, and after reasonable inquiry, the contentions contained in the within Brief are not frivolous.

Dated: New York, New York
July 28, 2023

DIANA NEYMAN

6946-1560
MORRISON

AFFIDAVIT OF SERVICE - REGULAR MAIL

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

REBECCA MITCHELL, being duly sworn, deposes and says that I am not a party in this action, I am over the age of eighteen and reside in Kings County, New York.

That on the **28th day of July 2023**, I served the within **THREE COPIES** of the within **STATE OF NEW YORK COURT OF APPEALS BRIEF FOR DEFENDANT-RESPONDENT** on each of the following:

PULVERS, PULVERS & THOMPSON, LLP
Attorneys for Plaintiff-Appellant
950 Third Avenue, 11th Floor
New York, New York 10022
(212) 355-8000
shadar@pulversthompson.com

Appellate Counsel:

WIESE & AYDINER PLLC
Attorneys for Plaintiff-Appellant
141 Willis Avenue
Mineola, New York 11501
(212) 471-5108
si@walawny.com

by depositing true copies thereof in properly sealed postpaid addressed wrappers, in a post office/official depository under the exclusive care and custody of the United States Postal Service within the State of New York addressed as above that/those being the address(es) designated by them for the purpose upon the latest papers served by them in this action.

REBECCA MITCHELL

Sworn to before me this
28th day of July 2023

NOTARY PUBLIC

Christina Gomes
Notary Public State of New York
No. 01GO6359317
Qualified in Queens County
My Commission Expires May 30, 2025