SUPREME COURT- STATE OF NEW YORK
IAS PART: ROCKLAND COUNTY
Present: HON. ALFRED J. WEINER
Justice of the Supreme Court

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JOSEPH G. CAIVANO,

Plaintiff,

-against-

EMPIRE CITY CASINO AT YONKERS RACEWAY,

Defendant.

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DECISION and ORDER

Index No.: 10794/09

Motion date: 6/10/11

The following papers, numbered 1 to 7, were read on this motion by Defendant for an order pursuant to CPLR §3212(b) granting the Defendant summary judgment and the dismissal of Plaintiff's Complaint:

Notice of Motion/Affirmation/Affidavit/Exhibits(A-F)-1-3
Defendant's Memorandum of Law-4
Affirmation in Opposition/Exhibits(A-G)-5
Plaintiff's Memorandum of Law-6
Reply Affirmation- 7

Upon the foregoing papers, it is ORDERED that this application is disposed of as follows:

In the underlying action, Plaintiff, a patron of the Defendant's casino, claims he was injured when he allegedly slipped and fell on debris in Defendant's parking lot. The accident occurred on August 13, 2007.

With this motion, Defendant seeks summary judgment and the dismissal of Plaintiff's complaint. It is Defendant's contention that there is no proof that Defendant had actual or constructive notice of a dangerous condition nor evidence that it created the allegedly

hazardous condition.

In support of it's motion, Defendant has submitted the affidavit and transcript of testimony of John Morrissey, the Manager of Yonkers Raceway Housekeeping Department. In his affidavit, Mr Morrissey stated that the parking lots are cleaned on a daily basis by a contractor and that he (Morrissey) was not aware of any debris on the parking lot surface on the date in question. He further states that he never received a complaint concerning the condition of the parking lot surface.

Plaintiff opposes the motion contending, first, that the transcript of John Morrissey is inadmissible since it is unsigned and secondly, that Defendant has failed to establish, *prima facie*, its entitlement to judgment. Plaintiff further contends that Defendant failed to prove lack of notice of a dangerous condition – only that the Defendant generally cleans the parking lot.

The burden on a motion for summary judgment rests initially upon the moving party to come forward with sufficient proof in admissible form to enable a court to determine that it is entitled to judgment as a matter of law. If this burden cannot be met, the court must deny the relief sought. CPLR §3212; *Zuckerman v. City of New York*, 49 NY2d 557, 1980. However, once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "...the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action". *Garnham & Han Real Estate Brokers v. Oppenheimer*, 148 AD2d 493, 1989; *Zuckerman*, supra at 562. Mere conclusory statements, expressions of hope, or unsubstantiated allegations are insufficient to defeat the motion. *Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966, 1988. Moreover, for purposes of establishing liability for slip and fall claim, general awareness that a dangerous condition may be present is legally insufficient to constitute notice of a particular condition that caused plaintiff's fall. *Andrus v. National Westminster Bank*, 266 A.D.2d 171, 2nd Dept.,1999.

Upon review of the submissions of counsel, the Court finds that Defendant has established its *prima facie* entitlement to judgment as a matter of law with the submission of the affidavit and deposition testimony of John Morrissey, Manager of Yonkers Raceway Housekeeping Department. Mr. Morrissey's testimony stating, in substance, that Defendant neither created the allegedly dangerous condition or that it had actual or constructive notice of the litter that is alleged to have caused Plaintiff's fall, is sufficient to establish Defendant's burden of proof.

On the other hand, the Court finds that Plaintiff's opposition to the motion is based upon speculation that a "crushed orange soda bottle" or other debris "*may have*" caused him to fall. That speculation is insufficient for Plaintiff to meet his burden of proof and establish the existence of an issue of fact. Plaintiff's subjective observations that the debris in the parking lot is an "...ongoing/recurring condition..." is equally insufficient to establish notice of a dangerous condition since a landowner's general awareness that a dangerous condition may be present is insufficient to constitute notice of a particular condition. Given the foregoing, the Court finds that Plaintiff's opposition to the motion fails to establish the existence of material issues of fact which requires a trial of the action. Accordingly, Defendant is entitled to summary judgment as a matter of law and the motion is granted.

Submit judgment.

Dated: New City, NY
October 3, 2011

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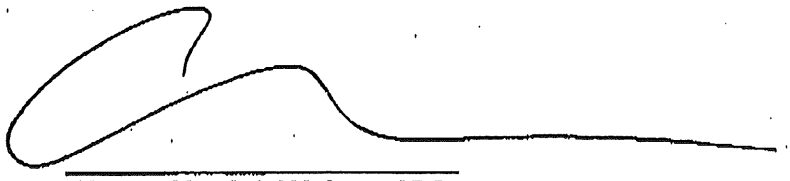

Hon. Alfred J. Weiner JSC

To:

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