UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

ROBERT PROVENCHER, Plaintiff	
v.	Civil No. 98-233-P-C
UNITED STATES OF AMERICA, Defendant	

Gene Carter, District Judge,

MEMORANDUM OF DECISION AND ORDER

Pro se Plaintiff, Robert Provencher, filed this action pursuant to the Federal Tort Claims Act, ("FTCA"), 28 U.S.C.A. § 1346(b) *et seq*., against Defendant, United States of America, for damages sustained when he slipped and fell on a plastic garbage bag on the cement steps leading to the warehouse where the United States Postal Service ("USPS") leased commercial space. Before the Court is Defendant's Motion for Summary Judgment wherein it contends that it had no legal duty to provide for appropriate exterior lighting or to maintain the outdoor staircase free of debris that could cause injury to lawful visitors (Docket No. 8). Plaintiff has not opposed this motion.

I. BACKGROUND

In March of 1995, Plaintiff was employed by Krisway Truck Leasing Co. ("Krisway"), located in South Portland, Maine, as a delivery truck driver. *See* Pedestrian Accident Questionnaire, Affidavit of David R. Collins ("Collins Affidavit"), Attachment 1 (Docket No. 10) at 1. In this position, Plaintiff delivered mail for the USPS from Maine to Massachusetts, making weekly trips to the mail delivery hub located in Westborough, Massachusetts ("Westborough Hub"). *See* Declaration of Brian D. Leary, USPS Supervising Manager ("Leary Declaration") (Docket No. 11) ¶ 3.

On March 19, 1995, at approximately 12:20 a.m., Plaintiff advised Leary, a USPS supervising manager, that he had slipped on a plastic bag and had fallen as he was walking down the outside cement stairs on the left side of the building housing the Westborough Hub. *See* Leary Declaration ¶ 4; Plaintiff's Response to Interrogatories, Collins Affidavit, Attachment 3 ¶ 6. Plaintiff asserts in his Complaint that the outside of the building by the stairs was not illuminated and, as a result, he was unable to see the plastic bag on the stairway. *See* Complaint ¶ 7. After Plaintiff complained of blurred vision, Leary took him to the University of Massachusetts Medical Center in Worcester. *See* Leary Declaration ¶ 4. Plaintiff was treated at the Medical Center emergency room at approximately 3:00 a.m. and, after his release, returned to the Westborough Hub, contacted Krisway to apprise it of the situation, and drove his truck back to Maine. *See* Leary Declaration ¶ 4; Plaintiff's Response to Interrogatories ¶¶ 6, 7. On April 11, 1995, Plaintiff completed a Pedestrian Accident Questionnaire and on July 28, 1997, he completed a Claim for Damage, Injury, or Death Against Federal Agency, SF-95 Claim Form, claiming total damages of $500,000.

The Westborough Hub is located in space contained in a warehouse building that Defendant leases from Otis Street Building III Limited Partnership ("Lessor"). *See* Lease Agreement Between Lessor and Westborough Hub ("Lease"), Leary Declaration, Attachment 2 at 1, 22(a). Under the Lease, the Lessor leased "48,000 net interior square feet" of the total 165,000-square-foot warehouse building to Defendant. *See* Lease at 23.

Pursuant to the Lease, "(t)he Lessor shall . . . maintain the demised premises, including the building and all equipment, fixtures, and appurtenances, whether severable or non-severable, furnished by the Lessor, in good repair and tenantable condition." *See* Lease ¶ 11 at 6. Furthermore, the Lease contains a "Maintenance Rider" which states in relevant part:

> (d) The Lessor is responsible for:
>
> > (1) Maintenance of all common or joint use areas that may be included as part of this lease agreement;
> > . . . .
> > (4) Maintenance resulting from defects in Lessor's construction or in Lessor's installation of equipment, fixtures, or appurtenances furnished by the Lessor;

See Lease at 18. The word "maintenance" is defined as "preservation in a condition not worse than that existing at the time this agreement is made, and includes in addition to preventive and remedial repairs of all kinds, replacement when determined necessary." *Id*. Additionally, the Lease provides an indemnity clause whereby "the Postal Service shall be under no obligation to save harmless or indemnify the Lessor where a negligent or wrongful act or omission of the Lessor, its employees or agents, in any way causes or contributes to the claim, loss, damage, action, cause of action, expense, and/or liability." Lease ¶ 32 at 15. Leary, a USPS supervising manager, attests that up to and during March of 1995, the Lessor was responsible for all exterior

maintenance, repairs, and modifications, if necessary, including those necessary to maintain the exterior stairs where Plaintiff indicated to Leary that he fell. *See* Leary Declaration ¶ 5. At some point after March of 1995, the Lessor added a light to the wall over the stairs where Plaintiff fell. *See* Leary Declaration ¶ 5.

II. STANDARD

Summary judgment may be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. Rule 56(c). Federal Rule of Civil Procedure 56 further provides that,

> [w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided under the rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Fed. R. Civ. P. 56(e). Here, Plaintiff did not respond within ten days to Defendant's motion for summary judgment. Nor has he presented an explanation for his failure to respond. Plaintiff has, thus, failed to comply with the requirements of Local Rule 7(b), to file "within ten (10) days after the filing of a motion, a written objection thereto, incorporating a memorandum of law." *See* D. Me. Local R. 7(b). By virtue of that failure, Plaintiff is deemed to have waived objection to the motion, empowering the Court to act on the motion. *See* D. Me. Local R. 7(b).

Despite the fact that the Court has authority to act on the motion, it is well established in this District that when a nonmoving party chooses to rest on his or her pleadings, as here, a court

may not automatically award summary judgment to the moving party and must take care to examine the merits of the motion. *See Winters v. Federal Deposit Insurance Corp.*, 812 F. Supp. 1, 2 (D. Me. 1992); *Gagne v. Carl Bauer Schraubenfabrick*, 595 F. Supp. 1081, 1084 (D. Me. 1984); *McDermott v. Lehman*, 594 F. Supp. 1315, 1320-21 (D. Me 1984). Instead, a party who fails to object to a motion for summary judgment within the time allotted under the local rules is deemed to have consented to the moving party's statement of facts to the extent it is supported by appropriate record citations. *See Winters*, 812 F. Supp. at 2. However, the moving party still has the burden of showing that the undisputed facts entitle it to summary judgment as a matter of law. *See* Fed R. Civ. P. 56(c); *Stepanishcen v. Merchants Despatch Transport. Corp.*, 722 F.2d 922, 929-30 (1st Cir, 1983).

Accordingly, in this case, Plaintiff is deemed to have waived his right to controvert the facts asserted by the moving Defendant. Thus, the Court will accept as true all material facts, supported by appropriate record citations, set forth by Defendant. To determine whether summary judgment for Defendant is appropriate, the Court will review the materials presented by Defendant to determine whether the standard for summary judgment is met even though Plaintiff has failed entirely to file materials in opposition. Summary judgment will be granted if, upon the Court's consideration of the pertinent papers, those facts entitle Defendant, the moving party, to judgment as a matter of law.

III. DISCUSSION

Section 1346(b) of the FTCA provides in relevant part that,

> the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . . for injury or loss of property, or personal injury or death

> caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C.A. § 1346(b). Accordingly, under the FTCA, the United States is liable, as a private person would be, for injury caused by the negligent act or omission of any government employee who is acting within the scope of his or her employment. *See Goldman v. United States*, 790 F.2d 181, 182-83 (1st Cir. 1986).

In analyzing a claim brought pursuant to this provision, a court determines the claimant's substantive rights according to the law of the state where the act or omission occurred. *See id.*; *see also Richards v. United States*, 369 U.S. 1, 10, 82 S. Ct. 585, 591 (1962); *Rodriguez v. United States*, 54 F.3d 41, 44 (1st Cir. 1995).

Here, Plaintiff's substantive rights are determined by the law of Massachusetts, where the accident occurred. Under Massachusetts law, to establish a claim for negligence, Plaintiff must demonstrate "(1) a legal duty owed by [the] defendant to [the] plaintiff; (2) a breach of that duty; (3) proximate or legal cause; and (4) actual damage or injury." *Verge v. United States Postal Service*, 965 F. Supp. 112, 117 (D. Mass. 1996) (citing *Jorgensen v. Massachusetts Port Authority*, 905 F.2d 515, 522 (1st Cir. 1990) (applying Massachusetts law)). For Plaintiff to survive summary judgment here, there must be sufficient evidence in the record that Defendant, as lessee to the commercial premises, owed Plaintiff a legal duty -- that is, that it had a duty to maintain exterior lighting and/or keep the exterior stairs free of debris.

Defendant first contends that it is entitled to summary judgement because the undisputed

material facts demonstrate that it owed no legal duty to maintain the exterior common areas, including the staircase where Plaintiff fell, because this duty rested solely with the Lessor. A lessor of commercial premises is liable in tort for personal injuries only if it contracted to make repairs and made them negligently, he or she undertook to keep the premises in a safe condition under the lease, or the defect that caused the injury was in a 'common area,' or other area appurtenant to the leased areas, over which the lessor had some control. *See Camerlin v. Marshall*, 582 N.E.2d 539 (Mass. 1991)*; Chausse v. Coz*, 540 N.E.2d 667, 669 (Mass. 1989); *Cronin v. Universal Carloading and Distributing Co.*, 204 N.E.2d 917, 919-20 (Mass. 1965); *Leonardo v. Great Atlantic And Pacific Tea Co.*, 164 N.E.2d 900, 902 (Mass. 1960) (citing cases); *Tuchinsky v. Beacon Property Management Corp.*, 698 N.E.2d 1291, 1292 (Mass. App. Ct. 1998); *Sheehan v. El Johnan, Inc.*, 650 N.E.2d 819, 820 (Mass. App. Ct. 1995); *Monterosso v. Gaudette*, 391 N.E.2d 948, 952-53 (Mass. App. Ct. 1979); *McKinney v. Dairy Mart East, Inc.*, 1994 WL 879553 *2 (Mass. Super. Ct.); *Marquez v. Sacco*, 1994 WL 879747 *3 (Mass. Super. Ct.)[1]. To determine whether the Lessor had a duty to maintain the offending instrumentality in a safe condition, in this case the exterior staircase, it is necessary to look at the language of the Lease. *See Cronin*, 164 N.E.2d at 902; *Leonardo*, 164 N.E.2d at 902; *Tuchinsky*, 698 N.E.2d at 1292-93; *Sheehan*, 650 N.E.2d at 820. If, according to the Lease, the Lessor contracted to maintain the exterior stairway, then the Lessor had a legal duty to do so that flows to Plaintiff.

Here, it is undisputed that the Lessor contracted in the Lease to "maintain the demised

[1] Although the Massachusetts Supreme Judicial Court has held that control over an area is not necessary for liability in the residential context, *see Young v. Garwacki*, 402 N.E.2d 1045, 1050 (1980) (landlord liable for injury due to defective condition on rented premises where he has notice of the defect), it has refused to extend this rule to commercial property. *See Camerlin*, 582 N.E.2d at 541 (refusal to extend *Young*, 402 N.E.2d at 1050, to commercial premises).

premises, including the building and all equipment, fixtures, and appurtenances, whether severable or non-severable, furnished by the Lessor in good repair and tenantable condition." *See* Lease at 6. Furthermore, the Lessor contracted to be responsible for "[m]aintenance of all common or joint use areas" including "[m]aintenance resulting from defects in Lessor's construction or in Lessor's installation of equipment, fixtures, or appurtenances furnished by the Lessor." *See* Lease at 18. Defendant leased 48,000 net interior square feet of the total warehouse space of 165,000 square feet. *See* Lease at 23. The exterior stairway is appurtenant to the leased space and, according to the terms of the Lease, the Lessor contracted to maintain the exterior stairway, including installing fixtures and keeping it in a tenantable condition. From the provisions of the Lease, the Court can infer that the Lessor contracted to maintain the exterior stairway in a tenantable condition, including providing exterior lighting and keeping the stairway free of debris. The Lessor's control over the exterior staircase and its duty to maintain it is further supported by the evidence in the record that after Plaintiff's accident in March of 1995, the Lessor installed an exterior light over the staircase where Plaintiff slipped and fell.[2] Accordingly, the Lessor had a legal duty to install exterior lighting if needed and to maintain the stairway free of debris.

The fact that the Lessor had a duty to maintain the exterior staircase does not foreclose the conclusion that Defendant, as the Lessee, also had a duty to maintain the stairway. *See Hopkins v. F.W. Woolworth Co.*, 419 N.E.2d 302, 303 (Mass. App. Ct. 1981) (holding that while reservation of control of premises will subject landlord to liability, tenant is not thereby

[2] Although not admissible to show negligence, Federal Rule of Evidence 407(a) permits evidence of subsequent remedial measures when offered for another purpose, such as proving ownership or control of the instrumentality in question.

automatically relieved of duty or liability); *Monterosso*, 391 N.E.2d at 953 (holding that the scope of the general proposition that a landlord is under a common duty of reasonable care to all lawful visitors on premises within his control does not operate automatically to relieve a tenant of his duty to warn persons of dangerous conditions within his knowledge in areas appurtenant to his premises where those conditions foreseeably could cause harm to persons lawfully in such areas). Plaintiff contends in his Complaint that Defendant was negligent in failing to maintain exterior lighting and/or to keep the exterior stairs free of debris. Although the record is devoid of any facts from which the Court could infer that Defendant had a duty to install exterior lighting, the Court finds that a genuine issue of material fact exists as to whether Defendant, as the lessee, shared with the Lessor the duty to keep the exterior staircase free of debris.

Here, there is evidence that Defendant was responsible, at least in part, for keeping the exterior stairway free of debris. In his declaration, Leary, a USPS supervising manager, attests that USPS employees were instructed, prior to Plaintiff's fall, to immediately advise a supervisor if they observed a dangerous condition, like a plastic bag blowing underfoot where someone could slip on it. *See* Leary Declaration ¶ 4. From this fact, the Court may infer that Defendant retained responsibility, at least in part, for keeping the exterior stairway free of debris. Thus, by virtue of this fact, there remains a genuine issue of material fact on this record as to whether the alleged defect in the stairs -- the fact that there was a plastic bag on the steps -- is one which Defendant should have used reasonable care to correct. Accordingly, the Court will not grant summary judgment for the Defendant on the basis that it did not owe a legal duty of reasonable care to Plaintiff.

Notwithstanding the Court's finding that Defendant may have had a legal duty to

maintain the exterior steps free of debris, there is simply no genuine issue of material fact on this record as to whether Defendant failed to use reasonable care in executing this duty. The obligation of one who controls business premises is to abide by the legal standard of care and maintain its property "'in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury to others, the seriousness of the injury, and the burden of avoiding the risk.'" *See Verge*, 965 F. Supp. at 117 (quoting *Toubiana v. Priestly*, 520 N.E.2d 1307, 1310 (Mass. 1988)).[3] The Massachusetts Supreme Judicial Court has stated what a Plaintiff must show in order to establish that a person in control of a common area was negligent in keeping the area free of debris:

> When a foreign substance on a floor or stairway causes [a] business visitor to fall and sustain injuries, he [or she] may prove the negligence of the defendant by proof that the defendant or his [or her] servants had actual knowledge of the existence of the foreign substance. In the more usual case, however, the plaintiff attempts to establish the defendant's negligence by showing that the foreign substance was present on the defendant's premises for such a length of time that the defendant should have known about it.

Oliveri v. Massachusetts Bay Transportation Authority, 292 N.E.2d 863, 864-65 (Mass. 1973)

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[3] The Massachusetts Supreme Judicial Court has obviated the legal significance in tort of categories of licensee and invitee and held that a landowner owes a duty of reasonable care to all lawful visitors. On this point, the court stated:

> The problem of allocating the costs and risks of human injury is far too complex to be decided solely by the status of the entrant, especially where the status question often prevents the jury from ever determining the fundamental question whether the defendant has acted reasonably in light of all the circumstances in the particular case.

Mounsey v. Ellard, 297 N.E.2d 43, 51 (Mass. 1973). Because there is no dispute that Plaintiff was a lawful visitor to the Westborough Hub, if the evidence demonstrates that Defendant owed a legal duty to him, Defendant owes a duty of reasonable care.

(internal citations omitted); *see also Kelleher v. Dini's, Inc.*, 118 N.E.2d 77, 78 (Mass. 1954); *Dos Santos v. Stop & Shop Supermarket Co.*, 1996 WL 729933 *2 (Mass. App. Ct.); *Wallace v. Building 19, Inc.*, 1996 WL 27064 *2 (Mass. App. Ct.); *Moreau v. Shaw's Supermarkets, Inc.*, 1994 WL 722821 *1 (Mass. App. Ct.); *Welch v. Angelo's Supermarket, Inc.*, 534 N.E.2d 821, 822 (Mass. App. Ct. 1989). Here, the record indicates that Defendant did not discover the plastic bag on the stairway prior to Plaintiff's accident. *See* Leary Declaration ¶ 4. Thus, sufficient evidence must exist in the record from which the Court may infer that the offending plastic bag should have been discovered by Defendant. The length of time allowed to a defendant to discover the debris is governed by the circumstances of each case and depends on the opportunity for discovery open to defendant's employees by reason of their number, their physical proximity to the condition in question, and in general, the likelihood that they would become aware of the condition in the normal performance of their duties. *See id.* (citing cases); *see also Fedorwicz v. Shaw's Supermarkets, Inc.*, 1998 WL 477963 *2 (Mass. App. Div. 1998).

The undisputed facts supported by citations to the record demonstrate that USPS employees were instructed to immediately advise a supervisor if they observed a dangerous condition, such as a plastic bag blowing underfoot where someone could slip on it. *See* Leary Declaration ¶ 4. The record also indicates that the first time that a USPS supervising manager was made aware that a plastic bag had appeared on the exterior stairs was when Plaintiff reported that he had fallen. *See id.* Although this evidence may not be sufficient to support a conclusion that Defendant used reasonable care, merely discrediting the inference does not permit the Court to automatically infer the contrary conclusion with no evidence to support it. Directly put, there are no facts in the record submitted on summary judgment from which the Court can infer that

the USPS employees knew or should have known that the plastic bag was blowing underfoot on the external staircase. As stated Plaintiff has not controverted Defendant's statement of the facts. Thus, Plaintiff has not submitted facts that tend to show that the debris was on the steps for a certain period of time, or that, under the circumstances, USPS employees were in a position to observe the plastic bag. Thus, the undisputed factual record properly before the Court supports the inference that Defendant was not negligent in regard to keeping the external stairway free of debris. *See Kelleher*, 118 N.E.2d at 77-79 (holding that judgment for defendant is appropriate where there was no evidence that carrot was on the floor for a long time); *Moreau*, 1994 WL 722821 at *2 (reversing judgment for the plaintiff because there was no evidence regarding how the jar became broken or how the mustard got on the floor); *Welch*, 534 N.E.2d at 822 (holding that summary judgment in favor of grocery store was appropriate where nothing in the record would fairly support an inference that the vegetable matter had lain on the floor sufficiently long that the defendant's employees should have seen in and cleaned it up). Because no evidence has been submitted to support the contrary conclusion, the Court will grant summary judgment for Defendant on Plaintiff's claim of negligence.

IV. CONCLUSION

To conclude, the Court finds that a genuine issue of material fact exists as to whether Defendant owed a legal duty to Plaintiff to keep the external staircase free of debris. However, it also finds that, assuming Defendant had a duty to use reasonable care, there is no genuine dispute of material fact as to whether Defendant breached this duty. Accordingly, the Court **ORDERS** that Defendant's Motion For Summary Judgment be, and it hereby is, **GRANTED.**

GENE CARTER
District Judge

Dated at Portland, Maine this 26th day of July, 1999.