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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 11 NASSAU COUNTY

PRESENT:
Honorable Karen V. Murphy
Justice of the Supreme Court

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LORI MASCIA,

Plaintiff(s),

-against-

ROBBINS LANE ELEMENTARY SCHOOL, SYOSSET CENTRAL SCHOOL DISTRICT, and SYOSSET BASKETBALL LEAGUE, INC.,

Defendant(s).

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Index No. 3896/09

Motion Submitted: 4/26/12
Motion Sequence: 003, 004

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....XX
Answering Papers.....XX
Reply.....XX
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

Motion by defendants Robbins Lane Elementary School, ("Robbins") and Syosset Central School District ("Syosset CSD") for an order pursuant to CPLR § 3212 granting them summary judgment dismissing the complaint as against them is granted. Cross-motion by defendant Syosset Basketball League, Inc. ("SBL") for an order pursuant to CPLR § 3212 granting it summary judgment dismissing the complaint as against it is granted.

On December 8, 2007, plaintiff attended her daughter's intramural basketball game which was supervised, operated and controlled by the SBL. The game and accident took place at Robbins Lane Elementary School located at 157 Robbins Lane, Syosset, New York.

Plaintiff alleges that she was caused to trip and fall while she was walking down the middle of the gymnasium stairs to get to the seats. Plaintiff claims that the stairway was overcrowded, not properly monitored, and the handrails were inaccessible.

Defendants move for summary judgment dismissing the complaint on the grounds that: plaintiff is unable to establish the cause of the alleged accident; plaintiff is unable to establish that a dangerous or defective condition existed; and plaintiff is unable to establish that defendant had actual or constructive notice of the dangerous condition. In support thereof, Robbins and Syosset CSD rely upon the deposition testimony of plaintiff; the deposition testimony of Charles Abner, the Director of School Facilities and Operations, an employee of the Syosset Central School District; and the deposition testimony of Jeffrey Levy, the President and Administrator of the Syosset Basketball League.

Overall, defendants maintain that they are entitled to summary judgment dismissing the complaint as plaintiff admitted during sworn testimony that she did not know the cause of the accident and is unable to establish that a dangerous condition existed. In addition, SBL argues that the alleged "overcrowding" condition, assuming *arguendo,* it existed, was readily observable and in her plain view.

In opposition to the motion, plaintiff asserts that summary judgment is unwarranted here as plaintiff was forced to enter the gymnasium by going down a crowded stairway where people were standing on each side, thus preventing plaintiff from being able to access the available handrails. In addition, Robbins and Syosset permitted SBL to hold events at their premises without taking adequate measures to prevent harm as evidenced by the fact that Robbins and Syosset did not require the application for community use of school facilities to be fully completed or further investigated. Nor were there any agreements requiring SBL to take adequate crowd control measures. In support thereof, plaintiff submits her own affidavit and a copy of the subject application.

In her affidavit, plaintiff states in relevant part that "since the stairway was crowded, it was very difficult to navigate down the stairs due to the fact that I was required to walk down the middle of the stairs while trying to avoid stepping on or bumping into the people who were standing on the sides of each stair watching the game that was already taking place."

In response thereto, SBL argues that such statements are contrived as there was no testimony/mention of having to "navigate" down the stairs. Further, the affidavit was tailored to create an issue of fact as it contradicts plaintiff's prior 50-h and deposition testimony regarding what caused her to fall. SBL further contends that the sole cause of

plaintiff's accident was her own conduct. This is particularly true since plaintiff cannot identify the cause of her fall and as such, any other finding of proximate cause would be based on speculation and is fatal to plaintiff's case.

Robbins and Syosset SBL reiterate that plaintiff's affidavit and counsel's affirmation fail to provide any relevant facts that would indicate that plaintiff possesses definitive knowledge of what caused her accident or that a dangerous or defective condition existed at the time of the accident.

A property owner has a duty to maintain its property in a reasonably safe condition, which "may also include the duty to warn of a dangerous condition" (***Cupo v. Karfunkel***, 1 A.D.3d 48, 51, 767 N.Y.S.2d 40 [2d Dept., 2003]). A property owner, however, has no duty to protect or warn against an open and obvious condition that is not inherently dangerous (*see* ***Atehortua v. Lewin***, 90 A.D.3d 794, 935 N.Y.S.2d 102 [2d Dept., 2011], *lv den* 18 N.Y.3d 811 (2012); ***Surujnaraine v. Valley Stream Cent. High School Dist.***, 88 A.D.3d 866, 931 N.Y.S.2d 119 (2d Dept., 2011); ***Katz v. Westchester County Healthcare Corp.***, 82 A.D.3d 712, 713, 917 N.Y.S.2d 896 [2d Dept., 2011]).

"[W]hether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury" (***Trincere v. County of Suffolk***, 90 N.Y.2d 976, 977, 688 N.E.2d 489, 665 N.Y.S.2d 615 (1997) (internal quotation marks omitted); *see* ***Cassone v. State of New York***, 85 A.D.3d 837, 838-839, 925 N.Y.S.2d 197 (2d Dept., 2011); ***Gutman v. Todt Hill Plaza, LLC***, 81 A.D.3d 892, 892-893, 917 N.Y.S.2d 886 [2d Dept., 2011]).

Further, "whether a hazard is open and obvious cannot be divorced from the surrounding circumstances" (***Atehortua v. Lewin, supra; Katz v. Westchester County Healthcare Corp., supra***). "A condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted" (***Calandrino v. Town of Babylon***, 95A.D.3d 1054, 944 N.Y.S. 286[2d Dept., 2012]).

"To demonstrate its entitlement to summary judgment in a slip-and-fall case, a defendant must establish, *prima facie*, that it did not create the condition that allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to remedy it" (***Oliveri v. Vassar Bros. Hosp.***, 943 N.Y.S.2d 604, 2012 WL 1605961 (2d Dept., 2012), *quoting* ***Cummins v. New York Methodist Hosp.***, 85 A.D.3d 1082, 1083, 926 N.Y.S.2d 313 (2d Dept., 2011), *quoting* ***Molloy v. Waldbaum, Inc.***, 72 A.D.3d 659, 659-660, 897 N.Y.S.2d 653 (2d Dept., 2010); *see* ***Milano v. Staten Is. Univ. Hosp.***, 73 A.D.3d 1141, 903 N.Y.S.2d 78 [2d Dept., 2010]).

"In a trip and fall case, [a] plaintiff's inability to identify the cause of his or her fall is fatal to his or her cause of action, since, in that instance, the trier of fact would be required to base a finding of proximate cause upon nothing more than speculation" (***Boudreau-Grillo v. Ramirez*** 74 A.D.3d 1265, 904 N.Y.S.2d 485(2d Dept., 2010)***; Louman v. Town of Greenburgh,*** 60 A.D.3d 915, 876 N.Y.S.2d 112 (2d Dept., 2009), (internal quotation marks and citations omitted); *see* ***Knox v. United Christian Church of God, Inc.***, 65 A.D.3d 1017, 884 N.Y.S.2d 866 [2d Dept., 2009]).

Applying these principles to the case at bar, the movants established their prima facie entitlement to judgment as a matter of law dismissing the complaint by demonstrating that plaintiff did not know what caused plaintiff to fall on the steps. (*See* ***Knudsen v. Mamaroneck Post No. 90 Dept. of New York***, 94 A.D.3d 1058, 942 N.Y.S.2d 800 (2d Dept., 2012); ***Yefet v. Shalmoni***, 81 A.D.3d 637, 915 N.Y.S.2d 866 (2d Dept., 2011); ***Mortone v. Shields***, 71 A.D.3d 840, 840-841, 899 N.Y.S.2d 249 [2d Dept., 2010]).

Plaintiff alleges that she fell on the stairs because they were overcrowded. Plaintiff's evidence does not raise a triable issue of fact as to whether her fall was proximately caused by the alleged unsafe condition. (***Knudsen v. Mamaroneck Post No. 90 Dept. of New York, supra; Noel v. Starett City, Inc.***, 89 A.D.3d 906, 932 N.Y.S.2d 727 (2d Dept., 2011). "Since it is just as likely that the accident could have been caused by some other factor, such a misstep or loss of balance, any determination by the trier of fact as to the cause of the accident would be based upon sheer speculation" (*see* ***Zalot v. Zieba***, 81 A.D.3d 935, 917 N.Y.S.2d 285 (2d Dept., 2011), *quoting* ***Teplitskaya v. 3096 Owners Corp.***, 289 A.D.2d 477, 478, 735 N.Y.S.2d 585 [2d Dept., 2001]).

In view of the foregoing, the motion and cross-motion are granted and the complaint is dismissed.

The foregoing constitutes the Order of this Court.

Dated: June 14, 2012
Mineola, N.Y.

Karen V. Murphy
J. S. C.
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ENTERED
JUN 19 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE