NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 03

Case Disposed ❑
Settle Order ❑
Schedule Appearance ❑

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

----------X

MANNING,ROGER

-against-

NYC

----------X

Index №. **0300573/2011**

Hon. ~~LARRY S. SCHACHNER~~ **Hon. Howard H. Sherman** Justice.

The following papers numbered 1 to 3 Read on this motion, **DISMISSAL**
Noticed on **July 24 2012** and duly submitted as No. ____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	2	
Replying Affidavit and Exhibits	3	
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING DECISION FILED HEREWITH

AUG 0 7 2013

Dated: 7/8/13

Hon. ~~LARRY S. SCHACHNER, J.S.C.~~
Hon. Howard H. Sherman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX - Part 4

----------x

Roger Manning

Index No. 300573/11

Plaintiff

DECISION/ORDER

-against-

The City of New York and
The New York Department of Corrections

Howard H. Sherman
J.S.C.

Defendants

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Facts and Procedural Background

Plaintiff seeks recovery for injuries allegedly sustained on July 22, 2010 when he slipped and fell while descending an interior stairway of the Otis Bantum Correctional Facility located within the Riker's Island Correctional Facility , East Elmuhurst, New York. Between the period May 24, 201 0 and August 16, 2010, plaintiff was an inmate in the facility.

This action was commenced in January 2011, after the Filing of a Notice of Claim on September 20, 2010, and issue was joined with the service of defendants' answer in February 2011.

Plaintiff was examined pursuant to General Municipal Law § 50-h on December 9, 2010.

Notice of Claim

In pertinent part, the municipal defendants were notified that the underlying claim arose when the claimant was caused to slip on the stairway "on a slippery solution on said defective stairway ", and that his injuries were "caused due to the dangerous, slippery, defective, poorly illuminated, improperly constructed , improperly designed , broken, improperly maintained and hazardous condition of the . stairway."

50-h Hearing

Plaintiff testified that the stairwell on which he fell was the one "that he always used to go from one part to another " in the facility [HRG: 14], and on the day of the accident he had last used the stairs at lunchtime to get to and to return from the mess hall[Id. 21]. He did not observe anything on the stairs at that time, nor when beginning to descend the stairs with the other inmates for dinner [Id. 22-23].

Plaintiff testified as follows concerning what he believed caused him to fall down the stairs.

Q. What is it that you believe caused you to fall down the staircase ?

A. I believe I slipped.

Q. Was it your left foot or your right foot or both feet ?

A. Well , I am not a hundred percent sure whether I was on my left foot or right foot when I actually slipped.

● ● ● ●

Q. What is it you believe caused you to slip ?

A. I believe it was liquid on the floor that caused me to slip.

Q. Prior to your slipping did you see any liquid ?

A. I wasn't paying attention to that substance that was on the floor.

Q. When you are now at the bottom the staircase on the landing, did you go back up the flight of stairs to see if there was any liquid or substance ?

A. No. I seem to recall - - I didn't , no.

Q. Did someone tell you that there was a substance on it ?

A. Yes. I remember the officer , I believe a nurse and couple of the - - - I don't' recall how many inmates were there at the time, but I remember they were talking about something that was on the floor.

Id. 25:24-27:10

Concerning prior observations of " an accumulation of substances , liquids or debris " on the staircase, plaintiff testified that he had seen "substances and debris on this floor " [Id. 19:19-24], however, he was not "one hundred percent sure" whether in that particular area the observed condition was one that "would remain for a long period of time or would get cleaned up [ ] ." [Id. 19:19- 20: 5] He had observed "stuff" on the

staircase "several times", "blankets on there soaking up water "; "water" , as well as "what may appear as trails of another viable liquid maybe milk." [Id. 20:5-11].

In addition, plaintiff testified as follows as to prior observations of leaks at the particular location.

> A. I have actually in this particular area, I have never seen it drip like coming from the ceiling, but I have seen evidence that there was something wrong in this area.
>
> Q. What type of evidence did you observe ?
>
> A. Like puddles.
>
> Q. Is that some form of substance, a liquid ?
>
> A. It could have been some form of a substance . I never experienced , I never walked in the corridor and have something fall on my head and said there is a leak up there.
>
> Q. You never saw where the leak would come from ?
>
> A. No. . . . .
>
> 20:18-21:8

Verified Bill of Particulars

It is alleged that defendants were negligent in *inter alia,* permitting the stairway to become and to remain in a "dangerous, hazardous , defective, slippery, poorly lit and/or illuminated and traplike condition and in failing to warn of same [¶ 19]. Both actual and constructive notice are alleged [Id. ¶ 25].

Plaintiff testified on November 29, 2011, and on January 9, 2012, Katrina Cambridge Captain of the New York City Department of Corrections testified.

The Note of Issue was filed on March 1, 2012.

Deposition Testimony

Plaintiff testified that he had observed "puddles of water" located "all over" the stairwell "[w]hen it rains " , and "all over the facility ", described as "[d]ifferent areas . . . water formed on the floor, you might see rags or blankets trying to soak up water and such." [Id. 42: 5-24]. He could not recall if it were raining on the date of the accident [Id. 42:25-43:1].

Motion

Defendants now move for an order awarding summary judgment dismissing the complaint on the grounds that the record is devoid of any evidence to raise a triable issue that before the accident, defendants caused or possessed actual or constructive notice of any dangerous condition on the steps or the staircase.

In **opposition**, plaintiff argues that defendants failed to satisfy their initial burden on the motion as there is an unresolved materia issue of fact "with regard to notice of the recurrent water condition which caused plaintiff to slip and fall [ ] " [Affirmation in Opposition ¶ 16] . Plaintiff submits the statement of a fellow inmate who witnessed the

accident who witnessed the accident, however the statement is unsworn , and as such, is inadmissible . [1]

In **reply,** defendants argues that plaintiff has not put forth any legal or factual arguments to rebut the municipal defendants' prima facie showing of entitlement to summary judgment dismissal of those claims alleged in negligent design, improper construction and/ or lighting , and as such , defendants are entitled to summary dismissal of such claims.

With respect to the remainder of the plaintiff's claim predicated on a transitory defective condition, defendants argue that there is no evidence in this record of any complaints of water or substances on the subject staircase to support a finding of a triable issue of fact that defendants possessed pre-accident knowledge of liquid on the steps of the staircase . Nor , in light of the testimony of plaintiff concerning his lack of observation of any liquid on the steps earlier in the day, and immediately prior to the incident, as well as that of Captain Cambridge regarding the daily "sanitation detail" schedule , is there here any unresolved issue of fact that any wetness on the steps was visible and apparent and existed for a sufficient length of time prior to the accident to permit defendants to discover and remedy it .

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[1] Nor does plaintiff offer an explanation for the failure to tender the statement in admissible form.

Finally, concerning any issue of fact that defendants had constructive notice of the causative transitory condition devolving from their knowledge of a recurrent condition routinely left unaddressed, defendants note that, to date, this allegation has never been asserted by notice of claim, complaint, nor by the verified bill of particulars, and, as such should not be considered as a matter of law. Substantively, it is maintained that this theory by which the requisite notice would be imputed to defendants must here fail as there is no evidence that on the day of the accident, the allegedly "recurrent " condition existed and caused plaintiff to slip and fall. Moreover, to the extent that plaintiff alleges a recurrent condition triggered by a rainfall , defendants argue that there is no evidence in the record that it rained on June 22, 2010, and submit copies of NOAA records indicating that it did not, nor was there any rainfall for the two days preceding the incident.

Discussion

It is by now well settled that the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of a material issues of fact. Zuckerman v. City of New York, 49 N.Y.2d 557, 404 N.E. 2d 718 , 427 N.Y.S. 2d 595 [1980]). Upon consideration of the motion , "the evidence must be construed in a light most favorable to the party opposing the motion (Weiss v Garfield, 21 AD2d 156)." Matter of Benincasa v. Garrubbo , 141 A.D.2d 636, 637-638 ; 529 N.Y.S.2d 797 [2d Dept. 1988]; see also,

Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P., 7 NY3d 96, 850 NE2d 653, 817 NYS2d 606 [2006]).

This "drastic remedy should not be granted where there is any doubt as to the existence of such issues (Braun v. Carey, 280 App.Div. 1019) or where the issue is 'arguable' (Barrett v. Jacobs, 255 N.Y. 520, 522), as such, 'issue-finding, rather than issue-determination, is the key to the procedure' (Esteve v. Avad, 271 App. Div. 725, 727)." (Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 , [1957]).

Failure to demonstrate the absence of any material issues of fact requires the denial of the motion , regardless of the sufficiency of the papers in opposition (see, Alvarez v. Prospect Hospital , 68 NY2d 320,324, 501 N.E.2d 572 [1986]; see also, Smalls v. AJI Industries, Inc., 10 NY3d 733, 735, 883 N.E.2d 350 [2008]; Vega v. Restani Constr.Corp., 18 N.Y.3d 499; 965 N.E.2d 240 [2012]) .

Moreover, " [a]s a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in opponent's proof , but must affirmatively demonstrate the merit of its claim or defense" (Larkin Trucking Co. V. Lisbon Tire Mart, 185 AD2d 614, 615 [4th Dept. 1992])" Pace v. International Bus. Mach., 248 AD2d 690,691, 670 N.Y.S.2d 543 [2d Dept 1998]; see also, Peskin v. New York City Transit Auth., 304 AD2d 634, 757 N.Y.S. 2d 594 [2d Dept. 2003]; Torres v. Indus. Container, 305 A.D.2d 136 , 760 N.Y.S.2d 128 [1st Dept. 2003]; Bryan v 250 Church Associates, LLC, 60 A.D.3d 578, 876

N.Y.S.2d 38 [1st Dept. 2009]).

Once a prima facie showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial of the action. Romano v. St. Vincent's Medical Center of Richmond, 178 AD2d 467 [1st Dept. 1991].

In the context of a slip-and-fall, the appellate court has recently restated the burden of a defendant moving for summary judgment dismissal of the complaint .

> A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence" (*Rodriquez v 705-7 E. 179th St. Hous. Dev. Fund Corp.*, 79 AD3d 518, 519, 913 N.Y.S.2d 189 [2010][internal quotation marks omitted]).

Pfeuffer v. New York City Housing Authority,93 A.D.3d 470, 471, 940 N.Y.S.2d 566 [1st Dept. 2012]

It is by now well settled that "[t]o constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to an accident to permit defendant's employees to discover and remedy it(*Negri v Stop & Shop*, 65 NY2d 625, 626; *Lewis v Metropolitan Transp. Auth.*, 64 NY2d 670, affg on opn at 99 AD2d 246, 249)." Gordon v American Museum of Natural History, 67 N.Y.2d 836, 837-838 , 501 N.Y.S.2d 646, 492 N.E.2d 774 [1986]; see also, Reynolds v. Knibbs, 15 N.Y.3d 879, 938 N.E.2d 996 [2010]

A defendant's "general awareness that it was raining and that water was being tracked into the building is insufficient to raise a triable issue of fact with respect to notice

of a specific dangerous condition (*Garcia v Delgado Travel Agency*, 4 AD3d 204, 771 NYS2d 646 [2004]; *Keum Choi v Olympia & York Water St. Co.*, 278 AD2d 106, 106-107, 718 NYS2d 42 [2000]; *Kovelsky v City Univ. of N.Y.*, 221 AD2d 234, 634 NYS2d 1 [1995])." (Wise-Love v 60 Broad Street LLC 75 A.D.3d 487, 906 N.Y.S.2d 35 [1st Dept. 2010] ; see also, O'Rourke v.Williamson , Pickett Gross, 260 AD2d 260, 261, 688 NYS2d 528 [1st Dept. 1999]; Asante v. JPMorgan Chase Co., 93 A.D.3d 429; 940 N.Y.S.2d 44 [1st Dept. 2012]).

It is also settled that a defendant may be charged with constructive notice where the record contains " 'evidence that an ongoing and recurring dangerous condition existed in the area of the accident which was routinely left unaddressed by the landlord' (*O'Connor-Miele v Barhite & Holzinger*, 234 A.D.2d 106, 106-107, 650 N.Y.S.2d 717 [1996]; accord *David v New York City Hous. Auth.*, 284 A.D.2d 169, 171, 727 N.Y.S.2d 404 [2001]; cf. *Endres v Mingles Rest.*, 271 A.D.2d 207, 706 N.Y.S.2d 32 [2000], *lv dismissed* 95 N.Y.2d 845, 735 N.E.2d 1283, 713 N.Y.S.2d 518 [2000])." Uhlich v. Canada Dry Bottling Co. Of N.Y., 305 A.D.2d 107, 758 N.Y.S. 2d 650 [1st Dept. 2003]; see also, Bido v 876-882 Realty , LLC, 41 A.D.3d 311; 839 N.Y.S.2d 54 [1st Dept. 2007]; Cabrera v New York City Department of Education, 92 A.D.3d 457; 937 N.Y.S.2d 848 [1st Dept. 2012]).

Conclusion

Upon review of the moving papers here, it is the finding of this court that defendants have demonstrated as a matter of law that before the accident, they neither

created any hazardous condition on the staircase, nor had actual or constructive notice of its existence.

The record here, including plaintiff's hearing and deposition testimony, and the affidavit of the expert [2], a certified safety professional as to the staircase's compliance with applicable standards for riser height, handrail systems, treads, and tread width and surfaces, and slip resistance qualities, as well as degree of overhead illumination, as well as the testimony of the captain on duty the day of the demonstrate as a matter of law the absence of any structural defect in the stairway or in the manner by which it was illuminated.

In addition, the municipal defendants have shouldered their burden to prove as a matter of law that there is no unresolved issue of fact that prior to the accident they possessed knowledge of any wet wet condition on a step of the staircase by which plaintiff and the group of more than fifteen inmates, as escorted by an officer, descended from the dormitory to the dining room. The evidence establishes that no complaints of such a condition had been lodged by any party, including plaintiff, and the inmates who were walking in "double file" formation ahead of him. [3]

Finally, it is the finding of this court that through the testimony of plaintiff and that

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[2] Exhibit L to Moving Papers

[3] Plaintiff testified that he usually "lags" at the end or near the end of the group [EBT: 28].

of Captain Cambridge , who was the captain on duty on the day of the accident, as to the regularly scheduled daily "sanitation details" encompassing the stairwell location, defendants have demonstrated that there are no material issues of material fact that any wet condition of the step was visible and apparent for a sufficient amount of time to have been discovered and remedied.

In opposition, plaintiff fails to raise any issues to rebut defendants' showing that prior to the incident, they did not cause any dangerous structural or lighting condition at the location, or had actual notice that there was a transitory wet condition there.

Nor in opposition, does plaintiff come forward with proof that the liquid, which was unseen by plaintiff either before or after the accident, was both visible and apparent , and had been on the step for a sufficient period to be observed and to be removed. Since the record provides no nonspeculative basis to determine for how long any wet condition was on the steps, plaintiff has failed to raise a triable issue of fact as to whether defendants had constructive notice of it (see O'Rourke v Williamson, Picket, Gross, Inc., op.cit., ; Weiss v Gerard Owners Corp., 22 A.D.3d 406; 803 N.Y.S.2d 51 [1st Dept. 2005]).

Even as afforded all favorable inferences , and in light of the meteorological records, plaintiff's testimony of undated observations of a "general awareness" of post-rain puddles "all over the facility" , without proof to link this " rainwater" condition to the specific causative condition here alleged , is insufficient to raise an issue of fact that his

accident was caused by a dangerous condition known by defendants to exist at the location and routinely left unaddressed and unremedied (see Raposo v. New York City Housing Authority, 94 A.D.3d 533, 534 , 942 N.Y.S. 2d 337 [1st Dept. 2012]).

For the reasons above stated, it is ORDERED that the motion of the defendants be and hereby is granted, and it is further

ORDERED that summary judgment be entered in favor of defendants dismissing the complaint.

This constitutes the decision and order of this court.

Dated: July 8, 2013

Howard H. Sherman