Camacho v Newburgh Enlarged City Sch. Dist.
2016 NY Slip Op 31204(U)
January 13, 2016
Supreme Court, Orange County
Docket Number: 1939/2014
Judge: Catherine M. Bartlett
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SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE
---x

ROSARIO CAMACHO,

Plaintiff,

-against-

NEWBURGH ENLARGED CITY SCHOOL DISTRICT,

Defendant.

---x

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. 1939/2014
Motion Date: December 18, 2015

The following papers numbered 1 to 4 were read on Defendant's motion for summary judgment dismissing the complaint:

Notice of Motion - Affirmation / Exhibits 1-2

Affirmation in Opposition / Exhibits 3

Reply Affirmation 4

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

This is an action to recover for personal injuries sustained by Plaintiff on July 10, 2013 when she slipped and fell in a puddle of water in a hallway at the Newburgh Free Academy ("NFA") in Newburgh, New York. Plaintiff asserts *inter alia* that Defendant is liable for having created an inherently dangerous condition. Defendant moves for summary judgment on the

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purported grounds that it did not create the condition and lacked notice thereof, and that the condition in any event was not inherently dangerous. Defendant proffers a surveillance videotape which captured Plaintiff's slip and fall as well as the actions of Plaintiff, NFA personnel and others in the hallway during several minutes before the accident occurred. Defendant also proffers deposition testimony by Plaintiff, by an NFA teacher who was present in the hallway when Plaintiff fell, and by NFA's head custodian.

Defendant's evidence shows *inter alia* that:

(1) The puddle of water was located just outside a janitor's closet.

(2) The door to the janitor's closet was open.

(3) The closet contained a slop sink, a water hose and spout, a mop and bucket.

(4) Three times before the accident occurred Plaintiff traversed the hallway near the spot where the accident occurred. She testified that she did not notice the puddle. The hallway lights were off at the time for energy saving purposes.

(5) After speaking in the hallway with NFA teacher Alexis Cooper, Plaintiff took a few steps away and slipped and fell in front of the janitor's closet.

(6) Ms. Cooper helped Plaintiff up, then bent to examine the area where she fell and observed the puddle of water.

(7) Two members of NFA's custodial staff, Bob Barki and Jerry Strack, appeared in the hallway shortly after the accident. They placed a yellow caution sign on the floor outside the janitor's closet, turned on the hallway lights, and mopped the floor.

(8) Defendant presented no evidence from Mssrs. Barki or Strack, or from anyone with knowledge concerning the open and unattended janitor's closet.

(9) Defendant presented no evidence as to when the hallway had last been mopped or inspected prior to the accident.

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"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v. New York University Medical Center,* 64 NY2d 851, 853 (1985). The movant's failure to meet this burden of proof "requires denial of the motion, regardless of the sufficiency of the opposing papers." *Id.*

The liability of a property owner is measured by "the single standard of reasonable care under the circumstances." *Basso v. Miller,* 40 NY2d 233 (1976). The owner must act as a reasonable person in maintaining the property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk. *See, Peralta v. Henriquez,* 100 NY2d 139, 144 (2003). In a common law negligence action based on an unsafe condition of the defendant owner's premises, liability may be predicated *inter alia* on the defendant's having created the hazardous condition, in which case proof of notice is not required. *See, e.g., Johnson v. City of New York,* 102 AD3d 746, 748 (2d Dept. 2013); *Sermos v. Gruppuso,* 95 AD3d 985, 986 (2d Dept. 2012).

As Defendant herein acknowledges, a property owner moving for summary judgment on such a claim bears the initial burden of establishing that it did not create the hazardous condition. *See, e.g., Santiago v. HMS Host Corp.,* 125 AD3d 838 (2d Dept. 2015); *Cruz v. Rampersad,* 110 AD3d 669, 670 (2d Dept. 2013). It cannot meet this burden merely by pointing to gaps in the plaintiff's case, but must affirmatively demonstrate the merit of its defense. *See, Collado v. Jianco,* 126 AD3d 927, 928 (2d Dept. 2015); *Marielisa R. v. Wolman Rink Operations, LLC,* 94 AD3d 963 (2d Dept. 2012); *Rubistello v. Bartolini Landscaping, Inc.,* 87 AD3d 1003, 1005 (2d Dept. 2011); *Shafi v. Motta,* 73 AD3d 729, 730 (2d Dept. 2010).

Defendant asserts that it demonstrated *prima facie* entitlement to summary judgment on the issue whether it created the puddle in which Plaintiff slipped, arguing:

> 37. Where the defendant neither created a condition nor had actual notice, a defendant seeking to dismiss the complaint must demonstrate the lack of evidence regarding how the alleged condition came into existence (Giuffrida v Metro North Commuter R. Co., 279 AD2d 403, 404 [1st Dept. 2001]).
>
> 38. Here, defendant has specifically denied creating a defect. At this juncture, the record is completely bereft of any evidence supporting the claim that defendant created a defect. Plaintiff, having filed her Note of Issue..., has sworn that no further discovery need take place in this matter. Thus, any argument regarding the origin of a wet spot at this point will be nothing more than rank speculation, insufficient to raise a genuine issue of material fact to overcome defendant's prima facie case on this point. As such, plaintiff is unable to meet her burden to prove that a defect was created by the defendant.

In other words, Defendant claims on the basis of *Giuffrida* (a constructive notice case, not a creation of defect case) to have met its initial burden simply by (1) denying that it created the condition, and (2) pointing to gaps in Plaintiff's proof.

This argument flies in the face of the line of Second Department authority, culminating in *Collado v. Jianco, supra,* that a defendant cannot establish *prima facie* entitlement to summary judgment merely by pointing to gaps in the plaintiff's case, but must affirmatively demonstrate the merit of its defense. The affirmative proof required for summary judgment, where it is claimed that the defendant created the hazardous condition that caused the plaintiff's accident, is exemplified by *Jackson v. Whitson's Food Corp.,* 130 AD3d 461 (1st Dept. 2015). In that case, the plaintiff slipped and fell on the hallway floor of a homeless shelter to which the defendant regularly delivered prepared meals. The court wrote:

> Whitson's Food, which had a contract with Camba to provide cooked meals for the shelter, failed to make a prima facie showing that it did not launch a force or instrument of harm by dropping liquid on the floor when it delivered food to the shelter on the day of the accident [cit.om.]. The deposition testimony from an employee of Whitson's Food

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> was insufficient to show that Whitson's Food did not cause or create the liquid condition, since he lacked personal knowledge as to whether the floor was clean after Whitson's Food delivered the food [cit.om.].

Id., 130 AD3d at 462. *See also, Jackson v. Manhattan Mall Eat LLC,* 111 AD3d 519, 520 (1st Dept. 2013).

Defendant has quite plainly failed to meet its burden in this case. The indisputable fact that the puddle was located just outside an open, unattended janitor's closet containing a slop sink, a water hose and spout, a mop and bucket – where, it may properly be inferred, NFA custodial staff engaged in water-related activity that could readily have produced the puddle on the floor – was more than sufficient to cast on Defendant, as movant, the burden of coming forward with affirmative evidence that it did not in fact create that condition. Having failed to proffer any evidence from the NFA custodians present in the hallway just after the accident or from anyone with knowledge concerning the open and unattended janitor's closet, and having also failed to proffer evidence as to when the hallway had last been mopped or inspected prior to the accident, Defendant failed to establish *prima facie* entitlement to summary judgment. Consequently, summary judgment must on this score be denied regardless of the sufficiency of the opposing papers.

Particularly in view of evidence that the puddle of water on the floor may not have been readily visible in the darkened school hallway, the question whether or not it constituted an inherently dangerous condition is in the circumstances of this case a triable issue of fact for the jury. *See, Trincere v. County of Suffolk,* 90 NY2d 976, 977 (1997). *See also, Oliveri v. Vassar Bros. Hosp.*, 95 AD3d 973 (2d Dept. 2012); *Baillargeon v. Kings County Waterproofing Corp.*, 91 AD3d 686 (2d Dept. 2012).

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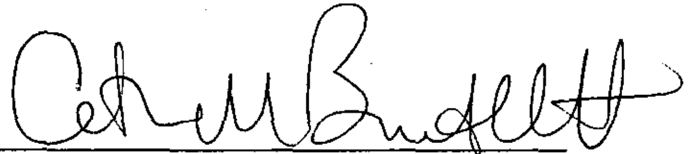
In view of the foregoing, the court declines to reach the parties' remaining contentions.

It is therefore

ORDERED, that Defendant's motion for summary judgment is denied.

The foregoing constitutes the decision and order of the court.

Dated: January 13, 2016 ENTER
Goshen, New York



HON. CATHERINE M. BARTLETT, A.J.S.C.

HON. C. M. BARTLETT
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE