SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYLE E. FRANK** **PART 52**

Justice

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SHALEEN CUEVAS,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF EDUCATION AND NEW YORK CITY BOARD OF EDUCATION, NEW YORK CITY DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES

Defendant.

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INDEX NO. 153572/2017

MOTION DATE 02/13/2019

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33

were read on this motion to/for SUMMARY JUDGMENT.

Upon the foregoing documents and for the reasons set forth below the City's motion for summary judgment is granted.

The instant action arises out of personal injuries allegedly sustained by plaintiff, when she slipped and fell on a puddle of water after exiting an elevator, at the premises located at 240 West 113th Street in the County, City, and State of New York on November 15, 2016. The location of plaintiff's accident is the Opportunity Charter School, where plaintiff was employed as an operations manager/administrative assistant.

Defendants, the City of New York and the New York City Department of Education, New York City Board of Education and New York City Department of Citywide Administrative Services (collectively "City") seek summary judgment arguing that it did not have actual or constructive notice of the alleged condition and there is no proof that it caused or created the condition.[1]

It is well settled that absent proof that a defendant actually created the dangerous condition or, had actual or constructive notice of the same, there can be no liability on a claim for premises liability (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]; *Bogart v F.W. Woolworth*

[1] The plaintiff consents to the dismissal of the City of New York as being an improper party to this action.

Company, 24 NY2d 936, 937, [1969]; *Armstrong v Ogden Allied Facility Management Corporation*, 281 AD2d 317 [1st Dept 2001]; *Wasserstrom v New York City Transit Authority*, 267 AD2d 36, 37 [1st Dept 1999]; *Allen v Pearson Publishing*, 256 AD2d 528, 529 [2d Dept 1998]; *Kraemer v K-Mart Corporation*, 226 AD2d 590 [2d Dept 1996]).

A defendant is charged with having constructive notice of a defective condition when the condition is visible, apparent, and exists for a sufficient length of time prior to the happening of an accident to permit the defendant to discover and remedy the same (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). The notice required must be more than general notice of any defective condition (*id.* at 838; *Piacquadio* at 969). Instead, notice of the specific condition alleged at the specific location alleged is required and, thus, a general awareness that a dangerous condition may have existed, is insufficient to constitute notice of the particular condition alleged to have caused an accident (*Piacquadio* at 969). The absence of evidence demonstrating how long a condition existed prior to a plaintiff's accident constitutes a failure to establish the existence of constructive notice as a matter of law (*Anderson v Central Valley Realty Co.*, 300 AD2d 422, 423 [2d Dept. 2002]. *lv denied* 99 NY2d 509 [2008]; *McDuffie v Fleet Fin. Group*, 269 AD2d 575 [2000]). Alternatively, a defendant may be charged with constructive notice of a hazardous condition if it is proven that the condition is one that recurs and about which the defendant has actual notice (*Chianese v Meier*, 98 NY2d 270, 278 [2002]; *Uhlich v Canada Dry Bottling Co. Of NY*, 305 AD2d 107 [2003]). If such facts are proven, the defendant can then be charged with constructive notice of the condition's recurrence (*id.; Anderson* at 422).

Generally, on a motion for summary judgment a defendant establishes prima facie entitlement to summary judgment when the evidence establishes the absence of actual or constructive notice (*Hughes v Carrols Corporation*, 248 AD2d 923, 924 [3d Dept 1998]; *Edwards v Wal-Mart Stores, Inc.*, 243 AD2d 803 [3d Dept 1997]; *Richardson-Dorn v. Golub Corporation*, 252 AD2d 790 [3d Dept 1998]). If defendant meets its burden it is then incumbent on plaintiff to tender evidence indicating that defendant had actual or constructive notice (*Strowman v Great Atlantic and Pacific Tea Company, Inc.*, 252 AD2d 384, 385 [1st Dept 1998]).

In addition to the foregoing, a defendant seeking summary judgment on grounds that it had no constructive notice of a dangerous condition, specifically a transitory one, must produce "evidence of its maintenance activities on the day of the accident, and specifically that the

dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell" (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421[1st Dept 2011]).

In support of its motion, the City annexes the deposition testimony of Mr. Nairne, the school's custodial engineer supervisor on the date of incident. Mr. Nairne testified, in relevant part, that prior to the subject accident he never received any complaints regarding water outside the fourth-floor elevator. The only complaint received was from the plaintiff on the date of the incident after her fall. Mr. Nairne also testified that on rainy days the custodial staff roams around the building to inspect for slip hazards. Mr. Nairne testified that he is notified of water anywhere in the building and was not notified of any condition on the fourth floor or the elevator prior to plaintiff's accident. The City also cites to plaintiff's own testimony denying ever seeing the wet condition prior to her accident.

Plaintiff opposes the motion alleging that a material issue of fact exists because the alleged wet condition was a recurring condition caused by rainwater and mats were not put down on the day of the incident. Plaintiff also alleges that she repeatedly complained regarding mats not being put down in the first-floor lobby.

The Court finds plaintiff's arguments unavailing. Plaintiff's previous complaints regarding mats in the first-floor lobby is wholly irrelevant to a wet condition on the fourth floor. Further, the cases cited by plaintiff involve either a leak or a development of a hazardous condition over time. Neither is analogous to the instant action. It is undisputed that the plaintiff never saw water in the location where she fell, nor was she aware of anyone else who had. She is also unable to testify as to how long the water had been present at the location. It should also be noted that plaintiff does not oppose the City's arguments that it did not have actual or constructive notice of the specific condition, a puddle outside of the fourth-floor elevator, that allegedly caused plaintiff's accident.

"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 Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "This drastic remedy should not be granted where there is any doubt

as to the existence of such issues, or where the issue is 'arguable'; 'issue-finding, rather than issue-determination, is the key to the procedure'" (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957] [internal citations omitted]).

The City has established its *prima facie* entitlement to judgment as a matter of law and plaintiff has failed to raise a triable issue of fact. Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

2/25/2019
DATE

LYLE E. FRANK, J.S.C.
HON. LYLE E. FRANK J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE