Schmied v City of New York
2019 NY Slip Op 33872(U)
December 5, 2019
Supreme Court, Queens County
Docket Number: 708416/2016
Judge: Joseph J. Esposito
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

FILED
DEC 16 2019
COUNTY CLERK
QUEENS COUNTY

Present: HONORABLE JOSEPH J. ESPOSITO IA Part 6
Justice

JUANITA KHO SCHMIED, x

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY BOARD OF EDUCATION and NEW YORK CITY DEPARTMENT OF EDUCATION,

Defendants.
x

Index Number 708416 2016

Motion Date August 5, 2019

Motion Seq. No. 1

The following numbered papers read on this motion by the City of New York (City) and The New York City Board of Education and the New York City Department of Education (collectively "DOE") for dismissal of the claims against the City pursuant to CPLR 3211(a)(7) on the basis it is not a proper party, or alternatively, for summary judgment in its favor and the DOE; and cross motion by plaintiff for summary judgment on the issue of liability.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.........	EF 1-32, 34
Notice of Cross Motion - Affidavits - Exhibits...	EF 39-43
Answering Affidavits - Exhibits.................	EF 46-47
Reply Affidavits................................	EF 44-45, 48-49

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

The court will first address the timeliness of plaintiff's cross motion for summary judgment on the issue of liability. Pursuant to a stipulation dated October 17, 2018, summary judgment motions were required to be made returnable no later than January 15, 2019. Although plaintiff's cross motion was clearly untimely, the nearly identical issue of defendants' liability was

raised in their own timely motion. As a result, the cross motion will be considered. (*See Sikorjak v City of New York*, 168 AD3d 778 [2d Dept 2019]; *Sheng Hai Tong v K&K 7619, Inc.*, 144 AD3d 887 [2d Dept 2016]; *Grande v Peteroy*, 39 AD3d 590 [2d Dept 2007].)

This matter arises out of injuries sustained by plaintiff, on September 28, 2015, when she allegedly slipped and fell on a wet floor located on the first floor hallway at P.S. 333, in Queens County. At the time of the incident, plaintiff was working at the school as a substitute nurse, assigned to a disabled child for medical reasons. This student was part of a class under the care of Christine Lawrence (Lawrence), a special education teacher. According to Lawrence's deposition testimony, she believed on the day of the incident the class was taken from their 2nd floor classroom following lunch to the gymnasium on the first floor. She further stated that when she brought the students back from the gymnasium she saw water on the first floor hallway in the vicinity of a water fountain. Lawrence then ushered the children around the water to ensure no one would be harmed. Plaintiff was at the end of the line with the student under her care. Lawrence did not observe water on the floor when she initially took her students to the gymnasium at the beginning of the period. After Lawrence took her students back to the classroom she let them unwind for about 4-5 minutes before she called the main office to inform them of the water condition on the first floor. Plaintiff testified that she left the classroom while Lawrence was on the phone to fill out paperwork on the first floor. On her way to the principal's office, plaintiff slipped and fell and felt that her clothing was wet. Plaintiff stated that she did not see the water before she fell.

The City and DOE are separate and distinct public entities. (*Tanaysha T. v City of New York*, 130 AD3d 916 [2d Dept 2015]; *Cohen v City of New York*, 119 AD3d 725 [2d Dept 2014].) The City does not operate, maintain or control the public schools and cannot be held liable for the negligent maintenance of school property. (Education Law § 2554(4); New York City Charter § 521; *see Falzone v City of New York*, 128 AD3d 389 [2d Dept 2015]; *Leacock v City of New York*, 61 AD3d 827 [2d Dept 2009]; *Goldes v City of New York*, 19 AD3d 448, 449 [2d Dept 2005].) Thus, the City is not a proper party and has established as a matter of law based on the undisputed evidence that the incident occurred on the premises of a public school. (*See also Dilligard v City of New York*, 170 AD3d 955 [2d Dept 2019]; *Mosheyev v New York City Dept. of Educ.*, 144 AD3d 645 [2d Dept 2016].)

Accordingly, that branch of the motion to dismiss the claims against the City pursuant to CPLR 3211(a)(7) is granted.

The DOE as the operator of the subject property has a duty to maintain the premises in a reasonably safe condition under the circumstances. (*See Powers v 31 E 31 LLC*, 24 NY3d 84,94 [2014]; *Basso v Miller*, 40 NY2d 233 [1976].) A defendant moving for summary judgment has the burden of establishing that it neither created the alleged dangerous condition nor had actual or constructive notice of the condition for a sufficient length of time to discover and remedy the problem. (*See Gordon v American Museum of Natural History*, 67 NY2d 836 [1986].) A general awareness that a dangerous condition may be present does not constitute constructive notice of a particular condition that caused the incident. (*Id., see Piacquadio v Recine Realty Corp.*, 84 NY2d 967 [1994]; *Adamson v Radford Mgt. Assoc., LLC*, 151 AD3d 913 [2d Dept 2017].)

In support of the motion, the DOE submitted pleadings, exhibits, plaintiff's 50-h and deposition transcripts as well as the depositions of Lawrence, and Steven Lewandowski, the Custodian Engineer (Custodian). Plaintiff incorporates by reference and relies on the exhibits provided by defendants to support her motion, and has also annexed the floor plan of the first floor of the school and the incident report prepared after her fall.

The DOE must offer evidence as to when the area at issue was last cleaned or inspected before the accident to demonstrate its entitlement to summary relief. (*See Quinones v Starret City, Inc.*, 163 AD3d 1020, 1022 [2d Dept 2018].) A general reference to cleaning practices is insufficient to establish a lack of constructive notice. (*See Eksarko v Associated Supermarket*, 155 AD3d 826, 827 [2d Dept 2017].) In the instant case, the testimony by the Custodian refers only to general cleaning practices, such as the staff regularly walking the hallways to detect unsafe conditions. The DOE has failed to present evidence as to specific cleaning or inspection relative to the time of the accident. (*See Burrus v Douglaston Realty Mgt. Corp.*, 175 AD3d 461 [2d Dept 2019].) DOE's reliance on Lawrence's testimony which indicates she did not observe a water spill in the area approximately 45 minutes to an hour before is insufficient to constitute an inspection. As a result, the DOE has failed to meet its initial burden. (*See Williams v Island Trees Union Free Sch. Dist.*, ___ AD3d ___, 2019 NY Slip Op 08443 [2d Dept 2019]; *Perez v Wendell Terrace Corp.*, 150 AD3d 1162 [2d Dept 2017].)

Accordingly, DOE's motion for summary judgment is denied.

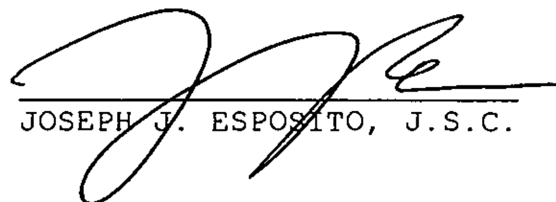
In order to prevail on her cross motion for summary judgment, plaintiff has the initial burden of demonstrating that the DOE created or had actual or constructive notice of the dangerous

condition. (*Hernandez v Conway Stores, Inc.*, 143 AD3d 943 [2d Dept 2016]; *see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986].) While the testimony given by Lawrence establishes that a DOE employee had actual knowledge of the hazardous condition, the brief time-frame of approximately 10 minutes between Lawrence having observed the hazardous condition and the happening of plaintiff's fall, was not a sufficient length of time to undertake remedial actions. (*See Byrd v Walmart, Inc.*, 128 AD3d 629 [2d Dept 2015]; *Rallo v Man-Dell Food Stores, Inc.*, 117 AD3d 705 [2d Dept 2014].)

In addition, plaintiff merely speculates that a DOE employee created the water spill (*see Cusak v Peter Lugar, Inc.*, 77 AD3d 785 [2d Dept 2010]), and further contends that the water spills near the fountain constituted a recurring condition, sufficient to provide constructive notice. Plaintiff has not, however, established that the water fountain was negligently maintained or that the DOE routinely left a dangerous condition unaddressed. (*See Pagan v New York City Hous. Auth.*, 172 AD3d 888 [2d Dept 2019].) A general awareness of a condition is legally insufficient to constitute constructive notice of a particular hazard that allegedly caused the accident. (*See Adamson* at 915.)

Accordingly, plaintiff's cross motion is denied.

Dated: December 5th 2019



JOSEPH J. ESPOSITO, J.S.C.