SHORT FORM ORDER

INDEX No. 16-617218
CAL. No. 19-00339OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 27 - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT F. QUINLAN
Justice of the Supreme Court

MOTION DATE 7-15-19
ADJ. DATE 11-6-19
Mot. Seq. # 002 - MD

MARILYN HARVEY and EVERETT G. HARVEY,

Plaintiffs,

- against -

BAYPORT-BLUE POINT UNION FREE SCHOOL DISTRICT,

Defendant.

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Upon the following papers numbered read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers by defendant, dated June 12, 2019; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers by plaintiffs, dated October 2, 2019; Replying Affidavits and supporting papers by defendant, dated November 4, 2019; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant for judgment dismissing the complaint is denied.

Plaintiff Marilyn Harvey commenced this action to recover damages for personal injuries she allegedly sustained as a result of a slip and fall accident that occurred at approximately 8:30 p.m. on December 22, 2015. Plaintiff allegedly slipped and fell in the lobby of Bayport High School, which is located within defendant Bayport-Blue Point Union Free School District, after attending a concert for her grandson. Her husband, Everett Harvey, brought a derivative claim for loss of services. By the complaint, as amplified by the bill of particulars, plaintiffs allege that defendant was negligent in, among other things, failing to properly maintain the floor and the floor area mats of its lobby.

Defendant now moves for summary judgment dismissing the complaint. It argues, in part, that it is entitled to summary judgment dismissing the claim sounding in premises liability, because there was

ongoing precipitation on the date of the accident. Defendant also argues that the alleged dangerous condition was open and obvious, and not inherently dangerous. In support of its motion, defendant submits, among other things, the transcript of the testimony from plaintiff's hearing held pursuant to General Municipal Law § 50-h, the transcript of the testimony from Mr. Harvey's examination under oath, and the transcripts of the testimony from the depositions of plaintiff, Debra Ali, Susan Schartner, and Marianne Duffy. In opposition, plaintiffs contend that defendant failed to establish that it lacked actual or constructive notice of the alleged dangerous condition, and that the alleged dangerous condition was open and obvious.

According to plaintiff's statutory hearing and deposition testimony, prior to the accident it was rainy, misty, and overcast. Plaintiff testified that she first observed that the lobby floor was wet when she arrived at the school before the concert started. She also testified that the lobby floor was composed of tiles. Plaintiff allegedly did not observe any warning signs or cones on display or custodians mopping the floor in the lobby. Plaintiff explained that the accident occurred when she was walking through the lobby to leave the school after the concert was completed. She further explained that the concert lasted for approximately 1½ or 2 hours. Plaintiff allegedly fell approximately three feet from the doors to enter and exit the school.

At plaintiff's statutory hearing, she testified that she believed that she observed liquid on the lobby floor three to four minutes before the accident occurred. She later testified that she did not observe liquid on the floor from the time that she left the auditorium until the time that she fell. However, according to plaintiff's deposition testimony, she observed liquid on the lobby floor as she was walking across it after the concert ended. She further testified that the liquid appeared to be water, and that the wet condition had dimensions of 20 feet by 20 feet.

At Mr. Harvey's examination under oath, he testified that it was raining, foggy, and misty when he arrived at the school on the date of the accident. He also testified that he observed a carpet runner when he entered the school. According to his testimony, he remained at the school for approximately 1½ hours on the date of the accident. He allegedly left the auditorium before plaintiff to bring his car in front of the school for her. Mr. Harvey testified that he observed that the area near the front door was wet when he was exiting the building. Mr. Harvey also stated that he did not observe any warning signs or cones on display or any custodians mopping the floor. The wet condition allegedly extended approximately 10 feet from the front door.

Mr. Harvey testified that he reentered the building after bringing his vehicle towards the front entrance. It allegedly was still misty and rainy at the time. Mr. Harvey explained that when he reentered the school, he found plaintiff on the floor and observed liquid on the floor. Plaintiff allegedly was located approximately five or six feet front the right door.

At her deposition, Debra Ali testified that she has been employed as a custodian for the school since 2014. She testified that she was working on the third floor on the date of the accident. She allegedly did not recall who was assigned to the area of the building which included the auditorium and the lobby. She also allegedly did not recall whether carpet floor mats were placed in the lobby on the

date of the accident. Ali explained that the responsibilities of the custodian assigned to the lobby included ensuring that there were no liquids on the floor. She further explained that in December of 2015, in the event of inclement weather, carpet floor mats were placed in the lobby.

Plaintiff's daughter, Susan Schartner, testified that she was present at the school on the date of the accident. According to her testimony, she drove to the school and arrived at approximately 6:30 p.m. for the concert. She testified that she observed dense fog and mist on her drive to the school. She further testified that she had to drive with her vehicle's windshield wipers in use and headlights illuminated, and that the roadway was wet.

Schartner stated there was at least one security guard present near the main doors of the high school when she arrived. She stated that there was moisture on the lobby floor. She clarified that there were "footprints" on the floor. According to her testimony, Schartner did not observe any custodial staff or wet floor signs displayed at the time that she entered the school. When asked to describe the number of attendees at the concert, Schartner explained that attendees were standing up, because there were no available seats remaining. She further explained that students in the band, the orchestra, and the chorus were performing during that concert. There allegedly were between 100 to 140 students performing in the chorus that evening.

According to her testimony, Schartner and plaintiffs proceeded to exit the auditorium after the performance was completed. Schartner explained that her mother left the auditorium approximately 30 seconds before she did. She testified that when she walked into the lobby, she observed plaintiff laying on the floor near the main doors, and she sat down with plaintiff on the floor thereafter. There allegedly was no rug in the vicinity of where plaintiff was located on the floor. The area where plaintiff was located allegedly was wet. Schartner clarified that there were "footprints" on the lobby floor at the time of the accident. She stated that her clothes became wet as a result of sitting on the floor with plaintiff. There allegedly were no wet floor signs displayed in the lobby at the time of the accident.

Marianne Duffy testified that she attended the concert at the school on the date of the accident. She stated that she did not recall whether the surfaces of the parking lot or of the floor leading to the auditorium were wet as she entered the school. She allegedly sat on the lobby floor with plaintiff after she observed that plaintiff was on the floor. Duffy testified that her clothes did not become wet as a result of sitting on the floor. She also testified that she did not observe any moisture on the lobby floor after the accident occurred.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 87 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (*see* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]; ***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once the movant demonstrates a prima facie entitlement to judgment as a matter of law, 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 which require a trial of the action (*see* ***Vega v Restani Constr. Corp.***, *supra*; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; *see also* CPLR 3212 [b]). The failure to make a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Vega v Restani Constr. Corp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*). In deciding the motion, the court must view all evidence in the light most favorable to the nonmoving party (*see* ***Matter of New York City Asbestos Litig.***, 33 NY3d 20, 99 NYS3d 734 [2019]; ***Vega v Restani Constr. Corp.***, *supra*).

A landowner, or a party in possession or control of real property, has a duty to maintain its property in a reasonably safe condition (*see* ***Kellman v 45 Tiemann Assoc.***, 87 NY2d 871, 638 NYS2d 937 [1995]; ***Kelly v Roy C. Ketcham High Sch.***, 179 AD3d 653, 113 NYS3d 572 [2d Dept 2020]; ***Pilgrim v Avenue D Realty Co.***, 173 AD3d 788, 99 NYS3d 688 [2d Dept 2019]; ***Chang v Marmon Enters., Inc.***, 172 AD3d 678, 99 NYS3d 397 [2d Dept 2019]). A defendant moving for summary judgment in a slip and fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence (*see* ***Carro v Colonial Woods Condominiums***, 178 AD3d 893, 112 NYS3d 540 [2d Dept 2019]; ***Coelho v S&A Neocronon, Inc.***, 178 AD3d 662, 115 NYS3d 91 [2d Dept 2019]; ***Pilgrim v Avenue D Realty Co.***, *supra*). Although a defendant is not required to cover all of its floors with mats, or to continuously mop all moisture resulting from tracked-in precipitation, it may be held liable for an injury proximately caused by a dangerous condition created by water, snow, or ice tracked into building if it either created the alleged dangerous condition or had actual or constructive notice of its existence for a reasonable amount of time to undertake remedial action (*see* ***Yarosh v Oceana Holding Corp.***, 172 AD3d 1142, 101 NYS3d 72 [2d Dept 2019]; ***Milorava v Lord & Taylor Holdings, LLC***, 133 AD3d 724, 20 NYS3d 398 [2d Dept 2015]; ***Murray v Banco Popular***, 132 AD3d 743, 18 NYS3d 92 [2d Dept 2015]). To meet its initial burden on the issue of lack of constructive notice, a defendant is required to offer some evidence as to when the accident site was last cleaned or inspected prior to the plaintiff's accident (*see* ***Radosta v Schechter***, 171 AD3d 1112, 97 NYS3d 664 [2d Dept 2019]; ***Mavis v Rexcorp Realty, LLC***, 143 AD3d 678, 39 NYS3d 190 [2d Dept 2016]; ***Milorava v Lord & Taylor Holdings, LLC***, *supra*). Mere reference to general cleaning practice, without evidence regarding any specific cleaning or inspection of the area in question, is insufficient to establish a lack of constructive notice (*see* ***Fortune v Western Beef, Inc.***, 178 AD3d 671, 115 NYS3d 93 [2d Dept 2019]; ***Williams v Island Trees Union Free Sch. Dist.***, 177 AD3d 936, 114 NYS3d 118 [2d Dept 2019]; ***Butts v SJF, LLC***, 171 AD3d 688, 97 NYS3d 219 [2d Dept 2019]).

However, there is no duty to protect or to warn against an open or obvious condition on the property that is not inherently dangerous as a matter of law (*see* ***Swinney v County***, 179 AD3d 731, 113 NYS3d 595 [2d Dept 2020]; ***Robbins v 237 Ave. X, LLC***, 177 AD3d 799, 113 NYS3d 235 [2d Dept 2019]; ***Cerrato v Jacobs***, 173 AD3d 1134, 103 NYS3d 557 [2d Dept 2019]). A condition is open and obvious where it is readily observable by those employing the reasonable use of their senses based on the circumstances at the time of the accident (*see* ***Robbins v 237 Ave. X, LLC***, *supra*; ***Ochoa-Hoenes v Finkelstein***, 172 AD3d 1080, 101 NYS3d 81 [2d Dept 2019]; ***Davidoff v First Dev. Corp.***, 148 AD3d 773, 48 NYS3d 755 [2d Dept 2017]). The question of whether a condition is open and obvious generally is a question for the fact finder to resolve (*see* ***Robbins v 237 Ave. X, LLC***, *supra*;

Shermazanova v Amerihealth Med., P.C., 173 AD3d 796, 103 NYS3d 160 [2d Dept 2019]; ***Kastin v Ohr Moshe Torah Inst., Inc.***, 170 AD3d 697, 95 NYS3d 292 [2d Dept 2019]). Proof that a dangerous condition is open and obvious does not preclude a finding of negligence, but is relevant to the issue of the plaintiff's comparative negligence (*see* ***Karpel v National Grid Generation, LLC***, 174 AD3d 695, 106 NYS3d 99 [2d Dept 2019]; ***Kastin v Ohr Moshe Torah Inst., Inc.***, *supra*; ***Crosby v Southport, LLC***, 169 AD3d 637, 94 NYS3d 109 [2d Dept 2019]). Accordingly, a defendant moving for summary judgment must establish, prima facie, that the alleged condition was open and obvious and not inherently dangerous to be entitled to summary judgment dismissing a claim sounding in premises liability (*see* ***Karpel v National Grid Generation, LLC***, *supra*; ***Erario v Wen Shirley, LLC***, 169 AD3d 770, 91 NYS3d 899 [2d Dept 2019]; ***Crosby v Southport, LLC***, *supra*).

Defendant failed to establish, prima facie, that it lacked constructive notice of the alleged dangerous condition (*see* ***Milorava v Lord & Taylor Holdings, LLC***, *supra*; ***Jordan v Juncalito Abajo Meat Corp.***, 131 AD3d 1012, 16 NYS3d 278 [2d Dept 2015]; ***Osbourne v 80-90 Maiden Lane Del, LLC***, 112 AD3d 898, 978 NYS2d 87 [2d Dept 2013]; ***Rodriguez v Hudson View Assoc., LLC***, 51 AD3d 1000, 858 NYS2d 761 [2d Dept 2009]). It failed to proffer evidence as to when the subject area was last cleaned or inspected prior to plaintiff's fall (*see* ***Milorava v Lord & Taylor Holdings, LLC***, *supra*; ***Jordan v Juncalito Abajo Meat Corp.***, *supra*; ***Osbourne v 80-90 Maiden Lane Del, LLC***, *supra*; ***Babb v Marshalls of MA, Inc.***, 78 AD3d 976, 911 NYS2d 640 [2d Dept 2010]; ***Rodriguez v Hudson View Assoc., LLC***, *supra*).

Defendant also failed to establish its prima facie entitlement to summary judgment on the ground that the condition was open and obvious and not inherently dangerous (*see* ***Mahoney v AMC Entertainment, Inc.***, 103 AD3d 855, 959 NYS2d 752 [2d Dept 2013]; ***Dalton v North Ritz Club***, 147 AD3d 1017, 46 NYS3d 900 [2d Dept 2017]; ***Rivero v Spillane Enters., Corp.***, 95 AD3d 984, 943 NYS2d 235 [2d Dept 2012]). In support of its motion, defendant submits conflicting evidence as to whether the alleged dangerous condition was readily observable by those employing reasonable use of their senses under the circumstances of the accident (*see* ***Shermazanova v Amerihealth Med., P.C.***, 173 AD3d 796, 103 NYS3d 160 [2d Dept 2019]; ***Lazic v Trump Village Section 3***, 134 AD3d 776, 20 NYS3d 643 [2d Dept 2015]). As previously indicated, at plaintiff's statutory hearing, she testified that prior to the accident, she did not observe liquid on lobby floor as she was walking towards the doors to leave the school. Morever, Duffy testified that there appeared to be no moisture on the surface of the floor in the area where plaintiff fell.

Accordingly, the motion by defendant for summary judgment dismissing the complaint is denied.

Dated: June 10, 2020

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION