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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. GEOFFREY J. O'CONNELL

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

SYDIA LIMEHOUSE,

Plaintiff(s),

INDEX No. 2512/07

-against-

MOTION DATE: 9/28/07

NASSAU COMMUNITY COLLEGE and
COUNTY OF NASSAU,

MOTION SEQ. No. 1-MG
XXX

Defendant(s).

The following papers read on this motion:
County Notice of Motion/Affirmation/Exhibits

The County seeks an Order granting it summary judgment pursuant to CPLR § 3212, arguing that there is no evidence that the COUNTY had prior written notice of the alleged defect, located on or in a stairway at the CCB Building at Nassau Community College, in Nassau County, New York.

In her Bill of Particulars, plaintiff alleges that on March 7, 2006 at approximately 2:30 p.m. she slipped and fell on a slippery substance, best described as a thin layer of sand or dirt, on the subject staircase.

On or about May 26, 2006 the plaintiff filed a Notice of Claim against the County. On February 16, 2007 the plaintiff served her Summons and Complaint.

In its application for summary judgment, the COUNTY contends that there is no proof that the COUNTY received prior written notice of the alleged defective condition. Counsel claims such notice is necessary to sustain this action pursuant to Nassau County Administrative Code 12-4.0(e).

Counsel for the plaintiff argues that prior written notice is not a condition precedent to this lawsuit alleging a defective interior stairway. He claims that this area is specifically identified under the provision relied upon by the County Attorney, which specifically refers to construction, maintenance and regulation of County Roads.

The Court agrees.

The area of an interior stairway of a County building used as part of the Community College, is clearly not envisioned to be a public access way, does not functionally fulfill the same purpose that a standard sidewalk would serve of flat topography. Walkways over which the public has a general right of passage fall within the protection of the municipality's prior written notice statute. *Rivers v. City of New Rochelle*, 178 AD2d 467 (2nd Dept. 1991); *Walker v. Town of Hempstead*, 84 NY2d 360 (1994); *Woodson v. City of New York*, 93 NY2d 936 (1999).

The Deputy County attorney, argues that since Section 12-4.0(e) of the Code references "stairway", it precludes this action. She inexcusably takes that notation out of context. The Code provision relied upon references open public areas, including County roads, sidewalks, ramps, gutters and related areas open for use and traversed by the general public. Counsel offers absolutely no law, legislative history or other evidence to support the argument that this provision of the Code was intended to include an interior stairway. Only in reply does counsel reference a non-binding case where a Supreme Court Justice found such application. Counsel does not however provide any written decision or transcript containing such a holding.

As the Court of Appeals determined in *Woodson v. City of New York*, 93 NY2d 936 (1999), prior written notice requirements extend to areas which act as a sidewalk would facilitate a general right of passage to the public. This clearly does not foresee use by a municipality to reach to building interiors.

The COUNTY also argues as a landowner, it had no actual or constructive knowledge of the alleged defect and therefore did not allow it to exist, uncorrected, for an unreasonable amount of time.

In opposing that aspect of the defendant's motion, plaintiff argues that SYDIA LIMEHOUSE testified at her deposition the subject stairway always had a "layer" of dirt on it, and that one could scoop up a handful from the steps.

The plaintiff also provides an unsigned copy of the deposition of Mr. Masoom Ali, the COUNTY employee who was Vice President for Facilities Operation and Maintenance at the College at the time of this incident. Ali testified that he was responsible for maintenance at the College, which has 48 buildings on more than 200 acres.

He testified that the building where the accident occurred has multipurpose rooms for functions and events on the first floor, offices on the second and first floors and a cafeteria in the basement. He testified that it had at least three entrances and one stairway. Mr. Ali testified that the College had a contract with custodians, who were to clean the buildings, including inspecting the stairways regularly, several times per day. He testified that prior to the incident there was no record of anyone calling to complain about the steps. (Opposition, Exh).

Counsel also relies on the plaintiff's testimony from her 50-h hearing wherein she testified that the dirt or sand always accumulated on the steps, and that prior to her fall she had heard others complain about it. She also testified that she complained to one of her professors and to the Dean of Students after the accident.

Counsel for the plaintiff argues that this demonstrates that the defendant knew or should have known of this recurring condition of sand or dirt accumulating on the steps. The Court disagrees.

A landowner has a duty to keep the property in a reasonably safe condition for those who use it. Once, as here, a plaintiff has offered some evidence that a dangerous condition exists, the burden is shifted to the defendant to demonstrate that they exercised reasonable care to remedy the condition to make the area safe. Evidence that a dangerous condition was open and obvious does not relieve the landowner of this obligation.

In this case the plaintiff argues that a trier of fact could find that the COUNTY and its employees failed in their duty to maintain the stairway.

In order to set forth a prima facie case of negligence, plaintiff must establish the existence of a duty of a defendant to plaintiff, a breach of such duty, and that the breach was a substantial cause of the resulting foreseeable injury. *Merino v. New York City Transit Authority,* 218 A.D.2d 451 (1st Dept. 1996); *Gordon v. City of New York,* 70 N.Y.2d 839 (1987). The plaintiff must offer any evidence that the defendant had

notice of any defective or dangerous condition. In a slip and fall case, a plaintiff must establish that the defendant either created the defective condition or had actual or constructive notice of the alleged defective condition. There must be evidence presented which a jury could find establishes that defendant had notice that a dangerous condition existed, and was visible and apparent and existed for a sufficient length of time prior to the accident to permit defendant to discover and remedy it. *Gordon v. American Museum of Natural History*, 67 N.Y.2d 836 (1986); *Rojas v. Supermarkets General Corp.*, 238 A.D.2d 393 (2nd Dept. 1997). A landowner or occupier must have a reasonably sufficient time to remedy the alleged dangerous condition. *Pelliccio v. TWC Realty Fund Holding Co.*, 291 AD2d 388 (2nd Dept. 2002); *Taylor v. New York City Transit Authority*, 266 AD2d 384 (2nd Dept. 1999).

The defendant's witness testified that the defendant had not received any complaints regarding the stairs. However, there is witness testimony that the defendant had a duty to maintain the stairway where plaintiff fell and that employees were to inspect it and repair or clean it if necessary on a daily basis.

The record provided contains no actual evidence from which a trier of fact could reasonably infer that the defendant had actual or constructive notice of a recurring condition. *Freund v. Ross-Rodney Housing Corp.*, 292 AD2d 341 (2nd Dept. 2002); *Irizarry v. 15 Mosholu Four, LLC.*, 24 AD3d 373 (1st Dept. 2005); *Schmidt v. DiPerno*, 25 AD3d 545 (2nd Dept. 2006); *Perkins v. Gervis*, 2006 NY Slip Op 50335U, 11 Misc3d 1061A (2006).

The Court finds that plaintiff has not offered proof, in evidentiary form, establishing that an issue of fact exists as to any alleged negligence on the part of defendant with respect to a dangerous condition on the steps. In reviewing a defendant's motion for summary judgment the Court must view the evidence in the light most favorable to the plaintiff and draw all inferences in her favor. To defeat the defendants' motion the plaintiff must demonstrate that there is a triable issue of fact in dispute regarding defendant's breach of its duty to her.

Based on the testimony of both plaintiff and the COUNTY's witness, the motion of the COUNTY seeking summary judgment is Granted. The Court cannot find that there is a triable issue of fact whether this defendant knew of a dangerous or defective condition yet allowed it to remain, or failed to take reasonable steps to prevent its use by the public at the time of the incident.

The Court merely has to determine whether the plaintiffs have identified a triable issue of material fact which needs to be resolved prior to absolving a defendant from all liability. The plaintiff has not done so. The plaintiff has not demonstrated a triable issue of fact. *O'Callaghan v. Great Atlantic & Pacific Tea*, 294 AD2d 416 (2nd Dept. 2002); *Labella v. Willis Seafood,* 296 AD2d 382 (2nd Dept. 2002); *Goldman v Waldbaum, Inc.*, 248 AD2d 436 (2nd Dept. 1998), aff. 92 NY2d 805 (1998).

There is no evidence that the defendants caused or created the defective condition, nor were negligent in their ownership of the premises.

Plaintiff offers no proof that the COUNTY created the defect or breached any duty to the plaintiff. There is no proof that either of these defendants were even made aware of the defect prior to the accident and failed to correct it. Nor is there any proof that there were prior complaints or similar accidents at the location. Plaintiff offers no evidence that the condition existed for a significant time or a sufficient period of time prior to the accident.

Where, as here a party demonstrates that it is entitled to summary judgment on the facts, it is incumbent on the party opposing summary judgment to reveal all of its proof to demonstrate that there is a triable issue of fact in dispute. Mere speculation or hopes of demonstrating such an issue at trial are insufficient. *Nel Taxi Corp. v. Eppinger*, 203 AD2d 438 (2nd Dept. 1994); *Sarabia v. Hilaire Farm Nursing Home,* 250 AD2d 586 (2nd Dept. 1998).

On a motion for summary judgment the moving party must demonstrate, by evidentiary facts, that he is entitled to judgment as a matter of law, whereupon the burden is shifted to the opponent to show that an issue of fact exists. *Piccolo v. De Carlo*, 90 AD2d 609 (3rd Dept. 1982). The Court finds that the COUNTY has met its burden. In opposing this motion for summary judgment, plaintiff's conclusory allegations, unsubstantiated by any factual evidence, are insufficient to show that there is a triable issue of fact with regard to the COUNTY's negligence. *Smith v. Johnson Products Co.*, 95 AD2d 675 (1st Dept. 1983); *Fishman v. Nassau County*, 84 AD2d 806 (2nd Dept. 1981). On a motion for summary judgment, more is required than disputation, denials and assertions that triable issues exist. *Rae v. Rosenberg*, 67 Misc.2d 881 (1971).

In this instance plaintiff has offered no actual proof that the COUNTY created a hazardous condition, concealed a defect, or had actual or constructive notice that one existed prior to the incident. *Papazian v. New York City Transit Authority*, 293 AD2d 658 (2nd Dept. 2002).

It is, SO ORDERED.

Dated: Nov 28, 2007

HON. GEOFFREY J. O'CONNELL, J.S.C.