SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3

Index. 100942/08
Motion No.: 001

ALYSSA MARCINAK, an infant over the age of fourteen (14) years, by her Father and Natural Guardian, THEODORE MARCINAK, III, and THEODORE MARCINAK, III, Individually

Plaintiffs

against

ST. PETER'S HIGH SCHOOL FOR GIRLS, THE ROMAN CATHOLIC CHURCH OF ST. PETER and THE ROMAN CATHOLIC ARCHDIOCESE OF NEW YORK,

Defendants

DECISION & ORDER

HON. JOSEPH J. MALTESE

The following items were considered in the review of the following motion for summary judgment.

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Defendants St. Peter's High School for Girls ("St. Peter's Girls"), The Roman Catholic Church of St. Peter ("St. Peter's Church"), and The Roman Catholic Archdiocese of New York ("Archdiocese") move pursuant to CPLR § 3212 for an order granting them summary judgment dismissing Plaintiff Alyssa Marcinak's complaint. Defendants' motion is denied.

FACTS

This is an action for personal injuries allegedly sustained by Plaintiff when she fell down a staircase located in Defendants' high school. Plaintiff was a freshman at Defendants' high school at the time of the accident on October 3, 2007 and had attended the school for approximately one month prior to the accident. The school was constructed in 1915 and has been continuously used as

a school by Defendants. The staircase at issue was allegedly too narrow for two students moving in opposite directions to use at the same time and had only one handrail on the left side running from top to bottom, which was inaccessible from the right side in the event of a fall. Plaintiff was carrying a tote bag as she descended the stairs on the right side of the staircase. In the middle of the staircase, Plaintiff's tote bag impacted the bag of another student who was ascending the stairs to Plaintiff's left. The impact caused Plaintiff to lose her balance and fall down the remaining six to eight steps, sustaining a fractured ankle as a result. Plaintiff's access to the handrail was allegedly blocked by the student to her left. Patricia Daggett, a physical education teacher at Defendants' school for 28 years, witnessed the accident from her office nearby.

DISCUSSION

A motion for summary judgment must be denied if there are "facts sufficient to require a trial of any issue of fact" (CPLR §3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. "Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion"[1] Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.[2] On a motion for summary judgment, the function of the court is issue finding, and not issue determination.[3] In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.[4]

---

[1] *Marine Midland Bank, N.A., v. Dino*, et al., 168 AD2d 610 (2d Dept 1990)

[2] *American Home Assurance Co., v. Amerford International Corp*, 200 AD2d 472 (1st Dept 1994)

[3] *Weiner v. Ga-Ro Die Cutting,* 104 AD2d 331 [2d Dept 1984]. *Aff'd* 65 NY2d 732 [1985]

[4] *Glennon v. Mayo,* 148 AD2d 580 [2d Dept 1989]

Once the moving party has made a showing of sufficient evidence, the burden shifts to the party opposing summary judgment to put forth evidence in admissible form to establish a triable issue of fact.[5]

Negligence, whether of the plaintiff or defendant, is usually a question of fact. It should be submitted to the jury if there is a valid line of reasoning and permissible inferences from which rational people can draw a conclusion of negligence on the basis of the evidence presented.[6]

In order to demonstrate a prima facie entitlement to judgment as a matter of law dismissing Plaintiff's complaint, Defendants must allege facts that show they did not create the hazardous condition and had no actual or constructive knowledge of the condition's existence. To constitute constructive notice, "a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it."[7] The motion before this Court fails to meet these criteria.

Defendants contend they are entitled to summary judgment dismissing plaintiff's action because did not have actual notice of the condition's existence and, with the exercise of reasonable care, could not have discovered and cured the condition. Defendants state that they lacked actual or constructive knowledge of the dangerous condition and that, at best, Defendants may have had a general awareness that a dangerous condition existed in the school. Defendants further allege that the staircase was an open and obvious condition and was not inherently dangerous. Defendants insist that any Building Codes currently being enforced are inapplicable since the school was constructed in 1915, prior to the passage of any building code, and that the school was therefore "grandfathered in" by virtue of its date of construction. Since the school was "grandfathered in," Defendants were

---

[5] *Zuckerman v. City of New York*, 49 NY2d 557 [1980]

[6] *Nallan v Helmsley-Spear, Inc.*, 50 N.Y.2d 507, 517, 407 N.E.2d 451, 429 N.Y.S.2d 606 [1980]

[7] *Gordon v American Museum of Natural History*, 67 N.Y.2d 836, 837, 492 N.E.2d 774, 501 N.Y.S.2d 646 [1986]

not required to renovate the staircase to include a second handrail or ensure that it complied with the current Building Codes. Furthermore, Plaintiff's impact with another student, not the condition of the staircase, was alleged to have been the proximate cause of Plaintiff's injuries.

Ordinarily Defendants may have presented insufficient evidence to show that they are entitled to summary judgment dismissing Plaintiff's action. Although Defendants allege that they did not have actual or constructive knowledge of the allegedly dangerous condition, Defendants fail to present any evidence whatsoever to indicate that it did not create the condition. Plaintiff has alleged the existence of a triable issue of fact as to whether Defendants or their contractors created the defect when the building was constructed in 1915. Furthermore, if it is found that Defendants created the alleged defective condition when Defendants or their contractors built the school in 1915, notice is not required to establish liability.[8]

In addition, Defendants also fail to provide prima facie evidence that they had no actual or constructive knowledge of the dangerous condition. Viewing the facts in the light most favorable to Plaintiff,[9] Ms. Daggett's statements that the staircase had been present, unchanged, for each of her 28 years as a teacher at the school provides a definite timetable from which a reasonable jury could infer that Defendants had actual or constructive knowledge of the condition.[10]

Even assuming Defendants met their burden of demonstrating its entitlement to summary judgment, Plaintiff has introduced evidence demonstrating issues of fact for resolution by the jury. Plaintiff alleges that Defendants are not entitled to summary judgment since Defendants were negligent in having failed to either install a handrail on the right side of the staircase or renovate the

---

[8] *Roberts v. Arrow Boat Club, Inc.*, 46 A.D.2d 815, 361 N.Y.S.2d 213 (2d Dept 1974); *Kesselman v. Lever House Rest.*, 29 A.D.3d 302, 816 N.Y.S.2d 13 (1st Dept 2006)

[9] *Glennon*, supra

[10] *June v. Bill Zikakis Chevrolet*, 199 A.D.2d 907, 606 N.Y.S.2d 390; (3d Dept 1993) (where the presence of a condition, unchanged for 1 and ½ years was held to constitute constructive notice)

staircase to conform with the 1938 or 1968 Building Codes of the City of New York ("Building Codes"). As a result of Defendants' failure to conform the staircase to current Building Codes, the staircases were not wide enough to accommodate individuals ascending and descending the staircase at the same time. Since the staircase is located within a crowded school, it was foreseeable that multiple students moving in opposite directions would use the staircase at the same time. In addition, Ms. Daggett acknowledged that she was aware of the staircase, because she taught at the school for 28 years, and that the staircase had not been altered during her tenure at the school.

Defendants' argument that the staircase was open and obvious does not absolve Defendants of the duty to take reasonable measures to maintain the premises in a safe condition.[11] The openness and obviousness of a defect is relevant only to the issue of whether Plaintiff was comparatively negligent.[12] As such, the percentage of negligence attributable to each party is a matter for the jury to decide.

A landowner whose property is a place of public assembly is nevertheless responsible for the presence of an unsafe condition on the landowner's premises, even though the defect may have been created during its construction prior to the institution of Building Codes.[13] Any alleged compliance with, or inapplicability of, statutes and regulations is not dispositive of the question whether a defendant has satisfied its duties under the common law.[14] The Defendants, as owners of the

---

[11] *DiVietro v. Gould Palisades Corp.*, 4 A.D.3d 324 (2d Dept 2004); *MacDonald v. City of Schenectady*, 308 A.D.2d 125 (3d Dept 2003)

[12] *Cupo v. Karfunkel*, 1 A.D.3d 48 (2d Dept 2003); *Pelow v. Tri-Main Dev.*, 303 A.D.2d 940 (4th Dept 2003)

[13] *Lesocovich v. 180 Madison Ave. Corp.,* 81 N.Y.2d 982 (1993); *Moore v. Round Hill Management Co*., 172 A.D.2d 406 (1st Dept 1991); *Thomassen v. J & K Diner, Inc.*, 152 A.D.2d 421(2d Dept 1989); *Koepke v. State of New York*, 2005 NY Slip Op 51789U (Ct. Cl. 2005);

[14] *Kellman v. 45 Tiemann Assocs.*, 87 N.Y.2d 871 (1995) (Defendant's summary judgment motion was denied where, in view of all the circumstances, Defendant may have failed to exercise reasonable care by not installing railings on the fire escapes of an apartment building, even though statutes and regulations did not require their installation.)

premises into which members of the public would be invited, have a nondelegable duty to provide the public with a reasonably safe premises and a safe means of ingress and egress.[15] A violation of the Building Codes is merely evidence of negligence, not negligence per se, just as the compliance with Building Codes is not the per se absence of negligence.[16] Whether the reasonably inexpensive installation of another handrail or the renovation of the staircase would have been sufficient to provide the students with a reasonably safe premises and a safe means of ingress and egress is an issue of fact for a jury to decide.

Furthermore, Plaintiff also raised a triable issue of fact with regard to Defendants' argument that Plaintiff's impact with another student, and not the lack of a handrail or compliance with Building Codes, was the proximate cause of Plaintiff's injuries. A reasonable jury may find it foreseeable that, in a school used by hundreds of students on a daily basis, two students would use the staircase in opposite directions at the same time.[17] Thus, Defendants have failed to establish that Plaintiff's impact with another student constituted an intervening cause that broke the chain of causation.

CONCLUSION

Judgment as a matter of law is inappropriate because Defendants have failed to meet their initial burden of showing a prima facie entitlement to summary judgment, and Plaintiff has raised several triable issues of fact.

Accordingly, it is hereby:

---

[15] *Peralta v. Henriquez*, 100 N.Y.2d 139 (2003); *June,* supra

[16] *Elliott v. City of New York*, 95 N.Y.2d 730 (2001)

[17] *Root v. Feldman*, 185 A.D.2d 409 (3d Dept 1992) (In a bar occupied by 300 people, it was foreseeable that two customers would use the staircase in opposite directions at the same time)

ORDERED, that the motion of St. Peter's High School for Girls, The Roman Catholic Church of St. Peter and the Roman Catholic Archdiocese of New York for summary judgment dismissing Plaintiff's complaint is denied; and it is further

ORDERED, that all parties shall return to DCM Part 3 on **February 17, 2010** for a status conference.

ENTER,

DATED: January 29, 2010

Joseph J. Maltese
Justice of the Supreme Court