Lynch v City of New York
2010 NY Slip Op 32300(U)
August 23, 2010
Supreme Court, New York County
Docket Number: 110497/07
Judge: Barbara Jaffe
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SCANNED ON 8/26/2010

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JAFFE BARBARA JAFFE J.S.C. Justice PART 5

Index Number : 110497/2007

LYNCH, SHANNON

VS.

CITY OF NEW YORK

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

CAL # 91

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. ______

MOTION CAL. NO. ______

on this motion to/for summ judgmt

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED

AUG 26 2010

NEW YORK COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 8/23/10 AUG 23 2010

BARBARA JAFFE J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

---x

SHANNON LYNCH,

Plaintiff,

-against-

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

Defendants.

---x

Index No. 110497/07
Motion Date: 7/27/10
Motion Seq. No.: 001
Calendar No.: 91

DECISION & ORDER

FILED
AUG 2 6 2010
NEW YORK
COUNTY CLERK'S OFFICE

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By notice of motion dated April 20, 2010, defendants City and the New York City Department of Education (collectively, defendants) move pursuant to CPLR 3212 for an order summarily dismissing the complaint. Plaintiff opposes.

I. UNDISPUTED FACTUAL BACKGROUND

On January 4, 2007, at approximately 11:15 a.m., plaintiff, a mathematics coach at P.S. 325, located on West 128th Street in Manhattan, tripped and fell when her right foot caught on a door saddle at the school's front entrance. (Affirmation of John Orcutt, ACC, dated May 14, 2010 [Orcutt Aff.], Exh. B at 12-13). The school safety agent witnessed the accident but does not know what caused it. (Orcutt Aff., Exh. E).

After filling out an accident report (Orcutt Aff., Exh. D), plaintiff returned to the scene at

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approximately 1:30 p.m. and noticed that "two pieces of stone in front of the metal saddle . . . were missing," leaving a space of two or three inches deep and a foot in width, and a slightly raised divot in the metal portion of the saddle. (Orcutt Aff., Exh. B at 15-17). Although plaintiff had previously noticed the divot, she did not report it. (*Id.* at 24; Affirmation of Randy Miller, Esq., dated June 10, 2010 [Miller Aff.], Exh. A).

Four to six weeks after the accident, plaintiff's friend took photographs of the accident location which plaintiff identified as fair and accurate representations of the condition on the day she fell, to the extent that the missing stones and divot were identical. (Orcutt Aff., Exh. B at 18, 19, 22-23). Plaintiff also testified that her union representative and co-employee Joanne Bitterman told her that the head custodian had told her that a work order had been placed for repair of the doorway had been prepared before the accident. (*Id.* at 25-26; Affirmation of Randy Miller, Esq., dated Jun.10, 2010 [Miller Aff.], Exh. B).

Clarence Thomas, a custodial engineer at P.S. 325 who undertook the duties of the engineer employed at the time of the accident, testified at a deposition held on November 17, 2008, that the duties of the custodial engineer include ensuring that the facility is in good condition and that work orders are placed in the event of "severe" maintenance problems (*id.*, Exh. C at 11) , and completing a log in which events such as accidents on the premises are noted as well as notes concerning the condition of the building and its perimeter. Thomas found no work orders for the time of plaintiff's accident or relating to the door saddle, but acknowledged that his predecessor may have prepared one or logged one in. (*Id.* at 12-15). Nor did he find any accident reports pertaining to plaintiff's accident. (*Id.* at 16).

School Principal Gary Cruz testified at a deposition held on May 5, 2009, that the

photographs of the door saddle offered by plaintiff were fair and accurate representations of the way it looked on the day of the accident. (Orcutt Aff., Exh D at 25). He does not sign off on work orders, and he discussed only major repairs with the former custodial engineer, lesser jobs being the engineer's sole responsibility. (*Id.* at 19-20). Before plaintiff's accident, he never noticed the missing portion in front of the door and heard no complaints about the door saddle, although complaints are sent to the custodial engineer, and was unaware of any work done on the door saddle. (*Id.* at 17, 20-21).

II. CONTENTIONS

Defendants contend that the complaint must be summarily dismissed absent actual or constructive knowledge of the allegedly dangerous condition. (Orcutt Aff.). In support, they rely on plaintiff's failure to report the condition before her accident, Cruz's lack of knowledge of the condition, the absence of any complaints or work orders relating to it, and the school safety agent's inability to identify the cause of the accident. (*Id.*, Exhs. B, C, D).

In response, plaintiff maintains that the evidence establishes that defendants were on notice of a defective condition, relying on her 50-h hearing testimony and affidavit, the deposition testimony of Cruz and Thomas, Bitterman's affidavit, and the photographs of the defect. (Miller Aff., Exhs., A, B, C; Orcutt Aff., Exhs. B, C, D).

III. ANALYSIS

"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." (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of*

New York, 49 NY2d 557, 562 [1980]; *Friends of Animals, Inc. v Associated Fur Mfrs, Inc.*, 46 NY2d 1065, 1067 [1979]). If this burden is not met, summary judgment must be denied, regardless of the sufficiency of the opposition papers. (*Winegrad*, 64 NY2d 851, 853).

When the moving party has demonstrated entitlement to summary judgment, the burden of proof shifts to the opposing party to demonstrate by admissible evidence the existence of a factual issue requiring trial. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman*, 49 NY2d 557, 562). The opposing party must "lay bare" its evidence (*Silbertstein, Awad & Miklos v Carson*, 304 AD2d 817, 818 [1st Dept 2003]); "unsubstantiated allegations and assertions are insufficient" (*Zuckerman*, 49 NY2d 557, 562).

"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 the defendant's employees to discover and remedy it." (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). That a defendant has conducted frequent inspections or maintenance work, with no indication of a dangerous condition, may constitute *prima facie* evidence that it had no notice. (*Smith v Costo Wholesale Corp.*, 50 AD3d 499, 500-501 [1st Dept 2008]; *D'Ambra v N.Y.C. Trans. Auth.*, 16 AD3d 101 [1st Dept 2005]). However, if a reasonable inspection would have disclosed the dangerous condition, the failure to inspect may constitute negligence. (*Colon v Bet Torah, Inc.*, 66 AD3d 731, 732 [2d Dept 2009]; *cf Singh v United Cerebral Palsy of New York City, Inc.*, 72 AD3d 272 [1st Dept 2010] ["failure to make a diligent inspection constitutes negligence only if such an inspection would have disclosed the defect"]).

It is generally within the province of the jury to determine if the "width, depth and appearance" of a defect is one which "must have come into existence over such a length of time

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that knowledge of [it] should have been acquired by the defendant in the exercise of reasonable care." (*Karten v City of New York*, 109 AD2d 126, 127-128 [1st Dept 1985]). Photographs may prove constructive notice of an alleged defect if taken reasonably close to the time of the accident, and there is testimony that the condition at the time of the accident is substantially represented in the photograph. (*Id.*, 109 AD2d at 127; *see also Taylor v New York City Trans. Auth.*, 48 NY2d 903, 904 [1979]).

Although Thomas found no work orders for the accident location, his search was too limited to be probative, and he had no knowledge as to whether defendants were aware of or should have been aware of the condition. Nor was Cruz able to establish a lack of actual or constructive notice. In any event, even if the absence of work orders had been sufficiently established, it would only demonstrate the absence of written, not constructive, notice which, given the size and nature of the defect and its duration, may evidence negligence. (*See D'Ambrosio v City of New York*, 55 NY2d 454, 462 [1982] [failure to repair defective condition, of which it has notice, renders City liable]). Consequently, defendants have not met their burden of establishing that they had no actual or constructive notice of the condition. (*Cf George v NYCTA*, 306 AD 160, 161 [1st Dept 2003] [City's failure to offer proof of inspections, in conjunction with evidence that defect not new presents factual issue at to construction notice]). That a witness was unable to discern the cause of plaintiff's fall, and that plaintiff herself did not know its cause until she returned to the scene, is irrelevant to the issue of notice. (*Cf George v New York City Trans.*, 41 AD3d 143 [1st Dept 2007] [that plaintiff speculated as to cause of fall irrelevant to notice]).

Moreover, even if defendants had sustained their burden, plaintiff's photographs of and

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prior familiarity with the divot, indicate that given the "width, depth, and appearance" of each defect, a reasonable jury could find that neither the divot nor the missing portions of the floor suddenly appeared. Rather, they apparently existed for a long enough period of time that defendants should have known about them through the exercise of reasonable care. (*Karten*, 109 AD2d at 127-128).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that the motion of defendants City of New York and New York City Department of Education is denied.

This constitutes the decision and order of the court.

Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: August 23, 2010
New York, New York

AUG 2 3 2010

FILED
AUG 2 6 2010
NEW YORK
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