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

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

Index Number : 113922/2007

ROWSER, DOMINIQUE

VS.

CITY OF NEW YORK

SEQUENCE NUMBER : 003

DISM ACTION/INCONVENIENT FORUM

CAL #90

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

n this motion to/for summary judgmt

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | 1 |
| Answering Affidavits — Exhibits | 2 |
| Replying Affidavits | 3 |

**Cross-Motion:** ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED
SEP 14 2010
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 8/20/10
AUG 20 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

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DOMINIQUE ROWSER, an infant by her Legal Guardian REGINA ROWSER and REGINA ROWSER, individually,

Plaintiffs,

-against-

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

Defendants.

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Index No. 113922/07

Motion Date: 7/20/10
Motion Seq. No.: 002
Calendar No.: 25

**DECISION & ORDER**



BARBARA JAFFE, JSC:

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**For defendant City:**
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By notice of motion dated April 15, 2010, defendant City, on behalf of both named defendants, moves pursuant to CPLR 3211(a)(7) and 3212 for an order summarily dismissing the complaint. As defendants offer no factual or legal basis for a dismissal pursuant to CPLR 3211(a)(7), only the motion pursuant to CPLR 3212 is addressed. (*See Kane v City of New York*, Sup Ct, New York County, May 14, 2010, Jaffe, J., Index No. 103963/07).

I. UNDISPUTED FACTUAL BACKGROUND

At approximately 3 p.m. on February 14, 2007, plaintiff, a 16-year-old student at Wadleigh High School in Manhattan, was on her way out of the school when she saw two people

almost fall as they approached the exit. Seeking to avoid a puddle of water on the floor near the exit and still inside the premises, plaintiff turned toward a different exit and then, she too, slipped and fell. As it had snowed the night before, there were two inches of snow on the ground outside the school, and it continued to snow that day. Although a mat had been placed on the floor by the entrance, it did not cover the area where plaintiff fell, some two to three steps from the door. (Affirmation of Peter C. Lucas, ACC, dated Apr. 15, 2010 [Lucas Aff.], Exh. E).

At a deposition held on January 5, 2009, Joseph Howell, a custodial engineer at the high school, testified that when it snows, his employee, German Ospina, comes in before the students arrive, removes the snow, salts the walkways, mops the entrances, places rubber mats inside the premises and approximately two inches from the doors, and inspects the entrances every ten minutes. (*Id.*, Exh. F).

At a deposition held on May 4, 2009, Ospina testified that when it snows, he and other employees remove the snow and mop the interior of the building, and he regularly inspects the floors and continually mops until his one-hour lunch break which commences at approximately 12:00 pm. (*Id.*, Exh. H at 21). After his lunch break, Ospina attends to the cafeteria until 2:45 pm and does not mop the front entrance unless asked to do so by security or Howell. (*Id.* at 22-23). At 2 pm, the night cleaning staff arrives to mop the cafeteria. Ospina leaves the premises at 2:45 pm. (*Id.* at 25).

## II. CONTENTIONS

City denies liability for plaintiff's injuries as it is a legal entity separate and distinct from the New York City Department of Education (DOE) and is not responsible for torts arising from the conduct of DOE's agents, servants, and employees. Thus, City claims it is not a proper party

to the action; rather, the Department of Education, as owner of the building and employer of the custodial personnel, is the proper party defendant. (Lucas Aff.).

DOE denies liability for plaintiff's injury, having received no actual or constructive notice of the puddle in which plaintiff fell, and asserts that absent any evidence as to how long the puddle had been there, plaintiff is unable to establish that it had notice of the condition. (*Id.*).

Plaintiff argues that as City has failed to prove that it does not own the premises, it is liable for her injuries. She also maintains that the deposition testimony establishes defendants' constructive knowledge of the wet condition of the floor and that they may thus be held liable for failing to correct it. And, as the mat was too far from the door to protect the portion of the floor where she fell, she argues that a triable issue of fact has been raised. (Affirmation of Marie DuSault, Esq., dated May 20, 2010).

In reply, City cites several decisions involving accidents occurring on the premises of public schools which were dismissed as against it on the ground that it is an entity separate from DOE, and several decisions in support of DOE's position. (Reply Affirmation of Peter C. Lucas, ACC, dated June 9, 2010).

## 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). A defendant moving for summary judgment must negate, *prima facie*, an essential element of the plaintiff's cause of action. (*Rosabella v Metro. Transp. Auth.*, 23 AD3d 365, 366 [2d Dept 2005]).

A. Is City a proper party?

The First Department has held that City's ownership of school premises does not render it liable for defective conditions thereon and that liability for such conditions rests solely with the Department of Education. (*Flores v City of New York* 62 AD3d 506 [1st Dept 2010]). City thus cannot be held liable for plaintiff's injuries here and its failure to demonstrate that it does not own the premises is immaterial. Consequently, City has demonstrated, *prima facie*, that it is not a proper party to this action, and plaintiff has failed to raise a triable issue of fact as to its liability. (*See Lorenzo v City of New York*, 71 AD3d 458 [1st Dept 2010] [teacher's personal injury complaint should have been dismissed as City not legally responsible for maintenance and repair of school premises]).

B. Constructive notice

"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 Am. Museum of Natural History*, 67 NY2d 836, 837 [1986]; *Gibbs v Port Auth. of NY and NJ*, 17 AD3d 252, 255 [1st Dept 2005]). However, "general awareness" that the floor of premises became wet during inclement weather has been held "insufficient to establish constructive notice of the specific condition causing [an] injury." (*Solazzo v New York City Transit Auth.*, 6 NY3d 734, 735 [2005]; *Wise-Love v 60 Broad St.*

*LLC*, 75 AD3d 487 [1st Dept 2010]; *Rodriguez v 520 Audobon Assoc.*, 71 AD3d 417 [1st Dept 2010). However, even where a property owner is aware of inclement weather, it is not obliged to constantly mop up water tracked into premises (*Razla v Surgical Sock Shop II, Inc.*, 70 AD3d 916 [2d Dept 2010]), nor is it required to cover all of its floors with mats. (*Kovelsky v City Univ. of New York*, 221 AD2d 234 [1st Dept 1995]).

Here, no evidence was presented that DOE was aware, constructively or otherwise, of the existence of the puddle at the front entrance where plaintiff fell, and although there was no evidence that it inspected or mopped up the front entrance after Ospina's lunch break and before plaintiff fell, it is undisputed that there were mats placed at the front entrance. Under these circumstances, DOE has established, *prima facie*, that it took reasonable precautions to prevent tracked-in snow from accumulating and melting at the front entrance. (*Amsel v New York Convention Ctr. Operating Corp.*, 60 AD3d 534, 535 [1st Dept 2009] [defendant established *prima facie* entitlement to summary dismissal by demonstrating that it had rained earlier in day, was raining when plaintiff fell, that it had taken reasonable precautions in placing mats on floor and mopping throughout day, and had no notice of particular wet condition that caused plaintiff's accident]). That the mats did not cover every portion of the floor does not raise an issue of fact requiring a trial.

## IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that the motions by defendants City of New York and the New York City Department of Education are granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of

costs; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: August 20, 2010
New York, New York

AUG 20 2010

FILED
SEP 14 2010
NEW YORK
COUNTY CLERK'S OFFICE