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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 5

NASSAU COUNTY

JAMES DINAPOLI,

Plaintiff,

-against-

MOTION SEQ. NO.:001
MOTION DATE: 9/24/10

CATHOLIC CHARITIES OF THE DIOCESE OF ROCKVILLE CENTRE, DIOCESE OF ROCKVILLE CENTRE, INC., and ST. CATHERINE OF SIENNA CHURCH,

INDEX NO.: 6812/08

Defendants.

The following papers having been read on the motion (numbered 1-3):

Notice of Motion.....1
Affirmation in Opposition.....2
Reply Affirmation.....3

The motion by defendants Catholic Charities of the Diocese of Rockville Centre ("Catholic Charities"), the Diocese of Rockville Centre, Inc. ("Diocese"), and St. Catherine of Sienna Church ("St. Catherine") is determined as follows.

This is a personal injury action arising out of a trip and fall accident. Plaintiff alleges that on January 20, 2006, he fell on a staircase within a premises known as defendant St. Catherine of Sienna Church located at 33 New Hyde Park Road, Franklin Square (the "Premises" or "St. Catherine") at approximately 5:00 p.m. The Court notes that the accident is variously referred to by both parties as occurring on January 19, 2006 and January 20, 2006. Plaintiff claims that the accident occurred on the top step of the stairway leading from the lobby to the gymnasium/auditorium of the Premises. Plaintiff's Bill of Particulars alleges that the defect causing him to fall was a "curled up and protruding rubber edge molding and/or protector."

Defendants move for summary judgment on grounds that defendants neither created the condition alleged to have caused plaintiff's fall nor had actual or constructive notice of its existence. Catholic Charities and the Diocese allege further that they did not own, operate, manage, maintain or control the Premises at the time of the accident.

Motion for Summary Judgment as to Catholic Charities and the Diocese

The Court finds that defendants have offered sufficient proof, unopposed by plaintiff, through the affidavit of Thomas G. Renker, General Counsel to the Diocese, sworn to on July 15, 2008, that on January 20, 2006, and prior thereto, Catholic Charities and the Diocese did not own, operate, manage, maintain or control the Premises. As such, plaintiff's claims against Catholic Charities and the Diocese are hereby dismissed.

Motion for Summary Judgement as to St. Catherine

In support of their motion, defendants submit plaintiff's deposition testimony of November 13, 2009. Plaintiff testified that while holding onto the railing, he stepped on the first step after the landing, when his right heel got caught causing him to fall down the stairs and injure his right knee [Defendants' Exh. F pp. 18-19, 26]. Plaintiff testified that before he fell, he looked down and did not notice that there was anything on the step or that the step was raised or that rubber was sticking up on the step's lip [Defendants' Exh. F pp. 16-19, 35-36]. In addition, plaintiff did not see any liquid or debris on the step and the lighting was "ok" [Defendants' Exh. F pp. 20-21, 23]. Plaintiff also testified that he had visited St. Catherine one month prior to the accident and did not notice a problem with the step [Defendants Exh. F pp. 24-25].

Defendants also proffer the deposition testimony conducted on March 1, 2010 of Daniel Cooper ("Cooper") who has been an employee of St. Catherine's maintenance department for approximately thirty years [Defendants' Exh. G p 5]. Cooper testified the stairs were covered in rubber material, which has not been replaced in the thirty years that he has worked there [Defendants' Exh. G p. 14], that as part of his job, he walks up and down the stairs everyday and never encountered loose, dislodged or raised rubber molding or material and that there is a schedule to sweep the stairs every day [Defendants' Exh. G pp. 13, 18, 25, 34]. Cooper also testified that he was not aware of any past complaints by parishioners, employees or other individuals with respect to the condition of the stairs and was not aware that anyone, prior to the accident, ever caught his foot or toe on any rubber moldings on the stairs [Defendants' Exh. G pp. 18-19, 27].

Generally, a defendant has the burden to make a *prima facie* showing in a slip and fall action, that the defendant property owner neither created the condition which caused the accident, nor had actual or constructive knowledge of it. *See* **Razla v. Surgical Sock Shop II Inc.**, 70 AD3d 916; **Pinto v. Metropolitan Opera**, 61 AD3d 949; **Hitzler v. St. Teresa's Church**, 35 AD3d 369; **Finocchiaro v. AVR Realty Corp.**, 32 AD3d 819;

In the case at bar, the Court finds that there is no evidence demonstrating that prior to his fall, plaintiff was able to identify any problem with the step. It was only after falling that he observed that a "piece of rubber was sticking up" on the lip of the first step down from the landing and concluded that it was this condition that caused him to fall. "Proximate cause may be established without direct evidence of causation, by inference from the circumstances of the accident; however, mere speculation as to the cause of an accident, when there could have been many possible causes, is fatal to a cause of action." **Costantino v. Webel**, 57 AD3d 472. "Since it is just as likely that the accident could have been caused by some other factor, such as a misstep or loss of balance, any determination by the trier of fact as to the cause of the accident would be based upon sheer speculation." **Manning v. 6638 18th Ave. Realty Corp.**, 28 AD3d 434, 435 *quoting* **Teplitskaya v. 3096 Owners Corp.**, 289 AD2d 477, 478.

However, even assuming that the rubberized material was loose and it is this condition which caused plaintiff to fall, the Court finds defendants have demonstrated *prima facie* that defendants neither created the condition nor had actual or constructive notice of is existence. After closely reviewing the transcripts, the Court finds that neither plaintiff nor Cooper has stated any fact demonstrating, or even permitting the inference, that defendants created or had actual knowledge of the condition which allegedly caused plaintiff's fall. Cooper testified that he walked up and down the stairs every day and never encountered loose or raised molding on the steps prior to the accident, that there was an everyday sweeping schedule, and that he was not aware that any complaints were made about the condition of the stairs or that anyone had previously caught his foot or toe on any rubber molding on the stairs. [Defendants' Exh. G pp. 18-19, 25, 27, 34]. *See* **Akhtar v. Zucker**, 50 AD3d 932

With respect to constructive notice, defendants have established *prima facie* that there is insufficient evidence in the deposition testimony to support a finding that the rubber molding on the stairs was sticking up or otherwise loose long enough to be discovered and removed by defendants in the exercise of reasonable care. "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." **Gordon v. American Museum of Natural History**, 67 NY2d 836, 837. *See* **Gonzalez v. Jenel Management Corp.**, 11 AD3d 656; **Stone v. Long Island Jewish Medical Center, Inc.**, 302 AD2d 376; **Yearwood v. Cushman & Wakefield, Inc.**, 294 AD2d 568.

Accordingly, defendants have demonstrated, *prima facie*, their entitlement to judgment as a matter of law. The burden thus shifts to plaintiff to tender evidence, in

admissible form, sufficient to raise a triable issue of fact. **Zuckerman v. City of New York,** 49 NY2d 557.

In opposition, plaintiff contends that (i) the deposition transcripts proffered by defendants were unsigned and unsworn and therefore not in admissible form; and (ii) even considering the deposition testimony, such testimony establishes that defendants had both actual and constructive knowledge of the condition on the stairs which allegedly caused plaintiff's fall.

The Court finds that it may consider the deposition testimony proffered by defendants as defendants have presented proof that said transcripts were forwarded to the witnesses for the witnesses' review. **CPLR §3116**. Even considering the deposition testimony, plaintiff argues defendants failed to meet their burden on the issues of actual and constructive notice. In support, plaintiff contends that Cooper testified at his deposition that he had not performed maintenance on the stairs, and that in the thirty years Cooper was employed, he was not aware that the rubber material had been altered or changed or that the glue had been replaced or reaffixed. In addition, plaintiff proffers affidavits of two witnesses, sworn to more than four years after the accident. In an affidavit of Nick Altilio ("Altilio"), sworn to on August 23, 2010, Altilo attests that on the date of the accident, he was ofticiating at a hockey game at St. Catherine. Altilio states that when he saw plaintiff on the bottom of the steps, he immediately looked up and observed "a piece of rubber molding that was curled and sticking up on the edge of the top step" which was the "same piece of rubber molding [he] had observed approximately one hour before on [his] way into the school." Plaintiff also proffers an affidavit of Luigina Andreu ("Andreu"), sworn to on August 24, 2010, who attests that she observed plaintiff trip on a "curled up piece of molding at the edge of the top step" which was the same condition she had observed thirty minutes earlier when she first arrived at St. Catherine.

The Court finds that plaintiff's opposition consists solely of conclusory assertions and unsubstantiated claims, which are insufficient to raise an issue of fact. **Zuckerman v. City of New York**, *supra*. The Court finds that plaintiff has failed to allege that defendants had actual knowledge of the condition on the stairs. Plaintiff attempts to cast doubt on the reasonableness of defendants' care of the stairs based upon Cooper's testimony that he did not perform maintenance on the stairs and that he was not aware that the rubber material had been altered in thirty years. The Court finds this argument to be purely speculative. The Court notes that plaintiff points to no standard of care to which defendants' regimen might be compared, such as an expert affidavit, and there is no evidence of any prior accidents, administrative citations, prior falls, lawsuits or any other events that would put defendants on notice of a need for increased vigilance.

With respect to constructive notice, plaintiff attempts to create an issue of fact through the affidavits of Altilio and Andreu which attest that at a maximum, the condition existed for one hour prior to plaintiff's fall. In addition, the Court notes that although plaintiff testified at his deposition that Altilio saw him fall down the steps [Defendants' Exh. F p. 21], Altilio states in his Affidavit that Altilio only "came to observe [plaintiff] sitting on the floor at the bottom of the steps leading from the lobby to the gymnasium/ auditorium level."

On the basis of the foregoing, it is

ORDERED, that the motion by defendants CATHOLIC CHARITIES OF THE DIOCESE OF ROCKVILLE CENTRE, DIOCESE OF ROCKVILLE CENTRE, INC. and ST. CATHERINE OF SIENNA CHURCH for summary judgment pursuant to **CPLR §3212** is **granted**.

This constitutes the Order of the Court.

Dated: December 23, 2010

J.S.C.