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

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

Index Number : 104685/2001

ZARATE, LILIA

INDEX NO. _____

VS

CITY OF NEW YORK

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

SUMMARY JUDGMENT

MOTION CAL. NO. _____

CAL # 131

The following papers, numbered 1 to 3 were read on this motion to/for dismiss

	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

APR 12 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 4/8/11 APR 08 2011

BARBARA JAFFE J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

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

----------x

LILIA ZARATE,

Plaintiff,

-against-

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

Defendants.

----------x

Index No.: 104685/01

Motion Date: 2/22/11
Motion Seq. No.: 001
Motion Cal. No.: 131

DECISION AND ORDER

BARBARA JAFFE, J.S.C.:

For plaintiff:
Gregory C. McMahon, Esq.
Budin, Reisman *et al.*
112 Madison Ave.
New York, NY 10016-7416
212-696-5500

For defendants:
Lynn M. Leopold, ACC
Michael A. Cardozo
Corporation Counsel
100 Church St.
New York, NY 10007
212-442-0398

By notice of motion dated July 27, 2010, defendants move pursuant to CPLR 3211(a)(7) and/or CPLR 3212 for an order dismissing plaintiff's claims against them. Plaintiff opposes the motion.

I. BACKGROUND

On September 15, 2000, plaintiff was allegedly injured when she slipped, tripped and fell in the vestibule area between the exterior and interior doors of the entrance of the Robert F. Kennedy School, P.S. 169, located on East 88th Street in Manhattan. (Affirmation of Lynn M. Leopold, Esq., dated July 27, 2010 [Leopold Aff.], Exh. A). On December 19, 2000, plaintiff served her notice of claim on defendant City of New York. (*Id.*).

At a 50-h hearing held on February 23, 2001, plaintiff testified that on the date of her accident, she was employed by the New York City Board of Education and assigned to P.S. 169,

that it had been raining before her accident and the ground was wet but it had just stopped raining when she entered the building, that the floor in the entrance was wet, although not visibly wet, and covered by one narrow mat, and that a teacher was leaving the building at the time that plaintiff was entering and as there was not enough space for the two of them to step on the mat, plaintiff stepped off the mat and slipped on the floor. Plaintiff was unsure how long the floor had been wet before she fell or how the floor had become wet, and thought that the school had a custodian who was in charge of cleaning the floors. (*Id.*, Exh. E).

On or about March 12, 2001, plaintiff served her summons and complaint on defendants, and on or about March 29, 2001, defendants served their answer. (*Id.*, Exhs. B, C).

II. CONTENTIONS

City argues that the complaint must be dismissed against it as City and defendant New York City Department of Education (DOE) are separate legal entities, and both defendants deny having actual or constructive notice of or created the allegedly wet condition of the floor before plaintiff's accident. (Leopold Aff.). They assert that it had been raining before, up to, and after plaintiff's accident, relying on certified meteorological records (*id.*, Exh. G), and contend that if the floor was wet due to tracked-in rain, they were not required to cover completely the floor with mats or to mop it continuously. To the extent that the floor was wet due to a condition unrelated to rain, defendants maintain that there is no evidence as to how the condition was created or how long it had been present before plaintiff fell. Defendants also allege that plaintiff's decision to step off the mat proximately caused her injuries and that she thereby assumed the risk of slipping on the wet floor. (*Id.*).

Plaintiff argues that defendants' motion is premature as no defense witnesses have been

deposed and they failed to produce a decipherable copy of the custodian's logbook or their rules and guidelines for the placement of mats in the accident location, and that such information is relevant to the circumstances of plaintiff's accident, defendants' responsibilities related to the placement of mats and maintenance of the floor, and to the cause of the wet condition. (Affirmation of Gregory C. McMahon, Esq., dated Nov. 8, 2010). Plaintiff also contends that she has stated a cause of action for negligence based on the allegations in her summons and complaint, bill of particulars, deposition testimony, and annexed affidavit, in which she states that as she walked to the school on the date of her accident, it was drizzling slightly, that the building's front doors were propped open, allowing rain to enter the vestibule, that there was inadequate lighting, that the floor was wet from the rain but she did not notice if before she fell as the area was unlit, and that she stepped off the mat because it was too narrow to permit two people to walk on it at the same time. (*Id.*, Exh. K, Affidavit of Lilia Zarate, dated Nov. 8, 2010). She asserts that there exist triable issues as to whether defendants created the wet condition, and she observes that defendants did not establish that they received no complaints about the area before the accident or that they properly maintained the area, and that their contention that they had no actual or constructive notice is unsupported by an affidavit from anyone with personal knowledge or proof of their policies and procedures for inspections and/or maintenance. She also denies having assumed any risk, and submits an affidavit from a licensed professional architect, who examined plaintiff's testimony and photographs of the vestibule and opines that defendants violated various building codes and safety standards. (*Id.*, Exh. J).

In reply, defendants observe that plaintiff did not address their contention that City is a separate legal entity from DOE, and maintain that plaintiff's affidavit contradicts her testimony,

and that her expert's affidavit impermissibly raises legal theories not contained in her notice of claim. (Reply Affirmation, dated Dec. 16, 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." (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If this burden is not met, summary judgment must be denied, regardless of the sufficiency of plaintiff's 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 which must 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 or assertions are insufficient." (*Zuckerman*, 49 NY2d 557, 562).

Moreover, "as a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense." (*Mennerich v Esposito*, 4 AD3d 399, 400 [2d Dept 2004], *quoting George Larkin Trucking Co. v Lisbon Tire Mart, Inc.*, 185 AD2d 614, 615 [4th Dept 1992]). And 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. Claim against City

Absent any dispute that City is a separate legal entity from DOE and that DOE owns the premises in which plaintiff was injured, plaintiff's claims against City must be dismissed. (*See Miner v City of New York*, 78 AD3d 669 [2d Dept 2010] [City could not be held liable for injury that occurred on school premises; Board of Education separate and distinct entity from City]; *Flores v City of New York*, 62 AD3d 506 [1st Dept 2009] [complaint properly dismissed against City where plaintiff sustained injury inside school as City was not proper party to action]; *Perez v City of New York*, 41 AD3d 378 [1st Dept 2007], *lv denied* 10 NY3d 708 [2008] [City and Board separate legal entities]).

B. Claim against DOE

To establish a *prima facie* cause of action for injuries resulting from a slip and fall, the plaintiff must prove that the defendant either created the condition which caused the accident or that it had actual or constructive notice of the condition and reasonable time within which to correct it. (*Campanella v 1955 Corp.*, 300 AD2d 427 [2d Dept 2002]). A defendant moving for summary judgment in a slip and fall case has the initial burden of establishing, *prima facie*, that it neither created the defective condition, nor had actual or constructive notice of it. (*Smith v Costco Wholesale Corp.*, 50 AD3d 499 [1st Dept 2008]).

Here, DOE failed to submit any proof based on personal knowledge establishing that it neither created the wet condition nor had actual or constructive notice of it, or that it took reasonable precautions to deal with it. (*See McPhaul v Mut. of Am. Life Ins. Co.*, 81 AD3d 609 [2d Dept 2011] [owner failed to show that it had no actual notice of water condition absent evidence that it had never received complaints about condition, or that it had no constructive

notice absent evidence as to when area was last cleaned or inspected prior to accident or that condition lasted insufficient length of time for owner to discover and remedy it]; *Signorelli v Great Atl. & Pac. Tea Co., Inc.*, 70 AD3d 439 [1st Dept 2010] [plaintiff allegedly slipped in vestibule wet from rain; defendants failed to make out *prima facie* case for dismissal as employees' testimony did not establish that defendants lacked actual or constructive knowledge of condition of vestibule]; *Babb v Marshalls of M.A., Inc.*, 78 AD3d 976 [2d Dept 2010] [defendants failed to offer any evidence as to when, if at all, they cleaned or mopped floor prior to plaintiff's fall due to accumulation of rainwater]; *Polatsek v Congregation Bais Arye*, 48 AD3d 438 [2d Dept 2008] [as defendants did not address issue of whether they created or had notice of wet floor, they failed to meet *prima facie* burden]; *Elbert v Dover Leasing, LP*, 24 AD3d 497 [2d Dept 2005] [even if plaintiff's fall was caused by accumulation of tracked-in rain, defendant did not make *prima facie* case as it relied on testimony of property manager who had no personal knowledge of relevant facts and thus did not establish that it neither created nor had actual or constructive notice of condition]; *compare Amsel v New York Convention Ctr. Operating Corp.*, 60 AD3d 534 [1st Dept 2009], *lv denied* 13 NY3d 710 [defendant established *prima facie* entitlement to summary dismissal by demonstrating that on date of accident, it had been raining earlier and was still raining at time of accident, that it had taken reasonable precautions to prevent tracked-in rain from accumulating by placing mats on floor and mopping, and that it had neither actual nor constructive notice of particular wet condition that caused accident]).

As plaintiff testified that she did not see the wet condition of the floor before her accident and that she stepped off the mat only because it was too narrow to permit two people to walk on

it at the same time, DOE has not established as a matter of law that plaintiff's actions were the sole proximate cause of the accident. (*See Alexander v St. Mary's Inst.*, 78 AD3d 1475 [3d Dept 2010] [plaintiff's actions not sole proximate cause of accident as matter of law even if she knew of icy condition on ground; her actions in attempting to go around ice were relevant to comparative negligence]; *Mezick v Hillside Assocs.*, 273 AD2d 449 [2d Dept 2000], *lv denied* 95 NY2d 902 [disagreeing with trial court's decision that plaintiff's decision to use particular route through defendants' property was sole proximate cause of his injuries as matter of law]).

Nor did plaintiff legally assume a risk here. (*See Trupia v Lake George Cent. School Dist.*, 14 NY3d 392 [2010] [assumption of risk limited to voluntary recreational and athletic activities];

Walker v City of New York, 2011 WL 923978, 2011 NY Slip Op 01999 [2d Dept] [assumption of risk did not apply to injury sustained when plaintiff slipped or tripped on defective condition]; *Alexander*, 78 AD3d at 1475 [assumption of risk did not apply to plaintiff's claim that defendants failed to remedy icy condition]; *Lauricella v Friol*, 46 AD3d 1459 [4th Dept 2007] [assumption of risk did not apply where plaintiff sustained injuries after falling into open pit in defendant's building]; *Sulinski v Ardco, Inc.*, 298 AD2d 992 [4th Dept 2002] [plaintiff did not assume risk of tripping and falling on defective floor]).

In any event, as DOE has failed to produce any witnesses for deposition or copies of its policies and procedures related to the placement of mats or general maintenance at the school, plaintiff has established that there are facts essential to her opposition that may exist but have not yet been determined. (CPLR 3212[f]; *see Rodriguez v DeStefano*, 72 AD3d 926 [2d Dept 2010] [even though defendant established *prima facie* entitlement to dismissal, plaintiff raised issues

warranting further discovery and thus dismissal properly denied as premature]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion to dismiss is granted to the extent that the complaint is hereby severed and dismissed in its entirety as against defendant The City of New York with costs and disbursements to The City of New York as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of The City of New York; and it is further

ORDERED, that the remainder of the action shall continue.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: April 8, 2011
New York, New York

APR 0 ◦ 2011

FILED

APR 12 2011

NEW YORK
COUNTY CLERK'S OFFICE