SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

----------X

BRYAN ROSAS, an infant under the age of fourteen (14) years, by his father and natural guardian, ANTHONY ROSAS, ANTHONY ROSAS, Individually, and ROSA ROSAS, Individually,

Plaintiffs,

- against -

BALDWIN UNION FREE SCHOOL DISTRICT and BALDWIN HIGH SCHOOL,

Defendants.

----------X

TRIAL/IAS PART 21

Index No. 11788/09
Mot. Seq. # 1
Mot. Date 2.18.11
Submit Date 6.3.11

The following papers were read on this motion: Papers Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed..... 1
Answering Affidavit 2
Reply Affidavit..... 3

Defendant Baldwin Union Free School District (hereinafter referred to as "School District") moves by notice of motion for an order pursuant to CPLR §3212, granting summary judgment and dismissing plaintiffs' complaint in its entirety.

It is undisputed that the incident arose on December 19, 2008 within the confines of Baldwin High School, one of the schools within the School District, at the main level steps of Building 6, at or about 2:40 p.m., after the last class for the day was dismissed.

Plaintiffs allege the infant plaintiff Bryan Rosas (hereinafter referred to as "infant plaintiff") was injured when he was caused to trip and fall on the wet staircase on the main level of Building 6 at Baldwin High School. School District contends that it was not negligent because it did not have actual or constructive notice of the alleged condition.

At an examination before trial, infant plaintiff testified that on the date of the accident, he arrived at school about 7:42 a.m. and left school about 2:40 p.m. He further testified it snowed all day on the date of his accident. His last class for that day was chemistry, which was located on the third floor of the building. Infant plaintiff testified he had used the same staircase to go up to the chemistry classroom at the start of class, and at that time the staircase was not wet. He had not used subject staircase on the date of the incident prior to heading to his chemistry class. Infant plaintiff further testified he was aware it was still snowing as he left his last class for the day. Prior to the fall, there was no snow on his shoes. He testified that after he had left his chemistry class, he was the first of his peers down the stairs. He stated that he ran down the stairs fast "because the school day was over." "As [he] was running down the stairs, [he] tripped on the very bottom one." However, infant plaintiff was unaware that the staircase was wet until moments after he fell. He then noticed that the "entire left portion" of the bottom step, where he had fallen, was wet with clear melting snow. Due to the clear, water-like appearance of melting snow, the "the wetness [of the step] was difficult to see." Additionally, he noted that the first five steps and platform on the bottom floor were also wet with snow and speculated the steps were wet because on the date of the incident, there had been a harsh snowstorm and other people with snow on their feet used the same steps he did, and likely tracked the snow onto the step he later slipped upon.

Ms. Mildred Rolon (hereinafter referred to as "Ms. Rolon"), a female security guard at and employed by the School District, witnessed the fall and came over immediately to help infant plaintiff. Ms. Rolon helped him sit down at a nearby desk. Infant plaintiff testified he refused Ms. Rolon's request to rest after the incident, because he "wanted to leave to go to the bus." Infant plaintiff testified that Baldwin High School made an announcement at that time that everyone had to exit the building due to the weather condition. His chemistry class ended at 2:35 p.m. He left Baldwin High School on his usual bus after the incident about 2:45 p.m., and arrived home at about 3:20 p.m.

Defendant School District argues that summary judgment should be granted in its favor because plaintiffs cannot establish that the School District had actual notice of the allegedly dangerous condition of the staircase, and have failed to establish that the School District had constructive notice of the allegedly dangerous condition. Defendant argues there is a lack of evidence to indicate that the water had been on the floor for any appreciable amount of time, and thus no evidence that the School District was afforded a reasonable opportunity to remedy the alleged condition. Defendant further argues that there is no evidence that the School District was notified of the condition, and based on the testimony of both infant plaintiff and Ms. Rolon, neither one had observed the wetness on the staircase prior to infant plaintiff's accident. As such, defendant argues that any offer of proof that may be made by the plaintiffs is based on speculation, and is unsupported by any admissible evidence that would allow a jury to reasonably infer that the water was on the staircase for any appreciable amount of time prior to the infant plaintiff's fall. It contends plaintiffs' speculation is entirely insufficient to defeat a motion for summary judgment.

Additionally, defendant argues that the personal injuries and/or damages alleged to have been sustained by infant plaintiff were caused entirely or in part through the culpable conduct of the infant plaintiff, without any negligence on the part of the School District. Defendant School District denied all allegations made in plaintiffs' verified complaint except those specifically admitted to, and seeks a dismissal or reduction in any recovery that may be had by the infant plaintiff in proportion to which the culpable conduct, attributable to the infant plaintiff, bears to the entire measure of responsibility for the occurrence. Moreover, School District argues that the infant plaintiff assumed the risk related to activity causing the injuries sustained.

Additionally, defendant School District, through its witness, Ms. Rolon, testified at a deposition that infant plaintiff was "running down the steps and he jumped and fell on the ground." He refused to go to the nurse and instead said he had to catch the bus. Ms. Rolon did not observe any physical injury to the infant plaintiff. She testified that when she looked at the floor and steps upon which infant plaintiff fell, she saw "nothing". In response, infant plaintiff testified he did not recall Ms. Rolon examining the steps that he had slipped on. Ms. Rolon further testified that if she ever observed water, snow or ice accumulating in the vicinity of the area she would call the custodian to clean it up, and in the meantime use tissues and a mop on the area until the custodian arrived. She further testified it was the responsibility of the security aides (such as herself) and custodians to make sure steps and hallways were clear. The last time a custodian had been in the area on the day of the accident was 12:30-1:00 p.m., and he was sweeping.

Plaintiffs oppose the application for summary judgment, stating that there are at least two factual issues which defeat the motion: 1) the School District had actual notice because the

defendant maintained or allowed said condition to remain on the subject premises for a prolonged period of time without notifying its students or other individuals on the premises and/or were physically on and/or should have been on the subject premises several times prior to and at the time of the subject accident; and 2) the School District also had constructive notice due to the length of time the condition complained of existed prior to the time of the accident, which existed for an unreasonable amount of time.

Plaintiffs argue there is a triable issue of fact as to whether the defendant had actual knowledge of an ongoing and recurring dangerous condition. (*See, e.g., Padula v. Big V Supermarkets*, 173 AD2d 1094 [3d Dept. 1991]). According to the deposition testimony of the infant plaintiff, there were no signs, barricades or cones placed in the subject area. However, defendant's witness, Ms. Rolon, testified that school custodians were in the vicinity of the area where infant plaintiff fell approximately two hours prior to the fall to remedy a condition to that floor. Plaintiffs argue an inference can be drawn that the school personnel had actual knowledge of a recurrent dangerous condition so as to constitute constructive notice on the part of defendant.

Furthermore, plaintiffs argue there is also a triable issue of fact as to whether the defendant had constructive notice of the defect. (*See, Gordon v. American Museum of Natural History*, 67 NY2d 836, 837 [1986]). Infant plaintiff testified that upon utilizing the subject staircase approximately 45 minutes prior to the accident, he did not notice any water or snow on the steps. Therefore, the dangerous condition was created sometime during the 45 minute duration of the infant plaintiff's class. Defendant's witness, Ms. Rolon, indicated that the School District did not maintain logs of any cleanups performed at the premises. Additionally, Ms. Rolon was uncertain if the janitors and custodians were responsible for filing logs detailing the

work performed. Defendant has not produced any logs regarding this matter. Plaintiffs refer to Ms. Rolon's testimony, which indicated that the last time a custodian had been in that location was two hours earlier, although it continued to snow throughout the entire day of the incident. As such, plaintiffs allege it is clear the dangerous condition which caused infant plaintiff's fall existed for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it.

Plaintiffs contend that it is clear defendant has failed to meet its initial burden of proof and that a triable issue of fact exists as to whether defendant was negligent in its maintenance of the school on the date of the incident.

In reply, defendant argues it has set forth a *prima facie* case showing entitlement to summary judgment as a matter of law. First, defendant argues that plaintiffs failed to show School District had actual knowledge of the recurrent dangerous condition. Defendant contends that plaintiffs' reliance on the Third Circuit's decision in *Padula v. Big V Supermarkets, infra*, is erroneous and easily distinguishable from the case at bar because there is no indication that School District had any knowledge of the dangerous condition on the stairs where infant plaintiff allegedly fell. Defendant further argues that unlike in *Padula*, School District was not in charge and control of the students tracking rain and snow into the building, but nevertheless took caution to place rugs at the entrance of the building and had custodians present, sweeping the area. Additionally, School District argues even if puddles had been spotted prior to the fall, it would still be insufficient to create a question of fact as to any recurring condition. (*See, Kaplan v.*

Waldbaum's Inc., 231 AD2d 680, 681, 647 NYS2d 560 [1996]). School District contends a negligence claim cannot be maintained absent proof that it had actual knowledge of the recurring dangerous condition.

Furthermore, defendant contends that plaintiffs failed to establish that the alleged dangerous condition was visible, apparent and existed for a sufficient time so as to put School District on constructive notice. (*See, Gordon v. American Museum of Natural History*, 67 NY2d 836, 838, 501 N.Y.S.2d 646, 647 [1986]). Defendant contends that a general awareness of a condition is insufficient to establish constructive notice of the particular condition which caused the infant plaintiff to fall. (*See, Wartski v. C.W. Post Campus of Long Island Univ.*, 63 A.D.3d at 917, 882 N.Y.S.2d 192 [2009]). School District points to infant plaintiff's own testimony in his examination before trial, in which he conceded the wet condition was "clear wet" and "difficult to see." Thus, the wet condition was not visible and apparent. As such, defendant argues it could not have been expected to clean up a condition the infant plaintiff did not even notice himself. Lastly, plaintiffs have not provided concrete evidence as to when the water got onto the staircase. (*See, Davis v. Supermarkets Gen. Corp.*, 205 A.D.2d 730, 731, 613 N.Y.S.2d 701, 702 [1994]). Therefore, defendant contends it would be pure speculation as to how long the wetness was on the stairs, which is insufficient to sustain plaintiffs' burden to establish that School District had constructive notice of the condition. In order to prevail on a constructive notice argument, a condition must be able to be shown to have existed for an appreciable amount of time prior to the incident, as to afford defendant a reasonable opportunity to remedy it. (*See Rojas v. Supermarkets Gen. Corp.*, 238 A.D.2d 393, 656 N.Y.S.2d 346 [1997]). In the instant case, the alleged condition

was not visible or apparent, and infant plaintiff was not aware of the wetness until after his fall. Thus, plaintiffs' constructive notice argument must fail.

Based on the foregoing, the decision of the court is as follows:

"A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it." (*Yioves v T.J. Maxx, Inc.*, 29 AD3d 572, 572; see *Britto v Great Atl. & Pac. Tea Co., Inc.*, 21 AD3d 436; *Joachim v 1824 Church Ave., Inc.*, 12 AD3d 409, 410; *Stumacher v Waldbaum*, Inc., 274 AD2d 572) Only after the movant has satisfied this threshold burden will the court examine the sufficiency of the plaintiff's opposition (*see Britto v Great Atl. & Pac. Tea Co., Inc.*, 21 AD3d 436; *Joachim v 1824 Church Ave., Inc.*, 12 AD3d 409). "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.

"To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell." *Birnbaum v. New York Racing Assn., Inc.*, 57 A.D.3d 598, 598-599 [internal citations omitted].

Applying the above principles to the case at bar, the defendant failed to satisfy its initial burden. The deposition testimony of defendant's security guard merely referred to the school's general cleaning practices. For example, if she observed a wet condition on the stairs which would necessitate a call to the custodian, she would "wipe it up with some tissue until they come

and get a mop." She additionally testified that the security aides and the custodians were responsible to make sure that the steps and hallways were safe and were clear of any water accumulation or drainage conditions. She stated generally that the custodians were constantly cleaning the hallways and the steps but failed to particularize any cleaning procedure or inspection of the area where plaintiff fell on the date of the accident. She testified that approximately one and one-half to two hours prior to the incident she observed a custodian sweeping. However, the record is devoid of any particulars with respect to the sweeping. For example, the exact location where the sweeping occurred, and the nature of the substance the custodian was sweeping. Since defendant failed to meet its initial burden, the court need not consider the opposition of the plaintiff (see, *Babb v Marshalls of MA, Inc.*, 78 A.D.3d 976).

Accordingly, it is hereby

ORDERED, that the defendant Baldwin Union Free School District's motion for summary judgment, pursuant to CPLR 3212, is **DENIED**.

The foregoing constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
July 22, 2011

ENTERED
JUL 26 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE

E N T E R :

HON. JEFFREY S. BROWN, J. S. C.

Attorney for Plaintiff
Ardito & Ardito, LLP
659 Franklin Avenue
Franklin Square, NY 11010

Attorney for Defendant
Ahmuty Demers & McManus, Esqs.
200 I.U. Willets Road
Albertson, NY 11507