SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

----------x

NANCY HARGETT,

Plaintiff,

-against-

THE DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK,

Defendant.

PART C-2
Present:
Hon. Thomas P. Aliotta

DECISION AND ORDER

Index No. 101157/10
Motion No. 1317-001
1997-002

----------x

The following papers number 1 to 5 were marked fully submitted on the 19th day of October, 2011:

	Pages Numbered
Notice of Motion for Summary Judgment by Defendant, with Supporting Papers and Exhibits (dated May 25, 2011)	1
Affirmation in Opposition with Supporting Papers and Exhibits (dated July 11, 2011)	2
Notice of Motion for Leave to Extend the Time for Filing by Defendant, with Supporting Papers and Exhibits (dated August 4, 2011)	3
Affirmation in Opposition with Supporting Papers and Exhibits (dated August 19, 2011)	4
Reply Affirmation (dated October 15, 2011)	5

Upon the foregoing papers, defendant's motion (No. 1997) for leave to file an untimely motion for summary judgement is denied; in light of the above, its further motion for summary judgment (No. 1317) is denied as academic.

Pursuant to this Court's Preliminary Conference Order dated October 26, 2010, "[a]ny dispositive motion(s) (CPLR 3211 and 3212) shall be made within 60 days of the filing of the Note of Issue unless the Court directs otherwise" (*see* Plaintiff's Exhibit "A"). Here, its Certification order did not provide otherwise. Nevertheless, defendant's motion for summary judgment was belatedly made 61 days after the filing of the note of issue. Defendant now moves for leave to extend its time to bring said motion, and for summary judgment and dismissal of the complaint. However, since defendant has failed to demonstrate good cause for its failure to timely file the instant motion, leave must be denied (CPLR 3212[a]; *see Deberry-Hall v. County of Nassau*, __AD3d__, 2011 NY Slip Op 6993 [2nd Dept]), as perfunctory claims of clerical inadvertence are insufficient to constitute good cause for the delay (*see Baldessari v. Caines*, 61 AD3d 904 [2nd Dept 2009]). In any event, were the Court to decide the motion on its merits, defendant's motion for summary judgment would be denied.

This is an action for personal injuries allegedly sustained by plaintiff arising out of an incident which occurred on March 10, 2009 at the Vanderbilt School, P.S. 14, on Staten Island. In her capacity as the school's principal, plaintiff was assisting a first grader who needed to use the bathroom. After failed attempts in pushing the cylindrical shaped flusher with her right hand, plaintiff attempted to use her foot to flush the toilet. It is alleged that these later attempts caused plaintiff to suffer injuries to her right hip and right leg. Plaintiff alleges, inter alia, the Department of Education of the City of New York (hereinafter "DOE")'s negligence in properly maintaining the plumbing fixtures and equipment in the school's bathroom and, more particularly, the girls' bathroom on the first floor at P.S. 14, despite notice of its defective condition, renders it liable for plaintiff's injuries (*see* Notice of Claim).

To the extent relevant, plaintiff testified at her deposition that the subject bathroom "has problems with the flushers most of the time" (EBT of Plaintiff, 17), and that on several occasions

prior to the date of this incident, she had spoken to the head custodian about this particular bathroom (id. at 29, 31-33).

On behalf of DOE, the head custodian, John Mottola, testified that the "main shutoff valve to this bathroom [is] broken", and he had put in a work order to have the valve replaced on or about September 17, 2008 (EBT of John Mottola, p 10-12). However, the valve was not replaced until December of 2009, subsequent to plaintiff's alleged injury (id. at 13). Mr. Mottola acknowledged prior problems with flushing the toilets, and further testified that the "plumbing parts in this building are extremely old and obsolete, and [are] totally worn [out]" (id. at 20). As a result, the witness claimed that he has repeatedly mentioned the need to upgrade the plumbing in the building to defendant's inspectors for the past fifteen years (id. at 21). Such inspections are performed only two to three times per year (id.). With respect to the subject bathroom, Mr. Mottola testified that "[a]t times there have been four [of the five stalls] out of service" simultaneously (id. at 25). However, he does not recall if he had received any complaints specifically with regard to the stall in question (id. at 44). Even though the main valve remained broken, he opined that the instant stall was operable on the date of plaintiff's purported injury (id. at 46). Nevertheless, he conceded that "we have opened and closed every one of them probably a dozen times over the past couple of years"(id. at 49).

A defendant moving for summary judgment in a premises liability 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 and a sufficient length of time to discover and remedy it (*see Bloomfield v. Jericho Union Free School Dist*, 80 AD3d 637, 638 [2nd Dept 2011]). Generally, whether or not a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case, and is generally held to be a question of fact for the jury (*see Surujnaraine v. Valley Stream High School Dist*, __AD3d__, 2011

NY Slip Op 7410 [2nd Dept]). More importantly, however, based on the respective deposition testimony of both plaintiff and the school's head custodian, the DOE has failed to establish, prima facie or otherwise, that the alleged condition cited by plaintiff was open and obvious and therefore not inherently dangerous (*see Beck v. Bethpage Union Free School Dist*, 82 AD3d 1026 [2nd Dept 2011]; *cf. O'Brien v. Sayville Union Free School Dist*, 87 AD3d 569, 570 [2nd Dept 2011]).

Lastly, DOE's contention that plaintiff's injuries were caused by her own actions, taken in violation of the relevant school protocols, merely raise an issue of fact concerning her comparative fault (*see Mei Xiao Guo v. Quong Big Realty Corp*, 81 AD3d 610 [2nd Dept 2011]).

Accordingly, it is

ORDERED that the motion for leave to file an untimely motion for summary judgment by the Department of Education of the City of New York is denied; and it is further

ORDERED that, in view of the foregoing, defendant's further motion for summary judgment is denied as academic.

ENTER,

/s/

Hon. Thomas P. Aliotta

J.S.C.

DATED: November 22, 2011

[* 5]