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| <b>Smith v County of Nassau</b>                                                                                                                                                                                                  |
| 2012 NY Slip Op 30703(U)                                                                                                                                                                                                         |
| March 13, 2012                                                                                                                                                                                                                   |
| Supreme Court, Nassau County                                                                                                                                                                                                     |
| Docket Number: 018148/10                                                                                                                                                                                                         |
| Judge: Randy Sue Marber                                                                                                                                                                                                          |
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## SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAUPresent: **HON. RANDY SUE MARBER**  
**JUSTICE**

TRIAL/IAS PART 14

\_\_\_\_\_  
X

ARSENIO SMITH,

Plaintiff,

Index No.: 018148/10

Motion Sequence...01

-against-

Motion Date...02/01/12

**XXX**

COUNTY OF NASSAU,

Defendant.

\_\_\_\_\_  
X

Papers Submitted:

Notice of Motion.....X

Affirmation in Opposition.....X

Reply Affirmation.....X

Upon the foregoing papers, the motion by the Defendant, THE COUNTY OF NASSAU ("County"), seeking an order, pursuant to CPLR § 3212, granting it summary judgment and dismissing the Plaintiff's complaint, is decided as hereinafter provided.

The Plaintiff commenced this action on September 23, 2010, to recover damages for personal injuries allegedly sustained when he was caused to trip and fall on a puddle of water in his jail cell on October 25, 2009. Issue was joined by service of the Defendant's verified answer on or about October 12, 2010. Specifically, in his verified complaint, the Plaintiff alleges that while he was incarcerated at the Nassau County

Correctional Center, he developed the Methicilin Resistant Staphylococcus Aureus (“MRSA”) infection as a result of laying in the water on the floor of his jail cell after his fall.

The Plaintiff testified at a hearing pursuant to General Municipal Law § 50-h on March 9, 2010. The Plaintiff testified that when he first moved into his jail cell, about one and a half weeks prior to the accident, he noticed that there was a leak from the toilet and that the water was covered up with newspaper. (*See* 50-h Transcript, pgs. 22-3, attached to the Defendant’s Notice of Motion as Exhibit “C”) According to the Plaintiff, the button to flush the toilet would get stuck causing water to overflow from the toilet. (*Id.* at pg. 30) The Plaintiff testified that on October 25, 2009, after eating his dinner, he used the bathroom and after flushing the toilet, the water overflowed. (*Id.* at 35) He asked the corrections officer for a mop and the officer never returned with a mop. When he got up again to ask for the mop, he slipped on the water and fell onto the floor. The Plaintiff testified that before he fell, he noticed the water accumulating on the floor. (*Id.* at 41-42)

On May 10, 2011, the Plaintiff testified at an Examination Before Trial, where he testified that there was a leak under the sink and not the toilet. (*See* EBT Transcript, pgs. 27-28, attached to the Defendant’s Notice of Motion as Exhibit “E”) Upon first arriving in his cell, the Plaintiff did not notice any problems with the toilet, only the sink. (*Id.* at 28) According to the Plaintiff’s testimony, the toilet overflowed on the date of the accident. (*Id.*) The Plaintiff called for an officer, but no one responded. (*Id.* at 33) When the Plaintiff got up from his bed to call a corporal he slipped and fell on the floor. The Plaintiff testified that

his elbow hit the edge of his bed when he fell. (*Id.* at 34) After laying on the ground for 45 minutes, a corporal, 2 officers and a nurse arrived in the Plaintiff's jail cell. (*Id.* at 35) After another 15 minutes, the ambulance arrived and the Plaintiff was taken to Nassau County Medical Center.

The Plaintiff testified that he notified correction officers about the leak, but he could not recall who. He stated that the officers did not do anything about the leak except give the Plaintiff a stick to un-jam the button for the toilet. (*Id.* at 62-63) He further testified that the toilet did not overflow on any day prior to the date of the accident. (*Id.* at 63) The sink, however, did leak before the date of the accident. The Plaintiff testified that the cause of his fall was the water that overflowed from the toilet.

Attached as Exhibit "D" to the Defendant's Notice of Motion is a Maintenance Work Order, dated October 15, 2009, which states that the sink hose was cracked, the hot and cold water was running and sink stoppage. The Work Order, signed by Joseph Rotundo, states that the work was completed on October 15, 2009.

In its motion for summary judgment, the County avers that it was unaware of any problems with the Plaintiff's toilet prior to the accident. The County further contends that it was only aware of a leaky sink. Based on the fact that the Plaintiff testified that the first time the toilet overflowed was the date of the accident, the County contends that it was not on notice, actual or constructive, of the defective condition prior to the accident. Moreover, the County contends that summary judgment is warranted because it had no duty

to warn the Plaintiff against a readily observable condition.

In opposition, the Plaintiff contends that the plumbing facilities in his cell, which consisted of a combination unit steel toilet and sink, was a constant problem. The Plaintiff relies on the deposition testimony of Scott Denis, a corrections officer, and Patrick Starke, a maintenance supervisor. Mr. Denis did not recall whether there was a problem with the toilet prior to the date of the accident nor whether the floor was wet at the time of the accident. (See Denis Transcript, dated May 18, 2011, attached to the Plaintiff's Opposition as Exhibit "F") Mr. Starke testified that he had dispatched a plumber to address the problems indicated in the work order regarding the leaky sink. He did not recall, however, any problems with the toilet or the button to flush the toilet. (See Starke Transcript, dated August 23, 2011, attached to the Plaintiff's Opposition as Exhibit "H") The Plaintiff also submits the EMS report prepared by the Nassau County Police Department emergency medical technician who indicated that Mr. Smith was lying on the soaking wet floor of his cell upon arrival. (See Plaintiff's Opposition Exhibit "I")

The County has a duty to maintain premises "in a reasonably safe condition under the circumstances [but is] not obligated to insure against every injury which may occur". *Smith v. State of New York*, 260 A.D.2d 819, 820 (3d Dept. 1999); see *Preston v. State of New York*, 59 N.Y.2d 997, 998 (1983). "[T]o 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". *Crawford v. AMF*

*Bowling Ctrs.*, 18 A.D.3d 798, 799 (2d Dept. 2005), quoting *Gordon v. American Museum of Natural Hist.*, 67 N.Y.2d 836 (1986). Actual notice may be found where the defendant created the condition, or was in fact aware of its existence prior to the accident. *Lewis v. Metropolitan Transp. Auth.*, 99 A.D.2d 246 (1st Dept. 1984)

The Defendant established its entitlement to summary judgment as a matter of law. The County presented evidence in admissible form establishing that it did not create the condition nor did it have actual or constructive notice of the defective condition prior to the date of the accident. Specifically, the County presented evidence that it responded to complaints of a leaky sink in the Plaintiff's jail cell and completed the repair.

In opposition, the Plaintiff failed to raise an issue of fact. Although a work order was placed regarding the sink, there is no evidence presented, other than the Plaintiff's own testimony, of a defective condition with respect to the toilet. The Plaintiff testified that the toilet did not overflow on any day prior to the date of the accident. While the County does have a duty to maintain the premises in a reasonably safe condition, the defective condition must exist for a sufficient length of time to permit the County to discover and remedy it. In the present case, in light of the Plaintiff's testimony that there were no prior incidents of the toilet overflowing, the County did not have sufficient notice to discover and remedy the problem. The Plaintiff was "required to show by specific factual references that the [D]efendant had knowledge of the allegedly recurring condition". *Green v. City of New York*, 34 A.D.3d 528, 529 (2d Dept. 2006), quoting *Stone v. Long Island Jewish Medical*

*Center*, 302 A.D.2d 376 (2d Dept. 2003). As testified to at his deposition, the Plaintiff did not complain of the toilet overflowing prior to the date of the accident.

Moreover, the Plaintiff testified that he noticed the water on the floor prior to the fall. The defective condition was readily observable, yet the Plaintiff elected to walk on the wet floor which caused him to slip and fall. It is well settled law that the County does not have a duty to warn of a condition that is open and obvious.

In view of the foregoing, the County has established its entitlement to summary judgment dismissing the complaint.

Accordingly, it is hereby

**ORDERED**, that the County's motion, seeking an order pursuant to CPLR § 3212, granting it summary judgment and dismissing the Plaintiff's complaint, is **GRANTED**.

This decision constitutes the decision and order of the Court.

DATED: Mineola, New York  
March 13, 2012

  

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Hon. Randy Sue Marber, J.S.C.  
XXX

**ENTERED**  
MAR 15 2012  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE