SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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WENDI IRELAND, **Part C2**

Plaintiff, **Present:**

HON. THOMAS P. ALIOTTA

-against-

DECISION AND ORDER

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, **Index No. 100466/10**

Defendant. **Motion No. 1973-001**

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The following papers numbered 1 to 5 were marked fully submitted on the 24th day of April, 2012.

	Papers Numbered
Notice of Motion by Defendant for Dismissal of the Complaint, with Supporting Papers and Exhibits (dated August 1, 2011)	1
Affidavit in Opposition to Defendant's Motion, with Supporting Papers and Exhibits (dated February 22, 2012)	2
Reply Affirmation in Further Support of Motion (dated February 28, 2012)	3
Supplemental Affidavit in Opposition to Defendant's Motion (dated March 26, 2012)	4
Supplemental Reply Affirmation in Support of Defendant's Motion (dated April 24, 2012)	5

Upon the foregoing papers, defendant's motion is granted and the complaint is dismissed.

In this personal injury action, plaintiff, an Emergency Medical Technician employed by the Fire Department's Emergency Medical Service, alleges that on July 31, 2009, she slipped and fell on a wet tile on the floor of in the Fleet Maintenance

Facility of the Integrated Facility Building located on the grounds of the Sea View Hospital Rehabilitation Center and Home in Staten Island, New York. Plaintiff alleges that the wetness was caused by the accumulation of condensation from the central air conditioning system located on the roof of said building, which caused interior damage to the hallway and floor of said facility.

On September 11, 2009, plaintiff filed a Notice of Claim (*see* Defendant's Exhibit "A") against the owner of Seaview, defendant New York City's Health and Hospitals Corporation (hereafter "HHC").

In support of the motion to dismiss the complaint for failure to state a cause of action, HHC argues that while plaintiff's action is premised upon a claim of negligent maintenance by HHC, the building where her fall occurred was leased to the New York City Fire Department (hereafter "Fire Department") pursuant to a license agreement dated September 8, 2008 which provided, in relevant part, that the Fire Department could "enter upon, occupy and use for a Fleet Maintenance Facility approximately 10,000 square feet of space in the Integrated Facility Building ... and shall be responsible for the operation, maintenance and repair of the licensed space..." (*see* Defendant's Exhibit "E"). Since, by the terms of the licensing agreement, the Fire Department assumed all responsibility for the maintenance of the area in which plaintiff's injury is alleged to have occurred, defendant argues that any

liability with respect to said claims can only lie against the Fire Department. Accordingly, defendant HHC argues plaintiff's action against it must be dismissed pursuant to CPLR 3211(a)(7).

In opposition, plaintiff initially argues that the motion is defective on its face based solely upon the procedural flaw of naming the City of New York rather than HHC as the defendant. Not only is this claim at variance with the papers presently before the Court, but any claim of confusion that could have arisen therefrom is unsustainable since the body of the affirmation in support of defendant's motion specifically and consistently alludes solely to HHC as the party defendant.

Alternatively, plaintiff contends that a question of fact exists as to whether or not the licensing agreement can be read as conferring upon the Fire Department the sole responsibility for the maintenance of entire facility, including the location of plaintiff's accident. In this regard, while the deposition testimony of the three non-party witnesses employed by the Fire Department's Emergency Medical Service all agreed that the Fire Department maintained and repaired the interior of the Integrated Facility Building, including the air conditioning units and the floor of the hallway where plaintiff purportedly fell (*see* Examinations Before Trial of Chief Roberto Colon, Anthony Coratola and Luis Gutierraz, Plaintiff's Exhibit "3", pp 41-44; Exhibit "5",

pp 18-21 and Exhibit "6", pp 25-26, respectively), Jeanne Policastro, an employee of HHC, testified that while the lease only covers 10,000 square feet of space, the building itself is much larger and includes areas that are not encompassed by the licensing agreement (see Plaintiff's Exhibit "4", pp 66). Additionally, the deposition testimony of Timothy Kelly, the Director of Facilities Operations at Seaview Hospital, indicates that maintenance of the air conditioning unit which allegedly caused the leak cited by plaintiff was the responsibility of defendant's Hospital (*see* Plaintiff's Exhibit "2", p 30).

Accordingly, plaintiff maintains that defendant failed to demonstrate a ground for dismissal under CPLR 3211(a)(7). In any event, at a conference before this Court on February 29,2012, it was determined that the motion should be converted into one for summary judgment pursuant to CPLR 3212 (*see* CPLR 3211[c]), and the parties were granted additional time to submit supplemental papers addressed to that issue. These papers are presently before the Court.

It is well established that a defendant moving for summary judgment in a slip-and-fall case has the burden of establishing, prima facie, that it neither created the alleged hazardous condition or had actual or constructive notice of its existence (*see* Arzu v County of Nassau, 76 AD3d 1036). Moreover, it has been

held that a mere general awareness that a particular hazard may sometimes develop at a given location, is insufficient to constitute constructive notice of the specific condition that allegedly caused plaintiff to fall (*see* Kostic v Ascent Media Group, LLC, 79 AD3d 818).

In support of summary judgment defendant HHC established, through the deposition testimony of numerous employees, that any complaints actually made by Fire Department personnel regarding the air conditioning at the instant facility referred solely to the *temperature* inside the building, and that none of the witnesses deposed had received or lodged any complaint regarding the wetness in the tiled hallway which allegedly caused plaintiff to slip. In fact, according to an affidavit of Timothy Kelly, Seaview's Director of Facilities Operations, the only complaints lodged regarding the air conditioning units at the entire Seaview Hospital complex for the year preceding plaintiff's accident did not pertain to Building 10, the site of her purported fall (*see* Defendant's Exhibit "A" annexed to Defendant's Supplemental Reply Affirmation). Accordingly, defendant has sustained its *prima facie* burden of establishing as a matter of law that it neither created the condition which allegedly caused plaintiff to slip, nor did it have actual or constructive notice of the supposed hazardous condition.

In opposition to the motion, plaintiff relies heavily on her own deposition testimony to the effect that, as a result of a defective air conditioning system, water would run down the walls on the Fleet Maintenance Facility and seep underneath the tile, causing them to become slippery and wet (*see* Plaintiff's Exhibit "1", pp. 21-23). However, plaintiff specifically testified that she did not personally notify anyone about the purported "wetness", claiming, instead, in testimony directly contradicted by her Commanding Officer, Roberto Colon, that the latter was aware of and had written letters to the "Grounds Department" notifying them thereof (*see* Plaintiff's Exhibit "1", pp 23). Critically, in his own deposition testimony, plaintiff's Commanding Officer swore that he had never witnessed any moisture on the hallway tiles, and never received any complaints about "wetness" in the area prior to July 31, 2009, the date of plaintiff's injury (*see* Plaintiff's Exhibit "3", p 25). Thus, in addition to her own self-serving, hearsay testimony on the issue of notice, plaintiff was unable to adduce any non-speculative evidence sufficient to raise a triable issue of fact that the "wetness" claimed to have caused her slip-and-fall was the product of any malfunctioning air conditioning unit, or that HHC, even if responsible for maintenance, had actual or constructive notice of the purported hazard (*see* Larsen v Congregation B'Nai Jeshurun of Staten Is., 29 AD3d 643).

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Accordingly, it is hereby

ORDERED, that defendant's motion to dismiss the complaint, converted pursuant to CPLR 3211(c) into one for summary judgment, is granted, and the complaint is dismissed; and it is further

ORDERED, that the Clerk of the Court enter judgment accordingly.

E N T E R,

/s/
Hon. Thomas P. Aliotta
J.S.C.

Dated: June 25, 2012