Diaz v Harriet Tubman Charter Sch. Jr. Academy
2016 NY Slip Op 30701(U)
March 1, 2016
Supreme Court, Bronx County
Docket Number: 350124/2013
Judge: Sharon A.M. Aarons
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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX - PART IA- 24

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BRANDON DIAZ, an infant by mother and guardian, CYNTHIA DIAZ, individually,

Plaintiff(s),

- against - INDEX NO: 350124/2013

HARRIET TUBMAN CHARTER SCHOOL JUNIOR ACADEMY, DECISION/ORDER

Defendant(s).

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HON. SHARON A.M. AARONS

Defendant's motion for summary judgment is decided as follows:

The infant plaintiff alleges that he slipped and fell on March 27, 2012 at 4:00 p.m. in the stairwell at Harriet Tubman Charter School Junior Academy. Specifically, plaintiff alleges that, as he was descending the stairs to exit the building, he slipped on an oily liquid substance and twisted his ankle, falling on his left side.

Defendant seeks summary judgment on the ground that it lacked actual or constructive notice of the alleged dangerous condition and that there is no evidence in the record to indicate that the defendant created the dangerous condition.

Defendant relies on the deposition testimony of Jonathan Maniotis, the

Director of the School. Mr. Maniotis is responsible for overseeing the day-to-day maintenance of the School's premises. Mr. Maniotis testified that neither he nor any other employee at the School was made aware of the dangerous condition prior to the accident. Further, he testified that the School had a maintenance contract with Spotless, Inc., pursuant to which the latter was responsible for cleaning and maintaining the School's premises at the time of the accident and the activities and schedule of the maintenance workers.

In opposition, plaintiff argues that Mr. Maniotis had no personal knowledge concerning the condition of the subject staircase or its condition at the time it was last inspected.

In reply, defendant submitted the affidavit of Theodore Sealy, the owner and manager of Spotless, Inc. Mr. Sealy's affidavit provides that he had personal knowledge of the cleaning that was performed on the day of the accident. Specifically, he affirmed that he created the cleaning schedule and ensured proper execution of this schedule on a daily basis[1].

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[1]A procedural point: plaintiff contends that the court should not consider the Sealy affidavit because the function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion. This rule, however, is discretionary and courts may consider a claim or evidence offered for the first time in reply where the offering party's adversary responded to the newly presented claim or evidence. See Kennlly v. Mobius Realty Holdings, LLC., 33 AD3d 380 (1st Depart 2006); see also Fiore v. Oakwood Plaza Shopping Center, Inc., 164 AD2d 737 (1st Dept 1991). Here, the plaintiff requested and was granted leave to submit a sur-reply to address the Sealy affidavit. Accordingly, the plaintiff suffered no prejudice. Thus, the affidavit is admissible and will be considered.

The law is clear that a defendant seeking 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 it. A defendant cannot satisfy its burden merely by pointing out putative gaps in plaintiff's case, and instead must submit evidence concerning when the area was last cleaned and inspected prior to the accident. See Sabalza v. Salgado, 85 AD3d 436 - 438, (1st Dept 2011). That is to say, the defendant must have an affirmative showing that it did not create or have notice of the condition.

Here, defendants submitted sufficient evidence concerning when the area was last cleaned. Mr. Sealy, the principal of the maintenance company, affirmed that he created the relevant cleaning schedule. He confirmed that on March 27, 2012, the date of the incident, Spotless workers performed a standard cleaning of the School's premises in accordance with this schedule. Furthermore, Mr. Maniotis testified that he oversees the work to ensure it is executed properly. Based on this evidence, defendant has met its *prima facie* burden of establishing that it neither created the hazardous condition, nor had actual or constructive notice of same.

In opposition, plaintiff, who submitted only an attorney's affirmation, failed to raise a triable issue of fact.

Accordingly, it is hereby ordered that the defendant's motion for summary judgment is granted, and it is further ordered that the complaint is dismissed.

The Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

So ordered.

Dated: March 1, 2016

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Sharon A.M. Aarons, J.S.C.