Jimenez v Roman Catholic Church of the Holy Rosary
2017 NY Slip Op 32227(U)
October 19, 2017
Supreme Court, New York County
Docket Number: 153577/12
Judge: Ellen M. Coin

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 62

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MICHELE JIMENEZ,

Plaintiff,

- against -

ROMAN CATHOLIC CHURCH OF THE HOLY ROSARY and PRINCE CONTRACTING, INC.,

Defendants.

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Index No. 153577/12
Subm. Date: June 7, 2017
Motion Sequence No. 002

DECISION AND ORDER

Appearances:

For Plaintiff:
Pazer, Epstein, Jaffe & Fein, P.C.
By Matthew J. Fein, Esq.
20 Vesey Street
New York, New York 10007
(212) 227-1212

For Defendant Church:
Marulli, Lindenbaum, & Tomaszewski, LLP
By Shari S. Levy, Esq.
5 Hamover Square—4th Floor
New York, New York 10004
(212) 553-3200

For Defendant Prince:
Goldberg Segalla LLP
By Edward V. Schwendemann, Esq.
200 Garden City Plaza, Suite 520
Garden City, New York 11530
(516) 291-9800

Papers considered on the motion and cross-motions:

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ELLEN M. COIN, A.J.S.C.:

Plaintiff Michelle Jimenez brings this personal injury action against the Roman Catholic Church of the Holy Rosary (Church) and Prince Contracting, Inc. (Prince), to recover for injuries suffered as a result of a slip and fall on the steps of the Church-operated Holy Rosary School (School), located at 371 Pleasant Avenue, New York, New York. Plaintiff alleges that Prince

negligently chose a slippery material when it repaired the subject staircase and that the Church was negligent in causing and/or permitting the stairs to remain wet, slippery and without adequate banisters, and in failing to adequately inspect the premises or use suitable mats and/or other devices. In addition, Church and Prince filed cross-claims, each seeking common law indemnification and contribution from the other.

The Church moves for summary judgment dismissing the complaint and Prince's cross-claims. Prince cross-moves for summary judgment dismissing the complaint and all cross-claims against it. Plaintiff also cross-moves to strike the Church's answer and for summary judgment against the Church, based on its alleged spoliation of evidence. In the alternative, plaintiff seeks preclusion of any favorable proof as to the condition of the staircase and an adverse inference charge at the time of trial.

I. Facts and Procedural History

In 2007, shortly before the start of the school year, a deliveryman damaged the front steps inside the School. The front staircase originally had a central handrail, in addition to two side handrails. The School removed the central handrail when the stairs were damaged and did not reinstall it. Suzanne Kaszynski (Kaszynski), the School's principal, hired Prince to replace the steps. Prince did not work on the staircase's top landing, sidewalls or handrails.

Kaszynski instructed Lakhwinder Singh (Singh), Prince's owner, to match the new steps to the old ones as closely as possible. Neither Singh nor Kaszynski could identify the original stone, but Kaszynski believes it was marble. Singh took a chunk of the original steps to a marble shop to match it and showed a sample of the new stone to Kaszynski, who approved it. Prince completed the job before classes resumed. The school's custodian, Jorge Balbuena (Balbuena),

also known as Miguel Ramos, added black, skid resistant strips to the steps about a month later. During his deposition, Balbuena stated that the installation instructions for the strips provided that they be placed half an inch from the lip of each step. According to Balbuena, he replaces the strips as they wear out, using their original placement as a template. The strips were on the steps on the day that plaintiff fell.

In her deposition, Kaszynski stated that prior to plaintiff's fall, she had not received any complaints about the staircase being unsafe and was not aware of any other incidents involving individuals slipping or being injured on the stairs. Balbuena testified that while the new steps were shiny, whereas the pervious steps were not, he did not believe that the new steps were more slippery than the old ones.

On May 4, 2011, plaintiff was working as a crossing guard outside the School. It was raining on and off that day. In deposition plaintiff testified that it had been drizzling in the morning, but that it was not raining when she returned to her post around 1:00 p.m. and that it did not resume raining until 3:00 or 3:30 p.m. She entered the School to use the restroom at 3:40 or 3:42 p.m. Plaintiff did not observe any wetness or slipperiness and had no difficulty getting to the top of the stairs. Approximately three minutes later, as she was making her way back down the stairs, using the same side that she had used on her way up, plaintiff slipped on the fourth step and slid down the remaining steps. She testified that she had her hand on the hand rail, but allegedly could not grip it because "[t]he handrail was too thick for [her] to grab the whole thing." Jimenez dep at 139:24-25. Plaintiff did not observe anything on the steps before starting down, but when she looked back to see what had caused her to slip, she saw water "on all the stairs." *Id.* at 40:8. There were no mats by the entry or on the top landing, and there were no

warning signs present. Plaintiff stated that two parents, Judy Young and Stacey Pizarro (Pizarro), observed her fall.

Pizarro alleges that "[i]t was raining heavily that day & had been for some time." Pizarro aff at 1. With respect to the condition of the subject staircase, she states,

> "the floors inside the outside door & the stairway steps were all wet, as parents coming for their kids tracked in the rain. There was no mat in the entrance area, where one could wipe your feet off. The stairs did not have any gritty strips or pads on their steps. There was no maintenance person there mopping up. There were no warnings posted, such as yellow signs stating 'Wet Floor.'"

Id. at 2.

According to Kaszynski, the School has two dismissal times, one at 2:45 p.m. and another at 4:00 p.m. There is traffic on the steps at both dismissals, as parents arrive to pick up their children. Kaszynski also stated that "[she] remember[ed] it was a heavy rain that day" (Kaszynski dep at 100:25-101:2). On such days, the steps would become wet, "especially at entrance and dismissal, [because] many people would be going up and down the steps," and the steps would become slippery if they were not mopped continuously. *Id.* at 78:11-13. According to Kaszynski, there is always a mat at the top and the bottom of the staircase and, on rainy days, the custodian sets out a warning sign and mops the stairs "on a continual basis." *Id.* at 79:3. Balbuena testified that it was his practice, on rainy days, to set out a "wet floor" sign, to check the steps every twenty minutes, and to dry the steps, as well as the mats, which would become saturated, with a mop. Balbuena stated that he had not mopped the stairs for "an hour or so" before plaintiff's fall, because he was busy with other duties. Balbuena dep at 41:23.

On May 10, 2011, plaintiff went to see Kaszynski to request a statement from the School, confirming that she had fallen while on the job, for a Worker's Compensation claim. Kaszynski asked that plaintiff provide a written statement describing the accident. In the statement, plaintiff wrote, among other things, that "[she] fell down the stairs [because] the floor was wet from the rain." Fein affirmation in support of cross-motion, ex. 1. After plaintiff left, Kaszynski and Balbuena viewed the security footage of the accident, which confirmed that plaintiff fell on the front steps. Kaszynski and Balbuena stated that they only viewed a few minutes of the video, from the time plaintiff entered the building to when she fell. No one other than Kaszynski and Balbuena viewed the footage, which no longer exists.

According to Kaszynski, the security system automatically recorded over old footage every two weeks. She testified that it did not occur to her to preserve the video and that she did not think that the system was set up to do so. Balbuena testified that Kaszynski asked him if there was a way to make a copy of the video, but he did not know of a way. He also testified that he attempted to contact the person who installed the camera system, but could not reach him. Both Kaszynski and Balbuena testified that by the time they tried to look at the footage a second time, it was already gone.

According to Kaszynski, following plaintiff's visit and her review of the security footage, "she wanted some advice as to how to proceed, particularly when there was some report requested [by plaintiff]." Kaszynski dep at 94:18-20. To that end, she contacted Rod Cassidy (Cassidy), the lawyer for the archdiocese. In a typed statement memorializing her interactions with plaintiff and Cassidy, Kaszynski wrote that plaintiff came to see her and that plaintiff "was using a cane and had a brace on one of her arms from wrist to elbow." Fein affirmation in

support of cross-motion, ex. 2. Kaszynski also wrote that "[a]n examination of the school's videotape showed that [plaintiff] did slip and fall down several steps as she had claimed" and that Cassidy advised her "not to give [plaintiff] any report" and to say that she "was prohibited by Archdiocesan policy from giving [plaintiff] an accident report." *Id.* Kaszynski testified that Cassidy did not instruct her to preserve the video.

Plaintiff commenced the instant action against the Church on June 11, 2012. Issue was joined on July 31, 2012 upon the filing of the Church's verified answer. Then, on January 15, 2014, plaintiff commenced an action against Prince, Singh and Metro Contracting N.Y., Inc., entitled *Michelle Jimenez v Prince Contracting, Inc.*, under index No. 150369/2014, in the Supreme Court, New York County. Prince filed its verified answer on May 21, 2014. By decision and order dated November 13, 2014, this court consolidated the two actions. By decision and order dated July 29, 2015, this court severed and dismissed the suit as against Lakhwinder Singh and Metro Contracting N.Y., Inc. Following the consolidation of the two actions, Church and Prince asserted cross-claims against each other, each seeking indemnification and contribution.

In support of its motion, the Church offers the affidavit of Michael Kravitz (Kravitz), a professional engineer, who inspected the premises on August 7, 2015. In his affidavit, Kravitz concludes that: (1) the stairs complied with the Building Code of the City of New York when the School was completed in 1922, and that because the replacement of the marble stairs with marble stairs was not a significant alteration, the building is grandfathered into the provisions of the 1916 Building Code, amended to 1922; (2) while "[t]here were no New York State or City statutory or regulatory requirements governing the diameter or thickness of handrails at the time

of construction . . . the handrails of the stairs [are] of a graspable diameter" (*id.*, ¶ 9); (3) "[t]he measurement of the average Static Coefficient of Friction for the stone tread surface [is] approximately [0.75]," which "is considered safe because the threshold between safe and slippery is [0.5] and higher" (*id.*, ¶ 10); (4) the staircase complies with section 153 (1) (c) of the 1916 Building Code of the City of New York, amended to 1922, which provides that "[t]he treads and landings shall be constructed and maintained in such manner as to prevent persons from slipping thereon," because the static coefficient of friction exceeded 0.50, and, while not required, non-skid strips further reduce the risk of slipping; and (5) "[w]hile the presence of rain water on the steps would reduce surface friction, . . . at the time [plaintiff] was descending the steps, the amount of moisture on the steps would not have reduced the co-efficient of friction to an unsafe level" (*id.*, ¶ 11), because "[t]he minimal pedestrian traffic over the forty minute period between 3:00 p.m. and 3:40 p.m., the time of the accident, could not have created the saturated condition or partially saturated condition on the stairs" necessary to render the stairs slippery. *Id.*, ¶ 12. He, thus, concludes that the stairs "were not dangerous, hazardous, or a trap" and that plaintiff "was not caused to slip because of any dangerous or hazardous condition involving the steps." *Id.*, 14.

In support of its cross-motion for summary judgment, Prince submits the affidavit of Edward J. Zemeck (Zemeck), a licensed professional engineer. Zemeck inspected the staircase on March 17, 2016. In his affidavit, Zemeck concludes that "[t]he stone treads were set solid and firm and checked level along their length" (Zemeck aff, ¶ 5) and that "the stone stair treads . . . were replaced by PRINCE CONTRACTING, INC. in a workmanlike manner that did not appreciably alter the original configuration of the stair." *Id.*, ¶ 8.

In support of her cross-motion, Plaintiff submits the affidavit of William Marletta, a certified safety professional. He inspected the subject staircase on November 13, 2013. After testing the coefficient of friction under dry and wet conditions, Marletta concludes that "the subject steps do not produce adequate slip resistance" when wet, with "the tread reach[ing] an unusually dangerous average of .09 . . . a finding [that] is analogous to the slip resistance finding for ice." *Id.*, ¶ 13. According to Marletta, "[t]hese hard terrazzo polished smooth surfaced treads are known to be safe when dry, but slippery and dangerous when wet and as such, were an inappropriate choice for the tread material for steps." *Id.*, ¶ 12. In addition, he concludes that the skid resistant strips, located three inches from the nosing, were "set back too far from the edge of the step treads to be of any use." *Id.*, ¶ 17. He also states that the School's inspection and maintenance was inadequate to keep the stair free of water, and that the absence of mats, appropriately placed slip resistant strips and warning signs violated good and safe practices.

II. Analysis

A. Plaintiff's Cross-Motion for Spoliation Sanctions

Plaintiff contends that the Church was on notice that the security footage would be relevant to potential future litigation and that its failure to preserve the footage of the accident merits the striking of its answer. In the alternative, plaintiff argues that because the footage was essential to plaintiff's negligence claim, the court should preclude the Church from offering testimony regarding the condition of the stairs, or, at a minimum, preclude Kaszynski and Balbuena's testimony about what they saw on the surveillance video, and provide an adverse inference instruction at trial. The Church counters that, the striking of its answer is a drastic remedy that is inappropriate here because, at the time of its destruction, there was no obligation

to preserve the footage, nor any intention to destroy the tape. It also argues that it should not be precluded from presenting evidence regarding the condition of the steps, because plaintiff is not entirely bereft of evidence to prove her case. In addition, it argues that a negative inference instruction is inappropriate, where, as here, evidence is discarded in good faith, pursuant to standard business practice.

To prevail on a motion seeking sanctions for spoliation, plaintiff must establish that: (1) defendant had a duty to preserve the evidence; (2) "the evidence was destroyed with a 'culpable state of mind'"; and (3) "the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense." *Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547 (2015) (internal quotation marks and citations omitted). "A 'culpable state of mind' for purposes of a spoliation sanction includes ordinary negligence." *VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 45 (1st Dept 2012) (citation omitted). "[T]he negligent erasure of [videotapes] can certainly give rise to the imposition of spoliation sanctions under New York's common-law spoliation doctrine, if the alleged spoliator was on notice [that] the [videotapes] might be needed for future litigation." *Strong v City of New York*, 112 AD3d 15, 22 (1st Dept 2013) (internal quotation marks and citations omitted); *see also Macias v ASAL Realty, LLC*, 2015 NY Slip Op 32684(U), *3 (Sup Ct, Bronx County 2015), *affd* 148 AD3d 622 (1st Dept 2017) (finding spoliation sanctions were appropriate where defendants failed to ensure that a video was not automatically erased, despite being "on notice of a credible probability that it would become involved in future litigation, and consequently, that the video depicting the specific location of plaintiff's fall at the time of the accident might need to be viewed for purposes of that litigation").

The drastic remedy of striking a pleading "is usually not warranted unless the evidence is crucial and the spoliator's conduct evinces some higher degree of culpability," such as bad faith or willfulness. *Russo v BMW of N. Am., LLC*, 82 AD3d 643, 644 (1st Dept 2011); *see also Strong*, 112 AD3d at 24. "Preclusion, also a relatively severe sanction, is appropriate where the defendants destroy[ed] essential physical evidence leaving the plaintiff without appropriate means to confront a claim with incisive evidence." *Strong*, 112 AD3d at 24 (internal quotation marks and citation omitted). "[A] less severe sanction or no sanction is appropriate where the missing evidence does not deprive the moving party of the ability to establish his or her case." *Pennachio v Costco Wholesale Corp.*, 119 AD3d 662, 664 (2d Dept 2014) (internal quotation marks and citation omitted).

Here, the Church was on notice that the video recording of plaintiff's accident might be needed for future litigation. Shortly after her accident, plaintiff, appearing with a cane and a cast, informed Kaszynski that she fell on the School's steps because they were wet. Kaszynski required plaintiff to make a written statement of the accident, reviewed the surveillance footage, which confirmed that plaintiff fell on the School's steps, and then consulted with an attorney about how to proceed. What is more, Kaszynski asked Balbuena if he knew how to save the video and Balbuena attempted to contact the person who installed the camera. This conduct indicates that the Church was on notice that the recording might be needed for future litigation. *See* Macias, 2015 NY Slip Op at *3 (finding defendant building owner on notice that surveillance footage might be needed for future litigation where building's superintendent witnessed plaintiff being taken by emergency services from building, and was informed by plaintiff that plaintiff slipped and fell inside lobby); *see also Pennachio*, 119 AD3d at 664 (while

"plaintiff did not request production of the subject jar until well after commencing the subject action," defendant on notice of potential need for jar in future litigation, as demonstrated by its employee initially marking jar as "evidence" not to be thrown away).

Nonetheless, nothing in the record supports a finding of deliberate destruction of the surveillance video. Kaszynski stated that she did not know of a way to preserve the video or make a copy. Likewise, Balbuena stated that he was unable to contact the individual who had installed the security camera, and that by the time he made another attempt to preserve the footage, it was already gone. However, their failure to act promptly to preserve the video, combined with their knowledge that the video might be necessary to future litigation, is "a sufficient showing that defendant's destruction of the evidence was, at a minimum, negligent." *Macias*, 148 AD3d at 622.

In addition, while the video was relevant to plaintiff's claim, destruction of the video does not leave plaintiff "prejudicially bereft of appropriate means to confront a claim [or a defense] with incisive evidence." *Kirkland v New York City Hous. Auth.*, 236 AD2d 170, 174 (1st Dept 1997). The video could have resolved many factual issues, such as whether mats and signs were set out on the staircase and whether the water was visible and present for a sufficient period to allow the School to discover and remedy it. However, plaintiff is able to testify about the accident and the condition of the staircase. In addition, there were two witnesses present, one of whom has submitted an affidavit describing the accident. As such, plaintiff is not prejudicially bereft of proof.

For the foregoing reasons, the severe sanctions of striking the Church's answer and precluding it from presenting any evidence concerning the condition of the stairs are

inappropriate. *Strong*, 112 AD3d at 24 (declining to strike City's defense or to preclude evidence of defense, where no evidence that erasure of audio recording was willful or in bad faith, and where plaintiff still able to challenge defense through examination of witnesses). However, the Church is precluded from offering testimony concerning what Kaszynski and Balbuena saw on the surveillance video. *See id.* at 24 (finding that "limited preclusion . . . preventing the City from introducing testimony as to the contents of the [destroyed] audio recording, [was] appropriate"). In addition, "to the extent that the deletion of the video may have impaired plaintiff's ability to establish prior notice of a defective condition . . . an adverse inference charge at trial that would permit the jury to infer that relevant evidence against defendant's interest was present on the erased recording" is appropriate. *Macias,* 2015 NY Slip Op at *4; *see also Suazo v Linden Plaza Assoc., L.P.*, 102 AD3d 570, 571 (1st Dept 2013) (adverse inference charge appropriate where defendants on notice of possible litigation but failed to "take active steps to halt the process of automatically recording over . . . old surveillance video").

Therefore, to the extent plaintiff seeks preclusion of testimony concerning what Kaszynski and Balbuena saw on the surveillance video and a negative inference instruction, her cross-motion is granted. The cross-motion is otherwise denied.

B. The Church's Motion for Summary Judgment

The Church contends that it is entitled to summary judgment because the staircase upon which plaintiff fell was not dangerous; the fall was not caused by a hazardous condition on the steps; and even assuming a hazardous condition existed, the Church did not have actual or constructive notice of it. Plaintiff counters that the Church knew that the steps would become wet and slippery on inclement weather days and that there are numerous issues of fact

concerning the dangerous condition of the stairs—including the inherent slipperiness of terrazzo floors when wet; the Church's failure to maintain a safe and dry staircase; its failure to provide mats or signs; and improper installation of slip resistant strips on the steps—which require a denial of summary judgment.

Pursuant to CPLR 3212 (b), "[t]o obtain summary judgment, the movant 'must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.'" *Madeline D'Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, 607 (1st Dept 2012), quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). "A [movant] cannot satisfy its burden merely by pointing out gaps in the [opponent's] case" (*Sabalza v Salgado*, 85 AD3d 436, 437-438 [1st Dept 2011]) or by relying on "[a] conclusory affidavit or an affidavit by an individual without personal knowledge of the facts." *JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 384 (2005) (citations omitted). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." *Alvarez,* 68 NY2d at 324. Once the movant satisfies its burden, the opposing party must "'produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.'" *Madeline D'Anthony Enters., Inc.*, 101 AD3d at 607, quoting *Alvarez*, 68 NY2d at 324. "In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party." *Stukas v Streiter*, 83 AD3d 18, 22 (2d Dept 2011); *see also Henderson v City of New York*, 178 AD2d 129, 130 (1st Dept 1991). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury

functions, not those of a judge . . . on a motion for summary judgment . . . ." *Forrest v Jewish Guild for the Blind,* 3 NY3d 295, 315 (2004) (internal quotation marks and citation omitted).

"A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence." *Briggs v Pick Quick Foods, Inc.*, 103 AD3d 526, 526 (1st Dept 2013), quoting *Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 (1st Dept 2008). To constitute constructive notice, a dangerous condition must be visible and apparent, and must exist for a sufficient length of time to permit the defendant to discover and remedy it. *Gordon v American Museum of Natural History,* 67 NY2d 836, 837 (1986). A defendant can be charged with constructive notice of "an ongoing and recurring dangerous condition [that] existed in the area of the accident which was routinely left unaddressed . . . ." *David v New York City Hous. Auth.*, 284 AD2d 169, 171 (1st Dept 2001) (internal quotation marks and citation omitted).

Here, the Church establishes, prima facie, that the steps were not dangerous. Kravitz states that, based on their static coefficient of friction, the steps were not slippery and that they were in compliance with the Building Code of the City of New York.[1] Moreover, to the extent that plaintiff challenges the appropriateness of marble as a building material for the steps, she "ignores the well-settled principle that absent proof of the reason for plaintiff's fall other than the 'inherently slippery' condition of the floor, no cause of action for negligence can properly be maintained." *Waiters v N. Trust Co. of N.Y.,* 29 AD3d 325, 326-327 (1st Dept 2006) (citation

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1 Kravitz also states that, while not required, "there were non-skid strips placed on the steps, the purpose of which was to further reduce the risk of slipping." Kravitz aff, ¶ 13. The court notes that Kravitz does not state whether such strips actually reduced the risk of slipping and plaintiff's expert concludes that they were improperly installed and ineffective.

omitted) (reversing motion court's finding of "a material issue of fact as to whether the [marble] floor itself, which was installed by defendants . . . , was a dangerous condition"); *see also Santiago v JP Morgan Chase & Co.*, 96 AD3d 642, 644 (1st Dept 2012) (allegation "that the tile floor was generally slippery. . . [would be] insufficient to establish liability"). In addition, there is no evidence that the Church either created, or had actual notice of, the wet condition that caused plaintiff's fall.

However, to the extent that the Church argues that there was no dangerous condition on the steps, it fails to make a prima facie showing. Kravitz opines that "[t]he minimal pedestrian traffic over the forty minute period between 3:00 p.m. [the time plaintiff testified that the rain resumed] and 3:40 p.m., the time of the accident," could not have caused the steps to be "wet enough to create a slippery condition." Kravitz aff, ¶ 12. However, Kravitz does not offer any basis for his conclusions. For example, he fails to explain: why he limits his analysis to a 40-minute window, ignoring the 2:45 p.m. dismissal and the accompanying foot traffic; why he concludes that the foot traffic was minimal; and how he concludes that, on a day of "heavy rain," such foot traffic did not track in sufficient water to create a slippery condition. Kaszynski dep at 100:25. In short, these speculative and conclusory assertions, based on observations made years after the accident, fail to establish, prima facie, the absence of a dangerous condition. *See Duffy v Universal Maintenance Corp.*, 227 AD2d 238, 239 (1st Dept 1996) ("the court properly disregarded as conclusory that part of plaintiff's expert's opinion that was based on observations of the [subject premises] made over four years after the accident"); *see also JMD Holding Corp.*, 4 NY3d at 384.

To establish, prima facie, its lack of constructive notice, the Church relies on Balbuena's testimony that he had mopped the staircase "an hour or so" before plaintiff fell. Balbuena dep at 41:23. In addition, it points to plaintiff's testimony that only a few minutes passed between the time that she ascended and descended the stairs, that she took the same path down the stairs that she had used on her way up, and that she did not think the stairs were slippery and did not observe any water on the stairs until after her fall. The Church argues that "it is likely that plaintiff herself tracked the water onto the stairs and three minutes is certainly not enough time for [the Church] to have discovered the wetness on the stairs and provided a remedy." Levy affirmation in support of motion, ¶ 34.

Viewing the evidence in the light most favorable to plaintiff, the Church fails to demonstrate the absence of constructive notice. First, the Church fails to specify whether Balbuena mopped the staircase after the dismissal at 2:45 p.m., when, according to Kaszynski, on a rainy day, such as the one at issue, the increased foot traffic would cause the stairs to become wet and slippery. *See* Kaszynski dep at 78:2-13, 82:11-14. Moreover, a review of plaintiff's deposition reveals that at no point did she testify that the stairs were dry when she first entered the School, but merely said that she did not look down at the floor and, so, did not observe whether there was water on the stairs. *See* Jimenez dep at 39-40, 136-138, 143; *see also Bartucci-Samuel v Macklowe Properties*, 2008 NY Slip Op 32819(U) (Sup Ct, NY County 2008) (plaintiff's statement, that she did not see water and ice in area of her fall until after her fall, "[did] not establish that the water condition was not present at the time of her fall"). In addition, plaintiff testified that when she looked to see what caused her fall, she saw water "[o]n all the stairs," not just where she had passed. *Id.* at 40:8. Therefore, the Church fails to establish, prima

facie, that it did not have sufficient time to discover and remedy the dangerous condition. *Contra Weiss v Gerard Owners Corp.*, 22 AD3d 406, 406 (1st Dept 2005) (granting summary judgment to defendant where there was "uncontroverted testimony that the floor of the corridor in question had been dry at about 7:30 a.m." and "the record provide[d] no nonspeculative basis to determine whether, and for how long, the water was on the floor before plaintiff walked in, or, alternatively, whether plaintiff himself tracked in the moisture on which he slipped"); *Mehta v Stop & Shop Supermarket Co., LLC*, 129 AD3d 1037, 1038 (2d Dept 2015) (defendant established lack of constructive notice where member of its maintenance crew "averred that he had inspected the area where the plaintiff alleged that she fell approximately 10 to 15 minutes prior to the accident and observed no water in the area at that time").

While the Church correctly points out that a property owner is "not obligated to provide a constant remedy to the problem of water being tracked into a building in rainy weather," its reliance on *Yearwood v Cushman & Wakefield, Inc.* (294 AD2d 568, 568 [2d Dept 2002]), and similar cases, is misplaced. These cases hold that no inference of constructive notice is possible "[i]n the absence of proof as to how long [a] puddle of water was on the floor." *Id.* at 569; *see also Gibbs v Port Auth. of New York*, 17 AD3d 252, 255 (1st Dept 2005) (internal citations omitted) (because "there [was] no proof in the record as to how long the water was on the floor. . . . there [was] no evidence from which a jury could infer that such condition existed for a sufficient period to allow [defendant] or its employees to discover and remedy it"); *Sangiacomo v State of New York*, 2006 NY Slip Op 52362(U), *5 (Ct Cl 2006) (no constructive notice where "the record [was] absolutely bereft of any evidence detailing the length of time water was on the floor . . ."); *Bartucci-Samuel*, 2008 NY Slip Op ("given that . . . there [was] no evidence of how

long [the water and ice] condition existed, no inference [could] be drawn that defendants . . . had constructive notice of a dangerously wet floor"). In the instant case, such proof may have existed, namely, the destroyed surveillance footage. As explained above, a fact finder may draw an adverse inference from its destruction.

The Church's failure to make its "prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." *Alvarez,* 68 NY2d at 324. However, even assuming that the Church met its initial burden, plaintiff raised triable issues of fact with respect to whether the Church had constructive notice of the wet steps. Kaszynski testified that on days of inclement weather, the stairs would become slippery if they were not continuously mopped, particularly around dismissal time. She also testified that there were always mats present at the base and the top of the stairs and that on rainy days, a warning sign would be displayed. In addition, Balbuena testified that he would check the area for water every twenty minutes. Yet, both plaintiff and Pizzaro stated that there were no mats or signs out. In addition, Balbuena stated that he had not mopped the staircase for about an hour before plaintiff's fall. Thus, "there is evidence from which a fact finder may conclude that defendant[] failed to use reasonable care to remedy the particular recurring condition that occurred during inclement weather conditions in the area of plaintiff's fall." *Bartucci-Samuel*, 2008 NY Slip Op (denying summary judgment where there was evidence that on days of inclement weather, water accumulated where plaintiff fell, that on such days, defendants placed mats down, but not in area where plaintiff fell, and that defendants had previously received complaints about the floor being wet and slippery on such days); *see also Santiago*, 96 AD3d at 644 (reversing grant of summary judgment to defendant where "there [were] triable issues of fact as to whether an unremedied recurring dangerous

condition caused plaintiff's injury," because "[t]he record show[ed] . . . that when it was wet outside, the tile floor . . . where plaintiff fell became wet [and] there were no mats or yellow tent signs . . . on the day of plaintiff's accident"); *Signorelli v Great Atl. & Pac. Tea Co., Inc.*, 70 AD3d 439, 439–440 (1st Dept 2010) ("[p]laintiff's statement that the floor was wet and slippery due to a constant rain [was] evidence sufficient to raise a factual question as to whether defendant knew or should have known of the existence of a hazardous condition;" when combined with testimony by defendant's employee "that it was the store's practice to put down mats during inclement weather," plaintiff satisfied burden of demonstrating constructive notice); *Milano v Staten Is. Univ. Hosp.*, 73 AD3d 1141, 1141–1142 (2d Dept 2010) (internal citation omitted) ("the plaintiff submitted sufficient evidence to raise a triable issue of fact as to whether the defendant had constructive notice of the alleged wet condition . . . [where] [t]he record reveal[ed], inter alia, that the defendant was aware that [the area where plaintiff fell would] become wet and dangerous during periods of inclement weather, and the maintenance staff followed a procedure of placing additional mats on the area," but no mats where present when plaintiff fell).

For the foregoing reasons, the Church's motion for summary judgment dismissing the complaint is denied.

C. Prince's Cross-Motion for Summary Judgment

Prince adopts and incorporates the arguments made by the Church on its motion for summary judgment. In addition, it argues that as a contractor that merely replaced the steps at the School's direction, it did not owe plaintiff a duty of care. In addition, Prince argues that, even if a duty existed, plaintiff cannot demonstrate breach or causation. Plaintiff counters that

Prince negligently chose a dangerous material for the steps and thereby launched an instrument of harm. Plaintiff also argues that Prince rushed to complete the job.

In a negligence case, the plaintiff must demonstrate that the defendants owed her a duty of care, that they breached that duty, and that the breach proximately caused her injury. *J.E. v Beth Israel Hosp.*, 295 AD2d 281, 283 (1st Dept 2002). Generally, "a contractor does not owe a duty of care to a noncontracting third party." *Timmins v Tishman Constr. Corp.*, 9 AD3d 62, 66 (1st Dept 2004), citing *Church v Callanan Indus.*, 99 NY2d 104 (2002). However, the Court of Appeals has recognized three exceptions that may give rise to a duty of care to noncontracting third parties:

> "(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launche[s] a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties[;] and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely."

Espinal v Melville Snow Contrs., 98 NY2d 136, 140 (2002) (internal quotation marks and citations omitted). To launch an instrument of harm is to exacerbate or create a dangerous condition. *Id.* at 143.

Here, Prince makes its prima facie showing of entitlement to summary judgment. Prince's expert states that Prince replaced the stair treads in "workmanlike manner that did not appreciably alter the original configuration of the stair." Zemeck aff, ¶ 8. In addition, testimony establishes that Kaczynski instructed Singh to match the marble for the new steps as closely as possible to the old steps and that Singh did so; the School never required Prince to do any remedial work on the steps; and there were no complaints about the new steps being slippery or dangerous. Therefore, Price demonstrates, prima facie, that in replacing the old marble steps

with the new marble steps, it did not exacerbate or create a dangerous condition. *See Zaslow v City of New York*, 124 AD3d 642, 643, 643–44 (2d Dept 2015) (contractor made prima facie showing that it did not "launch[] a force of harm, and thus owed no duty of care to the plaintiff," by demonstrating that before accident it completed its work "in accordance with contract specifications, that the roadway was swept upon completion of its work, and that the [employer] issued a final acceptance of its work. . .").

In opposition, plaintiff fails to raise an issue of fact as to whether Prince launched a force of harm. Plaintiff points to testimony that the new steps were shinier that the previous ones. However, testimony establishes that the School never received any complaints about the new steps being slippery. In addition, Balbuena stated that he did not think the new steps were more slippery than the old ones. Moreover, as explained above, the inherent slipperiness of marble does not give rise to a negligence claim. *See Waiters,* 29 AD3d at 326-327. To the extent that plaintiff argues that Prince rushed to complete the job before school was in session, plaintiff fails to specify how, in so doing, Prince made the steps unsafe. As such, plaintiff's conclusory allegation that Prince chose and installed a slippery material, thus creating or exacerbating a dangerous condition, is insufficient to raise an issue of fact. *See Espinal*, 98 NY2d at 141-142; For the foregoing reasons, Prince's cross-motion for summary judgment dismissing the complaint as against it is granted.

D. Cross-Claims

In its reply, Prince notes that the Church does not oppose its cross-motion for summary judgment dismissing the Church's cross-claims. This is the only time that either Prince or the Church offers any argument regarding the cross-claims.

As Prince's motion for summary judgment dismissing the complaint against it has been granted and as neither defendant opposes dismissal of its cross-claims, both cross-motions are granted to the extent that they seek summary judgment dismissing all cross-claims.

Accordingly, it is hereby

ORDERED that the motion of defendant Roman Catholic Church of the Holy Rosary is granted to the extent it seeks dismissal of cross-claims asserted by defendant Prince Contracting, Inc., and the motion is otherwise denied; and it is further

ORDERED that the cross-motion of defendant Prince Contracting, Inc. is granted, and the complaint and the cross-claims of defendant Roman Catholic Church of the Holy Rosary are dismissed as against Prince Contracting, Inc., with costs and disbursements to defendant Prince Contracting, Inc. as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the action is severed and continued against the remaining defendant; and it is further

ORDERED that the cross-motion of plaintiff Michelle Jimenez is granted to the extent of:

(a) directing that an adverse inference charge be given at trial relative to the missing surveillance video of the staircase on the day of the accident, with the trial judge to determine the precise wording of the jury instruction; and

(b) precluding testimony by witnesses for defendant Roman Catholic Church of the Holy Rosary regarding the content of that surveillance video; and

the motion is otherwise denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: October 19, 2017

ENTER:

Ellen M. Coin, A.J.S.C.