Short Form Order

SUPREME COURT - STATE OF NEW YORK
**I.A.S. PART XXXVI SUFFOLK COUNTY**

**PRESENT:**
**HON. PAUL J. BAISLEY, JR., J.S.C.**

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WENDY E. WILKEN,

Plaintiff,

-against-

EASTPORT-SOUTH MANOR CENTRAL SCHOOL DISTRICT, EVENT NOW KIDS, INC., AND EVENT NOW KIDS, D/B/A CAMP INVENTION,

Defendants.

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**PLAINTIFF'S ATTORNEY**:
The Hudson Group, PLLC
500 North Broadway, Suite 128
Jericho, New York 11753

INDEX NO.: 13572/14
MOTION DATE: 10/12/17
MOTION SEQ. NO.: 001 MG
MOTION SEQ. NO.: 002 MG; CASEDISP

**DEFENDANTS' ATTORNEYS:**
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Upon the following papers numbered 1 to 101 read on these motions for summary judgment: Notice of Motion and supporting papers 1-24; 32-82 ; Answering Affidavits and supporting papers 25-27; 83-88; 89-92; Replying Affidavits and supporting papers 28-31; 93-101 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that the following motions are consolidated solely for the purposes of this determination; and it is further

***ORDERED*** that the unopposed motion (motion sequence no. 001) of defendant Event Now Kids, Inc. and Event Now Kids d/b/a Camp Invention for summary judgment dismissing the complaint and all cross claims against it is granted; and it is further

***ORDERED*** that the motion (motion sequence no. 002) of defendant Eastport-South Manor Central School District for summary judgment dismissing the complaint and all cross claims against it is granted.

Plaintiff commenced this action to recover damages for personal injuries she allegedly sustained on July 16, 2013 when she slipped and fell in the cafeteria area of the Eastport-South Manor Junior/Senior High School owned by defendant Eastport-South Manor Central School

District (hereinafter "School District"). The verified complaint and bill of particulars allege that defendants created a slippery condition by excessively mopping the floor and were negligent in failing to remedy the condition once they had notice of it.

Defendants now move for summary judgment dismissing the complaint against them. Defendant Event Now Kids, Inc. (hereinafter "Event Now") argues that they did not owe a duty of care to plaintiff to maintain the premises in a reasonably safe condition, and that it did not create the alleged dangerous condition that caused plaintiff to slip and fall. Defendant School District argues that it did not create the alleged slippery condition and that it did not have notice of it. In support of its motion, Event Now submits copies of the pleadings, the notice of claim, the bill of particulars, photographs of the accident site, the transcript of plaintiff's testimony at the 50-h hearing, and transcripts of the parties' deposition testimony.

Plaintiff testified that on the date of the incident she went to the high school to pick up her daughter from a day-camp program conducted by Event Now known as Camp Invention. She testified that the weather was clear and dry, that she was wearing flip flops, and that she arrived at the school at approximately 3:00 p.m. She testified that after she signed her daughter out for the day, they walked through the cafeteria towards the exit doors, and she slipped and fell. Plaintiff testified that she did not observe any substances on the floor when she arrived or when she was walking back, and that after she fell, her shorts were a little wet, and she observed two shiny wet patches of clear liquid. She testified that it looked like the spots were in the process of drying. She testified that she did not observe any mops, buckets or water bottles near the area.

Plaintiff further testified that when she picked up her daughter on the day before the incident, she slipped in the cafeteria in front of Ms. Wedlock, who stated "Oh my goodness, the floor is slippery." She testified that Ms. Wedlock works for the School District as a teacher during the school year and runs Camp Invention in the summer. Plaintiff testified that Ms. Wedlock told her that she would "address the custodians." Plaintiff testified that she informed the security guard sitting at the front desk that the floor was slippery, and that she believed it was recently mopped, as the entire floor looked like it was wet, "smooth, even wet." She testified further that another parent had slipped, too. Plaintiff testified that the area where she had slipped the day prior to the incident was not the same area where she slipped and fell on the date of the incident. She testified further that on the date of the incident she intentionally looked down at the floor to make sure there was no liquid on the floor. She testified that when she entered, "I looked down and didn't see anything wet." She testified that she was able to observe the entire length of the floor, and that she did not observe any wetness, debris, objects or mopping supplies.

Christine Wedlock testified that she is a teacher for the School District and works at Dayton Elementary School during the school year and is a camp director for Camp Invention during the summer. She testified that Events Now is a company based in Ohio, and that it provides the curriculum for the science camp, which is a one week program that operates

Monday through Friday from 8:00 a.m. until 3:30 p.m. at the high school. She testified that she obtains permission to conduct the camp from Ron Ryan. Ms. Wedlock testified that the custodians are responsible for mopping and cleaning the cafeteria, and that she believes they clean each night, as the cafeteria is clean when she arrives in the morning. She testified further that the children bring their own lunch and beverages, and that Camp Invention maintains a cooler filled with beverages in case the children run out of their own beverages. She testified that the children are picked up by their parents from the cafeteria between 3:15 p.m. and 3:30 p.m.

Ms. Wedlock testified that she knows plaintiff, and that she asked her to distribute the flyers for Camp Invention as plaintiff is a member of the Parent Teacher Association ("PTA"). She testified that on the day of the incident, she did not observe plaintiff slip and fall but she observed her on the floor holding her wrist. She testified further that she walked through the cafeteria at 3:10 p.m. and did not observe any substances or objects on the floor. Ms. Wedlock was asked about the day prior to the incident and testified that she was not aware that plaintiff slipped on such day. She testified that she created an incident report regarding plaintiff's fall.

Joseph LoPardo testified that he works at the high school as a custodian from 3:30 p.m until 11:30 p.m., which is considered the "night shift," and the day shift is from 7:00 a.m. until 3:30 p.m. LoPardo testified that he and the other custodians regularly empty the garbage pails, dust the furniture, and sweep the floors. He testified that the custodians also mop the floors, but not until all of the camp programs conclude at 9:30 p.m. LoPardo testified that no mopping is conducted during the daytime unless there is a spill that needs to be cleaned. He testified further that the custodial closet is always locked, and that only the custodians have keys to it. LoPardo also testified that on the date of the incident, he arrived at the school at approximately 2:40 p.m., that some time before 3:30 p.m. a security guard called to inform him that there was a spill in the cafeteria, and that he and another custodian, Mike Munoz, responded to the area. He testified that he placed several chairs around the spill, and that Munoz went to the custodial closet to retrieve a mop. He described the spill as staggered droplets of water, and testified that Munoz mopped it up without moving the chairs and wet floor signs were placed at the area. LoPardo testified that he observed a woman sitting in a chair with her leg placed on another chair, but he did not see anyone on the floor and did not observe any EMTs in the area. He testified that he believes the woman was the injured plaintiff.

Barbara Lassen testified that she worked for the school district for 13 years, two of which were spent as a principal of the "alternative high school" and the remainder was at Dayton Elementary School in administration. She testified that in 2013 Camp Invention was held at the high school and Christine Wedlock was the local coordinator. She testified that her son, Chase, attended Camp Invention in 2013 at the high school, and that she saw Ms. Wedlock there each day when she dropped him off and picked him up. Ms. Lassen testified that on the date of the incident, she was exiting the school with Chase at 3:00 p.m. when she heard a commotion. She

testified that she turned to look and observed plaintiff on the floor. She testified that she secured the area, contacted emergency services, called her supervisors and took photographs of the area using her cell phone camera. She testified further that she walked to the custodian's office and brought them to the area.

Ms. Lassen testified that she did not observe any water on the floor before the incident happened, and that she had traversed the subject area five minutes prior to the incident. She testified that after the incident occurred, she observed scattered water marks where plaintiff slipped, and that it was approximately five ounces of water. She testified that the droplets appeared to be fresh, as if "someone dropped a little bit of water on the floor."

It is well settled that a party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067, 416 NYS2d 790 [1979]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980].

To prove a *prima facie* case of negligence, it is fundamental that plaintiff demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see Pulka v Edelman*, 40 NY2d 781, 390 NYS2d 393 [1976]). Generally, premises liability for an injury caused by a dangerous condition is predicated upon ownership, occupancy, control, or special use (*see Rodriguez v 5432-50 Myrtle Ave., LLC*, 148 AD3d 947, 50 NYS2d 99 [2d Dept 2017]; *Russo v Frankels Garden City Realty Co.*, 93 AD3d 708, 940 NYS2d 144 [2d Dept 2012]; *Ellers v Horwitz Family Ltd. Partnership*, 36 AD3d 849, 831 NYS2d 417 [2d Dept 2007]). The existence of one or more of these factors is sufficient to give rise to a duty to exercise due care; absent one of these factors, a party cannot be held liable for injuries caused by a dangerous or defective condition (*Zylberberg v Wagner*, 119 AD3d 675, 990 NYS2d 52 [2d Dept 2014]; *Suero-Sosa v Cardona*, 112 AD3d 706, 977 NYS2d 61 [2d Dept 2013]; *Grover v Mastic Beach Prop. Owners Assn.*, 57 AD3d 729, 869 NYS2d 593 [2d Dept 2008]), unless the party created it (*Micek v Greek Orthodox Church of Our Savior*, 139 AD3d 830, 31 NYS3d 189 [2d Dept 2016]).

Here, Event Now established its *prima facie* entitlement to summary judgment dismissing the complaint by demonstrating that it did not owe plaintiff a duty of care as it did not own, occupy or have a duty to maintain the subject premises, and more significantly, it did not create the allegedly slippery condition (*id.*). Having established its *prima facie* entitlement to summary judgment, the burden shifted to plaintiff to proffer evidence in admissible form sufficient to raise a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595). In opposition, plaintiff submits an affirmation of counsel and a statement by Barbara Lassen.

Counsel argues that Event Now had a duty to supervise the children in the camp, and that such duty required it to maintain the premises in a safe condition. Such argument is unpersuasive as the injured plaintiff was not one of the children who attended the camp, and no claim for negligent supervision is asserted against Event Now in the complaint or the bill of particulars (*see Darrisaw v Strong Mem. Hosp.*, 16 NY3d 729, 917 NYS2d 95 [2011]). Having failed to submit competent proof to raise a triable issue of fact, the motion of Event Now for summary judgment dismissing the complaint against it is granted.

Regarding the motion by Eastport-South Manor Central School District for summary judgment dismissing the complaint against it, the School District argues that it did not create the alleged slippery condition or have notice of it. In support of its motion, the School District submits copies of the pleadings, the notice of claim, the bill of particulars, photographs of the accident site, the transcript of plaintiff's testimony at the 50-h hearing, transcripts of the parties' deposition testimony, an affidavit by Ronald Ryan and a copy of the agreement between Event Now and the School District.

In his affidavit, Ronald Ryan states that he is the plant-facility's administrator for the School District, and that he approved the application by Event Now to use the school facility for the Camp Invention program. He states that the school's custodians do not perform any maintenance or cleaning services in occupied parts of the building and do not provide custodial assistance to outside groups such as Event Now unless the group specifically requests assistance. Ryan referred to the application and permit for the camp, which are submitted with the motion. The agreement requires Event Now to obtain insurance, and states, in pertinent part as follows:

> I assume any and all risk with respect to such access and use, and hereby release the district, its representatives, its agents, servants and employees from liability from any injuries or damages incurred in the course of such access and use resulting from any cause whatsoever which may be sustained.

The liability of a school district is determined by the same principles which govern the liability of private landowners (*Stevens v Central School Dist. No. 1*, 25 AD2d 87, 270 NYS2d 23 [2d Dept 1966]). A landowner who holds its property open to the public has a nondelegable duty to maintain the property in a reasonably safe condition to prevent the occurrence of foreseeable injuries (*see Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 429 NYS2d 606 [1980]; *Basso v Miller*, 40 NY2d 233, 386 NYS2d 564 [1976]). However, a landowner is not an insurer of the safety of others using its property (*see Maheshwari v City of New York*, 2 NY3d 288,778 NYS2d 442 [2004]), and may only be liable if it created the condition which caused the injury or had actual or constructive notice of its existence (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 501 NYS2d 646 [1986]). To provide 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" (*Id* at 837).

A defendant who moves for summary judgment in a slip and fall case has the initial burden of making a *prima facie* showing that it neither created the dangerous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (*see Mercedes v City of New York*, 107 AD3d 767, 968 NYS2d 519 [2d Dept 2013]). Here, the School District established its *prima facie* entitlement to summary judgment through the parties' deposition testimony, which demonstrates that the School District did not create the alleged slippery condition and did not have constructive notice of it (*Adamson v Radford Mgt. Assoc., LLC*, 151 AD3d 913, 58 NYS3d 100 [2d Dept 2017]; *Robustelli v Westchester Towers Owners Corp.*, 128 AD3d 938, 8 NYS3d 590 [2d Dept 2015]). Plaintiff testified that she did not observe any water droplets on the floor when she traversed the area five minutes prior to the incident, and that she did not see any mopping supplies in the area at either time she traversed the area. Both Wedlock and Lassen also testified that they did not observe any water in the area. Therefore, there is no basis to infer that the School District had constructive notice of the alleged slippery condition (*Valentin v Shoprite of Chester*, 105 AD3d 1036, 965 NYS2d 510 [2d Dept 2013]).

In opposition, plaintiff submits an affirmation by her counsel and an illegible, unsworn statement by Barbara Lassen. Counsel's argument that defendant created the wet floor condition by inadequately mopping the floor prior to plaintiff's accident is based on mere speculation and conjecture and is insufficient to raise a triable issue of fact (*Seung Chul Na v JP Morgan Chase & Co.*, 123 AD3d 903, 1 NYS3d 125 [2d Dept 2014]; *cf. Simion v Franklin Ctr. for Rehabilitation & Nursing, Inc.*, 157 AD3d 738, 69 NYS3d 64 [2d Dept 2018]). In *Simion*, circumstantial evidence established an inference of causation and rendered other possible causes sufficiently remote. Thus, logical inferences were provided by the evidence and not upon speculation. Here, counsel's argument is not supported by any facts as there is no evidence indicating that the water spots were created by mopping.

To defend a motion for summary judgment, a party opposing such motion must lay bare his or her evidentiary proof in admissible form (*see Zuckerman v City of New York, supra*; *Marine Midland Bank v Cafferty*, 174 AD2d 932, 571 NYS2d 628 [3d Dept 1991]). Conclusory allegations are insufficient to defeat the motion (*see Friends of Animals, Inc. v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790; *Burns v City of Poughkeepsie*, 293 AD2d 435, 739 NYS2d 458 [2d Dept 2002]). Furthermore, it is well settled that an affirmation of an attorney who lacks personal knowledge of the facts has no probative value (*see Cullin v Spiess*, 122 AD3d 792, 997 NYS2d 460 [2d Dept 2014]).

Counsel further attempts to raise a triable issue of fact by arguing that the camp conducted water activities with the children and the slippery condition was caused by such activities. However, the record does not support that claim. Moreover, this newly raised theory of liability is not alleged in the complaint or in the bill of particulars (*see Rumyacheva v City of New York*, 36 AD3d 790, 828 NYS2d 223 [2d Dept 2007]), and raises a feigned factual issue,

which is insufficient to show the existence of a triable issue of fact (*see Capasso v Capasso*, 84 AD3d 997, 923 NYS2d 199 [2d Dept 2011]; *Denicola v Costello*, 44 AD3d 990, 844 NYS2d 438 [2d Dept 2007]). A motion for summary judgment cannot be opposed by asserting new theories of liability for the first time in opposition to the motion (*id*).

Finally, counsel's untimely argument that there is alleged video footage of the incident that he has not received is insufficient to defeat defendants' motions. Plaintiff did not move to vacate the note of issue within 20 days of its service pursuant to 22 NYCRR 202.21(e), nor did plaintiff make a motion pursuant to 22 NYCRR §202.21 (d) for permission to conduct post-note of issue discovery, the only two methods available to a party who seeks to obtain disclosure after the filing of a note of issue (*see Singh v Finneran*, 100 AD3d 735, 953 NYS2d 683 [2d Dept 2012]; *Tirado v Miller*, 75 AD3d 153, 156, 901 NYS2d 358 [2d Dept 2010]).

Accordingly, the motion by defendant Eastport-South Manor Central School District for summary judgment dismissing the complaint against it is granted.

Dated: July 3, 2018

HON. PAUL J. BAISLEY, JR.

J.S.C.