SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
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MARY KAY RIVERA and ELADIO RIVERA,,

Plaintiff,

DECISION AND ORDER
(Motion # 1)

-against-

Index No.: 034396/2017

THE ROMAN CATHOLIC ARCHDIOCES OF NEW YORK, THE ROMAN CATHOLIC CHURCH OF ST. GREGORY BARBARIGO and ST. GREGORY BARBARIGO SCHOOL,

Defendants.
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Sherri L. Eisenpress, A.J.S.C.

The following papers, numbered 1 to 6, were considered in connection with Defendants The Roman Catholic Archdioces of New York, The Roman Catholic Church of St. Gregory Barbarigo and St. Greogory Barbarigo School'S (hereinafter "Defendants") Notice of Motion for an Order, pursuant to *Civil Practice Law and Rules* § 3212, granting summary judgment in their favor, dismissing the action, along with such other and further relief as this Court shall deem proper:

PAPERS[1]	**NUMBERED**
NOTICE OF MOTION/AFFIRMATION IN SUPPORT/AFFIDAVIT OF DANIEL SULLIVAN/EXHIBITS A-G	1-3
AFFIRMATION IN OPPOSITION/EXHIBITS 1-4	4
AFFIRMATION IN REPLY/AFFIDAVIT OF THOMAS HAMILTON	5-6

Upon the foregoing papers, the Court now rules as follows:

This personal injury action was commenced by Plaintiffs with the filing of the Summons and Complaint on September 11, 2017. Issue was joined with the service of an

[1]Plaintiffs filed a letter requesting that their already filed sur-reply be permitted. Defendants filed a letter expressing their objection to a sur-reply on the ground that Plaintiffs have failed to demonstrate "exceptional circumstances sufficient to support the application. The Court agrees that exceptional circumstances have not been shown and so the sur-reply has not been considered.

Answer on April 3, 2018. Discovery proceeded and a Note of Issue was filed on May 24, 2019.

Plaintiffs allege that on September 19, 2014, Mary Kay Rivera was caused to slip and fall due to the presence of water on the floor of the gymnasium in the St. Gregory Barbarigo School located in Garnerville, New York. On the day of her accident, Plaintiff and her husband drove to the St. Gregory Barbarigo School, where their granddaughter attended, in order to attend a "Family Bingo Night" fundraiser sponsored by the Home and School Association. She arrived at the school at approximately 6:30 p.m. There were approximately 60-70 people in attendance that evening and the room was brightly lit. Plaintiff's daughter in law, Nicole Dunn, testified that throughout the evening, four or five seven and eighth grade children wheeled a two-tiered refreshment cart from which cans of soda and bottle water were distributed to the room. Ms. Dunn asserted that the manner in which the children were operating the refreshment cart "was the subject of more than one parental/adult complaint during the evening."

Near the conclusion of the evening, Plaintiff gathered the empty plates from the table and intended to place them in the trash can located to the left of the stage and in the vicinity of the door to the kitchen. When she was approximately one foot from the trash can she felt her right foot slip and she fell immediately to the floor. Once on the floor, Plaintiff testified that she realized she was in "a big puddle" of water, which extended under the legs of the table which was set up under the window to the kitchen. When asked what caused the puddle, Mrs. Rivera testified that she "presumed" the puddle was caused by water which somehow spilled off a grey refreshment cart located nearby on the floor. Plaintiff has no knowledge of how long a period of time the water was on the floor before her accident took place. After the accident, and when she was being lifted to her feet, Mrs. Rivera first saw a mop being used to mop up the puddle.

Defendants filed the instant Notice of Motion seeking an Order granting summary judgment, and argue that based upon the sworn testimony of the parties and non-parties, there

is no indication that the puddle condition was in existence for a sufficiently long period of time to allow the Defendants to discover and remove the puddle before the accident occurred. As such, they contend that they did not have actual or constructive notice of the condition before the happening of the event and they are therefore entitled to summary judgment and dismissal of the action.

In support of their motion, Defendants submit an affidavit from Daniel Sullivan, a parishioner at the church, who is active in various social aspects of the parish and school. He attests that on the evening of Plaintiff's accident, he was present as one of the volunteers who assisted in running the "Family Bingo Night" fundraiser. He states that the event began in the evening at 7:00 p.m. and lasted to approximately 9 p.m. Mr. Sullivan further states that the kitchen was being used by volunteers and refreshments were served to patrons in sealed plastic water bottles and soda cans. There were trash cans provided on the gym floor including near the kitchen door.

Mr. Sullivan avers that during the event, he monitored the room and inspected the floor to see that no liquids were spilled and that no damage was caused to the floor. He states that he inspected the floor before the event began, at which time he verified that there was no debris and no water or other liquid on the floor. During the course of the event that evening, Mr. Sullivan states that he walked around the gym numerous times and inspected the floor and did not see any spills of liquid on the floor. He claims he inspected the area where plaintiff claimed to have fallen many times before he learned of her accident. Mr. Sullivan states that although he was not an eye-witness to Plaintiff's fall at about 8:30 p.m., after the accident her saw her sitting on the gym floor in the area near the door to the kitchen, and observed what appeared to be water on the floor in the area where she was seated. He states that he had not seen the water before and does not know how the water came to be on the floor. After her accident, the wood floor was mopped to remove the water.

In opposition to the motion, Plaintiff argues that there are triable issues of fact

as to whether defendants created the dangerous condition on the gymnasium floor or whether they had notice of the condition. With respect to the claim that Defendants created the condition, Plaintiff submits Defendant's accident report which was authored by Thomas Hamilton, the principal of the St. Gregory Barbarigo school on the date of the accident. Where it states "Briefly Describe Accident," the accident report contains the following description: "floor was wet because children mopped up after they had spilled soda. Grandmother slipped & fell." Plaintiffs allege that the water condition which caused her to slip and fall was "created by the students helping at the event who were-more or less-under the supervision of the principal and the adult school volunteers." In support of this contention, they rely upon the case of Weingrad v. Aguilar Gardens, 227 A.D.2d 546, 642 N.Y.S.2d 965 (2d Dept. 1996) which held that there existed triable issues of fact sufficient to defeat the managing agent's summary judgment motion where the porter who was charged with having been negligent was directly supervised by the managing agent.

In Reply, Defendants submit the affidavit of Thomas Hamilton, the former principal of the school and author of the accident report. He avers that he was present at the school that evening and did not observe any water or liquid on the gymnasium. At some point after the event was underway, he did not remain in the gym and went to his office in the school. While he was in the office, he was advised that an accident had taken place and so he returned to the gym. Mr. Hamilton states that he was told that Plaintiff slipped and fell due to water on the gym floor. He further attests that he did not witness Plaintiff's accident and has no first-hand knowledge or information concerning how the accident took place.

Mr. Hamilton asserts that although he wrote the portion of the accident report entitled "Briefly Describe Accident," it was based upon information told to him by a person or persons he does not recall; he has no knowledge concerning the accuracy of the information and does not know if the information imparted to him was from an eye- witness to the accident. Defendants argue that Plaintiff has failed to raise a triable issue of fact as the accident report

itself, and/or the description of the accident contained in the accident report, constitute inadmissible hearsay.

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v. Citibank Corp., *et al*., 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003), citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v. Gonzalez, 306 A.D.2d 250, 760 N.Y.S.2d 533 (2d Dept. 2003). However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124, 711 N.Y.S.2d 131 (2000), citing Alvarez, supra, and Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 508 N.Y.S.2d 923 (1985). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. Jacobsen v. New York City Health and Hospitals Corp., 22 N.Y.3d 824, 833, 988 N.Y.S.2d 86 (2014).

"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 hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it." Mantzoutsos v. 150 Street Produce Corp., 76 A.D.3d 549, 907 N.Y.S.2d 34 (2d Dept. 2010); Austin v. Town of Southampton, 113 A.D.3d 711, 712, 979 N.Y.S.2d 127 (2d Dept. 2014); Walsh v. Super Value, Inc., 76 A.D.3d 371, 375, 904 N.Y.S.2d 121 (2d Dept. 2010). To meet its prima facie burden on the lack of constructive notice, defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when plaintiff fell. Rong Wen Wu v. Arniotes, 149 A.D.3d 786, 787, 50 N.Y.S.3d 563 (2d Dept. 2017). In Perlongo v. Park City 3 & 4 Apartments, Inc., 31 A.D.3d 409, 816 N.Y.S.2 d

158 (2d Dept. 2006), the Court held that defendants established their entitlement to judgment as a matter of law by submitted proof that the length of time for which the accumulation or water existed was unknown.

Defendants have met their prima facie burden upon summary judgment. They have demonstrated the lack of actual and constructive notice by virtue of the affidavit of Daniel Sullivan, who helped set up and repeatedly inspected the gymnasium floor throughout the event but who observed no liquid on the ground. As such, defendants have established that the water was present on the floor for an unknown length of time. Moreover, Plaintiff did not see the water before the accident, and could not testify as to how long it was present.

In opposition to Defendants' prima facie showing, Plaintiffs have failed to demonstrate a triable issue of fact. With respect to Plaintiff's claim that the puddle was caused as a result of children mopping up a spilled can of soda, no admissible evidence has been submitted to support such a claim, assuming this Court accepted Plaintiffs' proposition that the school and diocese could be liable for the actions of children at a volunteer event. While this Court finds that the accident report itself is admissible under the business records exception pursuant to CPLR Sec. 4518, the inquiry does not end there. Even if the document may be considered under the business records exception to the hearsay rule, the statements contained in the report are admissible only if both the report and the statements fall within recognized exceptions to the hearsay rule.

In a case analogous to the matter at bar, Acevedo v. Williams Scotsman, Inc., 116 A.D.3d 416, 983 N.Y.S.2d 505 (1st Dept. 2014), the court held that an accident report attributing an employee's slip and fall accident to a damaged septic tank constituted inadmissible hearsay, as the source of the statement had no personal knowledge of the problem. See also Lessoff v. 26 Court Street Associates, LLC, 58 A.D.3d 6110, 872 N.Y.S.2d 144 (2d Dept. 2009)(date of accident contained in physician's report constituted inadmissible hearsay since the source of that information was unknown.)

Here, the description of the accident contained in the accident report constitutes inadmissible hearsay, as Mr. Hamilton did not witness the accident, does not recall the source of the information and does not know if the source's information was first-hand. While hearsay statements may be offered in opposition to a motion for summary judgment, such evidence alone is not sufficient to defeat the motion. Guanopatin v. Flushing Acquisition Holdings, LLC, 127 A.D.3d 812, 813, 7 N.Y.S.3d 322 (2d Dept. 2015); Feinberg v. Sanz, 115 A.D.3d 705, 982 N.Y.S.2d 133 (2d Dept. 2014); Sprotte v. Fahey, 95 A.D.3d 1103, 944 N.Y.S.2d 612 (2d Dept. 2012). In the instant matter, Plaintiffs solely rely on an inadmissible hearsay portion of the accident report to demonstrate a triable issue of fact as to whether Defendants created the defective condition and/or had constructive notice of same. This is insufficient to defeat summary judgment and Defendants are therefore entitled to dismissal of the Complaint.

Accordingly, it is hereby

ORDERED that the Notice of Motion filed by Defendants The roman Chatholic Archdiocese of New York, The Roman Catholic Church of St. Gregory Barbarigo and St. Gregory Barbarigo School is GRANTED in its entirety; and it is further

ORDERED that Plaintiff's Complaint is dismissed.

The foregoing constitutes the Decision and Order of this Court on Motion #1.

Dated: New City, New York
December 19, 2019

HON. SHERRI L. EISENPRESS
Acting Justice of the Supreme Court

TO: (all parties via NYSCEF)