| **Gorley v County of Westchester** |
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| 2020 NY Slip Op 34900(U) |
| May 14, 2020 |
| Supreme Court, Westchester County |
| Docket Number: 60919/2018 |
| Judge: Joan B. Lefkowitz |
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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SHERINE GORLEY,

Plaintiff,

Index No. 60919/2018

-against-

DECISION and ORDER
Motion Sequence No. 1

COUNTY OF WESTCHESTER, WESTCHESTER COUNTY DEPARTMENT OF CORRECTION,

Defendants.

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LEFKOWITZ, J.:

The following papers were considered on the motion by defendant County of Westchester pursuant to CPLR 3212 for summary judgment dismissing the complaint:

| Papers | Numbered |
|---|---|
| Notice of Motion, Affirmation, Exhibits A - L | 1 |
| Affirmation in Opposition, Exhibits A - I | 2 |
| Reply Affirmation | 3 |

In plaintiff's complaint, she asserts that on June 26, 2017 at approximately 12:30 p.m., while she was an inmate at the Westchester County Jail, she was caused to slip and fall on a slippery clear liquid near the garbage can on the floor of the dayroom of F Block in the women's section of the jail. She contends that defendant negligently allowed the liquid to remain for an extended period of time, and failed to warn or alert inmates to the presence of the liquid.

In moving for summary judgment, defendant County contends that, as a matter of law, it did not create the condition or have prior actual or constructive notice of liquid on the floor of the dayroom prior to plaintiff's fall, or sufficient time to discover and remedy any such condition

that may have developed in advance of plaintiff's accident. It relies on deposition testimony and an affidavit by Correction Officer Jessica Carducci, who was on duty at the F Block dayroom at the time of plaintiff's accident; it also submits inmate statements, a video recording of the accident, an incident report and the log book entry for that time.

In her affidavit, Correction Officer Carducci explained that

> "Lunch is served after 12:00 p.m. The trustees hand people their trays and I supervise it. After lunch, the trustees, take all the trays out of the dayroom, they take out the garbage that was there and replace the garbage bag. The beverage served in the dayroom is usually juice. The juice is usually in a jug. The water jug is by the microwave. The water jug is large and orange with handles at the top on the sides. . . . Prior to June 26, 2017, I had never seen any spills as it relates to garbage in the dayroom. Prior to that day, I had never seen an inmate miss the garbage and spill either food or liquid on the floor. The policy or procedure in June 2017 if a spill by the garbage occurred is that I would be alerted to the spill and immediately the trustee would grab the cleaning supplies, clean it up and put a wet floor sign down."
>
> "On the date of the incident, I was in the dayroom during the initial lunch handout for a few minutes and then I went back into the bubble/office. Prior to plaintiff's accident, I re-entered the dayroom approximately five minutes before that to create a recreational list for inmates that wanted to go outside. I was standing in the doorway. I was standing right next to the garbage area and would have seen something if it was on the floor. I saw nothing there, as I was looking in the area. If there was a spill, I would have seen it."
>
> "On the day of the incident, plaintiff had on flip flops. Immediately prior to her fall, I observed something fly by and heard a sound, so I went to investigate it. I also heard a thud. I opened the door to the dayroom and saw [plaintiff] on the floor. . . .The garbage was knocked over and there were no food or other items on the floor. I did not observe any water or juice on the floor. I initiated a code signal 3, which is a medical call. Pursuant to policy, I subsequently wrote a special report I gave the report to Sgt. Azim. I also filled out an injury report, and collected three inmate statements regarding the incident."
>
> "At no time prior to the time of plaintiff's fall, did I receive any notification of any water or other liquid being on the floor at or near the garbage."

In opposition, plaintiff relies on her own testimony at the 50-h hearing, her affidavit, a

Department of Corrections policies and procedures manual regarding sanitation at the jail, and parts of Officer Carducci's testimony. Plaintiff testified at the hearing that she had been sitting in the dayroom after eating her lunch, watching television, when she was called for recreation by the Correction Officer, who was standing by the door. She stood up and walked with her tray to the garbage can next to the door, but slipped and fell before she was able to dump the trash from her tray. The first time she noticed the liquid that caused her fall was after she fell on it, and that the liquid looked clear in color. Plaintiff asserted both in her testimony and in her affidavit that inmates would discard liquids along with solid trash into the garbage can in the dayroom next to where her fall occurred, since there is no sink or drain available there for disposing of liquids.

She observes that the video footage on which defendant relies displays several inmates throwing liquid waste into the garbage during the period of time before her accident. However, she does not suggest that any footage shows liquid waste intended for the garbage can landing on the floor instead. Nevertheless, she contends that the Correction Officer on duty should have seen the slippery liquid on the floor prior to her fall and taken steps to remedy it or warn inmates not to walk in the area; she further contends that the County had an obligation to place something under the garbage to soak up potential spills

Plaintiff also points to the testimony of Officer Carducci, where she explained that inmate trustees perform the necessary cleanup, but that there is no formal training process for inmate trustees. Officer Carducci testified that the inmate trustees would mop the Day Room after breakfast, but not after lunch. She also testified that the correction officers sometimes place a newspaper or a tray under the water jug to protect against water spilling on the floor, but

they do not place anything near or under the garbage to catch liquids spilled near the garbage. Officer Carducci also stated during her testimony that there was no system in place for inspecting the area around the subject garbage despite the fact that inmates dumped liquids into the garbage every day.

Applicable provisions of the Westchester County Department of Correction Policy and Procedure manual submitted by plaintiff include the following:

> "Correction Officers shall ensure that the housing unit inmate workers clean the common areas. The dayrooms shall be swept and mopped daily with a detergent cleanser. All floors located in common areas of the housing unit shall be swept and mopped at least three (3) times a day (at the completion of each inmate meal)."
>
> "All floors shall be maintained in a clean and, so far as practicable, in a dry condition, free of recognized hazards. While floors are in the process of being mopped, dry areas shall be provided for safe routes of travel whenever possible. Caution signs shall be appropriately placed to indicate areas where floors are being mopped or where the floor poses a potential hazard."
>
> "The dayroom trash shall be emptied after every meal and more often as needed."
>
> "All garbage shall be removed from the housing unit areas at least three times a day (after each meal) and disposed of by placing it into the appropriate garbage receptacle."
>
> "All garbage located throughout the common areas of the facility shall be disposed of at least two times a day by the Designated Officer(s)."

Finally, plaintiff testified that there were four cameras in the Day Room of F Block where her accident happened - one in each corner of the room. She protests that defendants have only produced video footage from two of these cameras, only one of which shows the subject fall from a distance. She complains that footage from the corner nearest to where the incident occurred has not been turned over by defendants, and suggests that based on this failure,

an inference should be drawn against the County, and summary judgment should be denied on that basis as well.

Discussion

The mere occurrence of the accident does not establish liability on the part of the defendant (*see Lewis v Metropolitan Transportation Auth.*, 64 N.Y.2d 670 [1984]). Nor is evidence that the floor may have been wet at the time of plaintiff's accident sufficient to establish liability for a dangerous condition (*see Patrick v Chos Fruit & Vegetables*, 248 A.D.2d 692 (2d Dept 1998). To hold a property owner liable for an alleged dangerous condition, that owner must have created the condition, or had actual or constructive notice of the condition (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). To constitute constructive notice, a condition 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.*).

"A defendant owner 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" (*Crapanzano v Balkon Realty Co.*, 68 AD3d 1042, 1042-1043 [2d Dept 2009]). In the *Crapanzano* case, the property owner made the requisite prima facie showing with evidence that "[t]he assistant superintendent of the building inspected the staircase on a regular basis, and he did not see any liquid on the staircase or receive any complaints about the condition of the staircase prior to the accident" (*id.* at 1043]).

Similarly, here, the evidence submitted by the County makes a prima facie showing that

it did not create or receive actual notice of spilled liquid on the floor of the dayroom on the date of the incident. Nor was it in possession of information giving it constructive notice of the presence of a slipping hazard at that location or in the vicinity. Moreover, even accepting that there was spilled liquid on the floor at the time of plaintiff's fall, the video and the County's other evidence demonstrates that it could only have appeared there moments before plaintiff's fall. As a matter of law, there would not have been a sufficient amount of time for defendant to discover and remedy that alleged condition prior to the accident.

Plaintiff's argument that regardless of whether it had sufficient notice of the particular spill that caused her accident, defendant failed to comply with its own rules regarding cleanup, and that defendant had an obligation to take affirmative steps to prevent spilled liquid near the garbage can from creating a slipping hazard, must also fail. While a chronic recurring dangerous condition may establish constructive notice upon which to predicate liability (*see Diaz v Parsons Props.*, 309 AD2d 892 [2d Dept 2003]), plaintiff's evidence that inmates would throw liquids into the garbage does not in itself establish a basis for a finding of constructive notice, since that evidence did not establish a chronic recurring problem with spilled liquids next to the dayroom garbage can. Similarly, in the absence of a chronic recurring problem of liquids spilling on the floor instead of into the garbage can, defendant was under no duty to place something under the garbage to soak up any possible spills. It is noteworthy that plaintiff testified that she never made any complaints to the County about water being found on the floor in the area of the garbage at any time prior to her fall.

Nor is a basis for liability established by a failure to comply with defendants own policies and procedures for cleaning up. Since plaintiff testified that the inmates had breakfast in their

cells rather than in the dayroom on the date of the incident, there is no need to consider whether there was compliance with standard procedures regard to cleanup after breakfast. Moreover, since the video establishes that lunch was still in progress at the time of plaintiff's accident, the required processes for cleaning up after lunch were not yet applicable at the time of plaintiff's fall.

As to plaintiff's complaint that footage from the corner nearest to where the incident occurred was not turned over by defendants, and that the failure justifies an inference against defendant, defendant explains the video it turned over clearly shows the events leading up to plaintiff's accident, and the other videos did not show anything different. Moreover, defendant points out that the note of issue filed by plaintiff specifies that all discovery has been exchanged. Therefore, plaintiff may now be heard to complain of missing evidence or to seek an adverse inference.

Based on the foregoing, it is hereby

ORDERED that the motion to dismiss the complaint is granted .

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
May 14, 2020

HON. JOAN B. LEFKOWITZ, J.S.C.

To: Counsel via NYSCEF