

<b>Heisler v County of Westchester</b>
2020 NY Slip Op 34904(U)
March 4, 2020
Supreme Court, Westchester County
Docket Number: 63324/2018
Judge: Charles D. Wood
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To commence the statutory time period 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**

-----X  
**STEVEN HEISLER,**

**Plaintiff,**

**-against-**

**DECISION & ORDER  
Index No. 63324/2018  
Sequence No. 1**

**COUNTY OF WESTCHESTER,**

**Defendant.**  
-----X

**WOOD, J.**

New York State Courts Electronic Filing (“NYSCEF”) Documents Numbers 19-37, were read in connection with defendant County of Westchester’s (“the County”) motion for summary judgment.

Plaintiff allegedly was injured when he slipped and fell while exiting a bathroom in the Westchester County Center.

Based upon the forgoing, the motion is decided as follows:

On or about April 5, 2018, plaintiff, served upon the County a notice of claim in connection with his slip and fall on February 13, 2018, on a wet floor in the men’s bathroom located in the basement of the County Center. Since June 2011, plaintiff is a Code Enforcement Officer for the Town of Eastchester, who is responsible to handle complaints relating to building violations to enforce the codes. He was at the County Center for a continuing education course given by the New York State Building Official’s Conference for his

certification. Shortly before lunch, he slipped on his second visit to the restroom that day. His first visit to the restroom was earlier in the morning at approximately 9-9:30am. He testified at his deposition that on his first visit to the men's bathroom he thought there was a little bit of water on the floor. He claims that the second time that he went to the men's bathroom, at approximately 11:30 A.M. he was not looking at the floor, and there was one other person in the bathroom at the time. When he went to the urinal his shoes were squeaking. He had finished going to the bathroom, and was almost in front of the door, opposite the urinals, when his right foot slipped and he fell. Plaintiff testified that:

Q. You were telling me your process.

A. Yeah. I finished using the restroom. I washed my hands, and I turned around and as I was walking out and approaching the door, my right door slipped out from under me and I fell..... (NYSCEF Doc No. 25, at p. 28)

He went up approximately 35 stairs up from the basement to complain to building staff, he reported the incident to the County to a woman upstairs, and he told her that there was a witness who did not see him fall, but heard the fall. He was taken by ambulance to White Plains Hospital and was discharged after two hours, there were no fractures or breaks diagnosed at the hospital. At the time of his fall, plaintiff had Chronic Fatigue Syndrome and a bit of depression and anxiety. He also has a stigmatism, which can make things blurry. Two months prior to the fall, plaintiff had surgery in December 2017 for cervical disc replacement.

County Employee Sonie Oates testified that he is the Events Supervisor at the County Center for half of the season, from the end of September to May 25<sup>th</sup>. He was present on the day of accident. He supervised an employee named Ronnie, who had the job of managing the restroom. Oates testified that every 15-20 minutes he would go downstairs and check the facility's bathrooms, which he observed to be fine and clean. There are no logs of this

inspection. There were no issues with leakage in the men's bathroom. Nothing was malfunctioning. In fact, immediately after plaintiff's reported fall, Oates went to the bathroom and observed a lot of men in the bathroom, but did not notice a puddle of water. He testified that there could have been some water on the floor from men washing their hands, but he did not notice that.

Lawrence Vitarello testified that he is employed with the Eastchester Fire Department as a fire inspector. He knows plaintiff, and was seated next to plaintiff at the County Center on the day of the incident. Vitarello frequented the men's bathroom on that day, and he thinks he recalled seeing water on the floor, but can't be positive. He thinks he saw a puddle of water, but ignored it and walked around it. He allegedly heard the sound of running water in the bathroom but did not make any complaints to the County about the conditions of the bathroom.

Ed McPherson testified that he was also at the same seminar as plaintiff on the day of the incident. He testified that the floor was almost always wet because the men's bathroom is small and crowded and people wash their hands and did not use the dryer and shake their hands as they go out. He doesn't recall if he observed water on the floor on his first time to the bathroom. He testified that he was in the bathroom when plaintiff fell. He was in the bathroom first before plaintiff. When he walked into the bathroom he saw water on the floor, in the center of the floor, but he avoided it. Plaintiff came after him. He was at the sink washing his hands when he heard a thump. He believes that the water was coming from people washing their hands and shaking the excess water on the floor. When he turned around, he saw plaintiff getting up from the floor. He did not actually see plaintiff fall.

It is well settled that a proponent of a summary judgment motion 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” (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]; Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the motion papers (Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1986]; Jakabovics v Rosenberg, 49 AD3d 695 [2d Dept 2008]; Menzel v Plotkin, 202 AD2d 558, 558-559 [2d Dept 1994]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (Zuckerman v New York, 49 NY2d 557, 562 [1980]; Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). In deciding a motion for summary judgment, the court is “required to view the evidence presented in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion” (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (Alvarez v Prospect Hospital, 68 NY2d 320,324 [1986]).

The elements of common law negligence are: “(1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, and (3) a showing that the breach of that duty constituted a proximate cause of the injury” (Ingrassia v Lividikos, 54 AD3d 721, 724 [2d Dept 2008]).

A defendant property 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 allegedly dangerous or defective condition nor had actual or constructive notice of its existence” (Toma v

Rizkalla, 138 AD3d 1103, 1104 [2d Dept 2016]). “To constitute 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 a defendant to discover and remedy it” (Toma v Rizkalla, 138 AD3d at 1104 [2d Dept 2016]). Proof of a defendant's general awareness of some dangerous condition is legally insufficient to constitute constructive notice of the particular condition that allegedly caused a plaintiff to fall (Toma v Rizkalla, 138 AD3d at 1104).

In support of its motion, the County argues that it maintained its premises in a reasonable safe condition, had no notice of any prior defects regarding the floor, and the County received no notice of any prior dangerous conditions regarding the floor, and plaintiff assumed the risk of his fall when he walked on the floor of the restroom. In its response, the County acknowledges that although several patrons claimed to have observed water on the floor prior to plaintiff's fall, none of those persons, including plaintiff made any reports/complaints to the County at any time prior to his fall. Thus, the County maintains that it did not have actual notice of water being on the floor at any time prior to plaintiff's fall.

In light of the foregoing, the County established its prima facie entitlement to judgment as a matter of law by submitting, inter alia, the deposition testimonies of the Events planner, plaintiff, and non party witnesses testimony that demonstrated that it neither created the wet floor condition nor had actual nor constructive notice of the wet floor condition. The County presented evidence regarding specific cleaning or inspection of the area in question relative to the time when the subject accident occurred, in that the supervisor inspected the bathroom every 15-20 minutes, and supervised a laborer who was responsible for maintenance of the bathroom (Steele v Samaritan Found., Inc., 176 AD3d 998, 999–1000, [2d Dept 2019]). Certainly, even if the County possessed general awareness of water on the bathroom floor, is

not sufficient to establish constructive notice of the particular condition which caused the plaintiff to fall. In addition, the record shows no evidence of prior complaints made as to water on the floor. There was no testimony presented as to whether the condition existed for an appreciable amount of time prior to the accident, nor any evidence that the condition was a recurring issue in the men's bathroom.

Accordingly, the County established that the evidence was insufficient to support a finding that a dangerous or defective condition caused plaintiff's accident.

In opposition, plaintiff failed to present sufficient proof to create a question of fact that the County had actual or constructive notice of the condition which caused the fall.


All matters not herein decided are denied. This constitutes the Decision and Order of the court.

NOW, therefore, it is hereby

ORDERED, that the County's motion for summary judgment is granted, and the Complaint is dismissed.

The Clerk shall mark his records accordingly.

**Dated: March 4, 2020**  
**White Plains, New York**

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**HON. CHARLES D. WOOD**  
**Justice of the Supreme Court**

To: All Parties by NYSCEF