

Zubair v Learning Tree of N.Y. LLC

2020 NY Slip Op 35692(U)

April 27, 2020

Supreme Court, Queens County

Docket Number: Index No. 702239/18

Judge: Robert I. Caloras

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ROBERT I. CALORAS PART 36

Justice

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**TAYYBA ZUBAIR and MUHAMMAD ZUBAIR,
Plaintiff,**

-against-

**LEARNING TREE OF NEW YORK LLC D/B/A CC
D/B/A C.C.B. SCHOOL OF NEW YORK, PLAZA 75
II LLC, PLAZA 75 CONDOMINIUM and NASH
MANAGEMENT LLC,**

Defendants.

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**Index No. 702239/18
Motion Date: 1/9/20
Motion Cal. No. 39
Seq. No. 1**

The following papers numbered E41-E64 read on this motion by the defendants for an order for the following: (1) pursuant to CPLR 3212 granting LEARNING TREE OF NEW YORK LLC d/b/a C.C.B. SCHOOL OF NEW YORK s/h/a LEARNING TREE OF NEW YORK LLC D/B/A CC D/B/A C.C.B. SCHOOL OF NEW YORK (hereinafter "Learning Tree"), PLAZA 75 II LLC, PLAZA 75 CONDOMINIUM (hereinafter "Plaza 75") and NASH MANAGEMENT, LLC summary judgment and dismissing the complaint; and (2) permitting the defendants to enter judgment with the Clerk of the Court and against the plaintiff with statutory costs and disbursements.

**PAPERS
NUMBERED**

Notice of Motion-Affirmation-Memo of Law-Exhibits..... E41-E58
Affirmation in Opposition-Memo of Law-Exhibits..... E59-E63
Reply Affirmation..... E64

Upon the foregoing papers, it is ordered that the motion by the defendants is denied as follows:

In this action, the plaintiff, Tayyba Zubair (hereinafter "Tayyba") alleges that on January 5, 2018 at around 4:00 p.m., she slipped and fell just inside the entrance to the Learning Tree due to water and wetness that had been tracked inside, at the premises located at 40-42 75th Street, Elmhurst, New York.

Defendants now move for summary judgment dismissing the Complaint as against the Learning Tree. Defendants have submitted, among other things, the following: photographs; Tayyba's deposition transcript; plaintiff, Muhammad Zubair's (hereinafter "Muhammad") deposition transcript; John Hahm's deposition transcript and affidavit; Christian Males' deposition transcript, defendants' expert disclosure for Stan Pitera, P.E., and Mr. Pitera's affidavit.

At Tayyba's deposition, she testified that her children attended the after-school

program at the Learning Tree. Prior to the accident, Tayyba had walked four blocks to the school with her children. Tayyba testified that it was not snowing outside, but there was some snow piled on the side of the sidewalk along the route she and her children walked to the school. Tayyba testified that it had last snowed the day or night before. As she approached the school, Tayyba testified that there was no snow or ice on the sidewalk in front of the exterior door to the building. Tayyba testified that she entered the building, by pulling open the door to enter into the foyer. There was a black colored mat on the floor in the foyer, which Tayyba testified was there every time she entered the school. Tayyba testified that the mat was around two feet away from the entrance, which exposed a tile floor between the entrance door and the mat. Tayyba testified that when she pulled the door open toward her and began to step inside, she did not look at the floor inside the building just beyond the entrance. However, Tayyba testified that after she fell, she saw that it was wet. Tayyba testified that as she pulled open the door using her right hand, and stepped inside with her left foot, she slipped and her left foot twisted. She testified that her left foot had made contact with the "tile space" when she slipped. After the accident, Tayyba testified that she sat inside the foyer, with part of her body on the tile floor, and part of her body on the mat. While she was sitting on the floor in the foyer, Tayyba testified that she noticed the floor was wet. She also testified that the tile area was wet, but she was not sure whether the area covered by the mat was wet. Tayyba testified that the right side of her jacket and pants were wet. Tayyba testified that she had observed wetness in the two-foot tile area, which she described as water and little pieces of snow but did not know how long the water and pieces of snow had been there prior to the accident. After the accident, Tayyba remained on the ground for twenty to thirty minutes until an ambulance came. Prior to the accident, Tayyba testified that she never complained about the alleged two-foot gap between the door and the mat, nor was she aware of anyone else who made a complaint regarding this. Tayyba also testified that she was not aware of anyone else having an accident at the entrance to the school.

At her deposition, Tayyba also reviewed photographs, which the defendants have submitted as Exhibit "D" to the instant motion. Tayyba testified that when the accident occurred there was a larger space between the entrance and the beginning of the mat, than what appeared in the photograph marked as Exhibit "D". Tayyba also placed an "X" on the photograph marked as Exhibit "D", depicting where the accident occurred. Tayyba was unable to identify what material was in the space underneath where she made the "X" in the photograph.

At his deposition, Muhammad testified that he arrived at the school after his wife was put in the ambulance. Mohammad testified that the area where the accident occurred was a ceramic tile and that there was no carpeting underneath the black mat. Muhammad observed that the location where Tayyba fell was wet, and that there were little pieces of ice. Muhammad also testified that the black mat was "away from the entrance like two to three feet, maybe more". He testified that the mat was always in this same position, away from the door. Muhammad testified that it was not snowing or raining when he arrived at the school, but he believed that it last snowed the night before. Muhammad testified that when he arrived at the school, the area outside the door was shoveled, and it wasn't wet, it just looked wet. Muhammad also testified when he arrived at the learning Tree on the day of the accident, the mat was not in the same position as depicted in the photographs annexed as

Exhibit "D" to the instant motion, but instead was two to three feet away from the door. Muhammad also testified that he was not aware of any other accidents at the entrance to the school. In addition, Muhammad testified that he never made a complaint about the positioning of the black mat or the entrance and was not aware of anyone else who made a complaint. Muhammad also testified that he never slipped at the entrance, and never found out how long the wet condition and pieces of ice were present just inside the entrance before his wife's accident occurred?

At his deposition, John Hahm testified that he is the owner of the Learning Tree, located at 40-42 75th Street, Elmhurst, New York, which is an after-school program for children in kindergarten through the sixth grade. As the owner, Mr. Hahm testified that he is responsible for overseeing the School Manager and the teachers who provide classroom instruction and supervision to the children. Mr. Hahm testified that the Learning Tree leased the first-floor premises from the building owner, Plaza 75. He testified that the entrance to the school has two glass doors located side by side that lead into a foyer. Mr. Hahm testified that after he leased the first-floor premises, he hired a contractor to build-out this space. The contractor installed granite tiles, which are a reddish color, for the floor in the foyer. Mr. Hahm described these tiles as having a shiny and slippery surface. Mr. Hahm testified that he also had the contractor install a permanent mat that was recessed into the floor (flush with the floor), which had a metal border that was secured in the floor with glue and could not be removed. Mr. Hahm testified that shortly after leasing the premises in 2014, and after the contractor completed the build-out, he purchased a custom-made, heavy, black mat to place in the foyer. Mr. Hahm testified that the mat was custom ordered and was measured to fit the size of the foyer, so that it extended from door to door. The edges of the mat were rubber, and it was heavy, so that the edges would not curl up. He testified that the edge of the black mat extended to within "a couple of inches before the front door", about "two" inches, so that it would not interfere with the opening and closing of the exterior door. He further testified that the other end of the black mat extended up to the interior door of the foyer. He testified that the black mat was placed on top of the permanent mat that was affixed and set in the floor. Prior to the accident, Mr. Hahm testified that he had never seen the mat a foot or more away from the front doors and had never received any complaints regarding wetness on the floor in the area that near the interior door inside the exterior door.

Mr. Hahm also testified that he did not recall what time it was when Gloria Kim, the Sales Manager, told him about the accident. Mr. Hahm testified that he did not see or hear the accident, nor was he aware that an ambulance had come for Tayyba. After he learned of the accident, Mr. Hahm went to the area where it occurred, but Tayyba was no longer there. At his deposition, Mr. Hahm was shown a photograph, which showed a plastic cover over the area where the accident occurred. However, Mr. Hahm testified that the plastic cover was not there on the day of the accident, and that the exposed portion of tile, was still a little wet when he looked at it. Mr. Hahm also testified that the black mat was in the same position as depicted in the photographs annexed as Exhibit "D" to the instant motion, which was beginning about two inches from the door saddle. Mr. Hahm further testified that it last snowed the day before the accident, that the sidewalk outside the school had been cleared, and that there was some snow piled on the sides of the sidewalk. Mr. Hahm testified that he was not aware of any prior accidents at the entrance. After the accident, Mr. Hahm testified

that the Superintendent for the building put “a tape -- sort of a sandpaper tape across the marble” in the area between the mat and the door.

Defendants also submitted an affidavit from Mr. Hahm, which was notarized on November 20, 2019. In his affidavit, Mr. Hahm stated that on the day of the accident he took smoking breaks each hour throughout the day and that, as he routinely does, he would smoke outside the school entrance, which required walking through the same area where the accident occurred. Mr. Hahm stated that his last smoking break occurred approximately twenty to thirty minutes before he was informed of Tayyba’s accident. At that time, Mr. Hahm stated that he did not observe any accumulation of water or wetness inside the entrance at that time, and also observed that the heavy black mat and the permanent recessed mat were both present. Mr. Hahm also observed that the heavy black mat was in its usual position, about two inches away from the exterior door. At his deposition, Christian Males testified that he is employed by Plaza 75 as the Superintendent of 40-40 75th Street, Elmhurst, New York. As the Superintendent, Mr. Males testified that he is responsible for keeping the building and sidewalks clean, and maintenance. When it snows, Mr. Males testified that he shovels and applies salt to the sidewalk. Mr. Males also testified that as a courtesy, he clears the snow on the sidewalk in front of the Learning Tree. Mr. Males testified that he is not responsible for performing any work or maintenance inside of the leased space occupied by the Learning Tree. Mr. Males also testified that there are two mats located in the foyer of the Learning Tree. Mr. Males testified that one mat is movable and the other one stays in the floor.

In his affidavit, Stan Pitera, P.E., stated that he inspected the subject area on January 3, 2019. Mr. Pitera stated that the configuration of foyer, the placement of the recessed carpet and mat, the lighting and the materials chosen for the floor, satisfy the Learning Tree's obligation to make the entrance area reasonably safe for patrons entering the building, and was not a proximate cause of the plaintiff's accident. Based upon his measurements of the dimensions of the foyer and the black mat, Mr. Pitera opined that it was impossible for there to have been a two-foot gap between the door saddle and the black mat, which at most could have only measured 2-3/4 inches. Mr. Pitera also stated that even if the black mat had been displaced by more than two feet, there was a permanent, recessed carpet in the floor which occupied the area immediately inside the exterior door. Mr. Pitera further stated that the granite tile floor was slip resistant and exceeded the accepted safe slip-resistant values. Mr. Pitera calculated the dry coefficient of friction to be 0.77, which exceeded the code requirement of 0.42. Consequently, Mr. Pitera found that no Building Code violations existed.

Based upon the foregoing, the defendants argue that Tayyba could not have slipped on granite tile, because the Learning Tree had a permanent immovable carpet installed inside the entrance, and there were no exposed tiles within two feet of the entrance door. Even if there was exposed tile, the defendants argue that the granite tile floor provided a slip-resistant surface that was in compliance with the Building Code requirements. Moreover, Mr. Hahm last inspected the subject area about thirty minutes earlier and did not observe any wet or dangerous condition. As such, the Learning Tree argues that it did not create, or have actual or constructive notice, of a dangerous or slippery condition that caused Tayyba’s

accident. Therefore, the Learning Tree argues that it is entitled to summary judgment dismissing the Complaint.

In opposition, the plaintiffs have submitted an affidavit from both Tayyba and Muhammad, wherein they both state that the photographs taken by Mr. Pitera, the defendants' expert, a year after the accident occurred do not fairly and accurately depict the floor as it existed from when their children started at the school in the fall of 2017 until the date of the accident. Both plaintiff's state that the "permanent" carpet did not exist at that time and had to have been installed after the accident. Plaintiffs also state that the photographs also show that the mat in question could have been folded or rolled under, exposing the tiles, which, contrary to Mr. Pitera's opinion, Mr. Hahm admitted were slippery when wet. A such, the plaintiffs argue that issues of fact exist regarding the placement of the mat, and whether the defendants' employees exacerbated the condition by rolling up the mat. Plaintiffs further argue that the defendants have failed to demonstrate their prima facie entitlement to summary judgment on the issue of whether they created the condition or had actual or constructive notice of the condition for a sufficient length of time to remedy it. Plaintiffs further argue, that Mr. Pitera's report and the photographs he took of the area where the accident occurred are not admissible. Plaintiffs assert that Mr. Pitera's report is based on an inspection a year after the accident occurred, after the area was substantially altered, and that the photographs Mr. Pitera relied upon were not authenticated.

In a slip and fall action, a defendant may establish his prima facie entitlement to judgment as a matter of law on the ground that it did not have constructive notice of the alleged dangerous condition (Butts v SJF, LLC, 171 AD3d 688 [2d Dept. 2019]). A defendant has constructive notice of a defect when the defect is visible and apparent, and existed for a sufficient length of time before the accident that it reasonably could have been discovered and corrected (*id.*; see Gordon v American Museum of Natural History, 67 NY2d 836, 837-838[1986]; Walsh v Super Value, Inc., 76 AD3d 371, 375 [2d Dept. 2010]). To meet its burden on the issue of lack of constructive notice, a defendant is required to offer evidence as to when the accident site was last cleaned or inspected prior to the accident (see Sartori v JP Morgan Chase Bank, N.A., 127 AD3d 1157 [2d Dept. 2015]; Campbell v New York City Tr. Auth., 109 AD3d 455, 456 [2d Dept. 2013]; Levine v Amverserve Assn., Inc., 92 AD3d 728, 729 [2d Dept. 2012]). "Mere reference to general cleaning practices, with no evidence regarding any specific cleaning or inspection of the area in question, is insufficient to establish a lack of constructive notice" (Herman v Lifeplex, LLC, 106 AD3d 1050, 1051[2d Dept. 2013]; see Rodriguez v Shoprite Supermarkets, Inc., 119 AD3d 923 [2d dept. 2014]; Rogers v Bloomingdale's, Inc., 117 AD3d 933, 933-934 [2d Dept. 2014]).

Initially, the Court notes that based upon the defendants papers it appears that they are only seeking summary judgment dismissing the Complaint as against the Learning Tree. The Court finds that the Learning Tree has failed to demonstrate, prima facie, a lack of constructive notice. Mr. Hahm's affidavit merely referenced his general inspection practices and was insufficient to establish when the area was last inspected prior to the subject accident (Butts v SFJ, LLC, *supra*; Clarkin v In Line Rest. Corp., 148 AD3d 559 [1st Dept. 2017]). Since the defendants failed to meet their initial burden to establish that they lacked constructive notice of the wet and icy surface as a matter of law, the burden never shifted to the plaintiffs to establish how long the condition existed. Moreover, although the defendants were not obligated to cover the entire area (Gonzalez v. Bd. of Educ. of City of New York,

165 AD3d 106 [2d Dept. 2018]), the conflicting testimony regarding the placement of the floor mat in an area that was prone to recurring accumulation of water during rain or snow conditions preclude granting the defendants summary judgment. Finally, the defendants' expert report was based upon an inspection that occurred a year after the accident, and there was no evidence that the conditions he observed were the same that existed when the accident occurred (see Cruz v Deno's Wonder Wheel Park, 297 AD2d 653 [2d Dept. 2002]; Santiago v UA Communs., Inc., 263 AD2d 407,408 [1st Dept. 1999]; Figueroa v Haven Plaza Hous. Dev. Fund Co., 247 AD2d 210 [1st Dept. 1998]). Specifically, Mr. Hahm testified that after the accident the Superintendent for the building made alterations to the area where the accident occurred. Moreover, the pictures Mr. Pitera submitted were not authenticated, and were disputed by the plaintiffs. Consequently, Mr. Pitera's report and photographs are not admissible. Accordingly, the motion is denied.

DATED: April 27, 2020



ROBERT I. CALORAS, J.S.C.

**FILED & RECORDED
7/10/2020
3:06 PM
COUNTY CLERK
QUEENS COUNTY**