

Colon v New York City Dept. of Educ.

2021 NY Slip Op 30571(U)

March 1, 2021

Supreme Court, New York County

Docket Number: 150379/2016

Judge: Richard G. Latin

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. RICHARD G. LATIN PART IAS MOTION 46

Justice

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INDEX NO. 150379/2016

PAVEL COLON,

MOTION DATE 02/11/2021

Plaintiff,

MOTION SEQ. NO. 002

- v -

NEW YORK CITY DEPARTMENT OF EDUCATION,
TEMCO SERVICE INDUSTRIES INC

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78

were read on this motion to/for JUDGMENT – SUMMARY.

Upon the foregoing documents, it is ordered that defendants’ motion for summary judgment pursuant to CPLR 3212, dismissing plaintiff’s complaint is determined as follows:

Plaintiff, a math teacher at Mott Hall School, commenced this action to recover for injuries he allegedly sustained on February 4, 2015 when he slipped and fell on wet stairs between the fifth floor and fourth floor located at P.S. 63 in the Bronx. Defendants now seek summary judgment on the basis that they did not create the dangerous condition or have either actual or constructive notice of the claimed condition.

“A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence” (*Pfeuffer v New York City Housing Authority*, 93 AD3d 470, 471 [1st Dept 2012], quoting *Rodriguez v 705-7 E. 179th St. Hous. Dev. Fund Corp.*, 79 AD3d 518, 519 [2010]). In order for a defendant to be found to have constructive notice, the subject defect must be visible and apparent, and exist for a period of time long enough prior to the

accident for the defendant to be able to discover and remedy the condition (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

In support of the motion, defendants submit, *inter alia*, plaintiff's 50-h and deposition transcript, and the deposition testimony of their agent, Rohan McAdam.

Plaintiff testified that he was a teacher at Mott Hall School that occupied the top two floors of the P.S. building. He averred that on the day of the accident that it was not raining or snowing, but that it had snowed a couple of days prior so that there was snow on the ground, and it was wet all over. He alleged that two and a half hours before the accident he picked up his scholars in the cafeteria to walk them up the stairs to class. At that time, he noticed that the cafeteria was slick and that the stairs were slick, had skid marks, and looked wet to him. In fact, he stated that he held on to the handrail on his way up the stairs that morning. He then stated that his shoes were then dry as he was in his classroom teaching for the next two and a half hours. He further testified that he eventually slipped and fell at approximately 1:20 PM and that he did not see a substance but saw skid marks and noticed that his pants were wet with a substance that appeared to be water. He claimed that after he fell, he did not lose consciousness and only spoke with the school principal, nurse, his nephew, and the EMTs, not Mr. McAdam.

Rohan McAdam testified that at the time of the accident he was employed by Temco as a handyman and cleaner at P.S. 63 and the Mott Hall School that was located inside P.S. 63. McAdam described his responsibilities as making sure everything was okay, and to clean up all the paper, water spill, and everything on the floor. He worked from six in the morning to three in the afternoon with another individual that he initially called Anthony "Fireman." He could not remember his last name but knew he was the superintendent in charge of the boiler besides, cleaning with him.

McAdam averred that his job was not really different on days when it was rainy or snowy outside. It was still his job to clean up, and large rubber mats were already placed on the inside of all doors leading to the outside. Every day there was the same schedule hanging up in the slop sink that stated, generally, that he was to mop and sweep spills, garbage, and make sure the mats were by the door. There were no specific times in which he was supposed to check the stairwell for spills, it was just something he alleged did regularly, every second. When it rained, he would sweep the large water saturated rubber mats with a dry mop, which he would also utilize for cleaning the stairs. He acknowledged that when it rained that students would typically drag water into the school. He would put up “wet signs” by the stairway, but only on the first and second floor. Additionally, he and Anthony would check the stairs for water and garbage about every three hours. He stated that there were six stairways, each of five flights of stairs, and that it would take about twenty minutes to check a flight of stairs and five to ten minutes to clean the stairs, if necessary.

Besides cleaning the stairs, McAdam alleged it was also his responsibility to clean the bathrooms, cafeteria, gym and/or play yard. He stated he would begin cleaning the bathrooms at 10:30AM and that there were approximately 10 bathrooms, although his testimony on this topic was unclear. As far as cleaning the bathrooms, he would make sure that there were paper towels, toilet paper, and would mop any spills on the floor. The cafeteria would be cleaned every day after each lunch session, four times a day corresponding to the different lunch schedules. The first lunch period began at 10:30AM and he would mop and clean the floor for about 20 minutes with the fireman. Once done they would walk the gym and play yard and check for spills. The next lunch sessions were at 11AM, 11:30AM, 12:30PM, and 1PM. He also averred that while lunch sessions were going on that they would check also check all stairways going up to the fifth floor. He also

checks each floor hallway for spills, and it takes him like 20-25 minutes to walk the first-floor hallway and 5-10 minutes to walk the hallways of each other floor. He basically states that he is always walking around looking for spills. The only times he would not be looking for spills would be his lunch between 12 PM and 1PM, when the fireman would take over. However, he clarified that while the fireman would generally have the same duties as him, he does not know what he actually does during that time.

When McAdam was initially asked if he had any specific recollection of February 4, 2015 he answered in the negative. He also initially did not recall anyone getting injured in the Mott Hall School. Later, he was asked again if he remembered February 4, 2015 and at that time he answered in the affirmative. He stated that he specifically remembered that day because the dean of the school called him to tell him that a teacher fell. He then recounted what he did following the phone call, including finding the location and speaking to the plaintiff. He also claimed that he had a perfect recollection of the day and that the stairs were never wet at any time.

In order to meet its initial burden on the issue of lack of constructive notice, the movants must make a showing as to when the specific area in question was last cleaned or inspected relative to the time when the plaintiff slipped and fell (*see Gautier v 941 Intervale Realty LLC*, 108 AD3d 481 [1st Dept 2013]; *Aviles v 2333 1st Corp.*, 66 AD3d 432 [1st Dept 2009]). “[M]ere proof of a set janitorial schedule does not prove that it was followed on the day of the accident, or eliminate the issue of constructive notice in this case” (*Dylan P. v Webster Place Associates, L.P.*, 132 AD3d 537, 538 [1st Dept 2015]).

Here, McAdam’s deposition testimony regarding his cleaning and inspection is insufficient to establish defendants’ prima facie burden. At best, his testimony describes a general pattern of cleaning practices and his recollection of February 4, 2015 after he was told about the accident. In


the light most favorable to the nonmoving party, McAdam’s testimony is confused, logically incoherent at times, and contradictory (see generally Castro v Hatim, 174 AD3d 464, 466 [1st Dept 2019]; see also Mendoza v Fordham-Bedford Housing Corp., 139 AD3d 578, 579 [1st Dept 2016]). With respect to the schools’ lunch schedule, he seems to lack an appreciation for the rules of time given the order of places he purports to clean and the time it supposedly takes him to clean or inspect each place. Further, while McAdam may have had a daily schedule, it never changed and just generally referenced cleaning and mopping without reference to specific areas or specific times. Most importantly, however, is that at no point does McAdam ever state when he inspected or cleaned the subject stairway, of six possible stairways, if at all, on the date of the accident before plaintiff’s fall (see Gautier, 108 AD3d 481; Aviles, 66 AD3d 432; Dylan P., 132 AD3d 537). He merely stated in conclusory fashion that everything was clean that day (cf. Raghu v New York City Hous. Auth., 72 AD3d 480 [1st Dept 2010]).

Accordingly, defendants’ motion for summary judgment is denied.

Plaintiff is directed to serve a copy of this order, with notice of entry, on defendants within 30 days of its upload onto NYSCEF.

This constitutes the decision and order of this Court.

3/1/2021
DATE


RICHARD G. LATIN, J.S.C.

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE