SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: PART C2

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MARGARET COLACINO-WILSON,

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY BOARD OF EDUCATION and THE NEW YORK CITY DEPARTMENT OF EDUCATION

Defendants.

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Hon. Thomas P. Aliotta

DECISION & ORDER

Index No: 150820/2015
Motion No. 002

Recitation, as required by CPLR 2219(a), of the following papers numbered "1" through "4" were fully submitted on the 10TH day of November 2021.

Plaintiff's Notice of Motion to Reargue
this Court's decision dated June 15, 2021,
together with Supporting Papers 1, 2

Defendants' Affirmation in Opposition,
together with Supporting Exhibits 3

Plaintiff's Reply Affirmation 4

Upon the foregoing papers, plaintiff's motion for an Order pursuant to CPLR 2221(d) to reargue the trial court's granting defendants' motion for summary judgment is decided as follows:

This action arises from a trip and fall accident that occurred on September 18, 2014, inside the entrance of P.S. 4, on Staten Island, New York. It is alleged that plaintiff fell on mats that were criss-crossed and bunched up in the lobby of the school.

By an Order dated June 15, 2021, this Court found as a matter of law that defendants neither caused and created the defective condition as alleged by plaintiff nor had actual or constructive notice of its existence.

In seeking leave to reargue this order, plaintiff asserts that this Court did not specifically address the case of *Hoppe v. Imperial Towers Associates,* 181 AD3d 659 [2d Dept. 2020]) cited in opposition to defendants' underlying motion. Plaintiff posits that unlike the cases cited by defendants in support of the motion for summary judgment, *Hoppe* "mirrors the present case" (NYSCEF 68, ¶6). In *Hoppe,* the Second Department reversed the trial court's granting of summary judgment wherein the non-party witness who resided in defendant's building testified the mats in the lobby had a tendency to "curl up" and that "almost every day, he saw the mat in an uneven condition." Here, plaintiff argues this is analogous to her testimony that prior to the happening of her accident, she noticed "several times" that the mats were overlapping (NYSCEF 47, pp.147-148). She further testified the mats were "bunched up and wavy at other times" but never notified anyone regarding the condition (*id.* at p.148).

It is well established a motion for leave to reargue is addressed to the sound discretion of the court and affords the moving party an opportunity to show that the court overlooked or misapprehended matters of fact or the law, or for some reason mistakenly arrived at its earlier decision (*see* CPLR 2221[d][2]; *JPMorgan Chase Bank, N.A. v. Novis*, 157 AD3d 776, 778 [2d Dept 2018]; *Cioffi v. S.M. Foods, Inc.,* 129 AD3d 888, 891 [2d Dept 2015]). It is not to be used, however, as a means by which an unsuccessful party is permitted to argue again the very issues previously decided, or to present new or different arguments, or matters of fact not originally tendered (*see Robinson v. Viani*, 140 AD3d 845, 847 [2d Dept 2016]; *Deutsche Bank Natl. Trust Co. v. Ramirez,* 117 AD3d 674, 675 [2d Dept 2014]; *Nicolia v. Nicolia.,* 84 AD3d 1327, 1328

[2d Dept 2011]). Therefore, in the Court's discretion, leave for reargument is granted. However, upon reargument, the granting of summary judgment to defendants remains undisturbed.

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 (*see Flores v BAJHolding Corp.,* 94 AD3d, 945, 946 [2d Dept. 2012]). To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell (*see e.g. Birnbaum v New York Racing Assn., Inc.,* 57 AD3d 598, 598-599 [2d Dept 2008] and *Musachio v Smithtown Cent. School Dist.,* 68 AD3d 949, 949-950 [2d Dept 2009]).

Here, construing the evidence in the light most favorable to plaintiff, the record demonstrates that defendants did not have actual or constructive notice that the mats were "bunched up" prior to her accident so as to be afforded the opportunity to remedy the condition. The holding in *Hoppe* does not dictate a different result. Plaintiff overlooks the fact that in reversing summary judgment, the Appellate Court held that, "The defendants' evidence failed to eliminate all triable issues of fact as to whether the mat was lying flat against the floor before the plaintiff fell" (*Hoppe v. Imperial Towers Associates,* 181 AD3d 659, *cf. Giannotti v. Hudson Valley Federal Credit Union,* 133 AD3d at 711-712). Here, the log books maintained by defendants' custodial engineer demonstrated that on the date of the accident, the area in question was inspected multiple times and there were no complaints that the mats were "bunched or wavy" prior to plaintiff's fall (*Denker v. Century 21 Dept. Stores, LLC,* 55 AD3d 527 [2d Dept. 2008]; *Birnbaum v New York Racing Assn., Inc.,* and *Musachio v Smithtown Cent. School Dist., supra*). More importantly, plaintiff did not see the condition of the mats prior to her fall and it

was only after her fall that she noticed the mats were "wavy", "bunched-up" and "like hills" (NYSCEF pp.61-65; and *Giannotti v. Hudson Valley Federal Credit Union,* 133 AD3d 711 [2d Dept. 2015]). Finally, there is no evidence that defendants received actual notice of the alleged recurring condition either from the plaintiff or others that was routinely left unaddressed (*Darbinyan v. 1806 Ocean Realty, LLC,* 185 AD3d 1003, 1004 [2d Dept. 2020]).

Accordingly, it is hereby

ORDERED that plaintiff's motion for leave to reargue this Court's decision dated June 15, 2021 is granted and, upon reargument, defendants' motion for summary judgment is granted; and it is further

ORDERED, that this action is dismissed in its entirety.

The foregoing constititutes the Decision and Order of the Court.

E N T E R:

HON. THOMAS P. ALIOTTA, J.S.C.

Dated: December 7, 2021