

<b>Varriale v Grace Church Parish House</b>
2021 NY Slip Op 33573(U)
August 4, 2021
Supreme Court, Orange County
Docket Number: Index No. EF001779-2019
Judge: Sandra B. Sciortino
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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 ORANGE

-----X  
ROSA VARRIALE,

Plaintiff,

-against-

GRACE CHURCH PARISH HOUSE and THE  
GUILD OF ST. MARGARET SOUP KITCHEN,

Defendants.  
-----X

SCIORTINO, J.

**DECISION AND ORDER**

INDEX NO.: EF001779-2019

Motion Date: 6/1/2021

Sequence No.: 1

The following documents numbered 1 to 17 were read on the motion by defendant Grace Church Parish House (hereinafter "Grace Church") brought pursuant to CPLR §3212, seeking summary judgment dismissing the Complaint against it:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Affirmation in Support (Frey)/Exhibits 1 - 7 <sup>1</sup>	1 - 10
Affirmation in Opposition (Del Duco)/Exhibits 1 - 4	11 - 16
Affirmation in Reply (Frey)	17

**Background and Procedural History**

This is an action for personal injuries allegedly sustained by plaintiff on October 26, 2016. Plaintiff claims she sustained injuries as the result of a slip and fall on a set of stairs that are near the entranceway to the dining hall of defendant Grace Church. This action was commenced by the filing of a Summons and Verified Complaint on March 6, 2019. An Amended Complaint and Verified Bill of Particulars, dated May 1, 2019, were subsequently

<sup>1</sup>Both NYSCEF Doc. 29 and NYSCEF Doc. 30 are labeled Exhibit 7.

served. Issue was joined by defendant Grace Church by service of its Answer on or about May 2, 2019<sup>2</sup>. Note of Issue was filed on October 26, 2020.

Examinations before trial of plaintiff and Phyllis Guardino, executive director of the Guild of St. Margaret Soup Kitchen, were held on February 11, 2020. During her deposition, the plaintiff disclosed the identity of a witness to the accident, Jerome Cooper. On January 27, 2021, plaintiff provided defendants with a Supplemental Response to Combined Demands identifying Jerome Cooper as a witness. Examination before Trial of non-party Jerome Cooper was taken on February 22, 2021. Note of Issue was filed on October 26, 2020.

#### Plaintiff's Testimony

Plaintiff testified that, on October 26, 2016, she traveled to Grace Church to attend a free lunch program. She arrived at approximately 12:15 p.m. and walked up two interior sets of stairs to the dining hall. Her friends, including Jerome Cooper, were already in the dining hall. Plaintiff stayed for approximately fifteen minutes and then exited the dining hall.

When plaintiff attempted to descend the upper set of stairs, her right foot slipped on the first step and she fell down the stairs, coming to rest on the landing. She did not use the available banister. She did not recall seeing what caused her to fall or if there was any liquid on the steps prior to her fall. After the fall, she testified that there was liquid "all over [her] pants." Her friends "got" her to Restorative Management, where her therapist called a cab to take her home. Once home, she called her doctor and was taken by ambulance to Orange Regional Medical Center.

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<sup>2</sup> No Answer has been filed on NYSCEF. An Answer and Answer to Amended Verified Complaint are appended to the moving papers as NYSCEF Docs. 22 and 25 respectively.

### Phyllis Guardino Testimony and Affidavit

Phyllis Guardino oversaw the operation of the soup kitchen and the three employees who would have been present on the day of the accident. The soup kitchen was open from 7:00 a.m. to 8:30 a.m. for breakfast and from 11:00 a.m. to 12:00 p.m. for lunch. No maintenance logs are kept. The stairs would typically be swept after breakfast and mopped, if necessary, and then mopped after lunch, after everyone leaves. If the stairs needed to be cleaned in between, they would be cleaned up immediately.

Guardino stated that defendants “don’t restrict people from coming or going.” Guardino was present on the day of the accident; her office, however, was located downstairs. Diane, a former employee who would have been monitoring the dining room area at the time, never reported that an incident had occurred to Guardino.

### **Motion for Summary Judgment**

Defendants argue plaintiff has failed demonstrate: (a) the cause for her fall; (b) that there existed a defect on the stairs; (c) that the defendant was on notice of that defect; or (d) that her fall was caused by that defect. Grace Church had procedures in place for inspecting and cleaning the subject stairs both before and after lunch and throughout the time the patrons were present. Plaintiffs failure to identify the cause of her fall at deposition is fatal to her case.

Defendants also seek dismissal of the complaint as against the Guild of St. Margaret Soup Kitchen. Defendants assert that, as it is not a legal entity, the Guild is not subject to a judgment.

In opposition, plaintiff argues defendant has failed to meet its burden. At her deposition, plaintiff testified that Jerome Cooper was present at the time of her accident, witnessed her fall and assisted her. Plaintiff submits the Witness Statement of Jerome Cooper, dated January 24,

2021 (Exhibit 1 to Opposition). In his affidavit, Cooper avers that, on the day of the accident, he observed a mop and bucket at the top of the stairs and described the stairs as “very wet.” Cooper identified several individuals who were present during the accident, and avers that there were no signs present warning of the condition of the stairs. The plaintiff argues that, even if defendants met their initial burden, the affidavit of Jerome Cooper raises a triable issue of fact.

In reply, defendants argue Cooper’s Witness Statement, dated January 24, 2021, contains no caption nor attestation that he was duly sworn. The validity of Cooper’s Witness Statement is also brought into question by his deposition testimony. Defendants append the transcript from Cooper’s Examination Before Trial taken on February 22, 2021<sup>3</sup>. At his deposition Cooper testified that he “didn’t write” the witness statement and instead met with an individual at a Dunkin Donuts parking lot for approximately ten to fifteen minutes. The individual asked Cooper questions and prepared the hand written statement. Cooper testified did not read the statement closely, but “read a little,” and signed it.

### Discussion

It is well established that “the 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 Hosp.*, 68 NY2d 320, 324 [1986]; see also *William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh*, 22 NY3d 470, 475-476 [2013]; CPLR 3212 [b]). Once the movant makes the proper showing, “the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Alvarez*, 68 NY2d at 324). The “facts must be viewed in

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<sup>3</sup> In the future, this Court will not consider portions of submitted transcripts. The entire transcript must be submitted, with direction to those portions upon which the party relies.

the light most favorable to the non-moving party” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks omitted]).

In a premises liability case, a defendant party in possession or control of real property who moves for summary judgment 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 (*Hanney v. White Plains Galleria*, 157 AD3d 660 [2d Dept 2018]). A defendant has constructive notice of a defect when the defect is visible or apparent, and existed for a sufficient length of time that it could have been discovered and remediated (*Hickson v. Walgreen Co.*, 150 AD3d 1087 [2d Dept 2017]).

Here, plaintiff testified that she entered the building approximately fifteen minutes before the slip and fall and did not observe any water on the stairs. Guardino testified that the stairs would be mopped after the lunch patrons leave, and would be cleaned immediately if needed between breakfast and lunch. This testimony was sufficient to meet defendants’ burden of establishing that they did not have actual or constructive notice of the presence of a hazardous condition at the time of plaintiff’s accident (*Dominy v. Golub Corp.*, 286 AD2d 810 [3d Dept 2001]). Defendants having demonstrated *prima facie* entitlement to summary judgment, the burden shifts to plaintiff to raise, by admissible proof, a triable issue of material fact (*Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

In opposition, plaintiff’s submit the Cooper affidavit. Cooper states that on the day of the accident he observed a mop and bucket at the top of the stairs and described the stairs as “very wet” as “they had just mopped the floors as someone had defecated on the steps.” Having put forth such evidence, plaintiff raised a triable issue of fact as to whether defendant had actual notice of the allegedly hazardous condition (*Alvarez*, 68 NY2d at 324).

With respect to the branch of defendants' motion seeking dismissal of the claims asserted against The Guild of St. Margaret, defendants offer no argument in support of this assertion. As such, defendants' have failed to establish that The Guild of St. Margaret is not a legal entity.

### Conclusion

On the basis of the foregoing, it is hereby


**ORDERED** that defendants' motion for summary judgment is denied with respect to defendant Grace Church; and it is further

**ORDERED** that defendants' motion is denied as to the branch of the motion seeking dismissal of the claims against The Guild of St. Margaret Soup Kitchen.

The foregoing constitutes the Decision and Order of the Court.

Dated: August 4, 2021  
Goshen, New York

ENTER:

  
HON. SANDRA B. SCIORTINO, J.S.C.

TO: *Counsel of Record via NYSCEF*