Cosme v New York City Dept. of Educ.
2022 NY Slip Op 31208(U)
April 11, 2022
Supreme Court, Kings County
Docket Number: Index No. 504826/2016
Judge: Consuelo Mallafre Melendez

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: PART 20

CHRISTINE COSME

Index No. 504826/2016
DECISION AND ORDER

Plaintiff,

-against-

THE NEW YORK CITY DEPARTMENT OF EDUCATION,

Defendants.

CONSUELO MALLAFRE MELENDEZ, J.:

The court's Decision and Order is based upon consideration of the following papers:

CPLR 2219(a) Recitation: Motion Sequence 4, NYSCEF Numbers: 45-73.

Plaintiff brought forth this negligence cause of action for injuries sustained against Defendant New York City Department of Education. Plaintiff claims that while working as an intern, she tripped and fell on an open desk drawer that was defective and slid open on its own as a result of a slanted floor. Defendant moves for summary judgment pursuant to CPLR 3212 arguing that it is entitled to summary judgment as a matter of law as the condition which caused Plaintiff to fall was not inherently dangerous and it had no constructive notice of the alleged defective desk or floor. Plaintiff opposes the motion.

"While a possessor of real property has a duty to maintain that property in a reasonably safe condition, there is no duty to protect or warn against an open and obvious condition, which as a matter of law is not inherently dangerous" (*Shermazanova v. Amerihealth Med.*, P.C., 173 A.D.3d 796, 797 [2d Dept. 2019] [internal citations omitted]). "The issue of whether a dangerous condition is open and obvious is fact-specific, and usually a question of fact for a jury" (*Id.* [internal citations omitted]). In the seminal Court of Appeals case, *Liriano v. Hobart* wherein the Court held that while there is no duty to warn against an open and obvious danger, there is no bright line rule as to what makes a condition "open and obvious" (*Liriano v. Hobart Corp.*, 9 N.Y.2d 232, 242 [1998]). However, "[w]here only one

conclusion can be drawn *from the established facts*…the issue of whether the risk was open and obvious may be decided by the court *as a matter of law*" (*Id*. [emphasis added]).

Under the *Liriano* standard, the court finds that Defendant established, "as a matter of law," that a single known occurrence of an open desk drawer is open and obvious and therefore not inherently dangerous. Defendant demonstrated that there were no prior incidents regarding the desk drawer opening on its own through the Examination Before Trial (EBT) testimonies of school employees. At his EBT, school custodia engineer, Peter Lombardo, testified that he could not recall any problems or complaints regarding the desk at issue. School guidance counselor, Chaya Ghafi testified at her EBT that she worked at the subject desk daily since the beginning of the school year and had never made complaints to anyone at the school regarding the desk. Defendant provides Plaintiff's 50-h hearing testimony wherein she states that she noticed the presence of the closed desk drawers which were not obstructed or in an otherwise defective state (Def. Exh. B pgs. 16-17). Defendant also provides Plaintiff's EBT wherein she testifies that she had sat at the subject desk on at least ten occasions prior to the accident (Def. Exh. G pg. 29).

In opposition, Plaintiff offers her own testimony from her January 27, 2016 50-h hearing wherein she stated that immediately after her accident, guidance counselor, Chaya Ghafi, came to the classroom and told Plaintiff that the desk drawer opens because the floor is slanted (Pl. Exh. E. pg 25). Plaintiff also offers her June 7, 2017 EBT, testimony wherein she stated that Ms. Ghafi told her that that the drawer pulled out on its own because the desk was broken (Pl Exh. F. pg. 36). However, both assertions are directly contested by the sworn deposition testimony of Ms. Ghafi. During her EBT Ms. Ghafi unequivocally testified that she never stated that the floor was slanted, she had never seen adhesive tape closing the drawer and had never seen the desk drawer open on its own (Def. Exh. J p. 39). Plaintiff's submission of Ms. Ghafi's statements constitute hearsay evidence and have a limited use when relied

upon in an opposition to a summary judgment motion. "While hearsay statements may be used to oppose motions for summary judgment, they cannot, as here, be the *only evidence* submitted to raise a triable issue of fact" (*Gomez v. Kitchen & Bath by Linda Burkhardt, Inc*., 170 A.D.3d 967, 969 [2d Dept. 2019] [internal citations omitted] [emphasis added]).

The only other evidence offered by Plaintiff is the photograph from her 50-h hearing marked as "Exhibit E." The photograph depicts a close-up of the desk drawer with what appears to be torn piece of adhesive tape. Plaintiff claims the tape was placed on the drawer to prevent it from sliding open. However, Plaintiff herself stated she took the photograph after the accident (Pl. Exh. E pg. 41). It is not clear if the adhesive was on the drawer prior to the accident or if the adhesive placed on after the accident as a remedial measure. Even if it were in place prior to the accident, it would be speculative to conclude that the small piece of adhesive tape was there due to the alleged defect. In either case, nothing in the photograph indicates the existence of a prior defective condition. Furthermore, Plaintiff does not state in her 50-h or EBT testimony that she noticed the adhesive prior to or immediately after her accident. Plaintiff also offers no evidence to substantiate her claim that the floor was slanted.

Based on this, Defendant also established its *prima facie* burden on the issue of constructive notice. "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" (*Bruk v. Razag, Inc.*, 60 A.D.3d 715, 715 [2d Dept. 2009] [internal citation and quotation marks omitted]). "To provide 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 defendant's employees to discover and remedy it" (*Pryzywalny v. New York City Tr. Auth*., 69 A.D.3d 598, 599 [2d Dept. 2008]; see *Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 838 [1986]). "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" (*Birnbaum v. New York Racing Assn., Inc*., 57 A.D.3d 598, 598-599 [2d Dept. 2008]).

Defendant established a lack of constructive notice through the same evidentiary submissions. Even if the drawer slid open as Plaintiff claims, absent further proof, the facts in evidence are not "legally sufficient to charge defendant with constructive notice" (*Gordon v. American Museum of Natural History*, 67 N.Y.2d at 838). In this regard, the court also notes that Defendant met its *prima facie* burden on constructive notice by showing that the plaintiff cannot substantiate the cause of her fall without speculation: "In a trip-and-fall case, a plaintiff's inability to identify the cause of the fall is fatal to the cause of action, because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation" (*Rivera v. J. Nazzaro Partnership, L.P*., 122 A.D.3d 826, 827 [2d Dept. 2014]). Here, there is no admissible evidence in the record to support Plaintiff's claims of a defective condition absent speculation. An open desk drawer by itself is not enough to charge Defendant with constructive notice of a dangerous condition.

Based on the foregoing, Defendant established that the evidence does not support a finding of an inherently dangerous condition which would give rise to a duty to warn or protect Plaintiff. Accordingly, Defendant's motion for summary judgment pursuant to 3212 is GRANTED. Plaintiff's Complaint is dismissed.

This constitutes the Decision and Order of the Court.

Dated: April 11, 2022
Brooklyn, NY

ENTER.

Hon. Consuelo Mallafre Melendez
J. S. C.