

<b>Shabazz v New York City Dept. of Educ.</b>
2022 NY Slip Op 32153(U)
July 7, 2022
Supreme Court, New York County
Docket Number: Index No. 160568/2017
Judge: J. Machele Sweeting
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. J. MACHELLE SWEETING PART 62**

*Justice*

-----X

KAREEMAH SHABAZZ,

Plaintiff,

- v -

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

Defendants.

-----X

INDEX NO. 160568/2017

MOTION DATE 10/21/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79

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

In the underlying action, plaintiff alleges that she sustained personal injuries on February 14, 2017, when she was substitute teaching, and tripped on an area rug in Room 217 of Public School 125 (“P.S. 125”), located at 425 West 123rd Street in the County, City and State of New York.

Pending before the court is a motion filed by plaintiff seeking an order:

- a) Granting plaintiff summary judgment as to liability and setting this matter down for an immediate trial on the sole issue of plaintiff’s damages; or
- b) In the event that the Court declines to grant plaintiff’s motion for summary judgment, plaintiff requests an order awarding plaintiff relief for defendants’ spoliation of the evidence, namely, the destruction of the rug.

Also pending before the court is a cross-motion filed by defendants NEW YORK CITY DEPARTMENT OF EDUCATION and NEW YORK CITY BOARD OF EDUCATION (collectively, the “City”) seeking an order, pursuant to CPLR 3212, granting summary judgment to defendants and dismissing the complaint, on the grounds that defendants did not have notice of the alleged defect, and they did not cause or create the alleged defect.

The undersigned heard oral arguments on the motion and cross-motion on June 8, 2022.

### Standard for Summary Judgment

The function of the court when presented with a motion for summary judgment is one of issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]; Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 [Sup. Ct. App. Div. 1<sup>st</sup> Dept. 1985]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [NY Ct. of Appeals 1986]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851 [NY Ct. of Appeals 1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party (Assaf v. Ropog Cab Corp., 153 A.D.2d 520 [Sup. Ct. App. Div. 1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]).

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, and failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, 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 v Prospect Hosp., 68 NY2d 320 [N.Y. Ct. of Appeals 1986]).

Further, pursuant to the New York Court of Appeals, “We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” (Zuckerman v City of New York, 49 NY2d 557 [N.Y. Ct. of Appeals 1980]).

### The Parties’ Motions

In her motion, plaintiff argues that summary judgment is warranted, as defendants were aware that plaintiff had disabilities, including impaired vision and mobility, yet allowed a tripping hazard, namely a rug, to exist in the classroom where plaintiff was assigned to work on the date of the accident. In the Attorney Affirmation in Support (NYSCEF Document #16), plaintiff argues that:

7. The area rug was not taped down nor were there any mechanisms in place to prevent the rug from bunching up or moving [...]

8. After the students were seated on the rug, Ms. Shabazz was walking across the rug to reach the whiteboard she would be using for the lesson. Because the rug had never been secured in

any manner, and with the children sitting on it, the rug had bunched and folded up creating a tripping hazard. Ms. Shabazz's foot got caught on the raised part of the rug causing her to fall [...]

9. Defendants were well aware that Ms. Shabazz has low vision and foot and ankle pain and was required to wear ankle braces and occasionally use a cane. Id. at 17:2-10 36:10- 23. Yet despite this actual knowledge, no measures of any kind were taken to ensure that area rugs in the school classrooms would be safe to use and not pose a tripping hazard.

[...]

31. As Ms. Shabazz attempted to walk across the rug to reach the white board for instruction, her right foot made contact with a part of the rug that had been bunched up as a result of the rug being left loose and unsecured on the floor [...]

[...]

In opposition to plaintiff's motion, and in support of their own cross-motion for summary judgment, the City argues that they did not cause or create the alleged defect and the City did not have actual or constructive notice of the alleged defect. Furthermore, in direct contravention of plaintiff's claims, the City contends that plaintiff's injuries were not the result of a rug at all but were the result of plaintiff having tripped over a student.<sup>1</sup>

On the issue of notice, the Affirmation of the City's attorney, (NYSCEF Document #33), states in part:

49. Defendants had no actual or constructive notice of any defects with the subject rug. As such, in the absence of any complaints regarding the rugs, Defendants had no reason to tape down the rugs or take any further action. This does not equate to negligence, but rather, the rugs were reasonably safe and thus required no further attention. In fact, in the absence of notice of any defective conditions, further action, such as taping down an area rug, could have created a hazard [...]

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<sup>1</sup> At oral argument, the City withdrew this assertion and their reliance on the statements made by children, that were attached to the City's motion papers. Plaintiff had objected, at argument, to these statements being considered, as they constitute inadmissible hearsay. Such statements are not considered in this decision,

The City submitted sworn Affidavits from Zofia Sapinski Head of the Facilities Records Management Unit for the New York City Department of Education (NYSCEF Document #50); Herminio Negrón (“Custodian Negrón”), Custodian Engineer P.S. 125 (NYSCEF Document #51); and Reginald Higgins (“Principal Higgins”), Principal of P.S. 125 (NYSCEF Document #52).

The Affidavit of Ms. Sapinski states:

1. I am the Head of the Facilities Records Management Unit for the New York City Department of Education ("DOE") and I have been in this position for over 3 years. As part of my duties, I have my staff perform record searches at the request of the New York City Law Department for records related to incident reports, work orders, maintenance and repair records, violations, custodial logbooks, building inspection reports, permits, contracts, facilities department rules & regulations, and I am familiar with the manner in which such records are maintained.
2. Upon request of the New York City Law Department, I personally conducted a records search for (i) photos of the subject rug; (ii) rules and regulations regarding the placement and/or inspection of rugs in classrooms; (iii) maintenance, repair, inspection, and complaints re: rugs placed in the classrooms of the subject school; (iv) records regarding the purchase of the subject rug and/or rugs placed in the classroom of the subject school; and (v) records regarding the disposition of the subject rug.
3. I searched in all locations such records would be maintained by DOE, including the agency's Violations, School Stats, PASSport, and FIS databases were searched. These are the only places where such records would be located and maintained by DOE. After an exhaustive search, my search did not find the aforementioned records at either location.

In addition, the City attached the deposition transcripts of Custodian Negrón, (NYSCEF Document #48), and Principal Higgins, (NYSCEF Document #49), who each testified that they were unaware that the rugs in any of the classrooms posed a tripping hazard. According to Custodian Negrón:

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Q. During the three years that you've worked at the school, have you ever had a teacher request that an area rug be secured to the floor in some fashion?

A. No.

Q. Okay. During the time you've worked at the school, have you ever received a complaint about any of the area rugs at the school?

A. No.

Q. During the time that you've worked at the school, apart from the accident involving Miss Shabazz, which is the subject of this lawsuit, have you ever heard anyone say or been notified in any way that anybody's foot got caught in one of these area rugs, or they tripped or almost tripped?

MS. CHAVEZ: Note my objection. You can answer.

A. No.

At her deposition, Principal Higgins testified:

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Q. Are you able to give us some estimate as to how many area rugs were in classrooms in the school during that school year [when the accident occurred]?

A. 12.

Q. Were they for particular 11 grades?

A. Pre-K through 5.

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Q. What year did you first start at P.S. 123? 2013?

A. September 2012, 2011.

Q. All right. When you first got to the school in 2011 or 2012, were those 12 area rugs present at the school?

A. Yes.

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Q. Prior to the date of Ms. Shabazz's accident did you ever receive complaints from anyone whether teachers, Paraprofessionals or students regarding the rugs that were present in the classrooms at the school?

A. No.

Q. Are you aware of any prior accidents where anyone tripped over any of the rugs in the school?

A. Not to my knowledge. Not since I've been Principal.

Importantly, and in addition to the above affidavits, the City submitted the transcript from plaintiff's deposition, (NYSCEF Document #47), at which plaintiff herself testified that she did not notice any defects in the condition of the rug before she fell. At her deposition, plaintiff testified:

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Q So on your way to the white board you tripped?

A Yes.

Q What caused you to trip?

A The rug was up.

Q Describe what the rug looks like?

A It is an area rug. They have them in all classes. I don't remember the exact colors because I go into almost all classes in that building and they have similar but some are rectangular, some are circular. They are blue with other colors. *[sic]*

Q What part of the rug was lifted exactly?

A It was the edge you first go in that area?

MR. LAVINSKY: Objection to form. You can answer.

A I would say it is a small section.

Q What part of your foot made contact with that section that caused you to fall?

A The bottom of my foot.

Q Could you describe to me exactly how that happened?

A Yes. The bottom of my foot went into, my right foot went into the rug that wasn't there and it caused me to lose my balance and I tried to grab the white board so I won't fall and I just twisted and fell back - boom.

**Q Did you notice this condition before you fell?**

**A No.**

Q Do you have any pictures?

A No.

**Q During the other times you had been assigned to this classroom, had you ever noticed that condition before?**

**A No.**

(emphasis added)

Here, neither party has established entitlement to summary judgement as a matter of law. As noted from the testimony above, plaintiff failed to establish that the City had notice of the alleged defect prior to her fall. Thus, summary judgment in favor of plaintiff is denied. Similarly, in their motion seeking summary judgment, the City failed to establish, that it did not cause or create the alleged defect that resulted in plaintiff's fall.

While the City proffered evidence that it did not have notice of any prior complaints about the subject rug absent from this record is any information about the subject rug itself on the date of plaintiff's accident or any information at all about the rugs that were in the school. There are no photos of the subject rug; no rules and regulations regarding the placement and/or inspection of rugs in classrooms; no maintenance, repair, inspection, and complaints regarding the rugs in the classroom; no records regarding the purchase of the subject rug and/or rugs; and no records regarding the disposition of the subject rug. In the absence of any such records, this court cannot conclude, as the City suggests in its affirmation, that the "rugs were reasonably safe" and that "taping down an area rug, could have created a hazard." Neither party having met its burden, both plaintiff's motion for summary judgment and the City's cross-motion for summary judgment are denied.

Spoliation

Plaintiff argues that spoliation sanctions against the City are warranted because the City allowed the rug over which plaintiff allegedly tripped to be thrown out, or otherwise lost. This court notes that plaintiff's demand for preservation of the rug was not made until September 21, 2018 (NYSCEF Document #56 and 69), which was over one year after the alleged incident occurred on February 14, 2017 and nine months after the complaint was filed in November 2017. Nevertheless, in orders dated December 20, 2018, April 4, 2019, June 27, 2019 and September 26, 2019 defendants were directed to produce the rug or a photograph of the same (to the extent that it was in the City's possession, custody and control), or to provide a good faith affidavit regarding the search for the rug and the date, manner and disposition of the same.

Despite the ongoing demand, it was not until June 27, 2019 that the City, in its "Response to Plaintiff's Demand for Discovery and Inspection dated January 26, 2018," responded as follows:

## SPECIFIC OBJECTIONS AND RESPONSES

1. Demand: Photos of the subject classroom/rug.

Response: Objection. A search was conducted for photos of the subject classroom and rug. No photos were found.

Further, in the "City's Response (dated June 27, 2019) to Plaintiff's Demand for Discovery and Inspection dated September 21, 2018," the City referred to the testimony of Mr. Negron and Mr. Higgins and responded as follows:

## SPECIFIC OBJECTIONS AND RESPONSES

1. Demand: Preservation of the subject rug involved in Plaintiffs February 14, 2017 accident at PS 125, room 217,425 East 123rd Street, New York, New York. To the extent that said rug is no longer in defendants' possession, custody and/or control, defendants shall provide an affidavit from a person with knowledge setting forth the date, manner and reason for the disposition of the subject rug and the name(s) and job title(s) of the person(s) who disposed of said rug.

Response: On March 18, 2019, Reginald Higgins, the Principal at PS 125, appeared for a deposition on behalf of the City. At said deposition, Mr. Higgins testified to the following:

Q: To your knowledge, was the rug that was in the classroom on February 14, 2017, is that rug still at the school?

A: No, it is not. No, it is not.

Q: What happened to the rug?

A: I bought new rugs this school year.

Q: This school year?

A: Yes, for all the classrooms.

[ . . . ]

Q: Do you know what happened to the rug in Ms. Shabazz's classroom and the other 11 rugs that had been at the school?

A: No, I don't know.

Q: Who would have taken care of the task of removing the old rugs and putting down the new ones?

A: The custodian.

Q: And the custodian at the school is Mr. Negron, Pirminio (phonetic) Negron?

A: Yes.

Q: So would he have been the one personally who would have removed the old rugs and put down the new one?

A: He wouldn't. Maybe not him exactly, but one of his staff members. Maybe a cleaner would be responsible for doing that task.

Q: It would have been under his direction though? In other words, Mr. Negron would have told one of his staff to remove the old rugs?

A: Yes. Mr. Negron would have told them to remove the old rugs.

Q: And as you sit here today do you have any knowledge at all as to what happened to the rug in question and the other 11 rugs?

A: No, I don't know what happened to the rugs.

Q: Is it possible they were thrown out?

A: I don't know.

Q: But you're not aware of them being anywhere in the school?

A:No.

See EBT Transcript of Reginald Higgins, at pg. 43-45

While Mr. Higgins testified that the rug was not still at the school and that he “bought new rugs this school year,” he did not provide the date on which new rugs were purchased and he did not know what happened to the subject rug or the date on which it was removed. Although Mr. Higgins further testified that school custodian Mr. Negron or members of Mr. Negron’s staff would have been responsible for removing the old rugs and putting down the new ones, at Mr. Negron’s EBT, on December 4, 2018, which was approximately three months prior to Mr. Higgins’ deposition, Mr. Negron denied having any information about the rug. At his deposition, (transcript at NYSCEF Document #20), he testified as follows:

Q. Do you know the current whereabouts of the rug that was involved in Miss Shabazz's accident?

MS. CHAVEZ: Just note my objection. You can answer.

A. No.

**Q. Do you have any knowledge whether anybody from the Board of Ed or the Department of Ed or the school, took any steps to preserve that area rug after her accident?**

MS. CHAVEZ: Note my objection. You can answer.

**A. To my knowledge, no.**

Q. Okay. **So would it be correct to say that you have no knowledge whether the rug still exists or is in the possession of or is still at P.S. 125?**

**A. I have no knowledge of that, no.**

**Q. Do you know whether anybody photographed the area rug in question after Miss Shabazz's accident?**

THE WITNESS: Can you repeat the question, please. (Whereupon, the referred to question was read back by the Reporter.)

A. No.

Q. No, you don't know or no, no one did?

**A. No, I don't know.**

(Emphasis added)

This court finds that the City failed to provide information sufficient as to the date, manner and disposition of the rug, as neither Mr. Higgins, Mr. Negron had any information as to when the subject rug was removed.

Nevertheless, to impose a sanction for spoliation, the evidence that is lost, destroyed or altered must be “key” evidence. In Kirkland v New York City Hous. Auth., 236 AD2d 170 [1st Dept 1997], the Appellate Division, First Department, held:

spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of *crucial items* of evidence involved in an accident before the adversary has an opportunity to inspect them [...]. We have found dismissal to be a viable remedy for loss of a “key piece of evidence” that thereby precludes inspection [...]. [*internal citations omitted*] [*emphasis added*]

*See also* Std. Fire Ins. Co. v Fed. Pac. Elec. Co., 14 AD3d 213 [1st Dept 2004] (“When a party alters, loses or destroys *key evidence* before it can be examined by the other party's expert, the court should dismiss the pleadings of the party responsible for the spoliation ... Spoliation sanctions ... are not limited to cases where the evidence was destroyed willfully or in bad faith, since a party's negligent loss of evidence can be just as fatal to the other party's ability to present a defense.”); Rookwood v Busy B's Child Care Daycare Inc., 147 AD3d 561 [1st Dept 2017] (“The intentional destruction of the staircase, *key physical evidence*, severely prejudices plaintiffs' ability to prove their case, and warrants the extreme sanction of striking defendants' answers”); Malouf v Equinox Holdings, Inc., 113 AD3d 422 [1st Dept 2014] (“The motion court's invocation of the harsh penalty of striking defendant's third-party complaint seeking contribution and indemnification based on the design, manufacture, sale, maintenance, and servicing of the treadmill was warranted since the treadmill was a *key piece of evidence* that is not available for inspection”) [*emphasis added*].


Here, plaintiff conceded at oral argument on the record, that while the rug would be “helpful,” it “is not critical” Accordingly, plaintiff’s motion for spoliation sanctions is denied.<sup>2</sup>

For all the aforementioned reasons, it is hereby:

**ORDERED** that plaintiff’s motion for summary judgment on the issue of liability is DENIED; and it is further

**ORDERED** that plaintiff’s request for spoliation sanctions is DENIED; with leave granted and the right preserved for plaintiff to request an adverse inference at trial; and it is further

**ORDERED** that the City’s cross-motion for summary judgment is also DENIED.

<u>7/7/2022</u> DATE		 J. MACHELLE SWEETING, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE

<sup>2</sup> Nothing contained herein precludes plaintiff from making an application before the trial court for an adverse inference at the time of trial.