

Pascucci v New York City Dept. of Educ.
2022 NY Slip Op 35122(U)
August 10, 2022
Supreme Court, Queens County
Docket Number: Index No. 704616/2022
Judge: Tracy Catapano-Fox
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

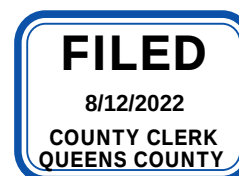
-----X
JAYSON PASCUCCI,

Plaintiff,

-against-

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

Defendant.
-----X



Index No. 704616/2022

Motion Date: June 27, 2022

Calendar No. 42

Sequence No. 4

The following papers numbered 1 to 7 were read on this motion by defendants for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212.

Papers
Numbered

Notice of Motion Affirmation, Exhibits.....1-4
Affirmation in Opposition, Exhibits.....5-7

Upon the foregoing papers, it is ordered that this motion is determined as follows:

Defendants' motion for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212 is granted, as defendants did not have notice of the dangerous condition that caused plaintiff's injuries. Plaintiff commenced this action for personal injuries sustained on March 16, 2015 when plaintiff slipped and fell on a liquid on the floor in the entranceway of a classroom in Thomas A. Edison Career & Technical Education High School located at 165-65 84th Avenue, Queens, New York. Plaintiff filed the Summons and Complaint on June 2, 2016, and issue was joined on February 28, 2018.

Pursuant to CPLR 3212, "[a] motion [for summary judgment] shall be granted if . . . the cause of action . . . [is] established sufficiently to warrant the court as a matter of law in directing

judgment in favor of any party.” (CPLR 3212 [b]; *Rodriguez v. City of New York*, 31 N.Y.3d 312 [2018].) The motion for summary judgment must also “show that there is no defense to the cause of action.” (*Id.*). The party moving for summary judgment must make a *prima facie* showing that it is entitled to summary judgment by offering admissible evidence demonstrating the absence of any material issues of fact and it can be decided as a matter of law. (CPLR § 3212 [b]; see *Jacobsen v New York City Health and Hosps. Corp.*, 22 N.Y.3d 824 [2014]; *Brill v City of New York*, 2 N.Y.3d 648 [2004].) In deciding a summary judgment motion, the court does not make credibility determinations or findings of fact. Its function is to identify issues of fact, not to decide them. (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 [2012].) Once a *prima facie* showing has been made, however, the burden shifts to the non-moving party to prove that material issues of fact exist that must be resolved at trial. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980].)

To find a defendant liable for a plaintiff’s injuries, plaintiff must present evidence showing the existence of a dangerous or defective condition and that the defendant either created the condition or had actual or constructive notice of the condition and failed to remedy it within a reasonable amount of time. (*Davis v. Sutton*, 136 A.D.3d 731, 732-733 [2d Dept. 2016].) A defendant has constructive notice of a hazardous condition on property when the condition is visible and apparent and has existed for a sufficient length of time to afford the defendant a reasonable opportunity to discover and remedy it. (*Williams v. Island Trees Union Free Sch. Dist.*, 177 A.D.3d 936, 937 [2d Dept. 2019].)

Defendants presented a prima facie entitlement to summary judgment, as they had no notice of a dangerous condition prior to plaintiff’s fall. Defendants presented the pleadings, plaintiff’s 50-h testimony, court orders, the parties’ deposition transcripts, and photographs from plaintiff’s deposition in support of their motion. Plaintiff testified that he was a teacher at the school and had been using classroom G10 during second and third period but did not observe a liquid on the floor. He testified that he left the classroom for fourth period, and when he returned to classroom G10 for fifth period he immediately saw a substance on the floor that looked like oil or transmission fluid. He further testified that the puddle was approximately seven feet by six feet, and he tried to clean the fluid by pouring speed dry on it and then rubbing a towel over it until

it was cleaned. Plaintiff further testified that he observed the floor after he removed the liquid and determined there was no slippery condition and it was safe for students, but when he walked toward his desk, he slipped and fell on the area he had just cleaned. Plaintiff admitted he did not report the slippery condition to maintenance or anyone at the school prior to his accident, and that prior to his fall there were no school staff in the classroom. Plaintiff alleged that the slippery liquid came from an engine that had been left in the classroom for over one week. However, defendants' witness John Rullan testified that he was the Coordinator the Career and Technical Education Department at the school, and he was not informed by plaintiff or anyone about a liquid condition in courtroom G10. He also testified that plaintiff was trained to clean a leak or spill in an automotive classroom with speed dry, and if the leak was bad plaintiff was instructed to notify the custodial staff. Mr. Rullan further testified that he went to plaintiff's classroom immediately after the accident and did not see any fluid or substance on the floor of the classroom.

Based upon the above, defendants established they had no actual or constructive notice of the slippery condition. (*See Nisimov v. Ocean Props., LLC*, 10 A.D.3d 640 [2d Dept. 2004].) Plaintiff acknowledged he had been in the classroom during the second and third period and did not observe a liquid condition. He also acknowledged he did not notify anyone of the slippery condition prior to trying to clean it himself, and he had been the only teacher using that classroom that day. He further admitted that the classroom had been locked during fourth period prior to him returning to it for fifth period. Rullan testified that he did not receive any complaints from plaintiff or anyone about a dangerous condition in classroom G10 on the date of plaintiff's accident or anytime prior to it. (*See Farren v. Board of Educ. of City of N.Y.*, 119 A.D.3d 518 [2d Dept. 2014].) Defendants also presented the custodial logbook which showed that there was no mention of a leak or slippery condition in classroom G10 for days prior and the day of plaintiff's accident. Defendants further demonstrated that the slippery condition was not visible and apparent because plaintiff cleaned the condition.

Plaintiff failed to raise a triable issue of fact in dispute. (*See Bluman v. Freeport Union Free Sch. Dist.*, 5 A.D.3d 341 [2d Dept. 2004].) Plaintiff's argument that he slipped and fell due to the dangerous and defective engine in the classroom for a week prior to the accident is

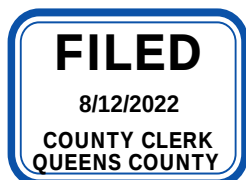
insufficient to raise an issue of fact, as plaintiff acknowledged he did not observe the liquid on the floor until fifth period on the date of his accident. Plaintiff contends that he complained of the broken defective condition that was improperly placed in classroom G10 but no remedial steps were taken to remove it. Even assuming this is true, the failure to remove the broken defective engine was not a proximate cause of plaintiff's accident, as plaintiff did not observe any liquid spilling from the engine on the date of his accident. Further, the evidence demonstrated that when plaintiff did see the liquid, he failed to notify maintenance or his supervisor of the condition, but rather cleaned it up himself, thereby not providing defendants with sufficient time to remove the liquid from the floor prior to his accident.

Plaintiff's expert affidavit from Ernest Gailor likewise did not raise a triable issue of fact. (*See Murphy v. Connor*, 84 N.Y.2d 969 [1994].) Mr. Gailor attested that he is a professional engineer with over 40 years of experience and opined that plaintiff's accident occurred due to the defective engine being left in the classroom in violation of New York State Property Maintenance Code §304.5. However, this affidavit is conclusory and does not assert how the failure to remove the defective engine was the proximate cause of plaintiff's injuries, as there is no evidence anyone observed liquid coming from the engine prior to plaintiff's accident. (*See Bedell v. Rocking Horse Ranch Corp.*, 94 A.D.3d 1389 [3d Dept. 2012].) The affidavit also does not acknowledge and refute plaintiff's own testimony that he believed he had cleaned up the area before walking into the exact same spot he had just finished cleaning. As plaintiff's evidence is speculative and conclusory, it fails to raise an issue of fact in dispute.

Accordingly, defendants' motion for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212 is granted, and plaintiff's Complaint is dismissed.

This constitutes the decision and Order of the Court.

Dated: August 10, 2022



Tracy Catapano-Fox
Tracy Catapano-Fox, J.S.C.