

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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_____AD3d_____

Submitted - December 18, 2006

ROBERT A. SPOLZINO, J.P.
ANITA R. FLORIO
ROBERT A. LIFSON
JOSEPH COVELLO, JJ.

2006-02740

DECISION & ORDER

Charles Bernth, appellant, v King Kullen
Grocery Co., Inc., respondent.

(Index No. 28937/03)

Mescal Maffei & Condon, Sayville, N.Y. (Frank H. Maffei, Jr., of counsel), for
appellant.

Kennedy & Gillen, Garden City, N.Y. (Christopher F. Mansfield of counsel), for
respondent.

In an action to recover damages for personal injuries, the plaintiff appeals from an
order of the Supreme Court, Suffolk County (Baisley, Jr., J.), dated February 21, 2006, which
granted the defendant's motion for summary judgment dismissing the complaint.

ORDERED that the order is affirmed, with costs.

The plaintiff allegedly fell over an empty merchandise cart in the frozen food aisle of
the defendant's supermarket. The cart was the type utilized by the defendant's employees to move
merchandise from the storage area to the shelves and was approximately six feet long, five feet high,
and one foot wide with orange bars on its sides. The plaintiff testified at his deposition that he saw
several such carts in the center of the aisle and that he saw the empty cart his right leg came into
contact with before his fall.

The defendant established its prima facie entitlement to judgment as matter of law by
demonstrating that the alleged defective condition which caused the plaintiff to trip and fall was open

January 30, 2007

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and obvious and not inherently dangerous (*see Cupo v Karfunkel*, 1 AD3d 48; *Mansueto v Worster*, 1 AD3d 412; *Schoen v King Kullen Grocery Co.*, 296 AD2d 486; *Tresgallo v Danica*, 286 AD2d 326). In opposition, the plaintiff failed to submit evidence sufficient to raise a triable issue of fact (*see Meagher-Cox v Winarski*, 32 AD3d 379; *Tenenbaum v Best 21 Ltd.*, 15 AD3d 646; *Mastellone v City of New York*, 29 AD3d 540; *Cupo v Karfunkel*, *supra*).

SPOLZINO, J.P., FLORIO, LIFSON and COVELLO, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court