

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

D14466  
G/cb

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Argued - February 27, 2007

REINALDO E. RIVERA, J.P.  
DAVID S. RITTER  
GLORIA GOLDSTEIN  
DANIEL D. ANGIOLILLO, JJ.

2006-06248

DECISION & ORDER

Germana DeFalco, appellant, v BJ's Wholesale  
Club, Inc., respondent.

(Index No. 12723/04)

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Michael Quintana, Brooklyn, N.Y. (Joseph Rinaldi of counsel), for appellant.

Torino & Bernstein, P.C., Mineola, N.Y. (Barbara A. Borden and Eva Tompkins of  
counsel), for respondent.

In an action to recover damages for personal injuries, the plaintiff appeals from an  
order of the Supreme Court, Queens County (Rosengarten, J.), dated May 11, 2006, which granted  
that branch of the defendant's motion which was for summary judgment dismissing the complaint.

ORDERED that the order is reversed, on the law, with costs, and that branch of the  
defendant's motion which was for summary judgment dismissing the complaint is denied.

“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” (*Ulu*  
*v ITT Sheraton Corp.*, 27 AD3d 554, quoting *Curtis v Dayton Beach Park No. 1 Corp.*, 23 AD3d  
511; see *Roethgen v AMF Babylon Lanes*, 30 AD3d 398; *Yioves v T.J. Maxx, Inc.*, 29 AD3d 572;  
*Daniels v Brisbane Leasing Ltd. Partnership*, 24 AD3d 409). Only after the movant has satisfied this  
threshold burden will the court examine the sufficiency of the plaintiff's opposition (see *Winegrad*  
*v New York Univ. Med. Ctr.*, 64 NY2d 851, 853; *Yioves v T.J. Maxx, Inc.*, *supra* at 573).

March 27, 2007

Page 1.

DeFALCO v BJ'S WHOLESALE CLUB, INC.

Here, the defendant failed to make a prima facie showing that it was entitled to judgment as a matter of law on the ground that it had no notice of the condition which allegedly caused the plaintiff's fall. This burden cannot be satisfied merely by pointing out gaps in the plaintiff's case (see *Cox v Huntington Quadrangle No. 1 Co.*, 35 AD3d 523; *Pearson v Parkside Ltd. Liab. Co.*, 27 AD3d 539; *South v K-Mart Corp.*, 24 AD3d 748; *Mondello v DiStefano*, 16 AD3d 637, 638; *Surdo v Albany Collision Supply, Inc.*, 8 AD3d 655; *O'Leary v Bravo Hylan, LLC*, 8 AD3d 542).

Accordingly, the Supreme Court should have denied that branch of the defendant's motion which was for summary judgment dismissing the complaint.

RIVERA, J.P., RITTER, GOLDSTEIN and ANGIOLILLO, JJ., concur.

ENTER:

  
James Edward Pelzer  
Clerk of the Court