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

D18276
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_____AD3d_____ Submitted - February 8, 2008

WILLIAM F. MASTRO, J.P.
JOSEPH COVELLO
RANDALL T. ENG
ARIEL E. BELEN, JJ.

2007-01862 DECISION & ORDER

Susan Sloane, appellant, v Costco Wholesale Corporation, respondents.

(Index No. 27770/04)

Kujawski & DelliCarpini, Deer Park, N.Y. (Mark C. Kujawski of counsel), for appellant.

Gallagher, Walker, Bianco & Plastaras, Mineola, N.Y. (Robert J. Walker, Ethan D. Irwin, and Dominic P. Bianco 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 (Kerins, J.), entered February 20, 2007, which granted the defendant's motion for summary judgment dismissing the complaint and denied her cross motion pursuant to CPLR 3126 to strike the defendant's answer based upon spoliation of evidence.

ORDERED that the order is affirmed, with costs.

"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" (*Frazier v City of New York,* _____AD3d_____, 2008 NY Slip Op 00450, *1 [2d Dept 2008]; *see Prusak v New York City Hous. Auth.,* 43 AD3d 1022; *Scoppettone v ADJ Holding Corp.,* 41 AD3d 693). Here, the defendant sustained this burden by submitting evidence that it did not create the condition which caused the plaintiff's fall, and that no spills or other hazards were found when an employee conducted a walk-through inspection of its store just minutes before the accident

occurred. In opposition, the plaintiff failed to raise a triable issue of fact (*see Frazier v City of New York,* _____AD3d_____, 2008 NY Slip Op 00450 [2d Dept 2008]; *Prusak v New York City Hous. Auth.,* 43 AD3d at 1023). Accordingly, the Supreme Court properly granted the defendant's motion for summary judgment dismissing the complaint.

Furthermore, the court providently exercised its discretion in denying the plaintiff's cross motion to strike the defendant's answer pursuant to CPLR 3126 based upon spoliation of evidence. The plaintiff failed to establish that the defendant intentionally or negligently failed to preserve crucial evidence after being placed on notice that such evidence might be needed for future litigation (*see Denoyelles v Gallagher,* 40 AD3d 1027; *Lovell v United Skates of Am., Inc.,* 28 AD3d 721; *Iannucci v Rose,* 8 AD3d 437, 438; *Andretta v Lenahan,* 303 AD2d 527, 528).

MASTRO, J.P., COVELLO, ENG and BELEN, JJ., concur.

ENTER:

James Edward Pelzer
Clerk of the Court