

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

D18348  
X/kmg

\_\_\_\_\_AD3d\_\_\_\_\_

Submitted - February 4, 2008

ROBERT A. SPOLZINO, J.P.  
DANIEL D. ANGIOLILLO  
RUTH C. BALKIN  
JOHN M. LEVENTHAL, JJ.

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2006-11836

DECISION & ORDER

Amira Khamis, etc., et al., appellants, v  
CG Foods, Inc., respondent.

(Index No. 25110/04)

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Levidow, Levidow & Oberman, P.C., New York, N.Y. (Peter LoDuca of counsel),  
for appellants.

Edward J. Troy, Greenlawn, N.Y. (Patrick J. Morganelli of counsel), for respondent.

In an action to recover damages for personal injuries, etc., the plaintiffs appeal from an order of the Supreme Court, Queens County (Taylor, J.), entered November 29, 2006, which granted the defendant's motion for summary judgment dismissing the complaint.

ORDERED that the order is reversed, on the law, with costs, and the motion for summary judgment dismissing the complaint is denied.

The infant plaintiff allegedly sustained personal injuries when she fell through an open cellar door, in the sidewalk, leading to the basement of the store owned by the defendant. The doors allegedly were flat on the ground, in the open position, without any safety or cautionary devices such as cones, tape, or other barricades around the opening. "A property owner may be held liable for a dangerous or defective condition on the property if the owner created the condition or had actual or constructive notice of it" (*Enamorado v KHR Holding Co., LLC*, 24 AD3d 411, 412; *see Ogletree v Rush Realty Assoc., LLC*, 29 AD3d 875).

The defendant, as the proponent of the motion for summary judgment, had the initial

March 11, 2008

KHAMIS v CG FOODS, INC.

Page 1.

burden of establishing its prima facie entitlement to judgment as a matter of law by tendering proof, in admissible form, sufficient to demonstrate the absence of any material issue of fact (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851; *Carbone v Lakeside Deli & Pizza, Inc.*, \_\_\_ AD3d \_\_\_, 2008 NY Slip Op 00441 [2d Dept 2008]; *Xu v 688 Sixth Ave. Realty Co.*, 19 AD3d 687). The defendant failed to make a prima facie showing that it neither created nor had actual or constructive notice of the allegedly dangerous condition (*see Soto-Lopez v Board of Mgrs. of Crescent Tower Condominium*, 44 AD3d 846; *Marshall v Jeffrey Mgt. Corp.*, 35 AD3d 399; *Bosman v Reckson FS Ltd. Partnership*, 15 AD3d 517).

As the defendant failed to make the prima facie showing necessary for an award of summary judgment, it is unnecessary to consider the adequacy of the plaintiffs' opposition papers (*see Alvarez v Prospect Hosp.*, 68 NY2d 320; *Restrepo v Rockland Corp.*, 38 AD3d 742; *Wolff v New York City Tr. Auth.*, 21 AD3d 956).

SPOLZINO, J.P., ANGIOLILLO, BALKIN and LEVENTHAL, JJ., concur.

ENTER:

  
James Edward Pelzer  
Clerk of the Court