

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

D23779
C/prt

_____AD3d_____

Argued - June 4, 2009

ROBERT A. SPOLZINO, J.P.
DANIEL D. ANGIOLILLO
CHERYL E. CHAMBERS
PLUMMER E. LOTT, JJ.

2008-09906

DECISION & ORDER

Chia Yun Tsai, et al., appellants-respondents, v
Duane Reade, Inc., respondent-appellant, et al.,
defendants.

(Index No. 9047/06)

Wade T. Morris (Kenneth J. Gorman, New York, N.Y., of counsel), for appellants-respondents.

Chesney & Murphy, LLP, Baldwin, N.Y. (Marie I. Goutzounis of counsel), for respondent-appellant.

Ahmuty, Demers & McManus, Albertson, N.Y. (Brendan T. Fitzpatrick of counsel), for defendants Landings Development Associates, Maple Associates, Malverne Group, Inc., and Standish Realty Corp.

In an action to recover damages for personal injuries, etc., the plaintiffs appeal, as limited by their brief, from so much of an order of the Supreme Court, Queens County (Cullen, J.), dated September 22, 2008, as denied their cross motion for summary judgment on the issue of liability against the defendant Duane Reade, Inc., and the defendant Duane Reade, Inc., cross-appeals from the same order.

ORDERED that the cross appeal is dismissed as abandoned (*see* 22 NYCRR 670.8[e]); and it is further,

ORDERED that the order is affirmed insofar as appealed from; and it is further,

June 30, 2009

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ORDERED that one bill of costs is awarded to the defendant Duane Reade, Inc.

The Supreme Court properly denied the plaintiffs' cross motion for summary judgment on the issue of liability against the defendant Duane Reade, Inc. (hereinafter Duane Reade). "A defendant will not be liable for a dangerous or defective condition on its property unless it created the condition, or had actual or constructive notice of its existence and a reasonable time to remedy the defect" (*Goldin v Riker*, 273 AD2d 197, 197-198; see *Bluman v Freeport Union Free School Dist.*, 5 AD3d 341, 342; *Hanley v Affronti*, 278 AD2d 868, 868; *McLaughlan v Waldbaums, Inc.*, 237 AD2d 335, 336). The plaintiffs failed to establish the absence of a triable issue of fact regarding whether Duane Reade created or had prior notice of a defect or dangerous condition related to the rolling gate which fell and struck the injured plaintiff.

The cross appeal must be dismissed as abandoned as Duane Reade does not seek reversal or modification of any portion of the order (see *Sirma v Beach*, 59 AD3d 611, 614; *Bibas v Bibas*, 58 AD3d 586, 587).

SPOLZINO, J.P., ANGIOLILLO, CHAMBERS and LOTT, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court