

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

D24090
T/prt

_____AD3d_____

Argued - May 19, 2009

A. GAIL PRUDENTI, P.J.
STEVEN W. FISHER
HOWARD MILLER
PLUMMER E. LOTT, JJ.

2008-04051

DECISION & ORDER

Marvin Mersack, appellant, v BJ's Wholesale
Club, Inc., respondent.

(Index No. 839/07)

Harley S. Fastman, Lake Success, N.Y. (Eric E. Rothstein, New York, N.Y., of
counsel), for appellant.

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

In an action to recover damages for personal injuries, the plaintiff appeals from an
order of the Supreme Court, Nassau County (Adams, J.), dated March 27, 2008, which granted the
defendant's motion for summary judgment dismissing the complaint.

ORDERED that the order is affirmed, with costs.

The plaintiff was injured when he allegedly slipped and fell on a small puddle of water
in an aisle of the defendant's store. He commenced this action and, after discovery was completed,
the defendant moved for summary judgment dismissing the complaint on the ground, insofar as
relevant here, that it did not have constructive notice of the condition. The Supreme Court granted
the motion, and we affirm.

The evidence submitted in support of the motion established that an employee of the
defendant observed the aisle where the plaintiff fell within 10 to 15 minutes before the plaintiff's fall
and saw no accumulation of water. Additionally, the deposition testimony of the plaintiff himself
established that he had been in that aisle for the 30 minutes preceding the accident and saw no

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accumulation of water. This evidence established, prima face, that the defendant did not have constructive notice of the puddle (*see Ganci v National Wholesale Liquidators of Farmingdale, Inc.*, 20 AD3d 551; *Berg v Wegmans Food Mkts.*, 242 AD2d 861, 862; *cf. Malenda v Great Atl. & Pac. Tea Co., Inc.*, 50 AD3d 972, 972–973). In opposition, the plaintiff failed to raise a triable issue of fact (*see Becker v Waldbaum, Inc.*, 221 AD2d 396; *Kaufman v Man-Dell Food Stores*, 203 AD2d 532, 533).

PRUDENTI, P.J., FISHER, MILLER and LOTT, 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