

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

D26820
Y/kmg

_____AD3d_____

Submitted - March 9, 2010

JOSEPH COVELLO, J.P.
ANITA R. FLORIO
RANDALL T. ENG
CHERYL E. CHAMBERS, JJ.

2009-06245

DECISION & ORDER

Edward Molloy, et al., respondents, v Waldbaum, Inc.,
appellant.

(Index No. 9850/06)

Kral Clerkin Redmond Ryan Perry & Girvan, LLP, Smithtown, N.Y. (James V. Derenze of counsel), for appellant.

Tinari, O'Connell, Osborn & Kaufman, LLP, Central Islip, N.Y. (Frank A. Tinari of counsel), for respondents.

In an action to recover damages for personal injuries, etc., the defendant appeals from an order of the Supreme Court, Suffolk County (Molia, J.), dated June 15, 2009, which denied its motion for summary judgment dismissing the complaint.

ORDERED that the order is affirmed, with costs.

To demonstrate its entitlement to summary judgment in a slip-and-fall case, a defendant must establish, prima facie, that it did not create the condition that allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to remedy it (*see Gregg v Key Food Supermarket*, 50 AD3d 1093). Here, the defendant failed to meet its burden in this regard. The defendant failed to tender evidence sufficient to establish, prima facie, that its employees did not create the allegedly dangerous condition that caused the injured plaintiff to slip (*see Tenkate v Tops Mkts., LLC*, 38 AD3d 987, 988-989). The defendant also failed to tender evidence sufficient to establish, prima facie, that its employees lacked constructive notice of that condition (*see Holub v Pathmark Stores, Inc.*, 66 AD3d 741, 742; *see also Erikson v J.I.B. Realty*

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Corp., 12 AD3d 344, 344-345). Accordingly, the Supreme Court properly denied the defendant's motion for summary judgment dismissing the complaint, regardless of the sufficiency of the plaintiffs' opposition papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 852).

COVELLO, J.P., FLORIO, ENG and CHAMBERS, 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