Short Form Order

NEW YORK SUPREME COURT -QUEENS COUNTY

PRESENT: ORIN R. KITZES **PART 17**
Justice

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JENNY DELVALLE-STONE,
Plaintiff,

Index No.: 12311/02
Motion Date: 10/6/04
Motion Cal. No.: 10

-against-

ULTIMATE SERVICE INC.,
Defendant.

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The following papers numbered 1 to 20 read on this motion by defendant for an order, pursuant to CPLR § 3212, granting summary judgment in its favor and dismissing the complaint; and cross-motion by plaintiff for an order vacating the Note of Issue and striking the case from the trial calendar.

	PAPERS NUMBERED
Amended Notice of Motion-Affirmation-Exhibits.....	1-3
Memorandum of Law.....	5-6
Notice of Motion-Affirmation-Exhibits.....	6-9
Notice of Cross-Motion-Affirmation-Exhibits.....	10-13
Affirmation in Opposition-Exhibits.....	14-15
Reply Affirmation-Exhibits.....	16-18
Reply Affirmation.....	19-20

Upon the foregoing papers it is ordered that the motion by defendant for an order, pursuant to CPLR § 3212, granting summary judgment in its favor and dismissing the complaint is granted; and the cross-motion is denied, for the following reasons:

It is axiomatic that the Summary Judgment remedy is drastic and harsh and should be used sparingly. The motion is granted only when a party establishes, on papers alone, that there are no material issues and the facts presented require judgment in its favor. It must also be clear that the other side's papers do not suggest any issue exists. Moreover, on this motion, the court's duty is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist. *See*, Barr v County of Albany, 50 NY2d 247 (1980); Miceli v Purex, 84 AD2d 562 (2d Dept. 1981); Bronson v March, 127 AD2d 810 (2d Dept. 1987.) Finally, as stated by the court in Daliendo v Johnson, 147 AD2d 312,317 (2d Dept. 1989), "Where the court entertains any doubt as to

whether a triable issue of fact exists, summary judgment should be denied."

The action herein stems from plaintiff, an employee of Macy's, allegedly stepping on an object referred to as a "Sensormatic" security device, that was lying on the floor near her work station. As a result of this contact, she suffered injuries and brought this action to recover damages.

Defendant's have now moved for summary judgment on the grounds that, inter alia, plaintiff's accident occurred at a time when defendant owed no duty to the store, that defendant had no notice of the alleged "Sensormatic" being on the floor, and there was an intervening event that caused the accident. Defendant has submitted plaintiff's deposition testimony, which indicates that the accident occurred at about 10:40 p.m. while she was standing and counting money at one of the cash registers in the Petite department. She explained that Sensormatics are security devices, consisting of two pieces, one of which resembles a thumb-tack. This is the piece that was lying on the floor and plaintiff stepped upon. Sensormatics are removed from clothing with the use of a machine, at the time of sale by the Sales Associate. The pieces are then put into a box near the cash register for eventual collection and re-use. Plaintiff noted that part of her responsibilities as a Sales Associate was to remove, Sensormatics from the floor. Regarding the Sensormatic she stepped on, plaintiff knew neither how it came to be on the floor nor how long it was on the floor. She did say that, on a previous date, she noticed cleaning people doing this work as well, however, she could not identify who these cleaning people were or whom they worked for.

Defendant also has submitted deposition testimony of Mr. Donato, a Vice-President of defendant, wherein he stated that defendant's responsibilities at the subject Macy's store did not include removing Sensormatics from the floor. He had visited the Macy's store on a monthly basis for four years prior to the accident and had never received a complaint regarding Sensormatics on the floor. Defendant has also submitted the deposition testimony of Mr. Sanchez, plaintiff's brother, wherein he states that, in essence he had neither personal knowledge of the subject accident nor the procedures of the subject store. Finally, defendant has submitted the deposition testimony of Mr. Khajenoori, defendant's supervisor at the subject store. He noted that Sensormatics would be on the floor in a random fashion, not accumulating in one particular area. He explained that Macy's in-house cleaning staff was responsible for removing Sensormatics from the

floor of the store.

In order to impose liability, it is required that plaintiff prove either actual or constructive notice of the dangerous condition by defendant or that the defendant created such condition. If a defendant moves for summary judgment dismissing the complaint based upon lack of notice, a prima facie showing affirmatively establishing the absence of notice as a matter of law must be made. *See*, Beltran v. Metropolitan Life, 259 A.D.2d 456 (2d Dept. 1999). The burden would then shift to the plaintiff to show notice.

In this case, the moving defendant has met its burden by submitting evidence of the procedures that were in place regarding ensuring that Sensormatics on the floor were reported and that no complaints were made. *See*, Melton v EPS Hari Design, Inc., 202 AD2d 649 (2d Dept. 1994.) Plaintiff has shown nothing more than that there was a Sensormatic on the floor on the subject date and there were also Sensormatics on the floor in the past on the floor of the store that would be picked up by sales associates or cleaning personnel. The mere fact that a Sensormatic was on the floor, without more, is insufficient to show that defendant had either actual or constructive notice of the alleged dangerous condition. *Id.*; Strowman v. Great Atlantic and Pacific Tea Company, Inc., 252 AD2d 384, (2d Dept. 1998). There is no evidence that would permit an inference that the Sensormatic on the floor was a condition created by defendant's employees or had been on the floor for a sufficient length of time to permit defendant's employees to discover and remedy. Chemont v. Pathmark Supermarkets, Inc., 279 AD2d 545 (2d Dept. 2001.) Therefore, since defendant has shown as a matter of law the absence of notice and plaintiff has failed to make a prima facie showing on the issue of notice, defendant's motion for summary judgment is granted. *Id. See also*, Cynar v US Trust Corporation, 7 AD3rd (2d Dept. 2004).

Plaintiff's cross-motion for an order vacating the Note of Issue and striking the case from the trial calendar is denied. In support of a motion for additional discovery made more than 20 days after a note of issue was filed, plaintiff must demonstrate that "unusual or unanticipated circumstances developed subsequent to the filing to the note of issue." 22 NYCRR 202.21 (d). *See*, Fitzgerald v Enterprise Rent-A-Car, Inc., 290 AD2d 481 (2d Dept 2002). Plaintiff's claim that he was not supplied with defendant's log books is not such a circumstance. Plaintiff fails to show any reason for the extensive delay in seeking court intervention in obtaining these books. Plaintiff concedes knowing about

their existence prior to Mr. Sanchez' deposition testimony and therefore, has waived her right to be provided with these log books. deposition. As such, it would be improvident for this court to order this additional discovery and the motion is denied.

Dated: October 14, 2004

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ORIN R. KITZES, J.S.C.