**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. F. DANA WINSLOW,**

**Justice**

**TRIAL/IAS, PART 7**
**NASSAU COUNTY**

**BLANCHE MENAKER,**

**Plaintiff,**

**-against-**

**MOTION DATE: 02/28/08**
**MOTION SEQ. NO.: 002**

**INDEX NO.: 8176/2006**

**ARAMARK AMERICAN FOOD SERVICES, INC.,**

**Defendant.**

**The following papers having been read on the motion (numbered 1-3):**

**Notice of Motion.....1**
**Affirmation in Opposition.....2**
**Reply Affirmation.....3**

This motion by defendant Aramark American Food Services, Inc. ("Aramark") for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint against it is **denied**.

In this action, the plaintiff seeks to recover damages for personal injuries she sustained on November 19, 2004 when she fell over cartons stacked in the cafeteria at C.W. Post College campus of Long Island University. Defendant Aramark seeks summary judgment dismissing the complaint on the grounds that the cartons the plaintiff fell over were open and obvious and not inherently dangerous.

"On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Sheppard-Mobley v King, 10 AD3d 70, 74 (2d Dept. 2004), aff'd. as

mod., 4 NY3d 627 (2005), citing Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." Sheppard-Mobley v King, supra, at p. 74; Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra. Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. Alvarez v Prospect Hosp., supra, at p. 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. See, Demishick v Community Housing Management Corp., 34 AD3d 518 (2d Dept. 2006), citing Secof v Greens Condominium, 158 AD2d 591 (2d Dept. 1990).

"The imposition of liability for a dangerous condition on property must be predicated upon occupancy, ownership, control, or special use of the premises (quotation omitted)." Casale v Brookdale Medical Associates, 43 AD3d 418 (2nd Dept. 2007); see also, Ellers v Horowitz Family Ltd. Partnership, 36 AD3d 849 (2nd Dept. 2007). While it is not clear precisely what Aramark's relationship was to the cafeteria, i.e., whether it owned or rented it, at this juncture it does not dispute its responsibility for the premises. "A [responsible party] 'must act as a reasonable [person] in maintaining his [or her] property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury and the burden of avoiding the risk.' " Cupo v Karfunkel, 1 AD3d 48, 51 (2nd Dept. 2003) quoting Peralta v Henriquez, 100 NY2d 139, 144 (2003), quoting Basso v Miller, 40 NY2d 233 (1976); see also, Ruiz v Hart Elm Corp., 44 AD3d 842 (2nd Dept. 2007). While "a [responsible party] has no duty to warn of an open and obvious danger . . . [a]part from the duty to warn of dangerous conditions on the

property, a [responsible party] also has a concomitant duty to keep the property in a reasonably safe condition for those who use it." Cupo v Karfunkel, supra, at p. 51-52 citing Basso v Miller, supra; see also, Ruiz v Hart Elm Corp., supra, at p. 843. Proof that a dangerous condition was open and obvious does not preclude a finding of liability against a responsible party for failing to keep his property in a safe condition; it is only relevant to a plaintiff's comparative negligence. Cupo v Karfunkel, supra, at p. 52; Ruiz v Hart Elm Corp., supra, at p. 843. To obtain summary judgment, a responsible party must also "demonstrate that he or she exercised reasonable care under the circumstances to remedy the condition and to make the property safe based on such factors as the likelihood of injury to those entering the property and the burden of avoiding the risk." Cupo v Karfunkel, supra, at p. 52. Thus, summary judgment lies only where a responsible party has established that "the condition complained of was both open and obvious and, *as a matter of law, was not inherently dangerous* (citations omitted)." Cupo v Karfunkel, supra, at p. 52. "In such circumstances, the condition which caused the accident cannot fairly be attributed to any negligent maintenance of the property." Cupo v Karfunkel, supra, at p. 52; see, e.g., Vergara v A&S Twins Construction Corp., 41 AD3d 588 (2nd Dept. 2007) (pile of wood which caused plaintiff's fall was open and obvious and not inherently dangerous); Bernth v King Kullen Grocery Co., Inc., 36 AD3d 844 (2nd Dept. 2007) (merchandise cart six feet long, five feet high and one foot wide was open and obvious and not inherently dangerous); Tenenbaum v Best 21 Ltd., 15 AD3d 646 (2nd Dept. 2005) (platform three feet wide by three feet long by one foot high which plaintiff stepped onto and off of minutes before her fall was open and obvious and not inherently dangerous); compare, Holly v 7-Eleven, Inc., 40 AD3d 1033 (2nd Dept. 2007) (defendant failed to demonstrate that bundle of logs being

used to prop open door was open and obvious and not inherently dangerous); Westbrook v WR Activities-Cabrera Markets, 5 AD3d 69 (1st Dept. 2004) (question of fact as to whether unopened single 10"-12" high box in store aisle was open and obvious and not inherently dangerous); DiVietro v Gould Palisades Corp., 4 AD3d 324 (2nd Dept. 2004) (question of fact as to whether defendant exercised "reasonable care under the circumstances" to secure the construction site); Power v Garden World, 15 Misc3d 1122(A) (Supreme Court Queens Co. 2007) (plaintiff raised a triable issue of fact as to whether cart's placement in the middle of the aisle under the lighting conditions present at the time created a hazardous condition); see also, Slatsky v Great Neck Plumbing Supply, Inc., 29 AD3d 776 (2nd Dept. 2006) (jury question whether bag of cement on floor of store was open and obvious and inherently dangerous).

At her examination-before-trial, the plaintiff, an employee at C.W. Post, testified that she went to the cafeteria, which she described as a snack bar with no seats, to purchase orange juice. She testified that she entered the snack bar and walked directly to the back where the refrigerator and cashier were. She requested help in opening the refrigerator because of her physical limitations but the cashier was unable to help her at that moment so she was going to attempt to open the refrigerator and get the juice herself. Plaintiff testified that as she turned around, both of her legs hit two cartons that were stacked in front of the refrigerator. The cartons stood to just below her hip and were filled with food. She testified that although she had noticed some cartons in the snack bar upon entering the snack bar, she did not realize that there were any in front of the refrigerator until she fell, which was when she first noticed them.

Mary Adams, an Aramark worker who worked in the cafeteria at and around

the time of the plaintiff's accident, testified at her examination-before-trial that the snack bar had no storage space and that inventory was customarily stocked on the floor throughout the store. Not only did she acknowledge having received complaints about that, she testified that one school employee as well as many students had complained that it was unsafe. She testified that she told the delivery driver that he couldn't continue to leave boxes on the floor but he did anyway and that she brought the problem to her supervisor's attention.

Even if the cartons that plaintiff fell over were open and obvious, in view of all of the evidence, there is nevertheless a question as to whether they were inherently dangerous. Holly v 7-Eleven, Inc., supra; Westbrook v WR Activities-Cabrera Markets, supra; Power v Garden World, supra; see also, Slatsky v Great Neck Plumbing Supply, Inc., supra; but see, Espinoza v Hemar Supermarket, Inc., 43 AD3d 855 (2nd Dept. 2007) (plaintiff filed to raise an issue of fact as to whether milk crates stacked in dairy aisle while restocking was being done by dairy manager were inherently dangerous).

Summary judgment is **denied.**

This constitutes the Order of the Court.

Dated: 5/1/08

ENTER:

J.S.C.