Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19
Justice

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SYLVIA FLAIM,

Plaintiff,

Index No: 15922/07
Motion Date:6/24/09
Motion Cal. No: 6 & 7
Motion Seq. No: 1 & 2

-against-

HEX FOOD INC. d/b/a PRICE CHOICE, PRICE RITE FOOD MARKET INC, d/b/a PRICE CHOICE, PREMIER FOOD MARKET INC. d/b/a PRICE RITE FOOD MARKET, HEX FOOD INC. d/b/a PRICE RITE FOOD MARKET, JID SUPERMARKET CORP. d/b/a PRICE CHOICE,

Defendants.

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The following papers numbered 1 to18 read on this motion by defendants for an order, pursuant to CPLR §3212, granting summary judgment dismissing all claims and cross claims on the ground that there is no material issue of fact and moving defendants are entitled to a judgment as a matter of law [Motion Cal. No. 1]; and upon this motion by plaintiff, pursuant to CPLR 3212, granting partial summary judgment on the issue of liability against defendants [Motion Cal. No. 2].

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 5
Affirmation in Opposition.....	6 - 7
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Upon the foregoing papers, it is hereby ordered that the motions are resolved as follows:

This is a personal injury action commenced by plaintiff Sylvia Flaim ("plaintiff") to recover damages for injuries allegedly sustained on February 4, 2007, as the result of a trip and fall due to the existence of a "U" boat/hand truck, located in the middle of the frozen food/dairy aisle of the supermarket at 64-01 Fresh Pond Road, Ridgewood, New York, that is owned, leased, operated

maintained, managed, controlled and/or inspected by defendants Hex Food Inc. d/b/a Price Choice, Price Rite, Food Market Inc. d/b/a Price Choice, Premier Food Market Inc. d/b/a Price Rite Food Market, Hex Food Inc. d/b/a Price Rite Food Market, JID Supermarket Corp. d/b/a Price Choice ("defendants"). Defendants moves for an order granting it summary judgment dismissing the complaint, and plaintiff moves for partial summary judgment on the issue of liability.

Summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1st Dept. 1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (2nd Dept. 1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, supra.

It is well recognized that a "defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (citations omitted)." Sloane v. Costco Wholesale Corp., 49 A.D.3d 522 (2nd Dept. 2008); Frazier v. City of New York, 47 A.D.3d 757 (2nd Dept. 2008); Ulu v. ITT Sheraton Corp., 27 A.D.3d 554 (2nd Dept. 2006); White v. L & M Corporate, Inc., 24 A.D.3d 659 (2nd Dept.2005); Beltran v. Metropolitan Life Ins. Co., 259 A.D.2d 456 (2nd Dept.1999). "Where there is no indication in the record that the defendant created the alleged dangerous condition or had actual notice of it, the plaintiff must proceed on the theory of constructive notice." Rabadi v. Atlantic & Pacific Tea Co., Inc., 268 A.D.2d 418, 419 (2nd Dept. 2000); see, also, Ramos v. Castega-20 Vesey Street, LLC, 25 A.D.3d 773 (2nd Dept. 2006); Klor v. American Airlines, 305 A.D.2d 550 (2nd Dept. 2003); O'Callaghan v. Great Atlantic & Pacific Tea Co., 294 A.D.2d 416 (2nd Dept. 2002). "To constitute constructive notice, a defect must be visible and apparent, and must exist for a sufficient length of time prior to the accident to permit the defendant's to discover and remedy it." Green v. City of New York, 34 A.D.3d 528, 529 (2nd Dept. 2006); see, Stone v. Long Island Jewish Medical Center, Inc., 302 A.D.2d 376 (2nd Dept. 2003); Blaszczyk v. Riccio, 266 A.D.2d 491 (2nd Dept. 1999); Russo v. Eveco Development Corp., 256 A.D.2d 566 (2nd Dept. 1998); Dima v. Breslin Realty, Inc., 240 A.D.2d 359 (2nd Dept.1997); Kraemer v. K-Mart Corp., 226 A.D.2d 590 (2nd Dept.1996).

The alleged cause of plaintiff's fall was the "U" boat/hand truck located in the middle of the frozen food/dairy aisle of defendants' supermarket that had been placed there by defendants' employee. There thus is no question that the condition, if dangerous, was created and attributable to defendants. Under such circumstances, summary judgment may properly be granted only if the condition complained of by plaintiff was both open and obvious and, as a matter of law, was not inherently dangerous. Defendants submitted in support of their claimed entitlement to summary

judgment, plaintiff's deposition testimony and the deposition testimony of Bernard Diaz ("Diaz"), the manager of the supermarket who was present on the day of plaintiff's fall. Plaintiff testified, inter alia, that the accident occurred when a "handcart" left in the aisle with a wheel sticking out caused her to fall; she described the handcart that she "backed into" and caused her to fall forward as being shorter than her five feet height with two wheels. She also testified that the "handcart... [had] a wheel [that] was sticking out. I didn't see it and that's when I fell." Diaz testified that the restocking of shelves generally is done by using a U-boat, described as u-shaped structure with a wooden platform measuring six to eight feet in width that is approximately five to six feet off the ground and has six wheels, and a hand truck. He further testified that the employee doing the restocking would "bring the U-boat into the particular aisle. . . take the merchandise from the U-boat... and stock them to the shelves." He also testified that when he responded at the time of the accident, he observed a U-boat in the middle of the aisle and plaintiff sitting on a milk crate next to the U-boat, and that he learned how plaintiff fell from the videotape or surveillance tape he viewed after the accident.

Whether the accident was caused by a handcart or a U-Boat, defendants' evidence was sufficient to establish their prima facie entitlement to summary judgment on the ground that the mechanism causing plaintiff's fall was both open and obvious and not inherently dangerous. See, Marchetti v. Modica, __ A.D.3d __, __N.Y.S.2d__, 2009 WL 2960807 (2nd Dept. 2009)[placement of furniture at the site of the subject accident]; Stern v. Costco Wholesale, 63 A.D.3d 1139 (2nd Dept. 2009)[flatbed shopping cart in one of the aisles of the defendant's store]; Neiderbach v. 7-Eleven, Inc., 56 A.D.3d 632 (2nd Dept. 2008)[blue plastic crate on the floor of an aisle in store]; Gagliardi v. Walmart Stores, Inc., 52 A.D.3d 777 (2nd Dept. 2008)[box containing unassembled chest of dresser drawers placed in the aisle of store]; Espinoza v. Hemar Supermarket, Inc., 43 A.D.3d 855 (2nd Dept. 2007)[stack of empty milk crates in the aisle of the supermarket]; Bernth v. King Kullen Grocery Co., Inc., 36 A.D.3d 844 (2nd Dept. 2007)[cart used to move merchandise from the storage area to the shelves]; Gibbons v. Lido & Point Lookout Fire Dist., 293 A.D.2d 646 (2nd Dept. 2002)[cement parking block on floor of a firehouse]; Connor v. Taylor Rental Ctr., 278 A.D.2d 270 (2nd Dept. 2000)[forklift in a marked stall in a parking lot]; Maravalli v. Home Depot U.S.A., 266 A.D.2d 437 (2nd Dept. 1999) [sink vanity on the floor of the store aisle].

Once the moving party makes a prima facie showing of entitlement to summary judgment in their favor, it is incumbent upon the opposing party to come forth with evidentiary proof in admissible form sufficient to demonstrate the existence of triable issues of fact. Chalasani v. State Bank of India, New York Branch, 283 A.D.2d 601 (2001); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980); Pagan v. Advance Storage and Moving, 287 A.D.2d 605 (2001); Gardner v. New York City Transit Authority, 282 A.D.2d 430 (2001). Pursuant to CPLR § 3212, summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1st Dept. 1993). In opposing the summary judgment motion, plaintiff was required to show that the mechanism causing her injury was not inherently dangerous. Here, plaintiff in opposition incorporates by reference the affirmation in support of her motion for partial summary judgment on the issue of liability, and argues:

> At the time of the accident, Gregory **was there** some 12 feet away from where the U-boat and Mrs. Flaim, who was, after the fall, found sitting on a milk crate next to the U-boat having been picked up by a customer from the floor, immediately after her fall. As such defendants through their employee, Gregory, observed, saw and knew or should have observed, seen and known that leaving, having, or allowing the U-boat in the aisle, which was there clearly to be seen was a [tripping] hazard and a dangerous condition. It is clearly foreseeable that if such a U-boat filled with closed boxes is left unattended in a supermarket aisle on a busy Sunday afternoon, someone may be caused to trip and fall on such a created condition. As such, defendant's motion should be denied. [Emphasis in original.][1]

Plaintiff concludes that the U-boat constituted a dangerous condition, and cites in support of this conclusion Burgos v. 205 E.D. Food Corp., 61 A.D.3d 403 (1st Dept. 2009); Westbrook v. WR Activities-Cabrera Markets, 5 A.D.3d 69 (1st Dept. 2004); and Colt v. Great Atlantic & Pacific Tea Co., Inc., 209 A.D.2d 294 (1st Dept. 1994).

Although these cases are persuasive, they nevertheless are distinguishable. In Burgos v. 205 E.D. Food Corp., the plaintiff allegedly tripped and fell over a box of tangerines the size of a supermarket shopping basket, which the Appellate Division, First Department, found could "constitute a dangerous condition," and ruled that there was an "issue of fact as to whether defendant supermarket created or had notice of this condition" that "was raised by the testimony of plaintiff and a nonparty witness that there were always boxes in the aisles." Here, there is no question that the condition complained of, the placement of the U-boat in the aisle, was created by defendants. In Westbrook v. WR Activities-Cabrera Markets, the pertinent inquiry was whether an unopened single box in an aisle constituted a "tripping hazard," which the court found that it did, upon the rationale that "because it was not readily visible to customers walking through the aisles. A lone 10- to 12-inch-high box in a supermarket aisle is, by definition, easily overlooked, creating a hazard which can, and ought to, be removed." Here, there is no dispute that the U-boat is very large. And, in Colt v. Great Atlantic & Pacific Tea Co., Inc, the issue, unlike here, was whether the defendant had actual or constructive notice of any dangerous condition caused by vegetable debris, probably snow pea pods, and that the floor in the produce lane that was commonly littered from which a reasonable inference could be drawn that defendant may not have maintained the aisle in an adequately clean and safe condition. While plaintiff's witness statement in her affidavit stated to the effect that she observed that "there was continually and repeatedly metal equipment, loaded/stocked with boxes of merchandise on it, left in the aisles as a regular occurrence would raise a question of fact as to notice,

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[1]Plaintiff concedes that she may have not used the "correct trade jargon" in describing what caused her to fall as a "hand truck" or "handcart."

it does not raise an issue of fact as to whether the U-boat was inherently dangerous.[2] Nor do the photographs submitted in support of plaintiff's motion raise an issue of fact as to whether the U-boat was inherently dangerous. As plaintiff failed to raise a triable issue of fact (see Taussig, 31 AD3d at 533), the granting of summary judgment in favor of defendants therefore is warranted. Based upon the foregoing, defendants' motion for summary judgment is granted and the complaint hereby is dismissed. Plaintiff's motion for partial summary judgment on the issue of liability is denied as moot.

Dated: September 24, 2009

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J.S.C.

[2]On plaintiff's motion for partial summary judgment, she submits, as an exhibit, a copy of an affidavit of Elvia Pierrepont, the sister of plaintiff.