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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Edmead Justice

PART 35

Gogos

- v -

Modell's Sporting Goods

INDEX NO. 103697/07

MOTION DATE 10/27/09

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED the motion by defendant Modell's Sporting Goods, Inc. pursuant to CPLR §3212 for summary judgment dismissing the Complaint of the plaintiffs Elissavet Gogos and Pashalis Gogos is denied; and it is further

ORDERED that said defendant serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 11/19/09

HON. CAROL EDMEAD J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------X

ELISSAVET GOGOS and PASHALIS GOGOS,

Plaintiffs,

Index No.: 103697/07

-against-

MODELL'S SPORTING GOODS, INC.,

Defendant.

----------X

MEMORANDUM DECISION

In this slip and fall action, defendant Modell's Sporting Goods, Inc. ("defendant") moves pursuant to CPLR §3212 for summary judgment dismissing the Complaint of the plaintiffs Elissavet Gogos ("Gogos" or "plaintiff") and Pashalis Gogos (collectively, "plaintiffs").

Factual Background

On September 16, 2006, Gogos allegedly slipped and fell on a piece of mango at the defendant's premises located at 606 West 181st Street, New York, New York. Plaintiffs allege, *inter alia*, that the defendant was negligent in allowing food into the premises and allowing food to remain on the floor for an unreasonable period of time. At her deposition, plaintiff testified that she met her daughter, Katherina Gogos ("Katherina") in front of the Modell's Store in order to go shopping. Katherina got on the escalator before plaintiff and was about four steps ahead of plaintiff while on the escalator. When the plaintiff got to the top of the escalator on the second floor she walked off to the right and took four or five steps when her foot slipped. Katerina came to her side while she was on the floor. Plaintiff and Katherina noticed the four pieces of mango on the floor a few inches next to her after she fell. Plaintiff testified that the fruit, which was a few inches away from where she fell, was a "piece of mango, yellow, like orange, yellow color"

and that the mango slices were "big" a foot apart from each other, and "brownish" because "it started to getting [sic] like old, like you know, it stayed there for at least, you know, changing color already." The plaintiff stated that when she got off the escalator she did not look at the floor before she started walking. The plaintiff did not notice the piece of fruit on the floor until after she fell and was on the ground. The plaintiff testified that there were no juice or containers on the floor and she did not know how long the mango was on the floor or what color it was when it first landed on the floor. At the time of her fall there were no customers shopping in the area. When the manager came over he was screaming at the employees for not checking the area or securing the area and that if they were careful "this is not going to happen."

Katherina testified at her deposition that once at the top of the escalator Katherina walked approximately ten steps to the gym clothes but did not notice any type of debris on the floor. Katherina did not look at the floor as she walked toward the gym clothes department, she looked where she was headed. Thereafter she heard a thud and then heard her mother calling her name. Katherina turned and saw plaintiff on the floor with a "stale piece of squished mango" next to her. There were three or four pieces of mango on the floor that looked like pieces from a mango stick. The mango "was not fresh" and was "orange brown," not yellow, and it looked stepped on. Katherina could not remember if all the pieces looked like they were stepped on. Then "the manager called over the cashier to yell at him for not doing his inspections." The manager said "Why didn't you guys see that before. You should have been doing your inspection." Outside of defendant's store were "fruit sellers" that sold sliced mango on a stick. Although Katherina did not remember seeing the vendors selling the mango stick, she testified "they are always out there."

Ceaser Abreu ("Abreu") the store's General Manager on the date of the plaintiff's accident testified that he was in his office at the time of Gogos's fall and he was notified about it by a sales associate. On the second floor there was a row of four cash registers to the right of the escalator. The cashiers were responsible to "stay visual" and watch for spills or debris on the floor. After the incident, Abreu cleaned up crushed mango from the floor with a napkin, adjacent to the row of four cash registers. The mango was only four feet from the registers. In addition to the four cashiers, there were four sales associates in the nearby men's apparel area. The sales associates were also responsible to make sure the floor was clean of debris at all times.

Downstairs from where Gogos fell the store had a security guard at the entrance, someone at the cash register and sales associates. If someone had food, Abreu stated that store personnel are supposed to tell the customer to put it away. Abreu stated that it was the job duty and ongoing responsibility of the employees on duty to make sure that the floor was always clean of debris. Further, the store had a rule for employees which prohibited the associates from having anything like water bottles open and eating inside the store. Also, the store did not allow customers to come in with any food. Abreu also testified that an associate would never eat on the sales floor because they have a break room for that activity. Abreu testified that he did not see anyone on the sales floor with a mango and did not know how the mango got on the floor and could not state how long the mango was on the floor. The second floor cashiers told Abreu they did not see anything, and were no even aware that a woman fell.

Defendant's Motion

Defendant argues that there are no questions of fact in this case which would preclude granting summary judgment to the defendant. Defendant's motion for summary

judgment should be granted because the plaintiff cannot establish that the defendant had actual and/or constructive notice of any condition or debris at the accident location.

As set forth in the affidavit of Tina Lewis ("Lewis"), the Director of Property Management for Modell's, and as stated above, defendant did not have any actual notice of the mango condition on the floor. The plaintiff never notified any representative of defendant of the mango condition on the floor prior to her accident. Further, the affidavit of Lewis indicates that a search of the records maintained by defendant failed to reveal that any prior complaints had been made regarding the allegedly dangerous condition in the area in question. Specifically, no employee was advised by any customer that mango was seen on the floor prior to the plaintiff's accident. Lewis reiterates the store policy that no employee is permitted to eat or drink while on the sales floor. Neither plaintiff, nor anyone else ever advised defendant of mango on the floor at the accident location prior to the plaintiff's fall. As such, plaintiff cannot establish that defendant had actual notice of the condition.

Nor is there any evidence that defendant had constructive notice of the mango condition. The mere existence of a foreign substance at the sight of the slip and fall accident, without more, is insufficient to support a claim of negligence. Plaintiff testified that she did not notice the mango on the floor prior to her fall. Moreover, Katherina testified that she passed the accident location several moments prior to the slip and fall and did not notice any debris or fruit on the floor. There was no evidence introduced regarding the length of time that the alleged defect may have existed prior to plaintiff's accident. As there is no evidence regarding exactly when the mango may have been placed on the floor, plaintiff cannot prove that defendant had sufficient time to remedy the dangerous condition to constitute constructive notice of the mango condition.

Moreover, there is no evidence to establish that defendant created the mango condition. Specifically, the plaintiff testified that she did not know how the mango got on the floor. Moreover, the testimony of Abreu and the affidavit of Lewis establishes that no store employee is permitted to have food on the sales floor. Further, Abreu testified that he did not know how the mango got on the floor and that the store employees and plaintiff speculated that a customer probably brought the mango into the store. As speculation as to how the mango got on the floor does not establish that defendant created the condition, summary dismissal is warranted.

Plaintiff's Opposition

Defendant failed to meet their burden of proof and issues of fact exist regarding defendant's negligence. Furthermore, defendant is in violation of this Court's discovery directives, and currently pending before this Court is plaintiffs' fully submitted motion to strike defendant's Answer for failing to preserve video evidence. In addition to the issues of fact that warrant the denial of summary judgment, it would be entirely unjust to grant defendant's motion in light of their admitted failure to retain video evidence.

The improper hearsay affidavit from Lewis, begins with "As I understand it" and "It is my understanding" and merely recites the store's policy that customers and employees are not permitted inside the store with food; indeed, defendant had a procedure whereby a customer would be directed to discard food before they were allowed entry into the store. Lewis was not present on the date of the incident and the balance of the affidavit is irrelevant. Although Lewis recites that there are no documents demonstrating notice of the mango condition, Lewis also states that if someone was aware of the mango they would only be expected to clean it up. There is no indication that any documentation was required, and as such, the lack of documentation is a

nonissue.

The testimony is clear that Abreu excoriated defendant's employees in the presence of plaintiff and her daughter for not properly inspecting the area where plaintiff fell. Furthermore, defendant offers no explanation how the mango pieces got into the store notwithstanding their policy and procedure to keep food out. Plaintiff submits a photo of a "mango on a stick," demonstrating that this is not an easily concealed food item. As set forth by both Abreu and Lewis, customers were not allowed to enter the store with food, and if a customer was seen with food they would be directed to discard it or be denied entry. However, defendant's security guard, downstairs sales associates, downstairs cashier, second floor sales associates and second floor cashiers did not notice someone enter the store and walk around with the mango. If the food was allowed into the store because it was brought in by an employee, this also would be a violation of defendant's policy and a substantial factor in causing the incident.

In any event, plaintiff contends, it is uncontested that the mango was brought to the second floor and dropped right next to the four cashiers. There were no customers in the area, indicating that if the mango was brought in by a customer, it remained on the floor for an extended period of time. In addition, the brown color and stale appearance also indicates that it was on the floor for an extended period. Additionally, Abreu's statements following the incident are an admission that defendant's employees did not properly inspect the store's floor prior plaintiff's fall. At a minimum, his words and reaction raise an issue of fact to be determined by a jury.

Moreover, defendant failed to meet its burden to warrant summary judgment. Abreu was in his office at the time of the incident, and had no personal knowledge of the incident, until after

its aftermath. He yelled at his cashiers for failing to do their inspections and failing to prevent the incident. His description of the cashiers' alleged denial of any knowledge of the incident or its aftermath, which took place right in front of them, is hearsay and not credible. The record demonstrates that Gogos fell right next to the four cash registers; yet the cash register employees denied knowledge of this entire event, after being berated by their manager for not doing their inspections. Also, Abreu's inquiry to only two customers after the incident is inadequate and unreliable for purposes of defendant's denial of notice. Defendant did not provide an affidavit from any cashier, did not provide an affidavit from any sales associate and did not submit evidence on their behalf from someone with personal knowledge of the facts. Instead, defendant relied upon the hearsay affidavit of an absentee executive who searched for documents that admittedly were not expected to be created in the first place. Defendant, therefore, has failed to submit evidence in proper form and summary judgment should be denied.

Defendant's motion should also be denied because it did not properly set forth when the area was last inspected. To sustain its burden, defendant must offer some evidence as to when the area in question was last inspected relative to the accident. Since the defendant offered no evidence as to when the area where plaintiff fell was last inspected prior to the incident, it failed to make a *prima facie* showing that it did not have constructive notice of the alleged hazardous condition of the mango.

It is unnecessary for the Court to even consider whether the papers submitted by the plaintiff are sufficient to raise a triable issue of fact.

Defendant also failed to retain evidence. It would be extremely prejudicial and unfair to grant summary judgment to defendant where they failed to retain important video evidence.

Abreu testified that there were video cameras throughout the second floor and that he reviewed the video that day following the incident. The area where plaintiff fell and where Abreu spoke to the cashiers after the incident were within the video camera's view. Defendant's legal department directed Abreu to preserve the videos in the store's safe, which Abreu testified he did. However, in opposition to plaintiff's motion to strike for failing to preserve evidence, defendant slated that the video was destroyed and not retained. To date, no video has been exchanged resulting in extreme prejudice to plaintiff. It is presumed that the video would show the incident, its aftermath, Abreu confronting his the employees, a person entering the store with a mango stick and walking around the store, the mango dropping on the floor and the passage of time to the incident. These images are material and necessary to plaintiffs' case but were not retained by defendant.

If plaintiff's pending motion to strike defendant's Answer is denied, it would be unwarranted to award summary judgment to defendant in light of the prejudice they have caused. Incredibly defendant destroyed the videos, presumably because it clearly demonstrated defendant's negligence. Defendant should not be rewarded for their failure to preserve the video.

Defendant's Reply

Plaintiff failed to come forward with any *prima facie* evidence indicating that defendant had actual or constructive notice of the alleged mango condition, and failed to raise any triable issue of fact in opposition to the motion. Plaintiff's speculation and unsubstantiated conclusions as to how the condition came to be on the floor and how long it was there are insufficient.

Defendant is not required to definitively deny actual or constructive notice of the condition. Further, Abreu testified at his deposition that the area where plaintiff fell was

maintained at all times and that if a substance or debris is found it will be brought to someone's attention. Abreu further testified that the cashiers in the area near plaintiff's fall must "stay visual" while on duty, and when they observe debris or other slippage on the floor, they would immediately notify the appropriate personnel to have the floor cleaned. Thus, defendant has demonstrated a proper inspection of the premises. Given that the accident occurred no more than three to four feet from several cashiers who were responsible for maintaining the floor, it is inconceivable for the plaintiff to claim that the area was not inspected regularly.

Plaintiffs' contention that the mango was brownish in color and therefore existed on the floor for a sufficient length of time to be discovered is pure speculation. There is no indication as to when the mango was brought into the store or whether it was in fact a mango on a stick. The record does not establish what condition the mango was in at the time it was purchased and brought into the store. Nor was there any evidence to establish that a mango was visibly apparent when brought into the store and not concealed by a customer thereby enabling them to pass security and break store policy concerning food in the store.

The condition of the mango is not sufficient to warrant any inference as to the length of time it had been on the store floor. The mango could have been deposited onto the floor only minutes or seconds before the accident in the condition plaintiff claims she saw it. Any other conclusion would be pure speculation. Additionally, the claim that the mango was "squished" is consistent with the manner in which the accident occurred. Any claim that the mango was in that condition prior to the accident is speculation.

Moreover, plaintiff's and Katherina's claim that they overheard Abreu screaming at store employees concerning the condition on the floor does not establish constructive notice. This

[* 11]

claim by plaintiff is pure hearsay and not credible, and thus, cannot establish notice or that the condition existed for a sufficient length of time for the cashiers to observe and rectify same. Even assuming that Abreu did yell at his employees for not properly inspecting the premises, it does not establish that the condition existed for a long period of time so that it would have been noticed by the cashiers.

Defendant's failure to retain certain video surveillance also does not warrant denial of summary judgment. Abreu testified that the tapes did not depict any mango condition or the accident location, or plaintiff's accident. And, there is some uncertainty as to whether a videotape even existed in the first place. Nonetheless, even assuming the video tapes did in fact exist, they do not have a direct bearing on the plaintiffs' case and in fact would only tend to disprove plaintiffs' claim. As such, these tapes could not be used to establish either actual or constructive notice of the alleged mango condition. The tapes would not establish whether in fact plaintiff fell on the mango and how long the mango was on the floor prior to the fall as this area was not in view of the cameras. The events following the plaintiff's accident are by definition, post-accident activities and have absolutely no bearing on the plaintiff's *prima facie* case.

Moreover, there is no indication that a mango stick was a cause of the plaintiff's fall and therefore plaintiff speculates as to whether someone was walking around the store with a mango stick and whether the videotapes depicted anyone with mango. Defendant does not deny that the plaintiff was present in the store at the time of accident or that mango was on the floor or that she did in fact fall. However, the tapes will not establish plaintiff's claim because they do not show the accident location.

Discussion

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390 [U] [Sup Ct New York County, 2003]). Thus, the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman, supra* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st

Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

To establish a *prima facie* case of negligence in a slip and fall case, a plaintiff must demonstrate that the defendant created the dangerous condition which caused the accident or that the defendant had actual or constructive notice of that condition and failed to remedy it within a reasonable time (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 501 NYS2d 646 [1986]; *see also Segretti v Shorenstein Co. East, LP*, 256 AD2d 234, 682 NYS2d 176 [1st Dept 1998]; *Weiss v Gerard Owners Corp.*, 22 AD3d 406, 803 NYS2d 51 [1st Dept 2005]; *O'Rourke v Williamson, Picket, Gross, Inc.*, 260 AD2d 260, 688 NYS2d 528 [1st Dept 1999]; *Gordon v Waldbaum, Inc.*, 231 AD2d 673, NYS2d 996 [2d Dept 1996]). Thus, a defendant, as the proponent of a summary judgment motion, must submit evidence in admissible form demonstrating that it did not create or have actual or constructive notice of the dangerous condition (*see Colt v Great Atlantic & Pacific Tea Co.*, 209 AD2d 294, 618 NYS2d 721 [1st Dept 1994]; *see also Giuffrida v Metro North Commuter Railroad Co.*, 279 AD2d 403, 720 NYS2d 41 [1st Dept 2001]; *Gordon v Waldbaum, Inc.*, 231 AD2d 673, *supra*).

To constitute constructive notice, a dangerous condition must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy the condition (*see Gordon, supra*; *see also Segretti*, 256 AD2d 234, *supra*;

Lemonda v Sutton, 268 AD2d 383, 702 NYS2d 275 [1st Dept. 2000]; *Guttierez v Lenox Hill Neighborhood House, Inc.*, 4 AD3d 138, 771 NYS2d 513 [1st Dept. 2004]; *Budd v Gotham House Owners Corp.*, 17 AD3d 122, 793 NYS2d 340 [1st Dept 2005]). A defendant/property owner may also have constructive notice of a dangerous condition if the plaintiff presents evidence that the condition was ongoing and recurring in the area of the accident, and such condition was left unaddressed (*see Gordon v American Museum of Natural History*, 67 NY2d 836, *supra*; *see also O'Connor-Miele v Barhite & Holzinger, Inc.*, 234 AD2d 106, 650 NYS2d 717 [1st Dept 1996]; *Colt*, 209 AD2d 294, *supra*). By contrast, a mere general awareness of the presence of some dangerous condition is legally insufficient to establish constructive notice (*see Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 622 NYS2d 493 [1994]; *see also Gordon*, *supra*; *Segretti*, 256 AD2d 234, *supra*).

Here, the record as submitted by defendant establishes that defendant did not create or have actual or constructive notice of the condition which allegedly caused plaintiff's injuries.

It is noted that defendant is not required "definitively [to] deny actual or constructive notice of the banana peel" (*Strowman v Greater Atlantic and Pacific Tea. Co.*, 252 AD2d 384, 675 NYS2d 82 [1st Dept 1998]). Such a requirement would, in effect, require a defendant to prove a negative on an issue as to which he does not bear the burden of proof (*id.*). In any event, there is no evidence that defendant's employees created the condition, by either bringing the mango into the store or dropping mango in the area where plaintiff fell. The record indicates that defendant's employees were not permitted to eat in the area of plaintiff's fall, and there is no evidence that they had eaten anything, let alone, mango, on the second floor where plaintiff fell.

Nor is there any indication that defendant ever received notice of the mango condition

prior to plaintiff's accident. The record demonstrates that defendant was first notified of the mango on the floor after plaintiff's fall, and there is no indication that anyone provided defendant with notice of the subject mango condition prior to plaintiff's fell. Therefore, there is no evidence that defendant had actual notice of the mango in the area of plaintiff's fall.

As to constructive notice, the only evidence of how long the mango was on the floor was the testimony of the plaintiff and her daughter Katherina that the mango was brown from "age." However, plaintiff's reliance on the aged condition of the mango is insufficient. The condition of the mango peel on the floor is insufficient "to warrant any inference as to the length of time" it had been on the store's floor (*Strowman*, *supra*). For all that this record shows, the banana peel could have been deposited on the floor only minutes or seconds before the accident (*Strowman*, *supra*). Any other conclusion would be pure speculation (*Strowman*, 252 *supra* [plaintiff's reliance on the alleged "crushed and dirty" condition of the banana peel is insufficient, as a matter of law, to establish actual or constructive notice]; *see also, Stadnicka v City of New York*, 2002 WL 338134 [Sup Ct App Term 2002] [stating that "that the 'crushed' fruit may have appeared 'grey, maybe brown' in color is hardly sufficient to establish constructive notice, particularly given plaintiff's own deposition testimony that it was 'possible' that she herself had 'smashed' the fruit by stepping on it"]; *Maiorano v Price Chopper Operating Co.*, 221 AD2d 698, 633 NYS2d 413 [3d Dept 1995] [holding that the "coloration of the banana, whether brown, or brown and yellow as plaintiff described it, fails to support the contention that the banana had been on the floor for any appreciable period of time"]).

The proposition that the mango was on a stick and was brought in through security and visible upon entry into the store is pure speculation. In any event, that the mango may have been

brought into the store does not establish that defendant had actual or constructive notice of the mango condition that caused plaintiff's fall.

Also, that plaintiffs' claim that the area in question is not regularly inspected is also speculative. The testimony indicates that the subject area was in view by store employees and that it was the sales associates' responsibility to observe the condition of the floors as part of their job duties.

Further, proximity of the cashiers to the accident is insufficient to raise an issue that they should have noticed the mango on the floor (*see Siciliano v Garden of Eden, Inc.*, 12 AD3d 319, 786 NYS2d 148 [1st Dept 2004] [stating that where plaintiff fell over grease in a storeroom, and where defendant's employees were seen near the storeroom carrying trays of prepared food and pots and pans, the argument that given the proximity of the storeroom to the kitchen, a jury could reasonably find either that the grease spot was created or should have been noticed by one of defendant's employees, was properly rejected as pure speculation]).

Therefore, defendant established that it did not create or have constructive notice of the mango condition which caused plaintiff's injury.

However, it is undisputed that this same defendant failed to preserve a video recording that *may have shown* the second floor area before and during plaintiff's accident. The unavailability to plaintiffs of the video recording may have impaired their ability to establish that defendant possessed the requisite notice of a dangerous mango condition on the floor (*see Minaya v Duane Reade Intern., Inc.*, 66 AD3d 402, 886 NYS2d 154 [1st Dept 2009]). Plaintiffs should not be bound by the testimony of defendant's store manager, Abreu, that neither plaintiff's accident nor the mango condition was depicted on the videotapes. Since an adverse

inference on the element of notice may issue to prevent defendant from using the absence of the videotape to its own advantage (*see Minaya, id.*), summary judgment cannot be granted.[1]

Conclusion

Based on the foregoing, it is hereby

ORDERED the motion by defendant Modell's Sporting Goods, Inc. pursuant to CPLR §3212 for summary judgment dismissing the Complaint of the plaintiffs Elissavet Gogos and Pashalis Gogos is denied; and it is further

ORDERED that said defendant serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: November 18, 2009

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

[1] By Order dated October 27, 2009, the Court decided the discovery motion (sequence 003), and ordered that a negative inference charge shall issue at the time of trial.with respect to what was depicted on the videotape.