SUPREME COURT OF THE STATE OF NEW YORK **Index No.:101797/06**
COUNTY OF RICHMOND DCM PART 3 **Motion No.:002**

MARGIT KASTELL, and
ARON KASTELL, Her husband,

Plaintiffs

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

KMART CORPORATION,

Defendant

The following items were considered in the review of the following motion for reargument.

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendant, Kmart Corporation ("KMart"), moves to reargue the decision and order of this court dated October 8, 2009 denying its motion for summary judgment pursuant to CPLR § 2221. Upon reconsideration this court's October 8, 2009 decision and order is confirmed.

Facts

On August 29, 2005 the plaintiffs were shopping at the KMart store located at 2660 Hylan Boulevard, Staten Island, New York, Margit Kastell sustained personal injuries after allegedly slipping and falling on a deposit of Ajax soap in the aisle. During her examination before trial, Ms. Kastell testified that she was shopping in the middle of two departments with ". .

. candies and junk food . .” on one side, and “. . . toiletries and soaps . . .” on the other.[1] Ms. Kastell further testified that her husband was “. . . closer to the candy aisle . .” and she was “. . . practically dead center.”[2] Ms. Kastell further testified that she slipped and fell on liquid Ajax soap that had spilled in the middle of the aisle “. . . and spread out in both directions . . .”[3] Photographs taken by Ms. Kastell’s husband approximately 15 minutes after her fall show a bottle of liquid soap missing a portion of its contents.

Kmart produced Gordon Browne, a Loss Prevention Manager, as a witness on its behalf. During his deposition Browne testified that employees were instructed to tour the floor area every fifteen minutes.[4] On the date of the plaintiff’s accident Browne testified that he was not aware if any Kmart employees inspected the area within fifteen minutes of the spill. Browne testified further that while there were surveillance cameras throughout the store ,if they were film the tapes would be kept for only 2 weeks, and if they were using DVR the video would be stored for three to six months. Additionally, Browne testified that although it was Kmart policy to take photographs of a spill site when someone claims to have been hurt, there were no photos in Kmart’s file with respect to this incident. Furthermore, Browne testified that in the course of his duties he inspected the scene of the accident and recorded his observations in a report. During his deposition Browne testified that he observed a half a bottle of Ajax detergent next to the spill, but was unable to recollect the position of the bottle.

In plaintiffs’ verified bill of particulars, the plaintiffs claim both actual and constructive notice. With respect to constructive notice the plaintiffs’ bill of particulars states that “the defective condition herein existed for a sufficient length of time . . .”

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[1] M. Kastell transcript at 50.

[2] Id. at 50 and 51.

[3] Id at 57.

[4] Browne transcript at 46.

The defendant moves for reargument contending that this court misapprehended the law and facts with respect to constructive notice.

Discussion

"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."[5] "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it."[6]

Defendant's witness Browne, testified that he was unaware as to when the last time Kmart employees inspected the area where Ms. Kastell fell. Recently, in *Aviles v. 2333 1st Corp,* in affirming the trial court's denial of summary judgment the Appellate Division, First Department held that a defendant's failure to testify whether its cleaning procedures were followed constituted an issue of fact as to whether the defendant had constructive notice of the complained of condition.[7]

Furthermore, in *Chetcuti v. Wal-Mart Stores, Inc.*, the Appellate Division, Second Department evaluated a trial court's denial of summary judgment based on a similar facts.[8] In *Chetcuti*, the plaintiff allegedly slipped and fell on a green substance on the floor of the

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[5] *Joachim v. 1824 Church Ave., Inc.*, 12 AD3d 409, [2d Dept 2004].

[6] *Strowman v. Great Atlantic and Pacific Tea Co.*, 252 AD2d 384, [1998], quoting *Gordon v. American Museum of Natural History*, 67 NY2d 836, and *Benware v. Big V Supermarkets*, 177 AD2d 846.

[7] 66 AD3d 432, [1st Dept 2009].

[8] 42 AD3d 419, [2d Dept 2007].

defendant's store. Subsequent to the fall a store employee observed and noted in an accident report that the green substance came from a small bottle of fragrance oil that had fallen from a display case. In affirming the trial court's decision the Appellate Division, Second Department stated "[o]n this record, the defendants' motion papers left unresolved triable issues of fact as to whether they created the alleged dangerous condition or, alternatively, whether they had actual or constructive notice of its existence."[9]

As was the case in *Chetcuti*, the defendant's witness acknowledge that there was a bottle of liquid Ajax at the scene of the accident. Furthermore, the defendant's testimony with respect to the incident report taken at the time of the accident clearly states that the plaintiff slipped and fell on liquid Ajax.

The defendant's reliance on the Appellate Division, First Department's decisions in *Segretti v. Shorenstein Co., East, L.P.*[10] and *Strowman v. Great Atlantic and Pacific Tea Co., Inc.,*[11] is misplaced. In *Segretti* the Appellate Division, First Department found the plaintiff "surmising that [an oily substance] might have come from the garbage room . . ." constituted mere speculation and was inadequate to sustain a cause of action.[12] Here there is testimony that the plaintiff slipped on Ajax and there was an Ajax bottle at the scene.

In *Strowman*, the defendant's employees had not recollection of a banana peel being present, nor did the record indicate that its presence was noted in an incident report. In this case, Browne testified that the plaintiff slipped on spilled Ajax. He further testified that at the time of the accident he recorded his observations on a report that observed a bottle of Ajax at the scene of the accident.

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[9] Id.

[10] 256 AD2d 234, [1st Dept. 1998].

[11] 252 AD2d 384, [1st Dept. 1998].

[12] *Segretti v. Shorenstein Co., East, L.P* 256 AD2d 234, [1st Dept. 1998].

Conclusion

Based on the record before the court, the defendant has not come forward with evidence sufficient to support a judgment of summary judgment in its favor.

Accordingly, after reconsideration, the decision and order of this court dated October 8, 2009 is confirmed. Accordingly it is hereby;

ORDERED, that K-Mart Corporation's motion for reargument is granted, and upon reargument the decision and order of this court dated October 8, 2009 is confirmed and will remain as the decision and order of this court, and it is further

ORDERED, that the parties return to DCM Part 3 on **Monday, April 26, 2010 at 9:30** a.m. for a pre-trial conference.

ENTER,

DATED: March 31, 2010

Joseph J. Maltese
Justice of the Supreme Court