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

PRESENT: HON. DORIS LING-COHAN Justice

PART 36

Rosalie Giannetto,

INDEX NO. 105685/09

MOTION DATE

- v -

MOTION SEQ. NO. 001

Costco Wholesale Corporation.

MOTION CAL. NO.

The following papers, numbered 1 to 4 were read on this motion ~~to~~/for Summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached memorandum decision.

FILED

JAN 13 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/10/11

J.S.C.
HON. DORIS LING-COHAN

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

----------X

ROSALIE GIANNETTO,

Plaintiff,

-against-

COSTCO WHOLESALE CORPORATION,

Defendant.

----------X

Index No. 105685/09

Motion Seq. No. 001

DORIS LING-COHAN, J.:

On December 29, 2008 at approximately 10:30 am, plaintiff Rosalie Giannetto was allegedly injured while shopping in a store owned by defendant Costco Wholesale Corporation. Plaintiff stepped onto a platform/pallet in order to test a recliner chair that she was interested in purchasing. Plaintiff alleges that immediately upon sitting, the chair tilted and she fell to the floor with the recliner. As a result, plaintiff allegedly sustained injuries to her left arm and shoulder.

Plaintiff commenced this action against defendant alleging that defendant caused, permitted, created and/or allowed a dangerous, hazardous, and defective condition to be and remain on the warehouse floor by failing to properly secure, balance, place and/or situate the recliner so that it would not tip over. Defendant now moves for summary judgment, pursuant to CPLR 3212, dismissing the complaint against it.

At her deposition, plaintiff testified that when she ascended onto the display pallet, the recliner was in the closed position, that is, the footrest was not open. Pl's Dep 15:7-16 (attached as Exh D to James C. Miller Aff). Plaintiff testified that when she sat in the chair, the recliner shifted to the left and tipped off of the pallet, sending her and the chair to the floor. *Id.* at 15:24-

17:14.

Plaintiff further testified at her deposition that the platform appeared level and the chair was fully on the platform. *Id.* at 13:10-16; 23:3-5. As to the chair and/or pallet, she testified that she did not learn: (1) what caused the chair to fall over; (2) that there was anything wrong with the platform or the chair; or (3) that the chair was not properly placed on the platform. *Id.* at 28:8-19.

An employee of defendant, Joseph Cueves ("Cueves"), testified at his deposition that he set up the reclining chair on the pallet at approximately 8:30 am. Joseph Cueves Dep 19:13-20 (attached as Exh E to Miller Aff). Cueves testified that the recliner was fully situated on the pallet. *Id.* at 13:15-19. He stated that he saw plaintiff sit on the open footrest of the recliner and then fall. *Id.* at 10:21-11:16. Cueves testified that after the accident, he inspected the chair and pallet and they did not appear to be defective in any way. *Id.* at 28:19-29:10.

It is well settled that the proponent of a summary judgment motion 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. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman*, 49 NY2d at 562. Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment. *Id.*

Defendant moves for summary judgment arguing that there are no material issues of fact

as plaintiff has failed to establish that any dangerous or defective condition existed at defendant's premises or that defendant had actual or constructive notice of a dangerous or defective condition. Defendant contends that plaintiff failed to point to specific evidence of a defect that caused her to fall. Defendant states that plaintiff's own testimony at her deposition failed to provide any such evidence.

Defendant relies on *Zalko v Sunrise Adult Health Ctr.*, 7 AD3d 616 (2d Dep't 2004). In *Zalko*, the plaintiff fell while attempting to get up from a plastic chair on the defendant's premises. Summary judgment was granted in favor of the defendant on the ground that "the plaintiffs had not identified any defective or dangerous condition, and, in any event, that there was no evidence that the defendant created or had notice of such a condition. . . . [Thus, it] was entirely speculative and unsupported." *Id.* at 617.

Further, defendant contends that, although plaintiff has not specifically put forth the theory of *res ipsa loquitur*, plaintiff appears to be using it as a predicate for liability by contending that, because plaintiff sat in the reclining chair and fell, there must have been negligence on the part of defendant. Defendant argues that ***res ipsa loquitur*** is not appropriate in this case since defendant did not have exclusive control over the reclining chair as the chair was open to the public prior to the accident. *See, e.g.*, *Loiacono v Stuyvesant Bagels, Inc.*, 29 AD3d 537, 538 (2d Dep't 2006).

Plaintiff contends that triable issues of fact exist in that defendant had actual or constructive notice of the defective condition. Plaintiff argues that defendant received actual notice of the defective condition based on its employee's admission that he placed the subject recliner on the display pallet two hours prior to the incident.

Defendant has made a prima facie showing of entitlement to judgment as a matter of law, dismissing the case. No evidence has been submitted as to what the specific defects were, relating to the chair and/or pallet that plaintiff fell from; there has been no proof, even in the form of plaintiff's own testimony, as to exactly what condition of the chair caused plaintiff to fall.

Moreover, there has been no evidence presented to demonstrate that defendant had either actual or constructive notice of any alleged defective condition. The notice required must be more than general notice of any defective condition. *See Gordon v Am. Museum of Natural History*, 67 NY2d 836, 838 (1986).

> Because a 'general awareness' that a dangerous condition may be present is legally insufficient to constitute notice of the particular condition that caused plaintiff's fall, liability could be predicated only on failure of defendants to remedy the danger presented by the specific condition after actual or constructive notice of the condition.

Piacquadio v Recine Realty Corp., 84 NY2d 967, 969 (1994). As to actual notice, both plaintiff and defendant's employee testified that they were not aware of any prior complaints or similar accidents. Pl's Dep at 49:15-20; Cueves Dep at 18:6-9.

To demonstrate that defendant had constructive notice of the defective condition, "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." *Gordon*, 67 NY2d at 837. At her deposition, plaintiff testified that the platform appeared level and the chair was fully on the platform. Pl's Dep at 13:10-16; 23:3-5. Thus, based on plaintiff's own testimony and due to the lack of any conflicting testimony, there was no evidence of a "visible and apparent" defect. *Gordon*, 67 NY2d at 837. Moreover, since there has been no evidence of a defect, defendant cannot be charged with having had constructive notice of any such defect.

As defendant has met its burden, the burden shifts to plaintiff to demonstrate by admissible evidence, that there are material issues of fact precluding the granting of summary judgment. However, plaintiff has failed to meet her burden and the case is dismissed.

Even accepting plaintiff's testimony, there are no issues of fact as there has been no testimony or evidence of a specific defect; nor is a specific defect even alleged. While plaintiff argues that defendant had actual or constructive notice "of the defective condition", plaintiff never details what the defective condition is. The assertion that the chair tipped to the left and plaintiff fell on her left side is not evidence of negligence and does not demonstrate that there was in fact a defect. Further, plaintiff's assertion appears to be premised on a theory of *res ipsa loquitur*, which is not applicable in this case. *See Loiacono*, 29 AD3d at 538.

Moreover, the affidavits of the non-party witnesses, plaintiff's two friends Domenica Di Laurentis and Yolanda Riccuti, fail to provide evidentiary support to raise questions of fact, since they admitted that their observations occurred after the accident. While the witnesses assert that they saw plaintiff fall from the reclining chair, they both acknowledged that "[they] could see after the accident that the reclining chair had not been completely or properly placed upon the wooden platform on which it was sitting." Domenica Di Laurentis Aff; Yolanda Riccuti Aff (attached to Seskin Affirmation in Opp) (emphasis supplied). However, they did not state that they witnessed any defective condition as to the chair and/or pallet, prior to plaintiff's fall.

Plaintiff's argument that defendant should be charged with actual notice based simply on the fact that Cueves admitted to placing the recliner on the platform is unpersuasive. Further, it is equally without merit that "defendant also receive 'actual notice' of the dangerous and hazardous condition by Cueves' watching and allowing plaintiff to sit on the 'foot' portion of the

recliner which Cueves testified could not support plaintiff's weight and which he knew would collapse, causing plaintiff to fall." Scott H. Seskin Affirmation in Opp at 9. Moreover, plaintiff's argument that the fact that the chair was removed after the accident somehow "acknowledges actual notice of the dangerous and hazardous condition presented by the recliner" (Seskin Affirmation in Opp 10) is also meritless because subsequent repairs are not admissible for that purpose, but instead can be used only to prove such things as ownership or control. *See Cacciolo v Port Auth. of New York and New Jersey*, 186 AD2d 528, 530 (2d Dep't 1992); *see also* Prince, Richardson On Evidence (Eleventh Edition) § 4-612.

The case cited by defendant, *Zalko v Sunrise Adult Health Care Ctr.*, 7 AD3d 616 (2d Dep't 2004), is illustrative as to the case herein. On rising from a chair at defendant's premises, plaintiff fell and brought suit. In affirming the dismissal of the case on defendant's summary judgment motion, the Appellate Court held that defendant established that there had been no prior notice of any defect in the chair and there was no defect in the chair discovered upon inspection after the plaintiff's fall. *Id.* at 617. The court further found that plaintiff failed to present sufficient evidence in admissible form in opposition because plaintiff's affidavit that the chair was "unstable" and "wobbled" was speculative. *Id.* Even though the lawsuit was nonetheless dismissed, the plaintiff in *Zalko* at least attempted to identify the defective condition by stating that the chair was unstable and wobbled, whereas here, plaintiff has failed to present any such testimony. Based on the above, the complaint is dismissed.

Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the

submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that within 30 days of entry of this order, defendant shall serve a copy of this order with notice of entry upon plaintiff.

Dated: 1/10/11

DORIS LING-COHAN, J.S.C.

J:\Summary Judgment\BYsubjectCLIPS\NEGLIGENCE CLIPS\Giannetto, summ judg by D, no evidence of defect or notice.wpd