

**Marangiello v Stop & Shop Supermarket Co. LLC**

2011 NY Slip Op 31469(U)

May 20, 2011

Supreme Court, Nassau County

Docket Number: 019712/09

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**  
**Justice**

TRIAL/IAS PART 18

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ROSE MARANGIELLO,

Plaintiff,

Index No.: 019712/09  
Motion Sequence...02, 03  
Motion Date...03/25/11

-against-

THE STOP & SHOP SUPERMARKET  
COMPANY LLC, PEPPERIDGE FARM, INC.  
and MITCHELL P. SUSLAK and GOLD COAST  
DISTRIBUTORS, LTD.,

Defendants.

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- Papers Submitted:
- Notice of Motion (Mot. Seq. 02).....X
- Affirmation in Opposition.....X
- Reply Affirmation.....X
- Notice of Motion (Mot. Seq. 03).....X
- Affirmation in Opposition.....X
- Affirmation in Reply.....X

Upon the foregoing papers, the motion by the Defendant, THE STOP & SHOP SUPERMARKET COMPANY LLC, (Mot. Seq. 03) and the motion by the Defendants, MITCHELL P. SUSLAK and GOLD COAST DISTRIBUTORS, LTD., (Mot. Seq. 02) seeking an Order of this Court awarding them summary judgment dismissing the Plaintiff's

complaint is determined as hereinafter provided.<sup>1</sup>

In this action, the Plaintiff seeks to recover damages for personal injuries she alleges she sustained as a result of the negligence of the Defendants. The complaint alleges that the Plaintiff was caused to trip and fall over a bakery tray that was placed on the floor in the aisle of the Defendant, THE STOP & SHOP SUPERMARKET COMPANY LLC's supermarket located on Forest Avenue in Glen Cove, New York. The Plaintiff alleges that the bakery tray, which she tripped on, was placed on the floor by the Defendant, MITCHELL P. SUSLAK during the time he engaged in the replenishment of the shelves of Pepperidge Farm bakery products. The Defendant, GOLD COAST DISTRIBUTORS, LTD., is the corporate entity which held the rights to make deliveries of Pepperidge Farm bakery products to the supermarket. The Defendant, THE STOP & SHOP SUPERMARKET COMPANY LLC owns and manages the supermarket where the accident occurred.

The Defendants argue that the Plaintiff is unable to establish the cause of her trip and fall and that she failed to identify the bakery tray as the cause of her fall. Regardless of whether the bakery tray was the cause of the Plaintiff's fall, the Defendants contend that the placement of the bakery trays on the floor of the aisle does not constitute a dangerous condition and as such, the Plaintiff's complaint should be dismissed for failure to state a cause of action. The Defendant, THE STOP & SHOP SUPERMARKET COMPANY LLC argues that it is mere speculation that the bakery tray caused the Plaintiff to fall and as such

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<sup>1</sup>By Stipulation dated December 22, 2010, the action against the Defendant, Pepperidge Farm, Inc. was discontinued.

this mere speculation is fatal to the Plaintiff's case. While not denying their duty to maintain their property in a reasonably safe condition, the Defendant, THE STOP & SHOP SUPERMARKET COMPANY LLC argues that there is no duty to warn against a condition which is not inherently dangerous and that can readily be observed by those employing the reasonable use of their senses.

“A landowner 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” (*Peralta v. Henriquez*, 100 N.Y.2d 139 [2003] quoting *Basso v. Miller*, 40 N.Y.2d 233 [1976]). “Although a jury determines whether and to what extent a particular duty was breached, it is for the court first to determine whether any duty exists, taking into consideration the reasonable expectations of the parties and society generally. The scope of any such duty of care varies with the foreseeability of the possible harm” (*Tagle v. Jakob*, 97 N.Y.2d 165 [2001]). The scope of a landowner's duty to maintain property in a reasonably safe condition may also include the duty to warn of a dangerous condition. However, a landowner has no duty to warn of an open and obvious danger. Unless a hazard is latent, a person entering the property is just as aware as the landowner of the condition of the property and the risks associated with it (*see Tagle v. Jakob, supra* at 169-170). Apart from the duty to warn of dangerous conditions on the property, a landowner also has a concomitant duty to keep the property in a reasonably safe condition for those who use it (*see Basso v. Miller*,

*supra*). Generally, the issue of whether a dangerous or defective condition exists depends on the particular facts of each case, and is properly a question of fact for the jury. *Trincere v. County of Suffolk*, 90 N.Y.2d 976 (1997); *Hawkins v. Carter Community Hous. Dev. Fund Corp.*, 40 A.D.3d 812 (2d Dept. 2007); *Riser v. New York City Hous. Auth.*, 260 A.D.2d 564 (2d Dept. 1999). It is well settled that a landowner is under no duty to warn of a dangerous condition that is open and obvious. However, recent case law on this issue is clear that proof that an alleged dangerous condition is open and obvious does not preclude a finding of liability against the landowner. Rather, it is relevant with respect to the level of the plaintiff's comparative fault. *Cupo v. Karfunkel*, 1 A.D.3d 48 (2d Dept. 2003); *see also Ruiz v. Hart Elm Corp.*, 44 A.D.3d 842 (2d Dept. 2007); (*Holly v. 7-Eleven, Inc.*, 40 A.D.3d 1033 (2d Dept. 2007); *Fairchild v. J. Crew Group, Inc.*, 21 A.D.3d 523 (2d Dept. 2007) (the fact that a defect may be open and obvious does not negate a landowner's duty to maintain its premises in a reasonably safe condition, but may raise an issue of fact as to the plaintiff's comparative negligence); *see also Simmons v. Saugerties Cent. School Dist.*, 82 A.D.3d 1407 (3d Dept. 2011) (open and obvious nature of large hole in bus circle, and student's allegedly long-standing knowledge of it, did not bar inquiry into whether allegedly dangerous condition resulted from school's negligent maintenance of its property); *Custodi v. Town of Amherst*, 81 A.D.3d 1344 (4th Dept. 2011) (it is well settled that "the open and obvious nature of the allegedly dangerous condition ... does not negate the duty to maintain [the] premises in a reasonably safe condition but, [instead], bears only on the injured person's

comparative fault”).

Summary judgment standards are well settled. The movant must establish the cause of action or defense by submitting evidentiary proof in admissible form “sufficiently to warrant the court as a matter of law in directing judgment” (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). Failure to do so “requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 [1985]). When such a showing has been made by the movant, then to defeat summary judgment “the opposing party must show facts sufficient to require a trial of any issue of fact” (CPLR § 3212, subd [b]; *Zuckerman v. City of New York*, *supra* at 562). On a summary judgment motion, the evidence must be viewed in a light most favorable to the nonmoving party (*Branham v. Loews Orpheum Cinemas, Inc.*, 8 N.Y.3d 931 [2007]).

The Defendants argue throughout their papers that the bakery trays, where they were placed, were in an open and obvious place and did not constitute a dangerous condition. The Defendants have ignored that portion of the Plaintiff’s Bill of Particulars wherein the Plaintiff alleges that she was caused to “trip and fall as a result of a bakery basket/tray which was placed on the bread aisle”.

Additionally, contrary to the Defendants contentions, the Plaintiff’s testimony at her Examination Before Trial does not conclusively eliminate the tray as the causation of the trip and fall. The Plaintiff does testify, in response to several inquiries, that she tripped on the tray. Moreover, a picture of the aisle (Exhibit G attached to Defendants’ SUSLAK

and GOLD COAST DISTRIBUTORS, LTD.'s motion) fails to depict the location of the accident as it appeared on the date of the occurrence, thus preventing this Court from rendering any opinion on the conditions as they existed on the date of the accident.

Upon the record, a factual issue exists as to whether the placement of the trays in the aisle as the Defendant, SUSLAK, restocked the display shelves, created a dangerous condition and whether the Defendant, THE STOP & SHOP SUPERMARKET COMPANY LLC failed to keep the property in a reasonably safe condition for those who use it.

Therefore, based upon the forgoing, the Defendants' motions seeking dismissal of the within complaint are hereby **DENIED**.

This constitutes the Decision and Order of the Court.

Any applications not specifically addressed herein are **DENIED**.

DATED: Mineola, New York  
May 20, 2011



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Hon. Randy Sue Marber, J.S.C.

**ENTERED**  
MAY 24 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE