SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

GREGORIA AREVALO,

Plaintiff,

- against -

ASSOCIATED SUPERMARKETS INC., JAYPEEJAY FOODS INC., GOLDEN KEY FOODS, INC., and PETER GIUNTA,

Defendants.

Index No.: 703904/2014

Motion Date: 8/2/16

Motion No.: 3

Motion Seq.: 3

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The following electronically filed documents read on this motion by defendants JAYPEEJAY FOODS INC., GOLDEN KEY FOODS, INC., and PETER GIUNTA (collectively hereinafter defendants) for an Order pursuant to CPLR 3212, granting summary judgment in favor of defendants, dismissing plaintiff's complaint:

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	30 - 39
Affirmation in Opposition	42
Reply Affirmation	43

This is an action for damages for personal injuries sustained by plaintiff in October of 2011, when she purportedly tripped and fell over a shopping basket that was near the cashier lanes of the Associated Supermarket located at 181 Middle Neck Road, Great Neck, New York. Plaintiff alleges that as a result of the accident she sustained, inter alia, a left hip and pelvis fracture, requiring left hip replacement surgery.

Plaintiff commenced this action by filing of a summons and complaint on June 5, 2014. Issue was joined by service of

defendants' answer dated August 12, 2014. Defendant Associated Supermarkets Inc. never answered. Defendants now move for an order pursuant to CPLR 3212(b), granting summary judgment on the issue of liability and dismissing the complaint. Defendants contend that they did not create the condition nor did they have actual or constructive knowledge of it. They further contend that the shopping basket was an open and obvious condition, and thus, they were under no obligation to warn about its presence. Additionally, defendants allege that they had proper inspection and cleaning procedures in place to ensure that nothing was obstructing the cashier aisles.

In support of the motion, defendants submit an affirmation from counsel, Scott W. Bermack, Esq; a copy of the pleadings; a copy of plaintiff's verified bill of particulars; copies of the transcripts of the examination before trial of plaintiff, non-party witnesses Pedro Arevalo and Mirna Uribe, and defendants' employee Alyssa McClane; a copy of the Note of Issue; and a copy of the Preliminary Conference Order.

At her examination before trial taken on March 9, 2015, plaintiff testified that the incident occurred near the cashier lanes within the subject Associated Supermarket. She did not know the date of the incident. Associated Supermarket was her regular supermarket. She was in Cashier Lane 3 in the middle of checking out when the cashier advised her that a different brand of rice was on sale. She left the cashier lane, and tripped on a red shopping basket. She did not know how long the basket was on the ground for or how it got there. She did not see the basket as she walked into the cashier lane to pay and never saw the basket until after she tripped.

Pedro Arevalo, plaintiff's significant other, was deposed on April 24, 2015 as a non-party witness. He affirmed that plaintiff fell at the subject supermarket near the cashier lanes. He did not recall when the accident occurred. He stated that he saw one red basket near the sweets display as he entered the subject cashier lane. This was the basket that plaintiff tripped over. He did not know how long the basket was on the ground for or how the basket got to that location.

Plaintiff's daughter, Mirna Uribe, appeared for a deposition on April 24, 2015, and testified that plaintiff fell at the subject supermarket near the third cash register. She did not know what date the accident occurred, but believed it was sometime in October 2011. She saw the red basket near the front of the cashier lane when she entered the lane. She testified that the baskets are not hard to miss. She did not know how the basket

got to that location or how long the basket was on the ground. She stated that possibly fifteen minutes passed from when she saw the basket till when plaintiff fell.

Alyssa McClane appeared for a deposition on July 13, 2015. She is employed by defendants Jaypeejay Foods Inc. as office personnel. Her duties include invoicing, handling of vendors, and assorted tasks at Associated Supermarket, including working as a cashier. In 2011, porters were employed to monitor wagons, baskets, garbage, boxes, and customers. Porters would constantly walk around the inside and outside of the store to ensure baskets were not blocking aisles. It was standard and the general responsibility of all store employees to patrol the store, pick up baskets if they noticed them on the ground, and bring the baskets back to the entranceway where they were stacked. Such was not in any job description. It was also procedure that the aisles were always to be free and clear of baskets. If a customer falls in the store, employees are required to report it to the office, and an incident report is completed. No incident report was found for plaintiff.

Defendants contend that there is no evidence that would establish that defendants created the condition. Additionally, as plaintiff cannot identify the date of the accident, defendants allege that the entire claim is speculative. Moreover, based on Ms. McClane's testimony that the porters monitored shopping baskets to ensure that they were not blocking aisles, defendants allege that they did not have actual or constructive notice of the shopping basket. Based on such, defendants argue that the occasional misplaced shopping basket, without more, is not enough to raise a triable issue that a known tripping hazard existed (citing Sewer v Fat Alberts Warehouse Inc., 235 AD2d 414 [2d Dept. 1997]).

In opposition, plaintiff's counsel, Robert Vilensky, Esq., contends that defendants failed to meet their initial burden on the issue of constructive notice as defendants failed to offer any evidence as to when the area in question was last cleaned or inspected relative to the time when plaintiff fell (citing Mahoney v AMC Entertainment, Inc., 103 AD3d 855 [2d Dept. 2013]). Plaintiff states that mere reference to general cleaning and inspection practices, with no evidence of any specific cleaning or inspection of the area in question, is insufficient to establish a lack of constructive notice (citing id.).

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. 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 or her position (see Zuckerman v City of New York, 49 NY2d 557[1980]).

A defendant owner or entity who is responsible for maintaining a premises who moves for summary judgment in a slip-and-fall or trip-and-fall case involving the property 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 (see Bloomfield v Jericho Union Free School Dist, 80 AD3d 637 [2d Dept. 2011]; Arzola v Boston Props. Ltd. Partnership, 63 AD3d 655 [2d Dept. 2009]; Bruk v Razag, Inc., 60 AD3d 715 [2d Dept. 2009]).

Upon review and consideration of defendants' motion, plaintiff's affirmation in opposition, and defendants' reply thereto, this Court finds that the evidence submitted by defendants was sufficient to demonstrate, prima facie, that defendants did not create the condition or have actual or constructive notice of the shopping basket on the ground near the cashier lane prior to plaintiff's trip.

For a plaintiff in a trip and fall case to establish a prima facie case of negligence, plaintiff must demonstrate that the defendant created the condition which caused the accident, or that the defendant had actual or constructive notice of the condition. 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" (Gordon v American Museum of Natural History, 67 NY2d 836 [1986]; Zerilli v Western Beef Retail, Inc., 72 AD3d 681 [2d Dept. 2010]; Yacovelli v Pathmark Stores, Inc., 67 AD3d 1002 [2d Dept. 2009]). "To meet their initial burden on the issue of lack of constructive notice, the defendants must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" (Birnbaum v New York Racing Association, Inc., 57 AD3d 598 [1986]; see Pryzywalny v New York City Tr. Auth., 69 AD3d 598 [2d Dept. 2010]; Arzola v Boston Props. Ltd. Partnership, 63 AD3d 655 [2d Dept. 2009]; Braudy v Best Buy Co., Inc., 63 AD3d 1092 [2d Dept. 2008]).

Here, although plaintiff claims that defendants failed to establish when the area in question was last cleaned or inspected, defendants have never been provided a consistent date and time for the alleged incident. As such, and based upon the

circumstances of this case, it would be merely speculative for plaintiff to suggest that defendants failed to sufficiently inspect the premises on the date and time of the incident. In any event, plaintiff failed to raise a triable issue of fact as to whether defendants affirmatively placed the shopping basket in the checkout lane or whether defendants had received any prior complaints regarding the condition so as to charge them with actual notice. Additionally, neither plaintiff nor Mr. Arevalo knew how long the basket was on the ground, and Ms. Uribe testified that probably only fifteen minutes passed between when she saw the subject basket on the ground and when plaintiff fell. Thus, in the absence of proof as to the length of time the basket was in the lane, plaintiff failed to raise a triable issue of fact as to whether defendants had constructive notice of the condition (Rosa v Food Dynasty, 307 AD2d 1031 [2d Dept. 2003]).

Accordingly, for all of the above stated reasons, it is hereby,

ORDERED, that defendants JAYPEEJAY FOODS INC., GOLDEN KEY FOODS, INC., and PETER GIUNTA's motion for summary judgment is granted, plaintiff's complaint is dismissed as against defendants JAYPEEJAY FOODS INC., GOLDEN KEY FOODS, INC., and PETER GIUNTA, and the Clerk of the Court shall enter judgment accordingly.

Dated: August 10, 2016
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.