SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

----------X

PATRICIA TERILLI and JAMES TERILLI,

Plaintiff,

- against -

KOHL'S DEPARTMENT STORES, INC.,
d/b/a KOHL'S,

Defendant.

----------X

DECISION and ORDER

Index No. 52946/2016

McLOUGHLIN, EDWARD T., AJSC

The following papers were considered in deciding defendant's motion for summary judgment seeking to dismiss the complaint:

Papers	Numbered
Defendant's Motion/Memorandum of Law /accompanying exhibits	13-25
Plaintiff's Affirmation in Opposition /accompanying exhibits	27-31
Reply Affirmation / accompanying exhibit	32-34

On December 21, 2013, the plaintiff, Patricia Terilli, was shopping with her husband, James Terilli, at Kohl's Department Store (defendant) in Wappingers Falls, New York. While traversing an aisle, the plaintiff tripped and fell over a large orange cart, commonly referred to as a "U-boat cart". As a result of the plaintiff's fall, she sustained the alleged injuries. The plaintiffs commenced the instant action on December 9, 2016.

Defendant has now moved for summary judgment seeking dismissal of the action. Defendant claims that there are no triable issues, as the u-boat cart was not dangerous or defective

in any way. Further, the defendant claims that summary judgment should be granted as the u-boat cart was open and obvious and readily observable by reasonable use of one's senses. The plaintiff opposes the summary judgment application.

It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits. See Vega v. Restani Construction Corp., 18 NY3d 499; Millerton Agway Co-Op v. Briarcliff Farms, Inc., 17 NY2nd 57. It is not the Court's function to determine credibility. See Chimbo v. Bolivar, 142 AD3d 944 (2nd Dept. 2016). Issue finding, rather than issue determination, is the key to the procedure. Sillman v. Twentieth Century Fox Film Corp., 3 NY2d 395.

Initially, the proponent must make a *prima facie* showing of entitlement to summary judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact. However, once the movant makes such a sufficient showing, 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. Alvarez v. Prospect Hospital, 68 NY2d 320. In making this determination, the Court must view the evidence in a light most favorable to the opposing party and must give that party the benefit of every inference which can be drawn from the evidence. Nash v. Port Washington Union Free School District, 83 AD3d 136 (2nd Dept. 2011).

It is well settled that a land owner or tenant in possession of the premises must act reasonably in maintaining the premises in question in a safe condition in view of all the circumstances. Basso v. Miller, 40 NY2d 233. However, there is no duty to protect or warn against an open and obvious condition which, as a matter of law, is not inherently dangerous.

Errett v. Great Neck Park District, 40 AD3d 1029 (2nd Dept. 2007); Fishelson v. Kramer Properties, LLC, 133 AD3d 706 (2nd Dept. 2015).

The defendant has submitted sufficient evidence to demonstrate that the condition of the u-boat cart was open and obvious and not inherently dangerous as a matter of law. Indeed, the photographs of the area in question were viewed by the plaintiff during the course of her deposition and the contrast between the white floor, dark gray bottom of the u-boat cart and the bright orange sides of the u-boat cart were readily apparent and open and obvious. Defendant has established a prima facie entitlement to summary judgment as a matter of law by demonstrating that the subject u-boat cart located in the aisle was open and obvious. It was readily observable by the reasonable use of one's senses and not inherently dangerous. Benjamin v. Trade Fair Supermarket, Inc., 119 AD3d 880 (2nd Dept. 2014).

A defendant is entitled to summary judgment as a matter of law when they are able to demonstrate that the alleged defective condition which caused the plaintiff to trip and fall was open and obvious and not inherently dangerous. Bernth v. King Kullen Grocery Company, Inc., 36 AD3d 844 (2nd Dept. 2007); Flaim v. Hex Food, Inc., 79 AD3d 797 (2nd Dept. 2010), lv. den. 17 NY3d 703.

Accordingly, it is hereby

ORDERED that the defendant's motion for summary judgment dismissing the complaint is granted.

The foregoing constitutes the decision and order of the Court.

Dated: Poughkeepsie, New York
October 15, 2018

HON. EDWARD T. McLOUGHLIN
Acting Justice Supreme Court

TO: Mark J. Metzger, Esq.
457 Maple Street
P.O. Box 1110
Poughkeepsie, NY 12602

Todd R. Harris, Esq.
Goldberg Segalla, LLP
P.O. Box 780
Buffalo, NY 14201