SHORT FORM ORDER **ORIGINAL** INDEX No. 602113/2019
CAL. No. 202000785OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 1/14/21
ADJ. DATE 2/18/21
Mot. Seq. #001 MG; CASEDISP

----------X

SANDRA DERISI,

Plaintiff,

- against -

KING KULLEN GROCERY CO. INC.,

Defendant.

----------X

MIRMAN, MARKOVITS, & LANDAU, P.C.
Attorney for Plaintiff
291 Broadway, 6th Floor
New York, New York 10007

CULLEN AND DYKMAN LLP
Attorney for Defendant
100 Quentin Roosevelt Boulevard
Garden City, New York 11530

Upon the following papers read on this e-filed motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers by defendant, dated December 14, 2020; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers by plaintiff, dated February 5, 2021; Replying Affidavits and supporting papers by defendant, dated February 16, 2021; Other ____; it is

ORDERED that the motion by defendant King Kullen Grocery Co., Inc. for summary judgment dismissing the complaint is granted.

Plaintiff Sandra Derisi commenced this action to recover damages for personal injuries she allegedly sustained as a result of an accident that occurred on November 19, 2018, at a supermarket operated by defendant King Kullen Grocery, Co., Inc., in Huntington Station, New York. By the complaint, as amplified by the bill of particulars and amended bill of particulars, plaintiff alleges, among other things, that defendant negligently permitted a sharp piece of counter to protrude, which created a trap on the premises.

Defendant now moves for summary judgment dismissing the complaint. Defendant argues that the "bumper guard" that allegedly caused plaintiff's accident was open and obvious and not inherently

dangerous. In support of its motion, defendant submits, among other things, the transcripts of the deposition testimony of plaintiff and James Hodermarsky, and various photographs.

In opposition, plaintiff argues, among other things, that triable issues of fact remain as to whether the bumper guard was open and obvious and not inherently dangerous, and whether it and the flooring created an "optical illusion" In support of her opposition, plaintiff submits, among other things, her own affidavit and the affidavit of Stanley Fein, P.E.

At plaintiff's deposition, she testified that the accident occurred at approximately 10:15 p.m., at a stand-alone counter displaying cheeses. The counter allegedly had "two short sides" and "two long sides." Prior to the accident, plaintiff allegedly was looking straight ahead and intended to walk around the display. Plaintiff testified that the accident occurred when her right shin hit the top portion of a "guard" for the corner of the display case. She further testified that she did not observe the subject guard until after the accident occurred. While plaintiff allegedly could not identify with certainty the precise material composing the guard, she described the material as "very hard." When asked to describe the lighting in the area of the accident, plaintiff testified that it was "not bright, bright; but it wasn't dim, dim." She further described the lighting as "medium." She clarified that she did not trip and fall. Plaintiff identified several photographs, including photographs depicting the bumper guard allegedly involved in her accident. She testified that there were no other witnesses to her accident. Plaintiff also testified that she shopped at the subject store approximately two times per week in 2018, and that she never observed the guards on prior visits to this store.

James Hodermarsky appeared for a deposition on behalf of defendant. At his deposition, Hodermarsky testified that he has been employed as a store manager for the subject supermarket for approximately 2½ years. He further testified that he was a store manager for the subject supermarket in November of 2018, and that his responsibilities included overseeing all departments and the maintenance of display cases. According to Hodermarsky's deposition testimony, a "deli island," which contained more than one bumper guards, was present in the store in November 2018. He stated that the deli island had a black base, that the surrounding flooring was black, and that he believed that the bumper guards were composed of plastic. When asked to describe the bumper guards, he testified that he believed that they were "just black," and that they permanently were affixed onto the island. He identified certain photographs as fairly and accurately depicting the bumper guard and floor on the date of the accident. When asked to describe the type of lighting in the area of the deli department, Hodermarsky stated that it was "[r]egular store lighting." Hodermarsky also testified that prior to the accident, he never received any complaints regarding the bumper guards on that particular island, and that he did not know of any accidents or incidents involving the bumper guards.

A landowner, or a party in possession or control of real property, has a duty to maintain its property in a reasonably safe condition (*see* ***Kellman v 45 Tiemann Assoc.***, 87 NY2d 871, 638 NYS2d 937 [1995]; ***Dougherty v 359 Lewis Ave. Assoc., LLC***, 191 AD3d 763, 2021 NY Slip Op 00835 [2d Dept 2021]; ***Wittman v Nespola***, 190 AD3d 1012, 136 NYS3d 885 [2d Dept 2021]). There is no duty to protect or to warn against conditions that are an open or obvious and not inherently dangerous (*see* ***Hayward v Zoria Hous., LLC***, 187 AD3d 997, 133 NYS3d 599 [2d Dept 2020]; ***Spina v Brookwood Ronkonkoma, LLC***, 185 AD3d 621, 124 NYS3d 814 [2d Dept 2020]; ***Holmes v Macy's Retail***

Holdings, Inc., 184 AD3d 811, 124 NYS3d 582 [2d Dept 2020]). A condition is open and obvious where it is readily observable by those employing the reasonable use of their senses, based on the circumstances at the time of the accident (*see* ***Robbins v 237 Ave. X, LLC***, 177 AD3d 799, 113 NYS3d 235 [2d Dept 2019]; ***Ochoa-Hoenes v Finkelstein***, 172 AD3d 1080, 101 NYS3d 81 [2d Dept 2019]; ***Davidoff v First Dev. Corp.***, 148 AD3d 773, 48 NYS3d 755 [2d Dept 2017]). The question of whether a condition is open and obvious cannot be divorced from the surrounding circumstances and generally is a question for the fact finder to resolve (*see* ***Brett v AJ 1086 Assoc., LLC***, 189 AD3d 1153, 138 NYS3d 546 [2d Dept 2020]; ***Robbins v 237 Ave. X, LLC***, *supra*; ***Shermazanova v Amerihealth Med., P.C.***, 173 AD3d 796, 103 NYS3d 160 [2d Dept 2019]). Similarly, whether a condition is not inherently dangerous, or constitutes a reasonably safe environment, depends on the specific facts of the case (*see* ***Brett v AJ 1086 Assoc., LLC***, *supra*; ***Holmes v Macy's Retail Holdings, Inc.***, *supra*; ***Graffino v City of New York***, 162 AD3d 990, 80 NYS3d 444 [2d Dept 2018]). To obtain summary judgment, a defendant must establish, prima facie, that the alleged condition was open and obvious and not inherently dangerous (*see* ***Masker v Smith***, 188 AD3d 867, 135 NYS3d 135 [2d Dept 2020]; ***Karpel v National Grid Generation, LLC***, 174 AD3d 695, 106 NYS3d 99 [2d Dept 2019]; ***Crosby v Southport, LLC***, 169 AD3d 637, 94 NYS3d 109 [2d Dept 2019]).

The defendant established its prima facie entitlement to summary judgment dismissing the complaint. Defendant, through the submission of, among other things, photographic evidence, demonstrated, prima facie, that the subject bumper guard was open and obvious and readily observable by the reasonable use of one's senses, and that it was not inherently dangerous (*see* ***Sarab v BJ's Wholesale Club***, 174 AD3d 933, 103 NYS3d 307 [2d Dept 2019], *lv denied* 34 NY3d 905, 114 NYS3d 286 [2019]; ***Frankl v Costco Wholesale Corp.***, 165 AD3d 760, 82 NYS3d 902 [2d Dept 2018]; ***Bartholomew v Sears Roebuck and Co.***, 159 AD3d 786, 69 NYS3d 813 [2d Dept 2018]; ***Gerner v Shop-Rite of Uniondale, Inc.***, 148 AD3d 1122, 50 NYS3d 459 [2d Dept 2017]). Significantly, there is no evidence that the lighting was inadequate, that other customers were present in the area of the accident, or that the subject bumper guard was in any way concealed at the time of the accident (*see* ***Gibbons v Lido & Point Lookout Fire Dist.***, 293 AD2d 647, 740 NYS2d 439 [2d Dept 2002]; *cf.* ***Elfassi v Hollister Co.***, 167 AD3d 569, 88 NYS3d 505 [2d Dept 2018]; ***Dalton v North Ritz Club***,147 AD3d 1017, 46 NYS3d 900 [2d Dept 2017]; ***Simon v Comsewogue School Dist.***, 143 AD3d 695, 39 NYS3d 180 [2d Dept 2016]). The Court notes that as the video footage submitted by defendant was not properly authenticated, the Court did not consider it in making its determination (*see* ***National Ctr. for Crisis Mgt. v Lerner***, 91 AD3d 920, 938 NYS2d 138 [2d Dept 2012]; ***Read v Ellenville Nat. Bank***, 20 AD3d 408, 799 NYS2d 78 [2d Dept 2006]; *cf.* ***Quinones v 2074 White Plains Road Building, LLC***, 180 AD3d 721, 115 NYS3d 705 [2d Dept 2020]), and in any event, defendant fails explain how such footage was relevant to the motion.

In opposition, the plaintiff failed to raise a triable issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). Stanley Fein, P. E., who avers that he is a licensed engineer in the State of New York, supplied an affidavit on behalf of plaintiff. Fein avers that he reviewed the pleadings, deposition transcripts, and unidentified photographs for this action. Notably, Fein misidentifies the location of the accident, and misapprehends the nature of the plaintiff's accident. He avers that plaintiff's accident was a trip-and-fall accident, and attributes her accident and injuries to a "display cabinet and floor," while plaintiff unequivocally testified that she did not trip and fall, and that

her shin hit a guard. Even were the Court to ignore such an obvious misunderstanding on the part of plaintiff's expert, and ascribe Fein's written opinions to the bumper guard specified by plaintiff, his affidavit is insufficient to raise a triable issue of fact, as it is speculative, conclusory, and lacking in foundational facts (*see* ***Bartholomew v Sears Roebuck & Co.***, *supra*; ***Boyle v Pottery Barn Outlet***, 117 AD3d 665, 985 NYS2d 291 [2d Dept 2014]). Significantly, Fein never visited the accident site, and never took any measurements. Yet, Fein describes "the bumper" as a "rubber bumper," and determines that it extended approximately 4.5 to 6 inches, based solely on deposition testimony and unspecified photographs. While Fein avers that the bumper guard and floor tiles were "the same black color," and created an "optical illusion," the record, namely, the photographic evidence, fails to support an argument that they created optical confusion (*see* ***McFeely v Mercy Hosp. of Buffalo***, 177 AD3d 1279, 113 NYS3d 416 [4d Dept 2019]; ***Namm v Levy***, 172 AD3d 507, 98 NYS3d 426 [1st Dept 2019]; ***Hall for Stephenson v New Way Remodeling***, 168 AD3d 620, 92 NYS3d 39 [1st Dept 2019]; ***Franchini v American Legion Post***, 107 AD3d 432, 967 NYS2d 48 [1st Dept 2013]). Specifically, the photographic evidence shows the that subject bumper guard was not the same or similar color as the surrounding floor, since it was black, with a white strip, while the surrounding floor was gray with white specks. Although Fein suggests the use of different colors, warning signs, and/or warning strips, he disregards that the subject bumper guard was a different color than the floor, and he fails to address that it had a white warning strip. He also cites to no authority mandating the design of the bumper guard and floor to be different than the one present at the subject supermarket. Additionally, Fein states that one's line of sight while walking and looking straight is between the horizontal and 18 degrees below the horizontal, and avers, without ever visiting the subject supermarket, that the "display defect is below the 18 degrees." He concludes, without further elaboration, that the subject condition "comes upon" one approaching it as a "dangerous and unexpected trap." Moreover, Fein's affidavit was speculative and conclusory in it its attribution of plaintiff's accident and injuries to defendant's purported negligent maintenance of "a display cabinet and floor that was dangerous and hazardous." Plaintiff's averment that the guard, display case, and floor were the same color is also insufficient, standing alone, to raise a triable issue of fact (*see* ***McFeely v Mercy Hosp. of Buffalo***, *supra*). Further, plaintiff's reliance on the accident report was misplaced, as it was not in admissible form (*see* ***Blocker v Filene's Basement***, 126 AD3d 744, 5 NYS3d 265 [2d Dept 2015]; ***Stock v Otis El. Co.***, 52 AD3d 816, 861 NYS2d 722 [2d Dept 2008]). Assuming *arguendo* that the accident report was submitted in admissible form, it also is insufficient to raise a triable issue of fact. The Court finds plaintiff's remaining arguments in opposition unavailing.

Accordingly, the motion by defendant for summary judgment dismissing the complaint is granted.

Dated: APR 19 2021

HON. JOSEPH A. SANTORELLI
J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION