SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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

TRIAL/IAS PART 14

X

LYNN LEW,

Plaintiff,

Index No.: 001176/11
Motion Sequence...02
Motion Date...06/17/13
XXX

-against-

MANHASSET PUBLIC LIBRARY and
THE BOARD OF TRUSTEES OF THE
MANHASSET PUBLIC LIBRARY,

Defendants.

X

Papers Submitted:
Notice of Motion.....x
Affidavit in Opposition.....x
Memorandum of Law.....x
Reply Affirmation.....x

Upon the foregoing papers, the motion by the Defendants, Manhasset Public Library and the Board of Trustees of the Manhasset Public Library (hereafter "Library") seeking an Order of this Court, pursuant to CPLR § 3212, granting summary judgment, dismissing the complaint of the Plaintiff, Lynn Lew, is determined as herein provided.

The instant motion arises out of a personal injury action commenced by the Plaintiff in this Court on January 25, 2011, where the Plaintiff tripped and fell in the corridor of the Library. She alleged in her complaint, inter alia, that the Defendants failed to provide adequate and sufficient space for her safe passage as they failed to keep movable objects out of the way.

The Plaintiff, in her Bill of Particulars, specifically alleges, inter alia, that the Defendants were negligent in that they: failed to provide adequate and sufficient space for the premises and circumstances existing; failed to provide adequate and sufficient space at and near the furniture so persons could safely walk past the same; failed to provide safe and adequate space in aisles so persons could safely use same; failed to keep moveable objects, such as chairs and book carts, in a safe location; and failed to provide signs, notices or other means to inform persons of the dangerous condition in the aisles.

On December 10, 2009 at about 1:00 p.m., the Plaintiff, while patronizing the Library located in Manhasset, County of Nassau, tripped and fell when her foot made contact with the leg of a chair in the Library corridor on the first floor. The Plaintiff sustained injuries, which included a fractured right femur.

According to the Plaintiff, there was not enough space in the corridor for her to avoid the book cart placed on the right side and safely go around the chair and/or couch, placed on the left.

The Defendants argue that the evidence clearly indicates that the placement of

furniture and the book cart, did not cause or contribute to the Plaintiff's accident. Further, they contend that there is no duty to warn of a condition that is readily observable by the use of one's own senses.

In support of their motion, the Defendants submit the transcripts of the Plaintiff's testimony given at the General Municipal Law §50-h hearing and her deposition at the Examination Before Trial, the transcript of deposition testimony by Deanna Fleck, Administrative Assistant of the Library, copies of the pleadings, a video recording of the Plaintiff's accident on disc, photographs of the furniture layout in the Library and the floor plans of the Library.

The Plaintiff argues that the Defendants failed to maintain the Library in a safe condition in that the placement of the book cart and the furniture obstructed the corridor. The open and obvious doctrine is inapplicable to the instant case as the theory invoked is not a duty to warn but a duty to maintain the premises in a safe condition. Additionally, the Defendants have failed to demonstrate that it did not have constructive or defective notice of the condition.

The standards for summary judgment are well settled. A Court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to summary judgment as a matter of law (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 [1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the

matter. Its task is to determine whether or not there exists a genuine issue for trial (*Miller v. Journal-News*, 211 A.D.2d 626 [2d Dept. 1995]).

The burden on the party moving for summary judgment is to demonstrate a prima facie entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v. Gervasio*, 81 N.Y.2d 1062 [1993]). Once the this initial burden has been met by the movant, the burden shifts to the party opposing the motion to submit evidentiary proof in admissible form, sufficient to create material issues of fact requiring a trial to resolve. Mere conclusions and unsubstantiated allegations or assertions are insufficient (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]).

Generally, a defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie case 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 *Sloane v. Costco Wholesale Corp.*, 49 A.D.3d 522 [2d Dept. 2008]).

The Defendants may also demonstrate their prima facie entitlement to judgment as a matter of law by submitting evidence that the placement of a rolling book cart in the corridor of the Library was not inherently dangerous and that the Plaintiff had observed the book cart before her accident, and that she tripped over the leg of a furniture piece after she had sufficiently passed the cart (see *Kaufmann v. Lerner New York, Inc.*, 41 A.D.3d 660 [2d

Dept 2007]).

It is well settled that while property owners and business proprietors have a duty to maintain their premises in reasonably safe condition, which duty includes eliminating, protecting against, or warning of dangerous, defective, or otherwise hazardous conditions, there is no duty to protect or warn against conditions that are in plain view, open, obvious, and readily observable by those employing the reasonable use of their senses (see *Bernth v. King Kullen Grocery Co., Inc.*, 36 A.D.3d 844 [2d Dept. 2006]).

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 (see *Tagle v. Jakob*, 97 N.Y.2d 165 [2001]).

This Court has defined an open and obvious condition as "of a nature that could not reasonably be overlooked by anyone in the area whose eyes are open, making a posted warning of the presence of the hazard superfluous."(see *Westbrook v. WR Activities-Cabrera Markets*, 5 A.D.3d 69, 71 [1st Dept 2004]). Therefore, where a dangerous condition is open and obvious, "the owner of the property has no duty to warn a visitor of the danger." (*Westbrook v. WR Activities-Cabrera Markets*, supra at 71).

Whether a condition is open and obvious is generally a jury question, and "a court should only determine that a risk was open and obvious as a matter of law when the

facts compel such a conclusion." (*Westbrook*, supra at 72). In other words, the nature of the alleged hazard must compel the conclusion as a matter of law that the claimed hazard was so obvious that it would necessarily be noticed by any *careful* observer.

The crux of the Plaintiff's claim, by way of her testimony and her pleadings, is that the book cart's placement in the corridor caused her to navigate around it and trip over the furniture. As such, the Defendants established their entitlement to judgment as a matter of law by submitting video evidence, which was viewed by the Plaintiff, showing that the Plaintiff, in actuality, walked for eight seconds after she reached the cart before she tripped and fell[1]. Further, the Plaintiff testified that the lighting was adequate, and that there was no debris on the Library floor.

In addition, the testimony of Ms. Fleck indicated that the Library was new and first open to the public in 2005 and that the layout of the library, specifically the distance between the furniture and the stacks in the main Library aisle, were in compliance with the Americans with Disabilities Act.

The Defendants demonstrated their prima facie entitlement to summary judgment by showing that the book cart and placement of furniture were readily observable by the reasonable use of one's senses and, therefore, they had no duty to warn the Plaintiff of the allegedly dangerous condition (see *Hunt v. Kostarellis,* 27 A.D.3d 1178 [4th Dept. 2006]).

In opposition, the Plaintiff's argues that the Defendants' theory that the alleged

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[1]The Court was unsuccessful in its attempt to view the video evidence. However, the Defendants cited the relevant events by time sequence which was not disputed by the Plaintiff.

defective condition was open and obvious is inapplicable, as she is not claiming that the Defendants had a duty to warn, is unavailing. It is noted that the Plaintiff, in her Bill of Particulars, specifically claimed that the Defendants failed to warn of a dangerous and/or defective condition (see Notice of Motion, Exhibit E, ¶ 3).

The Plaintiff's own statement in her affidavit, severely undermines her attempt to raise an issue of fact as to whether a dangerous condition existed and whether such condition was observable by reasonable use of her senses:

> "...if the book cart and chair had not been where they were, I would not have been injured. While I was watching where I going, *I was also looking at the book stack labels which are obviously placed there for patrons to look at. Between the furniture, the narrow aisle and the stack labels, I was distracted and did not see the protruding chair leg...*" (see Lew Affidavit in Opposition ¶ 6).

The cases cited by the Plaintiff are distinguishable as the facts in those cases set forth open and obvious conditions that were not readily observable or were obscured. Here, the Plaintiff did not refute that she passed the book cart and took several steps before she tripped. She also stated that she was looking at and distracted by stack labels, clearly indicating that, in actuality, she was not watching where she was going. Further, the Plaintiff described the chair leg as protruding, which indicates that it was an observable condition.

The Plaintiff attempts to get around that particular issue by claiming that the

arrangement of the furniture also caused a dangerous condition. However, she does not submit any evidence to support her contention. As such, she failed to present sufficient prima facie evidence to establish the existence of a dangerous or defective condition (see *Bishop v. Marsh*, 59 A.D.3d 483 [2d Dept. 2009]).

It is noted that the Plaintiff does make much of Defendant witnesses' lack of first hand information of her assertions regarding the incident and the ADA regulations. However, the Plaintiff offers nothing in rebuttal to refute her testimony.

Accordingly, it is hereby

ORDERED, that the Defendants' motion, seeking an order pursuant to CPLR § 3212, dismissing the Plaintiff's complaint, is **GRANTED**.

This constitutes the decision and order of the Court.

DATED: Mineola, New York
August 6, 2013

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