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SHORT FORM ORDER

INDEX No. 09-40937
CAL No. 13-00361OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 7-24-13
ADJ. DATE 1-15-14
Mot. Seq. # 008 - MG; CASEDISP

SHARON WEINSTEIN,

Plaintiff,

- against -

KMART CORPORATION and ISLAND SNACKS,

Defendants.

KMART CORPORATION,

Third-Party Plaintiff,

- against -

ISLAND SNACKS, INC.,

Third-Party Defendant.

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Upon the following papers numbered 1 to 37 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (008) 1-19; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers 20-35; Replying Affidavits and supporting papers 36-37; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (008) by defendants Kmart Corporation and Island Snacks pursuant to CPLR 3212 for summary judgment dismissing the complaint as asserted against them is granted and the complaint in the main action and the complaint in the third-party action are dismissed.

In this negligence action, Sharon Weinstein alleges that on September 3, 2009, she was caused to fall having tripped on a display rack located near register 7, at the Kmart premises located at 839 New

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York Avenue, in the Town of Huntington, New York. Weinstein seeks damages for personal injuries which she alleges to have sustained as a result of that fall.

Sharon Weinstein testified to the extent that on September 3, 2009, she was at the Kmart in Huntington at about 7:00 p.m., with her husband. Upon finding a bathing suit which she wished to purchase, she and her husband went to checkout at the registers located toward the right front of the store. She went to one register, number seven, and was told it was not open, so she got on line at the next register, where she waited. Shortly thereafter, the male cashier, who had told her that his register was not open, then told her that his register was open and that she could come to his line. As she pivoted around, her foot got caught under the snack display stand in back of her. She did not remember if she saw the stand prior to the incident. She testified that the stand had two legs coming out, one behind it and one to the front of it, "like little." She assumed the rack was pushed up against the dividers between the registers.

In her affidavit submitted in opposition to defendants' motion, plaintiff Weinstein averred that she went to the aisle between checkout counters seven and nine intending to check out at counter nine. There were people standing in that aisle, and she only looked straight ahead as she took her place in line, and to her left to monitor the conveyor belt on the check-out counter. She did not take notice of a candy rack which was towards the checkout counter seven-side of the aisle. After waiting in line at counter nine, her attention was directed towards the person at checkout counter seven who told her that she could come to check-out at counter seven as it was now open. She averred that her gaze was directed towards the face of the person at counter seven, to her right. She pivoted on her right foot and swung her left foot around in an arc. She was not looking down at her feet, but was looking straight ahead. It is noted that she now avers that her deposition testimony as to what occurred is still true, but she is now taking into account a more specific statement as to what occurred in corrections made on her deposition errata sheet. She now avers that a part of the rack was sticking into the aisle. She avers that she was caused to fall because her attention was diverted to the person at checkout seven, and because the rack had a "certain depth for the greater part of its height, and a much bigger depth at its bottom, which misled her into thinking she could turn without tripping on a protruding tripping hazard base of the candy rack.

Victor Meza testified to the extent that in September 2009, he was employed by Sears Holdings and Sears Roebuck and Company and that it is his understanding that he is also an employee of the Kmart Corporation. In 1999, he was transferred to the Riverhead location as assistant manager until about 2004 or 2005. He was thereafter transferred to the Huntington location at 839 New York Avenue, Huntington, as an assistant manager. The building was leased from its owner, Vornado Corp. by Sears/Kmart, but Vornado Corp. exercised no control over the subject rack. Concerning the incident which occurred on September 3, 2009, involving the plaintiff, Meza reviewed the accident report dated September 3, 2009, which indicated that the customer tripped over the display wheel between cashiers seven and nine and fell. He learned of the incident when Marilyn Strickland, who observed the plaintiff fall, called him. Meza testified that Marilyn Strickland, and the loss control manager, Michael Busse, wrote a report concerning the incident. He did not know who made the decision concerning the placement of the racks in the store, but he had an understanding that it was Kmart. The Kmart store manager determines which registers the racks are place at based upon high traffic locations, but Island Snacks physically moves the racks to their position.

Meza stated that the rack involved in the subject incident was located by registers seven and nine, against the counter. He described the rack as being about three or four feet tall, and about three feet, possibly four feet wide, and maybe fourteen inches deep. He was aware of no complaints about the rack. The rack was constructed of metal with signs on the sides and top. There were four metal wheels which are attached to a section which extends about 1/8 inches out of both the front and rear of the rack, and the brackets are covered by caps. The bottom portion of the rack is about three to four inches from the ground. There is a white metal bar from the left front wheel to the right front wheel six inches above the ground. He did not know if the wheels locked. Any complaints about the rack would be received by the store manager. He knew of no prior complaints concerning customers tripping over the area of the white bracket on the rack. He testified that he did not feel the rack was a tripping hazard as there was a lot of room to go around the rack. He never saw the rack out of place and did not know of any customers or anyone else moving the rack.

Michael Nieves, the store manager for the subject Kmart, submitted his affidavit in which he avers that he was the co-manager for the store on September 3, 2009. His duties and responsibilities included overseeing the total operation of the store, including associates and management issues. He stated that the cashier's job responsibilities and duties are to perform routine inspections of the cashier register area to ensure that the merchandise and displays are in their proper places throughout the day on a regular basis when there are no customers at the registers. If merchandise or displays are out of place, they would have been organized and rearranged immediately. Nieves continued that at no time prior to the accident date did Kmart make any complaints, written or verbal, to Island Snacks regarding the configuration and/or placement of the subject display rack, and it did not receive any complaints regarding the same. At no time, prior to or subsequent to the accident, were there any incidents or events involving the subject display rack at the Kmart store. He never personally observed the display rack to be in a position that would constitute an unsafe condition or tripping hazard.

Nisi Barak testified on behalf of Island Snacks, Inc. that he was employed as vice president of Island Snacks since 2004. His wife, Alin Barak was president of the corporation which was started in 1996. On September 3, 2009, Island Snacks was providing products to Kmart in Huntington, pursuant to an agreement sent from the Kmart corporate office. He did not see or negotiate the agreement, but provided for the supply of Island Snacks to Kmart in general. Kmart is paid a quarterly rebate for whatever Island Snacks are sold in the store. Kmart charges Island Snacks a placement fee of $75 per store on a one-time basis, but it is reimbursed by his customers. His customers, Direct Store Delivery (DSD), are individual business owners who buy the merchandise from Island Snacks and supply the merchandise to the stores. Sweet Tooth Distribution, known as the Cake Man in 2009, and also as LT of Long Island before it was incorporated, was the DSD which supplied the snacks to the Huntington Store. Island Snacks had no agreement with Sweet Tooth or Cake Man, as Island Snacks just fills an order when it is placed. He stated that Island Snacks had no control over what Sweet Tooth would do with the snacks, and it did not direct them. Sweet Tooth was the subcontractor to whom they sold their product. Sweet Tooth then serviced the stores that Island Snacks had agreements with. Larry Doniger is one of the officers of Sweet Tooth.

Barak testified that either his wife, or one of the sales people from Island Snacks, would have negotiated the agreement between Island Snacks and Kmart, effective February 19, 2007, and still in effect at the time of the deposition. Island Snacks had no control over where Kmart or the distributor

placed the racks within the Huntington Store. Kmart had control over the height of the rack, which it requested to be 54 inches high, the same height as the aisles, and flush with the panel abutting the cash register, to permit a sight line. Island Snacks did not manufacture the display rack involved in the incident, but requested the specifications for the yellow rack so the bags would fit. The rack manufacturer, Rompone Wire, determined how wide the racks would be after Island Snacks provided the measurements relating to the size of the snack bags. Island Snack gave no other dimensions or measurements for the rack. Island Snacks paid for the racks. The snack bags were attached to the rack on pegs. Rompone Wire determined the location of the pegs. He thought both Rompone Wire and Island Snacks determined how deep the rack was to be.

Barak continued that Lancaster LLC manufactured the wheels with locks used on the rack. Rompone designed the placement of the wheels to achieve as much stability as possible, but manufactured the racks without wheels. Sweet Tooth attached the wheels with a screw to the racks after Island Snacks shipped the racks to them. Barak testified that there are two wheels on the front and two wheels on the back of the rack. The two front wheels protrude three inches from the front of the rack. There are two bars which hold the wheels and are part of the rack. The wheels move but the bars do not move as this aids stability. There is a locking mechanism on the wheels. He did not think the bar protruded more than one inch on both the left and right side of the front and in the back, for stability, but he opined that if the wheel base was placed directly under the rack and did not protrude, that the rack would be unstable and unsafe. He testified that he never received any complaints from Kmart regarding the racks, only the height if it was 61 inches. Sweet Tooth was the owner of the racks.

Larry Doniger testified to the extent that in September 2009, he was employed by LT of Long Island, Incorporated, just to help with distributing merchandise to stores. He then stated that he was the owner of LT of Long Island. There were other corporate members or officers of LT of Long Island (LT) in September 2009, but he could not recall who they were, and he could not recall the names of any employees. Since 2008, Island Snacks, located in California, shipped merchandise to LT's storage unit in Bethpage. It was his responsibility to deliver that merchandise, consisting of bagged nuts and candies, to stores for Island Snacks. He did not recall if there was an agreement, either written or verbal, between LT of Long Island and Island Snacks. He faxed his orders to Island Snacks who dictated which stores to deliver the products to, including Kmart in Huntington, New York, in 2009. He went to the Kmart in Huntington every couple weeks to a month to see what was needed, then placed the Island Snack products on the display rack. He stated that Island Snacks provided the display rack to the Kmart store.

Doniger stated that he put the rack together in the Kmart store. He could not remember if he had to place the wheels onto the rack. The rack could be used without wheels, but Kmart wanted wheels on the rack. He had no involvement in the design of the racks, but stated that they were specifically designed for Kmart so they could not be above the register top, as the racks were usually placed by the registers. He stated placement of the rack was directed by the Kmart store manager or department manager. He did not know of any complaints about the racks, and he never made any complaints about the racks. He did not remember a time that he went to the Huntington Kmart and found the rack out of place. He never experienced a problem with the wheels and did not know if the wheels locked. When shown a picture of the rack, his attention was directed to the horizontal bar across the bottom that extends past the body of the rack. He stated that he never found it to be a tripping hazard for people in

the stores, and he never heard of any complaints about it. There were leveling pins on the bottom of the rack.

Defendants produced the affidavit of Robert L. Grunes, P.E., a licensed engineer in New York State. He reviewed, among other things, the plaintiff's recall of the event, including that she pivoted around when she was told she could go to another register which was now open. She "sort of pivoted around, and my foot got caught under this stand, and that was it." He also reviewed her corrected testimony to reflect that "my foot got caught under the stand to the area of the wheel & outside the wheel. Not between the two wheels. The part of the back that stuck out." He noted that she had no recollection of having seen any stands or display in the cashier's station before the accident occurred, but then described the stand location "right behind wherever I was." When she pivoted around, it was right there. There were two legs, one in the front and one in the back. It was her left foot which got caught.

P.E. Grunes conducted his inspection of the display stand as well as an exemplar at the Huntington Kmart store on March 25, 2013. He documented his inspection observations schematically and photographically. He described the checkout counters and stations, and location of the exemplar display rack to the right side of the aisle of the checkout stand. He described the measurements and location of the display rack upon examination, including a three inch clearing between the underside of the bottom rail and the floor. The wheels were 2.8 inches in diameter with a width of 1.95 inches mounted to the underside of the rail. There were no wheel locks. He continued that the wheels freely rotated about their axis, with three possible wheel orientations: one, parallel to the rail the wheel extended 0.9 inches beyond the rail; two, at a turn of 180 degrees, the extremity of the wheel left an overhang of 0.4 inches; and three, if the wheel was perpendicular to the long axis of the rail, it would project beyond the wheel side over a range of .009 to 1.130 inches.

P.E. Grunes continued that, based upon the normal and established position of the rack, as per Mr. Meza, and the pivoting motion of the plaintiff on her right foot, and her testimony that her left foot became caught underneath a rail outboard of the wheel, and based upon the three wheel orientations he described, it does not allow her foot to catch underneath the rail beyond the wheel. The other two situations allow for an extension of the rail beyond the wheel by 0.4 inches or by 0.009 to 01.130 inches, and in the worst case scenario, the plaintiff's foot was caught on the rail extension beyond the wheel of magnitude 0.4 inches. This, he stated, is not unreasonable, nor is it an indication of poor design. He continued that it is further difficult for him to imagine this as the modus for her foot becoming caught under the railing.

P.E. Grunes continued that plaintiff's expert's opinion that the display rack created a tripping hazard due to the fact that the bottom of the rack extended further than it should have, including the wheels and the area of the rack that the wheels were attached to, is inconsistent with the plaintiff's testimony as she claims her foot caught under the rail, outboard of the wheels, not between or at the wheels. While the plaintiff indicated that she had no knowledge as to the pre-accident location of the rack or displayed contents, and was totally surprised by it on having pivoted, it cannot be fathomed how these purported issues are relevant without a dimensioned analysis by her expert. Such dimensioned analysis is not offered by the plaintiff's expert as only an inspection of the accident site was indicated and not of the subject display stand at the accident site location.

Plaintiff's expert, Stuart K. Sokoloff, P.E., a professional engineer licensed in New York State, avers he has over 35 years experience in design and construction of major building projects. He stated that he inspected the display rack on May 21, 2013, and was assured that it was in the same condition at the time of his inspection as it was on September 3, 3009. He measured the rack and set forth those measurements. He found that the bottom bars on the display rack cleared the floor by 2-3/8 inches, and were set on wheels that rolled and pivoted. When the wheels were facing forward, they extended beyond the end of the bottom bars by approximately 1-1/8 inch, and when facing inward, the bar extended beyond the edge of the wheel by approximately one inch.

P.E. Sokoloff disagrees with the measurements obtained by defendants' expert. It is his opinion that the rack was inherently dangerous; the bottom bars were hidden and unforeseen since the bottom support bars extended beyond the vertical of the display by over three inches, and there was a space of 2-3/8 inches from the floor to the bottom of the horizontal support bar which created a trip hazard, trap-like condition. Had the rack not been on wheels, it would not have permitted the plaintiff to catch her foot below the bottom bar and she would not have been injured. He continued that the rack was particularly dangerous as it was placed in a relative narrow aisle in which occupants could reasonably be expected not to be looking down at their feet but towards the check-out counters, clerks, and merchandise at eye level or slightly below. P.E. Sokoloff does not indicate, however, that he went to the subject Kmart store and conducted measurements of the aisle and assessed the space that the plaintiff had to manipulate in, and in relation to the placement of the rack.

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact (***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]. The court's analysis must be viewed in a light most favorable to the non-moving party, herein the plaintiff (***Makaj v Metropolitan Transportation Authority***, 18 AD3d 625. 796 NYS2d 621 [2d Dept 2005]).

It is determined that the plaintiff presents credibility issues in that she testified that she did not remember if she saw the stand prior to the incident. Plaintiff then averred that she did not take notice of a candy rack which was towards the check-out at counter seven. As she continued, she averred that a part of the rack was sticking into the aisle, and that the depth and height of the rack, with a bigger depth at its bottom, mislead her into thinking that she could turn without tripping on a protruding tripping hazard base on the candy rack. Such testimony by the plaintiff is inconsistent.

The imposition of liability in a slip and fall case requires evidence that the defendant created the dangerous condition which caused the accident, or had actual or constructive notice of that condition. To constitute constructive notice, a defective condition must be visible and apparent, and must exist for a sufficient period of time before the accident for a defendant to discover and correct it (***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Borkenkoff v Old Navy***, 37 AD3d 749. 831 NYS2d 220 [2d Dept 2007]). To be entitled to summary judgment in a trip and fall case, defendant must establish, prima facie, that it maintained the premises in a reasonable safe condition and did not have notice of, or create, a dangerous condition that posed a foreseeable risk of injury to persons expected to be on the premises (***Villano v Strathmore Terrace Homeowners Assn., Inc***, 76 AD3d 1061, 908 NYS2d 124 [2d Dept 2010]). A property owner has no duty to protect or warn against

a condition that is not inherently dangerous and/or is readily observable by the use of one's senses (***Neiderbach v 7-Eleven, Inc.***, 56 AD3d 632, 868 NYS2d 91 [2d Dept 2008]).

It is determined that whether the plaintiff saw the rack or the base of the display before catching her foot on it, does not bespeak of any negligence on the defendants' part (***Schulman v Old Navy/The Gap, Inc.***, 45 AD3d 475, 845 NYS2d 341 [1st Dept 2007]). While the issue of whether a condition is a hazard or open and obvious is usually a question of fact, a court may determine the condition to be open and obvious when the established facts compel that conclusion (***Schulman v Old Navy/The Gap, Inc.***, 45 AD3d 475, 845 NYS2d 341 [1st Dept 2007]). The law draws a line between remote possibilities and those that are reasonably foreseeable because no person can be expected to guard against harm from events which are so unlikely to occur that the risk would commonly be disregarded (***Prado v City of New York***, 19 AD3d 674, 798 NYS2d 94 [2d Dept 2005]).

An inherently dangerous article is one fraught with danger lying in the character and content of the article, albeit the disastrous consequences are caused immediately by an external force (***Martinez v Kaufman-Kane Realty Co, Inc***, 74 Misc2d 341, 343 NYS2D 383 [Sup Ct, Bronx County 1973].

It is determined that the condition of the rack, including the base and wheels, complained of by the plaintiff, was both open and obvious, and, as a matter of law, was not inherently dangerous (*see* ***Gagliardi v Walmart Stores, Inc.***, 52 AD3d 777, 860 NYS2d 207 [2d Dept 2007]; ***Kaufman v Lerner New York, Inc.***, 41 AD3d 660, 838 NYS2d 181 [2d Dept 2007]). The condition complained of was open and obvious and the plaintiff claims she was mislead by the rest of the display. With the use of her senses, she was able to see what was open and obvious there for her to see, namely, the entire rack. That she became "mislead" by the rack and was looking elsewhere at the time she turned to walk did not render the condition hidden or obscured or render it inherently dangerous. The defendants have all testified that there were no prior complaints regarding the placement or condition of the rack, nor has anyone been injured by any portion of the subject rack. Plaintiff's expert has not established how the rack was inherently dangerous except to state it to be so in a conclusory opinion. He additionally did not do an analysis based upon not only the measurements and position of the rack, but also upon the racks orientation within the Kmart store in relation to the size and location of the aisle.

There is no evidence that the rack was moved or placed in the middle of the aisle obstructing the plaintiff's, or anyone else's passage, and the plaintiff does not establish that the position of rack was the cause of her tripping on it (*see* ***Atteritano v SF&G Associates***, 2012 NY Slip Op 30667(U) [Sup Ct, Nassau County 2012]). It has been established by photographic and testimonial evidence that the alleged defective condition was open and obvious, and not inherently dangerous (***Villanti v BJ's Wholesale Club, Inc.*** 106 AD3d 556, 965 NYS2d 472 [1st Dept 2013]). As set forth in ***Matteo v Kohl's Department Stores, Inc.***, 2012 U.S. Dist. Lexis 32193, U.S. District Court for the Southern District of New York, March 5, 2012, any hazard posed by the display rack and caster wheel affixed to the bottom of it was open and obvious and not inherently dangerous. In the case at bar, it is further determined that any hazard posed by the display rack and caster wheels affixed to the bottom of it was open and obvious and not inherently dangerous, and presented no unreasonable risk of harm (*see* ***Gallub v Popei's Clam Bar Ltd. of Deer Park***, 98 AD3d 559, 949 NYS2d 467 [2d Dept 2012]), and, therefore, the defendants had no duty to warn of its placement, condition, or of any danger it could possibly cause.

Plaintiff has raised no triable factual issues to preclude summary judgment from being granted. It has not been demonstrated that the shape of the display rack, or its position in the store, could have caused such an event, or that defendants could have foreseen such an event occurring due to the rack. The plaintiff has raised no factual issues concerning the rack being inherently dangerous or that defendants had a duty to warn a shopper such as the plaintiff of any hazard posed by the display rack or its location in defendant's premises.

Accordingly, summary judgment is granted and the complaints in the main action and in the third-party action are dismissed.

Dated: 4/21/14

J.S.C.

__X__ FINAL DISPOSITION__ NON-FINAL DISPOSITION