SHORT FORM ORDER

INDEX No. 620971/2018
CAL. No. 201902438OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 55 - SUFFOLK COUNTY

PRESENT:

Hon. GEORGE M. NOLAN
Justice of the Supreme Court

MOTION DATE 4-22-20
ADJ. DATE 7-19-20
Mot. Seq. # 001 - MG; CASEDISP

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JODI LECKIE,

Plaintiff,

- against -

KOHL'S DEPARTMENT STORES, INC.,

Defendant.

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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, filed March 11, 2020; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers by plaintiff, filed June 26, 2020; Replying Affidavits and supporting papers by defendant, filed July 16, 2020; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Kohl's Department Stores, Inc. for summary judgment dismissing the complaint is granted.

Plaintiff Jodi Leckie commenced this action to recover for personal injuries she allegedly sustained as a result of a trip-and-fall accident that occurred on March 18, 2017, at the commercial premises known as Kohl's, located at 5000 Nesconset Highway in East Setauket, New York. Defendant Kohl's Department Stores, Inc. allegedly owned and operated the subject premises at the time of the accident. The accident allegedly occurred when plaintiff tripped and fell on a mannequin stand or display. By the complaint, as amplified by the bill of particulars, plaintiff alleges that defendant was negligent in, among other things, permitting the subject mannequin stand or display to protrude into an aisle, and in creating a hazardous condition.

Defendant now moves for summary judgment on the ground that the alleged condition 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 Caroline DuRussel, and the affidavit of Caroline

DuRussel. In opposition, plaintiff argues, among other things, that triable issues of fact remain as to whether defendant created a dangerous condition by improperly placing the subject mannequin stand. In support of its opposition, plaintiff submits, among other things, her affidavit. The Court notes that defendant cured any defect in the admissibility of the deposition transcript of DuRussel by submitting, in reply, the reporter's certification and the fact that the transcript was forwarded to the witness for review and signature (*see* CPLR 2001; ***Gallway v Muintir, LLC,*** 142 AD3d 948, 38 NYS3d 28 [2d Dept 20016]).

At plaintiff's deposition, she testified that the subject accident occurred at approximately 2:00 p.m., in the casual wear section. When asked how the accident occurred, plaintiff testified that her right foot tripped over a display platform, causing her to fall onto the tile floor. Plaintiff further testified that the accident occurred when she was in the process of walking from the carpeted area to the tiled area. She described that the subject platform was partially located on the carpeted area and protruded two or three inches onto the tiled flooring. The subject platform allegedly was located within close proximity of a shelving unit for clothes. Plaintiff admitted that nothing obstructed her view of the mannequin stand as she was walking from the carpeted area towards the tiled area at the time of the accident.

DuRussel testified that she was working as a customer service area supervisor in March of 2017, and that she acted as the manager on duty on the date of the accident. She also testified that on the date of the accident, after the accident occurred, she inspected the subject mannequin base. She explained that she "couldn't comprehend where [plaintiff] would have tripped" based upon her inspection. According to her testimony, in the event that a mannequin base protruded onto the tiled area from the carpeted area, defendant's policy was to reposition it so that it was "even with the carpet."

DuRussel avers that on the date of the accident, she was working as a customer service area supervisor at the subject premises. She further avers that her responsibilities as a customer service area supervisor included supervising customer service employees and acting as the manager on duty on an as needed basis. According to DuRussel's affidavit, she visited the accident site "shortly" after the accident occurred, and that she observed no defect to the mannequin base. DuRussell contends that the mannequin base was located on the carpeted area in the misses section, and that nothing was covering or obscuring it.

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]; ***Bishop v Pennsylvania Ave. Mgt., LLC***, 183 AD3d 685, 123 NYS3d 685 [2d Dept 2020]; ***Kelly v Roy C. Ketcham High Sch.***, 179 AD3d 653, 113 NYS3d 572 [2d Dept 2020]). There is no duty to protect or to warn against an open or obvious condition on the property that is not inherently dangerous as a matter of law (*see* ***Spina v Brookwood Ronkonkoma, LLC***, 185 AD3d 621, 124 NYS3d 81 [2d Dept 2019]; ***Holmes v Macy's Retail Holdings, Inc.***, 184 AD3d 811, 124 NYS3d 582 [2d Dept 2020]; ***Swinney v County***, 179 AD3d 731, 113 NYS3d 595 [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* ***Robbins v 237 Ave. X, LLC***, *supra*; ***Davidoff v First Dev. Corp.***, *supra*; ***Simon v Comsewogue Sch. Dist.***,

143 AD3d 695, 39 NYS3d 180 [2d Dept 2016]). Similarly, whether a condition is not inherently dangerous, or constitutes a reasonably safe environment, depends on the specific facts of the case (*see* ***Holmes v Macy's Retail Holdings, Inc.***, *supra*; ***Russo v Home Goods, Inc.***, 119 AD3d 924, 990 NYS2d 95 [2d Dept 2014]). Proof that a dangerous condition is open and obvious does not preclude a finding of negligence, but is relevant to the issue of the plaintiff's comparative negligence (*see* ***Karpel v National Grid Generation, LLC***, 174 AD3d 695, 106 NYS3d 99 [2d Dept 2019]; ***Kastin v Ohr Moshe Torah Inst., Inc.***, 170 AD3d 697, 95 NYS3d 292 [2d Dept 2019]; ***Crosby v Southport, LLC***, 169 AD3d 637, 94 NYS3d 109 [2d Dept 2019]). Accordingly, a defendant must establish, prima facie, that the alleged condition was open and obvious and not inherently dangerous to obtain summary judgment (*see* ***Karpel v National Grid Generation, LLC***, *supra*; ***Erario v Wen Shirley, LLC***, 169 AD3d 770, 91 NYS3d 899 [2d Dept 2019]; ***Crosby v Southport, LLC***, *supra*).

Defendant established its prima facie entitlement to summary judgment by demonstrating, prima facie, that the subject mannequin stand or platform was open and obvious, and that it was not inherently dangerous (*see* ***Nannariello v Kohl's Dept. Stores, Inc.***, 161 AD3d 1089, 76 NYS3d 235 [2d Dept 2018]; ***Dapolito v Stop & Shop Supermarket***, 90 AD3d 693, 934 NYS2d 337 [2d Dept 2011]; ***Tenenbaum v Best, 21 Ltd.***,15 AD3d 646, 790 NYS2d 236 [2d Dept 2005], *lv denied* 5 NY3d 702, 799 NYS2d 773 [2005]). In support of its motion, defendant submitted, among other things, plaintiff's deposition testimony, which indicated that nothing obstructed her view of the subject mannequin stand or platform at the time of the accident (*see* ***Gallub v Popei's Clam Bar, Ltd., of Deer Park***, 98 AD3d 559, 949 NYS2d 467 [2d Dept 2012]; ***Zimkind v Costco Wholesale Corp.***, 12 AD3d 593, 785 NYS2d 108 [2d Dept 2004]; *cf* ***Stadler v Lord & Taylor LLC***, 165 AD3d 500, 86 NYS3d 30 [1st Dept 2018]). Thus, the burden shift to plaintiff to raise a triable issue of fact (*see generally* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]).

In opposition, plaintiff failed to raise a triable issue of fact (*see* ***Nannariello v Kohl's Dept. Stores, Inc.***, *supra*; ***Dapolito v Stop & Shop Supermarket***, *supra*; ***Tenenbaum v Best, 21 Ltd.***, *supra*). The claimed violation of defendant's internal rules or guidelines is insufficient to raise a triable issue of fact (*see* ***Byrd v Walmart, Inc.***, 128 AD3d 629, 8 NYS3d 428 [2d Dept 2015]; ***Branham v Loews Orpheum Cinemas, Inc.***, 31 AD3d 319, 819 NYS2d 250 [1st Dept 2006], *affd* 8 NY3d 931, 834 NYS2d 503 [2007]). A violation of a company's internal rules, standing alone, is insufficient to establish negligence, and where such rules require a standard beyond the standard of reasonable care, a breach cannot be considered evidence of negligence (*see* ***Gilson v Metropolitan Opera***, 5 NY3d 574, 807 NYS2d 588 [2005]; ***Byrd v Walmart, Inc.***, *supra*). Moreover, plaintiff's statement in her affidavit that her view of the subject mannequin stand was partially obstructed at the time of the accident presented a feigned issue of fact designed to avoid the consequences of her earlier deposition testimony that nothing obstructed her view of it at the time of the accident (*see* ***Bluth v Bias Yaakov Academy for Girls***, 123 AD3d 866, 999 NYS2d 840 [2d Dept 2014]; ***Russ v Fried***, 73 AD3d 1153, 901 NYS2d 703 [2d Dept 2010]; ***Sherman-Schiffman v Costco Wholesale, Inc.***, 63 AD3d 1031, 884 NYS2d 760 [2d Dept 2009]). Further, plaintiff's allegation that the subject mannequin stand protruded approximately two to three inches onto the tiled area from the carpeted area did not raise a triable issue of fact as to whether it was inherently dangerous (*see* ***Matteo v Kohl's Dept. Stores, Inc.***, 533 Fed Appx 1 [2d Cir 2013]; *cf.* ***Jackson v Paramount Decorators Inc.***, 132 AD3d 583, 18 NYS3d 384 [1st Dept 2015]).

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

Dated: August 31, 2020

HON. GEORGE NOLAN, J.S.C.

__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION