At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 24th day of May, 2021.

P R E S E N T:

HON. DEBRA SILBER,
Justice.

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BEVERLY HAREWOOD,

Plaintiff,

DECISION/ORDER

- against-

Index No. 515281/2018

AMAZING SAVINGS OF AVENUE M, LLC
and SIMPLY AMAZING d/b/a AMAZING SAVINGS,

MS #6

Defendants.

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The following e-filed papers read herein:	NYSCEF Doc.
Notice of Motion and Affidavits (Affirmations) Annexed	85-99
Opposing Affidavits (Affirmations)	109-117
Reply Affidavits (Affirmations)	119

Upon the foregoing papers in this personal injury action, defendants move in motion sequence (mot. seq.) six for an order, pursuant to CPLR 3212, granting them summary judgment dismissing the complaint.

Background

On May 13, 2018, at 3:15 p.m., plaintiff was shopping at defendants' store located at 1605 Avenue M, Brooklyn, New York when she alleges that she tripped and fell over a box

of goods that employees had left in the aisle of the store as they were in the processing of stocking the shelves. Plaintiff claims the reason for her fall was the defendant's negligent placement of the boxes on the floor in the aisle where customers would walk, which constituted a hazardous premises condition, and that it was crowded in the store and she did not see the box before she fell over it.

Defendants support the motion with the pleadings, EBT transcripts for plaintiff and defendants' assistant manager Mohammad Howladar, a surveillance video, and an affirmation of counsel. The court notes that the surveillance video does include the accident, but that it is so far from the camera and occurs behind a ladder such that it is not probative other than to confirm that plaintiff fell inside of defendants' store on the date and time stamped thereon and that there were many people coming and going through the aisles at the time of plaintiff's accident. In any event, it was not properly e-filed. Counsel e-filed a piece of paper in Doc 97 at the end of Mr. Howladar's affidavit authenticating it, with a link to the video file which, when clicked, states that "the link you are trying to access does not exist." Further, Form EFM-4 was not included. Thus, the court is constrained to determine that the video was not submitted in admissible form (*see Amezquita v RCPI Landmark Props., LLC*, 2021 NY Slip Op 02979 [1st Dept 2021]). Defendants also provide a copy of the accident report completed at the store at the time of the accident (Doc 92). Mr. Howladar wrote: "I look CCTV and I saw she was looking at something from top shelve [sic] she did not notice box on the floor because her face was up then she step forward and she fell down on the floor" [He clarifies what he wrote in the report in his EBT, Doc 95, at Page 37].

At her deposition held on November 5, 2019, plaintiff testified that on the date of her accident, she lived in Brooklyn with one of her adult children, her son, and his wife. She has four children and twelve grandchildren. She wears glasses. She is retired from a job as an endoscopy technician at a hospital, where she worked until 2005. She has been collecting Social Security since about the time of this accident. The day of the accident was not the first time she had shopped at Amazing Savings, defendants' discount store. The store is located near her dentist's office and she recalled that she had been there once before. On the day of the accident, she left home with her daughter-in-law Vanessa and her niece Trisha, who are 37 and 48 years old. They drove to the store in her niece's car. She intended to purchase aluminum foil.

Plaintiff testified that she asked an employee where the foil was, she and her niece walked over to the aisle, and [EBT at 42] "I pushed the cart to one side and I walked to the foil, picked up the foil and then flipped right over the box that was there." She was asked [EBT at 49] "did you see the box before you fell?" and she responded "no." She elaborates [EBT at 49, Line 14] "when I turned around to put it [the box of foil] in the cart, I just flip over the box." She was asked [EBT at 52] if the box was on the floor when she "placed the shopping cart" and she said "no." She testified that her niece and a store employee were near the cart when she fell, and that the store was crowded. She said she fell to the ground onto her knees and her face hit the shopping cart [EBT at 62]. Plaintiff repeated that the box was only there for a short time as it was not there when she parked the cart and walked over to the shelf where the foil was.

Mohammad Howladar appeared for an examination before trial on two different dates (Docs 93 and 95). He testified with the assistance of a Bengali interpreter. He was born in 1969 and holds a Batchelor's degree from a college in Bangladesh. He has been employed by defendants Amazing Savings for 24 years. He works full time and is the assistant manager of the store. He worked his way up from being a stock boy and has been an assistant manager for 15 years. He learned how to do the job from his prior boss, whose name he could not remember. He said the store is on the ground floor, and there is storage space in the basement and on the second floor. There were 25-30 employees working in the store on the date of plaintiff's accident. Almost all of them are "stock boys or stock girls." About half of the employees work on each shift. One shift is 10 a.m. to 6 p.m. and the other is 2 p.m. to 10 p.m., as the store is open from 10 am to 10 pm. During the four overlapping hours, 2-6, which is when plaintiff's accident took place, there are approximately 25 employees working at the store [Doc 93, EBT at 38].

Mr. Howladar testified that he has been verbally trained "when we are working on the aisle or we are stacking up goods, to ensure that customers are not walking down the aisle, they may have an accident." When asked if he meant "you would ensure that customers are not walking in that aisle?" he said "not that the customers would not be walking down the aisle, they would be coming down the aisle, but to leave the boxes on the floor while taking all the stuff, so it doesn't create any kind of problems for the customers." He was asked what type of devices the store had to provide a warning to customers, such as "orange cones, tape, scissor fences" and he said they did not have any of those type of things [EBT at 18].

The manager is Yaakov Baruchov, and he was the manager on the date of the plaintiff's accident as well.

Mr. Howladar was asked further about safety procedures, and he said [EBT at 21] "when the store is very busy with high volume of traffic, we move away those boxes to ensure that the customers can walk very easily and without any obstacles." He testified that "we are always alert that [goods on the top shelf] don't fall down." He then said there were no other safety procedures [EBT at 22]. He was then asked about deliveries. He said they received deliveries five days each week, Monday to Friday. He said they received 200 boxes on a typical day [EBT at 32]. When he unloads the truck, he does so with a forklift at the unloading area behind the store. There, they separate the goods by the aisle they need to be brought to, then put the boxes onto a U-Boat or a hand truck "and we place them on those aisles."

Mr. Howladar said there were no policies about unpacking boxes at any particular time, or with regard to blocking off the aisles when the goods are unpacked and placed onto the shelves [EBT at 40]. He said, "we don't take such steps, but we do work very cautiously, very carefully." Counsel noted that the plaintiff's accident was on a Sunday (Mother's Day) but the unloading questions continued. Also "During the time that those boxes are unpacked, and the items are placed on the shelves, are customers traversing in the aisles and shopping at the same time?" Answer "Yes." The witness then said that they had a policy that two employees would be present when unpacking was going on, and one would direct and control the customers to avoid the boxes. He was then [EBT at 51] asked "If there's a situation where they're working on the shelves, unpacking those very boxes, but they don't

tell the customers how to walk or direct the customer traffic, would that be a deviation of Amazing Savings' policy?" Mr. Howladar said "yes." He clarified [EBT at 66] "the guy on the ladder, when he's stacking the shelves, and there's one person downstairs, down at the ladder, he instructs the customers to either move away or move aside."

Mr. Howladar's EBT was continued and part two was taken about a month later, in January of 2020. He was asked if on the date of plaintiff's accident, which took place in Aisle 8 of the store, if there were two employees stocking the shelves. He responded that he did not know, and "we do not have a rule that there would be somebody there to control [the customers]. He was shown photos, which were presumably stills from the surveillance video. He said there were five boxes in the photo (Doc 95, EBT at 12). He was shown the accident report and identified his signature on it. He said he did not fill it out, and that plaintiff's companion did [EBT at 23]. He testified that the part of the report describing what he observed on the surveillance video was written in his handwriting [EBT at 36]. He was asked [EBT at 39] "My question to you is, you stated in your report that when she stepped forward, she fell down on the floor, were you able to see her on that video stepping forward and falling down?" He responded "Yes." After the witness answered the question, at the EBT, plaintiff's counsel "called for [the] production" of the video from which Mr. Howladar's account of the accident was based. If such video exists, it does not appear to have been exchanged and it was not submitted with these motion papers. Finally, Mr. Howladar was asked to clarify his answers from the first EBT. He was asked [EBT at 56] "Does Amazing Savings have any procedures or practices to prevent customers from walking down aisles where employees are unpacking boxes? A. No. Q. Does Amazing

Savings direct and control the flow of customer traffic down an aisle during the time in which employees are unpacking boxes in that aisle? A. No."

Defendants' attorney states that "it is well-settled that a box in the aisle of a store is an open and obvious condition that is not inherently dangerous. There is no evidence that the defendant created the condition because the box was only present for two minutes before the accident and there is no evidence that it was placed by Amazing Savings. Amazing Savings also did not have actual or constructive notice of the placement of the box. Lastly, the undisputed evidence indicates that plaintiff's failure to exercise due care was the sole proximate cause of her accident. Based on the above, the Court should dismiss this negligence action as a matter of law."

Plaintiff's counsel urges the court to find that defendants have failed to make a prima facie case for summary judgment. He then also discusses a number of court decisions which involved similar accidents.

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, thus, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment, as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Manicone v City of New York*, 75 AD3d 535, 537 [2010], quoting *Alvarez*, 68 NY2d at 324; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64

NY2d 851, 853 [1985]). If it is determined that the movant has made a prima facie showing of entitlement to summary judgment, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]).

Defendants' first argument, that "it is well-settled that a box in the aisle of a store is an open and obvious condition that is not inherently dangerous," is not a correct statement of the law. The Second Department has held that an owner or tenant has no duty to protect or warn against a condition that is *both* open and obvious *and* not inherently dangerous (*see Cupo v Karfunkel*, 1 AD3d 48, 52 [2d Dept 2003]; *see also Karpel v National Grid Generation, LLC*, 174 AD3d 695, 696-697 [2d Dept 2019]; *Crosby v Southport, LLC*, 169 AD3d 637, 640 [2d Dept 2019]). To clarify, "the open and obvious nature of an obstacle or defect simply negates the property owner's duty to warn of it; it does not eliminate the property owner's duty to ensure that that its property is reasonably safe" (*see Lawson v Riverbay Corp*, 64 AD3d 445, 446 [1st Dept 2009]).

Here, defendants have not established both prongs. The fact that there were boxes and ladders all over the place may have been open and obvious, but the store still had to ensure that the customers did not trip over them. "The court cannot conclude as a matter of law that a box a customer happened on as she rounded a corner into an aisle was 'open and obvious' " (*see Westbrook v WR Activities*, 5 AD3d 69 [1st Dept 2004]). In another case, *Robinson v 206-16 Hollis Ave. Food Corp*. (82 AD3d 735 [2d Dept 2011]), the plaintiff fell over a display. The court noted that the plaintiff said she did not see the display until she had

already tripped over it. The court concluded that "viewing the evidence submitted in support of the defendant's motion for summary judgment in the light most favorable to the plaintiff (*see Hantz v Fishman*, 155 AD2d 415, 416 [2d Dept 1989]), the defendant failed to make a prima facie showing of its entitlement to judgment as a matter of law by establishing that it maintained the premises in a reasonably safe condition" (*id.* at 736). Whether a condition is inherently dangerous, or constitutes a reasonably safe environment, depends on the totality of the specific facts of each case (*see Clayton v Marcy Supermarket & Deli Corp.*, 191 AD3d 842 [2d Dept 2021]; *Russo v Home Goods, Inc.*, 119 AD3d 924 [2d Dept. 2014]). Here, the plaintiff herein testified that the box she tripped over was not there when she parked her shopping cart and walked over to the shelf where the aluminum foil was. Thus, defendants' claim that the accident was solely her fault is not supported by the evidence submitted.

Defendant's second argument is that "there is no evidence that the defendant created the condition because the box was only present for two minutes before the accident and there is no evidence that it was placed by Amazing Savings. Amazing Savings also did not have actual or constructive notice of the placement of the box." This argument is completely without merit. There is no dispute that the boxes at issue contained items which were going to be stocked on the shelves of Aisle 8 by defendants' employees. A store owner cannot permit his employees to conduct themselves without any training or any rules or procedures and then claim it had no notice that they were acting without any regard for the safety of their customers. The length of time that the box was there is not relevant, as this is not a spilled drink type of case. While a transient condition, when the condition is caused or

created by the defendant, the length of time it existed has no relevance. Defendants' protestations that there is no proof that an employee placed the box on the floor are, viewing the evidence in the light most favorable to plaintiff, meritless. There is also no evidence that the customers were taking boxes off the U-boat and throwing them on the floor.

In conclusion, defendants fail to make a prima facie case for summary judgment. Whether the boxes in the store aisle created an inherently dangerous condition is a question of fact for the jury (*see Carpenter v 130 W. Merrick, Inc.*, 71 AD3d 715 [2d Dept 2010]; *Naletilic v Dan's Key Food*, 47 AD3d 903 [2d Dept 2008]; *Rivera v YMCA of Greater N.Y.*, 37 AD3d 579, 580 [2d Dept 2007]; *Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69 [2d Dept 2004]; *Greenstein v R & R of G.C., Inc.*, 50 AD3d 637 [2d Dept 2008]).

Accordingly, it is **ORDERED** that defendants' motion for summary judgment dismissing the complaint in mot. seq. no. 6 is denied.

This constitutes the decision and order of the court.

E N T E R,

Hon. Debra Silber, J. S. C.