At IAS Part 22 of the Supreme Court of the State of New York, held in and for Bronx County, on the 9th day of December, 2021.

PRESENT: HON. THERESA M. CICCOTTO
Justice of the Supreme Court

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SONIA LANZO,

Plaintiff,

-against-

DOLGENCORP OF NEW YORK, INC. and
528 JACKSON REALTY, LLC,

Defendants.

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Index No. 25639/2020E

Motion Seq. #3

DECISION /ORDER

RECITATION, AS REQUIRED BY CPLR§ 2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED	....1-2.....
ANSWERING AFFIDAVITS	....4-5.....
REPLY AFFIDAVITS	...6.....
OTHER.....Memo of Law	...3.....

UPON THE FOREGOING CITED PAPERS, THE COURT FINDS AS FOLLOWS:

Defendants move for an Order, pursuant to CPLR § 3212, granting summary judgment to them, and dismissing Plaintiff's Complaint with prejudice. Plaintiff opposes.

Background:

The instant action arises out of an alleged premises liability accident occurring at a Dollar General store located at 528 Jackson Avenue, Bronx, New York. Plaintiff claims that she sustained injuries when a metal shelf located behind her, which was overstocked with blankets, fell and struck

her on her head.

Subsequently, Plaintiff commenced this action via the filing of a Summons and Complaint on June 11, 2020. Defendants interposed an Answer on June 26, 2020. Plaintiff served a Verified Bill of Particulars on January 27, 2021, claiming various statutory violations, bodily injury, special damages and periods of confinement related to this accident. Plaintiff then provided a response to Defendants' Demand for a Verified Bill of Particulars, served with the Answer. Plaintiff filed a Note of Issue and a Certificate of Readiness for Trial on July 16, 2021.

Positions of the parties:

Defendant Dolgencorp argues that it is entitled to summary judgment because it did not create or have actual or constructive notice of the alleged dangerous condition. It argues that actual notice requires personal knowledge of the defect prior to the accident. Defendant Dolgencorp refers to and relies on the deposition testimony of said store's manager, Datwane Edwards, to prove that it did not have personal knowledge of the alleged defective shelf. Mr. Edwards testified that he did not have any notice of any kind of defect with the subject shelf. Mr. Edwards also testified that there had never previously been an issue with any of the store shelves during his employment. Moreover, he testified that neither he nor any other employee had received any prior complaints regarding the shelving.

Defendant Dolgencorp also argues that to prove constructive notice, the defect or dangerous condition must be visible and apparent and must exist for a sufficient length of time prior to the accident to have permitted a defendant to discover and remedy same. Here, it argues that Plaintiff's failure to proffer evidentiary proof of how long the alleged defective condition existed prior to the accident, undermines any theory of constructive notice.

Defendant 528 Jackson Realty, LLC, argues that it is also entitled to summary judgement

because the express terms of the lease agreement between it and Dolgencorp provide that Dolgencorp is exclusively responsible for maintaining the interior of Dollar General, where the subject accident allegedly occurred. Defendant 528 Jackson Realty, LLC also argues courts have "steadfastly held that out-of-possession landlords are not liable where the controlling lease agreement expressly states the landlord is not responsible for maintaining the area in question" (Memo of law, p. 6).

Specifically, paragraph 11(b) of the Lease provides:

> "Tenant shall maintain a commercial general liability insurance policy with a limit of $5,000.000, (at tenant's option $2,000,000 in primary coverage and $3,000,000 in excess lines) for bodily injury, death and property damage insuring Tenant with respect to occurrences on the demised premises. Landlord shall be named as an individual insured under the policy but only for claims against Landlord...."

Defendant 528 Jackson Realty, LLC argues that said lease agreement indemnifies the landlord from any liability to Plaintiff, thus providing it with an absolute defense to the action. As such, it is only Dolgencorp who owes a duty to Plaintiff. Defendant 538 Jackson Realty, LLC also argues that Plaintiff bears the burden of proving that either Defendant created or had actual or constructive notice of the alleged dangerous condition. Both Defendants point out that there can be no actual notice if there are no prior complaints concerning the alleged dangerous condition. Additionally, they argue that there can be no constructive notice if the alleged condition did not exist for a sufficient period of time, and in the exercise of reasonable care, could have been discovered and remedied.

Conclusions of Law:

"The proponent of a motion for summary judgment must demonstrate that there are no

material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 306 [1st Dept. 2007], citing, *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]; see *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324-325 [1986]). Once the proponent has proffered evidence establishing a prima facie showing, the burden then shifts to the opposing party to present evidence in admissible form raising a triable issue of material fact (see *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]; *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 1067 [1979]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat a summary judgment motion (*Zuckerman,* 49 N.Y.2d at 562). It is the duty of the court not to test the sufficiency of the pleadings, but rather to go behind them to the very substance of the action and distinguish matters of law from matters of fact, material issues of fact from immaterial ones (see *Wanger v. Zeh*, 45 Misc.2d 93, 94 [Sup. Ct. Albany Co. 1965]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (see *Gaines v. City of New York*, 8 Misc.3d 968, 971, 2005 N.Y. Slip Op. 25246 [Sup. Ct. Bronx Cty. 2005]; *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223, 231 [1978]).

"To establish a prima facie case of negligence, the plaintiffs must demonstrate (1) that defendants owed them a duty of reasonable care, (2) a breach of that duty, and (3) a resulting injury proximately caused by the breach" (*Huth v. Allied Maintenance Corp.*, 143 A.D.2d 634, 635 [2d Dept. 1988], citing, *Boltax v. Joy Day Camp*, 67 N.Y.2d 617, 619-620 [1986]; see *Solomon v. City of New York*, 66 N.Y.2d 1026, 1027-1028 [1985]). Courts have occasionally granted summary judgment to the moving party in an action where the evidence establishes that an alleged dangerous condition is in fact "open and obvious, readily observable by anyone employing the reasonable use

of their senses, and not inherently dangerous" (*Wachspress v. Central Parking Sys. of N.Y., Inc.*, 111 A.D.3d 499, 499 [1st Dept. 2013]). However, "the question of 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 v. WR Activities-Cabrera Mkts.*, 5 A.D.3d 69, 72 [1st Dept. 2004], citing, *Tagle v. Jakob*, 97 N.Y.2d 165, 169 [2001]). Furthermore, "[w]hether an asserted hazard is open and obvious cannot be divorced from the surrounding circumstances." (*Mauriello v. Port Auth. of N.Y. & N.J.*, 8 A.D.3d 200, 200 [1st Dept. 2004], citing, *Tarricone v. State of New York*, 175 A.D.2d 308, 309 [3d Dept. 1991]).

In the case at bar, the Court finds that Defendant 528 Jackson Realty Corp. is indemnified from liability pursuant to the lease. However, as to Defendant Dolgencorp, the Court finds that issues of fact exist that are more appropriately reserved for a jury's determination, i.e. whether Defendant Dolgencorp had notice of the alleged defect and failed to remedy same.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED, that Defendant 528 Jackson Realty LLC's motion for summary judgment is granted; and it is further

ORDERED, that Defendant Dolgencorp of New York, Inc.'s motion for summary judgment is denied.

This constitutes the decision and order of the Court.

DATED: December 9, 2021

ENTERED:

Hon. Theresa M. Ciccotto
JSC