SCAN

Short Form Order

SUPREME COURT - STATE OF NEW YORK

Present:

HON. JOSEPH COVELLO

Justice

CLAIRE MASS and HARVEY MASS,

Plaintiffs,

-against-

SHOP - RITE SUPERMARKET,

Defendant.

TRIAL/IAS, PART 22
NASSAU COUNTY

Index No.: 2457/04

Motion Seq. No.: 002

Motion Date: 04/07/05

The following paper read on this motion:

Notice of Motion	x
Affirmation in Opposition	x
Reply Affirmation	x

Upon the foregoing papers the motion by defendant, Food Parade, Inc. d/b/a Shop Rite, s/h/a Shop-Rite Supermarket ("Shop Rite"), for an order, pursuant to CPLR §3212, granting summary judgment in favor of defendant, Shop Rite, dismissing plaintiffs, Claire Mass and Harvey Mass (collectively known as "Mass"), Complaint, is denied.

Plaintiffs commenced this action to recover damages for injuries Claire Mass sustained on November 7, 2003 when she slipped and fell in defendant Shop Rite's premises located in Plainview, New York.

In order to establish a *prima facie* case on a slip and fall, plaintiff herein must show that the defendant either created a dangerous condition (**Segretti v. The Shorenstein Company, East,** 256 AD2d 234, 235) or had actual or constructive knowledge of the condition (**Gordon v. American Museum of Natural History,** 67 NY2d 836, 837). In order to constitute constructive notice, a defect "must be visible and apparent and it must exist for a sufficient

length of time prior to the accident to permit [the owners'] employees to discover and remedy it'." See, **O'Connor-Miele v. Barhite & Holzinger,** 234 AD2d 106, quoting, **Gordon v. American Museum of Natural History,** supra, at 837; **Colt v. Great Atlantic & Pacific Tea Company,** 209 AD2d 294. The burden may also be satisfied by providing evidence that an "ongoing and recurring dangerous condition existed in the area of the accident which was routinely left unaddressed by the landlord." **See, O'Connor-Miele v. Barhite & Holzinger,** supra.

On November 7, 2003, at approximately 10:30 a.m., plaintiff, Claire Mass, entered the defendant, Shop-Rite Supermarket, through the main entrance with a shopping cart and a grocery list of items she intended to purchase that morning. When she walked into the store, plaintiff walked with her shopping cart down the main front aisle, which is adjacent to the cashiers. While in that aisle, she noticed an area of debris on the floor. The debris consisted of several grocery items including loose fruit and a can. When plaintiff initially saw the items, she simply walked around them and began shopping.

Approximately one-half hour later, at around 11:00 a.m., as plaintiff walked through the area again (*See Plaintiff's EBT, page 50*), she slip and fell. Plaintiff testified that she did not observe what caused her to fall, and immediately prior to her fall she did not notice any debris on the floor. She testified that prior to the subject incident, she did not make any complaints to any store employee of the debris that she alleges that she saw when she first entered the supermarket at 10:30 a.m.. However, after her fall and while she was still on the ground, she asserts that a store employee scraped a fig off of her shoe. Plaintiff testified:

Q: Do you know what caused you to fall?
A: Yeah. I knew that after I fell.
Q: After you fell, how did you know what caused you to fall?

A: I – first of all, the – I don't know who, but whoever came to my aid right away said that there had been figs on the floor and they scraped the fig off my shoe, and I don't know whether there was other fruit there at that point.
See, Plaintiff's EBT, page 25.

After Plaintiff's fall, on the same day, defendant's store manager, Randall Levy, was notified of the incident, and as a result Mr. Levy executed the store incident report documenting plaintiff's slip and fall. Mr. Levy testified that it is custom and practice that either he fills out an incident report, or someone from security completes the form. In this case, defendant's Security Manager, Mr. Niall Bourke, completed the report and Mr. Randall Levy executed it.

Defendant's store manager testified that when he arrived at the scene where plaintiff fell, she was on the floor claiming she had slipped on a piece of fig. Mr. Levy testified that in a slip and fall incident it is custom and practice for the store personnel documenting the fall to inspect the floor area. In this case, he did not recall anything being on the floor. As such, he did not note anything on the incident report. Mr. Levy also stated, in his affidavit in support of the instant motion, that if the area needed to be cleaned, he would immediately call for a porter to clean the area; but, in this case, he did not call for a porter as none was needed.

Defendant, Shop-Rite, seeks summary judgment dismissing the plaintiffs' Complaint on the grounds that defendant did not know that there was anything "unsafe" about the entrance prior to the incident, as they did not create, or have any prior notice that there may have been an alleged "piece of fig" present thereat.

"On a motion for summary judgment to dismiss the complaint based upon lack of notice, the defendant is required to make a prima facie showing affirmatively establishing the absence of notice as a matter of law (see, **Gordon v Waldbaum, Inc.** 231 AD2d 673, 674; **Colt v Great Atl. & Pac. Tea Co.**, 209 AD2d 294, 295; **Padula v Big V Supermarkets,** 173 AD2d 1094)." (**Dwoskin v Burger King Corporation,** 249 AD2d 358 [emphasis supplied]; see also, **Cormack**

v Cross Sound Ferry Service, Inc., 273 AD2d 433, lv den 95 NY2d 765; **Castello v Bellport Liquors Store,** 273 AD2d 337; **Karras v County of Westchester,** 272 AD2d 377; **Goldman v. Waldbaum,** 248 AD2d 436.

At the time of the plaintiff's fall defendant's store was equipped with a digital surveillance system that was comprised of approximately fifty to one hundred closed circuit cameras that were constantly recording the activity in the store that day. Defendant's store manager, Randall Levy, testified, at his oral examination before trial, that information on the surveillance cameras is stored digitally unless there is an incident, at which point a person from Security, who makes a report of the incident, stores the digital information onto a disc. In the absence of an incident, the digital information on the cameras self erases after a certain period of time.

Defendant, in support of the motion, submitted a digital copy of the store surveillance video of the subject incident and a copy of a digital video still frame of the plaintiff and the store incident report. The plaintiff, at her deposition, identified herself in the video and the video still frame. See, *Plaintiff's EBT, page 11.* Plaintiff agreed that video and still frame depicts her heading toward one of the cashiers in the left of the photo. See, *Plaintiff's EBT, pages 11 and 17.* The store surveillance video shows the plaintiff falling. However, neither the individual frame or the video (approximately 23 seconds in length, appears to be only from one of the cameras) provides a close up of the area of plaintiff's fall. Accordingly, from the individual frame and video it cannot be determined whether or not there was any debris on the floor which caused plaintiff to fall.

"It is beyond cavil that in support of a motion for summary judgment, the movant must establish an entitlement to judgment as a matter of law by producing evidence demonstrating the

absence of any genuine issue of fact (see, **Alvarez v Prospect Hosp.,** 68 NY2d 320, 324, **Shay v Palombaro,** 229 AD2d 697,699; **Douglass v Gibson,** 218 AD2d 856, 857) . The evidence produced by the movant must be viewed in the light most favorable to the non- movant, affording the non-movant every favorable inference (see, **Risk v Cohen,** 73 NY2d 98, 103). Only after the movant has made this prima facie showing does the burden shift to the party opposing the motion to produce evidence showing the existence of material issues of fact which would require a trial (see, **Alvarez v. Prospect Hosp.,** supra, at 324; **Maiorano v Price Chopper Operating Co.,** 221 AD2d 698, 699).

Based upon the submitted proof, the defendant has failed to establish a *prima facie* entitlement to summary judgment. Issues of fact exist as whether the fig which purportedly caused plaintiff's fall was on the floor for a sufficient period of time that the defendant, in the exercise of reasonable care, should have discovered the condition and remedied it.

Therefore, it is hereby

ORDERED, that the motion by defendant, Shop-Rite Supermarket for summary judgment dismissing the plaintiff's complaint is denied.

This constitutes the decision and order of the court.

Dated: June 1, 2005

Joseph Covello, J.S.C.