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MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NASSAU

PRESENT:

Hon. Burton S. Joseph,

Justice.

MARY HOWELL,

Plaintiff,

- against -

"JOHN DOE" d/b/a SHOPRITE SUPERMARKET,

Defendant.

Trial/IAS	Part 18
Index No.	13300/1999
Motion No.	002
Motion Date	10/17/2002

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Papers Numbered

Notice of Motion, Affidavit & Exhibits Annexed	1
Affirmation in Opposition	2
Reply Affirmation	3

Upon the foregoing papers and for the following reasons, the motion by Defendant "John Doe" d/b/a ShopRite Supermarket (hereinafter referred to as "ShopRite"), for summary judgment dismissing the complaint, is granted.

This is an action to recover damages for personal injuries allegedly sustained by Plaintiff Mary Howell while she was shopping at the ShopRite located at 1121 Jerusalem Avenue in Uniondale, New York. Plaintiff alleges that she was caused to slip and fall "on a dry yellow substance which had been scattered about and had been squashed by grocery car wheels in all directions." Issue was joined shortly after commencement of the action and discovery proceedings have been concluded. The matter is currently awaiting trial assignment in the

Calendar Control Part.

By Notice of Motion returnable October 17, 2002, ShopRite moves for summary judgment dismissing the complaint pursuant to CPLR 3212, on the grounds that the record is devoid of any evidence establishing that it had actual notice of the dangerous and slippery condition of the floor which is alleged to have been scattered with pieces of a yellow, round, solid substance. In support of its motion, ShopRite provides the court ordered deposition of a witness on behalf of ShopRite: Mr. Colangelo. He testified that he was employed by ShopRite Supermarket, as an Assistant Store Manager at the supermarket located at Jerusalem Avenue, Uniondale, New York, and that there were two "porters" on duty between 7:00 AM to 11:00 PM, who take care of breakage or spillage throughout the day, mop and sweep the floor to keep the store clean. Notably, Mr. Colangelo testified that there was no incident report filed with regard to this accident.

A court ordered deposition was also conducted of Louis Vacca, Jr. Mr. Vacca has been employed by Laro Service Systems for 23 years. His company has a contract with ShopRite with respect to the maintenance and polishing of its floors at the subject store. Mr. Vacca testified that the store is cleaned after 12:00 a.m. every day and testified that waxing was done once a year. After the floors are stripped, the floor finish is applied with a rayon mop and dries in approximately 30 minutes. The finish that is applied for "waxing" on a weekly basis is a liquid. Significantly, Mr. Vacca testified that the machines used by his employees do not use any type of wax and/or substance which would produce yellow, round and/or solid balls of wax.

In order for a Plaintiff in a slip and fall case to establish a prima facie case of negligence, she must demonstrate that the defendant created this condition which caused the

accident or had actual or constructive notice of this condition (*Stancarone v Waldbaums, Inc.*, 275 AD2d 771; *Kaplan v Waldbaum's Inc.*, 231 AD2d 680). "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 Defendant's employees to discover and remedy it" (*Strowman v Great Atlantic & Pacific Tea Company, Inc.*, 252 AD2d 384 [*quoting Gordon v American Museum of Natural History*, 67 NY2d 836, 837]). A general awareness that a dangerous condition may be present is legally insufficient to constitute notice of the particular condition that caused the plaintiff's fall (*Piacquadio v Racine Realty Corp.*, 84 NY2d 967, 969).

Applying these principles to the matter at bar, ShopRite has established its entitlement to summary judgment dismissing the complaint through the provision of the evidenced previously mentioned. Contrary to Plaintiff's contention, she has not presented any evidence in admissible form establishing that ShopRite had actual notice of the slippery condition of the floor which is alleged to have been scattered with pieces of a yellow, round, solid substance. Nor has Plaintiff demonstrated that ShopRite had constructive notice of the condition since Plaintiff did not observe any pieces of the yellow substance and/or any slippery condition of the floor prior to her alleged slip and fall. Consequently, Plaintiff is unable to establish that the pieces of the yellow substance or any slippery condition of the floor was visible or apparent for any sufficient length of time to permit ShopRite remedy it. In addition, any claim that the alleged yellow substance had been on the floor for any appreciable amount of time would be mere speculation (*see Rojas v Supermarkets General Corp.*, 238 AD2d 393; *Anderson v Klein Foods*, 139 AD2d 904).

This Court has considered Plaintiff's contention that ShopRite created the

condition by using a waxing machine which emanated pieces of yellow wax. Plaintiff's affidavit submitted in opposition is based on mere speculation and is insufficient to lend credence to her opinion (*see Shea v Sky Bounce Ball Co., Inc.*, 294 AD2d 486). Furthermore, Mr. Vacca testified that the type of cleaning machine being used by the maintenance company used a liquid polish that did not emanate any type of waxy substance.

In view of the foregoing, ShopRite's motion for summary judgment is granted and the complaint is hereby dismissed in its entirety. This constitutes the decision, order and judgment of the Court.

ENTER:

Dated: Mineola, New York
December 5, 2002

Burton S. Joseph
J.S.C.

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COUNTY CLERK'S OFFICE