

SCAN

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. UTE WOLFF LALLY,**

*Justice*

TRIAL/IAS, PART 16  
NASSAU COUNTY

ROBERT FRITZLO and CONNIE FRITZLO,

Plaintiff(s),

-against-

MOTION DATE: 4/11/02  
INDEX No.:15328/00  
MOTION SEQUENCE NO:1

CAL. NO.:2001H6097

B.S.H.CORP. d/b/a BAY SHORE HESS and  
AMERADA HESS CORPORATION,

Defendant(s).

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	1-4
Answering Affidavits.....	5-7
Replying Affidavits.....	8,9
Briefs: .....	10

Upon the foregoing papers, it is ordered that this motion by defendant B.S. H. Corporation d/b/a Bay Shore Hess for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint as against it is denied

This is an action to recover money damages for personal injuries which arise out of a slip and fall on premises leased to defendant B.S.H. Corporation and operated as a Hess gasoline station. Plaintiff Robert Fritzlo alleges that on December 5, 1999 at 2:00 p.m., as he stepped onto the cashier's island at the Hess station in Bayshore, New York he slipped and fell. He felt sand or grit under his shoe, and afterwards, when his wife drove him to the hospital, a gritty substance was present on his clothing and in his car. The following day, when plaintiff returned with his wife to take photographs, he first saw the substance on the cashier's island. However, his wife saw the substance the day of the accident, as she returned to the station to report the accident after taking her husband to the hospital. At that time a station employee gave her the name and telephone number of a manager named Bob. She called Bob to report the accident and left a message with his wife.

Defendant B.S.H. moves for summary judgment alleging that it did not have actual or constructive notice of the sandy condition

and that it did not create the condition. B.S.H. avers that it never uses sand at the gasoline station, and thus could not have created the condition. Defendant also avers that the complaint must be dismissed because plaintiff failed to identify the substance upon which he fell.

"It is well settled that a plaintiff in a slip and fall case must establish that the defendant either created the defective condition or had actual or constructive notice of it" (**Nedd v Associated Hosp. Servs. of N. Y.**, 236 AD2d 455, 455-456; **Stasiak v. Sears, Roebuck & Co.**, 281 AD2d 533, 534). "Where the moving party has established that it is entitled to summary judgment, the party opposing the motion must demonstrate the existence of a factual issue requiring a trial of the action by admissible evidence, not mere conjecture, suspicion or speculation" (**Babino v. City of New York**, 234 AD2d 241). The plaintiff's burden, in a case such as this based upon circumstantial evidence, is to make "a showing of sufficient facts from which the negligence of the defendant and the causation of the accident by that negligence can be reasonably inferred" (**Babino v. City of New York**, *supra* at p 241-242).

Initially, the court rejects defendant's contention that the plaintiff failed to identify the cause of his accident warranting summary judgment in its favor (*see*, **Novoni v. La Parma Corp.**, 278 AD2d 393). Although plaintiff did not see the substance which caused his fall, he felt it under his shoes, and identified it as a gritty or sandy substance. Thus plaintiff adequately identified the cause of his fall through a sense other than sight. In addition, the presence of a gritty or sandy substance on his clothing and in his vehicle after the accident supports his sense impression that it was the cause of his fall.

Turning to the plaintiff's burden of proof, plaintiff has submitted admissible evidence which supports his contention that defendant created the defective condition. Plaintiff offers the affidavit of Robert (Bob) Baldwin, the former week day manager of the Bay Shore Hess gasoline station, who states that he received a phone call the night of the accident from Joe Piraino who was working at the station that day. Piraino advised that he had given Baldwin's number to a woman who's husband had slipped and fallen on sand in front of the cashier's window at the station. The following morning when Baldwin arrived at the gas station he observed Speedy Dry "in and around the area of the cashier's island" where the man had fallen. He described Speedy Dry as "a gritty, sandy-like substance that is spread to absorb gasoline and oil spills at the station." Baldwin immediately directed the maintenance man to sweep the area, and notified the owner of the station.

