

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

<p>MATTHEW WEBER, An Infant, by his Father and Natural Guardian, ROBERT C. WEBER,</p> <p style="text-align: right;">Plaintiffs,</p> <p style="text-align: center;">- against -</p> <p>HOME DEPOT USA, INC. and TECHNIBILT, LTD.,</p> <p style="text-align: right;">Defendants.</p>
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TRIAL / IAS PART 43
NASSAU COUNTY

Index No. 12673/99

Motion Sequence Nos.
04 and 05

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1</u>
Notice of Cross Motion	<u>2</u>
Answering Affidavits	<u>3</u>
Replying Affidavits	<u>4.5</u>
Briefs: Plaintiff's / Petitioner's	<u> </u>
Defendant's / Respondent's	<u> </u>

The defendant HOME DEPOT USA, INC. moves this court for an order granting summary judgment in favor of the defendant dismissing the complaint. The defendant TECHNIBILT cross moves for summary judgment dismissing the complaint.

The motion by the defendant HOME DEPOT USA, INC. is granted. To impose liability upon the defendant for injuries resulting from an allegedly defective condition the plaintiff must establish that the defendant had either created or had actual or constructive notice of the defective condition (see, *Gordon v. American Museum of Natural History*, 67 N.Y.2d 836). 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 defendant to discover and remedy it.

Here, there is no evidence that the defendant created, or had actual or constructive notice of, the allegedly defective condition. In fact, at his own examination before trial, the plaintiff ROBERT C. WEBER testified that his wife obtained the shopping cart in the parking lot and they placed the infant plaintiff in the cart and proceeded to travel the store aisles. At one point, after ten minutes the child was taken out of the child seat because he was restless and allowed to walk. Prior to the accident the infant was returned to the seat in the cart. At no time prior to the accident did the plaintiff ROBERT C. WEBER detect or encounter any problem or defect with the shopping cart. (*See, Blaszczyk v. Riccio*, 266 A.D.2d 491(N.Y.A.D. 2 Dept. 1999).

The burden then shifted to the plaintiffs to come forward with evidence sufficient to raise a triable issue of fact. However, the plaintiffs' opposition consisted of mere speculation that the defendant should have had constructive notice of a condition which the plaintiffs alleged to be a recurring hazard. Consequently, the plaintiffs failed to meet the evidentiary burden necessary to defeat the defendant's motion (see, *Gordon v. American Museum of Natural History*, 67 N.Y.2d 836; *Goldman v. Waldbaum, Inc.*, 248 A.D.2d 436). Further, plaintiff has failed to assert any case law to support its contention that the defendant was under a duty to inspect and conduct tests on the shopping carts used in its store.

The defendant TECHNIBILT cross moves for summary judgment dismissing the complaint. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law sufficient to demonstrate the absence of any material issue of fact (see, *Zuckerman v. City of New York*, 49 N.Y.2d 557,). The defendant, in support of its motion, submitted plaintiff's sworn deposition as well as the deposition of its employee who testified as to the testing the manufacturer conducted on its carts. Issues regarding design defects are generally inappropriate for summary judgment relief (see, *Lugo v. LJM Toys*, 539 NYS2d 923). The court finds that in the absence of expert testimony the defendant has failed to establish its entitlement to judgment as a matter of law.

Accordingly, the motion for summary judgment by the defendant HOME DEPOT USA, INC. dismissing the complaint as to that defendant is granted.

The motion by the defendant TECHNIBILT for summary judgment dismissing the complaint is denied.

Dated: September 14, 2001

ENTER:



J. S. C.

ENTERED

SEP 20 2001

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**