SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS, PART 15
NASSAU COUNTY

LORANA McVITIE, an infant by her Father and natural guardian, HOWARD McVITIE, and HOWARD McVITIE Individually,

Plaintiff(s),

-against-

SOUTH SHORE SKATING, INC. and HOT SKATES, INC.,

Defendant(s).

ORIGINAL RETURN DATE:09/18/02
SUBMISSION DATE: 09/18/02
INDEX No.: 1777/01

MOTION SEQUENCE #2

The following papers read on this motion:

Notice of Motion.....	1
Answering Papers.....	3
Reply.....	4
Defendants' Brief.....	2

Defendants South Shore Skating, Inc. and Leisure Time Sports, Inc. d/b/a Hot Skates, incorrectly s/h/a Hot Skates, Inc., move for an order pursuant to CPLR 3212 granting them summary judgment dismissing plaintiffs' complaint or, in the alternative, vacating plaintiffs' Note of Issue.

This personal injury action arises out of a trip-and-fall type accident, which occurred on February 28, 1998, at approximately 2:30 p.m., at a skating rink located at 14 Merrick Road in Lynbrook, New York. Plaintiffs allege that the infant plaintiff was caused to trip by an allegedly defective condition of the carpeting at the entranceway to the skating rink. Defendants move for summary judgment on the grounds that there is no evidence that they had actual or constructive notice of the alleged defect.

In opposition to the motion, plaintiffs submit an affidavit by Dexter Ottley, an adult relative of the infant plaintiff and a witness not previously deposed by defendants. Mr. Ottley states that he had brought Lorana McVitie to Hot Skates on Saturday, February 28, 1998, for a skating outing

with his own daughter and saw Lorana's fall. He further states that "As I ran over to assist Lorana, I observed what caused her to trip and fall. Her skate had gotten caught in a section of the worn, frayed and loose carpet that had obviously torn open creating a hole. ... The actual area of her tripping was not only worn, frayed and discolored but it was also loose."

Mr. Ottley goes on to state that he regularly skated at Hot Skates, most recently being there on the Saturday before February 28, 1998, as well as two Saturdays each in January, 1998, December, 1997 and November, 1997. According to Mr. Ottley, on each of those occasions the area where Lorana later fell was worn, frayed and very loose. Mr. Ottley concludes by stating that: "While I did not bring this condition to anyone's attention, it was obviously situated where it could have and should have been seen by anyone either cleaning or passing through the area."

Clearly, Mr. Ottley's affidavit is sufficient to raise a triable issue of fact as to constructive notice. "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." (**Gordon v American Museum of Natural History**, 67 NY2d 836, 837).

Accordingly, branches (1) and (2) of the defendants' motion, seeking summary judgment dismissing plaintiffs' complaint and permitting defendants to enter judgment against plaintiffs for statutory costs and disbursements are denied.

Branch (3) of defendants' motion, seeking an order vacating the note of issue filed and to compel service of authorizations addressed to the junior high school attended by the infant plaintiff is denied as to vacatur but otherwise granted. Plaintiffs are directed to provide the subject authorizations within 20 days after receipt of a copy of this order from any source.

Finally, inasmuch as counsel for defendants represent that they first learned of Mr. Ottley as a notice witness upon receipt of plaintiffs' answering papers, their informal request to depose him is granted. Defendants shall serve a subpoena upon him in furtherance thereof forthwith. The deposition shall be held within 60 days of defendants' receipt of a copy of this order from any source.

As this action has not as yet been scheduled for trial, the additional discovery permitted herein does not warrant vacatur of the note of issue and should not delay the trial.

This decision constitutes the order of the court.

Dated: 11-18-02

ENTERED

HON THOMAS P. PHELAN

J.S.C.

NOV 25 2002

NASSAU COUNTY
COUNTY CLERK'S OFFICE