SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
--- Index No.: xxxx/03

XXXXXXXXXX and XXXXXXXXXX,

Assigned to:

Plaintiffs,

-against-

AFFIRMATION IN OPPOSITION

WAKEFERN FOOD CORP. and WAKEFERN d/b/a SHOPRITE,

Defendants.

SIRS**:**

MAURICE J. RECCHIA, an attorney at law duly admitted to practice before the Courts of the State of New York, hereby affirms under the penalties of perjury as follows:

1. I am associated with the law firm of KORNFELD, REW, NEWMAN & SIMEONE, attorneys for the plaintiffs, XXXXXXXXXX and XXXXXXXXXX, and as such am fully familiar with the facts and circumstances surrounding this matter.

2. I make this affirmation in opposition to the plaintiff's motion for summary judgment.

FACTS

3. Plaintiff testified that she slid on a white liquid, which was "thick on the floor" and filled a space about 3-4 inches wide, (plaintiff's deposition testimony is attached here as **Exhibit** "1", 41-42), while she was shopping in the soap aisle of defendant's market on the date of the accident. She did not notice this liquid before she slid, but did notice it after she returned to the aisle with a store employee a few moments after her fall. (**Exhibit** "1", 44-45).

4. Plaintiff was with her brother, xxxxxxxxxx, at the time of the accident. He testified that he witnessed his sister's fall and that immediately after her fall he noticed "soap

on the floor" and a mark in the soap "where her feet slid through it" (xxxxxxxxxx testimony is attached as **Exhibit** "2", 17-19, 22 and 26).

5. After her fall, xxxxxxxxxx also noticed that his sister's "body was filled with soap" on her right side. (xxxxxxxxxx, as did the plaintiff, testified through a Creole interpreter. He presumably meant she had soap on her clothing.) He further testified that after her fall he saw liquid soap on the floor in a diameter of roughly 1-2 feet (**Exhibit** "2", 27-28).

6. Defendants' assistant manager Joseph Schrammel testified that the busiest hours of his store were between 5:00 and 7:00 p.m. (Mr. Schrammel's testimony is attached here as **Exhibit** "3", 28) and that at that time his porters would be assisting with carts, bagging, and helping customers (**Exhibit** "3", 29).

7. He further testified that he walked the entire store about an hour before the accident, and last walked the soap aisle between 7:30 and 8:00 p.m. (**Exhibit** "3", 23-24). He learned of the accident when a customer approached him and told him of the accident (**Exhibit** "3", 6). He filled out an accident report and signed it (**Exhibit** "3", 5). This accident report indicates that the accident occurred at 8:50 p.m. (a copy of the accident report is attached here as **Exhibit** "4").

POINT I
Defendants Have Failed To Meet Their Burden Of Establishing Absence Of Notice

8. Contrary to defendant's assertion that "there is no proof that Shop-Rite had actual or constructive notice of any dangerous condition that caused the injured Plaintiff to slip" (defendant's motion, ¶16) , the proof from the testimony of the defendants themselves leads to an inference that defendants had actual or constructive notice of a hazardous condition. In a slip and fall case such as this the defendant must establish the absence of notice of the

hazardous condition *Jaques v. Richel Enterprises, Inc.*, 300 A.D. 2d 45, 46, 751 N.Y.S. 2d 726, 727 (1st Dept. 2002); *See also Gordon v. Waldbaum, Inc.*, 231 A.D. 2d 673, 647 N.Y.S. 2d 996 (2nd Dept. 1996) affirming a trial court's denial of a defendant's motion for summary judgment and holding that defendants evidence failed to demonstrate absence of notice, and *Colt v. The Great Atlantic and Pacific Tea Company*, 209 A.D. 2d 294, 618 N.Y.S. 2d 721 (1st Dept. 1994) affirming a trial court's denial of defendant's motion for summary judgment and holding it was defendant's responsibility to establish absence of notice (cited by the *Gordon* decision *supra*).

9. Here too, the defendants have failed to meet their burden of establishing absence of notice. Neither the affidavit of Joseph Schrammel, nor the affidavit of Attorney xxxxxxx, provides any proof, must less proof sufficient for a finding of summary judgment, that as a matter of law defendants lacked actual or constructive notice of a hazardous condition, a soap spill, on the floor of the soap aisle on the day of the accident.

10. Indeed rather than establishing absence of notice, the evidence adduced by the defendants leads to an affirmative inference that at the very least 50 minutes elapsed between the time the soap aisle was last checked by the defendants and plaintiff's accident. Thus, there was sufficient time, as a matter of law, to impute constructive notice to the defendants of a hazardous condition in the soap aisle before plaintiff's fall.

11. As noted above, assistant manager Schrammel testified that he last walked the soap aisle between 7:30 and 8:00 p.m. The accident report, filled out by Schrammel, indicates that plaintiff came to him at 8:50 p.m. to report the accident. Therefore, at least 50 minutes - or as much as 80 minutes - elapsed between the time the soap aisle was last inspected by a store employee and plaintiff's accident. These time frames are sufficient to impute constructive notice of a hazardous condition to the defendants on the day of this accident.

12. In *Negri v. Stop and Shop*, 65 NY 2d 625, 626, 491 N.Y.S. 2d 151, 152 (1985), a case with similar facts, the Court of Appeals reversed the Appellate Division and found that trial evidence that the aisle in question "had not been cleaned or inspected for at least 50 minutes prior to the accident" was sufficient to permit a jury to infer that the defendant had at least constructive notice of a slippery condition.

13. In *Rose v. DaEcib*, 259 A.D. 2d 258, 260, 686 N.Y.S. 2d 19, 21 (1st Dept. 1999), the Appellate Division found that a 15-minute time period within which a defendant could have noticed a slippery condition was "sufficient to take the question of constructive notice to the jury." *See also* most recently *Bevilacqua v. Club Azzuro, Inc.*, 8 A.D. 3rd 599, 778 N.Y.S. 2d 890 (2nd Dept. 2004) standing for the same principles as *Negri* and *Rose supra* (no time frame was mentioned by the court).

POINT II
A Grant Of Summary Judgment At This Stage Would Be Premature – All Discovery Is Not Complete

14. "It is well established that where facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge and control of the movant, summary judgment may be denied. This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion." *Baron v. Incorporated Village of Freeport* 143 A.D. 2d 792 – 793, 533 N.Y.S. 2d 143 (2nd Dept. 1988). Here depositions of the 2 porters working on the date of the accident, one of whom was asked to clean up the spill in the soap aisle after Plaintiff's accident, are outstanding. In addition, as discussed below, discovery regarding the general duties of porters and the sweeping log maintained by the store is outstanding. This is information which is exclusively within the

control of the defendant and essential to any opposition to defendants' motion for summary judgment.

15. Assistant manager Joseph Schrammel testified that there were two porters on duty on the day of the accident (**Exhibit** "3", 17). He further testified that when he learned of plaintiff's accident, he called a porter to clean up the spill (**Exhibit** "3", 9). At his deposition, Mr. Schrammel could not recall the name of the porter. At the deposition (**Exhibit** "3, 17-18), and again following the deposition, plaintiff specifically requested the names of the porters and requested a deposition of the porter(s) involved in the clean-up after plaintiff's accident (see correspondence collectively attached as **Exhibit** "5").

16. To date, defendant has neither identified the porter(s) involved nor produced either person for a deposition. Clearly, the porters working on the day of the accident and specifically the porter involved in the clean-up after the accident, possess information which is relevant both regarding the general policies and procedures followed by the defendants, and specifically for the facts on the day of this accident, information which is exclusively within the knowledge of the defendants. It would therefore be premature to grant summary judgment when this relevant discovery is not complete. The law is well settled that it is premature to grant a litigant summary judgment when such relevant discovery is still outstanding. *See Mazzola v. Kelly*, 291 A.D. 2d 535, 738 N.Y.S. 2d 246, 247 (2nd Dept. 2002) (affirming trial Court's denial of defendant's motion for summary judgment as premature where plaintiff had not had opportunity "to conduct discovery into several relevant issues that are exclusively within knowledge of" defendant), *Bartell v. Mazzafero*, 5 A.D. 3d 618, 774 N.Y.S. 2d 783 (2nd Dept. 2004) (affirming the trial Court's denial of defendant's motion for summary judgment where plaintiff did not have adequate opportunity to conduct discovery and facts essential to

justify opposition were within exclusive knowledge of defendant), *Destin v. New York City Transit Authority*, 303 A.D. 2d 713, 756 N.Y.S. 2d 864 (2nd Dept. 2003) (affirming trial court's denial of defendant's motion for summary judgment where discovery still outstanding), *Rengifo v. City of New York*, 7 A.D. 3d 773, 776 N.Y.S. 2d 865 (2nd Dept. 2004) (affirming trial Court's denial of defendant's motion for summary judgement as premature where discovery still outstanding).

POINT III
The Belated Discovery Response
By Defendants Created Issues of Fact
and Requires Further Discovery

17. The deposition of defendant's witness Joseph Schrammel occurred on March 8, 2004. Over a month later, defendants provided a discovery response outlining the job duties of the assistant store manager as well as a summary of the porter's duties at defendant's store. (A copy of this discovery response is attached as **Exhibit** "6"). The defendant's discovery response creates issues of facts. At his deposition Joseph Schrammel specifically testified that the defendants do not maintain a sweeping log (**Exhibit** "3", 26-27). However, in their discovery response which describes the duties of the porter, under the category "essential functions", this job description specifically states that one of the porter's functions is to maintain a sweeping log (see discovery response **Exhibit** "6"). At his deposition, Joseph Schrammel specifically testified that there was no written document describing what the porters duties were (**Exhibit** "3", 20, and 22). As can be seen from **Exhibit** "6" however, there is such a document which was provided by the defendant *after* Mr. Schrammel's testimony which clearly outlines and describes the duties of porters. Joseph Schrammel testified at his deposition that the porter's duties regarding mopping were just for "spillage" (**Exhibit** "3", 23). However, the document which describes the porter's duties clearly indicates that the porter's

duties included mopping and sweeping according to company specifications. Listed separately under the porter's essential functions is another description requiring porters to clean breakage immediately (**Exhibit** "6"). This testimony alone, together with the discovery response, clearly raise issues of fact and the credibility of Mr. Schrammel's testimony, which in and of themselves are sufficient for a denial of summary judgment.

18. Moreover, the discovery response clearly opens up further avenues for discovery, areas which are under the exclusive knowledge and control of the defendants and which need to be explored by the plaintiff. As noted above a deposition of the porters working on this accident is still outstanding; among the questions to be asked to any porter produced would be what his activities were on the date of the accident, the facts and circumstances of the creation of the sweeping log and what that log disclosures about the period of time when the defendant was potentially on actual or constructive notice of the dangerous condition alleged by the Plaintiff , among other things.

POINT IV
The Law On Summary Judgment Favors The Plaintiff And Requires Denial Of Defendant's Motion

19. Clearly, the legal standards governing summary judgment favor the plaintiff here. "It is well settled that summary judgment should be granted only if there are no material and triable issues of fact. Summary judgment is a drastic remedy and should not be granted if there is any doubt as to the existence of a triable issue. It is not up to the Court to determine issues of credibility or the probability of success on the merits, but rather whether there exists a genuine issue of fact. *Issue finding rather than issue determination* is the key to summary judgment and the affidavits should be scrutinized carefully in the light most favorable to the party opposing the motion". *Hantz v. Fishman*, 155 A.D. 2d 415, 416, 547 N.Y.S. 2d 350, 352

(2nd Dept. 1989) (emphasis added); *see also Freese v. Schwartz*, 203 A.D. 2d 513, 611 N.Y.S. 2nd 37 (2nd Dept. 1994), *Daliendo v. Johnson*, 147 A.D. 2d 312, 543 N.Y.S. 2d 987 (2nd Dept. 1989), *Lui v. Park Ridge at Terryville Assoc. Inc.* 196 A.D. 2d 579, 601 N.Y.S 2d 496 (2nd Dept. 1993), *Marine Midland Bank N.A. v. Dino and Arties Automatic Transmission Company*, 168 A.D. 2d 610, 563 N.Y.S. 2d 449 (2nd Dept. 1990), *The Museums at Stony Brook v. The Village of Patchogue Fire Department*, 146 A.D. 2d 572, 536 N.Y.S. 2d 177 (2nd Dept. 1989).

20. Here it is clear that the drastic remedy of summary judgment should not be granted as defendant has failed to prove absence of notice, all discovery is not yet complete, and defendant's belated discovery responses create further issues of fact.

WHEREFORE, it is respectfully requested that defendant's motion for summary judgment be denied in its entirety, and that this Court grant costs for making this opposition and grant such other and further relief that this Court may deem just and proper.

Dated: Suffern, New York
December 31, 2004

Yours, etc.,

KORNFELD, REW, NEWMAN & SIMEONE

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