SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : **HON. JOSEPH P. DORSA** **IAS PART 12**
Justice

- x

CYNTHIA POWER and WILLIAM POWER,

Plaintiff, Index No.: 6240/05

- against - Motion Date: 2/21/07

GARDEN WORLD, INC. Motion No.: 29

Defendant.

- x

The following papers numbered 1 to 9 on this motion:

	Papers Numbered
Defendant's Notice of Motion-Affirmation-Affidavit(s)-Service-Exhibit(s)	1-4
Plaintiff's Affirmation in Opposition-Affidavit(s)-Exhibit(s)	5-7
Defendant's Reply Affirmation-Exhibit(s)	8-9

By notice of motion, defendant, Garden World, Inc. (Garden World), seeks an order of the Court, pursuant to CPLR § 3212, granting them summary judgment and dismissal of the complaint.

Plaintiff files an affirmation in opposition and defendant replies.

The underlying cause of action is a claim by plaintiffs for personal injuries alleged to have been sustained on December 4, 2004, at about 6:00 p.m., at the business/premises known as Garden World when plaintiff, Cynthia Power, tripped and fell over an empty flatbed cart.

Plaintiff avers that the note of issue was served on August 17, 2006, and attaches a copy (see, plaintiff's Exh. B). While the certificate of readiness was dated August 17, 2006, the sworn statement of service asserts that the note of issue and

certificate of readiness was served on opposing counsel on August 22, 2006. Defendant's affidavit of service regarding the motion for summary judgment is dated December 22, 2006; the date of service is acknowledged by plaintiff.

Contrary to plaintiff's contention, there is no blanket 60 day rule for service of summary judgment motions in Queens County. Pursuant to the published rules of this part, service of the summary judgment motion within 120 days from the date of the note of issue is sufficient.

Defendant maintains that by plaintiff's own testimony, it is established that the area where she was walking was lit, that she was looking to the left, and not straight ahead, and that she didn't see the approximately ankle high, flatbed, customer cart before she tripped and fell on it.

Defendant maintains that the carts are there for the use of the customers and that they are open and obvious and not defective or inherently dangerous.

In Cupo v. Karfunkel, 1 AD3d 48, 767 NYS2d 40 (2d Dep't 2003), the Appellate Division opined, "[O]n this appeal we are asked to consider whether proof that an allegedly dangerous condition on real property is 'open and obvious' precludes a finding of liability against a landowner. Recognizing that our decisions on this issue may appear inconsistent, we take this opportunity to clarify that the open and obvious nature of an allegedly dangerous condition is relevant to the issue of the comparative fault of the plaintiff and does not preclude a finding of liability against the landowner." Id., at 49.

In at least three instances since Cupo was decided, the Court has reiterated their position by upholding denial of summary judgment to defendants or reversing where summary judgment was granted to defendants. Divietro v. Gould Palisades Corp., 4 AD3d 324, 771 NYS2d 527 (2d Dep't. 2004) (plaintiff slipped and fell on rock and gravel, that condition was open and obvious merely created issue as to plaintiff's comparative negligence); Newman v. Consolidated Edison Co. of N.Y., Inc., 35 AD3d 824, 825, 826 NYS2d 714 (2d Dep't. 2006) (plaintiff allegedly slipped and fell on wet steps at a building owned by the defendant; alleged open and obvious nature of the condition only raised a triable issue of fact as to the comparative fault of plaintiff); Mejia v. City of New York, 33 AD3d 675, 676, 823 NYS2d 108 (2d Dep't. 2006) (plaintiff tripped and fell while walking backwards, looking up and spraying insecticide, allegedly due to loosened and uneven dirt and tracks; fact that alleged...

depression in ground was readily observable merely speaks to the injured plaintiff's possible comparative fault).

In at least two instances since Cupo, the Court has upheld the granting of summary judgment to defendant or reversed where such was denied where defendant claimed that the allegedly dangerous condition was open and obvious. In Brown v. Melville Industries Associates, 34 AD3d 611, 823 NYS2d 697 (2d Dep't 2006) plaintiff alleged she tripped and fell over a coin sized (half dollar) rock in parking lot adjacent to defendant's building. After defendant made out a prima facie defense that the rock was open and obvious and not inherently dangerous, the Court determined that plaintiff failed to respond with admissible evidence raising a triable issue of fact to the contrary. Id. The Appellate Division found that defendant's motion for summary judgment was improperly denied.

In Bernth v. King Kullen, 36 AD3d 844, 830 NYS2d 222 (2d Dep't 2007) "...plaintiff allegedly fell over an empty merchandise cart in the frozen food aisle of the defendant's supermarket." Id. at 845. In this case, plaintiff admitted to seeing the cart on which he struck his leg as well as others in the center of the aisle before the accident. Id. In opposition to defendant's prima facie defense, plaintiff failed to submit evidence to raise a triable issue of fact.

In response to defendant Garden World's prima facie establishment that the cart over which plaintiff fell was not inherently dangerous, plaintiff has raised a triable issue of fact as to whether the cart's placement, in the middle of the aisle, under the lighting conditions present at the time created a hazardous condition.

Plaintiff established through her own testimony and that of her mother, that although the area was lit, it was not brightly lit. Plaintiff states that she was concentrating on looking at wreathes to buy, a focus defendant could not only foresee but encourage, and did not see the cart in question before her ankle struck it. Thus, the fact that the cart's presence in the aisle was allegedly open and obvious, coupled with plaintiff's claim that the lighting was insufficient, raises triable issues of fact regarding plaintiff's comparative negligence.

Accordingly, upon all of the foregoing, defendant's motion for summary judgment is denied.

Dated: Jamaica, New York
April 13, 2007

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JOSEPH P. DORSA
J.S.C.