UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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ARLENE GERVIS,

Plaintiff,

MEMORANDUM OF DECISION & ORDER
CV 16-380 (GRB)

-against-

TARGET CORPORATION,

Defendant.
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GARY R. BROWN, United States Magistrate Judge:

In this action, plaintiff Arlene Gervis seeks recovery for damages incurred when an empty runaway shopping cart, propelled by a gust of wind, knocked her to the ground in the parking lot of a store operated by defendant Target Corporation ("Target"). Currently pending before the Court in this matter is Target's motion for summary judgment. For the reasons set forth herein, the motion is GRANTED.

PROCEDURAL HISTORY

This action was commenced via a complaint filed with the Supreme Court of New York, County of Suffolk, which was removed by the filing of a notice of removal on or about January 25, 2016. Docket Entry ("DE") 1. On or about May 4, 2016, the parties consented to the undersigned assuming jurisdiction over this matter for all purposes, which was so ordered by the Honorable Leonard D. Wexler. DE 16. Following a period of discovery, the Court set a briefing schedule for a motion for summary judgment, which was fully filed by May 10, 2017. *See* DE 40-55. This opinion follows.

UNDISPUTED FACTS

Based upon the parties' Local Civil Rule ("Rule") 56.1 statements and the additional factual material submitted on this motion, the following facts, asserted by defendant, are undisputed or effectively undisputed by plaintiff:

On April 25, 2015, the plaintiff went to a Target location in South Setauket, New York to return merchandise. DE 42, 43.2 ¶1. She parked in a disability-access spot across from an entrance to the store, designated as the "blue" entrance, and entered the store at approximately 11:30 a.m. *Id.* ¶2. The parking lot had cart corrals distributed around the parking lot and two holding areas for storing unused shopping carts. *Id.* ¶3.[1] In addition, the store had an employee assigned to the lot as a "Cart Attendant," whose duties included, though were not necessarily limited to, retrieving unused shopping carts and returning them to the holding areas. *Id.* ¶4.

The day in question was blustery, as revealed by several sources, one of which was not cited by the parties. First, records from a weather station at MacArthur Airport, miles away but still telling, documented a wind gust of 22 miles per hour some 90 minutes before the incident, and a wind gust of 18 mph about a half hour after the accident. DE 52-3. Second, Target's accident report attributes the incident to it being a "windy day," noting that the wind propelled the shopping cart in question. DE 52-2 at 3. Third, a surveillance video, discussed below, appears to reveal a certain measure of camera shake that *may* be attributable to the wind, though

[1] This relatively innocuous assertion—that Target maintained cart corrals in the parking area—provides an excellent example of ineffective disputation of fact by plaintiff on this motion. While Target documents this assertion with detailed citation to deposition testimony from two witnesses and an affidavit, plaintiff simply indicates that she "denies" a large portion of this assertion, without any citation to contrary evidence. *Compare* DE 42 ¶3, *with* DE 43-2 ¶3. A review of the record reveals no evidence to contradict the assertion, and this, as well as similarly ineffectively disputed facts, are deemed admitted. *See* Local Civ. R. 56.1(c), discussed further *infra*.

the parties have not cited this fact. *See* DE 40-11, Ex. A. However, the surveillance video unequivocally captures the fact that the errant shopping cart that resulted in injury was driven, abruptly and forcefully, by the wind, as no other motive force was present. *Id.* Importantly, though, on the video, no other evidence of the effects of the wind, including but not limited to other gale-propelled wagons, is perceptible. *Id.*

The following facts are drawn from the parties' documents and close observation of surveillance video supplied by Target on this motion. At approximately 11:34 a.m., two customers exited the blue entrance to the store, leaving an empty handcart on the sidewalk of the building, between the doors and the access ramp. *See* DE 40-11 ¶22; DE 42, 43.2 ¶12. Approximately 90 seconds later, plaintiff exited the store, passing the abandoned trolley, and headed into the crosswalk. DE 42, 43.2 ¶¶14-15. After plaintiff passed the unattended cart, the rogue vehicle, unexpectedly catapulted by a gust of wind, hit the plaintiff from behind, forcefully knocking her to the ground. *Id.* ¶15. The runaway cart continued, hurtling across several lanes of the parking lot, coming to a stop near a parked car. DE 40-11, Ex. A.

An hour's worth of surveillance video of the parking lot reveals no carts remaining unattended for lengthy periods, as the carts appear to have been in continuous demand. *Id.* Indeed, only minutes after the accident, a passing shopper snatched up the offending pushcart while the plaintiff remained prone on the asphalt. *Id.* Equally important, other than the sudden propulsion of this particular conveyance, there were no other wind-driven shopping carts. *Id.*; *cf.* DE 42, 43-2 ¶6 (Plaintiff did not observe any unattended shopping carts prior to the accident).

DISCUSSION

i. Standard of Review

The motion for summary judgment is decided under the oft-repeated and well-understood standard for review of such matters, as discussed in *Bartels v. Inc. Vill. of Lloyd Harbor*, 97 F. Supp. 3d 198, 211 (E.D.N.Y. 2015), *aff'd sub nom. Bartels v. Schwarz*, 643 F. App'x 54 (2d Cir. 2016), which discussion is incorporated by reference herein.

To oppose a motion for summary judgment, though, a party is required by the Court's Local Rules to submit a Statement of Material Facts upon which it contends there "exists a genuine issue to be tried" and "each statement controverting any statement of material fact . . . must be followed by citation to evidence which would be admissible, set forth as required by Fed. R. Civ. P. 56(c)." L. Civ. R. 56(d); *Tuccio v. FJC Sec. Servs., Inc.*, No. CV 12-5506(JFB)(GRB), 2014 WL 4438084, at *5 (E.D.N.Y. Aug. 18, 2014), *adopted by*, 2014 WL 4438469 (E.D.N.Y. Sept. 8, 2014), *appeal dismissed*, (2d Cir. Mar. 18, 2015). A party may not rest on a mere denial without citing supporting admissible evidence. "Merely denying certain statements in the moving party's statement of undisputed material facts without stating the factual basis for such denial and without disclosing where in the record is the evidence relied upon in making such denial does not constitute a 'separate, short, and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried'—as is required to controvert the moving party's statement of undisputed material facts." *Covelli v. Nat'l Fuel Gas Distrib. Corp.*, No. 99-cv-0500E(M), 2001 WL 1823584, at *1 (W.D.N.Y. Dec. 6, 2001) (citing *Holtz v. Rockefeller & Co.*, 258 F.3d 62, 74 (2d Cir. 2001)), *aff'd*, *Covelli v. Nat'l Gas Distrib. Corp.*, 49 F. App'x 356 (2d Cir. 2002).

Upon the failure to properly controvert a movant's statement of material fact, such statement "will be deemed admitted for the purposes of the motion." L. Civ. R. 56.1(c); *D.N. ex rel. D.N. v. Bd. of Educ. of Ctr. Moriches Union Free Sch. Dist.*, No. CV 14-99(GRB), 2015 WL 5822226, at *3 n.3 (E.D.N.Y. Sept. 28, 2015); *see also Edmonds v. Seavey*, No. 08 CIV. 5646 (HB), 2009 WL 2949757, at *1 n.2 (S.D.N.Y. Sept. 15, 2009), *aff'd*, 379 F. App'x 62 (2d Cir. 2010); *AFL Fresh & Frozen Fruits & Vegetables, Inc. v. De-Mar Food Servs. Inc.*, No. 06 Civ. 2142(GEL), 2007 WL 4302514, at *5 (S.D.N.Y. Dec. 7, 2007). At the same time, of course, district courts have "broad discretion to determine whether to overlook a party's failure to comply with local court rules." *Holtz*, 258 F.3d at 73. And the Court may not rely solely upon the failure to controvert assertions made in a Rule 56.1 statement if those assertions are not supported in the record. *See Giannullo v. City of New York*, 322 F.3d 139, 140 (2d Cir. 2003) ("[E]ven though plaintiff's Rule 56.1 counter-statement failed to specifically controvert these assertions, the unsupported assertions must nonetheless be disregarded and the record independently reviewed."); *compare Jackson v. Fed. Express*, 766 F.3d 189, 196 (2d Cir. 2014) (distinguishing *Giannullo* and upholding default where "each statement of proposed undisputed facts was supported by a citation to the record sufficient to prove each such fact").

In this case, at times, plaintiff's counsel interposed a statement indicating that they denied knowledge or information sufficient to respond, which clearly is not a sufficient rebuttal, and in other instances, substantively denied an assertion without citing responsive appropriate evidence. *See generally* DE 43-2. In any event, the core facts here relating to the critical issue of notice do not appear to be in dispute.

ii. Notice

Because this matter is before this Court under diversity jurisdiction, the applicable law is that of the relevant state. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state."). Thus, the Court looks to substantive New York law in this negligence action. As one district court has observed, under New York law:

> A plaintiff in a negligence action must establish that the defendant breached a cognizable duty of care. *See Quarles v. Columbia Sussex Corp.*, 997 F.Supp. 327, 330 (E.D.N.Y. 1998). In the slip-and-fall context, a storekeeper must maintain its property in a "reasonably safe condition." *Naughtright v. Weiss*, 826 F.Supp.2d 676, 692 (S.D.N.Y. 2011) (*citing Basso v. Miller*, 40 N.Y.2d 233, 386 N.Y.S.2d 564, 352 N.E.2d 868 (1976)). The storekeeper breaches this duty by (1) creating a dangerous condition; (2) failing to remedy a dangerous condition in a reasonable time after having actual notice of the condition; or (3) failing to discover and remedy a visible and apparent condition in a reasonable amount of time. *See, e.g., Gonzalez v. K–Mart Corp.*, 585 F.Supp.2d 501, 504–05 (S.D.N.Y. 2008*); Gordon v. Am. Mus. Of Nat. History*, 67 N.Y.2d 836, 501 N.Y.S.2d 646, 492 N.E.2d 774, 774–75 & n.(1986)*; Nesterenko v. Starrett City Assocs., L.P.*, 111 A.D.3d 806, 975 N.Y.S.2d 123, 124 (2d Dep't 2013*); Podlaski v. Long Is. Paneling Ctr. of Centereach, Inc.*, 58 A.D.3d 825, 873 N.Y.S.2d 109, 110 (2d Dep't 2009) ("plaintiffs need not establish ... notice ..., since th[e] dangerous condition allegedly was created by [defendant's] agent").

Cruz v. Target Corp., No. 13 Civ. 4662(NRB), 2014 WL 7177908, at *3 (S.D.N.Y. 2014) (internal footnotes omitted). Here, there is no evidence that Target created the dangerous condition alleged.

In the seminal case of *Gordon v. Am. Museum of Nat. History*, 492 N.E.2d 774, 774 (N.Y. 1986), the New York Court of Appeals held that where, as here, "[t]here is no evidence in the record that defendant had actual notice" of the subject dangerous condition, a plaintiff may only prevail by demonstrating 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." *Id.* (internal citations omitted). In

Gordon, which involved a plaintiff who slipped on a piece of wax paper on the steps of the defendant museum, the Court of Appeals found that "on the evidence presented, the piece of paper that caused plaintiff's fall could have been deposited there only minutes or seconds before the accident and any other conclusion would be pure speculation." *Id.* Hence, the alleged condition was not actionable.

The First Department's decision in *Kelly v. Berberich*, 828 N.Y.S.2d 332 (App. Div. 2007) has particular application to the case at bar.[2] In that action, plaintiff sought to recover for injuries resulting from a motor vehicle accident. The decision notes that:

> The accident occurred when an unattended shopping cart, allegedly propelled by strong winds, rolled down the driveway connecting the highway to the parking lot of a store owned by defendant Staples, entered the highway and caused plaintiff to abruptly decrease the speed of her vehicle. Plaintiff's vehicle collided with the cart and, seconds later, her vehicle was struck by the vehicle traveling behind it driven by defendant Berberich.
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> Plaintiff commenced this action against, among others, Staples, claiming that it negligently permitted the cart to enter the roadway. Plaintiff's theory of liability against Staples is that the design of the parking lot and driveway, which sloped down to the highway, the presence of unattended shopping carts in the parking lot and windy weather combined to form a dangerous condition. Staples moved for summary judgment dismissing the complaint as asserted against it and Berberich's cross claims for indemnification or contribution, arguing that it neither created nor had actual or constructive notice of the dangerous condition.

Kelly, 828 N.Y.S.2d at 333-34. The facts established on a summary judgment motion were highly similar to the record here:

> Staples made a *prima facie* showing of entitlement to judgment as a matter of law on the ground that it neither created the condition through an affirmative act of misfeasance nor had actual or constructive notice of the condition. In support of its motion, Staples submitted the deposition testimony of two individuals who were employees of Staples at the time the accident occurred. Neither witness had seen an unattended cart move in the store's parking lot due to windy conditions and

[2] By contrast, plaintiff's citation to *DiFranco v Golub Corp.*, 660 N.Y.S.2d 514 (App. Div. 1997) is entirely unavailing, as that matter involved a question of whether defendant's employee pushed the offending shopping cart into the plaintiff.

> neither witness received any complaints about carts moving due to wind. Similarly, neither witness was aware of any instances in which an unattended cart rolled from the parking lot onto the highway.

Id. at 334 (internal citations omitted). The dangerous condition alleged by defendant included three elements, "(1) the physical characteristics of the parking lot and driveway, (2) the presence of unattended carts in the parking lot, and (3) windy weather." *Id.* Of course, only the latter two elements are present here.

In *Kelly*, the lower court denied summary judgment. The Appellate Division reversed, noting, as relevant here:

> [P]laintiff submitted no evidence that Staples placed carts in the parking lot and left them unattended. To the contrary, while Staples was aware that customers would bring carts into the parking lot and leave them unattended, Staples' employees would periodically collect carts from the parking lot and bring them back inside the store. Again, while Staples may have permitted unattended carts to remain in the parking lot, there is no indication that Staples, through an affirmative act, caused unattended carts to be present there.

Kelly, 828 N.Y.S.2d at 334. Again, the same can be said of Target's conduct in the instant case. The record here may, in fact, be stronger for defendant, as the evidence shows that Target maintained numerous corrals to help further ensure that carts were stored in a reasonably safe manner. "With regard to the element of windy conditions," the Appellate Division concluded, in a determination of particular import here, "Staples is not responsible for the 'unpredictable vagaries of the weather.'" *Id.* at 334-35 (first quoting *Cook v. Rezende*, 32 N.Y.2d 596, 599 (1973); then citing *Chamberlain v. City of New York*, 286 A.D.2d 232 (2001), *leave denied*, 97 N.Y.2d 605 (2001)). Finally, the *Kelly* decision concluded that:

> Similarly, plaintiff presented no evidence that Staples had actual notice of the condition or that the condition was visible and apparent and existed for a sufficient length of time prior to the accident to permit Staples to discover and remedy it (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 837 (1986)). Plaintiff did tender some evidence regarding whether the condition was a recurring one; however, this evidence is insufficient to raise a triable issue of fact

> regarding constructive notice. Plaintiff's affidavit, in which she stated that, prior to the accident, "on more than one occasion . . . [she] saw shopping carts on [both] side[s] of [the highway]," was conclusory and bereft of any detail regarding when she saw the carts on the side of the highway, the number of times she saw them or how they came to rest on the sides of the highway. Identical infirmities plague plaintiff's daughter's affidavit. Therefore, no triable issue of fact exists regarding whether an ongoing and recurring dangerous condition existed that was routinely left unaddressed by Staples (*see Green v City of New York*, 34 AD3d 528 (2006); *Tejeda v Six Ten Mgt. Corp*., 15 AD3d 265 (2005)*; DeLeon v New York City Tr. Auth*., 5 AD3d 531 (2004); *cf. Uhlich v Canada Dry Bottling Co. of N.Y.*, 305 AD2d 107 (2003); *Lemonda v Sutton*, 268 AD2d 383 (2000)).

Id. at 335. The short time frame here—a period of ninety seconds—also undermines plaintiff's argument that Target had actual notice based on the presence of video surveillance. *See id.* (granting summary judgment based on absence of evidence that shopping cart was unattended "for a sufficient length of time prior to the accident to permit Staples to discover and remedy it").

Cases in a slightly different context, but involving similar timeframes, reach the same conclusion. In *Gonzalez v. K-Mart Corp.*, 585 F. Supp. 2d 501 (S.D.N.Y. 2008), in which plaintiff sought recovery for a fall caused by spilled hair gel discovered by employees prior to the incident in question, the district court awarded summary judgment, noting: "Plaintiff's accident, therefore, must have happened less than three minutes after K-Mart learned of the existence of the spill. As a matter of law, such a brief period of time is insufficient to give the Defendant a reasonable opportunity to address the situation." *Id.* at 505 (citing *Williams v. Hannaford Bros. Co.*, 710 N.Y.S.2d 714, 716 (App. Div. 2000)).

Finally, plaintiff attempts to cast this as a failure to warn case, claiming that Target had a duty to notify plaintiff about the risk of wind-driven shopping carts. *See, e.g.*, DE 52-1 (plaintiff's affidavit reporting the absence of notification about this risk). However, under New York law, a duty to warn arises only where there is actual or constructive notice of a danger, and is thus coextensive with the negligence standard. *See, e.g.*, *Ramos v. Baker*, 937 N.Y.S.2d 328,

330 (App. Div. 2012) (granting summary judgment as to negligent failure to warn where, as here, defendant "lacked actual or constructive notice of the allegedly dangerous condition"). For the reasons discussed above, it is clear that Target lacked actual or constructive notice of the danger in this particular circumstance, which could well be characterized as a one-off occurrence. And while plaintiff attempts to suggest that Target had a duty to warn arising from a more general knowledge of dangers from untended shopping carts, even assuming that such an obligation could exist, the evidence belies the existence of a generalized hazard of injury due to wind-driven carts.[3]

Therefore, upon the undisputed facts herein, plaintiff cannot establish that the injury complained of resulted from negligence on the part of defendant, including a failure to warn.

CONCLUSION

Based on the foregoing, defendant Target's motion for summary judgment is granted and the case will be dismissed.

Dated: Central Islip, New York
July 20, 2017

/s/ Gary R. Brown
GARY R. BROWN
United States Magistrate Judge

[3] The parties quarrel over the history of unattended shopping cart damage at the Target location on Pond Path in Setauket. *See* DE 42, 43.2 ¶27, and the matters cited therein. However, based on the testimony there are some immaterial disputes over collisions between unattended carts and parked cars. *See Kelly*, 828 N.Y.S.2d at 335 (finding "evidence regarding whether the condition was a recurring one . . . insufficient to raise a triable issue of fact regarding constructive notice"). As relevant herein, one fact emerges clearly: despite extensive discovery on the point, other than the instant case, there is *no* evidence of record of any claims of personal injury based upon impact with unattended shopping wagons.