2012 IL App (1st) 112481-U

FIRST DIVISION
September 24, 2012

No. 1-11-2481

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

VITA CALE, Plaintiff-Appellant, v. ULTA SALON, COSMETICS & FRAGRANCES, INC., a Delaware Corporation, Defendant-Appellee.	)))))))))	Appeal from the Circuit Court of Cook County. No. 09 M2 2033 Honorable Jeffrey L. Warnick, Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Cunningham concurred in the judgment.

O R D E R

¶ 1 *Held*: Summary judgment properly entered for defendant/store owner where plaintiff, a business invitee, failed to present a sufficient evidentiary basis as to an unsafe condition of defendant's entry door.

¶ 2 Plaintiff, Vita Cale, filed this suit on July 8, 2009, against defendant, Ulta Salon, Cosmetics and Fragrances Inc., seeking damages for injuries she suffered while entering one of defendant's stores. The circuit court granted defendant's motion for summary judgment and denied a motion to reconsider that order. We affirm.

¶ 3 BACKGROUND

¶ 4 In her first-amended, two-count complaint, plaintiff alleged that on July 12, 2007, she was a business invitee to defendant's store at 4150 North Harlem Avenue in Norridge, Illinois. In her first count, plaintiff alleged defendant owed her a duty of ordinary care to keep its premises,

including its entry door, reasonably safe and free from dangerous conditions, and to warn her of any such conditions. Plaintiff claimed defendant breached that duty by the following negligent acts or omissions: (1) failed to keep its entry door in a reasonably safe condition; (2) permitted the door to remain in a dangerous condition with sharp corners on its metal frame; (3) failed to provide "a working door governor" to control the rate upon which the door opened; and (4) failed to warn of a dangerous condition. Plaintiff alleged that as a direct and proximate cause of defendant's negligence, her foot was injured by the metal frame on the entrance door when the door was caught in the wind. Plaintiff further claimed her injuries are permanent. Plaintiff, in her second count, brought an action for spoilation of evidence based on defendant's alleged destruction of a security video recording.

¶ 5 Defendant, in its answer, denied negligence and that its entrance door was in a dangerous condition. Defendant also set forth affirmative defenses to the negligence count, claiming plaintiff's own carelessness was the proximate cause of the accident. In reply, plaintiff denied the allegations of the affirmative defenses. Defendant also filed a motion to strike and dismiss plaintiff's spoilation count, which the circuit court subsequently granted. Plaintiff has not appealed the dismissal of that claim.

¶ 6 During discovery, depositions were taken of plaintiff, her daughter Maria Gabriella Vessia, and two of the store's employees–Valerie Merker, a merchandise manager, and Amanda Ortiz, a cashier. Plaintiff testified that prior to the incident, she had been a customer of the store for five years, that she did not notice any change to the door during those years, and previously had no difficulty opening and closing the door. Plaintiff further testified that she had returned to the store since the incident, and used the same door without physical difficulty.

¶ 7 Plaintiff testified that on July 12, 2007, the weather was sunny and hot. The following exchange took place:

"Q. Was it windy?

A. I believe it was windy.

Q. Do you recall it all being a windy day?

A. Not particularly. I remember it being hot."

¶ 8 At 1:30 p.m., plaintiff drove to the store with her daughter, who was then a teenager. Plaintiff was wearing wedged flip-flop sandals. Her daughter exited plaintiff's car in the parking lot and entered the store before plaintiff had reached the store. The door to the store was glass with aluminum framing, with side-by-side ingress and egress openings. Plaintiff used her right hand to open the entrance door toward her. Plaintiff testified that as she opened it "about 30 degrees, this force, the door swung open, that it flew out of my hand. It opened all the way *** about 180 degrees."

¶ 9 When asked if she knew what caused the door to swing open, plaintiff responded: "I don't know." When asked if she knew whether the wind moved the door, she said: "Honestly, I do not know. I am trying to play the scene over and over again. How could this happen?"

¶ 10 Plaintiff immediately felt pain in her foot. When she looked down, she saw blood on her foot and her sandal was five feet away from her. A store employee called an ambulance for her.

¶ 11 At the hospital, plaintiff received eight stitches on her right foot. Plaintiff later went to see Dr. Elipas, a foot specialist who discovered the fifth toe of plaintiff's right foot was fractured. She continued to visit Dr. Elipas for pain treatment. Dr. Elipas has recommended surgery to alleviate the pain.

¶ 12 In her deposition, Ms. Vessia stated the day was "pretty windy," based on the fact her hair was sticking to her lip gloss. Ms. Vessia testified that she had entered the store approximately 30 seconds before plaintiff and did not see the incident. Additionally, during Ms. Vessia's deposition, the following exchange took place:

"Q. Okay. You said the door seemed light to you?

A. Uh-huh.

Q. Okay. How did the door seem light? In relation to what?

A. Like a normal door. Just it seemed light because I think it was aluminum.

Q. Did it seem lighter than the door you would have in your home?

A. Yes.

Q. Did it seem lighter than any other door that you've gone into in stores?

A. Yeah, I could say that.

Q. Okay. You don't know how many pounds of weight or anything like that, do you?

A. No. No."

¶ 13 Ms. Vessia said she had no difficulty opening the door on July 12, 2007. She also asserted that she had no problems with the door on prior visits to the store and had no difficulties opening or closing the store's door on visits after the incident.

¶ 14 Ms. Vessia testified she did not recall seeing a "door governor," which controls the rate at which a door opens, but that she had "no idea" if the door had a "governor." Her deposition testimony included the following colloquy:

"Q. Is there any kind of mechanical mechanism or was it just a normal door that you would open?

A. Just a normal door that I would open.

Q. It didn't open automatically or anything like that?

A. No.

Q. Okay. So you had to physically pull on the door to open it?

A. Yeah.

Q. Okay. How far did you open it?

A. All the way I guess."

On cross-examination, she also testified as follows:

"Q. Did you notice anything different about how it was to open the door back on the

day of the event, July 12th, 2007?

A. Not anything different. Just I know that because the wind maybe it was lighter.

Q. The door was lighter?

A. Yeah?"

¶ 15 Ms. Vessia testified that she heard plaintiff on that date tell store employees that the door hit her toe. According to Ms. Vessia, plaintiff at some later time told her that "a gust of wind just flew open the door as [plaintiff] was opening it so it was just [plaintiff's] force and the wind."

¶ 16 Valerie Merker, at her deposition, was shown a one-page paper of typed, unsigned statements relating to the incident, with her name and the names of Ms. Ortiz and Linda Grey, administrative manager of the store (Oliveri deposition exhibit number 4) and an accident report form (Oliveri deposition exhibit number 5). As to exhibit number 4, Ms. Merker said that she had typed the statements which proceeded her name and the name of Ms. Ortiz. According to Ms. Merker, Ms. Grey typed the statement which preceded her name on exhibit number 4 and filled out exhibit number 5, the accident report form.

¶ 17 Exhibit number 4 included the following statements above Ms. Merker's name:

"At the time of the incident, I was at the cash wrap. A woman was entering the store, and as she pulled the door open, it was caught by the wind. The bottom corner of the door caught one of her toes.

***

I did not actually see the incident happen, however, I know that on windy days gusts of wind cause the door to snap open upon entering."

Above Ms. Ortiz's name was the following statement:

"I turned around to look outside and I saw that a woman was coming into the store. The wind took her and the door as she was coming in the store ***."

Finally, above the name of Ms. Grey were the following statements:

"I was standing near the front door and looked up to greet the customers walking in. As I looked up the woman walking in was blown by a strong gust of wind. The door flew open knocking off her flip flop and catching her foot in the process ***."

Exhibit number 5, the accident report form, indicated that the door slammed on plaintiff's foot, her "pinkie toe [was] busted," and there were windy conditions in the area prior to the incident.

¶ 18 Ms. Merker testified at the deposition, consistent with her typed statement, that she had not seen plaintiff enter the store and had not seen any of what happened to plaintiff as set forth in the first part of her statement in exhibit number 4. At her deposition, Ms. Merker also explained her typed statement in exhibit number 4, as to the wind opening the door in the past, and said:

"Q. And then you say–well, what do you say next?

A. That on windy days, gusts of wind cause the door to snap open when you are entering.

Q. Now, is that something you've observed?

A. Well, yes. It does pull the door. But it's like any other door.

Q. Have you seen people have trouble with the door on windy days?

A. Not that I remember.

Q. Have you done anything to draw to the attention of Ulta that the door snaps open on windy days?

A. No. I never reported it.

Q. Did you tell me you don't remember when you made this statement?

A. No. I have no clue. I've never made a statement for anything like this."

¶ 19 In her deposition, Ms. Ortiz, a cashier, testified that she did not recall: (1) the incident; (2) whether she was working that day; or (3) whether she provided Ms. Merker with a statement. Ms. Ortiz further testified she never had trouble with the door to the store on windy days and never received or heard any complaints relating to the door.

¶ 20 On February 22, 2011, defendant filed a motion for summary judgment, arguing that plaintiff had not disclosed expert opinion testimony regarding the condition of the door, and the deposition testimony of plaintiff and Ms. Vessia did not establish negligence on its part. Defendant submitted the transcripts of the deposition testimony of plaintiff and her daughter in support of its motion.

¶ 21 Plaintiff, in response, argued that there was sufficient evidence that the wind caught the aluminum-framed glass door and caused plaintiff's injury, that the door was "inadequately controlled," and that defendant had notice of the door's dangerous condition. In support of her arguments, plaintiff submitted the transcript of the deposition testimony of Ms. Merker and exhibits number 4 and 5, which were discussed during Ms. Merker's deposition.

¶ 22 In its reply, defendant argued the unsigned statements of its employees did not conform to the requirements of Supreme Court Rule 191. Ill. S. Ct. R. 191 (eff. July 1, 2002). Defendant further argued that even if considered, the statements do not support plaintiff's claim that the door was unreasonably dangerous, only that there may have been a gust of wind.

¶ 23 On April 14, 2011, the circuit court entered a written order which stated that upon consideration of the briefs, and oral argument having been waived, defendant's motion for summary judgment was granted. No transcript was made of the proceedings in which the court announced its ruling.

¶ 24 Notwithstanding, plaintiff subsequently filed a motion to reconsider asserting the circuit court, when granting summary judgment, improperly commented on the issue of proximate cause which, she claimed, is one of fact and *sua sponte* without a formal motion to strike, stated it was not considering the accident report form (exhibit number 5), nor the exhibit containing the statements of defendant's employees (exhibit number 4) because these materials did not comply with Rule 191.

¶ 25 Plaintiff also argued the accident report form and the employee statements were admissible as admissions against interest, or as a business record, and did not need to comply with Rule 191. Plaintiff maintained these exhibits established both that defendant's negligence was the proximate

cause of her injury, and defendant had knowledge of the door's dangerous condition. In support of her motion for reconsideration, plaintiff attached the transcript of the deposition of Ms. Ortiz.

¶ 26 At a July 28, 2011, hearing on the motion to reconsider, the court stated it did not remember if it had struck the unsworn statements and accident report, or did not consider these exhibits in making its ruling. The court, however, recalled reading the exhibits and considering defendant's contention in its reply memorandum that the exhibits did not comply with Rule 191. After hearing the arguments, the court denied plaintiff's motion to reconsider. This timely appeal followed.

¶ 27 On appeal, plaintiff argues the circuit court erred in granting defendant's motion for summary judgment where it determined issues of fact which should properly be decided by the jury. Plaintiff maintains there exists an issue of fact as to the proximate cause of her injury to defeat summary judgment where defendant had notice that on windy days the door snapped open, but let the unsafe condition remain.

¶ 28 Discussion

¶ 29 Summary judgment is properly granted where the pleadings, depositions, and admissions on file, together with any affidavits, indicate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2010). Although a drastic means of disposing of litigation, summary judgment is, nonetheless, an appropriate measure to expeditiously dispose of a suit when the moving party's right to the judgment is clear and free from doubt. *Gaston v. City of Danville*, 393 Ill. App. 3d 591, 601 (2009).

¶ 30 A "defendant moving for summary judgment bears the initial burden of production." *Nedzvekas v. Fung*, 374 Ill. App. 3d 618, 624 (2007). The defendant may satisfy this "burden of production in two ways: (1) by affirmatively showing that some element of the case must be resolved in his favor [citation], or (2) by establishing 'that there is an absence of evidence to support the nonmoving party's case.' " (Citation omitted.) *Id.* When the defendant has met this initial burden, the burden shifts to "the plaintiff to present a factual basis which would arguably entitle her to a

favorable judgment." *Id.* A plaintiff is not required to prove her case in response to the motion for summary judgment, but must present evidentiary facts to support the elements of the cause of action. *Richardson v. Bond Drug Co. of Illinois*, 387 Ill. App. 3d 881, 885 (2009).

¶ 31 The court must examine the evidentiary matter in a light most favorable to the nonmoving party (*Pavlik v. Wal-Mart Stores, Inc.*, 323 Ill. App. 3d 1060, 1063 (2001)), and construe the evidence strictly against the movant and liberally in favor of the nonmovant (*Espinoza v. Elgin, Joliet and Eastern Ry. Co.*, 165 Ill. 2d 107, 113 (1995)). When reviewing an order granting summary judgment, "we conduct a *de novo* review of the evidence in the record." *Id.*

¶ 32 As an initial matter, we observe defendant did not file a motion to strike plaintiff's submitted material–exhibits number 4 and 5–as insufficient under Supreme Court Rule 191 (Ill. S. Ct. R. 191 (eff. July 1, 2002)) or, on any other basis. The record is unclear as to whether the court struck or considered these exhibits in making its ruling. That said, it was defendant's burden to assert objections regarding plaintiff's exhibits and to obtain a ruling on them. See *Cordek Sales, Inc. v. Construction Systems, Inc.*, 382 Ill. App. 3d 334, 383 (2008) (sufficiency of affidavits cannot be tested for first time on appeal where no objection made below). Since defendant failed to do so, exhibits number 4 and 5 may be considered on appeal. *Id.*

¶ 33 We also note some confusion regarding the nature of plaintiff's injury suit. Plaintiff, in her first-amended complaint, labeled the first count as a premises-liability claim. However, the complaint did not contain allegations as to defendant's notice of an unsafe condition which, as will be discussed, is an element of such a cause. Plaintiff, in response to the summary judgment and on appeal, described her action as a "negligence case," but presented arguments as to defendant's notice of an "alleged defect." Defendant was entitled to summary judgment under either theory of liability.

¶ 34 To succeed in a cause of action for negligence, a plaintiff must establish: (1) defendant owed plaintiff a duty of care; (2) defendant breached that duty; and (3) plaintiff suffered an injury proximately caused by the breach of that duty. *Doria v. Village of Downers Grove*, 397 Ill. App. 3d

752, 757 (2009). "The burden to prove all the elements of a negligence claim remains on the plaintiff throughout the proceedings. It is not the defendant's burden to disprove negligence." *Krywin v. Chicago Transit Authority*, 238 Ill. 2d 215, 233 (2010).

¶ 35 Defendant does not dispute plaintiff was a business invitee and lawfully seeking entrance to its premises at the time of her injury. Defendant, therefore, owed plaintiff a general duty of care and, in particular, a duty to provide her a reasonably safe means of ingress and egress to its business. *Reed v. Galaxy Holdings, Inc.,* 394 Ill. App. 3d 39, 42 (2009). Under the circumstances here, to show a breach of this duty, plaintiff must show some unsafe condition which was the result of defendant's negligence or known to defendant, which caused her injury. See *Caburnay v. Norwegian American Hosp.*, 2011 IL App (1st) 101740, ¶¶ 45, 47-50 (summary judgment for defendant improper on negligence claim where deposition testimony showed that mat plaintiff was allegedly injured by was prone to buckling and unsecured); *Britton v. University of Chicago Hospitals*, 382 Ill. App. 3d 1009, 1010-11 (2008) (summary judgment for defendant proper where plaintiff was injured by shattered glass in revolving door).

¶ 36 Additionally, to maintain a premises-liability claim, a plaintiff must establish that defendant knew about a condition on its premises causing an unreasonable risk of harm to its customers or, that defendant would have discovered the condition by the exercise of reasonable care. *Genaust v. Illinois Power Co.*, 62 Ill. 2d 456, 468 (1976). "Our courts have interpreted this to mean that 'there is no liability for [landowners] for *dangerous or defective conditions on the premises* [emphasis added] in the absence of the landowner's *actual* or *constructive knowledge* [of those conditions].' " (Emphasis in original.) *Caburnay* at ¶43 (quoting *Tomczak v. Planetsphere, Inc.*, 315 Ill. App. 3d 1033, 1038 (2000)).

¶ 37 Plaintiff's claim, as set forth in her complaint, was that defendant breached its duty of care by permitting its door to remain in an unreasonably unsafe condition, which allowed the door to be blown by the wind resulting in plaintiff's injuries. Defendant moved for summary judgment arguing

in part that plaintiff had no evidence of an unsafe condition. To survive summary judgment under either a general negligence or a premises-liability theory, plaintiff was required to offer evidentiary support of a specific unsafe or defective condition in the door. See *Britton*, 382 Ill. App. 3d at 1010-11 (to prevail on theory that defendant's negligent operation of revolving door caused his injuries in a premises liability action, plaintiff was required to come forth with some evidence tending to prove that a specified condition under defendant's control caused the glass in the door to break); *Zonta v. Village of Bensenville*, 167 Ill. App. 3d 354, 357-58 (1988) (summary judgment properly entered against plaintiff who was injured by window that broke when he leaned on it where plaintiff failed to offer any hint as to what defect in the window caused his injury, other than mere speculation that the glass might have been too thin); *Kimbrough v. Jewel Companies, Inc.*, 92 Ill. App. 3d 813, 817-18 (1981) (trial court properly granted defendant summary judgment where plaintiff admitted to not knowing what caused her to fall on defendant's stairwell, and there was no proof that the condition of the stairwell or alleged failure to comply with handrail ordinances caused plaintiff's injury). Plaintiff did not do so.

¶ 38 Plaintiff presented testimony that generally described the door as glass with aluminum framing, with side-by-side ingress and egress doors. Plaintiff did not present evidence that the door was broken, damaged, in disrepair, or installed improperly. Plaintiff presented no evidence of prior complaints or claims of injuries regarding the door to defendant's store. Plaintiff presented no expert evidence tending to show that the door's construction or use was defective or dangerous.

¶ 39 In her deposition, plaintiff testified that during the five years prior to her injury, she had been a customer of the store and never had a problem with the door. In addition, she never had a problem with the door when she visited the store after the incident. Plaintiff's daughter, Ms. Vessia, who entered the store just before plaintiff attempted to do so, recalled that she had no problems with the door on that day. Plaintiff's daughter also testified she had no difficulties with the door on previous visits to the store.

¶ 40 Defendant's employees, Ms. Merker and Ms. Ortiz, testified they never had any problems with the entrance door on windy days. They also testified that they knew of no prior claims of injuries or complaints about the door.

¶ 41 Plaintiff, in the trial court, suggested that the door was in an unreasonably unsafe condition because it did not have a governor or was not heavy enough. Plaintiff never substantiated these contentions beyond surmise. Ms. Vessia, in her deposition, described the door as "light" when compared to other doors, and felt "light" on the day of the incident because of the wind. Furthermore, the only evidence as to a governor was Ms. Vessia's testimony that she had no idea whether the door had one. The record contains no detailed evidence of how the door was controlled, its size, or actual weight. Plaintiff, in responding to the motion for summary judgment, did not present sufficient evidence for establishing that the door was unsafe because of its weight or because it had no controller.

¶ 42 In her brief on appeal, as to the door's condition, plaintiff states only: "The alleged defect is that the defendant failed to keep the entry door in a reasonably safe condition." Plaintiff then says Ms. Merker made a statement that the door would snap open in the wind. Plaintiff, having not presented arguments as to a specified unsafe condition in the door, which existed at the time of her injury, or arguments to support her contentions that the door was "light," or not controlled by a governor, has waived these points. Ill. S. Ct. R. 341 (eff. July 1, 2008); see also *Lozman v. Putnam*, 379 Ill. App. 3d 807, 824 (2008).

¶ 43 Plaintiff appears to argue that Ms. Merker's statement, that in the past the wind would cause the door to blow open, is circumstantial evidence of the existence of an unreasonable safe condition at the time of her injury which allowed the door to be blown by the wind. We disagree.

¶ 44 "Negligence may be established by using direct or circumstantial evidence." *Barker v. Eagle Food Centers, Inc.*, 261 Ill. App. 3d 1068, 1072 (1994). However, as the court in *Brett v. F. W. Woolworth Co.*, 8 Ill. App. 3d 334 (1972) stated:

> " 'Proof of a mere possibility is not sufficient. A theory can not be said to be established by circumstantial evidence, unless the facts are of such a nature and so related, as to make it the only conclusion that could reasonably be drawn. It can not be said one fact can be inferred, when the existence of another inconsistent fact can be drawn with equal certainty.' " (Citation omitted.) *Id*. at 337.

¶ 45 In her deposition, Ms. Merkel explained her written statement about the door in exhibit number 4, saying defendant's door "pulled" open with the wind "like any other door." Ms. Merkel's general statement–that the door opened with the wind in the past "like any other door"–without further elaboration of the surrounding circumstances of these incidents, and without discussion of the time period or frequency of these events, does not suffice to support plaintiff's theory that the door was in an unsafe condition at the time she was injured. Furthermore, Ms. Merkel did not see plaintiff open the door and try to enter the store on the day plaintiff was injured. Ms. Merkel, therefore, did not and cannot compare what happened to plaintiff with what may have happened to the door on any other occasion–particularly since plaintiff herself did not know what forced the door open. Even viewing the evidence in the light most favorable to plaintiff, her contention that an unreasonable condition existed at the time of her injury making the door unsafe was predicated upon conjecture.

¶ 46 Plaintiff failed to present an adequate factual basis showing the existence of a specified condition of the door which made it unsafe or posed a danger of harm. Plaintiff's failure to present such evidence in this case supports the trial court's entry of summary judgment in favor of defendant. See *Britton*, 382 Ill. App. 3d at 1011 (upholding summary judgment on negligence claim where plaintiff failed to demonstrate "a specified condition under the defendant's control caused plaintiff's injury."). Having made this finding, we need not address the other issues raised on appeal.

¶ 47 In light of the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 48 Affirmed.