2016 IL App (1st) 161038-U

FIRST DIVISION
November 28, 2016

No. 1-16-1038

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BRAULIA HURTADO,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 13 L 7304
	)	
COSTCO WHOLESALE CORPORATION,	)	Honorable
	)	Daniel T. Gillespie,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Connors and Justice Mikva concurred in judgment.

ORDER

¶ 1 ***Held*****:** We affirm the order of the trial court granting summary judgment in favor of defendant-appellee Costco Wholesale Corporation. Plaintiff has forfeited review of the denial of her motion to compel and we do not consider it.

¶ 2 Plaintiff-appellant, Braulia Hurtado (hereinafter plaintiff), brought this action against defendant-appellee, Costco Wholesale Corporation (hereinafter defendant), after she slipped and fell inside one of defendant's stores located in Bedford Park, Illinois. On August 12, 2012,

plaintiff was with her family shopping at a Costco store when she slipped and fell after stepping on an unknown liquid. Defendant answered the complaint but denied all allegations of negligence. After the close of discovery, defendant moved for summary judgment, arguing there were no facts plaintiff could rely on to show the substance was sold or related to defendant's operations or that defendant had actual or constructive notice of the liquid. The trial court agreed and on December 16, 2015, it granted defendant's motion for summary judgment. Plaintiff filed a motion to reconsider, which the trial court denied.

¶ 3 Plaintiff raises two issues on appeal. First, plaintiff argues the trial court abused its discretion in denying her motion to compel the production of a report and two recorded statements withheld by defendant based on a privilege claim. Next, plaintiff argues a genuine issue of material face remained as to how the spill formed and whether defendant inspected the spill location.

¶ 4 For the reasons set out more fully below, plaintiff has forfeited review of the denial of the motion to compel by failing to include the documents she sought to have produced in the appellate record before this court. Further, we affirm the trial court's entry of summary judgment in favor of defendant.

¶ 5 JURISDICTION

¶ 6 On December 16, 2015 the trial court granted defendant's motion for summary judgment and entered judgment in its favor. On January 15, 2016, plaintiff filed a motion to reconsider the trial court's grant of summary judgment in favor of defendant. The trial court denied plaintiff's motion to reconsider on March 15, 2016. On April 13, 2016, plaintiff filed a notice of appeal. Accordingly, this court has jurisdiction over this matter pursuant to Article VI, Section 6 of

the Illinois Constitution, and Illinois Supreme Court Rules 301 and 303. Ill. Const. 1970, art. VI, §6; Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); Ill. S. Ct. R. 303 (eff. May 30, 2008).

¶ 7 BACKGROUND

¶ 8 On June 25, 2013, plaintiff filed a one-count complaint seeking to recover damages for injuries which she sustained on August 12, 2012 when she slipped and fell on a "liquid oily substance" in the parking lot next to defendant's retail premises at 7300 South Cicero Avenue in Bedford Park, Illinois. The complaint alleged defendant was negligent in failing to maintain and inspect the property and in allowing a condition to remain on the property without warning customers. The complaint further alleged that as a result of defendant's negligence, the plaintiff fell and sustained bodily injuries.

¶ 9 On July 25, 2013, defendant filed an answer and affirmative defenses. Defendant admitted it owned, operated, managed, and maintained the retail store and parking lot and that the plaintiff was a patron of the store. Defendant denied all allegations of negligence. Defendant further alleged as its affirmative defense that the plaintiff was comparatively negligent and/or solely at fault in failing to keep a proper lookout for her own safety.

¶ 10 Thereafter, the plaintiff obtained leave to file an amended complaint to change the location of her fall from the parking lot to the refrigerator area located inside the store. Costco filed an answer and affirmative defenses to the amended complaint consistent with the answer and affirmative defenses to the original complaint. The parties then proceeded to discovery.

¶ 11 During the discovery phase, the depositions of plaintiff, her daughter, and several store employees were taken. Plaintiff testified that on August 12, 2012, she was with her daughter and granddaughter at defendant's store. While walking down an aisle and while holding her granddaughter, plaintiff slipped on a liquid. She did not know if the liquid was water or oil, nor

could she recall the type of merchandise displayed on the shelves near where she fell. She further stated that nothing was blocking her view or distracting her. Plaintiff did not know how long the liquid had been on the floor. She denied telling people she slipped in the parking lot or that she slipped on oil in the parking lot. She stated that her fall was so hard she did not pay any attention to what she had slipped on and could not explain why a doctor's note she produced stated that she slipped on oil in the parking lot. Plaintiff's daughter filled out the incident report.

¶ 12 In answers to interrogatories, the plaintiff stated she slipped and fell by the "oil merchandise" in the refrigerator area and it was unknown to her when defendant became aware of the spill. In response to the plaintiff's production request, defendant withheld a report and two tape recorded statements. Defendant refused to produce a report completed by the store's front end manager, Edward Butner, asserting attorney-client, work product, and insured-insurer privileges. Similarly, defendant asserted insured-insurer privileges with respect to the tape recorded statements given by Bunter and Jeremy Battistoni, a loss prevention employee.

¶ 13 The plaintiff filed a motion to compel production of these three items. In its response, defendant asserted the report and the two tape recorded statements were protected by various privileges. On November 5, 2014, the trial court ordered an *in camera* inspection of the documents. On December 22, 2014, the trial court, having reviewed the three items, denied plaintiff's motion to compel.

¶ 14 On November 16, 2015, the defendant filed a motion for summary judgment asserting plaintiff could not identify the substance and could not demonstrate defendant had actual or constructive notice of the liquid on the premises. After briefing, the trial court granted defendant's motion and entered judgment in its favor on December 16, 2015. On January 15,

2016, plaintiff filed a motion to reconsider the grant of summary judgment in favor of defendant, but the trial court denied this on April 13, 2016. This timely appeal followed.

¶ 15 ANALYSIS

¶ 16 Before proceeding to the merits of plaintiff's appeal, defendant asks us to strike plaintiff's brief for failure to comply with certain Illinois supreme court rules. Defendant argues plaintiff's statement of facts fails to set forth "facts necessary to an understanding of the case" along with the appropriate citation to the record in conformity with Illinois supreme court rule 341(h)(6). Ill. S. Ct. R. 341(h)(6) (eff. Feb. 6, 2013). The defendant also argues plaintiff's appendix fails to comply with Illinois Supreme Court Rule 342(a) because it does not contain a complete table of contents for the appellate record. R. 342(a) (eff. Jan. 1, 2005).

¶ 17 A party's brief that fails to substantially conform to the pertinent Illinois supreme court rules may justifiably be stricken. *Hall v. Naper Gold Hospitality LLC*, 2012 IL App (2d) 111151, ¶ 7. The purpose of the rules is to require parties to present clear and orderly arguments, supported by citations of authority and the record, so that this court can properly ascertain and dispose of the issues involved. *Hall*, 2012 IL App (2d) 111151, ¶ 7. Striking a party's brief, in whole or in part, is a harsh sanction and is appropriate only when the violations hinder our review. *Hall*, 2012 IL App (2d) 111151, ¶ 15. While defendant is correct in that plaintiff's statement of facts and appendix do not conform themselves to the applicable Illinois supreme court rules, the deficiencies are not so grievous as to prevent our consideration of the merits of this appeal.

¶ 18 On appeal, Plaintiff challenges the trial court's denial of her motion to compel production of an incident report and two tape recorded employee interviews. During discovery, defendant disclosed the existence of the report and interviews but withheld them from production based on

several different privilege claims. After plaintiff moved to compel the production of the three items, the trial court conducted an *in camera* inspection to determine whether they should be produced. On December 22, 2014, after inspecting the documents, the trial court found them to be privileged and denied the motion to compel.

¶ 19 It is well established that a trial court has considerable discretion in managing the discovery process before it. *TTX Co. v. Whitley*, 295 Ill. App. 3d 548, 553 (1995). A reviewing court will not disturb a discovery order absent an abuse of discretion, however a trial court does not have discretion to compel disclosure of privileged information or information otherwise exempted by statute or common law. *In re Marriage of Daniels*, 240 Ill. App. 3d 314, 324 (1992). The control over the discovery process includes the power to review discovery materials *in camera* to determine possible relevance. *Youle v. Ryan*, 349 Ill. App. 3d 377, 381 (2004).

¶ 20 Defendant argues plaintiff has forfeited review of this issue by failing to include the documents reviewed *in camera* in the appellate record. An appellant carries the burden of presenting a sufficiently complete record from which a reviewing court can determine whether there was the error claimed by the appellant. *Webster v. Hartman*, 195 Ill. 2d 426, 432 (2001) citing *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391 (1984). Where the issue on appeal relates to the conduct of a hearing or proceeding, this issue is not subject to review absent a report or record of the proceeding. Instead, absent a record, "it [is] presumed that the order entered by the trial court [is] in conformity with the law and had a sufficient factual basis." *Foutch*, 99 Ill. 2d at 392.

¶ 21 We agree with the defendant that plaintiff's failure to include the documents in the appellate record results in the forfeiture of the issue. A reviewing court can only determine if a trial court abused its discretion in denying the motion to compel after conducting an *in camera* review if the reviewed documents are before the appellate court so it can conduct its own *in*

camera review. *Deprizio v. MacNeal Memorial Hosp. Ass'n*, 2014 IL App (1st) 123206, ¶ 38 ("From our own *in camera* inspection of the records…"); *People v. Bean*, 137 Ill. 2d 65, 102 (1990) ("We have reviewed all of [the witness]'s mental health records and cannot say that the trial court abused its discretion."); *People v. Votava*, 223 Ill. App. 3d 58, 75 (1991) ("the defendant did not provide the victim's psychiatric records to this court, so a determination of whether the trial court abused its discretion is not possible."). Accordingly, the plaintiff's failure to include the three items as part of the appellate record prevents us from reviewing the issue and it has been forfeited.

¶ 22 Plaintiff next argues the trial court erred in granting summary judgment in favor of defendant. Summary judgment is proper where the pleadings, depositions, admissions and affidavits on file, viewed in the light most favorable to the nonmoving party, show that no genuine issue of material facts exists and the moving party is entitled to judgment as a matter of law. *Cochran v. George Sollitt Construction Co.*, 358 Ill. App. 3d 865, 872 (2005). Summary judgment is not proper where material facts are in dispute or reasonable persons might draw different inferences from the undisputed facts. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 43 (2004). We review the trial court's grant of summary judgment *de novo*. *Cochran*, 358 Ill. App. 3d at 872.

¶ 23 To state a cause of action for negligence, plaintiff must show that defendant owed her a duty, defendant breached that duty, and defendant's breach was the proximate cause of plaintiff's injury. *Hills v. Bridgeview Little League Ass'n*, 195 Ill. 2d 210, 228 (2000). "Where a business invitee is injured by slipping on a foreign substance on the premises, liability may be imposed if the substance was placed there by the negligence of the proprietor or his servants, or, if the substance was on the premises through acts of third persons or there is no showing how it got there, liability may be imposed if it appears that the proprietor or his servant knew of its presence, or that

the substance was there of sufficient length of time so that in the exercise of ordinary care its presence should have been discovered." *Miller v. National Ass'n of Realtors*, 271 Ill. App. 3d 653, 656 (1994). Where the substance is on the premises through the acts of a third party, the time element to establish knowledge or notice to the proprietor is a material factor. *Thompson v. Economy Super Marts, Inc.*, 221 Ill. App. 3d 263, 265 (1991). However, a store owner is not the insurer of the safety of its customers merely because they are on the premises. *Olinger v. Great Atlantic & Pacific Tea Co.*, 21 Ill. 2d 469, 475 (1961); *Dunlap v. Marshall field & Co.*, 27 Ill. App. 3d 628, 633 (1975).

¶ 24 When there is no direct evidence as how the foreign substance got on the premises, the question becomes what "circumstantial evidence is sufficient to sustain a reasonable inference that the substance was there through the act of the defendant or his servants." *Olinger*, 21 Ill. 2d at 475. If the substance is unrelated to the business and plaintiff can provide no evidence of actual or constructive notice, "defendant is entitled to a directed verdict, since there is no evidence from which it could be reasonably inferred that the substance was more likely to have been dropped by defendant's servants than by third persons." *Id.*

¶ 25 After reviewing the pleadings, depositions, and other material in the record in a light most favorable to the plaintiff, we agree with the trial court that defendant was entitled to summary judgment in its favor. In this case, plaintiff has put forth no direct or circumstantial evidence as to how the foreign substance came to be on defendant's floor. Additionally, there is no evidence as to what was the substance. The plaintiff could not remember the substance she slipped on, while her daughter described the substance as "clear" and "oil." However, an employee for the defendant testified that based on his observations, the substance was water. Accordingly, any determination as to what plaintiff slipped on would be pure speculation. Based

on an inability to identify the substance, plaintiff cannot show the substance was a product sold or related to defendant's business.

¶ 26 Moreover, plaintiff cannot demonstrate defendant had either actual or constructive notice of the spill. Neither the plaintiff nor her daughter knew how long the substance had been present when plaintiff fell. Plaintiff could not recall the merchandise being displayed in the area where she fell. Plaintiff did not notice any employee in the area before she fell and she stated that no employee ever told her they were aware of a spill in the area. Defendant's employees did not find any open bottles or leaks which would identify the source for the substance. Similarly, the employees responsible for performing hourly floor safety checks testified that they did not observe the presence of any liquid in the area where plaintiff fell during their safety walks. There is simply no evidence in the record, direct or circumstantial, which plaintiff can rely on to demonstrate defendant had actual or constructive notice of a substance or its source which proximately caused her injuries.

¶ 27 Based on the lack of evidence concerning what she slipped on, the exact location of the slip or that defendant had actual or constructive notice of the substance, plaintiff is unable to demonstrate defendant was negligent. Accordingly, liability may not be imposed and the defendant was entitled to summary judgment.

¶ 28 CONCLUSION

¶ 29 Based on the above, we affirm the trial court's entry of summary judgment in favor of defendant.

¶ 30 Affirmed.