2017 IL App (1st) 170286-U
No. 1-17-0286
Order filed December 26, 2017

Second Division

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IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

ROCHELLE BLOCKER,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellant,	)	
v.	)	No. 15 L 002854
KMART CORPORATION,	)	
Defendant-Appellee	)	The Honorable Daniel T. Gillespie Judge, presiding.

JUSTICE HYMAN delivered the judgment of the court.
Presiding Justice Neville and Justice Mason concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted summary judgment to the defendant store where the record contained insufficient facts to support an inference that store was responsible for liquid on the floor in which the plaintiff slipped and fell; the plaintiff did not establish the store had actual or constructive notice of the substance on the floor.

¶ 2 Plaintiff Rochelle Blocker slipped and fell in defendant Kmart's store and sued Kmart for her injuries, alleging that its negligent acts caused her fall. After discovery, Kmart moved for summary judgment, which the trial court granted. We affirm the entry of summary judgment in favor of Kmart, finding that Blocker failed to establish (i) the substance she slipped on was

placed on the floor by Kmart's employees or (ii) the employees had actual or constructive notice of the alleged dangerous condition. First, Blocker did not present any evidence showing the substance was sold by Kmart or was related to Kmart's operations. Second, the record contains no direct or circumstantial evidence demonstrating Kmart had actual notice of a substance that caused the fall or of its source. Finally, neither Blocker nor the employees knew how long the substance had been on the floor before Blocker fell.

¶ 3 Background

¶ 4 On July 4, 2013, a dry and sunny Fourth of July morning, Blocker went to her neighborhood Kmart with her neighbor, Melvin Thompson, for items to have a barbecue. Blocker testified at her deposition that the store was well-lit. As she pushed a cart full of groceries towards the cashier, she slipped in something wet. Blocker did not see anything on the floor before she fell. Afterwards, she looked at her shoes ("flip flops") and noticed they were wet. Blocker testified that there was an unobstructed view between where she fell and where store employees stood at both the cashiers and customer service station. After the fall, Blocker showed a store manager what she described as a long, clear line of liquid where she slipped.

¶ 5 Blocker denied that there was any brown liquid or pop on the floor. Blocker was shown photographs of the area where the incident occurred. Blocker pointed to a long line in the photographs as a substance that caused her to fall. The photographs also showed a brown spot on the floor, which she never saw before.

¶ 6 An incident report filled out on the same day and signed by Blocker stated "Walking to checkouts slipped in a puddle of pop was holding on to basket, right leg went down to floor, picked myself hurt whole right side [*sic*]."

¶ 7 Thompson testified at his deposition that he was with Blocker in the store. Thompson saw Blocker fall and then pull herself up on the cart. He had an unobstructed view from where he stood near the deli area. No wet floor warning signs were present. The only liquid Thompson saw on the floor was clear and did not look like it was tracked through the store.

¶ 8 Thompson did not see anyone cleaning the area before the spill. There were at least five employees around the area before the accident. Three Kmart employees were behind the service desk within view of the area. Two men were taking pictures when he returned to the aisle where the accident occurred. When Thompson was shown the photographs, he described a long line as the liquid that caused Blocker to fall. He could not identify the brown liquid shown in the photographs. Thompson and Blocker were inside the store for about an hour and a half.

¶ 9 Former Kmart human resource manager Catherine Jodlowski testified concerning Kmart's policies. Kmart informally relied on employees to periodically walk the aisles looking for spills or something "broken on the floor." If a spill was found, it was either cleaned up or covered until it could be cleaned up. Blocker slipped and fell near the front of the store. According to Jodlowski, the long, clear line in the photographs was fluorescent lighting reflection.

¶ 10 Former Kmart assistant manager Nizar Shurbaji testified that the store operated 24-hours a day. Customers would spill things on the floor daily. Kmart hired outside contractors to maintain the floor overnight. Each Kmart employee was responsible for checking for spills and if an employee saw a large spill, he or she would block it off with shopping carts, call for a cleaning crew, and remain there until someone came to remove it.

¶ 11 Shurbaji thought the spill that Blocker slipped in was "pop." Whenever a customer fell in the store, a manager would fill out an incident report, but Shurbaji did not do so for this incident.

Shurbaji remembered two women who fell in the store that day. The second woman was pregnant, but he did not remember whether Blocker fell first. Shurbaji did not have an independent recollection of Blocker being on the floor, but he remembered a "lady" being helped by an employee to a chair in front of the checkout area.

¶ 12 Shurbaji did not know why Blocker fell or the nature of the substance on which she slipped. Shurbaji pointed to a brown spot of pop on the floor in the photographs that was involved in an incident with the second woman. He did not know how long the brown pop was on the floor, but he assumed that Blocker slipped on the same spill as the other woman. The photographs showed an apron on the floor; Shurbaji had covered the spill with his apron. Shurbaji's impression was that the line shown in the photographs was a reflection of lighting from a ceiling fixture.

¶ 13 Blocker sued Kmart for negligence. The trial court granted Kmart's motion for summary judgment.

¶ 14 Analysis

¶ 15 As a preliminary matter, we note that Blocker's brief states the following: "The court noted that the issue is whether the Defendant had notice of the spill. Additionally, the court noted the fact that there may have been Kmart employees nearby is just as likely to show that they did not have notice as it was to show that they did have notice. Last, the court noted that under case law it would involve more speculation than it would reasonable inference in the circumstances." Blocker cites to the record by including "(C_)" and two "*id.*" citations without referring to a page in the record. After reviewing the record, we were able to locate two handwritten orders signed by the trial judge: one entered November 8, 2016, granting Kmart's motion for summary judgment, and a second order entered January 17, 2017, denying Blocker's motion to reconsider.

Neither order nor anything else in the record sets forth what Blocker says the trial court "noted." We admonish Blocker to comply with Illinois Supreme Court Rule 341 (h)(6) (eff. Jan. 1, 2016), which requires the appellant's statement of facts to "contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment, and with appropriate reference to the pages of the record on appeal."

¶ 16 Summary judgment is appropriate only when the "pleadings, depositions, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2012). Summary judgment should be denied "'where reasonable persons could draw divergent inferences from the undisputed material facts or where there is a dispute as to a material fact.'" *Linh Phung Hoang Nguyen v. Nhutam Lam*, 2017 IL App (1st) 161272, ¶ 19. (quoting *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 113-14 (1995)).

¶ 17 "To recover damages based on negligence, plaintiff must allege and prove that defendant owed a duty to plaintiff, that defendant breached that duty, and that the breach was a proximate cause of plaintiff's injuries." *Richardson v. Bond Drug Co. of Illinois*, 387 Ill. App. 3d 881, 885 (2009). Although a plaintiff need not prove his or her case at the summary judgment stage, he or she must present evidentiary facts to support the elements of the cause of action. *Id.* (citing *Helms v. Chicago Park District*, 258 Ill. App. 3d 675, 679 (1994)). We review a grant of summary judgment *de novo*. *Seitz-Partridge v. Loyola University of Chicago*, 409 Ill. App. 3d 76, 82 (2011).

¶ 18 The general rule is that liability will be imposed where a business invitee is injured by slipping and falling on a foreign substance on the premises if: (i) the substance was placed there by the negligence of the owner or its employees; (ii) the owner or its employee knew of its

presence; or (iii) the owner had constructive notice of the substance because it "was there for a sufficient length of time so that in the exercise of ordinary care its presence should have been discovered." *Olinger v. Great Atlantic & Pacific Tea Co.,* 21 Ill. 2d 469, 474 (1961); *Hayes v. Bailey,* 80 Ill. App. 3d 1027, 1030 (1980) (time element material factor where plaintiff alleges constructive notice).

¶ 19 Blocker argues (i) she was not required to prove notice when disputed material facts could show a dangerous condition caused by the actions of Kmart's employees; and (ii) Kmart had constructive notice of the spill. Blocker did not establish that she or the employees knew how long the substance had been there before she fell. There is no direct evidence in the record that can demonstrate Kmart had actual or constructive notice of a substance that caused the fall or its source.

¶ 20 In the absence of direct evidence, the question becomes "what circumstantial evidence is sufficient to sustain a reasonable inference that the substance was there through the act of defendant or his servants." *Olinger,* 21 Ill. 2d at 475. In *Olinger,* the plaintiff was a business invitee to whom defendant store owed "a duty of exercising ordinary care in maintaining the premises in a reasonably safe condition." *Id.* at 473. The Illinois Supreme Court held that, to defeat the defendant's motion for summary judgment, the plaintiff had to present "some" evidence from which it could be inferred that it was more likely the defendant's employee, rather than a customer, spilled shampoo on the floor. *Id.* at 475-76. The plaintiff presented no evidence that the location of the substance—about five feet from a check-out aisle—or the defendant's business practice made it more likely that an employee, rather than a customer spilled the shampoo. *Id.* While proof existed that the defendant sold the foreign substance, the plaintiff

presented no evidence other than the presence of the substance and the injury. Thus, the trial court properly entered summary judgment for defendant. *Id.*

¶ 21 Similar facts appear in *Richardson v. Bond Drug Co. of Illinois*, 387 Ill. App. 3d 881, 882 (2009). There, the plaintiff argued that the trial court erred in granting summary judgment where the evidence created fact questions regarding (i) whether a dangerous condition existed, whether defendant had notice of the dangerous condition, (ii) whether there was a sufficient nexus between defendant's conduct and plaintiff's injury, and (iii) whether the defendant exercised reasonable care in maintaining its premises. *Id.* at 882. The plaintiff slipped on a wet floor but he did not know what caused his fall, but he assumed the floor was wet because his clothes were wet after he fell. *Id.* at 885. This court concluded: "[s]ince the factual allegations in the complaint and the deposition testimony of the witnesses do not show with any measure of probability that liquid was on the floor prior to plaintiff's fall, plaintiff has failed to present sufficient evidence of a causal nexus between his injuries and defendant's conduct." *Id.* at 886.

¶ 22 As in *Olinger* and *Richardson*, Blocker presents no evidence, direct or circumstantial, as to how the slippery substance came to be on the floor. Neither Blocker nor the employee's reports and depositions identify the substance on which she slipped. Nor did Blocker demonstrate the substance was a product sold by Kmart or related to Kmart's business. Blocker could not identify the substance on which she slipped, thus any determination of its identity involves speculation; Jadlonski thought the photographs showed only a reflection of the ceiling lights; and Shurbazi remembered the substance as "pop." Blocker presented no evidence that the substance was sold in the store or that the defendant's business practice made it more likely a store employee dropped the substance.

¶ 23 "[I]f the facts in the record point to the defendants as being responsible for the liquid substance on the floor, either directly or by reasonable inference, the plaintiff is entitled to submit her claim to a jury." *Ishoo v. General Growth Properties, Inc.*, 2012 IL App (1st) 110919, ¶ 23. On the other hand, unless a plaintiff can establish that the nature of the substance is related to the defendant's business and "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," judgment as a matter of law will be entered for a defendant. See *Olinger,* 21 Ill. 2d at 475. We find no material facts that must be resolved at a trial.

¶ 24 Notice

¶ 25 Without any evidence of the substance's origin, Kmart can only be held liable for plaintiff's injury if it had either actual or constructive notice of the hazard. See *Tomczak v. Planetsphere, Inc.*, 315 Ill. App. 3d 1033, 1039 (2000) (defendant liable if owner or employees knew of hazard or should have discovered hazard due to length of time it was present). Blocker failed to offer evidence that Kmart had actual notice or constructive notice of the presence of the substance or how long the substance had been there. "Generally, if a plaintiff is relying on proof of constructive notice, [he or] she must establish that the dangerous condition existed for a sufficient time or was so conspicuous that the defendant should have discovered the condition through the exercise of reasonable care." *Smolek v. K.W. Landscaping,* 266 Ill.App.3d 226, 228-29 (1994). "[S]ufficient notice of a dangerous condition may give rise to a breach of duty by the defendants if the condition is left uncorrected." *Ishoo,* 2012 IL App (1st) 110919, ¶ 26.

¶ 26 *Ishoo,* relied on by Kmart, is analogous. See *id.,* ¶ 21 (no facts existed to either connect the defendant shopping mall owners to the presence of the liquid substance in which plaintiff slipped or establish notice). In *Ishoo*, the plaintiff claimed that she slipped and fell on an

unidentified substance on the floor in a shopping mall. *Id*. ¶ 4-5. The undisputed evidence showed that janitorial staff inspected the floors of the mall about every 30 minutes and that no spills had been noted before the plaintiff fell. We held that the defendants had neither actual nor constructive notice of the puddle before the accident because there was no evidence that the defendants knew that the puddle was there and no evidence of the length of time the puddle was on the floor. See *id*. ¶¶ 27-28. Absent evidence, Blocker cannot establish Kmart's constructive notice of the substance.

¶ 27 Blocker has only established several employees were present in the store but any connection to the substance requires speculation, which is insufficient to resist Kmart's motion for summary judgment.

¶ 28 Affirmed.