2017 IL App (1st) 170679-U

SECOND DIVISION
December 19, 2017

No. 1-17-0679

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

ADELA PANTOJA,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 15 L 12684
	)	
PETE'S FRESH MARKET 4700 CORPORATION,	)	Honorable
	)	Janet Adams Brosnahan,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE MASON delivered the judgment of the court.
Presiding Justice Neville and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the trial court's grant of summary judgment in favor of defendant grocery store owner where plaintiff customer failed to present any evidence that oil on which she fell was caused by defendant's employees or resulted from its negligence.

¶ 2 Plaintiff, Adela Pantoja, filed a two-count second amended complaint against Pete's Fresh Market 4700 Corporation (Pete's), stemming from a slip and fall injury that occurred at a

Pete’s grocery store located at 4700 South Kedzie, in Chicago. The circuit court granted summary judgment in favor of Pete's. We affirm.

¶ 3 On June 2, 2016, Pantoja filed a second-amended complaint asserting negligence (Count I) and alleging Pete's violated the Premises Liability Act (Count II). She sought damages for injuries she suffered as a result of slipping and falling on an oily substance, which she claimed was emitted from an improperly-maintained refrigerator near the bakery section of the grocery store. Pantoja alleged various failures by Pete's including, *inter alia*, failure to train and/or supervise the persons maintaining store equipment, failure to train and/or supervise employees to ensure the store was monitored and inspected for potentially dangerous and hazardous conditions, failure to properly maintain store equipment, and failure to warn Pantoja and others that a dangerous slippery substance was on the floor.

¶ 4 Pete's moved for summary judgment, arguing there was no evidence that Pantoja’s fall was the result of a defective refrigerator and there was no issue of fact regarding actual or constructive notice of the oily substance such that Pete's would be liable for Pantoja’s injuries. Pantoja responded that a question of fact existed regarding the source and cause of the oil on the floor thus precluding summary judgment in Pete's’s favor.

¶ 5 On April 28, 2015, Pantoya went to Pete’s, where she had shopped for years, between 11 a.m. and 12 p.m., to buy groceries. She was in the checkout line with her husband when she realized she had forgotten to get bread. When she went around the aisle for the bread, she slipped. About three feet from where she slipped, there was a small glass front refrigerator containing cold drinks near a post.

¶ 6 Pantoja testified that clear-colored oil caused her to slip. The oil did not have any smell, and she knew it was oil because it was slippery when she tried to get up. The oil was smeared on the ground and all over her hands and pants. Pantoja later threw away her clothes because they were covered in oil.

¶ 7 According to Pantoja, the oil was pooled in a two to three foot puddle "coming" from the area of the refrigerator. She did not look under the refrigerator to see if that was the source of the spill and she did not know how long the oil had been on the floor. Pantoja did not see any broken bottles or packaging on the floor, and testified that oil was not sold in this area of the store. Pantoja was eventually transported by ambulance to a hospital.

¶ 8 Antonio Vidal was working at Pete's as a cleaner at the time of the incident. Vidal's only duties are to clean and sweep. After he learned someone had fallen, he went to the bakery and cleaned up the oil. Vidal testified that he passes by the bakery every 15 minutes and, about five minutes before Pantoja fell, he looked at the floor of the bakery and did not see anything. He did not know how the substance got on the floor and did not see any broken glass. An inspection log indicates that Vidal checked the bakery areas at 12:03:48 p.m. and 12:04:44 p.m. and marked those locations "clear." This designation indicates that nothing was on the floor.

¶ 9 Peter Kakridas was the manager of the Pete's's store when Pantoja slipped. He filled out an accident report indicating that Pantoja slipped at 12:10 p.m. He did not know where the oil had come from. Kakridas explained that while all employees are told to pick things up off the floor, Vidal's sole job is to clean the store. Employees are trained to walk around the store every hour.

¶ 10 The circuit court, in a written order, granted summary judgment in Pete's favor. The order stated there was no evidence that Pete's negligence caused the dangerous condition (the oil on the floor), the refrigerator itself was not a dangerous condition, and there was no evidence of actual or constructive notice. Pantoja filed a timely notice of appeal.

¶ 11 On appeal, Pantoja argues the circuit erred in granting summary judgment to Pete's because there exists a genuine issue of material fact as to whether the oil on the floor was there as a result of Pete's negligence.[1] Specifically, she contends that Pete's, through its business practices, created the hazard on the floor that caused Pantoja to slip and fall.

¶ 12 Summary judgment is proper when the pleadings, affidavits, depositions, and admissions on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Mashal v. City of Chicago*, 2012 IL 112341, ¶ 49. Summary judgment is inappropriate when material facts are disputed, reasonable persons could draw different inferences from the undisputed facts, or reasonable persons could weigh the factors relevant to the legal standard at issue differently. *Seymour v. Collins*, 2015 IL 118432, ¶ 42. Summary judgment is a drastic means of disposing of litigation and should only be granted when the moving party's right to it is free from doubt. *Mashal*, 2012 IL 112341, ¶ 49. However, "[m]ere speculation, conjecture, or guess is insufficient to withstand summary judgment." *Sorce v. Naperville Jeep Eagle, Inc.*, 309 Ill. App. 3d 313, 328 (1999). We review *de novo* the trial court's grant of summary judgment.

[1] We note plaintiff's brief is in violation of Illinois Supreme Court Rule 342 (eff. July 1, 2017), which requires an appendix that includes, *inter alia*, "a complete table of contents, with page references, of the record on appeal." While compliance with Supreme Court Rules is mandatory and failure to abide may result in the brief being stricken, we nevertheless will address the merits of plaintiff's appeal. See *In re Marriage of Hluska*, 2011 IL App (1st) 092636, ¶¶ 57-58.

See *Hastings Mutual Insurance Co. v. Blinderman Construction Company, Inc.*, 2017 IL App (1st) 162234, ¶ 15.

¶ 13 To sustain her negligence action, Pantoja was required to present sufficient factual evidence to establish the existence of a duty of care owed by Pete's to her, a breach of that duty, and an injury proximately caused by the breach. See *Keating v. 68th and Paxton, L.L.C.*, 401 Ill. App. 3d 456, 470 (2010). The parties do not dispute that Pete's owed Pantoja, as a business invitee, a duty of reasonable care. See *Pavlik v. Wal-Mart Stores, Inc.*, 323 Ill. App. 3d 1060, 1063 (2001). But a business is not the insurer of a customer's safety. *Olinger v. Great Atlantic & Pacific Tea Co.*, 21 Ill. 2d 469, 477 (1961). In other words, it is not enough for a customer to prove that she slipped on a foreign substance on the premises of the business. In order to show a business owner beached its duty to an invitee for a slip and fall caused by a foreign substance, the plaintiff must show " '(1) the substance was placed there by the negligence of the proprietor or (2) [its] servant knew of its presence, or (3) the substance was there a sufficient length of time so that, in the exercise of ordinary care, its presence should have been discovered, *i.e.*, the proprietor had constructive notice of the substance.' " *Pavlik*, 323 Ill. App. 3d at 1063 (quoting *Hayes v. Bailey*, 80 Ill. App. 3d 1027, 1030 (1980)).

¶ 14 In her brief on appeal, Pantoja argues only that a triable issue of fact exists regarding whether Pete's negligence caused the oil to be deposited on the floor. She does not pursue her alternative theory that even if the oil spill was not the result of Pete's negligence, Pete's could still be liable because it had either actual or constructive notice of the condition and failed to remove it or warn customers of the hazard. Points not argued are waived. Ill. Sup. Ct. Rule 341(h)(7) (eff. Jan. 1, 2016). Consequently, we will not address the notice issue, except to note

that on this record there is no evidence that Pete's had either actual or constructive notice of the condition as the bakery area had been inspected about five minutes before Pantoja's fall and the floor was clean.

¶ 15 With respect to Pete's claimed negligence in creating the condition, Pantoja's theory was that Pete's allowed oil to be emitted from an improperly-maintained refrigerator and failed to monitor and inspect for potentially dangerous and hazardous conditions. And while this theory would be sufficient to support liability if borne out by the facts, it is insufficient to withstand summary judgment in the absence of any evidence.

¶ 16 Although the party opposing summary judgment is not required to prove her case at this stage, she must still adduce some evidence to support the elements of her cause of action. *Bank Financial, FSB v. Brandwein*, 2015 IL App (1st) 143956, ¶ 40. Pantoja failed to present any evidence that the oil leaked onto the floor as a result of the negligence of Pete's. See *Pavlik*, 323 Ill. App. 3d at 1063. Specifically, there is no evidence that Pete's failed to properly maintain the refrigerator or was aware of any leaks from this equipment. Rather, Pantoja's contention that the oil came from the refrigerator or that Pete's was negligent in maintaining the refrigerator is mere speculation, which is insufficient to defeat summary judgment. See *Sorce*, 309 Ill. App. 3d at 328. Consequently, Pantoja cannot establish a breach of a duty of care where there is no evidence the oil on the floor was caused by Pete's's employees or resulted from its own negligence.

¶ 17 Pantoja cites *Donoho v. O'Connoll's, Inc.*, 13 Ill. 2d 113, 118 (1958), for the proposition that the "slightest of proof" of a foreign substance related to the proprietor's business, together with "some further slight evidence" that allows for an inference the substance was not on the floor as a result of another invitee, is sufficient to create a triable issue regarding negligence. In

Donoho, the plaintiff slipped and fell on an onion ring as she walked past a stand-up table in the defendant's restaurant. *Donoho*, 13 Ill. 2d at 116. There was no direct evidence of how the onion ring got onto the floor, but some evidence was presented that a bus boy wiped the table clean 15 minutes before the plaintiff fell, and it was not uncommon for food to fall to the floor when tables were cleaned. *Id.* at 124.

¶ 18 Our supreme court in *Donoho* found that the issue of whether the onion ring, a product related to the defendant's business operations, was on the floor because of the activities of the defendant's employees presented a jury question. *Id.* at 124. Specifically, the court noted that "it could be reasonably inferred that it was more likely that the onion ring was on the floor through the act of defendant's servant, than by the acts of any customer." *Id.* at 125.

¶ 19 *Donoho* does not help Pantoja. Here there is no evidence that the oil on the floor was (i) related to Pete's business operations or (ii) in any way caused by an employee of Pete's. See *id.* Accordingly, as there was no evidence presented that the oil spill was caused by any activities of Pete's or its employees, *Donoho* is distinguishable.

¶ 20 *Newsom-Bogan v. Wendy's Old Fashioned Hamburgers of New York, Inc.*, 2011 IL App (1st) 092860, and *Weigman v. Hitch-Inn Post of Libertyville*, 308 Ill. App. 3d 789, 792 (1999), both cited by Pantoja, are likewise unhelpful as both cases predicated the business owner's liability on constructive notice of the condition that caused the plaintiff's fall, even though the condition was not caused by the owner's employees. Here we are concerned only with evidence of any negligence on Pete's part (*e.g.*, knowledge that the refrigerator was leaking or failure to maintain the refrigerator) that caused the oil spill. The only evidence of Pete's conduct in the record is that Vidal, consistent with store policy, checked the bakery area about 5 minutes before

Pantoja fell, and saw nothing on the floor. That Pantoja had oil on her hands and clothes after the fall, which we accept as true, is insufficient to create a genuine issue of material fact as to whether Pete's negligence was responsible for the presence of the oil on the floor in the first place. Consequently, summary judgment in Pete's favor was warranted.

¶ 21 We affirm the judgment of the circuit court of Cook County.

¶ 22 Affirmed.