IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

EDNA BALZEREIT,	:	
	:	C.A. No. S11C-03-016 WLW
Plaintiff,	:	
	:	
v.	:	
	:	
HOCKER'S SUPERTHRIFT, INC., d/b/a HOCKER'S SUPER CENTER	:	
	:	
Defendant.	:	

Submitted: April 23, 2012
Decided: July 24, 2012

ORDER

Upon Defendant's Motion for Summary Judgment.
Denied.

James P. Hall, Esquire of Phillips Goldman & Spence, P.A., Wilmington, Delaware; attorney for Plaintiff.

Colin M. Shalk, Esquire of Casarino Christman Shalk Ransom & Doss, P.A., Wilmington, Delaware; attorney for Defendant.

WITHAM, R.J.

FACTS

On March 11, 2011, Edna Balzereit ("Plaintiff") filed suit against G & E, Incorporated, Hocker's SuperThrift, Inc., d/b/a Hocker's Super Center, and Hocker's Grocery & Deli, LLC. On June 30, 2011, the parties filed a partial stipulation of dismissal with prejudice as to G &E Incorporated and Hocker's Grocery and Deli, LLC. Hocker's SuperThrift, Inc., d/b/a Hocker's Super Center ("Defendant") remains. Plaintiff's premises liability suit arose out of an alleged slip and fall that occurred while Plaintiff was shopping on Defendant's premises for a frozen dinner and some dairy products. She wore flat, leather-soled loafers with no laces. After proceeding to the frozen food aisle, she spoke with Defendant's employee restocking the freezer units with frozen dinners from a supply in the aisle. Plaintiff asked for a recommendation, and Defendant's employee provided Plaintiff with two frozen dinners. Plaintiff then proceeded toward the dairy section, seeing no safety cones or warning signs along the way. Reaching the intersection of the frozen food aisle and the dairy section, she felt her right foot hit something and she slipped as if her foot had hit ice. Plaintiff claims she became fully airborne before striking the floor. Plaintiff alleges permanent injuries and pain and suffering. On February 1, 2012, Defendant filed a motion for summary judgment.

Standard of Review

Summary judgment should be granted only if the record shows that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as

a matter of law.[1] The facts must be viewed in the light most favorable to the non-moving party,[2] and all reasonable inferences must be drawn in favor of the non-moving party.[3] Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law to the circumstances.[4] However, when the facts permit a reasonable person to draw but one inference, the question becomes one for decision as a matter of law.[5] The movant bears the burden of demonstrating that a genuine issue of material fact does not exist.[6] Should the movant satisfy his burden, then the non-movant must prove that genuine issues of material fact exist.[7] Mere bare assertions or conclusory allegations do not create a genuine issue of material fact for the non-movant.[8] If the non-moving party fails to make a sufficient showing on an essential element of his or her case for which he or

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[1]Super. Ct. Civ. R. 56(c).

[2]*Guy v. Judicial Nominating Comm'n*, 659 A.2d 777, 780 (Del. Super. 1995).

[3]*Lundeen v. Pricewaterhousecoopers, LLC*, 2006 WL 2559855 (Del. Super. Aug. 31, 2006).

[4]*Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

[5]*Wooten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

[6]*Lundeen*, 2006 WL 2559855, at *5 (citing *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979)).

[7]*Id.* (citing *Moore* 405 A.2d at 681).

[8]*Id.* (citing *Sterling v. Beneficial Nat'l Bank, N.A.*, 1994 WL 315365, at *3 (Del. Super. Apr. 13, 1994)).

she has the burden of proof, the moving party is entitled to judgment as a matter of law.[9]

"Negligence is never presumed from the mere fact that a plaintiff has suffered an injury."[10] When a business invitee brings a negligence action for personal injuries sustained while on a business' premises, he or she must demonstrate three elements: "(1) there was an unsafe condition in the defendant's store (2) which caused the injuries complained of, and (3) 'of which the storekeeper had actual notice or which could have been discovered by such reasonable inspection as other reasonably prudent storekeepers would regard as necessary.'"[11]

DISCUSSION

In its motion for summary judgment, Defendant makes two key arguments. First, Defendant argues that there is no evidence of an unsafe condition. Second, Defendant argues that there is no evidence that it knew or should have known of the purported unsafe condition. For the reasons enunciated below, the Court disagrees with these arguments.

Viewing the evidence in the light most favorable to the non-moving party, there is a genuine issue of material fact regarding evidence of an unsafe condition. Plaintiff

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[9] *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).

[10] *Rowan v. Toys 'R' Us, Inc.*, 2004 WL 1543238, at *2 (Del. Super. June 18, 2004) (citing *Wilson v. Derrickson*, 175 A.2d 400, 401 (Del. 1961)).

[11] *Hazel v. Delaware Supermarkets, Inc.*, 953 A.2d 705, 709 (Del. 2008) (quoting *Howard v. Food Fair Stores, New Castle, Inc.*, 201 A.2d 638, 640 (Del. 1964)).

states that her right foot slipped forward as if she was on ice.[12] Plaintiff notes that as she was laying on the floor, some time later she heard someone who identified himself as a current or former Millville emergency medical technician state to the store manager something to the effect of, "I think I see something on the floor over there."[13] Furthermore, Defendant's employee was restocking frozen foods, an activity known to potentially cause frost, condensation, and water leakage into the aisle.[14] Therefore, there is some evidence to support Plaintiff's *prima facie* case for the existence of an unsafe condition. Although Defendant notes that several people did not observe any substance or condition to speak of, as a result of Plaintiff's evidence above and the reasonable inferences that may be drawn therefrom, the issue of the existence of an unsafe condition is disputed and will therefore be determined by the jury.[15]

On the causation factor for the *prima facie* case in this premises liability negligence case, there are genuine issues of material fact. Defendant acknowledges that Plaintiff fell, and Plaintiff brings forth evidence that she was injured as a result

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[12]*See Rowan*, 2004 WL 1543238, at *2 (court took "slipping sensation" as a factor in establishing the element of a dangerous condition and in ultimately denying the motion for summary judgment).

[13]The identity of this man remains unknown. The Court makes no comment as to the admissibility of this statement.

[14]*See Hazel*, 953 A.2d at 711.

[15]*Messina v. Sipple*, 634 A.2d 938, 1993 WL 478080, at *1 (Del. Nov. 15, 1993) (TABLE) ("Credibility determinations are uniquely within the province of the jury as the trier of fact . . . .").

of the fall. Therefore, this element is established for the purposes of summary judgment, and there exists a genuine issue of material fact as to whether an unsafe condition caused Plaintiff's injuries.

Moving to the third element, Defendant urges the Court to apply two cases to the facts at bar. In the first, *Talmo v. Union Park Automotive*,[16] the Delaware Supreme Court affirmed the trial court's decision to grant a defendant's motion for summary judgment on the basis that plaintiffs failed to establish a *prima facie* case that Defendant acted negligently where plaintiff walked into stationary plate glass during daylight hours at an automotive dealership.[17] The *Talmo* Court noted, "[P]atrons must also exercise reasonable care: they have an affirmative obligation to 'exercise the sense of sight in a careful and intelligent manner to observe what a reasonable person would see.'"[18] Ultimately, the Delaware Supreme Court held, "Owners and occupiers of property are under no duty to warn persons on their premises about the existence of windows."[19]

Talmo is not helpful in the case at bar. Plaintiff's deposition testimony reveals that she was alert to the environment in front of her as she walked through the frozen

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[16]38 A.3d 1255, 2012 WL 730332 (Del. Mar. 7, 2012) (TABLE).

[17]*Id.* at *1.

[18]*Id.* at *2.

[19]*Id.* at *3.

food aisle toward the dairy section.[20] Further, there is no allegation of a clearly open and obvious condition, like a stationary plate glass window, in this case.

In the second case discussed by Defendant, *Corrado v. Super Fresh Food Market, Inc.*,[21] the Third Circuit affirmed a lower court ruling granting a motion for summary judgment in a slip and fall suit finding: "No evidence shows that the passage of customers through the produce section regularly caused fruit to fall to the floor. Thus, the Corrados are not entitled to a presumption that Super Fresh had notice of the fallen blueberries."[22]

The factual scenario in this case is distinguishable from *Corrado*. As noted above, there is evidence that Defendant's employee was restocking frozen foods from some sort of supply in the aisle where Plaintiff slipped. The situational setup of the case at bar case bears striking similarity to the *Hazel* case. In *Hazel*, while in the frozen foods section of a grocery store, plaintiff slipped and fell in the vicinity of a non-store employee restocking the ice cream freezers.[23] In a rare three to two decision, Justice Jacobs, for the majority, held:

> Experience shows that when frozen products are left outside a freezer for a period of time, frost and condensation may form and water may leak as a result. A reasonable jury could conclude that [defendant]

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[20]Pl.'s Dep. at 27-29.

[21]395 Fed.Appx. 864 (3d Cir. 2010).

[22]*Id.* at 867.

[23]953 A.2d at 707.

should have known that water might have been on the floor in the frozen food aisle, near the ice cream pallet where Hazel fell.

Under *Hazel*, a reasonable jury could find that restocking frozen goods puts a store on actual or constructive notice of any slippery conditions in the area. Plaintiff has met the third element of her *prima facie* case.

CONCLUSION

Defendant's motion for summary judgment is hereby ***denied***.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh