

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2018 CA 0924

REBECCA BOND

VERSUS

YOUR MOM'S RESTAURANT AND BAR

DATE OF JUDGMENT: DEC 21 2018

ON APPEAL FROM THE TWENTY-FIRST JUDICIAL DISTRICT COURT
NUMBER 2016-0002829, DIVISION F, PARISH OF TANGIPAHOA
STATE OF LOUISIANA

HONORABLE ELIZABETH P. WOLFE, JUDGE

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Investments, LLC, and Your Mom's
Restaurant and Bar, LLC

BEFORE: PETTIGREW, WELCH, AND CHUTZ, JJ.

Disposition: AFFIRMED.

9/27
Pettigrew, J. concurs and assigns
Reasons
Jew Welch J. concurs in result

CHUTZ, J.

Plaintiff-appellant, Rebecca Bond, appeals the trial court's judgment, granting a motion to strike filed by defendants-appellees, Foremost Signature Insurance Company, NGO & Fresnia Investments, LLC, and Your Mom's Restaurant and Bar, LLC (collective Your Mom's Restaurant) in response to her untimely filed opposition to summary judgment. Thereafter, the trial court granted Your Mom's restaurant's summary judgment and dismissed Bond's claims for damages arising from the injuries she alleged that she sustained after she slipped and fell at the restaurant. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On October 20, 2016, Bond filed a petition for damages, claiming that she fell inside Your Mom's Restaurant and averring entitlement to damages. After answering the lawsuit, Your Mom's Restaurant subsequently filed a motion for summary judgment on September 7, 2017, seeking dismissal of Bond's claims. A hearing was set for November 13, 2017.

On October 27, 2017, Bond obtained an unopposed continuance of the summary judgment hearing, re-setting the matter to December 11, 2017. Bond subsequently filed a memorandum in opposition to Your Mom's Restaurant's motion for summary judgment on December 7, 2017, attaching to it excerpts of deposition testimony and an affidavit.

On December 11, 2017, the date of the summary judgment hearing, Your Mom's Restaurant filed a motion to strike Bond's opposition documents and, during argument, requested that the trial court preliminarily address the matter before taking up the motion for summary judgment. Bond orally argued her position, opposing the motion to strike and urging the trial court to deny the requested relief. The trial court concluded that because Bond had not filed her memorandum with attachments within fifteen days of the December 11, 2017 hearing, the opposition documents were

inadmissible. Your Mom's Restaurant then argued its entitlement to the unopposed motion for summary judgment, asserting that Bond was unable to sustain her burden of proof at trial. The trial court agreed, granted summary judgment, and dismissed Bond's claims. A judgment in conformity with the trial court's rulings was signed on December 29, 2017. Bond devolatively appealed.

DISCUSSION

Appellate courts review the grant or denial of a motion for summary judgment de novo under the same criteria governing the district court's determination of whether summary judgment is appropriate. *Schultz v. Guoth*, 2010-0343 (La. 1/19/11), 57 So.3d 1002, 1005-06. A motion for summary judgment shall be granted only if the pleadings, memoranda, affidavits, depositions, answers to interrogatories, certified medical records, written stipulations, and admissions admitted for purposes of the motion for summary judgment show there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966A(3) & (4).

Unless extended by the court and agreed to by all of the parties, a motion for summary judgment shall be filed, opposed, or replied to in accordance with the following relevant provisions: any opposition to the motion and all documents in support of the opposition shall be filed and served not less than fifteen days prior to the hearing on the motion; and any reply memorandum shall be filed and not less than five days prior to the hearing on the motion. No additional documents may be filed with the reply memorandum. La. C.C.P. art. 966B(2) & (3).

In ruling on the motion for summary judgment, the court may consider only those documents filed in support of or in opposition to the motion for summary judgment and shall consider any documents to which no objection is made. Any objection to a document shall be raised in a timely filed opposition or reply

memorandum. The court shall consider all objections prior to rendering judgment. La. C.C.P. art. 966D(2).

Here, it is undisputed that Bond failed to file her opposition memorandum with attachments within fifteen days of the December 11, 2017 hearing as required under Subsection B(2). She asserts that because Your Mom's Restaurant failed to raise the objection to the timeliness of her opposition documents in a reply memorandum, under Subsection D(2), the trial court was mandated to consider them. We disagree.

It is evident from the plain language of Subsection D(2), the objections to which these provisions direct themselves are those that are challenges to the quality of the evidence rather than to the admissibility of that evidence based on timely compliance with Subsection B(2). The language employed in Subsection D(2) supports this distinction because such objections are required to "be raised in a timely filed opposition or reply memorandum." Therefore, the admissibility of summary judgment evidence based solely on the lack of its timely submission under Subsection B(2) cannot fall within the scope of the provisions of Subsection D(2).

Because Bond did not file her opposition documents until four days before the summary judgment hearing, Your Mom's Restaurant was precluded from filing a reply memorandum raising any objection "not less than five days prior to the hearing on the motion" by Bond's untimeliness. Because Article 966 does not articulate a procedural vehicle by which a mover may point out to the court the untimeliness of opposition documents, Your Mom's Restaurant chose to employ a motion to strike. While Bond has correctly pointed out that under the present version of Article 966, the motion to strike is no longer used to object to the evidentiary value of attachments to an opposition to summary judgment, see *Adolph v. Lighthouse Prop. Ins. Corp.*, 2016-1275 (La. App. 1st Cir. 9/8/17), 227

So.3d 316, 320, we find no error where, as here, the motion to strike was directed to the admissibility of the opposition documents based on their untimeliness. See and compare *Lewis v. Old Republic Ins. Co.*, 2017-456 (La App. 3d Cir. 8/23/2017), 226 So. 3d 557, 559 (where mover filed a motion to strike, trial court had no discretion to allow a late-filed opposition to motion for summary judgment as mandated by La. C.C.P. art. 966 and committed reversible error by entertaining the late-filed pleading and exhibits). See also *Buggage v. Volks Constructors*, 2006-0175 (La. 5/5/06), 928 So.2d 536 (per curiam) (holding that the time limitation established by La. C.C.P. art. 966B for the service of affidavits in opposition to a motion for summary judgment is mandatory and finding no abuse of discretion by the trial court's exclusion as inadmissible affidavits not timely filed).

We note that a party filing a motion is required to serve a memorandum in support of the motion to all other parties at least fifteen calendar days before the hearing, unless the court sets a shorter time; and service of an opposition memorandum to the motion is required to be made at least eight calendar days before the hearing. See La. Dist. Ct. Rule 9.9(b) & (c). Failure to comply with these deadlines subjects the party to forfeiture of oral argument at the trial court's discretion. See La. Dist. Ct. Rule 9.9(e) ("Parties who fail to comply with paragraphs (b) and (c) of this Rule may forfeit the privilege of oral argument."). The trial court allowed Your Mom's Restaurant to orally argue the motion to strike although it was not raised until the date of the hearing. Additionally, Bond was permitted to orally argue her opposition to the motion.¹ Accordingly, we find no error in the trial court's grant of Your Mom's Restaurant's motion to strike Bond's

¹ Bond filed her memorandum in opposition to the motion to strike into the record subsequent to the hearing on December 13, 2017.

opposition memorandum with the attachments under the procedural posture of this case.

On appeal, Bond maintains that with the attachments, she was able to produce factual support sufficient to demonstrate material issues of fact insofar as her entitlement to damages for having slipped and fallen in the restaurant. Although she does not raise any contentions with the trial court's grant of summary judgment in the absence of the untimely submitted documents, we nevertheless review the record de novo to ensure summary judgment is warranted.

The burden of proof on a motion for summary judgment rests with the mover. But if the mover will not bear the burden of proof at trial on the issue that is before the court on the motion for summary judgment, the mover's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court the absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. La. C.C.P. art. 966D(1).

In a negligence claim brought against a merchant by a person lawfully on the merchant's premises for damages as a result of an injury, death, or loss sustained because of a fall due to a condition existing in or on a merchant's premises, the claimant shall have the burden of proving, in addition to all other elements of her cause of action that, among other things, the merchant either created or had actual or constructive notice of the condition which caused the damage, prior to the occurrence. La. R.S. 9:2800.6B(2). "Constructive notice" means the claimant has proven that the condition existed for such a period of time that it would have been discovered if the merchant had exercised reasonable care. La. R.S. 9:2800.6C.

Your Mom's Restaurant submitted Bond's answer to an interrogatory in response to a request that she "give a concise description of the way in which the incident ... occurred." Bond stated, "There was a large amount of water on the floor

which caused me to fall.” Additionally, Bond’s deposition excerpts that Your Mom’s Restaurant attached to its motion for summary judgment established that after she ordered a Coke, while waiting for others to arrive, she walked down a hallway and exited the building, where she smoked a cigarette in an alleyway. After about five minutes, she returned through the same door and, as she stepped into the hallway with her right foot, she slipped. Recalling that it had rained recently and the alleyway was wet, Bond testified that she did not see any water when she exited out of the building or immediately before she fell. She could not identify any Your Mom’s Restaurant employee who was aware that the water was present on the floor where she slipped and fell and acknowledged that she had not advised any employee of the existence of the water before her fall.

With this showing, Your Mom’s Restaurant pointed out the absence of factual support that would allow the trier of fact to find that the merchant either created, or had actual or constructive notice of, the condition which caused the damage prior to the slip and fall as she was required to do under La. R.S. 9:2800.6B. See *White v. Wal-Mart Stores, Inc.*, 97-0393 (La. 9/9/97), 699 So.2d 1081, 1084 (“A claimant who simply shows that the condition existed without an additional showing that the condition existed for some time before the fall has not carried the burden of proving constructive notice as mandated by the statute.”). Accordingly, we find no error in the trial court’s grant of summary judgment and dismissal of Bond’s claims.²

DECREE

For these reasons, the trial court’s judgment, granting the motion for summary judgment filed by defendants-appellees, Foremost Signature Insurance Company,

² Your Mom’s Restaurant contends that Bond was also unable to sustain her burden of proving the condition presented an unreasonable risk of harm to her and that risk of harm was reasonably foreseeable as required under La. R.S. 9:2800.6B(1). Because we have determined that Bond could not establish the requirements of La. R.S. 9:2800.6B(2), we pretermite a discussion of whether the attachments to Your Mom’s Restaurant’s summary judgment also established an absence of factual support that the large amount of water on the floor on which Bond alleged she fell presented an unreasonable risk of harm to her and that risk of harm was reasonably foreseeable.

NGO & Fresnia Investments, LLC, and Your Mom's Restaurant and Bar, LLC, after finding Bond's opposition documents inadmissible due to her failure to timely comply with the provisions of La. C.C.P. art. 966B(2), is affirmed. Appeal costs are assessed against plaintiff-appellant, Rebecca Bond.

AFFIRMED.

REBECCA BOND

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BEFORE: PETTIGREW, WELCH, AND CHUTZ, JJ.

 PETTIGREW, J., CONCURS, AND ASSIGNS REASONS.

I agree with the majority's legal analysis of the current La. Code Civ. P. art. 966 on summary judgments and the jurisprudence interpreting same.

However, because of the constant amendments to Article 966 by the legislature, the hyper technical substance of said article, and the lack of discretion given to the trial courts, I have concerns whether the party litigants are actually receiving due process and justice under the current version of Article 966.