TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-19-00774-CV

Gloria Galvan, Appellant

v.

Camden Property Trust and Camden Property Management, Appellees

FROM THE 201ST DISTRICT COURT OF TRAVIS COUNTY
NO. D-1-GN-16-002994, THE HONORABLE TODD A. BLOMERTH, JUDGE PRESIDING

MEMORANDUM OPINION

Gloria Galvan appeals an order granting Camden Property Trust's no-evidence motion for summary judgment on Galvan's premises liability suit. We will affirm.

BACKGROUND

Galvan was a tenant of an apartment complex owned by Camden. In July 2014, she was walking her dog at the apartment complex near buildings 7 and 8 when she stepped into a hole in a grassy area which caused her to fall and suffer serious injuries, including a foot injury that required the amputation of her toe. Galvan sued Camden for premises liability and negligence.[1] Camden filed a no-evidence motion for summary judgment, asserting that Galvan

[1] Although Galvan's petition alleges both premises liability and negligence, her claim sounds in premises liability, and her brief discusses only the elements of premises liability. *See United Scaffolding, Inc. v. Levine*, 537 S.W.3d 463, 471 (Tex. 2017) (discussing the relationship between negligence and premises liability).

presented no evidence of an unreasonably dangerous condition at the complex and no evidence that Camden had actual or constructive knowledge of any such condition. In her response to the motion, Galvan quoted testimony from the deposition of Soledad Jaimes, one of the complex's employees. Galvan also attached an affidavit by Jaimes and a photograph of a hole.[2] Jaimes's affidavit says that she "witnessed the hole creating the dangerous condition," which she reported to "the management," but the affidavit does not specify when Jaimes saw the hole or when she reported it to the management. In her deposition, Jaimes could not confirm that she worked at the complex on or before the day of Galvan's incident. Instead, Jaimes testified that she herself stepped into a hole behind building 5 sometime after Galvan's incident. When asked what month and year that occurred, Jaimes responded "maybe it was 2015." After that, Jaimes told a Camden maintenance employee, that there were holes behind buildings 5 and 6, and she said that employee explained that Camden's maintenance workers knew about the holes behind those buildings, which were caused by past removal of trees. Jaimes confirmed that she did not have knowledge of the complex's condition prior to Galvan's incident, and she did not mention in her testimony the condition of the property near buildings 7 and 8.

Camden objected to Galvan's summary-judgment evidence, asserting that (1) Jaimes's affidavit was "unsworn, unnotarized, and not based on personal knowledge, and was hearsay"; (2) there is no evidence that the deposition excerpts contained in the motion were made under oath; and (3) the excerpts from Jaimes's deposition were unauthenticated, not based on personal knowledge, hearsay, and irrelevant. The district court sustained Camden's objections to the evidence and granted Camden's no-evidence motion for summary judgment. Galvan appeals,

[2] The response does not discuss the photograph, which contains a handwritten caption describing it as "another hole as an example in the area."

asserting the district court erred in sustaining the objections to her summary-judgment evidence and arguing that, as a result, the no-evidence motion should not have been granted.

ANALYSIS

In her first issue, Galvan complains that the district court erred in excluding her summary-judgment evidence. We review evidentiary rulings in summary-judgment proceedings for an abuse of discretion. *See Ordonez v. Solorio*, 480 S.W.3d 56, 67-68 (Tex. App.—El Paso 2015, no pet.); *Paciwest, Inc. v. Warner Alan Props., LLC*, 266 S.W.3d 559, 567 (Tex. App.—Fort Worth 2008, pet. denied); *Owens v. Comerica Bank*, 229 S.W.3d 544, 548 (Tex. App.—Dallas 2007, no pet.); *see also Caffe Ribs, Inc. v. State,* 487 S.W.3d 137, 142 (Tex. 2016) (stating that we review trial court's exclusion of evidence for abuse of discretion). A trial court abuses its discretion if it acts without regard for any guiding rules or principles. *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998). We must uphold the trial court's evidentiary ruling if there is any legitimate basis for the ruling. *Id.* Additionally, to establish reversible error on an evidentiary complaint, the complaining party must show that the trial court erred in excluding the evidence and that the error probably caused rendition of an improper judgment. Tex. R. App. P. 44.1; *Gee v. Liberty Mut. Fire Ins.*, 765 S.W.2d 394, 396 (Tex. 1989).

Camden objected to Jaimes's affidavit because there was no proof it was made under oath. *See* Tex. R. Civ. P. 166a(f) (describing requirements for an affidavit opposing a motion for summary judgment); *see also* Tex. Civ. Prac. & Rem. Code § 132.001(c)(2) (unsworn declarations); *Texas Dep't of Pub. Safety v. Caruana*, 363 S.W.3d 558, 564 (Tex. 2012) (stating an unsworn declaration may be used as long as it is subscribed as true under penalty of perjury). In her brief, Galvan does not argue that Jaimes's affidavit is competent summary-judgment

evidence. Instead, she "concedes this point" and states that the issue is "moot" because "the statements made in the written statement were also made in the deposition of the same witness." As a result, the sole disputed evidentiary issue is whether the district court erred in excluding the deposition excerpts that were included in the body of Galvan's response to the motion for summary judgment.

Galvan quoted Jaimes's deposition testimony regarding (1) Jaimes's experience of stepping in a hole near building 5 or 6, (2) a conversation in which Jaimes informed a Camden maintenance worker about the hole she stepped in behind buildings 5 and 6 and his response that the holes on the property resulted from tree removal, and (3) how, sometime after Galvan had been injured, Galvan showed Jaimes the hole Galvan had stepped in, and the hole was about a foot deep at the time when Jaimes observed it. Camden objected to the use of these excerpts on several grounds, including relevance. "Irrelevant evidence is not admissible." Tex. R. Evid. 402; *see also id.* R. 401(b) ("Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."). Jaimes's testimony does not indicate when any of Camden's employees initially might have become aware of any holes caused by tree removal, nor does her testimony indicate whether any Camden employee was ever made aware of any holes near buildings 7 or 8, where Galvan was injured, prior to Galvan's injury. "The supreme court has repeatedly held that the relevant unreasonably dangerous condition in a premise liability case is generally the condition at the time and place injury occurs." *City of Austin v. Leggett*, 257 S.W.3d 456, 470 (Tex. App.—Austin 2008, pet. denied); *see City of Dallas v. Thompson*, 210 S.W.3d 601, 602-03 (Tex. 2006) ("[T]he fact that materials deteriorate over time and may become dangerous does not itself create a dangerous condition, and the actual knowledge required for liability is of the dangerous condition

at the time of the accident, not merely of the possibility that a dangerous condition can develop over time."). Jaimes's testimony about different holes that she encountered at an unspecified period of time after Galvan's injury in a separate area of the complex is not relevant to whether Camden or its employees knew about the condition giving rise to Galvan's injury. Accordingly, we conclude that the district court did not err in sustaining Camden's objection to Jaimes's deposition testimony.

Moreover, because Jaimes's testimony does not indicate when Camden became aware of the holes on its premises, it would not have created a fact issue sufficient to survive summary judgment even had it not been excluded. We review a trial court's grant of summary judgment de novo. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). A no-evidence summary-judgment motion must assert that the nonmovant has produced no evidence of one or more essential elements of its claim. *Duvall v. Texas Dep't of Human Servs.*, 82 S.W.3d 474, 477 (Tex. App.—Austin 2002, no pet.); *see* Tex. R. Civ. P. 166a(i). Once the movant specifies the elements on which there is no evidence, the burden shifts to the nonmovant to produce summary-judgment evidence raising a genuine issue of material fact on the challenged elements. *Trilogy Software, Inc. v. Callidus Software, Inc.*, 143 S.W.3d 452, 459 (Tex. App.—Austin 2004, pet. denied) (citing Tex. R. Civ. P. 166a(i)). To raise a genuine issue of material fact, the nonmovant must set forth more than a scintilla of probative evidence as to the essential elements of the nonmovant's claim on which the nonmovant would have the burden of proof at trial. *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997). If the evidence supporting a finding rises to a level that would enable reasonable, fair-minded persons to differ in their conclusions, then more than a scintilla of evidence exists. *Id.* Less than a scintilla of evidence exists when the evidence is "so weak as to do no more than create a mere surmise or

suspicion" of fact, and the legal effect is that there is no evidence. *Jackson v. Fiesta Mart, Inc.*, 979 S.W.2d 68, 70 (Tex. App.—Austin 1998, no pet.) (citing *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983)). If the nonmovant fails to produce more than a scintilla of evidence of the challenged fact, the motion must be granted. *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004). A plaintiff asserting a claim for premises liability must show that (1) the defendant had actual or constructive knowledge of some condition on the premises; (2) the condition posed an unreasonable risk of harm to the plaintiff; (3) the defendant did not exercise reasonable care to reduce or to eliminate the risk; and (4) the defendant's failure to use such care proximately caused the plaintiff's personal injuries. *United Scaffolding, Inc. v. Levine*, 537 S.W.3d 463, 471 (Tex. 2017).

In this instance, Galvan did not meet her burden to raise a genuine issue of material fact about whether Camden had actual or constructive knowledge of the condition at the time and place injury occurred. *See Thompson*, 210 S.W.3d at 602-03 (stating "the actual knowledge required for liability is of the dangerous condition at the time of the accident"); *Leggett*, 257 S.W.3d at 470 (stating "the relevant unreasonably dangerous condition in a premise liability case is generally the condition at the time and place injury occurs"). "In determining whether a premises owner has actual knowledge, 'courts generally consider whether the premises owner has received reports of prior injuries or reports of the potential danger presented by the condition.'" *City of Dallas v. Reed*, 258 S.W.3d 620, 622 (Tex. 2008) (quoting *The Univ. of Tex.-Pan Am. v. Aguilar*, 251 S.W.3d 511, 513 (Tex. 2008) (per curiam)). If actual knowledge was not present at the time of the incident, but there is evidence to show that the unreasonably dangerous condition has existed long enough for the defendant to discover it upon reasonable inspection, constructive knowledge can be established. *CMH Homes, Inc. v. Daenen*, 15 S.W.3d 97, 102-03 (Tex. 2000).

Constructive knowledge cannot be established without evidence of the length of time the unreasonably dangerous condition existed prior to the injury-causing event. *Wal-Mart Stores, Inc. v. Reece*, 81 S.W.3d 812, 816 (Tex. 2002). If there is no temporal evidence, there is no basis upon which the fact finder can reasonably assess the opportunity the defendant had to discover the dangerous condition. *Id.* Galvan has provided no evidence supporting her claim that Camden had actual knowledge of the alleged dangerous condition that caused her injuries, and she has not established how long the condition giving rise to her injuries had existed. In the absence of temporal evidence, there was no basis for the district court to assess Camden's opportunity to discover the dangerous condition. As a result, Galvan did not meet her burden to set forth more than a scintilla of probative evidence as to Camden's actual or constructive knowledge of the dangerous condition. Therefore, the district court did not err in granting Camden's no-evidence motion for summary judgment.

CONCLUSION

We affirm the district court's judgment.

Gisela D. Triana, Justice

Before Chief Justice Rose, Justices Baker and Triana

Affirmed

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