NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2015 CA 0970

DARRY HUGHES

VERSUS

HOME DEPOT U.S.A., INC.

Judgment Rendered: DEC 2 3 2015

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On Appeal from the Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
No. C624885

Honorable William A. Morvant, Judge Presiding

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BEFORE: McDONALD, McCLENDON, AND THERIOT, JJ.

McCLENDON, J.

In this falling merchandise case, plaintiff appeals a judgment granting the merchant's motion for summary judgment that dismissed plaintiff's claims with prejudice. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

On July 23, 2013,[1] Darry Hughes and a co-worker, Clarice Angie Palmer, went to a Home Depot store located in Baton Rouge, Louisiana, to purchase a plastic storage bin to be used as a first-aid kit at their office. Mr. Hughes alleges that he was injured when he removed a bin with both hands from a shelf, and a second bin fell and hit his nose. On September 26, 2013, Mr. Hughes filed the instant lawsuit, naming Home Depot U.S.A., Inc. as defendant, alleging that the storage bin "was unstable in the storage area of the store."

On March 10, 2015, Home Depot filed a motion for summary judgment, asserting that "there are no contested issues of material fact and under the applicable law, it is entitled to summary judgment." Home Depot attached a memorandum in support of its motion for summary judgment, asserting that Mr. Hughes: 1) will be unable to prove that neither he nor another customer caused the bin to fall, and 2) lacks evidence to show any negligence on the part of Home Depot or causation for the incident itself.

Additionally, Home Depot submitted the affidavit of its assistant store manager, Thomas Workman, who was employed by Home Depot for twelve years and routinely investigated store incidents. Mr. Workman attested that he had never heard of, witnessed, or completed an incident report where a customer alleged that this bin fell from the shelf and struck him or where a customer alleged that any product fell from the shelf due to the type of shelving used.

Mr. Hughes opposed the motion, contending that genuine issues of material fact remained as to whether placement of the storage bin on an unlevel shelf was

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[1] There is conflict in the record as to the date of the accident. Several places, including the petition and one of the affidavits submitted by Home Depot, reflect that the accident occurred on July 23, 2013. However, other places, including Mr. Hughes's deposition and the incident statement, reflect that the accident occurred on July 16, 2013.

an unreasonably dangerous condition. Mr. Hughes also asserted that Home Depot's motion did not specifically set forth any basis for which Home Depot was entitled to summary judgment. Additionally, Mr. Hughes averred that he sought a LSA-C.C.P. art. 1442 deposition of a Home Depot corporate representative, but that deposition had not yet taken place. Mr. Hughes asserted that summary judgment was premature until the corporate representative could answer questions about the shelf design and how often merchandise falls from the shelf.

Following a hearing on April 13, 2015, the trial court granted Home Depot's motion for summary judgment. On the same day, the trial court signed a judgment dismissing Mr. Hughes's claims against Home Depot with prejudice.

Mr. Hughes has appealed, asserting that the trial court erred in granting the motion for summary judgment.

DISCUSSION

Summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, admissions, affidavits, if any, admitted for purposes of the motion for summary judgment, show that there are no genuine issues of material fact and that the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(B)(2).

On a motion for summary judgment, the initial burden of proof is on the mover. If the moving party will not bear the burden of proof at trial, the movant'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 that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, the nonmoving party must produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden at trial. If the nonmoving party fails to make this requisite showing, there is no genuine issue of material fact, and summary judgment should be granted. See LSA-C.C.P. art. 966(C)(2).

A summary judgment is reviewed de novo on appeal under the same criteria that govern the trial court's determination of whether summary judgment is

appropriate. **East Tangipahoa Development Company, LLC v. Bedico Junction, LLC**, 08-1262 (La.App. 1 Cir. 12/23/08), 5 So.3d 238, 243, writ denied, 09-0166 (La. 3/27/09), 5 So.3d 146. Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. **The Shaw Group v. Kulick**, 04-0697 (La.App. 1 Cir. 4/8/05), 915 So.2d 796, 800, writ denied, 05-1205 (La. 11/28/05), 916 So.2d 148.

A merchant's duty to keep customers safe from harm caused by falling merchandise is set out in LSA-R.S. 9:2800.6(A), which provides:

> A merchant owes a duty to persons who use his premises to exercise reasonable care to keep his aisles, passageways, and floors in a reasonably safe condition. This duty includes a reasonable effort to keep the premises free of any hazardous conditions which reasonably might give rise to damage.

This duty encompasses the responsibility on the part of store employees to place the merchandise safely on the shelf in such a manner that the merchandise will not fall, as well as to safely replace merchandise that has been moved or removed. The employees have the additional responsibility to check the shelves periodically to ensure that the merchandise is in a safe position and does not present an unsafe condition. See **Smith v. Toys "R" Us, Inc.**, 98-2085 (La. 11/30/99), 754 So.2d 209, 215.

Proof that an accident occurred does not fulfill the plaintiff's burden in a falling merchandise case; the plaintiff must further prove that the merchant's negligence was a cause of the accident. **Smith**, 754 So.2d at 214. To prevail in a falling merchandise case, the customer must demonstrate that (1) he or she did not cause the merchandise to fall, (2) that another customer in the aisle at that moment did not cause the merchandise to fall, and (3) that the merchant's negligence was the cause of the accident. The customer must show that either a store employee or another customer placed the merchandise in an unsafe position on the shelf or otherwise caused the merchandise to be in such a precarious position that eventually, it does fall. Only when the customer has negated the first two possibilities and demonstrated the last will he or she have proved the existence

of an "unreasonably dangerous" condition on the merchant's premises. **Davis v. Wal-Mart Stores, Inc.**, 00-0445 (La. 11/28/00), 774 So.2d 84, 90.

Mr. Hughes contends that Home Depot's motion for summary judgment was procedurally defective as the motion did not give him notice of what issues the court would be determining on summary judgment. Mr. Hughes notes that a summary judgment may be granted "only as to those issues set forth in the motion under consideration by the court at that time." LSA-C.C.P. art. 966(F)(1). Mr. Hughes notes that Home Depot, in its motion, simply moved "for summary judgment in its favor as there are no contested issues of material fact and under the applicable law, it is entitled to summary judgment."

However, we note that Home Depot's motion specifically provided that "Home Depot includes as part of this Motion the attached statement of uncontested facts and legal elements, as well as the memorandum in support and exhibits attached thereto as if incorporated herein *in extenso*." In the memorandum, Home Depot specifically stated the bases for its motion: 1) that plaintiff is unable to prove that neither he nor another customer caused the bin to fall, and 2) that plaintiff lacks evidence as to any negligence on the part of Home Depot or causation for the incident itself. Accordingly, Home Depot's motion and attached memorandum adequately placed Mr. Hughes on notice as to which issues were being addressed by its motion for summary judgment. This argument is without merit.

Mr. Hughes also asserts that the trial court erred in failing to delay the summary judgment hearing to allow him to take the deposition of a Home Deport corporate representative under LSA-C.C.P. art. 1442 prior to granting Home Depot's motion for summary judgment. Mr. Hughes contends that the deposition was needed to address shelf design and how often items fall.

Louisiana Code of Civil Procedure article 966(C)(1) expressly provides for the granting of a motion for summary judgment "after adequate discovery" being accomplished, or a party has at least been afforded the opportunity to undertake adequate discovery. However there is no absolute right to delay action on a motion

for summary judgment until discovery is completed. **Judson v. Davis**, 04-1699 (La.App. 1 Cir. 6/29/05), 916 So.2d 1106, 1115-16, writ denied, 05-1998 (La. 2/10/06), 924 So.2d 167. The only requirement regarding discovery in the context of summary judgment is that the parties be given a fair opportunity to present their claims. **Judson**, 916 So.2d at 1116.

Despite his assertion that a LSA-C.C.P. art. 1442 deposition was needed, Mr. Hughes did not specifically request a continuance of the summary judgment hearing. See **Judson**, 916 So.2d at 1116. Nevertheless, absent peremptory grounds, a continuance rests within the sound discretion of the trial court. **St. Tammany Parish Hosp. v. Burris**, 00-2639 (La.App. 1 Cir. 12/28/01), 804 So.2d 960, 963. In granting Home Depot's motion for summary judgment, the trial court stated:

> And my review of this file, this incident occurred July 23rd of 2013. Suit was filed back in in September of 2013, we're nineteen months post accident. If there's going to be a deposition or discovery, there's been ample time to do that. So I don't see that this is a motion for summary judgment that is made at the very early stages of the litigation that would require additional discovery to take place....

The trial court apparently concluded that both parties were afforded the opportunity to undertake adequate discovery. We find no abuse of discretion with the trial court's ruling in this regard. Accordingly, Mr. Hughes's argument that the trial court erred in not allowing him to take the LSA-C.C.P. art. 1442 corporate deposition prior to granting Home Depot's motion for summary judgment is without merit.

Even so, Mr. Hughes contends that genuine issues of material fact remain regarding whether the placement of the bin on the shelf presented an unreasonable risk of harm. In his deposition, Mr. Hughes testified that the bin that fell "had to be right behind" the bin that he pulled off of the shelf. Mr. Hughes indicated that he did not touch the second bin and that he did not see any customer or employee move any of the bins prior to his accident. Mr. Hughes opined that the bin, which had legs, was unstable as the shelf's bottom was made of wood slats and the legs were positioned between the slats. Mr. Hughes avers

that before he was hit, he did not know how the second bin was positioned on the shelf, but when he placed the bin back on the shelf it was unstable because the legs were not on the wood slats.

Mr. Hughes asserts that the facts, considered in a light most beneficial to him, show that the bin fell onto his nose without being touched by him or any other customer. Mr. Hughes avers that the falling bin, without other superseding cause for falling, creates an unreasonable risk of harm.

Regardless of whether anyone touched the bin, Mr. Hughes has failed to present any evidence to meet his evidentiary burden of proof at trial to show that Home Depot's negligence was the cause of the accident. Specifically, Mr. Hughes has presented no evidence to show that either a store employee or another customer placed the merchandise in an unsafe position on the shelf or otherwise caused the merchandise to be in such a precarious position that eventually, it did fall. Cf. **Lapeyrouse v. Wal-Mart Stores, Inc.**, 98-547 (La.App. 5 Cir. 12/16/98), 725 So.2d 61, 65, writ denied, 99-0140 (La. 3/12/99), 739 So.2d 209 (the manner of stacking items three on top of each other and overlapping the shelf can obviously cause the objects to fall when one item is selected). Mr. Hughes acknowledged that he did not know how the bin was positioned on the shelf prior to it falling. He testified that he tested the bin when he placed it back on the shelf after it fell, and the bin was "wobbly." Mr. Hughes then speculates that the bin must have been positioned in the same manner prior to its fall. However, mere speculation that the bin was positioned precariously prior to it falling is insufficient to defeat a motion for summary judgment. See **Babin v. Winn-Dixie Louisiana, Inc.**, 00-0078 (La. 6/30/00), 764 So.2d 37, 40.

Mr. Hughes also contends that the trial court should have considered a video of the shelf and of the plastic bin, along with a still photograph of the bin. Mr. Hughes notes that Home Depot, in a reply memorandum three days prior to the hearing, objected to the introduction of the video and photograph of the bin, asserting that they were not certified or verified in any manner, as required by LSA-C.C.P. arts. 966 and 967. Mr. Hughes asserts that after Home Depot

complained of use of the video and photograph in the reply memorandum, the trial court did not give him sufficient time to address the issue prior to the hearing on the motion for summary judgment.

We note that the objection to evidence submitted in opposition to a motion for summary judgment may be raised through a reply memorandum, provided that the reply memorandum is furnished to the trial judge and served on all parties on a day that allows one full working day before the hearing. See LSA-C.C.P. art. 966(F)(3) and District Court Rule 9.9(d). Because these requirements were met, Home Depot's opposition was timely.

Despite the timely opposition, Mr. Hughes asserts that the video and photograph were properly authenticated and verified in his deposition such that they should have been considered in opposition to Home Depot's motion for summary judgment. Mr. Hughes notes that it was undisputed that he gave Home Depot the video and photograph during discovery, that the video and photograph were identified in his deposition, and that he attached the entire deposition to his opposition to Home Depot's motion for summary judgment. We recognize that items attached to a deposition, which are properly identified and verified, may be considered on summary judgment when the deposition and its attachments are introduced. See **Boland v. West Feliciana Parish Police Jury**, 03-1297 (La.App. 1 Cir. 6/25/04), 878 So.2d 808, 814, writ denied, 04-2286 (La. 11/24/04), 888 So.2d 231. Even assuming that the video and photograph were properly identified and verified in Mr. Hughes's deposition, we have reviewed same and conclude that they raise no genuine issue of material fact.[2] The photograph shows a picture of the bin, while the video does not create a factual dispute with regard to the condition of the shelf. As noted above, such speculation is insufficient to defeat a motion for summary judgment.

[2] On appeal, Home Depot asserts that the shelf on the video is in a different location and not the same shelf at issue herein.

CONCLUSION

For the foregoing reasons, we affirm the trial court's April 13, 2015 judgment granting Home Depot's motion for summary judgment and dismissing plaintiff's claims with prejudice. Costs of this appeal are assessed to plaintiff, Darry Hughes.

AFFIRMED.