NOT DESIGNATED FOR PUBLICATION

ILONA WILLS	*	**NO. 2001-CA-2341**
VERSUS	*	**COURT OF APPEAL**
SEARS, ROEBUCK AND COMPANY	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
	*	

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APPEAL FROM
FIRST CITY COURT OF NEW ORLEANS
NO. 00-52243, SECTION "C"
Honorable Sonja M. Spears, Judge
* * * * * *
Judge David S. Gorbaty
* * * * * *

(Court composed of Chief Judge William H. Byrnes III, Judge James F. McKay III, Judge David S. Gorbaty)

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AFFIRMED

In this appeal, Ilona Wills contends that the trial court erred in granting the motion for summary judgment filed by defendant, Sears, Roebuck and Company, and dismissing her lawsuit. For the reasons set forth below, we affirm.

FACTS AND PROCEDURAL HISTORY

Ms. Wills alleges that while shopping at a Sears department store on the evening of July 7, 1999, she struck her foot on the edge of a clothing rack and suffered severe and disabling injuries to her foot. In the ensuing lawsuit she filed against Sears, Ms. Wills alleged that her foot injuries were caused by the fault and negligence of Sears in the following particulars: failing to use reasonable care to keep aisles, passageways and floors in a safe condition; failing to use reasonable care to keep the premises free of hazardous conditions; failing to properly inspect the premises; failing to establish proper procedures for identifying hazardous conditions and conducting safety inspections; allowing a foreign and dangerous item to remain on the floor of the store, thus creating an unreasonable and foreseeable risk and hazard of injury to her; creating and/or having actual or constructive notice of the condition that caused her injury prior to its

occurrence.

Sears filed a motion for summary judgment, asserting that the clothing rack on which Ms. Wills was allegedly injured did not present a hazardous condition that reasonably could cause injury to someone. With its motion, Sears submitted an affidavit from Denise Cratchan, an asset protection agent at Sears, who stated that she had never been advised that the clothing rack Ms. Wills bumped into was dangerous or constituted a hazard. Sears also submitted the affidavit of Jeff Mader, its store manger, who stated:

> He is familiar with the clothes racks used in the Women's Department and their construction. These racks are in use throughout the Sears stores around the country. To his knowledge none have been found to be defective or determined to [be] a danger to customers. As far as he knows no customer at the Sears Clearview store at 4400 Veterans Memorial Boulevard has ever complained to him [that] a clothes rack poses a risk of harm or has harmed any customer.

Sears included a portion of Ms. Wills's deposition testimony in which she acknowledged that the aisle in front of the clothing rack was wide enough, the area was satisfactorily lit, and she could see clearly. Finally, photographs of the clothing rack at issue were included with the summary judgment motion.

In opposition to the motion, Ms. Wills offered only the legal argument that Sears was attempting to apply an incorrect section of the statute

applicable to merchant liability, La.R.S. 9:2800.6, and that she need only prove the standard elements of a negligence action using a duty-risk analysis.

On March 8, 2001, the trial court granted Sears's summary judgment motion and dismissed Ms. Wills's lawsuit with prejudice. Ms. Wills subsequently filed this appeal.

DISCUSSION

Appellate courts review summary judgments *de novo*, using the same criteria applied by trial courts to determine whether summary judgment is appropriate. Independent Fire Ins. Co. v. Sunbeam Corp., 99-2181, 99-2257 (La. 2/29/00), 755 So.2d 226, 230. The supporting documentation submitted by the parties should be scrutinized equally, and there is no longer any overriding presumption in favor of trial on the merits. Id., 755 So.2d at 231.

In a summary judgment proceeding, the initial burden of proof is on the mover to show that no genuine issue of material fact exists. However, if the movant will not bear the burden of proof at trial, his burden on the motion does not requires him to negate all essential elements of the plaintiff's claim, but rather to point out that there is an absence of factual

support for one or more elements essential to the claim. La. C.C.P. art. 966 (C)(2); Fairbanks v. Tulane University, 98-1228 (La.App. 4 Cir. 3/31/99), 731 So.2d 983, 985.

After the mover has met his initial burden of proof, the burden shifts to the non-moving party to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden at trial. La.Code Civ.P. art. 966(C)(2). If the non-moving party fails to meet this burden, there is no genuine issue of material fact, and the mover is entitled to summary judgment. La.Code Civ.P. art. 966; Schwarz v. Administrators of Tulane Educational Fund, 97-0222 (La.App. 4 Cir. 9/10/97), 699 So.2d 895, 897. When a motion for summary judgment is properly supported, the non-moving party may not rest on the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided by law, must set forth specific facts showing that there is a genuine issue of material fact for trial. La.Code Civ.P. art. 967; Townley v. City of Iowa, 97-493 (La.App. 3 Cir. 10/29/97), 702 So.2d 323, 326.

In her first three assignments of error, Ms. Wills basically argues that paragraph B of La. R.S. 9:2800.6 does not apply in this case. Although we agree with Ms. Wills, neither the trial court ruling nor our decision in this appeal hinges on application of paragraph B. La. R.S. 9:2800.6 addresses

the burden of proof in claims against merchants and provides in part:

> A. 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.
>
> B. 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 his cause of action, all of the following:
>
> (1) The condition presented an unreasonable risk of harm to the claimant and that risk of harm was reasonably foreseeable.
>
> (2) The merchant either created or had actual or constructive notice of the condition which caused the damage, prior to the occurrence.
>
> (3) The merchant failed to exercise reasonable care. In determining reasonable care, the absence of a written or verbal uniform cleanup or safety procedure is insufficient, alone, to prove failure to exercise reasonable care.

Paragraph B applies to tort claims that result from a fall on a merchant's premises. Retif v. Doe, 93-1104 (La. App. 4 Cir. 2/11/94), 632 So.2d 405, 407. In this case, the record does not contain sufficient evidence to support a finding that Ms. Wills fell; Sears only references a statement

made by Ms. Wills' attorney that she "stumbled," but did not fall.

Nevertheless, the case upon which Ms. Wills relies to support her claim that Paragraph B of R.S. 9:2800.6 does not apply in this case, Retif v. Doe, establishes that Paragraph A of the same statute does apply in this case. The court in Retif determined that a store was not liable for injuries to a four-year-old that occurred when a shopping cart, containing two bags of soil, with which the child was playing, fell on him. The court found that Paragraph A of La.R.S. 9:2800.6 applied:

> A close reading of the above statute indicates that Subsection (A) applies to tort actions, such as that presented in the instant case, which result from accidents other than a fall on the store owner's premises. In those cases, the store owner or person having custody of the property has a duty to keep the property in a reasonably safe condition as well as a duty to keep the premises reasonably free of any hazardous conditions which might cause damage. Thus, the store owner must discover any unreasonably dangerous condition on the premises and either correct the condition or warn potential victims of its existence. (Citations omitted.)

Retif, 93-1104, p. 3, 632 So.2d at 407. Thus, the court concluded that the applicable burden of proof was the same as in any other negligence case--the duty-risk analysis.

The court also found that the plaintiff had failed to establish that the store had breached its duty of care by failing to keep the aisle reasonable safe or free of any hazardous conditions which reasonably might give rise to

damage. Id., 632 So.2d at 408. The court noted:

> . . . R.S. 9:2800.6(A) defines the general duty a merchant owes to patrons, invitees and guests on the premises. Under that statute, the merchant has a duty to exercise reasonable care to protect those who enter the store. **This duty extends to keeping the premises safe from unreasonable risks of harm or warning persons of known dangers**. . . .
>
> However, store owners are not required to insure against all accidents that occur on the premises. . . . They are not absolutely liable whenever an accident happens. A shopper has the duty of exercising reasonable care for his own safety and for the safety of those under his care and control. (Citation omitted.) (Emphasis added.)

Id.

In the case before us, we find nothing in the trial court's Reasons for Judgment indicating that the trial court relied upon paragraph B of R.S. 9:2800.6. The trial court's statement that "Plaintiff submitted nothing in the record to establish that the rack created an unreasonable risk of harm" indicates that, in accordance with Retif, the trial court found that Ms. Wills had not shown she could satisfactorily prove the breach of duty element essential to her case at trial. See also Leonard v. Wal-Mart Stores, Inc., 97-2154 (La. App. 1 Cir. 11/6/98), 721 So.2d 1059, citing Retif for the proposition that paragraph A requires merchants to keep their premises safe from unreasonable risks of harm and warn persons of known dangers.

The Reasons for Judgment indicate that the court found that Sears

had fulfilled its burden of proof in its summary judgment motion by pointing out the absence of factual support for an essential element of Ms. Wills's cause of action: proving that Sears's conduct failed to conform to the appropriate standard of care, or the breach of duty element. We also find that Sears satisfied its proof burden in the summary judgment proceedings with the information presented with its motion.

The judgment also indicates that when the burden shifted to Ms. Wills, she failed to satisfy her burden of producing factual support sufficient to establish that she would be able to satisfy her evidentiary burden at trial. We agree, finding that Ms. Wills offered no factual support at all, only a misdirected legal argument.

In her final assignment of error, Ms. Wills asserts that the trial court erred by granting the summary judgment motion based mainly on affidavit and deposition testimony and not live testimony. There is nothing in the record, however, that suggests that Ms. Wills attempted to present live testimony in the trial court. Summary judgment is properly granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact, and that the mover is entitled to judgment as a matter of law. La.Code Civ.P. art. 966. This statute clearly authorizes summary judgment

in this case based on the information provided by Sears.

CONCLUSION

Accordingly, for the foregoing reasons, we affirm the judgment of the trial court granting summary judgment in favor of Sears.

AFFIRMED