Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **10th day of December, 2021** are as follows:

PER CURIAM:

2021-CC-00347 ***CINDY PLANCHARD VS. NEW HOTEL MONTELEONE, LLC (PARISH OF ORLEANS CIVIL)***

JUDGMENT OF THE DISTRICT COURT REVERSED. MOTION FOR SUMMARY JUDGMENT GRANTED. SEE PER CURIAM**.**

Hughes, J., dissents and assigns reasons.

SUPREME COURT OF LOUISIANA

No. 2021-CC-00347

CINDY PLANCHARD

VS.

NEW HOTEL MONTELEONE, LLC

On Supervisory Writ to the Orleans Civil District Court, Parish of Orleans Civil

PER CURIAM

In this slip-and-fall case, we are called upon to determine whether the district court erred in denying defendant's motion for summary judgment on the ground there were genuine issues of material fact as to whether defendant exercised reasonable care under La. R.S. 9:2800.6. For the reasons that follow, we reverse the judgment of the district court and render summary judgment in favor of defendant.

UNDERLYING FACTS AND PROCEDURAL HISTORY

Plaintiff, Cindy Planchard, filed suit against defendant, the New Hotel Monteleone, LLC. Plaintiff alleged that as she traversed the lobby of defendant's hotel, she slipped on a foreign substance on the marble floor and fell, sustaining an injury.

After discovery, defendant moved for summary judgment. In support, defendant relied on a surveillance video of the accident. The video showed a hotel employee dry mopping the lobby area at 8:36 p.m., approximately three minutes before plaintiff's accident. Two "wet floor" signs are in place in the area. At 8:37 p.m., approximately one minute before plaintiff's fall, two more "wet floor" signs were added to the area, and an employee continued to dry mop the area. Plaintiff is then seen to fall at 8:38 p.m.

Defendant also submitted plaintiff's deposition testimony. In her deposition, plaintiff acknowledged seeing the signs:

> I know that there was something there that I walked to the left of and then I walked to the right of, so there were signs there. I don't know how many there were in total. I do remember that I was weaving in and out of them.

Plaintiff also testified she "had to walk around" the signs because there "was no other path to the front door." As a result, plaintiff stated she "walked to the side of the signs to get to the front door."

Plaintiff opposed defendant's motion for summary judgment. Relying on her deposition testimony, plaintiff did not dispute that she saw the signs, but asserted that she thought they were "chalkboard" and did not read them. Plaintiff introduced pictures of the signs showing they did not have the traditional bright orange or yellow appearance, but were made of wood and brass.

After a hearing, the district court denied defendant's motion for summary judgment. In oral reasons for judgment, the district court concluded there were questions of fact concerning the "reasonableness on the part of the defendant" based on the visibility of the signs.

Defendant applied for supervisory review of this judgment. The court of appeal denied the writ.

Upon defendant's application, we granted certiorari to consider the correctness of the district court's ruling. *Planchard v. New Hotel Monteleone, LLC*, 2021-00347 (La. 5/4/21), 315 So.3d 212.

DISCUSSION

A summary judgment is reviewed on appeal de novo, with the appellate court using the same criteria that govern the trial court's determination of whether summary judgment is appropriate; i.e., whether there is any genuine issue of material fact, and whether the movant is entitled to judgment as a matter of

law. *Guidry v. Brookshire Grocery Co*., 2019-1999 (La. 2/26/20), 289 So.3d 1026, 1027; *Murphy v. Savannah*, 2018-0991 (La. 5/8/19), 282 So.3d 1034, 1038; *Wright v. Louisiana Power & Light*, 2006-1181 (La. 3/9/07), 951 So.2d 1058, 1070.

A motion for summary judgment "shall be granted if the motion, memorandum, and supporting documents show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law." La. Code Civ. P. art. 966(A)(3); *Davis v. A Bar & Grill with a Bite, Inc*., 2019-1928 (La. 3/16/20), 294 So. 3d 1051, 1052.

On a motion for summary judgment, the burden of proof remains with the mover. However, if the moving party will not bear the burden of proof on the issue at trial and points out an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense, then the non-moving party must produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial. If the opponent of the motion fails to do so, there is no genuine issue of material fact and summary judgment will be granted. La. Code Civ. P. art. 966(D)(1); *Stephenson v. Bryce W. Hotard Sunbelt Rentals, Inc.*, 2019-0478 (La. 5/20/19), 271 So.3d 190, 193; *Bufkin v. Felipe's Louisiana, LLC*, 2014-0288 (La. 10/15/14), 171 So.3d 851, 854; *Schultz v. Guoth*, 2010-0343 (La. 1/19/11), 57 So.3d 1002, 1006.

Plaintiff's claims against defendant are governed by La. R.S. 9:2800.6, which sets forth the burden of proof for negligence claims against merchants.[1] This statute provides in pertinent 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

[1] For purpose of this section, the definition of a "merchant" includes "an innkeeper with respect to those areas or aspects of the premises which are similar to those of a merchant, including but not limited to shops, restaurants, and lobby areas of or within the hotel, motel, or inn." La. R.S. 9:2800.6(C)(2).

> 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. [emphasis added].

The jurisprudence has recognized the failure to prove any of the three required elements in La. R.S. 9:2800.6(B) is fatal to the plaintiff's case. *See, e.g., Matlock v. Brookshire Grocery Co*., 53,069 (La. App. 2 Cir. 11/20/19), 285 So.3d 76, 82, *writ denied*, 2020-00259 (La. 4/27/20), 295 So.3d 389.

In the case at bar, the focus is on the third element of La. R.S. 9:2800.6(B) – namely, whether plaintiff has established that defendant failed to exercise reasonable care. Defendant asserts the surveillance video as well as plaintiff's deposition testimony proves it exercised reasonable care by placing "wet floor" caution signs in the area. However, plaintiff contends that while she saw the signs, she did not recognize them as caution signs.

A review of the picture of one of the signs introduced into the record indicates the sign base is made of wood. On the face of the sign is a brass plate containing the words "CAUTION WET FLOOR" on the top half and "PRECAUCION PISO MOJADO" on the bottom half. In the center of the brass plate, there is a pictogram

of a falling figure surrounded by a triangle containing the words "CAUTION CUIDADO ATTENTION." The video evidence indicates that a total of four of these warning signs had been placed in the lobby prior to plaintiff's fall.

Although plaintiff takes the position that the signs did not stand out from the surroundings, her deposition testimony establishes that she was aware of the presence of the signs. In particular, she testified that she "walked to the side of the signs to get to the front door." She further admitted to "weaving in and out of" the signs because "there was no other path to the front door."

Under these circumstances, we find the undisputed evidence establishes plaintiff saw the warning signs in the area prior to her fall. Any failure of plaintiff to read these signs was a product of her own inattentiveness and not a result of the defendant's failure to take reasonable precautions. *See Collins v. Franciscan Missionaries of Our Lady Health System, Inc*., 2019-0577 (La. App. 1 Cir. 2/21/20), 298 So.3d 191, 198, *writ denied*, 2020-00480 (La. 6/22/20), 297 So.3d 773 (explaining that because the plaintiff "had an unobstructed view of the warning cone for several seconds prior to slipping into it, she cannot rely on her failure to see what should have been seen to defeat summary judgment.").

Accordingly, defendant is entitled to summary judgment as a matter of law.

DECREE

For the reasons assigned, the judgment of the district court is reversed. The motion for summary judgment filed by New Hotel Monteleone, LLC is granted, and plaintiff's suit is dismissed with prejudice.

SUPREME COURT OF LOUISIANA

No. 2021-CC-00347

CINDY PLANCHARD

VS.

NEW HOTEL MONTELEONE, LLC

On Supervisory Writ to the Orleans Civil District Court, Parish of Orleans Civil

Hughes, J., dissenting.

I respectfully dissent. As on learned jurist has remarked, "One doesn't whisper danger." I believe this case calls for a determination by the tried of fact and is therefore not appropriate for summary judgment.