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NO. COA01-543

NORTH CAROLINA COURT OF APPEALS

Filed: 7 May 2002

ELIZABETH LIOTTA,
Plaintiff,

v.

Iredell County
No. 99-CVS-1808

LAKESIDE RESTAURANT & LOUNGE, L.L.C., LAKESIDE HOSPITALITY, INC., and FLOWERS BAKING COMPANY OF JAMESTOWN, INC.,
Defendants.

Appeal by plaintiff from judgments entered 3 and 4 October 2000 by Judge Michael E. Beale in Iredell County Superior Court. Heard in the Court of Appeals 30 January 2002.

Rudolph Maher Widenhouse & Fialko, by M. Gordon Widenhouse, Jr. for plaintiff.

Stiles Byrum & Horne, L.L.P., by D. Lane Matthews and Ned A. Stiles, for defendant Lakeside Restaurant & Lounge, L.L.C.

Cranfill, Sumner, & Hartzog, L.L.P., by S. Mujeeb Shah-Khan for defendant Flowers Baking Co. of Jamestown, Inc.

BIGGS, Judge.

Elizabeth Liotta (plaintiff) appeals the trial court's orders granting summary judgment in favor of defendants, Lakeside Restaurant & Lounge, L.L.C. (Lakeside) and Flowers Baking Co. of Jamestown, Inc. (Flowers). For the reasons herein, we reverse and remand in part, and affirm in part.

On 22 September 1996, plaintiff and her family were dining at Lakeside. A loaf of bread was served to their table on a cutting board with butter and a knife. Plaintiff sliced four pieces of bread, buttered them, and served them to her family. Plaintiff did not notice anything unusual with the bread. However, while biting into her slice, plaintiff "bit into something very hard" and she and her family heard "a loud crunch". Plaintiff experienced immediate pain on the right side of her face and jaw and broke three teeth. A waitress came to the table and apologized along with two evening managers, Julia Auten and Kori Langos. According to them, the restaurant prepared food "with rock salt and sometimes it gets into the bread." One of the evening managers gave plaintiff a business card where she wrote "something in the bread (glass or rock salt); broke top and bottom teeth." They each signed the card, "Julia and Kori, P.M. Managers". Plaintiff could not tell if a piece of glass or rock salt was in her bread. Plaintiff brought negligence actions against defendants, Lakeside and the company responsible for baking the bread, Flowers, seeking compensatory and punitive damages for her injuries. After discovery was conducted, Lakeside and Flowers moved for summary judgment. The trial court granted summary judgment in favor of both defendants. From these orders, plaintiff appeals.

A defendant is entitled to summary judgment if the record shows "that there is no genuine issue as to any material fact and that [defendant] is entitled to . . . judgment as a matter of law."

N.C.G.S. § 1A-1, Rule 56(c) (1999). Conversely, "summary judgment is inappropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show a genuine issue as to any material fact." *Phillips v. Restaurant Mgmt. of Carolina, L.P.*, 146 N.C. App. 203, 208, 552 S.E.2d 686, 690 (2001); *see* N.C.G.S. § 1A-1, Rule 56(c). Defendant, as the moving party, bears the burden of establishing the absence of any triable issues of fact. *Smith v. Cochran,* 124 N.C. App. 222, 476 S.E.2d 364 (1996). In ruling on a summary judgment motion, the trial court must construe all evidence in the light most favorable to the nonmoving party. *See Nourse v. Food Lion, Inc.,* 127 N.C. App. 235, 488 S.E.2d 608 (1997), *aff'd per curiam*, 347 N.C. 666, 496 S.E.2d 379 (1998).

To prevail on a motion for summary judgment, the defendant must show either that: (1) an essential element of the plaintiff's claim is nonexistent; (2) the plaintiff is unable to produce evidence that supports an essential element of his claim; or, (3) the plaintiff cannot overcome affirmative defenses raised against him. *Dobson v. Harris*, 352 N.C. 77, 530 S.E.2d 829 (2000). Once the defendant shows the plaintiff's inability to prove an element, then the burden shifts to the plaintiff for a contrary showing. *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 414 S.E.2d 339 (1992). "If the plaintiff does not meet this burden, summary judgment is proper." *Nicholson v. County of Onslow*, 116 N.C. App. 439, 441, 448 S.E.2d 140, 141 (1994). "[A]n adverse party may not rest upon the mere allegation of its pleadings." *Id.*; *see also*,

N.C.G.S. § 1A-1, Rule 56(c). "A response, by affidavits or as otherwise provided by Rule 56, must set forth specific facts showing that there is a genuine issue for trial." *Id.*

To sustain a claim of negligence, plaintiff must show that the defendant owed a duty to plaintiff, breached that duty, and such breach was the proximate cause of plaintiff's injuries. *Sweat v. Brunswick Electric Membership Corp.,* 133 N.C. App. 63, 514 S.E.2d 526 (1999). This Court has long held that issues of negligence are rarely appropriate for summary judgment, because application of the reasonably prudent person standard is usually for the jury. *Diorio v. Penny,* 103 N.C. App. 407, 405 S.E.2d 789 (1991), *aff'd*, 331 N.C. 726, 417 S.E.2d 457 (1992). Moreover, because summary judgment is a drastic remedy, it must be exercised with great caution. *Nicholson,* 116 N.C. App. at 441, 448 S.E.2d at 141.

I.

Plaintiff first assigns as error the trial court's order granting summary judgment in favor of defendant Lakeside, contending that there was sufficient evidence that Lakeside's negligence caused her injuries. We agree.

Our Supreme Court has articulated the duty of a restaurant in providing food to its customers as follows:

> A keeper of a public eating place, engaged in the business of serving food to customers, is bound to use due care and see that the food served to his customers, at his place of business, is fit for human consumption and may be eaten without its causing injury, and for an injury caused by negligence in failing to observe this duty to his patrons such keeper is liable.

Goodman v. Wenco Foods, Inc., 333 N.C. 1, 19, 423 S.E.2d 444, 453 (1992) (quoting 36A C.J.S. *Food* § 61, at 914 (1961)). The Court also stated that the North Carolina Pure Food, Drug and Cosmetic Act imposes upon a restaurateur the general duty not to sell adulterated, or harmful, food, but acknowledged that the act does not set out a standard for compliance. *Id.* Thus, we are guided by the standard of care imposed under the law of negligence.

The issue is whether there is sufficient evidence from which a jury might determine that the restaurant breached the standard of due care and that such breach was the proximate cause of the plaintiff's injury. *Goodman,* 333 N.C. at 19, 423 S.E.2d at 453. This Court has held that "[t]he presence of such a small fragment, standing alone, creates no inference [of such] negligen[ce]. . . ." *Goodman,* 333 N.C. at 20, 423 S.E.2d at 453-54. Nor is the doctrine of *res ipsa loquitur* applicable in a case involving an injury from the ingestion of an adulterated food product. *Jones v. GMRI,* 144 N.C. App. 558, 566, 551 S.E.2d 867, 873 (2001), *cert. dismissed as improvidently granted*, 355 N.C. 275, 559 S.E.2d 787 (2002).

In the case *sub judice,* the burden is upon the defendant to establish that plaintiff cannot satisfy an essential element of its claim. To meet this burden defendant offers the affidavit of Julia Auten, an employee of Lakeside, to support its position that plaintiff will be unable to establish, at trial, any breach of duty by Lakeside. Ms. Auten's affidavit indicates, in pertinent part, the following:

. . . .

> 3. The dinner bread served at Lakeside Restaurant & Lounge in September of 1996 arrived packaged and wrapped in plastic bags on a daily basis. The wrapped bread was kept in the walk-in cooler in the front of the restaurant's kitchen. When the restaurant opened for business, wrapped bread was moved to the bread warmer for the day. The bread remained wrapped in the plastic bag it came in until it was served on a cutting board with a knife and butter to the customer.
>
> 4. The loaf of bread was cut into slices by the customer only after the bread left the hands of the server at Lakeside Restaurant & Lounge.
>
> 5. Rock salt was used at Lakeside . . . as part of the process of baking potatoes. The boxes of rock salt were not stored in the same area as the loaves of bread.

In response to this showing by Lakeside, plaintiff offered the following deposition testimony:

> Q. Did the waitress come immediately over?
>
> A. Uh huh.
>
> Q. And what did she say?
>
> A. They apologized.
>
> Q. Do you remember her name?
>
> A. Let's see. I gave you the card I think.
>
> MS. CHURCH: It's in your file.
>
> Q. Is that the card that's in the discovery? Is that what you're referring to?
>
> A. Yeah. That was the person and she got the manager and they came over and they apologized and *she said that they prepare with rock salt and sometimes it gets into the bread, into the salad* and – and I just – I didn't say anything. She said she was sorry that it happened, that they would pay the bills and –
>
> Q. Did anybody know exactly what it was you

> bit into? I mean –
>
> A. I just presume what they said, that it was rock salt. I don't know. I mean I never – I don't know what rock salt is or what it's prepared in, but when she said that it was used in the salads and – no– it's used to prepare the bake potatoes, is what she said and sometimes it falls in the salad. I guess it's in the same proximity of where they prepare. I don't know. And she said it could have gotten into the salad or the bread. She had told me it happened to someone in the salad (sic) before, so I only presume that that's what happened.

"Upon a motion for summary judgment by a defendant, a plaintiff 'need not present all the evidence available in his favor but only that necessary to rebut the defendant's showing that an essential element of his claim is non-existent or that he cannot surmount an affirmative defense.'" *Pulley v. Rex Hospital,* 326 N.C. 701, 704, 392 S.E.2d 380, 382-83 (1990) (quoting *Dickens v. Puryear*, 302 N.C. 437, 453, 276 S.E.2d 325, 335 (1981)).

We believe that plaintiff's forecast of evidence presents a genuine issue of material fact as to whether Lakeside breached its duty of care and whether such breach was the proximate cause of plaintiff's injury.

Defendant relies on *Jones,* 144 N.C. App. 558, 551 S.E.2d 867, in support of its motion. We first note that *Jones* involved a motion for directed verdict rather than summary judgment. *See Edwards v. Northwestern Bank,* 53 N.C. App. 492, 495, 281 S.E.2d 86, 87 (1981) (holding that "[t]he mechanics of the [motion for summary judgment and motion for directed verdict] differ at times, as, for example, where defendant is moving for summary judgment on the

ground that plaintiff's claim lacks merit. At trial the plaintiff has the burden of, and must take the initiative in, establishing the prima facie elements of his claim; and if he does not the defendant is entitled to a directed verdict. But if the defendant moves for summary judgment on the ground that plaintiff does not have an enforceable claim he has the burden of clearly establishing the lack of any triable issue of fact and must take the initiative of . . . so showing.")

Moreover, the plaintiff in *Jones* offered no evidence from which a jury could infer a breach of duty or standard of care. We think that plaintiff's evidence in the case *sub judice,* is sufficient to survive summary judgment.

Accordingly, we hold that the trial court erred in granting summary judgment as to the issue of Lakeside's breach of due care to plaintiff and this matter is remanded to the trial court for a trial on the merits.

II.

Plaintiff next assigns as error the trial court's order granting summary judgment in favor of defendant Flowers. Specifically, plaintiff argues that there was sufficient evidence establishing that Flowers negligently manufactured the bread which caused her injuries. We disagree.

Our Supreme Court has held that "'a manufacturer of a product is under a duty to the ultimate purchaser . . . to use reasonable care in the manufacture and inspection of the article so as not to subject the purchaser to injury from a latent defect.'" *Goodman,*

333 N.C. at 26, 423 S.E.2d at 457 (quoting *Terry v. Bottling Co.*, 263 N.C. 1, 4, 138 S.E.2d 753, 755 (1964)).

We re-emphasize that on a motion for summary judgment, the burden is upon the movant to prove that there is no genuine issue of any material fact. *Goodman,* 333 N.C. at 27, 423 S.E.2d at 458. A movant may meet this burden by "'showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim. . . .'" *Roumillat,* 331 N.C. at 63, 414 S.E.2d at 342 (quoting *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)). If the movant is unable to meet this burden, summary judgment is not appropriate regardless of whether the nonmoving party responds. *Id.* However, if the movant meets this burden, then the plaintiff, in a negligence action against a product manufacturer, "must present evidence tending to show that the manufactured product was defective when it left the [defendant-]manufacturer's plant, and that the [defendant-]manufacturer 'was negligent in its . . . inspection of the product.'" *Goodman,* 333 N.C. at 26, 423 S.E.2d at 457 (quoting *Sutton v. Major Products Co.,* 91 N.C. App. 610, 612, 372 S.E.2d 897, 898 (1988)). Moreover, "[t]he chain of causation cannot have been . . . interrupted by the intervention of a third party." *Id.*

In the case *sub judice,* defendant had the burden to establish, through discovery, that the plaintiff could not produce evidence to support an essential element of her claim. In response to discovery requests, Flowers offered the following evidence: that

the bread making process is fully automated; that the bread is automatically cooked, wrapped, tied with a twist tie and then stocked onto trays; that the trays of bread have been loaded onto trucks to be taken to a distribution center; that any employee in the areas where the bread is cooked, packaged and loaded wears gloves; that the bread is delivered to Lakeside through a distributorship program; and that once the bread was loaded onto the trucks, it is then delivered to a warehouse where it is then picked up and delivered to the customer.

Furthermore, in a supplemental discovery request, Flowers offered the following: that inspection is also a part of the manufacturing process; that Flowers and other Flowers plants are inspected randomly and periodically throughout a calendar year by the American Institute of Baking, Quality Bakers of America, the North Carolina Department of Agriculture and the FDA; that Flowers follows good manufacturing practices and has internal inspections; and that whenever ingredients are received at the plant for the manufacturing of the bread, a receiving clerk inspects each item to ensure that none of the containers, seals or boxes have been broken.

Plaintiff, in the present case, offered no evidence tending to show that the bread manufactured was defective at the time it left the Flowers plant; and further, that Flowers was negligent in its inspection of the bread. Nor has plaintiff established that the chain of causation was not interrupted by the intervention of a third party, Lakeside, in its preparation and serving of the bread

to plaintiff. We conclude that Flowers has established through discovery that plaintiff cannot produce evidence to support that Flowers was negligent.

Moreover, because this Court has long held that the doctrine of *res ipsa loquitur* is inapplicable to cases involving injury from the ingestion of adulterated food products, we reject plaintiff's contention that it is applicable here. *Jones*, 144 N.C. App. at 566, 551 S.E.2d at 873. We conclude that the trial court did not err in granting Flowers' motion for summary judgment as to the negligence claim. Accordingly, this assignment of error is overruled.

We reverse the trial court's grant of summary judgment in favor of defendant Lakeside and remand for trial on the merits; we affirm its grant of summary judgment for defendant Flowers.

Reversed and remanded in part; affirmed in part.

Judges WALKER and MCGEE concur.

Report per Rule 30(e).