Opinion filed March 23, 2017

In The

Eleventh Court of Appeals

No. 11-15-00042-CV

SHARON JOHNSON, Appellant

V.

ROBERT LARSON AND GAYLE LARSON, Appellees

On Appeal from the 104th District Court

Taylor County, Texas

Trial Court Cause No. 25,776-B

M E M O R A N D U M O P I N I O N

Appellant, Sharon Johnson, appeals from an order in which the trial court granted summary judgment in favor of Appellees, Robert Larson and Gayle Larson. We affirm.

Appellees' home was for sale, and Appellant acted as the real estate agent for them, as well as for the parties who ultimately purchased the property. On

October 4, 2012, Appellant scheduled a final walk-through of the home with the buyer. At the time of the walk-through, Appellees no longer resided at the home, the home was empty, and the utilities had been disconnected. The inside of the home was lit by natural light, but the garage only had a sliver of light showing through underneath the bottom of the closed garage door. When Appellant realized that there was no electricity in the house, she called Gayle, and Gayle told her that the electricity had been disconnected at the house that day. Appellant was on the phone with Gayle when Appellant entered the garage. She was headed toward the sliver of light to open the garage door when she missed or tripped on a step down into the garage and was injured.

Appellant filed suit against Appellees and asserted claims for premises liability and negligent undertaking. Appellant and Appellees each filed motions for summary judgment. The trial court granted Appellees' motion for summary judgment and denied Appellant's.

Appellant presents a single issue on appeal. Appellant argues that the trial court erred when it granted Appellees' motion for summary judgment. Specifically, Appellant argues that she was an invitee at Appellees' residence and that she relied on Appellees' representations that they would keep the premises lit. In contrast, Appellees argue that Appellant was a licensee on the property and, therefore, that Appellees are not liable for Appellant's injuries.

We review a trial court's grant of summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). When, as here, the parties both move for summary judgment and the trial court grants one motion and denies the other, we review the summary judgment evidence presented by both parties and determine all the issues presented. *Id.*; *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000). If we determine that the trial court erred,

then we render the judgment that the trial court should have rendered. *Valence Operating Co.*, 164 S.W.3d at 661; *FM Props.*, 22 S.W.3d at 872.

Because the trial court did not specify the grounds on which it granted summary judgment, we must affirm the summary judgment if any of the grounds presented to the trial court are meritorious. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 216 (Tex. 2003). When a party moves for summary judgment on both traditional and no-evidence grounds, we review the no-evidence grounds first. *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013) (citing *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004)). If the nonmovant fails to produce legally sufficient evidence to meet her burden as to the no-evidence motion, there is no need to analyze whether the movant satisfied its burden under the traditional summary judgment motion. *Id.* A trial court must grant a no-evidence motion for summary judgment if the nonmovant fails to produce more than a scintilla of evidence raising a genuine issue of material fact on the challenged element of the cause of action. TEX. R. CIV. P. 166a(i); *see Ridgway*, 135 S.W.3d at 600. A nonmovant produces more than a scintilla of evidence when the evidence "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Ridgway*, 135 S.W.3d at 601 (quoting *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)).

Appellees argue that, even if we were to assume that Appellant was an invitee on the property, her premises liability claim still fails. We agree. To prevail on a premises liability claim as an invitee, the invitee must show these elements: (1) the property owner had actual or constructive knowledge of some condition on the premises; (2) the condition posed an unreasonable risk of harm; (3) the property owner did not exercise reasonable care to reduce or eliminate the risk; and (4) the property owner's failure to use such care proximately caused the plaintiff's injuries. *Corbin v. Safeway Stores, Inc.*, 648 S.W.2d 292, 296 (Tex. 1983).

Appellees contend that Appellant failed to produce a scintilla of evidence that the lack of electricity on the property at the time of the incident posed an unreasonable risk of harm to Appellant. "A condition presenting an unreasonable risk of harm is defined as one in which there is a sufficient probability of a harmful event occurring that a reasonably prudent person would have foreseen it or some similar event as likely to happen." *Seideneck v. Cal Bayreuther Assocs.*, 451 S.W.2d 752, 754 (Tex. 1970); *accord Wyatt v. Furr's Supermarkets, Inc.*, 908 S.W.2d 266, 269 (Tex. App.—El Paso 1995, writ denied). Appellant, as Appellees' real estate agent, had been to Appellees' home on several occasions prior to the fall in the garage and was familiar with the layout of the home. Appellant was aware that the electricity was off throughout the home before entering the garage. Appellant said that the home itself was relatively lit by natural light but that there was only "a sliver of light" in the garage. Appellant also agreed that she had previously sold more than one property that had a step leading down into the garage similar to the one at Appellees' home. Additionally, Appellant has provided no guidance or support as to what makes the unlit garage such an unreasonable risk of harm that a reasonably prudent person would have foreseen that Appellant would be injured in the garage. Accordingly, we cannot say that Appellant produced more than a scintilla of evidence raising a genuine issue of material fact on whether an unreasonable risk of harm existed.

Appellant also contends in her first issue that a fact issue exists as to all of the elements of Appellant's negligent undertaking claim. To prevail on a negligent undertaking claim, a plaintiff must prove that "(1) the defendant undertook to perform services that it knew or should have known were necessary for the plaintiff's protection; (2) the defendant failed to exercise reasonable care in performing those services; and either (a) the plaintiff relied upon the defendant's performance, or (b) the defendant's performance increased the plaintiff's risk of harm." *Nall v. Plunkett*,

404 S.W.3d 552, 555–56 (Tex. 2013). Appellant points out that Appellees conceded that they undertook to secure lighting at the premises. However, Appellees argue that they did not undertake or have a duty to Appellant because the agreement to keep the lights on at the property was made pursuant to the sales contract between Appellees and the buyer of the property; Appellant was not a party to that contract. Appellees further argue that the sales contract does not indicate that the purpose of keeping the utilities on in the house was in "any way related to the safety or protection of the Buyer (or Appellant)."

We agree with Appellees. Appellant has failed to provide any evidence that shows that Appellees undertook to keep the premises lit for Appellant's protection. Appellant directs us to Gayle's testimony to which Gayle agreed that "common sense dictates that you need to properly illuminate for the buyers what they're buying and that it needs to be a safe place to walk through." First, Gayle agreed that the property needed to be lit *and* that it needed to be safe to walk through. She did not agree that the property needed to be lit to be safe. Second, Gayle testified only that the property needed to be lit "for the buyers what they're buying." Appellant is not discussed in that testimony; only the buyers' interests are mentioned. Further, as discussed above, Appellant had been to Appellees' home on several occasions prior to the fall in the garage and was familiar with the layout of the home, so there is nothing that indicates that Appellees knew or should have known that lighting was necessary for Appellant's protection. Accordingly, we cannot say that Appellant produced more than a scintilla of evidence raising a genuine issue of material fact on whether Appellees undertook to perform services that they knew or should have known were necessary for Appellant's protection.

Because Appellant, the nonmovant, failed to produce legally sufficient evidence to meet her burden as to the no-evidence motion, there is no need to analyze

whether Appellees satisfied their burden under the traditional summary judgment motion. Appellant's sole issue on appeal is overruled.

We affirm the order of the trial court.

JIM R. WRIGHT
CHIEF JUSTICE

March 23, 2017

Panel consists of: Wright, C.J.,
Willson, J., and Bailey, J.