AFFIRM; and Opinion Filed July 29, 2016.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-00737-CV

JOHN CRUZ, Appellant
V.
SEARS, ROEBUCK AND CO., Appellee

On Appeal from the County Court at Law No. 2
Dallas County, Texas
Trial Court Cause No. C-13-04113-B

MEMORANDUM OPINION

Before Justices Lang, Brown, and Whitehill
Opinion by Justice Brown

John Cruz appeals a take-nothing summary judgment granted in favor of appellee Sears, Roebuck and Co ("Sears") on his premises liability claim. In two issues, Cruz generally asserts the trial court erred in granting Sears's traditional and no-evidence motion for summary judgment. For the following reasons, we affirm.

I. Background

Cruz was injured when he tripped and fell on a concrete planter that was built into the sidewalk in front of a Sears store at Irving Mall. At the time of his injury, Cruz was using the sidewalk to go to a movie theater next to Sears. Because Sears owned the land where Cruz fell,

Cruz sued Sears for premises liability.[1] In his petition, Cruz asserted the planter was a dangerous condition and that Sears breached its duty to him, as an invitee, by failing to make its premises reasonably safe for his use.

Sears moved for summary judgment on traditional and no evidence grounds. First, Sears asserted it was entitled to summary judgment because there was no evidence that the planter was an unreasonably dangerous condition. Sears also asserted that Cruz was not an invitee as a matter of law, but a licensee, and that it was entitled to summary judgment because (1) Cruz had no evidence Sears had actual knowledge of an unreasonably dangerous condition on its property, and (2) the evidence conclusively established that Cruz did have actual knowledge the condition. Finally, Sears asserted it was entitled to summary judgment even if Cruz was an invitee because there was no evidence that Sears had constructive knowledge of the condition. The trial court granted Sears's motion without specifying its reasons. Cruz appeals.

II. Applicable Law

A. Summary Judgment Standards

The standards for reviewing both traditional and no-evidence motions for summary judgment are well established. *See Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985). A party moving for traditional summary judgment must show no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). If the movant meets its burden, the burden shifts to the nonmovant to present to the trial court any issues or evidence that would preclude summary judgment. *Matheson Tri-Gas, Inc. v. Atmel Corp.*, 347 S.W.3d 339, 342

[1] Cruz initially sued the mall and the owner of the mall asserting he was an invitee of the mall. However, Cruz later nonsuited those parties and added Sears to the lawsuit because Sears owned the property.

(Tex. App.—Dallas 2011, no pet.); *Hackberry Creek Country Club, Inc. v. Hackberry Creek Home Owners Ass'n*, 205 S.W.3d 46, 50 (Tex. App.—Dallas 2006, pet. denied).

A no-evidence summary judgment motion is essentially a motion for a pretrial directed verdict. *Timpte Indus*., 286 S.W.3d at 310. To defeat a no-evidence motion, the nonmovant must present evidence that raises a genuine issue of material fact on each challenged element. *Rico v. L–3 Commc'ns Corp*., 420 S.W.3d 431, 438 (Tex. App.—Dallas 2014, no pet.); *see* TEX. R. CIV. P. 166a(i).

If a trial court does not state the grounds upon which it granted summary judgment, an appellant must attack every ground that would support the judgment. *Ontiveros v. Flores*, 218 S.W.3d 70, 71 (Tex. 2007); *Malooly Bros., Inc. v. Napier*, 461 S.W.3d 119, 121 (Tex. 1970). If an appellant fails to do so, we must affirm on any unchallenged ground. *Wilhite v. Glazer's Wholesale Drug Co., Inc./Glazer Family of Companies*, 306 S.W.3d 952, 954 (Tex. App.—Dallas 2010, no pet.); *Jarvis v. Rocanville Corp*., 298 S.W.3d 305, 313 (Tex. App.—Dallas 2009, pet. denied)

B. Premises Liability

In a premises liability case, the duty owed to the plaintiff depends on his status as an invitee, licensee, or trespasser. *See Rosas v. Buddie's Food Store*, 518 S.W.2d 534, 536 (Tex.1975); *Osadchy v. S. Methodist Univ*., 232 S.W.3d 844, 849 (Tex. App.—Dallas 2007, pet. struck). As a general rule, a plaintiff is an invitee if, at the time of his injury, he was on the premises because of business relations with the owner for their mutual benefit or for the benefit of the owner. *Osadchy*, 232 S.W.3d at 851-52; *Weaver v. KFC Mgmt., Inc*., 750 S.W.2d 24, 26 (Tex. App.—Dallas 1988, writ denied); *see also Renfro Drug Co. v. Lewis*, 235 S.W.2d 609, 615-16, 194 Tex. 507, 517 (1950). On the other hand, a plaintiff is a licensee if he was on the owner's premises with its permission, but for his own convenience or for the benefit of someone

other than the owner. *Weaver*, 750 S.W.2d at 26. To prevail on a premises liability claim as a licensee, the plaintiff must show that the owner had actual knowledge of the dangerous condition and that the plaintiff lacked such knowledge. *Osadchy*, 232 S.W.3d at 852.

III. Application

Because Sears's duties to Cruz depend on his status, we will first address Cruz's argument under his second issue, asserting Sears failed to conclusively establish he was a licensee. It is undisputed that, at the time of his injury, Cruz was on Sears's sidewalk, going to the movie theater next to Sears, and not to shop at or conduct any business with Sears. Cruz nevertheless asserts he was an invitee because Sears invites the public to use its store to access other business inside the mall so that it might benefit from increased foot traffic through its store. Sears responds that, regardless, Cruz himself was not an invitee because he neither entered, attempted to enter, nor had any intent to enter its store at the time he was injured. We agree with Sears.

When a person is injured while in or going into a retail establishment, Texas law does not require the plaintiff to show the person intended to conduct business with the merchant. *Renfro Drug Co.*, 235 S.W.2d at 615-16. Instead, when a store owner invites members of the public to enter its store, the owner owes a duty of care "to those who so enter, regardless of whether they have any intent to purchase merchandise." *Renfro Drug Co.*, 235 S.W.2d at 615-16 (citing *Carlisle v. J. Weingarten, Inc.*, 137 Tex. 220, 152 S.W.2d 1073 (Tex. 1941)). The person's passage through the store "is itself of sufficient advertising benefit to make the visit connected with the merchant's business." *Renfro Drug*, 235 S.W.3d at 617.

In this case, Cruz acknowledges that he was not injured while in or going in Sears's store, and that he did not, and had no reason to, enter the store when he was at the mall. He

nevertheless asserts he was an invitee because Sears benefits from its mall location, its entrance to the mall, and the mall parking lot. However, whether Cruz was an invitee depends upon whether *his* presence could benefit Sears, not whether Sears benefitted from the premises. We conclude that Cruz's presence on Sears' property to walk by, not through its store, did not benefit Sears or otherwise present Sears with a sufficient potential to benefit such to connect Cruz's presence to Sears's business. *See Olivier v. Snowden*, 426 S.W.2d 545, 550 (Tex. 1968) (invitee's presence must be of at least potential pecuniary profit to owner). Instead, Cruz was on Sears's property with its permission, but solely for his own convenience. *See Weaver*, 750 S.W.2d at 24. Therefore, he was a licensee as a matter of law.

As a licensee, to recover for premises liability, Cruz must show Sears had actual knowledge of the dangerous condition *and* that he did not. *Osadchy*, 232 S.W.3d at 852. Sears moved for summary judgment on these two elements asserting (1) Cruz had no evidence that Sears had actual knowledge of the allegedly dangerous condition and (2) the evidence conclusively established Cruz did have actual knowledge of the condition. We now turn to whether Cruz has met his burden to show the trial court erred in granting summary judgment on both of theses grounds.

In his first issue, Cruz asserts he presented sufficient evidence to raise "fact issues." It appears this issue is intended to challenge Sears's no-evidence grounds for summary judgment. However, Cruz does so by merely reciting the summary judgment evidence, without identifying how that evidence raised a fact issue on each of the specific elements Sears challenged. For example, Cruz does not identify the evidence he asserts shows Sears had actual knowledge of the dangerous condition or that it possessed such knowledge at the time of his injury. Nor does Cruz cite any legal authority under this point explaining how the evidence showed Sears's actual

knowledge. Indeed, it is not clear from our review of his brief whether Cruz even intends this issue to constitute a challenge to Sears' no-evidence motion on this ground.[2]

An appellant may present a general point of error complaining the trial court erred in granting summary judgment. However, that point must properly challenge each ground supporting the summary judgment. *See* TEX. R. APP. P. 38.1(h); *Graham v. Federated Dept. Stores, Inc*., 05-09-01310-CV, 2011 WL 3435371, at *3 (Tex. App.—Dallas Aug. 8, 2011, no pet.); *Cruikshank v. Consumer Direct Mortg., Inc*., 138 S.W.3d 497, 502–03 (Tex. App.—Houston [14th Dist.] 2004, pet. denied). If an appellant presents an issue generally asserting the summary judgment evidence raised fact issues, that issue must also include argument and authority explaining how the evidence defeated each ground for summary judgment. *Cruikshank*, 138 S.W.3d at 502-03; *see also* TEX. R. APP. P. 38.1(i). We conclude Cruz's issue is insufficient to present a challenge to all of Sears's no evidence grounds for summary judgment.

But even if Cruz did challenge all the grounds raised in Sears's motion, we would nevertheless be required to affirm the judgment on Sears's traditional grounds. Sears moved for summary judgment asserting it conclusively established Cruz had actual knowledge of the allegedly dangerous condition. To support its motion, Sears relied on a photograph of the planter and on Cruz's deposition testimony, in which he admitted that he saw the planter before he fell.

On appeal, Cruz does not assert Sears' evidence was insufficient to conclusively show he had knowledge of the dangerous condition. Instead, he asserts he presented sufficient evidence to raise a fact issue as to his knowledge. However, in his response to Sears's motion, the only fact issues he asserted precluded summary judgment were whether he was an invitee and whether

[2] Of note, in his petition, Cruz relied entirely on his status as an invitee to support his claim, asserting Sears knew *or* should have known of the dangerous condition.

Sears had knowledge of the condition. Cruz did not assert he raised a fact issue with respect to his own knowledge.

A non-movant for summary judgment is required to file a written response directing the trial court to any fact issues defeating the movant's entitlement to summary judgment. *McConnell v. Southside Indep. Sch. Dist*., 858 S.W.2d 337, 341 (Tex. 1993); *City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671, 678 (Tex. 1979); *Holmes v. Dallas Intern. Bank*, 718 S.W.2d 59, 60 (Tex. App.—Dallas 1986, writ ref'd n.r.e.). If a non-movant does not do so, he waives his complaint. *Holmes*, 718 S.W.2d at 60.

Because Cruz did not direct the trial court to the fact issue he now asserts precludes summary judgment or the evidence he asserts raised that fact issue, he has waived his complaint. *See Clear Creek Basin Authority*, 589 S.W.2d at 678. Therefore, we affirm the trial court's judgment.

/Ada Brown/
ADA BROWN
JUSTICE

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JUDGMENT

JOHN CRUZ, Appellant

No. 05-15-00737-CV V.

SEARS, ROEBUCK AND CO., Appellee

On Appeal from the County Court at Law No. 2, Dallas County, Texas
Trial Court Cause No. C-13-04113-B.
Opinion delivered by Justice Brown. Justices Lang and Whitehill participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee SEARS, ROEBUCK AND CO. recover its costs of this appeal from appellant JOHN CRUZ.

Judgment entered this 29th day of July, 2016.