Affirmed and Memorandum Opinion filed January 24, 2017.

In The

Fourteenth Court of Appeals

NO. 14-15-00271-CV

PATRICIA BROWN, Appellant

V.

HEB GROCERY COMPANY, LP, Appellee

On Appeal from the 190th District Court
Harris County, Texas
Trial Court Cause No. 2014-43623

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

This is an appeal from a summary judgment in a slip-and-fall case. The appellant/plaintiff asserts that the trial court erred in striking her affidavit and in granting summary judgment without allowing more time for discovery and despite the existance of fact issues. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant/plaintiff Patricia Brown slipped on spilled milk while shopping on

premises allegedly possessed and controlled by appellee/defendant HEB Grocery Company, LP. Brown filed suit against HEB asserting a negligence claim based on a premises-liability theory. HEB filed a summary-judgment motion asserting both traditional and no-evidence grounds. The trial court postponed the hearing on the motion for four weeks to allow more time for discovery. Brown filed her summary-judgment affidavit less than seven days before the summary-judgment hearing and sought leave to file the affidavit late. HEB objected and moved to strike the affidavit. The trial court struck the affidavit and granted the summary-judgment motion.

II. ISSUES AND ANALYSIS

A. Did the trial court err in granting summary judgment without allowing more time for discovery or in determining that there had been an adequate time for discovery?

In her first issue, Brown asserts the trial court erred in granting summary judgment without giving Brown additional time to conduct discovery.[1] Brown complains that she had not yet had an adequate opportunity for discovery. She also asserts that as to HEB's no-evidence ground, the trial court erred in determining that there had been an adequate time for discovery. *See* Tex. R. Civ. P. 166a(i) ("After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial"). When a party contends she has not had an adequate opportunity for discovery before a summary-judgment hearing or that there has not been adequate time for discovery under Texas Rule of Civil Procedure 166a(i), the party must file either an affidavit explaining the need for

[1] In support of her argument Brown cites several Florida cases in which the courts apply Florida law. These cases are not on point because Texas law governs the issues in this appeal.

further discovery or a verified motion for continuance. *See Tenneco, Inc. v. Enterprise Products, Co*., 925 S.W.2d 640, 647 (Tex. 1996); *Triad Home Renovators, Inc. v. Dickey*, 15 S.W.3d 142, 145 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *Green v. City of Friendswood*, 22 S.W.3d 588, 594 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). The record does not reflect that Brown took either of these steps; thus, she failed to preserve error. *See Tenneco, Inc.*, 925 S.W.2d at 647; *Doe v. Roman Catholic Archdiocese of Galveston-Houston ex rel. Dinardo*, 362 S.W.3d 803, 811–12 (Tex. App.—Houston [14th Dist.] 2012, no pet.); *Green*, 22 S.W.3d at 594; *Triad Home Renovators, Inc.*, 15 S.W.3d at 145. We overrule Brown's first issue.

B. Did the trial court err in striking appellant's untimely affidavit or in denying leave for appellant to file the affidavit late?

In her third and fourth issues, Brown asserts that the trial court should have allowed her to supplement her summary-judgment response past the deadline for doing so and that the trial court should have considered the information in her requested supplement in deciding whether to grant summary judgment. Brown filed a supplement to her summary-judgment response less than seven days before the date set for the summary-judgment hearing. The supplement contained Brown's affidavit. By written motion, Brown sought leave to file the affidavit late and for the trial court to consider the affidavit as part of the summary-judgment evidence. HEB objected to the affidavit and moved to strike it as untimely. The trial court denied Brown's motion for leave and granted HEB's motion to strike the affidavit because it was not filed timely.

In Brown's argument under her third and fourth issues, Brown does not provide any analysis, citations to the record, or citations to legal authorities to support the proposition that the trial court erred in striking her affidavit as

untimely, or in denying her motion for leave to file the affidavit untimely, or in denying her leave to amend her summary-judgment response.

In the summary-of-the-argument and argument sections of her brief Brown asserts that the trial court erred in not allowing her to amend her pleadings and in failing to consider information in the proposed amendment. Brown cites to the record and to authorities regarding the legal standard for amending pleadings under Texas Rule of Civil Procedure 63. Though Brown briefs an argument in support of the notion that the trial court erred in not allowing her to amend her pleadings under Rule 63, neither this rule nor cases applying it govern the determination as to whether the trial court erred in denying the nonmovant leave to file summary-judgment evidence or to amend a summary-judgment response less than seven days before the summary-judgment hearing. *See Carpenter v. Cimarron Hydrocarbons Corp*., 98 S.W.3d 682, 685–88 (Tex. 2002). A different legal standard applies to this determination. *See id*. Thus, Brown's argument under Rule 63 lacks merit and does not support her third and fourth issues in which she asserts that the trial court should have allowed her to supplement her summary-judgment response beyond the deadline for doing so and that the trial court should have considered the information in her requested supplement in deciding whether to grant summary judgment. Even construing Brown's brief liberally, we cannot conclude that she has briefed adequately any argument in support of her third and fourth issues. *See In re Estate of Gibbons*, 451 S.W.3d 115, 123 n.7 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). Brown has waived her third and fourth issues regarding the trial court's refusal to allow her to supplement her summary-judgment response and to file the affidavit. *See id.* We overrule the third and fourth issues.[2]

[2] Even if Brown had briefed these issues adequately, we would not conclude that the trial court

C. Did the trial court err in granting summary judgment?

In her second issue, Brown contends the trial court erred in granting summary judgment. HEB moved for summary judgment on the ground that there was no evidence HEB had actual or constructive knowledge of the substance on the floor of HEB's premises.

In reviewing a no-evidence summary judgment, we ascertain whether the nonmovant pointed out summary-judgment evidence raising a genuine issue of fact as to the essential elements challenged in the no-evidence motion. *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 206–08 (Tex. 2002). In our de novo review of a trial court's summary judgment, we consider all the evidence in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006). The evidence raises a genuine fact issue if reasonable and fair-minded jurors could differ in their conclusions in light of all of the summary-judgment evidence. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007).

We presume for the sake of argument that Brown had invitee status when she slipped on the milk and fell on the floor of the HEB store. HEB owed Brown, its invitee, a duty to exercise reasonable care to protect her from dangerous conditions in the store that were known or reasonably discoverable, but HEB was not an insurer of Brown's safety. *See Wal-Mart Stores, Inc. v. Reece*, 81 S.W.3d 812, 814 (Tex. 2002). An essential element of Brown's claim is that HEB had actual or constructive knowledge of the milk on the floor. *See id.*; *Keetch v. Kroger Co.*, 845 S.W.2d 262, 264 (Tex. 1992).

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reversibly erred in striking Brown's affidavit.

Brown may prove this element by establishing that (1) HEB placed the milk on the floor, (2) HEB actually knew that the milk was on the floor, or (3) it is more likely than not that the condition existed long enough to give HEB a reasonable opportunity to discover it. *See Reece*, 81 S.W.3d at 814; *Keetch*, 845 S.W.2d at 265. On appeal, Brown does not assert that HEB placed the milk on the floor or that HEB actually knew that the milk was on the floor, nor is there any summary-judgment evidence that would raise a fact issue on these points. Therefore, to avoid summary judgment, there must be summary-judgment evidence raising a fact issue as to whether the milk had been on the floor for a sufficient period of time that HEB had a reasonable opportunity to discover it.

The rule requiring proof that a dangerous condition existed for some length of time before a premises owner may be charged with constructive knowledge is firmly rooted in Texas jurisprudence. *See Reece*, 81 S.W.3d at 815. This rule emerged from the reluctance of Texas courts to impose liability on a storekeeper for the carelessness of another over whom the storekeeper had no control or for "the fortuitous act of a single customer" that instantly could create a dangerous condition. *See id*. at 816. This rule is based on the premise that temporal evidence best indicates whether the owner had a reasonable opportunity to discover and remedy a dangerous condition. *See id*. Without some temporal evidence, there is no basis upon which the factfinder reasonably can assess the opportunity the premises owner had to discover the dangerous condition. *See id*. Before liability can be imposed on the premises owner for failing to discover and rectify, or warn of, the dangerous condition, there must be some proof as to how long the hazard existed. *See id*.

Our record contains no summary-judgment evidence as to how long the milk was on the floor before Brown slipped and fell. In her deposition, Brown testified

that she did not know how long the milk had been on the floor before she slipped and fell. None of Brown's deposition testimony raised a fact issue as to how long the milk had been on the floor. Brown timely submitted two affidavits from her attorney, her responses to HEB's requests for disclosure, and the transcript from the deposition of Jason Gulley, who was the assistant store director at the HEB store when Brown slipped and fell. None of this evidence raises a genuine fact issue as to how long the milk was on the floor.

We have no summary-judgment evidence indicating when or how the milk came to be on the floor or how long it remained there before the slip and fall. Likewise, the record contains no timely summary-judgment evidence of any condition of the milk that might indicate how long the milk had been on the floor when Brown slipped and fell. Under the applicable standard of review, we conclude the evidence does not raise a genuine issue of fact as to whether (1) HEB placed the milk on the floor, (2) HEB actually knew that the milk was on the floor, or (3) it is more likely than not that the milk had been on the floor long enough to give HEB a reasonable opportunity to discover the milk. *See id*. at 814–17. The summary-judgment evidence does not raise a genuine fact issue as to whether HEB had actual or constructive knowledge that the milk was on the floor. *See id*.; *Martinez v. Fallas Paredes*, No. 14-11-00869-CV, 2012 WL 5336961, at *1–3 (Tex. App.—Houston [14th Dist.] Oct. 30, 2012, no pet.) (mem. op.).

Absent evidence that HEB placed the milk on the floor or actually knew that it was there, in responding to the no-evidence motion, Brown had the burden to submit evidence as to how long the milk had been on the floor when she slipped and fell. *See Reece*, 81 S.W.3d at 815; *Martinez*, 2012 WL 5336961, at *1–3. Because no summary-judgment evidence addresses how long the milk had been on the floor when Brown slipped and fell, the trial court did not err in granting

summary judgment. *See Reece*, 81 S.W.3d at 815; *Martinez*, 2012 WL 5336961, at *1–3. Therefore, we overrule Brown's second issue.

Having overruled all of Brown's issues, we affirm the trial court's judgment.

/s/ Kem Thompson Frost
Chief Justice

Panel consists of Chief Justice Frost and Justices Boyce and Wise.