COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00234-CV

AIDA COLLINS-BASEMORE — APPELLANT

V.

HOME DEPOT U.S.A., INC. — APPELLEE

FROM COUNTY COURT AT LAW NO. 2 OF TARRANT COUNTY
TRIAL COURT NO. 2015-000680-2

MEMORANDUM OPINION[1]

This is a premises liability case. Appellant Aida Collins-Basemore sued Appellee Home Depot U.S.A., Inc. (Home Depot) after she was injured in a Home Depot store. The trial court granted summary judgment for Home Depot, and Collins-Basemore now appeals. In one issue, Collins-Basemore asks

[1]*See* Tex. R. App. P. 47.4.

whether the trial court erred by granting Home Depot's no-evidence motion for summary judgment on its asserted ground that there was no evidence it had notice of the condition that caused her injuries. We affirm.

Facts and Procedural Background

Collins-Basemore alleged in her petition that while shopping in a Home Depot store, she severely lacerated her thumb in attempting to retrieve a mirror from a shelf of mirrors. She alleged that, unbeknownst to her, one of the mirrors on the shelf had been broken and that this broken mirror lacerated her thumb. She asserted a negligence claim and sought damages for past and future medical expenses, past and future pain and suffering, past and future mental anguish, and attorney's fees.

Home Depot filed a combined traditional and no-evidence motion for summary judgment. As no-evidence grounds, Home Depot asserted that there was no evidence that it broke the mirror, that it knew the mirror had been broken, or that the broken mirror had been present long enough for Home Depot to be charged with having discovered it. As a traditional ground, Home Depot asserted that it did not have notice of the condition of the broken glass.

As summary judgment evidence, Home Depot attached copies of Collins-Basemore's answers to Home Depot's request for admissions and responses to Home Depot's interrogatories, as well as her deposition testimony. In its request for admissions, Home Depot asked Collins-Basemore to admit that she did not know who broke the mirror, when it was broken, or how long it had been on the

shelf after it was broken. She denied the admissions on the basis that she was "without information to admit or deny." Further, she admitted that Home Depot did not have notice that the mirror was broken prior to her injury.

In Home Depot's interrogatories, it asked Collins-Basemore to state all facts upon which she asserted that Home Depot knew or should have known about the broken mirror. In response, she answered that "the company should have frequently checked these displays or moved this section to a custom service area. Had Home Depot done any of these things the incident would not have happened."

At her deposition, Collins-Basemore testified that she had no idea who broke the mirror or how long it had been broken before she encountered it. She stated that she had no way of seeing the mirror was broken before the box containing it was pulled out, and the broken mirror was "[a]bsolutely not" obvious to anybody walking by.

Challenging Home-Depot's no-evidence grounds in her summary judgment response, Collins-Basemore asserted that Home Depot's constructive notice of the broken mirror replaced its need to have actual notice of that dangerous condition. She also relied on her deposition testimony attached to Home Depot's summary judgment motion, where she testified that Home Depot should have frequently checked the mirror display case. With respect to the traditional motion, Collins-Basemore contended that Home Depot had failed to produce any

testimony that an employee of the store frequently inspected the condition of the mirror display case.

After conducting a hearing on the motion, the trial court granted summary judgment for Home Depot without specifying the grounds for its ruling.

Standard of Review

A defendant is entitled to traditional summary judgment on an affirmative defense if the defendant conclusively proves all the elements of the affirmative defense. *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 508–09 (Tex. 2010), *cert. denied*, 562 U.S. 1180 (2011); *see* Tex. R. Civ. P. 166a(b), (c). To accomplish this, the defendant-movant must present summary judgment evidence that conclusively establishes each element of the affirmative defense. *See Chau v. Riddle*, 254 S.W.3d 453, 455 (Tex. 2008).

After an adequate time for discovery, the party without the burden of proof may, without presenting evidence, move for summary judgment on the ground that there is no evidence to support an essential element of the nonmovant's claim or defense. Tex. R. Civ. P. 166a(i). The trial court must grant the motion unless the nonmovant produces summary judgment evidence that raises a genuine issue of material fact. *See* Tex. R. Civ. P. 166a(i) & cmt.; *Hamilton v. Wilson*, 249 S.W.3d 425, 426 (Tex. 2008).

We review a summary judgment de novo. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). We consider the evidence presented in the light most favorable to the nonmovant, crediting evidence favorable to the

nonmovant if reasonable jurors could, and disregarding evidence contrary to the nonmovant unless reasonable jurors could not. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009); *Sudan v. Sudan*, 199 S.W.3d 291, 292 (Tex. 2006).

When a party moves for summary judgment under both rules 166a(c) and 166a(i), we will first review the trial court's judgment under the standards of rule 166a(i). *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004). If the appellant failed to produce more than a scintilla of evidence under that burden, then there is no need to analyze whether the appellee's summary judgment proof satisfied the rule 166a(c) burden. *Id*.

Analysis

Collins-Basemore asserted a premises liability claim against Home Depot. *See Occidental Chem. Corp. v. Jenkins*, 478 S.W.3d 640, 644 (Tex. 2016) (describing the differences between a premises liability claim and a negligence claim when a person is injured on another's property and providing that "[w]hen the injury is the result of the property's condition rather than an activity, premises-liability principles apply"). "Under premises-liability principles, a property owner generally owes those invited onto the property a duty to make the premises safe or to warn of dangerous conditions as reasonably prudent under the circumstances." *Id.* When, as here, the injured party is an invitee, the elements of a premises liability claim are as follows:

> (1) Actual or constructive knowledge of a condition on the premises by the owner or occupier;
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> (2) That the condition posed an unreasonable risk of harm;
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> (3) That the owner or occupier did not exercise reasonable care to reduce or eliminate the risk; and
>
> (4) That the owner or occupier's failure to use such care proximately caused the plaintiff's injury.

CMH Homes, Inc. v. Daenen, 15 S.W.3d 97, 99 (Tex. 2000); s*ee Am. Indus. Life Ins. Co. v. Ruvalcaba*, 64 S.W.3d 126, 135 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) ("A person is an invitee only where the owner or occupier invites the person to enter the premises and where the person's visit involves at least a potential pecuniary profit to the owner or occupier").

"Actual knowledge 'requires knowledge that the dangerous condition existed at the time of the accident, as opposed to constructive knowledge which can be established by facts or inferences that a dangerous condition could develop over time.'" *Duncan v. First Tex. Homes*, 464 S.W.3d 8, 16 (Tex. App.—Fort Worth 2015, pet. denied) (quoting *City of Corsicana v. Stewart*, 249 S.W.3d 412, 414–15 (Tex. 2008)). To show constructive notice of a dangerous condition, the injured party must prove that "'It is more likely than not that the condition existed long enough to give the premises owner a reasonable opportunity to discover it.'" *Brookshire Bros., Ltd. v. Aldridge*, 438 S.W.3d 9, 16 (Tex. 2014) (quoting *Wal–Mart Stores, Inc. v. Reece*, 81 S.W.3d 812, 814 (Tex. 2002)); *see Richardson v. Wal-Mart Stores, Inc.*, 963 S.W.2d 162, 165 (Tex. App.—

Texarkana 1998, no pet.) (stating that to establish an owner's actual or constructive knowledge of a dangerous condition on the floor, an invitee may prove (1) that the owner put the foreign substance on the floor; (2) that the owner knew that it was on the floor and negligently failed to remove it; or (3) that the substance was on the floor so long that, in the exercise of ordinary care, it should have been discovered and removed).

Collins-Basemore filed no evidence as part of her summary judgment response. Rather, she relied entirely on references to the summary judgment evidence provided by Home Depot in support of its motion. A review of her discovery responses and deposition testimony provides no evidence that Home Depot had actual knowledge of the broken mirror. *See, e.g.*, *Duncan*, 464 S.W.3d at 16–17 ("When determining if a premises owner has actual knowledge of a condition that presents an unreasonable risk of harm, courts generally consider whether the owner had received reports of prior injuries or reports of the potential danger presented by the condition."). Nor does the summary judgment record contain any evidence relating to Home Depot's constructive knowledge of the condition, such as how long the broken mirror had been there before Collins-Basemore was injured by it. To the contrary, Collins-Basemore admitted that she had no information about how long the mirror had been there, and she admitted that the condition was not obvious to anyone walking by. Indeed, her own deposition testimony was that Home Depot could not have discovered the broken mirror until the box containing the mirror was

actually pulled off the shelf. She only argued that Home Depot should have inspected the area more frequently, but she offered no evidence of how often Home Depot did inspect the area.

As a result, Collins-Basemore produced no evidence raising an issue of material fact about whether Home Depot actually knew or had constructive knowledge of the broken mirror. Accordingly, the trial court did not err by granting the no-evidence summary judgment for Home Depot. *See Hamilton*, 249 S.W.3d at 426. We overrule Collins-Basemore's issue.

Conclusion

Having overruled Collins-Basemore's sole issue, we affirm the trial court's judgment.

/s/ Mark T. Pittman
MARK T. PITTMAN
JUSTICE

PANEL: SUDDERTH, KERR, and PITTMAN, JJ.

DELIVERED: February 23, 2017