Filed 7/17/13 Arreola v. Daniel Food Enterprises CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ISIDRO ARREOLA, Plaintiff and Appellant, v. DANIEL FOOD ENTERPRISES, INC., Defendant and Respondent.	B243828 (Los Angeles County Super. Ct. No. EC054300)

APPEAL from a judgment of the Superior Court of Los Angeles County. William D. Stewart, Judge. Affirmed.

Law Offices of Julian A. Pollok and Julian A. Pollock for Plaintiff and Appellant.

Wesierski & Zurek, Frank J. D'Oro and Ryne W. Osborne for Defendant and Respondent.

Plaintiff and appellant Isidro Arreola (plaintiff) appeals the summary judgment entered in favor of defendant and respondent Daniel Food Enterprises, Inc., sued as Vallarta Supermarkets, Inc. (defendant), in this action for negligence and premises liability for injuries sustained when plaintiff slipped and fell inside a Vallarta Supermarket. We affirm the judgment.

BACKGROUND

Plaintiff slipped and fell in a Vallarta Supermarket at approximately 4:00 p.m. on December 2, 2009. He sued defendant for negligence and premises liability, claiming that a slippery and sticky substance on the floor caused him to slip and fall and sustain injury.

Defendant moved for summary judgment on the grounds that plaintiff failed to establish a claim for either negligence or premises liability and that no triable issue of material fact existed with respect to duty and causation. In support of its motion, defendant submitted a separate statement of undisputed material facts stating that plaintiff fell at approximately 4:00 p.m. on December 2, 2009, after stepping in an unknown "wet" and "sticky" substance on the floor in the produce department of the market. Plaintiff did not see anything on the floor before he fell. After he fell, plaintiff did not look at the floor to determine whether there was some substance on the floor that could have caused him to slip and fall, nor did he examine the bottom of his shoes to see if there was anything on them. Defendant's separate statement was supported by portions of plaintiff's deposition testimony.

Also in support of the summary judgment motion, defendant submitted the declaration of Francisco Yonamine (Yonamine), a maintenance employee of Vallarta Supermarket No. 9, the store at which the incident occurred. In his declaration, Yonamine stated that as a maintenance employee, he was responsible for inspections of the store's floor. He began his inspections at the cash registers and ended in the produce department. Each inspection took approximately 20 to 25 minutes to complete, and upon completion of an inspection, Yonamine placed his initials on the store's "floor sweep sheet." Yonamine stated that he was working in maintenance at the store on December 2,

2009. He completed a floor inspection at 4:05 p.m. that day and initialed the store sweep sheet. Yonamine further stated that his inspection would have included an inspection of the produce department several minutes before he initialed the sweep sheet at 4:05 p.m. that day, and that had he noticed any liquids or debris during his inspection, he would have cleaned them up.

Defendant also submitted the declaration of Silvia Perez, the manager of Vallarta Supermarket No. 9. Perez stated in her declaration that it is defendant's regular business practice to have store employees complete store "sweep sheets" by writing their initials and the time at which a store inspection has been completed. Perez further stated that store employees are under a business duty to prepare the sweep sheets truthfully and accurately. Attached to Perez's declaration was a copy of the store sweep sheet for the week ending December 6, 2009.

Plaintiff opposed the summary judgment motion, arguing that triable issues of fact existed as to whether there had been a dangerous condition on the floor of the market, whether defendant had actual or constructive knowledge of that dangerous condition, and whether the dangerous condition was the cause of plaintiff's fall. In support of his opposition, plaintiff submitted his own deposition testimony in which he described slipping on a wet and sticky substance on the floor of the produce department in the presence of a Vallarta Supermarket employee who was working nearby. Plaintiff also submitted deposition testimony by Yonamine in which Yonamine admitted that he could not remember, at the time of his deposition, whether or not he saw something on the floor during the inspection he completed at 4:05 p.m. on December 2, 2009.

Defendant's reply to plaintiff's opposition included additional deposition testimony by plaintiff, in which plaintiff admitted that he did not see anything on the floor before he slipped and that the wet, sticky substance he felt on the bottom of his shoe at the time he fell "was just a little tiny thing." Plaintiff had also testified that the Vallarta Supermarket employee who was in the produce department at the time of the incident had his back to plaintiff the entire time before plaintiff fell.

The trial court concluded that plaintiff's testimony regarding his tactile impression of the condition of the floor was sufficient to demonstrate that he had evidence of a dangerous condition that had caused him to slip and fall. The trial court further concluded, however, that defendant had demonstrated that it neither knew nor should have known about the allegedly dangerous condition and that plaintiff failed to produce evidence raising a triable issue of fact regarding notice. The trial court granted summary judgment in defendant's favor, and this appeal followed.

DISCUSSION

I. Standard of review

Summary judgment is granted when a moving party establishes the right to entry of judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment bears the initial burden of proving that there is no merit to a cause of action by showing that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subd. (p)(2); *Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1037.) Once the defendant has made such a showing, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or as to a defense to the cause of action. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.) If the plaintiff does not make such a showing, summary judgment in favor of the defendant is appropriate. In order to obtain a summary judgment, "all that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action . . . . [T]he defendant need not himself conclusively negate any such element . . . ." (*Id*. at p. 853.)

We review the trial court's grant of summary judgment de novo and decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348; Code Civ. Proc., § 437c, subd. (c).)

II. Negligence and premises liability

The elements of a negligence cause of action are the existence of a legal duty of care, breach of that duty, and proximate cause resulting in injury. (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917-918.) The elements of a cause of action for premises liability are the same as those for negligence: duty, breach, causation, and damages. (*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1205 (*Ortega*); see Civ. Code, § 1714, subd. (a).) In addition, a plaintiff suing for premises liability has the burden of proving that the owner had actual or constructive knowledge of a dangerous condition in time to correct it, or that the owner was "'able by the exercise of ordinary care to discover the condition.'" (*Ortega, supra*, at p. 1206, quoting *Girvetz v. Boys' Market, Inc.* (1949) 91 Cal.App.2d 827, 829.) The reason for placing this burden of proof on the plaintiff "is that if the burden of proving lack of notice were placed on the owner in a slip-and-fall case, where the source of the dangerous condition or the length of time it existed cannot be shown, failure to meet the burden would require a finding of liability, effectively rendering the owner an insurer of the safety of those who enter the premises. [Citation.]" (*Ortega*, at p. 1206.)

When the plaintiff has no evidence of how long the dangerous condition existed prior to the injury, "evidence of the owner's failure to inspect the premises within a reasonable period of time is sufficient to allow an inference that the condition was on the floor long enough to give the owner the opportunity to discover and remedy it. [Citation.]" (*Ortega, supra*, 26 Cal.4th at p. 1203, fn. omitted.) Although the owner's constructive knowledge of the dangerous condition may be inferred from a failure to inspect the premises within a reasonable time, speculation and conjecture are insufficient to sustain the plaintiff's burden. (*Id.* at pp. 1205-1206.) Whether a dangerous condition existed long enough for a reasonably prudent person to have discovered it is ordinarily a question of fact for the jury. (*Id*. at p 1207.) However, if the evidence does not support a reasonable inference that the hazard existed long enough to be discovered in the exercise of reasonable care, the issue of notice may be resolved as a matter of law. (*Ibid.*) An owner is therefore entitled to judgment as a matter of law if the plaintiff fails to show that

the dangerous condition existed for at least a sufficient time to be discovered by ordinary care and inspection. (*Ibid*.)

III. No actual or constructive notice of the dangerous condition

Defendant met its statutory burden of proof under Code of Civil Procedure section 437c of showing that plaintiff cannot establish that defendant had actual or constructive notice of the dangerous condition, and plaintiff failed to show a triable issue of fact as to notice.

Plaintiff has no direct evidence of how long the wet, sticky substance on which he allegedly slipped was on the floor. He relies instead on the evidence of defendant's inspection procedures. Defendant presented evidence that its procedures required regular inspections of the store. Defendant kept written records of inspections, and required its employees to initial the sweep log immediately after completing each required inspection. On the day of plaintiff's fall, Yonamine initialed the sweep log at 4:05 p.m. Yonamine stated that his inspections took between 20 to 25 minutes to complete and that he would have cleaned up any liquids or debris he noticed during his inspections. Yonamine further stated he typically ended his inspections in the produce department, and that by following his customary inspection route, he would have been in the produce department several minutes before initialing the sweep sheet at 4:05 p.m. Plaintiff fell in the produce department at approximately 4:00 p.m., or shortly thereafter. The evidence thus shows that plaintiff's fall occurred minutes after Yonamine completed his inspection. The evidence does not raise a reasonable inference that the alleged hazard existed long enough to be discovered and remedied.

Plaintiff cites *Ortega* and *Louie v. Hagstrom's Food Stores, Inc.* (1947) 81 Cal.App.2d 601 (*Louie*) as support for his argument that the instant facts give rise to an inference that defendant had notice of the dangerous condition. Those cases, however, are distinguishable. In *Ortega*, the plaintiff slipped in a puddle of milk in a Kmart but had no evidence of how long the milk had been on the floor. Although Kmart presented evidence that its employees were trained to look for and clean up spills, it kept no written inspection records. Kmart's manager testified that he would not have known if the area

in which the spill occurred had been inspected at any time that day and that the milk could have been on the floor for as long as two hours. (*Ortega*, *supra*, 26 Cal.4th at p. 1204.) Our Supreme Court affirmed the judgment in favor of the plaintiff, holding that Kmart's failure to conduct inspections within a reasonable time before the incident was evidence of negligence and raised a reasonable inference that the spill existed long enough to be discovered and remedied. (*Id.* at p. 1211.) Here, in contrast, defendant conducted regular inspections and kept written inspection records. Those records showed that the produce area in which plaintiff fell had been inspected just minutes before the accident.

Louie is equally distinguishable. The plaintiff in that case slipped in a puddle of Karo syrup near the entrance of a grocery store. The evidence showed that no employee had inspected that area for 15 to 20 minutes before the plaintiff's fall. The syrup was thick and did not flow freely, and by the time the plaintiff slipped, it had formed a puddle a foot and a half wide. The court in *Louie* affirmed the judgment in the plaintiff's favor, finding that the evidence raised a reasonable inference that the syrup had been on the floor for "a substantial period of time" for the owner to have discovered it. (*Louie, supra*, 81 Cal.App.2d at pp. 608-609.) Unlike *Louie*, the evidence in the instant case showed that Yonamine had completed an inspection of the produce area a few minutes before plaintiffs' fall, and there was no physical evidence to confirm the presence of any wet, sticky substance on the floor in that area.

Plaintiff contends he presented evidence, in the form of Yonamine's deposition testimony, that raises a triable issue as to whether or not Yonamine saw anything on the floor during his inspection of the produce department immediately before plaintiff's accident. The record shows that Yonamine made several inspections of the store on December 2, 2009. During his deposition, taken more than three years later, Yonamine testified that he could not remember what he picked up during any of the inspections he conducted on December 2, 2009, or whether he saw anything on the floor during any of those inspections. This evidence is insufficient to raise a triable issue as to whether defendant had notice of a dangerous condition in time to correct it. The undisputed

evidence shows that plaintiff slipped and fell in the produce department at approximately 4:00 p.m., or shortly thereafter, on December 2, 2009. Yonamine stated in his declaration that he completed a store inspection at 4:05 p.m. that day and that he would have been in the produce department several minutes before he initialed the store sweep sheet at 4:05 p.m. -- just minutes before plaintiff's accident. Yonamine further stated that he would have cleaned up any liquids or debris he noticed during the course of his inspection. That Yonamine could not recall during his deposition what he saw or cleaned up during the course of several store inspections he made on a particular day more than three years earlier raises no triable issue as to when Yonamine inspected the produce area on the date and time at issue, or as to whether he would have cleaned up any hazards he observed during that inspection.

Plaintiff next argues that the presence of an unidentified employee working in the produce department at the time of his fall raises a triable issue of fact as to whether defendant had actual or constructive notice of the dangerous condition. Plaintiff testified that an unidentified employee was regularly in the produce area whenever plaintiff was in the store. This same employee was present in the produce department approximately 20 feet away from plaintiff at the time of the accident. Plaintiff admitted, however, that the employee had his back to plaintiff the entire time. The mere presence of the employee in the general vicinity at the time plaintiff slipped and fell raises no triable issue as to whether defendant had actual or constructive notice of a dangerous condition. There was no evidence that the employee, or anyone else, saw anything on the floor that might have caused plaintiff to slip and fall, either before or after the accident.

The trial court did not err by concluding that plaintiff could not establish that defendant had actual or constructive notice of any dangerous condition in time to remedy it.

IV. Alleged procedural defect

Plaintiff contends summary judgment should have been denied because defendant failed to comply with the required format for a separate statement of undisputed material facts. Plaintiff maintains defendant's separate statement should have separately

identified plaintiff's causes of action for negligence and premises liability and each supporting material fact claimed to be without dispute with respect to each of those causes of action.

The purpose of the separate statement requirement is to give the parties notice of the material facts at issue and to allow the trial court to focus on those facts. (*Parkview Villas Assn., Inc. v. State Farm Fire & Casualty Co.* (2005) 133 Cal.App.4th 1197, 1210.) Defendants argued that the same set of undisputed facts applied to defeat both the negligence and premises liability causes of action asserted by plaintiff. Plaintiff could readily determine that all of the facts in defendant's separate statement were claimed to be without dispute with respect to both of those causes of action. Plaintiff does not claim to have suffered prejudice in any manner whatsoever as the result of the alleged procedural defect, nor does he appear to have had any difficulty in responding to defendant's motion. The trial court accordingly did not abuse its discretion by disregarding the alleged formatting defect. (*Collins v. Hertz Corp.* (2006) 144 Cal.App.4th 64, 73.)

DISPOSITION

The judgment is affirmed. The parties will bear their respective costs on appeal.

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_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.*
FERNS

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.