Filed 10/31/17 De Paz v. Northgate Gonzalez Markets CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

EMMA DE PAZ, Plaintiff and Appellant, v. NORTHGATE GONZALEZ MARKETS, INC., Defendant and Respondent.	B278586 (Los Angeles County Super. Ct. No. BC544501)

APPEAL from a judgment of the Superior Court of Los Angeles County, David Sotelo and Patricia Nieto, Judges. Affirmed.

Law Offices of Andrew Zeytuntsyan, Andrew Zeytuntsyan, and Joseph S. Socher for Plaintiff and Appellant.

Wesierski & Zurek, Frank D'Oro, Brent Gerome, and Lynne Rasmussen for Defendant and Respondent.

Emma De Paz was allegedly injured when she slipped and fell in a grocery store owned by defendant Northgate Gonzalez Markets, Inc. (Northgate). She sued Northgate for damages based on theories of negligence and premises liability. The trial court granted Northgate's motion for summary judgment on the ground that Northgate had no actual or constructive notice of the condition that caused De Paz to fall. The trial court thereafter denied De Paz's motion for new trial and entered judgment for Northgate. De Paz timely appealed. We affirm.

FACTUAL AND PROCEDURAL SUMMARY

On September 12, 2012, De Paz was shopping at Northgate's grocery store in Los Angeles. Sometime between 7:15 p.m. and 7:20 p.m., De Paz slipped on a piece of a vegetable and fell in an area between the store's cash registers and merchandise aisles.[1] The vegetable—possibly a verdolaga leaf or a celery stalk—was approximately 10 centimeters (four inches) long. De Paz alleges she was injured as a result.

In May 2014, De Paz sued Northgate to recover damages based on theories of negligence and premises liability. Northgate answered the complaint in June 2014 and denied liability.

In June 2015, Northgate filed a motion for summary judgment. Northgate asserted that De Paz could not establish that it had actual or constructive notice of the injury-causing vegetable, and that it was therefore entitled to judgment as a matter of law.

---

[1] There are references in the record to the incident occurring "in front" of the registers and "behind" the cash registers. In this case, these apparent antonyms refer to the same place: the area between the cash registers and the store's merchandise aisles, where customers might wait before paying for their purchases.

De Paz's discovery responses established that: De Paz did not know where the vegetable came from or who caused it to be on the floor; she did not know whether anyone saw or knew of the vegetable before she fell; and it did not appear to De Paz that a shopping cart had run over the vegetable before she fell.

Northgate also submitted declarations by three Northgate employees: Miriam Nava, Consuelo Robles, and Rafael Raimundo. Nava, Northgate's human resources manager, stated that Northgate "maintains a 'constant vigilance' approach to spills or foreign substances on the floor" and "that it is part of every employee's job duties to continuously inspect the store floors for spills or other objects that could potentially be a hazard. This policy," Nava stated, "was in effect and was being carried out on the day of" De Paz's fall. Specifically, Robles and Raimundo conducted the store inspections on that day.

Robles and Raimundo stated in their declarations that on the day of the incident they performed their duties "to constantly walk, inspect, and police the store floors to ensure that the floors were free of any foreign substances, dangerous conditions, dangerous objects, or any other type of debris." Their "frequent and regular inspections of the store" "covered the floors for all areas of the store that are open to customers," and "included the area in front of the cash registers" where De Paz fell.

On the day of the incident, Robles filled out a "Complete Store Maintenance Log," or "sweep sheet," on which Robles recorded the time she completed each inspection. This document shows that Robles conducted 19 inspections between 3:00 p.m. and 10:00 p.m., including inspections that she completed at 6:23 p.m., 6:51 p.m., 7:22, p.m., and 7:39 p.m.

Northgate also produced a "Gleason Report," which indicates the date and time an employee carrying a "Gleason device" passes by checkpoints located throughout the store.

The checkpoints are numbered 1 through 22 (but do not include a number 20) and each is associated with a distinct location. Checkpoint 1, for example, is labeled "Entrance/Exit," and checkpoint 2 is labeled "Bakery." There is a checkpoint for each of eight aisles of merchandise, and one labeled "Registers." According to Raimundo, each entry in the report indicates when he inspected the floor in the area identified in the report at the time noted in the report. Raimundo identified the times corresponding to certain checkpoints associated with merchandise aisles, not the times corresponding to the "Registers" checkpoint, as the times when he inspected "the area in front of the cash registers."

Among other inspections on the day of the incident, Raimundo conducted an inspection that began at 6:16 p.m. during which he passed by the various aisle checkpoints between 6:20 p.m. and 6:25 p.m., and completed the inspection of the store at 6:29 p.m. Raimundo began another inspection at 7:06 p.m., passed by the eight aisle checkpoints between 7:12 p.m. and 7:22 p.m., and finished his inspection at 7:29 p.m.

Robles and Raimundo each stated that they did not see any pieces of fruits or vegetables in the area in front of the cash registers prior to De Paz's fall. Nava stated that she was not aware that anyone had reported any fruits or vegetables on the floor in front of the registers prior to the time De Paz fell.

In opposition to the motion, De Paz argued that Northgate's evidence was insufficient to establish that the store had conducted a reasonable inspection of the premises prior to De Paz's fall. De Paz further argued that there were "ongoing, serious discovery disputes" and that Northgate "has withheld evidence."

De Paz submitted deposition testimony by Nava and another Northgate employee, Oscar Padilla. Nava stated that

an employee performing an inspection using the Gleason system conducts a "walk-through" of the entire store, which takes about 15 minutes unless there is something to clean up. These inspections are conducted every half-hour. In addition, the head of each of the five departments within the store is responsible for ensuring that a "sweep" of the department is performed. At one point, Nava testified that these inspections are performed every hour; at another point, she said they are performed every half-hour.

Nava testified that a store manager informed her of De Paz's fall the day after it occurred. The manager reported that the incident occurred at 7:15 p.m., and that De Paz "appeared to be fine" and "didn't seem to be hurt." The manager helped De Paz with her groceries and rang up her purchases at a cash register. No one took any pictures of De Paz or the area where she fell.

Nava stated that she reviewed security camera video recordings for a period beginning one-half hour before the incident and concluding one-half hour after the incident. The video shows the cash registers, but not De Paz's fall or the area where she fell. Nava did not remember seeing De Paz in the video at any point. She said she sent a copy of the video to Northgate's risk management department along with the manager's report of the incident.

Padilla testified at his deposition that security cameras are focused on the cash registers, but not in the area "behind" the registers. Padilla stated that security camera video is recorded electronically and new material is automatically recorded over the prior video after approximately 30 days. Whether to retain a video recording is "at the discretion of the store director in most cases." Northgate would, however, ordinarily retain video

recordings when there is a "slip and fall" or other incident that requires an investigation.

De Paz also submitted the declaration of Brad Avrit, a "loss prevention, safety and risk management expert witness."[2] Avrit opined that 15 minutes to conduct inspections of the store, as Nava had testified, "seems to be very short," and that a "general 30-minute inspection of an entire store is not the best practice"; and more frequent inspections should take place in high traffic areas, such as near the cash registers. Avrit also opined that Northgate's "training is inadequate" and persons not properly trained "will likely just glance around the area . . . [and] not visualize the entire area being inspected." Furthermore, Avrit opined that the store should not merely conduct visual inspections and clean up areas when the need arises, but should sweep high risk areas of the store every 30 minutes throughout the day. Avrit concluded that De Paz's injuries could have been "prevented if [Northgate's] employees performed their duties adequately."

In support of its reply, Northgate submitted the declaration of Mayra Rivera, a claims manager in its risk management department. Rivera stated that Northgate has "no record or information of any kind confirming that any video evidence that may have been preserved by [Nava] . . . in connection with [De Paz's] incident ever arrived at the Northgate risk management office." If a video recording was transmitted, it may have been accidentally discarded or misfiled. Although Rivera

---

[2] The trial court sustained Northgate's objections to certain parts of Avrit's declaration. De Paz does not challenge the trial court's rulings on appeal. We do not, therefore, consider the statements Avrit made to which objections were sustained. (Code Civ. Proc., § 437c, subd. (c); *Loggins v. Kaiser Permanente Internat.* (2007) 151 Cal.App.4th 1102, 1108, fn. 5.)

"made a diligent search for any video regarding this incident," she "found nothing."

At the hearing on the motion, De Paz's counsel requested a continuance to conduct further discovery to obtain a copy of Northgate's surveillance video.[3] The trial court denied the request.

The trial court rejected Northgate's proffered undisputed fact No. 11 that Raimundo inspected the area in front of the cash registers between 6:20 p.m. and 6:25 p.m. and between 7:12 p.m. and 7:22 p.m. Although this fact was supported by Raimundo's declaration, the trial court explained that the times did not correspond with the times indicated in the Gleason Report for the "registers" checkpoint. Notwithstanding Northgate's failure to establish this fact, the trial court ruled that Northgate had established that it had no actual notice of any produce on the floor prior to De Paz's fall and that "it is undisputed that Robles inspected the area in front of the cash registers approximately 19 to 24 minutes before [De Paz] fell."[4] This period of time, the trial court concluded, was insufficient to support a finding that Northgate had constructive notice of a dangerous condition. Northgate was therefore entitled to summary judgment.

DePaz filed a motion for new trial on the ground that the trial court erred in denying her request for a continuance

---

[3] Our record does not include a transcript of the hearing on the motion for summary judgment. The evidence that De Paz's counsel requested a continuance is counsel's declaration submitted in support of De Paz's motion for a new trial.

[4] De Paz contends, and Northgate does not dispute, that the trial court's calculation of time was erroneous. If Robles's 6:51 p.m. inspection completion time is used and De Paz fell between 7:15 p.m. and 7:20 p.m., then the intervening period is 24 to 29 minutes, not 19 to 24 minutes.

of Northgate's summary judgment to allow her time to compel the production of Northgate's surveillance video. Northgate opposed the motion on the ground that Northgate "does not have possession, custody, or control of" the video De Paz seeks. The trial court denied the motion.

After the trial court entered judgment for Northgate, De Paz appealed.

DISCUSSION

I. Standard of Review

Summary judgment is proper when all the papers submitted on the motion show there are no triable issues of material fact and the moving party is entitled to judgment as a matter of law. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843; Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment bears an initial burden of showing that one or more elements of the plaintiff's cause of action cannot be established or that there is a complete defense to that cause of action. (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 849.) If the defendant meets this burden, the plaintiff has the burden to demonstrate one or more triable issues of material fact as to the cause of action or defense. (*Ibid.*) A triable issue of material fact exists "if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Id.* at p. 850.)

In reviewing summary judgment, "[w]e review the trial court's decision de novo, liberally construing the evidence in support of the party opposing summary judgment and resolving doubts concerning the evidence in favor of that party." (*State of California v. Allstate Ins. Co.* (2009) 45 Cal.4th 1008, 1017-1018.)

II. Analysis

The elements of a negligence claim and a premises liability cause of action are the same: The defendant owed the plaintiff a legal duty of care, the defendant breached that duty, and the breach was a proximate or legal cause of plaintiff's injuries. (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1158; *Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917-918.)

Grocery store owners are not insurers of their patrons' safety, but do owe them a "duty to exercise reasonable care in keeping the premises reasonably safe." (*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1205 (*Ortega*).) And if an owner or a store employee has actual or constructive knowledge of a dangerous condition on the premises, the owner has a duty to remedy it. (*Hatfield v. Levy Brothers* (1941) 18 Cal.2d 798, 806; *Getchell v. Rogers Jewelry* (2012) 203 Cal.App.4th 381, 385-386.) An owner has "constructive knowledge" of a dangerous condition when the "condition has existed long enough for a reasonably prudent person to have discovered it." (*Ortega*, *supra*, 26 Cal.4th at p. 1207.)

Proving how long a dangerous condition existed prior to a patron's slip-and-fall may be problematic for a plaintiff when, as here, there is no evidence of when or how the dangerous condition came to be. Our Supreme Court addressed this problem in *Ortega*, *supra*, 26 Cal.4th 1200. In that case, the plaintiff was injured when he slipped on a puddle of milk in the defendant's store. (*Id.* at p. 1204.) At trial, the plaintiff produced no evidence showing how long the milk had been on the floor. Defendant's store manager could not state whether the aisle where the accident occurred had been inspected on the day of the accident, and said that the milk could have been on the floor for up to two hours. (*Ibid.*)

The *Ortega* Court considered whether a plaintiff, who was injured by a dangerous condition in a store and "has no evidence of the source of the dangerous condition or the length of time it existed, may . . . rely solely on the owner's failure to inspect the premises within a reasonable period of time in order to establish an inference that the defective condition existed long enough for a reasonable person exercising ordinary care to have discovered it." (*Ortega*, *supra*, 26 Cal.4th at p. 1203.) The Court gave this answer: "[E]vidence 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." (*Ibid.*; see also *id.* at p. 1210.) Stated differently, when "there is no direct evidence of the length of time the dangerous condition existed, the plaintiff can demonstrate the store owner had constructive notice of the dangerous condition by showing that the site had not been inspected within a reasonable period of time." (*Moore v. Wal-Mart Stores, Inc.* (2003) 111 Cal.App.4th 472, 477.)

Whether a store's inspections are reasonable must be determined in light of the circumstances in each case, and there is no "exact time the condition must exist." (*Louie v. Hagstrom's Food Stores* (1947) 81 Cal.App.2d 601, 608 (*Louie*).) The issue is ordinarily a question of fact (*Ortega*, *supra*, 26 Cal.4th at p. 1213), but can be decided as a matter of law when the evidence "is insufficient to support an inference that the defendant proprietor failed to exercise the care required" (*Girvetz v. Boys' Market, Inc.* (1949) 91 Cal.App.2d 827, 831).

Northgate satisfied its initial summary judgment burden of showing that De Paz cannot establish that it had actual or constructive notice of the injury-causing vegetable on the store's floor. It pointed to De Paz's discovery responses to show that De Paz had no evidence that Northgate had actual knowledge

of when or how the vegetable came to be on the floor. As for constructive knowledge and the reasonableness of its inspections, Northgate produced Nava's declaration testimony that it is part of every Northgate employee's job duties "to continuously inspect the store['s] floors for spills or other objects that could potentially be a hazard," and that its constant vigilance policy "was in effect and was being carried out on the day of" De Paz's fall. Robles and Raimundo stated that they constantly walked and inspected the store's floors throughout the day, including the area in front of the cash registers where De Paz fell. The declarations, together with the documentary evidence, show that Northgate had two employees independently, concurrently, and repeatedly walking throughout the store in the hours before the incident, inspecting the floors for dangerous conditions, objects, or debris.

Robles's sweep sheet shows that Robles conducted 19 inspections over seven hours on the day of the incident. The time between the completion of one inspection and the completion of the next inspection ranged from 14 minutes to 32 minutes and averaged approximately 23 minutes. The Gleason report indicates that Raimundo passed by each checkpoint in the store 15 times between 2:08 p.m. and 9:33 p.m. on the day of the incident. The time he took to walk through the store ranged from 12 minutes to 29 minutes, and averaged 17 minutes. The period between the time he passed by a particular checkpoint and the time he passed by the same checkpoint during his next walk-through averaged approximately 30 minutes. Together, the two employees completed approximately four inspections per hour.

The inspection records further show the following inspections around the time of De Paz's fall: Robles completed an inspection at 6:23 p.m.; Raimundo completed an inspection

at 6:29 p.m.; Robles completed inspections at 6:51 p.m. and 7:22 p.m.; and Raimundo completed an inspection at 7:29 p.m. Although the record is not clear as to which Gleason checkpoint De Paz was closest to when she fell or the precise times Robles and Raimundo inspected the floor where she fell, the lack of such precision does not preclude summary judgment. (See *Ortega*, *supra*, 26 Cal.4th at p. 1207 [courts "do not impose exact time limitations" and "[e]ach accident must be viewed in light of its own unique circumstances"].) The question is whether Northgate made a prima facie showing that it acted as a reasonably prudent store owner under the circumstances. Based on the evidence described above, it did.

In opposing summary judgment, De Paz argues that a triable issue of material fact existed because the evidence established that at the time she fell, the area where she fell might not have been inspected for up to 29 minutes and possibly longer.[5] De Paz asserts that case law has established that a lapse of time of 15 to 30 minutes prior to the incident is sufficient to raise an inference of constructive notice. She relies on *Louie*, *supra*, 81 Cal.App.2d 601; *Sapp v. W. T. Grant Co.* (1959) 172 Cal.App.2d 89 (*Sapp*); and *Ortega*, *supra*, 26 Cal.4th 1200.

In *Louie*, the plaintiff fell on a puddle of syrup that had formed on the store floor after leaking from a glass bottle that had broken near the front entrance to the store. In addition to evidence that the store was busy and the area had not been

---

[5] De Paz calculates the 29-minute period based on Robles's completion of her inspection at 6:51 p.m. and the time of 7:20 p.m. when De Paz claims she fell. De Paz further states that because the 6:51 p.m. time is the time Robles completed her inspection, Robles may have actually inspected the location where De Paz fell sometime earlier.

inspected for 15 to 25 minutes, there was evidence from which the jury could infer that a nearby cashier would have heard the "appreciable noise" caused by the breaking of the glass bottle on the concrete floor. (*Louie*, *supra*, 81 Cal.App.2d at p. 608.) The location where the bottle fell was also within the sight of the cashier, whose "duties required her to face the front of the store on frequent occasions." (*Ibid.*) Further, the incident occurred on a cold day when the syrup would have taken a "substantial period of time" to form its "puddle of appreciable proportions." (*Ibid.*) Based on all these circumstances, the Court of Appeal held that there was sufficient evidence to support the jury's verdict in plaintiff's favor.

Louie is factually distinguishable from the instant case. A verdolaga leaf or celery stalk would not make an "appreciable noise" that might have been heard by a Northgate employee, and there is no circumstantial evidence analogous to the appreciable size of the syrup puddle on a cold day that might suggest that the vegetable had been on the floor for a substantial period of time. Indeed, the undisputed fact that the vegetable had not been run over by a shopping cart suggests that it had not been on the floor for very long.

In *Sapp*, a particular person was the only employee assigned to the notions department of the defendant's store. (*Sapp*, *supra*, 172 Cal.App.2d at p. 92.) That employee violated the store's policy when she left her assigned area to take a coffee break without informing another employee in a neighboring department of her absence. She was away from her department for 20 minutes. During that time, a customer slipped on a spool of thread lying on the floor in the notions department. The Court of Appeal upheld the plaintiff's verdict, stating that the employee's violation of the store's rule was " 'a circumstance for the jury to consider on the issue of [the store's] negligence,' "

and that " 'a "breach of duty" might be implied from a finding of violation of the [store's] rule.' " (*Id.* at p. 93.) Here, by contrast, Northgate's uncontradicted evidence shows that its employees acted in accordance with Northgate's "constant vigilance" policies. *Sapp*, therefore, does not aid De Paz.

De Paz also relies on *Ortega*, stating that "there was an interval of time of 'at least 15-30 minutes' " in that case in which the area had not been inspected. Although that is true, there was also evidence from which the jury could conclude that the injury-producing puddle of milk "could have been on the floor for as long as two hours." (*Ortega*, *supra*, 26 Cal.4th at p. 1204.) There is nothing in *Ortega* that suggests that a 15 to 30 minute gap between inspections, without more, would support a finding of constructive knowledge.

De Paz asserts that Northgate "failed to establish the precise location of the accident" or its location vis-à-vis the checkpoints in the Gleason Report. There is some merit to this point. The Gleason Report identifies various checkpoints, but does not indicate whether particular checkpoints correspond to locations from where one could see the area where De Paz fell. Nevertheless, Raimundo's statement that he inspected "the area in front of the cash registers where the incident is alleged to have occurred," and that he did so at the times correlated to specific checkpoints in the Gleason Report necessarily implies that Raimundo could and did see the area where De Paz fell from the specified locations at the stated times.[6] Thus, although the declaration could have been more explicit, it nevertheless supports Northgate's summary judgment.

---

[6] For the same reason, we disagree with the trial court's conclusion that Raimundo's declaration did not support fact No. 11 in Northgate's separate statement of undisputed material facts.

De Paz further contends that the Gleason Report and Robles's sweep sheet do not "ensure that an actual inspection ha[d] taken place or that it was sufficient"; nor do they "record the actual condition of the floor." That is true, but the argument ignores the declarations from Robles and Raimundo, which state that they inspected the areas "where the incident is alleged to have occurred," and they confirmed that the area was "free of foreign substance, dangerous conditions, dangerous objects, or any other type of debris." De Paz's and Avrit's (De Paz's expert witness) suggestions to the contrary are insufficient to create a triable issue of fact.

Lastly, De Paz contends that the trial court should have granted a continuance of Northgate's motion, denied the motion, or granted her motion for new trial because Northgate did not produce the store's surveillance video. We disagree. A party is entitled to a continuance of a motion for summary judgment if the request is made at or before the party's opposition papers are filed and is supported by evidence showing "that facts essential to justify opposition may exist but cannot, for reasons stated, be presented." (Code Civ. Proc., § 437c, subd. (h); see Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2017) ¶¶ 10:207.5—10:207.10, pp 10-87.) De Paz did not request a continuance until the hearing on the motion. It was therefore untimely, and the trial court did not err in denying the request. (See *Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 547-548.)

Although a party's "willful suppression of evidence" may support an inference against the party that has suppressed evidence (Evid. Code, § 413), De Paz has not established such willful suppression. Nava stated in her deposition that she sent a copy of a portion of the store's surveillance video to Northgate's risk management department and, according to Northgate's

risk management claims manager, that video was either never received, accidentally discarded, or misfiled and cannot be located. De Paz produced no contrary evidence, and her assertion of willful suppression is based on conjecture.

Based on our de novo review of the record, Northgate has satisfied its burden of showing that it had no actual or constructive knowledge of the matter that caused De Paz to fall, and De Paz has failed to establish the existence of a triable issue of material fact. Because Northgate has also satisfied its ultimate burden of persuasion that it is entitled to judgment as a matter of law, the trial court did not err in granting its motion for summary judgment.

DISPOSITION

The judgment is affirmed. Respondent Northgate is awarded its costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

JOHNSON, J.