Filed 3/12/13 Khatchaturian v. Home Goods CA2/5CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

JENYA KHATCHATURIAN, Plaintiff and Appellant, v. HOME GOODS, INC., Defendant and Respondent.	B241153 (Los Angeles County Super. Ct. No. EC052576)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, David S. Milton, Judge. Affirmed.

Law Offices of Maro Burunsuzyan, Maro Burunsuzyan for Plaintiff and Appellant.

Bradley & Gmelich, Thomas P. Gmelich, Jaimee K. Wellerstein, and Mark I. Melo for Defendant and Respondent.

INTRODUCTION

Plaintiff slipped and fell in a store, fracturing her femur. Claiming the fall was due to a wet surface, she sued the defendant store for negligence and premises liability. The trial court granted defendant's motion for summary judgment. We affirm.

BACKGROUND[1]

Plaintiff Jenya Khatchaturian slipped and fell on her way to the cash register at a defendant Home Goods, Inc.'s store in La Canada, Flintridge, breaking her femur. Plaintiff claimed that the fall occurred on a wet surface.

Defendant's employee, Cindy Thieme, said that employees are trained to watch for hazards. She did not indicate that there were regular scheduled inspections of the floor. She said that several hours prior to the incident, there was a shiny spot on the floor, but she checked and it was not wet. She sprayed Windex on the floor and wiped it with tissues, but she did not know how long it would take to dry. She put up the caution cones; it was a busy day. The cones were moved prior to the accident and stacked against the counter. She said the cones were in a "separate area" from the fall.

Another employee, Stephanie Wymess, checked near the cash register in question and found no spills or other safety hazard on the floor near that area shortly before the accident. Katy Stover, also defendant's employee, saw no spills or merchandise near the cash register just before the accident. She said, "it was the regular policy and practice of all Home Goods employees working at the Store to immediately address all safety concerns which they became aware of during their work shifts. Some employees were instructed to watch out for any spills or debris on the floor, and to clean up such items or

[1] We state the facts set forth in the moving and responding papers, recognizing that they should be viewed in accordance with the standard of review for summary judgments discussed *post.*

spills right away." She said she learned there was "a clean-up," and that is why caution cones were placed.

Plaintiff in her deposition testimony said "Just as if I was on ice. I slipped and fell." She said that while on the ground, she did not feel any wetness, liquid or other substance and that her hands touched the floor. Later in the deposition, she said that neither of her hands touched the ground. She said she wore a short-sleeved shirt and felt no wetness on her arms that were not covered by clothing. When asked if she slipped on liquid, she responded, "I don't know." Again, she was asked, "Did you slip on any debris, trash, leaves, anything?" She responded, "no." Plaintiff stated she did not look at the floor before the slip and following the fall, was in such pain she did not "follow up what was around me."

Following the accident, plaintiff saw no liquid on the floor. Plaintiff's companion saw no liquid or water on the floor, although she added she did not look at the floor. She said she saw an employee mopping the floor after plaintiff's fall, but also said she did not know if the employee used a mop or a broom. Defendant's employee, Ian Kennedy, at first said in his deposition, "I do remember seeing water on the floor" . . . in the general up-front area" near the register. Later in the deposition, he said, "I am not even sure if I remember even seeing the liquid." He added he had no "first hand" evidence or information of there being liquid on the floor in the area in question at the time of the accident. There were surveillance cameras, but none of the film retrieved showed the area in question before the fall.

Plaintiff's expert, Brad Avrit, a civil engineer, testified that upon testing, he determined that the floor in the area in question is "unreasonably and dangerously slippery when wet." He did not testify that the floor was wet at the time plaintiff fell.

Plaintiff filed a complaint against defendant for negligence and premises liability. Defendant moved for summary judgment and in the alternative summary adjudication, contending that there was no evidence that a dangerous condition existed where plaintiff fell, that defendant contributed to a dangerous condition or had notice of any dangerous

condition, and that plaintiff did not exercise reasonable care. The trial court granted the motion for summary judgment. Plaintiff timely appealed.

DISCUSSION

A. Standard of Review

Our review of the trial court's rulings on the summary judgment motions is governed by the well established principles. "'"A trial court properly grants a motion for summary judgment only if no issues of triable fact appear and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); see also *id.*, § 437c, subd. (f) [summary adjudication of issues].) The moving party bears the burden of showing the court that the plaintiff 'has not established, and cannot reasonably expect to establish,'" the elements of his or her cause of action. (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 460 [30 Cal.Rptr.3d 797, 115 P.3d 77].)' (*Wilson v. 21st Century Ins. Co*. (2007) 42 Cal.4th 713, 720 [68 Cal.Rptr.3d 746, 171 P.3d 1082].) We 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. (*Yanowitz v. L'Oreal USA, Inc*. (2005) 36 Cal.4th 1028, 1037 [32 Cal.Rptr.3d 436, 116 P.3d 1123].)" (*State of California v. Allstate Ins. Co*. (2009) 45 Cal.4th 1008, 1017-1018.) "[W]e must construe plaintiff's evidence liberally and accept all reasonable inferences which could be drawn by a trier of fact in favor of plaintiff." (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 854.)

"We review the trial court's decision [on a summary judgment motion] de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports. (*Artiglio v. Corning, Inc*. (1998) 18 Cal.4th 604, 612 [76 Cal.Rptr.2d 479, 957 P.2d 1313].) In the trial court, once a moving defendant has 'shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established,' the burden shifts to the plaintiff to show the existence of a triable issue; to

meet that burden, the plaintiff 'may not rely upon the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action . . . .' (Code Civ. Proc., § 437c, subd. (o)(2); see *Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 854-855 [107 Cal.Rptr.2d 841, 24 P.3d 493].)" (*Merrill v. Navegar, Inc*. (2001) 26 Cal.4th 465, 476-477.)

B. General Principles

The store owner must use "reasonable care to keep the premises in a reasonably safe condition and must give warning of latent or concealed perils." (*Lucas v. George T.R. Murai Farms, Inc.* (1993) 15 Cal.App.4th 1578, 1590.) Failure to fulfill this duty is negligence. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673.) For a store owner to be liable for injuries to a business invitee caused by a dangerous condition on its premises, the owner must have actual or constructive notice of the dangerous condition. (*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1203.) "[W]here the plaintiff relies on the failure to correct a dangerous condition to prove the owner's negligence, the plaintiff has the burden of showing that the owner had notice of the defect in sufficient time to correct it." (*Id.* at p. 1206.) "The plaintiff need not show actual knowledge where evidence suggests that the dangerous condition was present for a sufficient period of time to charge the owner with constructive knowledge of its existence. Knowledge may be shown by circumstantial evidence 'which is nothing more than one or more inferences which may be said to arise reasonably from a series of proven facts.' [Citation.] Whether a dangerous condition has existed long enough for a reasonably prudent person to have discovered it is a question of fact for the jury . . . . [Citation.] The owner must inspect the premises or take other proper action to ascertain their condition, and if, by the exercise of reasonable care, the owner would have discovered the condition, he is liable for failing to correct it." (*Id.* at pp. 1206-1207.) "Liability is particularly appropriate where the landowner has actual knowledge of the danger, e.g., where the landowners has created the condition." (6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 1120, p. 452 (6 Witkin).) "The knowledge of an employee may be

imputed to the landowner, as where the employee, acting within the scope of employment, creates the condition." (*Id.* at p. 453.) The landowner has a duty to inspect the premises or take other means to ascertain the condition as part of the duty to keep the premises in a reasonably safe condition. (6 Witkin, *supra*, § 1121, p. 453.)

A store owner is not the insurer of its patrons' personal safety, but does owe patrons a duty to exercise reasonable care in keeping the premises reasonably safe. (See *Ortega v. Kmart Corp., supra*, 26 Cal.4th at p. 1205.) To establish the owner's liability on a negligence theory, the plaintiff must prove duty, breach, causation and damages. (*Ibid.*) "A plaintiff meets the causation element by showing that (1) the defendant's breach of its duty to exercise ordinary care was a substantial factor in bringing about plaintiff's harm, and (2) there is no rule of law relieving the defendant of liability. [Citation.] These are factual questions for the jury to decide, except in cases in which the facts as to causation are undisputed." (*Ibid.*) To meet its burden of proof, a "'plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.' [Citation.]" (*Id.* at pp. 1205-1206.)

The Supreme Court has stated in *Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 826 that "'something slippery on the floor affords no res ipsa case against the owner of the premises, unless it is shown to have been there long enough so that he should have discovered and removed it.' [Citation.]" "'This burden is not met merely by proof that plaintiff invitee stepped on something while on invitor's premises and thereby was caused to fall and receive injuries, for "[n]o inference of negligence arises based simply upon proof of a fall upon the owner's floor.'" (*Id.* at p. 827.) In *Buehler v. Alpha Beta Co.* (1990) 224 Cal.App.3d 729, 734, the court held that "[c]onjecture that the floor might have been too slippery at the location where appellant happened to fall is mere speculation which is legally insufficient to defeat a summary judgment."

Plaintiff alleges two causes of action—negligence and premises liability. But premises liability is "a form of negligence . . . [t]he owner of premises is under a duty to exercise ordinary care in the management of such premises in order to avoid exposing persons to an unreasonable risk of harm. A failure to fulfill this duty is negligence. (*Brooks v. Eugene Burger Management Corp.* (1989) 215 Cal.App.3d 1611, 1619.)

C. No Disputed Issues of Fact

Plaintiff at first relied upon the alleged shiny spot observed by Ms. Thieme that she wiped with Windex and then surrounded with caution signs. But at oral argument, plaintiff no longer relied upon this evidence because the event took place much earlier in the day then the accident.

Plaintiff thus relies upon Mr. Kennedy's statement that he saw water on the floor; plaintiff's statement that when she slipped she felt like she was on ice; caution signs had been in the area but had been removed; a companion said she saw someone mopping the area after plaintiff fell; and the gaps in the surveillance film suggest the destruction of evidence.

Mr. Kennedy stated he had no first-hand knowledge of whether there was liquid on the floor. He added, "I am not even sure if I remember even seeing the liquid." Plaintiff did not see or feel any liquid. The caution signs were placed in the area hours earlier in connection with the Windex used on the so-called shiny spot and were at some point removed. The companion saw no liquid on the floor and was not sure if she saw the person cleaning up afterwards using a broom or a mop. After a person falls, cleaning up the area does not suggest that there was something there before the fall. And the saved film from the camera reflected the fall. While the video generally is saved "around 27 days," defendant's witness said, "I cannot speak for that store specifically. I can tell you, when it comes to the systems that are there, that there's a lot of factors that will dictate how much video is saved on there."

Other than Mr. Kennedy, who later qualified his statements, there is no one who saw any liquid or other hazard on the floor where plaintiff slipped. And there are a

number of other witnesses who state there was no liquid on the floor in that area. There is no evidence of other slip and falls that day. Even if there were something on the floor upon which plaintiff slipped, there is no evidence that defendant had knowledge of it or that it was there for such a time that defendant is deemed to have constructive notice of it. Defendant's employees had observed the area shortly before the accident and reported not seeing anything. Plaintiff's case is based on mere speculation. Thus, there is no evidence that defendant failed to exercise reasonable care in maintaining the store or was otherwise negligent.

Accordingly, plaintiff has not set forth evidence to raise a triable issue of fact as to either negligence or premises liability causes of action. We therefore affirm the summary judgment.

DISPOSITION

The judgment is affirmed. In the interests of justice the parties are ordered to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MOSK, J.

We concur:

ARMSTRONG, Acting P. J.

KRIEGLER, J.