SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2462-20

ATEF KAMEL,

Plaintiff-Appellant,

v.

PANYORK GROUP, INC., and PANYORK GIBRALTAR TOWERS, INC.,[1]

Defendants-Respondents.

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Submitted April 6, 2022 – Decided May 2, 2022

Before Judges Whipple and Geiger.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-0424-19.

Sabbagh Thapar, LLC, attorneys for appellant (Salim F. Sabbagh, on the briefs).

Law Offices of Linda S. Baumann, attorneys for respondents (Dennis J. Loffredo, of counsel and on the brief).

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[1] Improperly pled as Gibraltar Towers, Inc.

PER CURIAM

Plaintiff Atef Kamel, a residential tenant in a building owned by defendants Panyork Group Inc. and Panyork Gibraltar Tower, Inc., appeals an April 5, 2021 order entering summary judgment in this slip and fall case. We affirm.

The following facts are derived from the evidence submitted in support of and in opposition to the summary judgment motion, which we view in the light most favorable to plaintiff. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). When reviewing a grant of summary judgment, this court uses the same standard as the trial court. Globe Motor Co. v. Igdalev, 225 N.J. 469, 479 (2016).

On August 19, 2017, at approximately 10:40 p.m., plaintiff slipped and fell down multiple steps in the building's stairwell while he was taking out his recycling. Plaintiff claims his slip and fall was caused by a combination of an unknown, oily liquid on the floor and a broken light in the stairwell. At the time of plaintiff's accident, every tenant including plaintiff was limited in using the building's elevators because of an elevator modernization project. Tenants could use the elevators but only with the assistance of building staff. Tenants were

requested to dispose of their own recycling in designated areas. They also had the option of leaving the recycling in trash rooms on their respective floors.

The superintendent of the building, Jose Lopez, oversaw maintenance. He testified in his deposition that he works Mondays through Fridays from 8:00 a.m. to 4:30 p.m. in the building, as does his assistant. His testimony explained that although he only works Monday through Friday, he was working on Saturday August 19 because of the elevator project. He had an employee handbook, but it did not give instructions about inspecting the stairwells nor did Lopez give training about it.

Lopez inspected the stairwells around four times a day regularly, because he and his assistant use the stairs themselves. The stairwell was also inspected every day between 9 a.m. and Noon when they took care of the garbage. On August 19, he finished work at around 8:00 p.m.; he did not detect any spills in the stairwell and the lights were functioning properly. He also testified that the last time the stairwell was inspected was at 4 p.m., and his assistant inspected it again at 5 p.m. When plaintiff called the police to report his accident, Lopez was notified of the spill by the fire department, and he immediately cleaned it. He also fixed the light. He did not think that the spill was caused by plaintiff's recycling bags.

The property manager, Lisa Deanne, also testified in a deposition that the maintenance workers only work from Monday through Friday and did so during the time of the incident. Nightly inspections were not routine. She explained that although the superintendents receive training, it is on-the-job training; there is no type of log for ordinary maintenance; and inspections are generally not done on weekends. However, when reports are made by tenants, those issues are taken care of immediately.

As a result of the fall, plaintiff underwent a C4-C5 and C5-C6 anterior cervical decompression and fusion. He experienced complications from the surgery but ultimately recovered. He will have to have physical therapy and take pain medication for the rest of his life. According to plaintiff's neurosurgeon, he did not have any previous neck injuries or neck pain before his fall.

Plaintiff filed a complaint seeking damages for the injuries he sustained. On October 16, 2020, prior to the end of discovery, defendants moved for summary judgment. On April 5, 2021, the trial court granted summary judgment, explaining that plaintiff did not offer any evidence that could "establish when the alleged spill of the oily substance occurred, or when the stairwell light was damaged. There were no calls or complaints registered by

anyone, to anyone, reporting either the spill or the light malfunction at any time before the accident." The court also found that plaintiff is not

> able to establish that anyone observed the spill before plaintiff fell, nor, even if the light was out before 9:00 p.m., that anyone notified defendants of that before the fall. Plaintiff does not have an expert to testify about apartment building maintenance, or to offer guidelines about a standard for inspections or their frequency. He nonetheless argues a jury could find defendants failed to inspect reasonably, and that if they had inspected, they might have discovered the dangerous condition. Because he cannot establish when the condition developed, he cannot establish what inspection schedule would have uncovered the problem.

This appeal followed. We review the trial court's grant or denial of a motion for summary judgment de novo. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021). When reviewing a grant of summary judgment, we apply the same standard as the motion judge and consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill, 142 N.J. at 540; accord Rozenblit v. Lyles, 245 N.J. 105, 121 (2021).

A question cannot go to the jury if a finding in plaintiff's favor could be reached only by speculation. See Battaglia v. United Parcel Serv., Inc., 214 N.J. 518, 554-55 (2013) (affirming the appellate court's decision that determined

certain jury charges improperly permitted a jury verdict based on speculation); Rempfer v. Deerfield Packing Corp., 4 N.J. 135, 145 (1950) ("The jury cannot indulge in mere speculation and surmise . . . ."); Brindley v. Firemen's Ins. Co. of Newark, 35 N.J. Super. 1, 9 (App. Div. 1955) ("The jury must not be left to mere conjecture or speculation. . . ."). Similarly, speculation is insufficient to defeat summary judgment. Merchs. Express Money Ord. Co. v. Sun Nat'l Bank, 374 N.J. Super. 556, 563 (App. Div. 2005).

To establish a prima facie case of negligence, the plaintiff has the burden to show that defendant: (1) owed plaintiff a duty of care; (2) breached that duty; and (3) that proximately caused plaintiff's damages. D'Alessandro v. Hartzel, 422 N.J. Super. 575, 579 (App. Div. 2011). "Under the common law of premises liability, a landowner owes increasing care depending on whether the visitor is a trespasser, licensee or social guest, or business invitee." Sussman v. Mermer, 373 N.J. Super. 501, 504 (2004); see also Rowe v. Mazel Thirty, LLC, 209 N.J. 35, 43 (2012) (explaining the common law classifications of invitee, licensee, and trespasser). Tenants are considered business invitees of the landlord in the common areas of the apartment complex. Gonzalez v. Safe & Sound Sec. Corp., 185 N.J. 100, 121 (2005).

Under the duty element, a property owner owes a business invitee "reasonable care to make the premises safe, including the duty to conduct a reasonable inspection to discover defective conditions." D'Alessandro, 422 N.J. Super. at 579 (quoting Daggett v. Di Trani, 194 N.J. Super. 185, 192 (App. Div. 1984)); see also Scully v. Fitzgerald, 179 N.J. 114, 121-22 (2004) ("A landlord has a duty to exercise reasonable care to guard against foreseeable dangers arising from use of portions of the rental property over which the landlord retains control."). Thus, the owner owes an affirmative duty to inspect the premises and is "require[d] . . . to discover and eliminate dangerous conditions, to maintain the premises in safe condition, and to avoid creating conditions that would render the premises unsafe." Nisivoccia v. Glass Gardens, Inc., 175 N.J. 559, 563 (2003) (citing O'Shea v. K. Mart Corp., 304 N.J. Super. 489, 492-93 (App. Div. 1997)).

Owners of a premises are generally not liable for injuries caused by a defect if they have no actual or constructive notice and no reasonable opportunity to discover the defect. See ibid. "The absence of such notice is fatal to [a] plaintiff's" premises liability claim. Arroyo v. Durling Realty, LLC, 433 N.J. Super. 238, 243 (2013) (citing Nisivoccia, 175 N.J. at 563). "The mere '[e]xistence of an alleged dangerous condition is not constructive notice of it.'"

Ibid. (alteration in original) (quoting Sims v. City of Newark, 244 N.J. Super. 32, 42 (Law Div. 1990)).

"A defendant has constructive notice when the condition existed 'for such a length of time as reasonably to have resulted in knowledge and correction had the defendant been reasonably diligent.'" Troupe v. Burlington Coat Factory Warehouse Corp., 443 N.J. Super. 596, 602 (App. Div. 2016) (quoting Parmenter v. Jarvis Drug Stores, Inc., 48 N.J. Super. 507, 510 (App. Div. 1957)). "Constructive notice can be inferred in various ways[,]" including from the "characteristics of the dangerous condition giving rise to the slip and fall . . . or [from] eyewitness testimony . . . ." Ibid. (internal citations omitted).

Under the first element, there is no dispute as to the duty of care because plaintiff was a tenant of defendants' property. Plaintiff's claim fails, however, because plaintiff has not demonstrated that defendants had actual or constructive notice of the spilled liquid spilled or broken light in the stairwell.

It was plaintiff's burden to prove that had defendants inspected the stairwell, they would have found the dangerous condition and fixed it within a reasonable time. Plaintiff has provided no facts to support that theory beyond mere speculation. Taking everything in the light most favorable to plaintiff, even if Lopez and his assistant failed to keep the premises safe, and only

inspected the stairwell that Friday, they were not on actual or constructive notice about the spill and the broken light. When they finished work that Friday, there was nothing wrong in the stairwell. No other tenants reported anything wrong with the stairwell on Saturday for the defendants to fix within a reasonable time. There are also no witnesses who can testify to the fact that defendants had constructive notice.

Plaintiff argues that the light had been broken once before, but this does not provide constructive notice to defendants to fix it in this specific instance, as the light that was broken before was fixed after plaintiff reported it to Lopez. Lopez, as well as Deanne, testified that reported maintenance issues are always fixed either immediately or within the next business day. There was no report of anything wrong, nor did Lopez or his assistant see anything wrong, on Friday August 18 or Saturday August 19. Plaintiff could not prove that anyone reported the deficiencies in the stairwell to Lopez or his assistant or that had they inspected it a few hours earlier, they would have noticed the defects. Taking all of this into account, with all inferences in favor of plaintiff, summary judgment was still proper for defendants here.

We also reject plaintiff's argument that the mode-of-operation standard should be expanded to fit the landlord/tenant relationship where it has not been

previously. The mode-of-operation rule is a "'special application of foreseeability principles' because of the risks posed by self-service and 'not a general rule of premises liability.'" Id. at 604 (quoting Prioleau v. Kentucky Fried Chicken, Inc., 223 N.J. 245, 262 (2015)).

The rule provides an inference of negligence against a defendant business establishment by relieving a plaintiff of proving the defendant had actual or constructive notice of a particular dangerous condition if the defendant's mode-of-operation created the condition that caused the accident. Prioleau, 223 N.J. at 248. Our Supreme Court emphasized in Prioleau that the mode-of-operation rule does not apply where there is no evidence that the "plaintiff's accident . . . bears the slightest relationship to any self-service component of defendant's business." See id. at 264. The rule was inapplicable where a plaintiff alleged that her slip and fall at a fast-food restaurant was caused by either grease tracked on the floor by employees working in the kitchen or patrons tracking water into building during rainy weather. Id. at 264-65.

Our courts have "never . . . expanded [the mode-of-operation rule] beyond the self-service setting, in which customers independently handle merchandise without the assistance of employees or may come into direct contact with product displays, shelving, packaging, and other aspects of the facility that may

present a risk." Troupe, 443 N.J. Super. at 603-04 (quoting Prioleau, 223 N.J. at 261-62).

The trial court explicitly rejected this argument because mode-of-operation does not apply to landlord/tenant cases. Mode-of-operation is a specific, niche rule laid out where a plaintiff is injured due to businesses where customers must engage in some type of self-service. Here, plaintiff argues that tenants being asked to take out their own recycling constitutes self-service. We disagree. This was a temporary solution to the elevators being out, not a core function of defendants' business. Plaintiff had the option of leaving the trash on his floor for maintenance to dispose of and chose to take the stairs. The mode-of-operation argument does not apply here.

Finally, plaintiff argues for the first time on appeal that defendants violated N.J.A.C. 5:10-11.3(a)(2) for maintenance of hotels and multiple dwellings, which states:

> (a) The person in regular attendance on the premises and responsible for providing janitorial or maintenance duties as required by this subchapter shall provide the following services:
>
> . . . .
>
> 2. Providing regular daily care for all common areas including removal of garbage, litter or other accumulations . . . .

A "common area" is defined as "all areas accessible to, and which may be utilized by either occupants of a building or the general public, or both, including, but not limited to, vestibules, hallways, stairways, landings and common space and occupiable room or space, . . . which is not part of any dwelling unit." N.J.A.C. 5:10-2.2.

Plaintiff did not raise this negligence per se argument to the trial court. We need not consider issues raised for the first time on appeal. State v. Walker, 385 N.J. Super. 388, 410 (App. Div. 2006) (explaining that "issues not raised below . . . will not ordinarily be considered on appeal unless they are jurisdictional in nature or substantially implicate public interest. . . ."); accord Hill v. N.J. Dep't of Corr. Com'r Fauver, 342 N.J. Super. 273, 293 (App. Div. 2001).

To the extent we have not addressed plaintiff's remaining arguments, we are satisfied they are without sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.