SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0223-22

MICHAEL PUCHALSKI,

Plaintiff-Appellant,

v.

HARRAH'S ATLANTIC CITY OPERATING COMPANY, LLC, d/b/a HARRAH'S RESORT ATLANTIC CITY,

Defendant-Respondent.

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Argued October 4, 2023 – Decided October 25, 2023

Before Judges Currier, Firko, and Susswein.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-2258-19.

Gregory D. Shaffer argued the cause for appellant (Brandon J. Broderick, LLC, attorneys; Gregory D. Shaffer, on the briefs).

Frederick E. Blakelock argued the cause for respondent (Reilly, McDevitt & Henrich, PC, attorneys; Frederick E. Blakelock and Yvette C. Cave, on the brief).

PER CURIAM

In this personal injury matter, plaintiff Michael Puchalski alleges he suffered personal injuries when he slipped, but did not fall, on a wet substance on defendant Harrah's Atlantic City Operating Company, LLC's casino floor. Plaintiff claimed video surveillance evidence demonstrates the spill that caused him to slip occurred fifty-two seconds beforehand. He appeals from a Law Division order granting summary judgment to defendant and an order denying his motion for reconsideration. Because we conclude there are no genuine issues of material fact that precluded judgment as a matter of law under Rule 4:46-2(c), we affirm.

I.

Viewed in the light most favorable to plaintiff, Templo Fuente De Vida Corporation v. National Union Fire Insurance Company of Pittsburgh, 224 N.J. 189, 199 (2016), the pertinent facts are as follows. On October 21, 2017, at approximately 10:58 p.m., plaintiff slipped on a wet substance on defendant's casino floor in front of the Total Reward Center. Initially, plaintiff described the substance as a "clear liquid" to defendant's security personnel and as a "watery substance" in his signed incident report.

During discovery, defendant produced a two-hour security video which captured plaintiff's slip. The video shows an unidentified male carrying a drink being bumped by a female fifty-two seconds prior to plaintiff's slip. The male depicted in the video looked to the ground where plaintiff slipped.[1] After he slipped, plaintiff continues walking but then turned around to examine the floor area.

Defendant moved for summary judgment, contending there was no evidence it had actual or constructive notice of any hazardous condition that caused plaintiff to slip. During oral argument, plaintiff's counsel admitted there was no evidence of actual or constructive notice. The court granted defendant's motion and issued a memorializing order.

Plaintiff retained new counsel and subsequently filed a motion for reconsideration. For the first time, plaintiff alleged two new facts: (1) the video depicts a patron in the area where plaintiff slipped "waving a full, open cup of what looks to be beer" approximately twenty-three minutes prior to the slip; and (2) plaintiff slipped in "beer" and not an unidentifiable liquid. Plaintiff claimed

[1] The record indicates defendant's counsel provided a copy of the security video of the two-hour time period surrounding plaintiff's slip in addition to providing a shorter excerpt of the period of time before plaintiff's slip and events immediately following the slip to plaintiff's counsel. The shorter excerpt was provided on appeal and reviewed by this court.

the spill was foreseeable, and defendant does not have employees inspecting and patrolling the interior of the casino, thus creating genuine issues of material fact precluding summary judgment. Plaintiff asserted twenty-three minutes was sufficient time to provide constructive notice and defendant did not sufficiently clean and inspect the casino premises. Based on prior personal injury accidents at defendant's casino, plaintiff alleged defendant engaged in unsafe business practices that render the likelihood of a patron slipping foreseeable under the mode-of-operation theory, establishing questions of fact for a jury to determine.

The court conducted oral argument on plaintiff's motion for reconsideration and reserved decision. In its order and written statement of reasons, the court denied plaintiff's motion for reconsideration. The court highlighted that plaintiff did not explain why the "evidence" of a patron waiving an open full cup of beer in the area where he slipped was not presented initially in opposition to defendant's motion for summary judgment. The court stressed plaintiff "could have, but did not" direct the court to review the full two-hour video footage instead of only a "several minute section."

In its reconsideration decision, the court emphasized plaintiff changed the factual basis of his opposition to defendant's summary judgment motion. Plaintiff's former counsel submitted a certification in opposition to the summary

judgment motion stating "the video does not reveal that anything actually spilled onto the floor" but on reconsideration, plaintiff's new counsel argued the spill occurred "twenty-three minutes" earlier. The court found these are "not newly discovered facts" but an attempt to "redo" the case with new counsel and seek a "second bite at the apple," which is an improper basis to seek reconsideration.

The court also rejected plaintiff's mode-of-operation doctrine argument because it was not previously raised in opposition to defendant's summary judgment motion. The court noted the mode-of-operation doctrine has "never been expanded beyond the self-service setting, in which customers independently handle merchandise without the assistance of employees," citing Prioleau v. Kentucky Fried Chicken, Inc., 223 N.J. 245, 262 (2015). In addition, the court highlighted there was no evidence in the record that the liquid plaintiff slipped on was beer or sold to a patron at a self-service counter at defendant's casino.

On appeal, plaintiff reprises the arguments he presented in the motion for reconsideration. Plaintiff contends there are genuine issues of material fact as to defendant's obligation to prevent foreseeable hazards to business invitees precluding summary judgment.

II.

We review a grant of summary judgment de novo, using the same standard that governed the trial court's decision. Samolyk v. Berthe, 251 N.J. 73, 78 (2022). We owe no special deference to the motion judge's legal analysis. RSI Bank v. Providence Mut. Fire Ins. Co., 234 N.J. 459, 472 (2018) (quoting Templo Fuente De Vida Corp., 224 N.J. at 199). Summary judgment will be granted when "the competent evidential materials submitted by the parties[,]" viewed in the light most favorable to the non-moving party, show that there are no "genuine issues of material fact and . . . the moving party is entitled to summary judgment as a matter of law." Grande v. Saint Clare's Health Sys., 230 N.J. 1, 23-24 (2017) (quoting Bhagat v. Bhagat, 217 N.J. 22, 38 (2014)); accord R. 4:46-2(c).

"An issue of material fact is 'genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.'" Grande, 230 N.J. at 24 (quoting Bhagat, 217 N.J. at 38).

The appellate "standard of review on a motion for reconsideration is deferential." Castano, 475 N.J. Super. at 78. Reconsideration is only

appropriate in "that narrow corridor in which either (1) the [c]ourt has expressed its decision based upon a palpably incorrect or irrational basis, or (2) it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of probative, competent evidence." Triffin v. SHS Group, LLC, 466 N.J. Super. 460, 466 (App. Div. 2021) (quoting Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996)).

A.

Plaintiff argues the court did not consider all the pertinent evidence and failed to consider the foreseeability of his slip from a spilled beverage—alcohol served in open cups to patrons at defendant's casino. Plaintiff claims the court was obligated to scrutinize the record and recognize error capable of producing an unjust result under Rule 2:10-2 and it erred in granting defendant summary judgment.

A cause of action for negligence "requires the establishment of four elements: (1) a duty of care; (2) a breach of that duty; (3) actual and proximate causation; and (4) damages." Jersey Cent. Power & Light Co. v. Melcar Util. Co., 212 N.J. 576, 594 (2013). The plaintiff "bears the burden of establishing those elements by some competent proof[.]" Davis v. Brickman Landscaping,

Ltd., 219 N.J. 395, 406 (2014) (quoting Overby v. Union Laundry Co., 28 N.J. Super. 100, 104 (App. Div. 1953)).

"[A] proprietor's duty to his invitee is one of due care under all the circumstances." Prioleau, 223 N.J. at 257 (quoting Bozza v. Vornado, Inc., 42 N.J. 355, 359 (1964)). The duty of due care to a "business invitee includes an affirmative duty to inspect the premises and 'requires a business owner to discover and eliminate dangerous conditions, to maintain the premises in safe condition, and to avoid creating conditions that would render the premises unsafe.'" Troupe v. Burlington Coat Factory Warehouse Corp., 443 N.J. Super. 596, 601 (App. Div. 2016) (quoting Nisivoccia v. Glass Gardens, Inc., 175 N.J. 559, 563 (2003)).

Thus, "an invitee seeking to hold a business proprietor liable in negligence 'must prove, as an element of the cause of action, that the defendant had actual or constructive knowledge of the dangerous condition that caused the accident.'" Prioleau, 223 N.J. at 257 (quoting Nisivoccia, 175 N.J. at 563); see also Arroyo v. Durling Realty, LLC, 433 N.J. Super. 238, 243 (App. Div. 2013) (stating that "[t]he absence of [actual or constructive] notice is fatal to plaintiff's claims of premises liability," and that "[t]he mere existence of an alleged dangerous

condition is not constructive notice of it") (quoting Sims v. City of Newark, 244 N.J. Super. 32, 42 (Law Div. 1990)).

"Owners of premises are generally not liable for injuries caused by defects of which they had no actual or constructive notice and no reasonable opportunity to discover." Troupe, 443 N.J. Super. at 601-02. "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." Id. at 602 (quoting Parmenter v. Jarvis Drug Store, 48 N.J. Super. 507, 510 (App. Div. 1957)).

Constructive notice may be inferred from "the characteristics of the dangerous condition giving rise to the slip and fall" and from "eyewitness testimony." Troupe, 443 N.J. Super. at 602; see also, e.g., Grzanka v. Pfeifer, 301 N.J. Super. 563, 574 (App. Div. 1997) (finding constructive notice where eyewitness observed the light had been out for a while); Tua v. Modern Homes, Inc., 64 N.J. Super. 211, 220 (App. Div. 1960) (finding constructive notice where wax on a floor had hardened around its edges); Parmenter, 48 N.J. Super. at 511 (1957) (finding "dirtiness" of water that caused the plaintiff's fall "tended to be corroborative of the length of time it lay on the floor").

Plaintiff claims the court erred by finding the evidence insufficient to establish defendant had constructive notice of the liquid on the floor. Plaintiff concedes he did not assert his new liability theory in opposition to defendant's motion for summary judgment but rather only in support of his motion for reconsideration. But the record before the court at the time summary judgment was determined clearly shows no evidence—"constructive or otherwise"—of notice to defendant of any spill, as acknowledged by plaintiff's former counsel. However, as acknowledged by plaintiff's first counsel, the record before the court when it heard defendant's motion for summary judgment did not include any evidence that defendant had actual or constructive notice of any liquid on the floor prior to plaintiff's slip.

Moreover, in response to defendant's statement of material facts under Rule 4:46-2(b), plaintiff admitted he did not know what the substance was that caused him to slip or how long it was present. The court found plaintiff did not sustain his burden because there was no evidence what the liquid was, where it came from, or how long it was on the floor. Plaintiff only relied on the short segment of the video in opposing defendant's motion.

In his reconsideration motion, plaintiff's new counsel speculated there was beer on the floor where plaintiff slipped, that had allegedly been spilled by a

patron twenty-three minutes before plaintiff's slip. These suppositions were not based on newly obtained evidence but rather were derived from the video recording in plaintiff's possession for nearly four years prior to opposing defendant's summary judgment motion. And, plaintiff's newly minted liability arguments are speculative at best and do not constitute genuine issues of material fact.

Rule 4:49-2 governs motions for reconsideration. The Rule requires the movant to "state with specificity the basis on which it is made, including a statement of the matters or controlling decisions that counsel believes the court has overlooked or as to which it erred . . . ." Plaintiff's new counsel did not comply with the Rule. The Rule only applies when the court's decision represents "a clear abuse of discretion based on plainly incorrect reasoning or failure to consider evidence." Kornbleuth v. Westover, 241 N.J. 289, 301-302 (2020).

Here, plaintiff's motion was based on new factual and legal arguments that were not presented by his prior counsel in the underlying opposition to defendant's summary judgment motion. This does not constitute a proper basis for a reconsideration motion. Therefore, plaintiff's motion for reconsideration was properly denied. Medina v. Pitta, 442 N.J. Super. 1, 18 (App. Div. 2015).

B.

We next address whether the mode-of-operation doctrine applies in this case. This doctrine creates an inference of negligence which excuses a plaintiff from having to prove notice and shifts the burden to the defendant to show it exercised due care. Prioleau, 223 N.J. at 263. The Prioleau Court clarified "the mode-of-operation [doctrine] is not a general rule of premises liability, but [rather] a special application of foreseeability principles in recognition of the extraordinary risks that arise when a defendant chooses a customer self-service business model." Id. at 262.

Principles which apply when a business allows customers to handle products and equipment, unsupervised by employees, due to the increased risk "that a dangerous condition will go undetected and that patrons will be injured." Ibid. The mode-of-operation doctrine applies where customers "may come into direct contact with product displays, shelving, packaging and other aspects of the facility that may present a risk." Ibid. (citing Nisivoccia, 175 N.J. at 563-66). Importantly for the purposes of this appeal, "the mode-of-operation doctrine has never been expanded beyond the self-service setting." Ibid.

Here, plaintiff raised the mode-of-operation theory for the first time in his motion for reconsideration. The court properly rejected this argument as being

improperly raised for the first time on reconsideration of a final order under Rule 4:49-2. Nonetheless, the court addressed the merits of the mode-of-operation argument and rejected it.

On appeal, plaintiff contends he should not have been required to show actual or constructive notice under the mode-of-operation doctrine because, as stated in Nisivoccia, the dangerous condition, which occurred here, "is likely to occur as a result of the nature of [defendant's] business" or "a demonstrable pattern of conduct or accidents." Nisivoccia, 175 N.J. at 563. Plaintiff further argues defendant knew "full well" that its patrons fall as a result of spilled liquids on its premises, and it allows patrons to walk around "with open beverage containers in a semi-intoxicated state" but did not change its business procedures to eliminate or ameliorate the foreseeable harm.

In Jeter v. Sam's Club, our Supreme Court reaffirmed the context in which the doctrine applies, limiting it "to the self-service setting, where customers are independently handling merchandise without the assistance of employees." 250 N.J. 240, 255 (2022) (citing Prioleau, 223 N.J. at 262). In Jeter, the plaintiff, "while walking away from the checkout area after realizing she forgot an item, . . . slipped and fell [on grapes] 'halfway past' the fruit and vegetable aisle." Id. at 245. The Court found plaintiff was in sufficient geographical proximity to

the self-service sale of grapes in "closed clamshell containers" for the mode-of-operation doctrine to apply. Id. at 256.

The disputed issue in that case was whether there was "a reasonable factual nexus between the self-service activity and the dangerous condition causing plaintiff's injury." Ibid. Analysis of that issue required consideration of whether the packaging of the grapes makes it "reasonably foreseeable that grapes will drop [on] the floor." Ibid. Ultimately, the Court held that sealed containers "posed virtually no chance of spillage during ordinary, permissible customer handling[,]" and therefore, the trial court properly found the mode-of-operation doctrine inapplicable. Id. at 257.

Applying these legal principles and granting all reasonable inferences to plaintiff, we are unpersuaded by his argument the mode-of-operation doctrine applies in this case. While there is no dispute that plaintiff, as a patron in defendant's casino, was a business invitee entitled to "due care under all the circumstances[,]" Prioleau, 223 N.J. at 257, no New Jersey cases have expanded the mode-of-operation doctrine to circumstances such as those presented here. Rather, in the line of cases cited by the parties, our Court has emphasized the self-service nature of the defendant's business and the foreseeability of some risk of injury inherent therein. Id. at 260.

We conclude the court in the matter under review correctly determined that the mode-of-operation doctrine is not applicable here because there is no evidence in the record indicating plaintiff slipped because a patron spilled a drink "obtained from a self-service counter" at defendant's premises. Moreover, there is nothing in the record to establish the liquid plaintiff slipped on was beer—or any other type of liquid—sold to a patron at a self-service counter. And, no evidence was presented to support plaintiff's argument as to what defendant's "policies and protocols" were, if any, for cleaning spills at defendant's casino.

As stated, plaintiff admitted in response to defendant's statement of material facts under Rule 4:46-2(b) that he could not identify what substance caused him to slip or how long it was present. Thus, plaintiff cannot demonstrate that his injury was foreseeable in the context of the mode-of-operation doctrine.

Under these circumstances, defendant was entitled to judgment as a matter of law, and plaintiff's motion for reconsideration was properly denied. We conclude the remaining arguments—to the extent we have not addressed them—lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.