SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3366-22

JEANETTE WILLIAMS,

Plaintiff-Appellant,

v.

ROCKAWAY SHOPRITE ASSOCIATES INC., WAKEFERN FOOD CORP., CONVERY COMPLEX HOLDINGS, LLC., GLASS GARDENS, INC., and NOVA MANAGEMENT, INC.,

Defendants-Respondents.

———————————————

Submitted May 20, 2024 – Decided June 6, 2024

Before Judges Marczyk and Vinci.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-3155-21.

Law Offices of Karim Arzadi, attorneys for appellant (Ernest Blair, on the briefs).

Carey & Grossi, attorneys for respondents Rockaway ShopRite Associates Inc., Wakefern Food Corp., and Glass Gardens, Inc. (Charles Barber Carey, on the brief).

Clemente Mueller, PA, attorneys for respondent Convery Complex Holdings, LLC (Jonathan D. Clemente, on the brief).

O'Toole Scrivo, LLC, attorneys for respondent Nova Management, Inc. (Edward F. Ryan, of counsel and on the brief; Antonio A. Vayas, on the brief).

PER CURIAM

In this trip and fall case, plaintiff Jeanette Williams appeals from three May 26, 2023 orders granting summary judgment in favor of defendants Convery Complex Holdings, LLC ("Convery"), Nova Management, Inc. ("Nova"), and Rockaway ShopRite Associates Inc., Wakefern Food Corporation, and Glass Gardens, Inc.[1] (collectively "ShopRite"). We affirm.

On November 16, 2019, plaintiff fell outside the ShopRite supermarket on Convery Boulevard in Perth Amboy. According to plaintiff, she tripped on "broken" and "uneven" asphalt. Her godson, Jeremy Harris, witnessed her fall and testified he did not observe any dangerous condition that caused her fall.

[1] On July 3, 2023, the court entered a revised order adding Glass Gardens, Inc., which was inadvertently omitted from the May 26 order.

Plaintiff did not immediately seek medical attention or report the incident to defendants. Two days later, on November 18, 2019, plaintiff called the Perth Amboy police to her home to report her fall. The incident report prepared by the responding officer, dated November 19, provides:

> Upon arrival, I spoke to . . . Williams . . . who stated on [November 16, 2019,] at approximately [3:15 p.m.], she was in the parking lot of Shop[R]ite located at 365 Convery Boulevard and as she was walking towards the supermarket, she fell to the ground. [She] stated she tripped over an area of the parking lot which was lifted and as [a] result she fell on the blacktop.

At some point after November 16, plaintiff's daughter visited the ShopRite alone to take photographs of the area where plaintiff allegedly tripped. Her only guidance was plaintiff's direction to look for "broken" asphalt in front of the ShopRite entrance. She took two photographs of the area.

Plaintiff filed this action against Convery, the property owner; Nova, the property manager; and ShopRite, the tenant, alleging she sustained injuries from the fall. In discovery, plaintiff produced the two photographs taken by her daughter of the area where she fell, along with four other photographs depicting her injured foot and toe on a single sheet of paper. The photographs produced in discovery were each approximately two inches by two and a half inches.

Nova's counsel requested plaintiff provide it with "full-size, digital copies of the photographs that [she] will rely upon to support [her] liability claim" as he "[could not] see anything in the small photos [provided] and w[ould] object to usage of any larger photographs at the time of trial if same are not provided." Plaintiff did not provide any other photographs or digital copies of photographs. At her deposition, plaintiff was shown the photographs produced in discovery and testified they showed the area where she fell and were the only photographs she had.

Discovery expired and defendants moved for summary judgment. Plaintiff's counsel submitted a certification in opposition to summary judgment, to which he annexed two photographs he certified were "true copies of photographs of the area where [p]laintiff fell. . . . [and] were produced in discovery and marked at [p]laintiff's deposition."

In response, Nova's counsel wrote to plaintiff's counsel contending the photographs attached to his opposition certification were neither produced in discovery nor marked at deposition, and requested he withdraw his certification pursuant to Rule 1:4-8. Plaintiff's counsel, who did not attend plaintiff's deposition, thereafter filed a "corrected" certification in which he conceded the photographs attached to his initial certification "were not marked at deposition."

Nova's counsel filed a responding certification contending the photographs attached to counsel's opposition certification were neither marked nor shown to plaintiff at her deposition, were not supplied in discovery, and do not depict the area where she fell. Nova's counsel stated, "[a] review of the transcript makes clear that [p]laintiff was shown the two . . . very small photographs of the blacktop that she included in the only photo[ ]sheet . . . that was produced in discovery," and "[t]he condition in the[] [opposition] photographs is considerably different than the conditions in the [discovery] photographs . . . which [p]laintiff testified [were] the only photographs of the condition that exist."

On May 26, 2023, the court heard oral argument on the summary judgment motions. Plaintiff's counsel argued the photographs attached to his opposition certification were "the same photographs" submitted in discovery, "just enlarged."

The court granted summary judgment in favor of defendants in an oral opinion. It determined the photographs submitted in opposition to the motions were not produced in discovery or identified at plaintiff's deposition and, therefore, declined to consider them. The court found:

> [I]n the opposition, we have two pictures that . . . show . . . a couple of gouges . . . in the road

and . . . they do show potholes. I do[not] know how big because we have no scale . . . .

[D]efendants' counsel asked that I just look at them, and . . . conclude on my own that . . . they[are] different pictures of different things. . . .

[L]et[us] look at these pictures. The pictures on the sheets that . . . plaintiff referred to in the deposition . . . it looks like there[is] a penny in each one of them that[is] lying on the ground. . . . There appears to be an oil stain a few inches away from the penny. And other than that, it[is] unremarkable. . . . [I]t just looks like asphalt.

There are no obvious gouges or—there might be something that could be a hairline crack but it[is] really not all that visible. . . .

The picture submitted . . . in opposition . . . appears to be lightened. And next to . . . the oil stain, appears to be a number of cracks . . . in the . . . asphalt, even though [the photo has] been lightened. There . . . are what, I think, engineers call alligator-type cracks because they . . . resemble an alligator-hide skin. There is a painted line.

And you do[no]t see any alligator cracks near the oil stain in the other pictures [produced during discovery]. You do[no]t see any painted lines at least—something that might be like a chalk line, but it[i]s nowhere near the oil stain. The painted line is right next to the oil stain [in the opposition photographs].

. . . .

The pictures offered in opposition appear to be just pictures taken of some random pothole somewhere; not

> specifically a picture taken . . . of a pothole in [the] ShopRite parking lot.

The court determined the photographs produced in discovery were "unremarkable" and the asphalt depicted in them showed "no obvious gouges" and "just look[] like asphalt." It granted summary judgment because plaintiff failed to "show a hazard," and therefore "[t]here is no liability."

On appeal, plaintiff argues the court impermissibly weighed the evidence and did not consider other evidence in the record. More particularly, she contends the court failed to consider her testimony, Harris's testimony, and the police incident report. Plaintiff also argues the court improperly determined the photographs submitted in opposition to the motions were not the same photographs produced in discovery because that determination should have been left for the jury.

We review a grant of summary judgment de novo, Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021), "under the same standard that govern[ed] the court's determination." Goldhagen v. Pasmowitz, 247 N.J. 580, 593 (2021). We "must '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.'" Meade v. Twp. of Livingston, 249 N.J. 310, 327 (2021)

(quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)). "Summary judgment should be granted . . . 'against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" Friedman v. Martinez, 242 N.J. 449, 472 (2020) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)).

"When, as in this case, a trial court is 'confronted with an evidence determination precedent to ruling on a summary judgment motion,' it 'squarely must address the evidence decision first.'" Townsend v. Pierre, 221 N.J. 36, 53 (2015) (quoting Est. of Hanges v. Metro. Prop. & Cas. Ins., 202 N.J. 369, 384-85 (2010)). "Appellate review of the trial court's decisions proceeds in the same sequence, with the evidentiary issue resolved first, followed by the summary judgment determination of the trial court." Ibid.

A trial judge's evidentiary decisions made in the context of a summary judgment application are reviewed under the abuse of discretion standard. Est. of Hanges, 202 N.J. at 383-84. An abuse of discretion occurs when a decision is "made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002) (quoting Achacoso-Sanchez v. Immigr. &

Naturalization Serv., 779 F.2d 1260, 1265 (7th Cir. 1985)).

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) (citations omitted) (first citing Buckelew v. Grossbard, 87 N.J. 512, 525 (1981), then quoting Overby v. Union Laundry Co., 28 N.J. Super. 100, 104 (App. Div. 1953)).

"[A]n 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 v. Ky. Fried Chicken, Inc., 223 N.J. 245, 257 (2015) (quoting Nisivoccia v. Glass Gardens, Inc., 175 N.J. 559, 563 (2003)); see also Arroyo v. Durling Realty, LLC, 433 N.J. Super. 238, 243 (App. Div. 2013) ("The absence of [actual or constructive] notice is fatal to plaintiff's claims of premises liability," and "[t]he mere '[e]xistence of an alleged dangerous condition is not constructive notice of it.'") (third alteration in original) (quoting Sims v. City of Newark, 244 N.J. Super. 32, 42 (Law Div. 1990)).

Pursuant to these principles, we affirm substantially for the reasons set forth in the court's May 26, 2023 oral opinion. We add the following comments.

We are not persuaded by plaintiff's contention that the court improperly invaded the province of the jury by determining the photographs submitted in opposition to defendants' motions were not the same photographs produced in discovery. It is the function of the court, not the jury, to determine the admissibility of evidence. When confronted with a question regarding the admissibility of evidence in connection with a summary judgment motion, the court must address the evidentiary decision in the first instance. Townsend, 221 N.J. at 53.

Here, the court was required to determine whether the photographs submitted in opposition to defendants' motions were produced in discovery and, in turn, whether the court should consider them as competent evidence in opposition to the motions. The court carefully reviewed both sets of photographs and made detailed factual findings regarding the differences and inconsistencies between them. It determined the photographs submitted in opposition to defendants' motions were not the photographs produced in discovery or enlargements of those photographs. We defer to the court's detailed factual findings and are convinced it did not misapply its discretion by declining

to consider the photographs.

Additionally, we are unconvinced that the court failed to consider the police incident report or Harris's testimony. The police incident report simply memorializes plaintiff's own statement to the officer who responded to plaintiff's home two days after the incident. There is no indication the officer inspected the site or made any personal observations. Likewise, Harris, who witnessed the incident, testified he did not observe any dangerous condition that caused plaintiff's fall.

We are satisfied the court, after considering the competent evidential materials presented, correctly determined plaintiff failed to present evidence sufficient to permit a rational factfinder to find the existence of a dangerous condition that caused her fall or that defendants had actual or constructive notice of such a condition.

To the extent we have not addressed any of plaintiff's remaining arguments, it is because they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.