SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0648-20

DANIELLE DONAHUE,

Plaintiff-Appellant,

v.

NEW JERSEY TURNPIKE AUTHORITY and LIVE NATION WORLDWIDE, INC.,[1]

Defendants-Respondents.

Submitted September 14, 2021 – Decided April 7, 2022

Before Judges Currier and DeAlmeida.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-2001-18.

R.C. Shea & Associates, PC, attorneys for appellant (Michael J. Deem, of counsel and on the brief).

Marshall Dennehey Warner Coleman & Goggin, attorneys for respondent (Leonard C. Leicht and Walter F. Kawalec, III, on the brief).

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[1] Improperly pled as LIVENATION.

PER CURIAM

Plaintiff Danielle Donahue appeals from the October 21, 2020 order of the Law Division granting summary judgment to defendant Live Nation Worldwide, Inc. (Live Nation) in this slip-and-fall premises liability action. We affirm.

I.

The motion record, construed in the light most favorable to Donahue as the non-moving party, Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995), reveals the following facts. The New Jersey Turnpike Authority (NJTA) owns the PNC Bank Arts Center (PNC Center), a public entertainment venue in Monmouth County. PNC Center is a partially covered, open-air amphitheater. Closest to the stage is permanent arena seating mostly covered by a roof. Patrons may also purchase a ticket for lawn seating, which is a license to sit or stand on a bowl-shaped, sloped lawn behind the permanent seating. The natural grass lawn is not covered by a roof and is exposed to the elements. Patches of grass have been worn down, leaving exposed dirt.

On July 14, 2017, Live Nation, operating PNC Center as a lessee of NJTA, scheduled a concert for the facility. Donahue, who had previously attended events at the PNC Center for which she had lawn seating, purchased lawn seating tickets for herself and others for the concert. She knew rain showers were

forecast for that evening and that lawn seating was exposed to the elements. Donahue decided to wear flip-flops to the event.

Approximately five minutes after Donahue and her party found a place to sit on the lawn, it began to rain. She described the rain as "medium" and noticed that the ground was wet and muddy in spots.

About fifteen minutes after the rain began, Donahue walked across the wet, sloped, muddy lawn toward a concession stand. She slipped, fell, and was injured when her left foot slid out from under her in mud. Donahue described the slope in the area of the fall as "medium." During discovery, Donahue admitted that prior to the fall, she knew as a matter of "common sense" that muddy ground could be slippery and that she required no warning of that fact.

Donahue filed a complaint in the Law Division alleging that Live Nation breached its duty of reasonable care to her by not remediating a dangerous condition at the PNC Center of which it was, or should have been, aware. She sought damages for her injuries.

Live Nation moved for summary judgment, arguing that no reasonable jury could find, based on the evidence produced during discovery, that Live Nation had actual or constructive notice of a dangerous condition on NJTA's

property.[2] In addition, Live Nation argued that the expert report on which Donahue intended to rely was inadmissible because it contained a net opinion. That report stated that Live Nation was "aware, or should have been aware, of the hazardous conditions created by the combination of the steeply sloped surface of the lawn area, the poorly maintained condition of the lawn area, and the foreseeably wet conditions of the lawn area . . . ."

The trial court issued a written opinion granting Live Nation's motion. The court held that no reasonable jury could conclude that the muddy lawn was a dangerous condition of the PNC Center property. The court found that the muddy and slippery conditions were natural occurrences for a lawn that is exposed to a rainstorm. In addition, the court found that no reasonable jury could conclude that Live Nation breached a duty of care to Donahue in regard to the naturally occurring condition of the lawn area. The court noted that there is no action Live Nation could take to cure a muddy lawn while it was raining.

The court also concluded that the expert report on which Donahue relied was a net opinion. The court found that the expert observed the lawn two years after the fall and subsequent to NJTA's modification of the area through the

[2] Live Nation does not dispute that it is responsible for the safety of the patrons at events it holds at the PNC Center. Donahue named NJTA as a defendant. She did not appeal the trial court order granting summary judgment to the authority.

addition of artificial turf. Thus, the court concluded, although the expert opined that the 11.1 to 11.5 degree of slope in the area of the fall during his inspection was a dangerous condition, "he cannot say if the slope was the same when the incident took place." In addition, the court observed that "[t]he report cites to no standard as to what degree of slope is permitted and does not opine that the slope in this portion of the lawn exceeds any applicable standard" for an open lawn seating area. The standards cited by the expert are applicable to areas of egress and areas other than open lawns.

An October 21, 2020 order memorializes the court's decision.

This appeal follows. Donahue argues the trial court erred by resolving genuine issues of material fact and rejecting the expert opinion she offered in opposition to the summary judgment motion.

II.

We review the trial court's decision granting summary judgment de novo, using "the same standard that governs trial courts in reviewing summary judgment orders." Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div. 1998). Rule 4:46-2(c) provides that a court should grant summary judgment when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no

genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." "Thus, the movant must show that there does not exist a 'genuine issue' as to a material fact and not simply one 'of an insubstantial nature'; a non-movant will be unsuccessful 'merely by pointing to any fact in dispute.'" Prudential, 307 N.J. Super. at 167 (quoting Brill, 142 N.J. at 529-30).

In order to prove Live Nation's liability, Donahue needed to establish: "(1) a duty of care, (2) a breach of that duty, (3) actual and proximate causation, and (4) damages." Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 406 (2014) (quoting Jersey Cent. Power & Light Co. v. Melcar Util. Co., 212 N.J. 576, 594 (2013)). Because Donahue was a business invitee, Live Nation owed her "a duty of reasonable care to guard against any dangerous conditions on [its] property that [it] either knows about or should have discovered." Rowe v. Mazel Thirty, LLC, 209 N.J. 35, 44 (2012) (quoting Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 434 (1993)). "[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)).

The absence of actual or constructive notice of a dangerous condition is generally "fatal to [a] plaintiff's claim of premises liability." Arroyo v. Durling Realty, LLC, 433 N.J. Super. 238, 243 (App. Div. 2013). It is well-established that:

> [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." Parmenter v. Jarvis Drug Stores, Inc., 48 N.J. Super. 507, 510 (App. Div. 1957). Constructive notice can be inferred in various ways. The characteristics of the dangerous condition giving rise to the slip and fall, see, Tua v. Modern Homes, Inc., 64 N.J. Super. 211, 220 (App. Div. 1960) (finding constructive notice where wax on the floor had hardened around the edges), or eyewitness testimony, see, Grzanka v. Pfeifer, 301 N.J. Super. 563, 574 (App. Div. 1997) . . . (finding constructive notice where eyewitness noted the light had been out for a while)[,] may support an inference of constructive notice about the dangerous condition.
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> [Troupe v. Burlington Coat Factory Warehouse Corp., 443 N.J. Super. 596, 602 (App. Div. 2016).]

"The mere '[e]xistence of an alleged dangerous condition is not constructive notice of it.'" Arroyo, 433 N.J. Super. at 243 (alteration in original) (quoting Sims v. City of Newark, 244 N.J. Super. 32, 42 (Law Div. 1990)).

We have carefully reviewed the record and conclude, as did the motion judge, that the lawn seating area at the PNC Center was not a dangerous

condition at the time Donahue fell. As the trial court found, slippery mud is a naturally occurring condition when it rains on a lawn that is open to the elements. There was nothing Live Nation could have done to ameliorate the condition of the lawn once it began to rain. In addition, Donahue, who had previously sat in the lawn area during a concert, was aware of the weather forecast, and admitted that it was common sense that a lawn might be slippery during a rainstorm. Thus, even if the mud was considered to be a dangerous condition, Live Nation breached no duty to Donahue by not warning her of a danger about which she was already aware.[3]

Finally, like the trial court, we see no support in the record for Donahue's contention that Live Nation breached a duty to her by allowing portions of the lawn area to be worn down to dirt that turned to mud when it rained. Donahue elected to purchase tickets to an outdoor seating area during an evening rainstorm. Donahue had been in the lawn seating area previously. During discovery she stated that she expected there would be more grass than dirt in the area. There is, however, nothing in the record describing with precision the

[3] We question, too, the fairness of imposing a duty on Live Nation to warn patrons of the commonsense fact that mud is slippery during a rainstorm.

extent to which the grass had been worn away or identifying any accepted industry standard of a safe grass-to-dirt ratio for a lawn used for concert seating.

Finally, we see no error in the trial court's rejection of the expert opinion offered by Donahue. The opinion set forth in the written report is not predicated on an inspection of the lawn area as it existed at the time of the fall. It is instead based on the expert's examination of the lawn two years after the incident and subsequent to NJTA's modification of the lawn through the addition of artificial turf. Although he opined that the slope of the area at the time of his inspection was dangerous, he could not identify the slope of the area at the time of the fall. In addition, the expert relied on building standards applicable to means of egress, but Donahue was not exiting the lawn area when she fell. She was, instead, traversing a sloped area. As a result, the report contained nothing more than the expert's net opinion that the lawn area was in a dangerous condition at the site and time of Donahue's fall. The trial court correctly concluded that the opinion was inadmissible. See Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 373 (2011) ("[I]f an expert cannot offer objective support for his or her opinions, but testifies only to a view about a standard that is 'personal,' it fails because it is a mere net opinion.").

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

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION