SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2853-15T2

KAREN L. LANDERS,

Plaintiff-Appellant,

v.

MEDFORD FITNESS CENTER,

Defendant-Respondent,

and

TERM PROPERTY LLC and/or SWEAR FITNESS,

Defendants.

Argued May 16, 2017 – Decided August 17, 2017

Before Judges Ostrer and Moynihan.

On appeal from the Superior Court of New Jersey, Law Division, Burlington County, Docket No. L-1391-14.

Maria DeTitto argued the cause for appellant (Law Offices of Robert I. Segal, attorneys; Ms. DeTitto, on the brief).

Mitchell S. Berman argued the cause for respondent.

PER CURIAM

Plaintiff Karen Landers appeals from the trial court's summary judgment dismissal of her slip-and-fall complaint. Plaintiff injured her right wrist and knee when she fell on the floor of a gym operated by defendant Medford Fitness Center. Relying on the mode-of-operation doctrine, plaintiff contends that Medford was liable for the injuries she sustained. In granting summary judgment, the trial court found the mode-of-operation doctrine inapplicable and plaintiff failed to demonstrate actual or constructive notice of a dangerous condition. Having considered plaintiff's arguments in light of the record and applicable principles of law, we affirm.

I.

The material facts were undisputed. On January 6, 2014, plaintiff slipped and fell while participating in a Zumba class at Medford. The week before the accident, Medford had the group exercise studio floor waxed and re-coated. It was the first time plaintiff had been in the studio since the floors were redone.

About fifteen minutes into the class, plaintiff noticed drops of water on the floor, stopped dancing, and wiped the floor with a paper towel. She did not know the source of the water, and did not notify the Zumba instructor who led the class from the front of the room. She moved a few feet to the left to continue dancing. Twenty minutes later, plaintiff slipped and fell while performing

a dance routine. At the time, plaintiff was shifting to her left, when her right foot slipped from under her, causing her to fall on her right-side, injuring her right wrist and knee. Plaintiff later claimed the moisture or dampness – as distinct from a puddle or water drops – caused her fall. She could not identify the source of the moisture, and did not see anyone spill water or sweat profusely. Although plaintiff said the floor was "shiny," she testified that it did not feel any different than it did before it was re-coated.

Colleen Normandin, an eyewitness to the accident, testified that "the floor was extremely slippery that day" and she believed the studio floor's condition caused plaintiff to fall. She described the studio as humid, comparing it to a bathroom after a hot shower, and opined that the combination of the waxed floor and the humidity of the studio caused the floor to be slippery.[1] She

[1] Normandin also claimed she overheard an unidentified Medford employee describe the studio as "a skating rink." The trial court disregarded the statement as inadmissible hearsay. See R. 1:6-6. We agree. Although the statement was an apparent admission, the employee was unidentified. Therefore, Medford could not determine whether the employee's statement was "within the scope of the agency or employment" when made, N.J.R.E. 803(b)(4), nor could Medford cross-examine the employee. See Beasley v. Passaic Cnty., 377 N.J. Super. 585, 603-04 (App. Div. 2005) (holding inadmissible under N.J.R.E. 803(b)(4) the statement of an unidentified declarant because it was impossible to determine whether the statement was within the declarant's scope of employment, or to cross-examine the alleged declarant); see also Carden v. Westinghouse Elec. Corp., 850 F.2d 996, 998-1002 (3d

conceded, however, that she did not hear anyone complain to the instructor about the slippery conditions.

Maureen Faber, Medford's general manager and co-owner, testified in deposition that she inspected the group studio after plaintiff's accident and did not notice any substances or moisture on the floor. She also testified that, for the month of January 2014, she was not aware of any other incidents in which someone slipped in the group exercise studio.

Plaintiff alleged in her complaint that Medford created a dangerous and hazardous condition, and failed to warn her of the dangers, which caused her injuries. In its summary judgment motion, Medford argued that plaintiff failed to prove that it had actual or constructive notice of the dangerous substance that caused her fall. Medford also noted that plaintiff failed to identify the source or moisture that caused her fall. Plaintiff responded that, based on Medford's mode-of-operation, she was not required to prove actual or constructive notice.

In granting summary judgment, Judge Susan L. Claypoole found that plaintiff failed to establish that Medford's negligence caused her injuries. Citing Prioleau v. Kentucky Fried Chicken,

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Cir. 1988) (concluding that a supervisor's statement to the plaintiff that "they wanted a younger person" was inadmissible under Fed. R. Evid. 801(d)(2)(D) because the proponent failed to "identify the unknown 'they'").

Inc., 223 N.J. 245 (2015), Judge Claypoole concluded the mode-of-operation doctrine did not apply:

> The Court agrees with the notion that gyms are self-service businesses because it is simply the nature of how gyms operate. The second principle cited by [plaintiff], however, is where the argument for Mode-of-Operation as the correct analysis fails.
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> "[T]he rule applies only to accidents occurring in areas affected by the business's self-service operations . . . ." Prioleau, [supra,] 223 N.J. [at] 262. Here, the accident occurred in the group exercise studio where [Medford] hosts exercise classes, i.e., there are instructors supervising the classes. [Plaintiff] contends that the fact that [Medford] keeps exercise balls, dumbbells, exercise mats, and weights in the group exercise studio makes the area an area affected by [Medford's] self-service operations, but offers no citation to the record to support that such equipment is in fact kept in there and that patrons utilize the group exercise studio other than when classes are occurring.
>
> Accordingly, the Court concludes that actual or constructive knowledge of the dangerous condition is the correct analysis, not Mode-of-Operation.

The court also found that the record failed to support a finding of actual or constructive notice of a dangerous condition.

On appeal, the parties essentially renew the arguments they presented to the trial court.

II.

We review a trial court's grant of summary judgment de novo, employing the same standard used by the trial court. Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 330 (2010). Pursuant to that standard, the trial court shall grant summary judgment if the evidence "show[s] 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." R. 4:46-2(c); see also Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

In order to sustain her negligence claim, plaintiff had the burden to demonstrate four elements: "(1) a duty of care, (2) a breach of that duty, (3) proximate cause, and (4) actual damages." Townsend v. Pierre, 221 N.J. 36, 51 (2015) (internal quotation marks and citation omitted). As this is a premises liability case and neither party disputes plaintiff's status as an invitee, Medford owed plaintiff "a duty of reasonable or due care to provide a safe environment for doing that which is within the scope of the invitation." Nisivoccia v. Glass Gardens, Inc., 175 N.J. 559, 563 (2003). Specifically, Medford had an affirmative duty "to discover and eliminate dangerous conditions, to maintain the premises in safe condition, and to avoid creating conditions that would render the premises unsafe." Ibid. In asserting a breach of this duty, plaintiff needed to demonstrate "'that the defendant had actual or constructive knowledge of the dangerous condition that caused

the accident.'" Prioleau, supra, 223 N.J. at 257 (quoting Nisivoccia, supra, 175 N.J. at 563).

The parties' respective burdens change substantially under the mode-of-operation doctrine, which addresses "circumstances in which, as a matter of probability, a dangerous condition is likely to occur as the result of the nature of the business, the property's condition, or a demonstrable pattern of conduct or incidents." Nisivoccia, supra, 175 N.J. at 563; see Prioleau, supra, 223 N.J. at 258. The dangerous condition may arise from customer negligence, the actions of employees, "or the inherent qualities of the merchandise itself." Id. at 263. When applicable, the rule "gives rise to a rebuttable inference that the defendant is negligent, and obviates the need for the plaintiff to prove actual or constructive notice." Id. at 258. Instead, the defendant has the "obligation to come forward with rebutting proof that it had taken prudent and reasonable steps to avoid the potential hazard." Nisivoccia, supra, 175 N.J. at 563-64.

"[T]he mode-of-operation doctrine has never been expanded 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." Prioleau, supra, 223 N.J. at 262; see also Walker v. Costco

Wholesale Warehouse, 445 N.J. Super. 111, 121 (App. Div. 2016) (recognizing the application of mode-of-operation liability principles to businesses providing goods through "self-service" operations). The Court specifically rejected the idea that the doctrine applied whenever a risk of injury was "inherent in the nature of the defendant's operation." Prioleau, supra, 223 N.J. at 264 n.6 (internal quotation marks and citation omitted).

Furthermore, to invoke the mode-of-operation doctrine, a plaintiff must prove that the dangerous condition arose from the business's self-service operation. "The dispositive factor is . . . whether there is a nexus between self-service components of the defendant's business and a risk of injury in the area where the accident occurred." Id. at 262. The doctrine will not apply, however, where there is no evidence that "the location in which [the] plaintiff's accident occurred . . . bears the slightest relationship to any self-service component of [the] defendant's business." Id. at 264.

With these principles in mind, we conclude the trial court properly rejected plaintiff's reliance on the mode-of-operation doctrine. The record fails to establish a nexus between the dangerous condition and Medford's mode-of-operation. Even assuming for argument's sake that Medford operated in some respects

as a self-service business,[2] its "self-service components," if so characterized, would have been limited to activities in which gym patrons exercised, unsupervised by employees, utilizing Medford's fitness equipment, such as dumbbells, free-weights, and cardio equipment. See Prioleau, supra, 223 N.J. at 262 (describing a self-service operation as one "in which customers independently handle merchandise without the assistance of employees"); O'Shea v. K. Mart Corp., 304 N.J. Super. 489, 493 (App. Div. 1997) ("The absence of sales personnel leads to the inference that [the] defendant is a self-service store."). However, plaintiff's injury was sustained during a Zumba class, which does not fall within one of Medford's self-service components. Notably, she was not using any merchandise or equipment and, more importantly, she was in the

[2] Extending the mode—of-operation doctrine to health clubs, and recognizing a rebuttable presumption of negligence, may create tension with the Court's statement in Stelluti v. Casapenn Enters., LLC, 203 N.J. 286, 311 (2010) that health clubs "need not ensure the safety of its patrons who voluntarily assume some risk by engaging in strenuous physical activities that have a potential to result in injuries." The Court added, "Any requirement to so guarantee a patron's safety from all risk in using equipment, which understandably is passed from patron to patron, could chill the establishment of health clubs . . . [which] perform a salutary purpose by offering activities and equipment so that patrons can enjoy challenging physical exercise." Ibid. Contrary to plaintiff's contention that the Zumba classroom should have been inspected before and during each class, the Supreme Court held "it would be unreasonable to demand that a fitness center inspect each individual piece of equipment after every patron's use . . . ." Ibid.

presence and had the assistance of an instructor.[3] Since plaintiff's injury did not involve a self-service component, the mode-of-operation doctrine does not apply.

We also agree with the trial court that Medford did not have actual or constructive notice of a dangerous condition. Constructive notice can be established "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) (internal quotation marks and citation omitted). "The mere '[e]xistence of an alleged dangerous condition is not constructive notice of it.'" Arroyo v. Durling Realty, LLC, 433 N.J. Super. 238, 243 (App. Div. 2013) (quoting Sims v. City of Newark, 244 N.J. Super. 32, 42 (Law Div. 1990)).

[3] Plaintiff argues the instructor's presence was inconsequential, as is a supermarket employee's mere presence in a self-service produce aisle. See Nisivoccia, supra, 175 N.J. at 561 (the plaintiff slipped and fell on loose grapes); Wollerman v. Grand Union Stores, Inc., 47 N.J. 426, 428 (1966) (the plaintiff slipped and fell on a string bean). We disagree. The instructor actively guided the class, as would a trainer assisting a gym member in using exercise equipment, and as distinct from a supermarket employee who may restock bins, but does not directly interact with customers. Simply put, the "equitable considerations," Nisivoccia, supra, 175 N.J. at 563, that prompted application of the doctrine when a defendant resorts to a self-service mode-of-operation do not apply here.

Here, the record fails to demonstrate that Medford had actual or constructive notice of a dangerous condition. No competent evidence was presented establishing the Zumba instructor's, or any other Medford employee's, awareness of the slippery conditions of the floor. No testimony was provided that anyone complained, before the accident, about the slippery conditions, nor was there any evidence presented that any other patrons had slipped in the studio.

Even if the instructor noticed that plaintiff mopped up the floor and was on notice that there was something wet on the floor, that, alone, did not provide constructive or actual notice of the alleged dangerous condition that caused plaintiff's fall. First, plaintiff apparently toweled off the drops of water. If anything, this evidence suggests notice of the removal of an alleged dangerous condition, not its presence. Second, plaintiff moved to a different location. There is no evidence that the instructor or anyone else at the gym had actual or constructive notice of the moisture or dampness at plaintiff's second location. In sum, "[t]he absence of such notice is fatal to plaintiff's claim[] of premises liability." Arroyo, supra, 433 N.J. Super. at 243.

Affirmed.