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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4331-15T1

ELIZABETH C. DECARLO,

Plaintiff-Appellant,

v.

AQUA BEACH RESORT, LLC, d/b/a AQUA BEACH RESORT, NORTH AMERICAN RISK SERVICES, a/k/a NARS, and STARR INDEMNITY COMPANY,

Defendants-Respondents.

Submitted May 10, 2017 – Decided June 1, 2017

Before Judges Simonelli and Carroll.

On appeal from the Superior Court of New Jersey, Law Division, Cape May County, Docket No. L-0428-14.

Radano & Lide, attorneys for appellant (Jennifer L. Pustizzi, on the briefs).

Gage Fiore, LLC, attorneys for respondents (AnnMarie Flores, on the brief).

PER CURIAM

Plaintiff Elizabeth C. DeCarlo appeals the Law Division's February 10, 2016 order dismissing her personal injury complaint

against defendant Aqua Beach Resort, LLC on summary judgment. Plaintiff also appeals the trial court's May 27, 2016 order denying reconsideration. We affirm because, lacking any actual or constructive notice of the claimed dangerous condition, defendant did not breach the duty of care owed to plaintiff as its invitee.

Plaintiff, who was seventy-four years old at the time of the incident, visited the Aqua Beach Resort Hotel (Hotel) in Wildwood Crest in September 2013, as part of a senior citizen tour group. At approximately 11:00 p.m. on September 5, 2013, plaintiff took a bath in her room. As she attempted to stand from the bathtub, plaintiff grabbed onto an adjacent metal bar. The left side of the bar detached from the wall, causing plaintiff to fall back into the tub. Plaintiff noted pain in her hips, back, and shoulder, but did not report the incident until the following morning.

Plaintiff testified at her deposition that she had used the shower in the tub area during each of the three previous days but had not touched the metal bar prior to the incident. When asked whether she saw anything wrong with the bar before the incident, plaintiff responded, "No." After the bar came out of the wall, plaintiff opined that the tub, which was plastic, "was broken and never replaced. It was . . . never fixed correctly. They should have had a piece of wood in there."

Plaintiff also testified that, approximately a year later, in September 2014, she returned to the Hotel with friends and coincidentally was given the same room. When plaintiff showed a friend the bathtub where she fell the year before, the friend touched the bar and it again came out of the wall. Surprised that the bar was still broken, plaintiff took several pictures and a video depicting the unattached bar.

Defendant's employees testified that numerous individuals frequently check the rooms for unsafe conditions. Specifically, the Hotel uses "punch lists" at the beginning and end of each season to determine what needs to be repaired or replaced. The Hotel also employs an inspection team, a maintenance and repair team, contractors, carpenters, handymen, plumbers, electricians, housekeeping inspectors, and a full housekeeping staff, all of whom check the rooms on a regular basis. None of these individuals reported, nor did the Hotel records reflect, any issue regarding the bathtub in the room plaintiff occupied. Similarly, Hotel employees testified that the room was not a handicapped room, and was not outfitted with ADA-approved grab bars. Instead, the metal bar came with the prefabricated tub, and appeared to be "a decorative bar" according to the Hotel manager. A maintenance employee, however, surmised that the bar was there "for people to hold themselves [up]."

Defendant filed a motion for summary judgment. Defendant also moved in limine to bar the September 2014 photographs and video at the time of trial. In response to the motions, plaintiff submitted an affidavit reciting many of the same facts discussed above. She also now added that she "could see that a previous repair attempt had been made" involving "a piece of wood, . . . to attempt to secure/hold the [bar] in the socket hole." Plaintiff stated, "the photographs and video taken on September 4, 2014, could just as easily have been taken minutes after [she] fell."

Defendant's motion for summary judgment was granted by Judge J. Christopher Gibson. In a comprehensive sixteen-page written opinion, the judge found that:

> [T]he record does not create a jury question as to the issue of liability and notice. . . . Plaintiff's contention seems to be that since the "safety grab bar" detached from the socket/hole . . . then an inference of negligence should follow. However, such observation is not sufficient to create a jury question as to constructive notice. There is nothing in the record to suggest that [d]efendant[] should have known of a dangerous condition as there were no prior incident reports in regard to the "safety grab bar" for Room 408 where [p]laintiff's incident took place.
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> Although [p]laintiff supports her affidavit with photographs and videos that she took one year after the incident in order to prove the conditions she encountered when she fell and to show that repairs were not made, this [c]ourt finds that such evidence is not

> sufficient to create a reasonable inference of constructive notice of a dangerous condition. At the time of [p]laintiff's fall there were no prior incident reports as to the "safety grab bar" in Room 408, wherein [p]laintiff completed an incident report after the accident . . . . Thus, [p]laintiff's contention that [d]efendant[] had notice, either actual or constructive, based on her observation of a "piece of wood" attached to the hole/socket, is pure speculation and conclusory. The evidence must show that it can be reasonably inferred by the jury from any evidence that the property owner either knew about the condition or could have discovered the condition through reasonable inspection. See generally Francisco v. Miller, 141 N.J. Super. 290 (App. Div. 1951). . . . This [c]ourt finds [] it undisputed that visual inspections of the bathroom are performed and housekeepers would also conduct inspections. . . . In addition, the log for Room 408 does not contain a request for repair of the bathroom bar prior to [p]laintiff's accident. . . .
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> Although [p]laintiff herself speculates that she believes a prior repair was made, there are no facts in the record to substantiate such a repair nor is there expert testimony to establish that the condition she observed would not have existed but for a repair. Nonetheless, discovery has not disclosed any such repair.

The motion judge entered a memorializing order on February 10, 2016. The order also provided that defendant's "motion to bar any photographs or videos taken in September 2014 at the time of trial is moot."

On May 27, 2016, the judge denied plaintiff's motion for reconsideration, finding that she failed to meet the standards required under Rule 4:49-2. The court also found that the photos and video taken by plaintiff in September 2014 were not sufficient to infer negligence, and were not admissible pursuant to N.J.R.E. 403.

In this appeal, plaintiff argues that the court erred in granting summary judgment because genuine issues of fact exist. Plaintiff further contends that the photographs and video should be admissible at trial and considered by the court in its summary judgment analysis, and that a liability expert is not needed to establish defendant's negligence.

"[W]e review the trial court's grant of summary judgment de novo under the same standard as the trial court." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co., 224 N.J. 189, 199 (2016) (citation omitted). Thus, we consider, as the trial court did, "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." Davis v. Brickman Landscaping Ltd., 219 N.J. 395, 406 (2014) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)). If there is no genuine issue of material fact, we must then "decide

whether the trial court correctly interpreted the law." DepoLink Court Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013) (quoting Brill, supra, 142 N.J. at 520, 540). We review issues of law de novo and accord no deference to the trial judge's conclusions on issues of law. Nicholas v. Mynster, 213 N.J. 463, 478 (2013). Applying these standards, we discern no reason to reverse the grant of summary judgment.

"'[A] negligence cause of action 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.'" Davis, supra, 219 N.J. at 406 (quoting Jersey Cent. Power & Light Co. v. Melcar Util. Co., 212 N.J. 576, 594 (2013)). A plaintiff bears "'the burden of establishing those elements by some competent proof.'" Townsend v. Pierre, 221 N.J. 36, 51 (2015) (quoting Davis, supra, 219 N.J. at 406) (alteration in original).

"Although the existence of a duty is a question of law, whether the duty was breached is a question of fact." Jerkins v. Anderson, 191 N.J. 285, 305 (2007) (citing Anderson v. Sammy Redd & Assocs., 278 N.J. Super. 50, 56 (App. Div. 1994), certif. denied, 139 N.J. 441 (1995)). Summary judgment is, however, appropriate when the court is "satisfied a rational fact finder could not conclude defendant breached [its] duty of care." Endre v. Arnold, 300 N.J. Super. 136, 143 (App. Div.), certif. denied, 150 N.J. 27

(1997). The issue here is not whether defendant owed a duty to plaintiff - it did - but whether the record supports the court's decision that, as a matter of law, defendant did not breach that duty.

"It is well recognized that the common law imposes a duty of care on business owners to maintain a safe premises for their business invitees because the law recognizes that an owner is in the best position to prevent harm." Stelluti v. Casapenn Enters., LLC, 203 N.J. 286, 306 (2010). 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." Nisivoccia v. Glass Gardens, Inc., 175 N.J. 559, 563 (2003). "[T]he business entity will not be held liable for injuries sustained 'so long as [the business] has acted in accordance with the ordinary duty owed to business invitees, including exercise of care commensurate with the nature of the risk, foreseeability of injury, and fairness in the circumstances.'" Stelluti, supra, 203 N.J. at 307 (quoting Hojnowski v. Vans Skate Park, 187 N.J. 323, 340-41 (2006)) (alteration in original).

Owners of premises generally are not liable for injuries caused by defects for which they had no actual or constructive

notice and no reasonable opportunity to discover. Nisivoccia, supra, 175 N.J. at 563; Brown v. Racquet Club of Bricktown, 95 N.J. 280, 291 (1984). For that reason, "[o]rdinarily an injured plaintiff . . . 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." Nisivoccia, supra, 175 N.J. at 563.

In addition, "[n]egligence is a fact which must be shown and which will not be presumed." Long v. Landy, 35 N.J. 44, 54 (1961). "[T]he mere showing of an accident causing the injuries sued upon is not alone sufficient to authorize an inference of negligence[.]" Vander Groef v. Great Atl. & Pac. Tea Co., 32 N.J. Super. 365, 370 (App. Div. 1954) (internal quotation marks omitted).

In this case, we are in substantial agreement with Judge Gibson's thorough and well-reasoned analysis. The summary judgment record fails to support plaintiff's claim that, prior to the incident, defendant: had actual or constructive notice of the dangerous condition; made faulty repairs to the metal bar or bathtub area; did not conduct reasonable inspections to discover the alleged dangerous condition; or otherwise failed to properly protect plaintiff against such a condition. Without actual or constructive notice of the dangerous condition, plaintiff's claim failed, even if she had photos and video of the detached bar. The

judge therefore correctly concluded that defendant did not breach its duty to plaintiff. To the extent we have not specifically addressed plaintiff's remaining arguments, we find they lack sufficient merit to warrant discussion. 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