SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1518-21

IRINA GALPERIN,

Plaintiff-Appellant,

v.

MACY'S and KELLERMEYER BERGENSONS SERVICES, LLC,

Defendants-Respondents.

Argued March 29, 2023 – Decided April 19, 2023

Before Judges Firko and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-7737-19.

Ralph P. Ferrara argued the cause for appellant (Ferrara Law Group, PC, and Giblin & Gannaio, attorneys; Michael A. Gannaio, on the brief).

Paul Tarr (Lester Schwab Katz & Dwyer, LLP) of the New York bar, admitted pro hac vice, argued the cause for respondent Macy's (Lester Schwab Katz & Dwyer, LLP, and Paul Tarr, attorneys; Crystal E. Dozier, on the brief).

David A. Semple argued the cause for respondent Kellermeyer Bergensons Services, LLC (McCormick & Priore, PC, attorneys; David A. Semple, on the brief).

PER CURIAM

Plaintiff Irina Galperin appeals from two Law Division orders granting defendants Macy's and Kellermeyer Bergensons Services, LLC's (Kellermeyer) motions for summary judgment. We affirm.

I.

We briefly summarize the facts from the summary judgment record, viewing them in a light most favorable to plaintiff. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). Plaintiff sustained injuries when she fell in a Macy's store, located in the Garden State Plaza Shopping Center in Paramus, upon stepping from a tile walkway to a carpeted area. Plaintiff filed a complaint alleging in pertinent part she "was caused to slip and fall" in Macy's and sustained "severe and permanent injuries." According to the complaint, Macy's owned or was in "custody and control of the property and premises" and Kellermeyer, as Macy's housekeeping contractor pursuant to a written agreement, was "responsible for servicing, cleaning and/or maintaining the property and premises."

Defendants filed competing crossclaims for contribution and indemnification. Macy's crossclaims against Kellermeyer were based on an indemnification provision of the parties' Master Services Agreement. Specifically, that provision required Kellermeyer to "indemnify, defend, and hold harmless Macy's . . . from and against any and all claims, losses, costs, liabilities, damages or expenses" arising from Kellermeyer's performance under the contract, including an "injury to any person . . . arising from an act or omission of [Kellermeyer]."

The contract also required Kellermeyer to promptly respond to "Macy's store employee's requests to deal with spilled substances, tracked-in water, ice or snow or other situations requiring attention" and to timely report "unsafe conditions" observed by its employees. Additionally, Kellermeyer's internal safety manual instructs employees to "[l]ook for and note slip or trip hazards," including "surface and/or elevation changes."

In her initial answers to interrogatories, plaintiff certified "she was caused to slip and fall due to a dangerous condition, namely liquid on the floor."[1] When

[1] We note a Macy's incident report included in the record states plaintiff's fall was "due to her shoes." It does not appear the trial court relied on this report in granting defendants' summary judgment and we decline to consider it as well, as no party laid the proper foundation to establish that hearsay document as a

confronted with this statement at her deposition by Kellermeyer's counsel, however, plaintiff disavowed her response contending she signed the certification without first reviewing the responses prepared by her former counsel. Plaintiff also stated she was unable to identify "anything [she] found on the floor that caused or contributed to her fall." In an amended interrogatory answer, plaintiff stated she fell when the "front of [her] right foot got caught on the edge of the carpet which bordered the tile walkway."

At her deposition, plaintiff testified the incident occurred after she stepped off the escalator and walked towards the store's exit. She stated as she walked on a tiled walkway near the handbag area, there were too many people in the aisle and so she "lean[ed] to her right" to let other customers pass her. While "trying to go around" the customers, she fell "on the border of tile and carpet" and struck a display table with a metal frame. When specifically asked what caused her fall, plaintiff simply stated, the "border between [the] tiles and carpet."

When shown a photo of the handbag display area, plaintiff identified the location of her fall, which contained a display table with a metal frame and a

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business record, thereby permitting it to be considered for purposes of summary judgment. See N.J.R.E. 803(c)(6); see also New Century Fin. Servs., Inc. v. Oughla, 437 N.J. Super. 299, 332 (App. Div. 2014).

shorter table with a leather top. Plaintiff testified the two tables were placed closely to the carpeted area, but she was unable to identify their placement on the day of her fall, and at no point did she allege the location of the tables caused her fall. When asked whether she fell "because [she] walked into that low table," she stated, "Maybe. I don't know. I cannot say now."

Additionally, when asked at her deposition whether she "slipped" or "tripped" on anything, plaintiff generally stated she fell "between [the] tile and carpet." When Kellermeyer's counsel inquired as to what precisely occurred, plaintiff responded she did not get a "chance to look at . . . what caused [her] fall." Upon further questioning by Kellermeyer's counsel, plaintiff speculated "something between [the] tiles and the carpet" caused her to fall and further offered "maybe [the] carpet was not . . . leveled. I don't know." When confronted regarding her previous interrogatories where she certified the cause of her fall to be spilled liquid on the floor, plaintiff affirmed the "only thing" she knew was that she "lifted [her] right foot from the tile and placed it on the carpet and [she] started to fall." Plaintiff later affirmed her "foot got caught on the edge of the carpet," but could not add any detail to that statement.

Kellermeyer's Regional Store Manager, Miley Martinez, and the Operations Manager of the Macy's store where the incident occurred, Robert

Santiago, were also deposed. Martinez and Santiago testified Kellermeyer was responsible for vacuuming and cleaning the floors throughout the store, taking out the garbage, maintaining the bathrooms, and cleaning the store's escalators and entrances. They also confirmed Kellermeyer was not responsible for installing the tile or carpet in the store and had no input as to where any furnishings were placed.

In seeking to dismiss plaintiff's direct claims as well as Macy's crossclaims for indemnification and contribution, Kellermeyer contended it was only responsible for cleaning the store and had no role in the selection or installation of any flooring or in placement of any furniture or fixtures. Kellermeyer also argued plaintiff failed to identity the alleged dangerous condition that caused her fall and accordingly could not establish it breached any duty of care. Further, relying on D'Alessandro v. Hartzel, 422 N.J. Super. 575, 579 (App. Div. 2011), Kellermeyer maintained, to the extent plaintiff claimed her fall was caused by the transition between the tiles and the carpet, she failed to produce any expert testimony that either Kellermeyer or Macy's violated any applicable code, rule, or industry standard supporting her allegation the transition area constituted a dangerous condition.

As to Macy's crossclaims, Kellermeyer reiterated its contentions that the Master Services Agreement limited its responsibilities to ministerial custodial tasks and did not obligate it to install the tile or carpet or make repairs to the floors in the store. It also argued its safety manual was meant for Kellermeyer workers, and it had no duty to warn Macy's of any purported hazardous conditions.

Macy's also moved for summary judgment. In its application, Macy's similarly argued plaintiff failed to identify a dangerous condition that caused her accident, nor did she establish Macy's possessed actual or constructive notice of any such condition. Macy's, like Kellermeyer, stressed plaintiff's inability to identify the cause of her fall and emphasized plaintiff alleged in her initial interrogatory responses liquid on the floor caused the accident, and only later, contended arguably a height differential from tile to carpet caused her accident.

Macy's also joined in Kellermeyer's argument that, to the extent plaintiff maintained the purported height differential constituted a hazardous condition, any claim was beyond the ken of the average juror thereby requiring expert testimony, which she failed to provide. Further, Macy's maintained that in the event the court refused to dismiss plaintiff's claims, it should likewise deny Kellermeyer's cross-motion in light of the Macy's-Kellermeyer contract which

it argued required Kellermeyer to inspect and notify Macy's of any dangerous condition in the store.

Plaintiff opposed defendants' motions and argued Macy's possessed actual or constructive notice that changes in elevation between tiled and carpeted floors can cause customers to trip. Plaintiff also contended in light of her deposition testimony that she caught her foot in the transition area between the carpet and tile, as well as her claim that the close proximity of the furniture and the tile walkway itself created a hazardous condition for patrons, factual questions existed in the record warranting denial of defendants' motions.

Further, plaintiff contended a factual question existed regarding whether Kellermeyer breached a duty of care by not informing Macy's of the aforementioned hazards. Specifically, plaintiff maintained the Kellermeyer manual required Kellermeyer employees to inspect the area where plaintiff fell and notify Macy's of any dangerous conditions, including dangerous elevation changes in transition areas such as surface or elevation changes. Plaintiff argued expert testimony was not required as the cause of plaintiff's fall involved principles of "basic physics."

After considering the parties' submissions and oral arguments, the court granted defendants' motions, dismissed plaintiff's complaint and entered

conforming orders. In a comprehensive oral opinion, the court acknowledged that as a business invitee, Macy's owed plaintiff a duty of reasonable care to ensure its premises was safe for its customers and to conduct reasonable inspections. The court specifically found the motion record devoid of any proofs the "condition of which she complains was dangerous and involved an unreasonable risk of physical harm to visitors."

The court observed plaintiff disavowed her initial, uncertified discovery responses that she fell as a result of a spill or a wet surface and noted in her deposition "plaintiff made clear that she [did] not know why she fell," beyond her claim she caught her foot on the edge of the carpet. The court found plaintiff failed to provide "even a shred of evidence to show there was a defective condition" in the area where she fell. The court rejected plaintiff's contention the mere existence of a transition from tile to a carpet, without even "some kind of torn or ripped carpet, broken tiles, or a misleveled surface," constituted a dangerous condition. The court concluded such a claim failed as patrons regularly encounter "this type of extremely common flooring surface" in "countless stores everywhere," and there was no competent factual or expert proofs presented that such flooring "violated some code or rule or regulation or standard that a reasonably prudent business owner would . . . meet."

The court also reasoned plaintiff's claims that the border between the tile and the carpet created a defect required expert testimony, as such an allegation "would not be something within the ken of the average juror." The court rejected plaintiff's claim that the Kellermeyer safety manual created a factual question regarding defendants' negligence, as it did not establish an ordinary transition from tile to carpet is a slip hazard in all circumstances.

The court similarly refused to accept plaintiff's argument that either defendant was negligent based on its alleged role in the placement of the furniture and fixtures in the area where plaintiff fell. The court again noted plaintiff admitted in her deposition that she did not know if she walked into the furniture before she fell or if the furniture impeded her pathway. Further, the court found the photographs in evidence "show the fixtures and furniture did not impede [her] walkway in any way."

With respect to Kellermeyer, the court determined it had no role in the placement of any fixtures or furniture and characterized plaintiff's claim Kellermeyer was negligent for failing to notify Macy's of a dangerous condition as "simply insupportable" as there was no dangerous condition to report. This appeal followed.

II.

Before us, plaintiff reprises the same arguments she made before the trial court. Specifically, she argues as a business invitee, Macy's owed her a duty to "make the business reasonably safe" including conducting a "reasonable inspection of the premises to discover hazardous conditions." She further argues the motion record contained numerous genuine and material factual questions supporting her claim the "transition area" was a dangerous condition, including Kellermeyer's statement in its safety manual that "surfaces and/or elevation changes are slip or trip hazards." Plaintiff also maintains the court erred in concluding expert testimony was necessary as the Kellermeyer safety manual clearly stated such elevation changes "are a slip hazard" and defendants "knew or should have known these surfaces are universally tripping hazards."

Plaintiff further argues summary judgment was inappropriate as the motion record contained factual questions regarding "whether or not the placement of the mannequin[] [and] furniture . . ." created a hazardous condition discernable to plaintiff. She maintains the "placement of the furnishing in the [area where she fell] was perilously close to the walkway" and appears to "dissuade an individual from walking parallel on the transition area," instead

directing "patrons to walk in a perpendicular manner." We disagree with all of these arguments.

We review the disposition of a summary judgment motion de novo, applying the same standard used by the motion judge. Townsend v. Pierre, 221 N.J. 36, 59 (2015). Like the motion judge, we view "the competent evidential materials presented . . . in the light most favorable to the non-moving party, [and determine whether they] are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Town of Kearny v. Brandt, 214 N.J. 76, 91 (2013) (quoting Brill, 142 N.J. at 540); see also R. 4:46-2(c). If "the evidence 'is so one-sided that one party must prevail as a matter of law,'" courts will "not hesitate to grant summary judgment." Brill, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986)).

A plaintiff bears the burden to prove negligence, which is never presumed. Khan v. Singh, 200 N.J. 82, 91 (2009). "[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) (quoting Hansen v. Eagle-Picher Lead Co., 8 N.J. 133, 139-40 (1951)).

In order to establish defendants' negligence, plaintiff needed to establish: "(1) a duty of care, (2) 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). As this is a premises liability case, and plaintiff was clearly a business invitee, see Rowe v. Mazel Thirty, LLC, 209 N.J. 35, 43 (2012), Macy's owed plaintiff a "duty of reasonable care to guard against any dangerous conditions on [its] property that the owner knew about or should have discovered. That standard of care encompasses the duty to conduct a reasonable inspection to discover latent dangerous conditions." Id. at 44 (quoting Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 434 (1993)).

Here, we agree with the court the motion record, read in its most favorable light, failed to establish a genuine and material factual question that the transition area or the placement of furniture or fixtures constituted a dangerous condition that created an unreasonable risk of harm. Indeed, when deposed plaintiff failed to identify anything related to the tile or carpet that caused her to fall. The only evidence that the transition area constituted a dangerous condition was plaintiff's vague statements that her foot "caught the edge of the carpet" and "something between [the] tiles and the carpet" caused her to fall. Further, while plaintiff equivocated that perhaps the "carpet was not . . . leveled" she admitted

during her deposition she was not certain of that statement. Giving plaintiff all reasonable inferences, at best, she identified the location of the fall, but could not identify what dangerous condition contributed to it.

With respect to Macy's or Kellermeyer's purported negligence as to the placement of furniture or fixtures, nothing in the motion record supported such a theory. While plaintiff described the furniture's placement in close proximity to the transition where she fell, she never alleged the furniture caused her fall, instead simply stating she may have "walked into [a] low table," but was not even certain that occurred. It appears this theory of liability was based on counsel's argument only, which is not evidential. See Condella v. Cumberland Farms, Inc., 298 N.J. Super 531, 537 (App. Div. 1996) (stating "arguments of counsel, are simply that, argument, and not evidence"). Simply put, nothing in the motion record established Macy's had knowledge, actively or constructively, of a dangerous condition in the area where plaintiff fell.

Having failed to establish the existence of a dangerous condition to which defendants had knowledge, any assertion the transition area was dangerous due to a design or installation defect clearly required expert testimony and we reject plaintiff's arguments to the contrary. In determining whether expert testimony is necessary, a court must consider "whether the matter to be dealt with is so

esoteric that jurors of common judgment and experience cannot form a valid judgment as to whether the conduct of the [defendant] was reasonable." Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 407 (2014) (alteration in original) (quoting Butler v. Acme Mkts., Inc., 89 N.J. 270, 283 (1982)).

In some cases, the "jury is not competent to supply the standard by which to measure the defendant's conduct," and thus the plaintiff must establish the defendant's standard of care and breach of that standard by presenting expert testimony. Ibid. (quoting Sanzari v. Rosenfeld, 34 N.J. 128, 134-35 (1961)); see, e.g., id. at 408 (expert required to explain fire code provisions and standards); D'Alessandro, 422 N.J. Super. at 582-83 (stating an expert is required to explain dangerous condition of a step down into a sunken living room near the entrance because allegations of a design flaw or construction defect are "so esoteric or specialized that jurors of common judgment and experiences cannot form a valid conclusion" (quoting Hopkins, 132 N.J. at 450)); Vander Groef, 32 N.J. Super. at 370 (concluding plaintiff "failed to introduce any evidence that the construction of a platform [forty-four] inches high without steps or a ladder was in any way a deviation from standard construction, or that it was unsafe").

In contrast, where "a layperson's common knowledge is sufficient to permit a jury to find that the duty of care has been breached," an expert is not required. Davis, 219 N.J. at 408 (quoting Giantonnio v. Taccard, 291 N.J. Super. 31, 43 (App. Div. 1996)). That is because "some hazards are relatively commonplace and ordinary and do not require the explanation of experts in order for their danger to be understood by average persons." Hopkins, 132 N.J. at 450 (stating an expert is not required to establish a dangerous condition of camouflaged step); see also Scully v. Fitzgerald, 179 N.J. 114, 127-28 (2004) (expert not required to explain danger of throwing a lit cigarette onto a pile of papers or other flammable material); Berger v. Shapiro, 30 N.J. 89, 101-02 (1959) (expert not required to explain dangerous condition caused by a missing brick in top step of a porch); Campbell v. Hastings, 348 N.J. Super. 264, 270-71 (App. Div. 2002) (expert not required to establish danger of unlit sunken foyer).

Here, plaintiff failed to provide any expert evidence to support her claim the transition area, or the placement of furniture, was in any way defective, hazardous, or dangerous. In light of plaintiff's inability to identify the circumstances of her fall, expert testimony was necessary to establish the area where she fell was in some manner dangerous, if for no other reason than to

exclude other potential causes of the accident and avoid pure speculation by the factfinder.

Affirmed.