SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2726-21

SAMIRA H. ALY,

Plaintiff-Appellant,

v.

A & H BAGELS & DELI INC.
and METRO BAGELS & DELI,

Defendants-Respondents.

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Argued April 18, 2023 – Decided May 8, 2023

Before Judges Fisher and Chase.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-5992-19.

Corey A. Dietz argued the cause for appellant (Brach Eichler, LLC, attorneys; Corey A. Dietz, on the briefs).

Charles Rabolli argued the cause for respondent A & H Bagels & Deli Inc. (Messineo Law, LLC, attorneys; Charles Rabolli, on the brief).

PER CURIAM

Samira Aly appeals from an order granting summary judgment in favor of A & H Bagels & Deli. Our review of the record and the applicable legal principles deriving from Aly's personal injury claim require us to affirm in part and reverse in part.

On April 28, 2019, Aly was a customer at A&H Bagels. While walking to throw out her trash, she fell and was seriously injured. Deposition testimony revealed the presence of a brown substance on the floor near where she fell. A&H Bagels representative, Hala Ali, testified she was the only person working in the shop when Aly fell. She accompanied Aly to the hospital and then returned to A&H Bagels and made an incident report that was subsequently destroyed in a fire. A&H Bagels further claims it kept a log of inspections to the premises that was also lost in the fire. Furthermore, both Aly's fall and the brown substance were documented through A&H Bagels surveillance footage. While A&H Bagels admits to viewing this footage and recognizing a brown fluid on the ground where Aly fell, the footage was taken into police custody after the fire and never viewed by Aly.

Two trial dates were continued by the court before the summary judgment motion was filed by A&H Bagels. The summary judgment motion received a return date more than thirty days before the third trial date.

Aly contends that the trial court erred in granting A&H Bagel's motion for summary judgment for three reasons: (1) the filing of their summary judgment motion was untimely under Rule 4:46-1; (2) the trial court failed to consider the appropriate, "mode of operation" standard; and (3) even absent the applicability of the mode of operation standard, the trial court should have found A&H Bagels to be under constructive notice of the brown substance on the floor near the receptacle.

I.

First, we briefly address Aly's argument that the summary judgment motion was filed untimely under Rule 4:46-1 and should not have been considered by the trial court. Aly contends that A&H Bagels' late filing prejudiced her by not allowing sufficient time to prepare for trial after the outcome of the summary judgment motion hearing. Pursuant to Rule 4:46-1, "All motions for summary judgment shall be returnable no later than 30 days before the scheduled trial date. . .." The Rule only requires that all motions for summary judgment be returnable no later than 30 days before the trial date, and not necessarily before the first trial date. See Holez v. Bowers, 473 N.J. Super. 42, 51-52 (App. Div. 2022).

II.

We review a trial court's grant or denial of a motion for summary judgment de novo, applying the same standard used by the trial court. Samolyk v. Berthe, 251 N.J. 73, 78 (2022); Stewart v. N.J. Tpk. Auth./Garden State Parkway, 249 N.J. 642, 655 (2022); Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021). Moreover, Rule 4:46-2(c) provides that a motion for summary judgment must be granted "if 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."

We 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." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). In other words, the court must consider the evidence presented "together with all legitimate inferences therefrom favoring the non-moving party." Rule 4:46-2(c).

"Summary judgment should be granted, in particular, 'after adequate time for discovery and upon motion, 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. 450, 472 (2020) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)). Summary judgment is not meant to "shut a deserving litigant from his trial," Brill, 142 N.J. at 540, nor is it appropriate when discovery is incomplete and critical facts are within the moving party's knowledge. Friedman, 242 N.J. at 472.

To sustain her negligence claims, Aly has 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 omitted) (quoting Polzo v. Cnty. of Essex, 196 N.J. 569, 584 (2008)). Whether a person owes a duty requires courts to weigh several factors including "the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution." Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 439 (1993) (citing Goldberg v. Housing Auth. of Newark, 38 N.J. 578, 583 (1962)).

In a premises liability case, as here, the type of duty owed by defendant to plaintiff generally depends upon plaintiff's classification. Hopkins, 132 N.J. at 433 (noting that the three classifications are business invitee, licensee, and

trespasser). Business invitees are defined as individuals that "come by invitation, express or implied." Snyder v. I. Jay Realty Co., 30 N.J. 303, 312 (1959). The duty owed to business invitees, like Aly, is a "duty of reasonable care to guard against any dangerous conditions on [his] property that [defendant] either knew about or should have discovered. That standard of care encompasses the duty to conduct a reasonable inspection to discover latent dangerous conditions." Hopkins, 132 N.J. at 434.

Distinctly, when the very nature of a business' operation creates the hazard, the "mode-of-operation rule" applies. This standard creates an inference of negligence and "the burden shifts to the defendant to 'negate the inference by submitting evidence of due care.'" Nisivoccia v. Glass Gardens, Inc., 175 N.J. 559, 564 (2003) (quoting Bozza v. Vornado, Inc., 42 N.J. 355, 359 (1964)). This inference relieves the plaintiff of proving that the defendant had actual or constructive notice of the dangerous condition and instead requires the defendant to show it did "all that a reasonably prudent man would do in light of the risk of injury [the mode of operation] entailed." Wollerman v. Grand Union Stores, Inc., 47 N.J. 426, 429 (1966).

Our Supreme Court first articulated that modification of the cause of action in Bozza, 42 N.J. at 359-60, wherein it approved the rationale of Torda

v. Grand Union Co., 59 N.J. Super. 41, 45 (App. Div. 1959), which had applied the mode-of-operation principle. In Bozza, the plaintiff, when leaving the counter of a self-service cafeteria, claimed to have slipped on a sticky, slimy substance on the littered and dirty floor. It was pointed out that spillage by customers was a hazard inherent in that type of business operation from which the owner is obliged to protect its patrons, and the Court held that when it is the nature of the business that creates the hazard, the inference of negligence thus raised shifts the burden to the defendant to "negate the inference by submitting evidence of due care." 42 N.J. at 360. The mode-of-operation rule was further discussed in Wollerman, where the plaintiff had slipped on a string bean in the produce aisle of a supermarket. The Court explained in Wollerman that the defendant's self-service method of operation required it to anticipate the hazard of produce falling to the floor from open bins because of the carelessness of either customers or employees, imposing upon the defendant the obligation to use reasonable measures promptly to detect and remove such hazards to avoid the inference that it was at fault. 47 N.J. at 429-30; see also Troupe v. Burlington Coat Factory Warehouse Corp, 443 N.J. Super. 596, 605 (App. Div. 2016) (holding it is the patron who must first show a clear

nexus between the self-service component of the business and a risk of injury in the area where the accident occurred).

Applying these principles, we find the trial court erred in failing to apply the mode-of-operation standard to the facts of this case. Like the businesses previously found to have created the hazard by their self-service nature, A&H Bagels' format requires courts to contemplate its duty through a mode-of-operation standard as well. Moreover, the trial court failed to adhere to the summary judgment standard of giving all reasonable inferences to the non-moving party when it granted A&H Bagels' motion.

Customers at the bagel shop purchase sandwiches, coffee in cups, and juices in closed containers at a counter. Customers then carry their food and beverages to their seats to eat before disposing of their trash in a receptacle. Based on evidence that customers wait on themselves after being served at a counter, this is exactly the situation where the burden should shift to the defendant to show that they acted reasonably considering this specific business format. The dangerous condition caused by the brown substance near the trash receptacle was a foreseeable risk posed by the bagel shop's mode of operation. Therefore, the mode-of-operation rule applies.

The trial court held that the mode-of-operation rule did not apply to this setting, but that even if it did, A&H Bagels had met its burden because they did all that a reasonably prudent shop would do considering the risk of injury the mode of operation entailed. While we disagree with the trial court's failure to apply the mode-of-operation rule to a business that squarely fits under the rule's "self-serving" description, the more harmful effect of the trial court's ruling was that it improperly concluded that A&H Bagels took all reasonable actions. When viewing the evidence in the light most favorable to the non-moving party, and if we consider all the evidence presented, there are genuine issues of material fact present that only a jury can untangle. It is disputed exactly how much of the brown substance was on the floor, whether the brown substance caused the fall and how soon before the fall there were inspections and garbage changes. Furthermore, it is the jury's charge to decipher whether defendant acted reasonably no matter who's burden it becomes to prove that.

Summary judgment is improper in a scenario like this one, particularly considering the loss of physical evidence in a file that occurred a few weeks after Aly's fall. Critical facts are within the moving party's knowledge and what

the surveillance footage depicted[1], and whether the defendant did in fact keep a log of spills, inspections and incidents is evidence available only through defendant's testimony. This is testimonial evidence which cannot be presumed to be true to the benefit of the moving party. Finding summary judgment in favor of the moving party after only testimonial evidence that the bagel shop acted reasonably, even if it is not its burden, is erroneous, especially given that Aly is already disadvantaged because of unavailable evidence. For these reasons, the trial judge mistakenly entered summary judgment.

Reversed and remanded for trial.

[1] The record reveals that Ali reviewed video surveillance tape that depicted Aly's fall but that this and other video recordings were gathered by law enforcement after the fire. It is not clear whether these recordings are still in the possession of law enforcement or are available to the parties.