SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3270-21

DELMY MIGUEZ,

Plaintiff-Appellant,

v.

SHOPRITE OF KEARNY, LLC,

Defendant-Respondent.

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Argued May 8, 2023 — Decided June 1, 2023

Before Judges Whipple, Mawla, and Walcott-Henderson.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-2146-19.

Douglas D. Burgess argued the cause for appellant (Icaza, Burgess, and Grossman, PC, attorneys; Douglas D. Burgess, of counsel and on the briefs; Randi S. Greenberg, on the briefs).

Laurie P. Beatus argued the cause for respondent (Rawle and Henderson, LLP, attorneys; Laurie P. Beatus, on the brief).

PER CURIAM

Plaintiff Delmy Miguez appeals from a May 25, 2022 order granting summary judgment to defendant Shoprite of Kearny, LLC, and dismissing her personal injury complaint. We affirm in part and reverse in part for the reasons expressed in this opinion.

On June 28, 2018, plaintiff was a customer at Shoprite of Kearny when she slipped and fell in the deli aisle. She filed a complaint in the Law Division on May 31, 2019. Plaintiff maintains that she was injured near the deli department while walking towards a self-serve refrigerator to retrieve frozen avocados. She recalled that her foot landed on top of "a metal thing, and then that thing flew away and [she] fell backwards." The metal object was a vent cover from the self-service refrigerator. The store surveillance video from the day of the incident showed the vent cover falling from the refrigerator after an employee placed items inside, closed the door and walked away. [1] Subsequently, several customers ran over the vent cover with their shopping carts and stepped on it before plaintiff encountered it and fell. There were two employees working in the deli area at the time, less than thirty feet from the refrigerator, and neither removed the object from the floor. Shortly after

[1] Neither party discusses nor provides information on how much time elapsed between the vent cover falling off the refrigerator and plaintiff's fall.

plaintiff fell, the assistant store manager came to the scene and observed the loosed metal vent cover.

On April 1, 2021, approximately three years after the incident, plaintiff's expert, Robert S. Bertman, an engineer, inspected the refrigerator unit. He also reviewed the store surveillance video from the date of the incident, which showed the store employee closing the refrigerator door and the metal vent cover falling off a few seconds later, landing on the floor in the aisle. Bertman opined that defendant's failure to inspect the premises for hazards such as the metal vent cover on the floor violated various BOCA[2] and other applicable codes. Bertman also noted that the vent cover was dented and filthy, the refrigerator had not been cleaned or serviced in many years, and there were two missing vent screws. He concluded that had the vent cover been secured by the missing two screws at the top, it would not have fallen off and that the failure to inspect and maintain the refrigerator unit allowed an unsafe condition to exist that ultimately caused plaintiff's injury.

On February 16, 2022, defendant filed for summary judgment on the grounds plaintiff had failed to establish actual or constructive notice of the

[2] Building Officials and Code Administrators International, Inc. The Adoption of a State Uniform Construction Code can be found under N.J.S.A. 52:27D-123.

condition that caused plaintiff's fall. Plaintiff argued the mode-of-operation doctrine, or, in the alternative, that defendant created the condition that caused her fall, which relieved her of the burden to prove defendant had actual or constructive notice.

The motion judge granted defendant's motion for summary judgment and dismissed plaintiff's complaint. The court also found that the mode-of-operation doctrine does not apply to the facts of this case. Additionally, the motion judge stated,

> [p]laintiff relies upon caselaw inapposite to the facts here, citing cases where the [c]ourt found for a plaintiff when a customer slipped on a grape at a grocery store where the store should have anticipated careless handling of grapes was reasonably likely . . . and another where a customer was injured when a golf bag fell off a display as she reached for another bag . . . .

The court reasoned that "the mode[-]of[-]operation doctrine [does not] apply to all the ongoings within the supermarket." Further, the court concluded that:

> [H]ere, the [c]ourt does not find that the facts support the argument that there is a substantial risk of injury inherent in customers' use of a self-service refrigerator and [p]laintiff does not present arguments proving such. Further, there is no allegation that the contents of the refrigerator were stored in such a way that they could reasonably cause injury, as in the above-discussed cases involving a golf bag display. O'Shea v. K Mart Corp., 304 N.J. Super. 489 (App. Div.

> 1997). Therefore, [p]laintiff has not shown . . . that the self-service refrigerator had an inherently substantial risk, nor has she shown a nexus between the self-help aspect of the refrigerator and her alleged slip and fall. As such, the mode-of-operation doctrine does not apply.

On the issue of actual or constructive notice, the motion judge concluded that:

> Additionally, [p]laintiff argues that the grate was on the ground long enough for [m]ovant to [have] noticed and removed it, however [p]laintiff does not state how long the grate was on the ground and provides no caselaw showing that the grate was on the ground for a sufficient time to obligate [m]ovant to rectify the allegedly hazardous condition. "An inference [of negligence] can be drawn only from proven facts and cannot be based upon the foundation of pure conjecture, speculation, surmise or guess." Long v. Landy, 35 N.J. 44, 54 (1961). Therefore, [p]laintiff's notice argument fails.
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> Plaintiff has not shown genuine issues of fact, proven that the mode[-]of[-]operation [doctrine] applies, or shown that [m]ovant had notice of the alleged hazardous condition. Therefore, [p]laintiff cannot defeat [d]efendant's motion for summary judg[]ment.

Ultimately, the trial court held plaintiff was required to prove actual and/or constructive notice and failed to do so.

On appeal, plaintiff argues the court erred when it granted summary judgment and dismissed her complaint. We review a grant of summary judgment de novo, using the same standard that governed the trial court's

decision. Samolyk v. Berthe, 251 N.J. 73, 78 (2022). We owe no special deference to the motion judge's legal analysis. RSI Bank v. Providence Mut. Fire Ins. Co., 234 N.J. 459, 472 (2018) (quoting Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co., 224 N.J. 189, 199 (2016)). Summary judgment will be granted when "the competent evidential materials submitted by the parties[,]" viewed in the light most favorable to the non-moving party, show that there are no "genuine issues of material fact and . . . the moving party is entitled to summary judgment as a matter of law." Grande v. Saint Clare's Health Sys., 230 N.J. 1, 23-24 (2017) (quoting Bhagat v. Bhagat, 217 N.J. 22, 38 (2014)); accord R. 4:46-2(c). "An issue of material fact is 'genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.'" Grande, 230 N.J. at 24 (quoting Bhagat, 217 N.J. at 38).

I.

We first address the issue whether the mode-of-operation doctrine applies in this case. This doctrine creates an inference of negligence which excuses a plaintiff from having to prove notice and shifts the burden to defendant to show it exercised due care. Prioleau v. Ky. Fried Chicken, Inc.,

223 N.J. 245, 263 (2015). The Prioleau Court clarified "the mode-of-operation [doctrine] is not a general rule of premises liability, but [rather] a special application of foreseeability principles in recognition of the extraordinary risks that arise when a defendant chooses a customer self-service business model." Id. at 262. Principles which apply when a business allows customers to handle products and equipment, unsupervised by employees, due to the increased risk "that a dangerous condition will go undetected and that patrons will be injured." Ibid. While "the mode-of-operation doctrine has never been expanded beyond the self-service setting," such a setting encompasses where customers "may come into direct contact with product displays, shelving, packaging and other aspects of the facility that may present a risk." Ibid. (citing Nisivoccia v. Glass Gardens, Inc., 175 N.J. 559, 563-66 (2003)).

Here, plaintiff argues the motion court misapplied the summary judgment standard when it granted defendant's motion. She argues that she should not have been required to show actual or constructive notice of the condition that caused her fall for two reasons, "defendant created the condition," or, "[a]lternatively, the mode[-]of[-]operation [doctrine] is applicable," and should have relieved her of that burden. Plaintiff asserts the

holding in Prioleau applies because there is "a nexus between the self-serving components of defendant's business and a risk of injury in the area where the accident occurred," and ultimately her injury. She states "[i]n the instant matter, the refrigerator was placed in the area and filled with goods precisely to facilitate self-service by customers." She maintains that the motion court interpreted Prioleau too narrowly. Defendant's principal argument is that plaintiff's case is distinguishable from the line of cases where injuries occurred as a direct result of mostly food items offered for sale because the "refrigerator unit is not for sale and is a devi[c]e only used to keep customer orders fresh until the orders are picked up."

In Jeter v. Sam's Club, our Supreme Court reaffirmed the context in which the doctrine applies, limiting it "to the self-service setting, where customers are independently handling merchandise without the assistance of employees." 250 N.J. 240, 255 (2022) (citing Prioleau, 223 N.J. at 262). In Jeter, the plaintiff, "while walking away from the checkout area after realizing she forgot an item, . . . slipped and fell [on grapes] 'halfway past' the fruit and vegetable aisle." Id. at 245. The Court found plaintiff to be in sufficient geographical proximity to the self-service sale of grapes in "closed clamshell containers" for the mode-of-operation doctrine to apply. Id. at 256. The

disputed issue in that case was whether there was "a reasonable factual nexus between the self-service activity and the dangerous condition causing plaintiff's injury." Ibid. Analysis of this issue required consideration of whether the packaging of the grapes makes it "reasonably foreseeable that grapes will drop [on] the floor." Ibid. Ultimately, the Court held that sealed containers "posed virtually no chance of spillage during ordinary, permissible customer handling[,]" and therefore, the lower courts' denial of the mode-of-operation doctrine was affirmed. Id. at 257.

Applying these legal principles and granting all reasonable inferences to plaintiff, we are unpersuaded by plaintiff's argument the mode-of-operation doctrine applies in this case. While there is no dispute that plaintiff, as a customer in defendant's supermarket, was a business invitee entitled to "due care under all the circumstances[,]" Prioleau, 223 N.J. at 257, no New Jersey cases have expanded the mode-of-operation doctrine to circumstances such as those presented here. Rather, in the line of cases cited by these parties, the Supreme Court has emphasized the self-service nature of the defendant's business and the foreseeability of some risk of injury inherent therein. Id. at 260.

Under this doctrine, "a business invitee who is injured is entitled to an inference of negligence and is relieved of the obligation to prove that the business owner had actual or constructive notice of the dangerous condition that caused the accident." Id. at 248 (citing Nisivoccia, 175 N.J. at 563-65). Critically, the Court noted that, "[t]he [doctrine] has only been applied to settings such as self-service or a similar component of the defendant's business, in which it is reasonably foreseeable that customers will interact directly with products or services, unassisted by the defendant or its employees," and suffer some injury from products offered for sale. Id. at 249. Here, it is undisputed that plaintiff's unfortunate injuries "were unrelated to any aspect of defendant['s] business in which the customer foreseeably serves himself or herself, or otherwise directly engages with products or services, unsupervised by an employee." Ibid.

Again, this doctrine is an exception, not the rule, and the Supreme Court included in its analysis foreseeability of the hazard in the self-service area. Since there is no dispute that the loosed metal vent cover from the self-service refrigerator caused plaintiff to slip and fall, plaintiff cannot demonstrate that her injury was foreseeable in the context of the mode-of-operation doctrine. Plaintiff was not injured by spillage from any food item offered for sale in the

self-service area, as in the cases where the doctrine has been applied. In fact, plaintiff's injury could be considered unrelated to the self-service of the food items offered for sale and as previously stated, the mere fact that the injury occurred in a supermarket is insufficient. Nisivoccia, 175 N.J. at 565 (holding mode-of-operation applies only in "[a] location within a store where a customer handles loose items during the process of selection and bagging from an open display," and in the checkout area because droppage and spillage are "foreseeable"). Where a plaintiff was not "'engaged in . . . any self-service activity, such as filling a beverage cup' or 'selecting items from a condiment tray[,]'" and the hazard was "unrelated to any self-service component of defendant's business[,]" the case should be deemed "an 'ordinary premises liability negligence claim.'" Jeter, 250 N.J. at 254-55 (quoting Prioleau, 223 N.J. at 251, 264-65).

Plaintiff's argument that all that is required is a nexus between the self-service aspect of defendant's operation and injury is unavailing. Here, plaintiff has failed to demonstrate the necessary nexus between a defendant's self-service operations and her fall. The vent cover was not a "loose item reasonably likely to fall to the ground," nor was it a foreseeable risk considered when defendant undertook the self-service deli business. The

dangerous condition created by the fallen vent was not foreseeable, or related to the self-service deli operations consistent with precedent in other mode-of-operation cases. For these reasons, the motion judge's finding the mode-of-operation doctrine does not apply here did not constitute reversible error.

II.

We now turn to address plaintiff's second argument that the court erred in granting summary judgment because she failed to demonstrate that defendant had actual or constructive notice of the hazardous condition that caused her fall. And, whether plaintiff should be relieved of the obligation to prove defendant had notice of the dangerous condition since it was defendant's own inaction that created the dangerous condition.

Plaintiff relies upon her expert to show that defendant's failure to maintain the refrigerator led to loosening and eventual falling off of the vent into the supermarket aisle. Considering the applicable standard of review, the undisputed proofs showing the cause of plaintiff's injury and the opinion of plaintiff's expert, a dismissal based on summary judgment cannot be sustained. The undisputed evidence when viewed in the light most favorable to plaintiff shows that there are genuine issues of material fact as to whether defendant

had actual or constructive notice of the dangerous condition, or whether defendant caused this condition thereby relieving plaintiff of this duty entirely.

The incident occurred "in front of the deli." Two employees were working in the deli area at the time, less than thirty feet from the refrigerator. Neither party has submitted any evidence of the duration in which the vent cover remained on the ground prior to plaintiff's fall. Additionally, defendant has no specific safety inspection procedures for employees but asserts that inspections are done "as needed[,]" and require no written record of such inspections after their completion.

Under these circumstances, defendant is not entitled to judgment as a matter of law. For these reasons, we reverse the entry of summary judgment in defendant's favor.

Affirmed in part and reversed in part. We do not retain jurisdiction.