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This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4060-14T2

LOUISE ANDERSON,

Plaintiff-Appellant,

v.

STOP AND SHOP SUPERMARKET COMPANY, L.L.C.,

Defendant-Respondent.

Argued September 29, 2016 – Decided November 3, 2016

Before Judges Lihotz and Whipple.

On appeal from Superior Court of New Jersey, Law Division, Union County, Docket No. L-0015-13.

Christopher F. Struben argued the cause for appellant (Michael A. Percario, attorney; Mr. Struben, on the brief).

Walter H. Iacovone argued the cause for respondent (Margolis Edelstein, attorneys; Colleen M. Ready, on the brief).

PER CURIAM

Plaintiff, Louise Anderson, appeals from a February 20, 2015 order granting summary judgment to defendant, Stop and Shop

Supermarket, and an April 10, 2015 order denying reconsideration. We affirm.

On August 15, 2012, plaintiff and her husband were shopping in the defendant's supermarket in Bayonne. Plaintiff was in the frozen food aisle when she slipped and fell after stepping on an unidentified substance on the floor. Plaintiff had just placed sealed bags of french fries from the freezer in her shopping cart, when she slipped on a "whitish," "transparent," blob-like substance. Plaintiff described the substance as very slippery, a bit roundish, and the size of a peanut butter jar cap but thicker. She stated when she stepped on the substance it was as if her foot was "sinking in." Plaintiff did not offer any further details on what the substance was, how long the substance was on the ground, or where the substance came from.

Plaintiff suffered a severe fracture of her right hip, which required surgery. Following plaintiff's fall, an incident report had been prepared by Customer Service Manager, Anthony Lombardo, stating "[c]ustomer either slipped or collapsed while in the frozen food aisle. Customer appeared weak, initially she was not aware but came around." The incident report stated the area was inspected after the fall but no reference is made to any substance on the floor.

Plaintiff filed a complaint against defendant seeking compensatory damages. During discovery Michael Coor, the Perishable Manager, testified he performs inspections of the store, which involve walking around the store on alert for hazardous conditions. Coor was the first manager notified about plaintiff's fall and testified he found the floor dry, with no slippery substance. Coor performed what he called a "kick test," where you rub your foot on the floor to see whether it is slippery. On the day of plaintiff's fall, defendant received no other reports by customers or employees reporting the floor in the frozen food aisle was slippery.

Coor stated when he is made aware of a hazardous condition, he required someone to stay by the condition until he retrieved a maintenance porter to clean the spill or cleaned the spill himself. Coor testified maintenance porters are constantly in motion around the store.

Security cameras are located around the store, but no camera faced the frozen food aisle and there is no video of plaintiff's fall. No photographs were taken of the frozen food aisle at the time of the accident.

After the completion of discovery, defendant moved for summary judgment, arguing plaintiff could not prove defendant had actual or constructive notice of the substance that caused her to

fall. On February 20, 2015, the motion judge granted the application. Plaintiff moved for reconsideration, which the motion judge denied on April 10, 2015. This appeal followed.

On appeal, plaintiff argues defendant's mode of operation negates the requirement that plaintiff must show defendant was on notice of the condition causing her injury, and the motion judge erred in granting summary judgement. We disagree.

When reviewing an order granting summary judgment, we "employ the same standard [of review] that governs the trial court." Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 330 (2010) (quoting Busciglio v. DellaFave, 366 N.J. Super. 135, 139 (App. Div. 2004)). Summary judgment is appropriate "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." R. 4:46-2(c). Absent any genuine factual disputes, we afford no deference to the trial court. Henry, supra, 204 N.J. at 330 (citations omitted). We engage in de novo review of the decision whether a moving party is entitled to judgment as a matter of law. Ibid.

"In general, '[b]usiness owners owe to invitees a duty of reasonable or due care to provide a safe environment for doing that which is in the scope of the invitation.'" Stelluti v.

Casapenn Enters., LLC, 408 N.J. Super. 435, 446 (App. Div. 2009) (quoting Nisivoccia v. Glass Gardens, Inc., 175 N.J. 559, 563 (2003)), aff'd, 203 N.J. 286 (2010). "The duty of due care 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, supra, 175 N.J. at 563 (citing O'Shea v. K Mart Corp., 304 N.J. Super. 489, 492-93 (App. Div.1997)). See also Arroyo v. Durling Realty, LLC, 433 N.J. Super. 238, 243 (App. Div. 2013). Such a duty is imposed because "business owners 'are in the best position to control the risk of harm.'" Hojnowski v. Vans Skate Park, 187 N.J. 323, 335 (2006) (quoting Kuzmicz v. Ivy Hill Park Apartments, Inc., 147 N.J. 510, 517 (1993) (citations omitted)).

To recover for injuries suffered, a plaintiff must establish the defendant had actual or constructive knowledge of the dangerous condition that caused the accident, in addition to establishing defendant's duty of care. Nisivoccia, supra, 175 N.J. at 563 (citing Brown v. Racquet Club of Bricktown, 95 N.J. 280, 291 (1984)). "An inference [of negligence] can be drawn only from proved facts and cannot be based upon a foundation of pure conjecture, speculation, surmise or guess." Prioleau v. Kentucky Fried Chicken, Inc., 434 N.J. Super. 558, 587, (App. Div.)

(footnote omitted), aff'd in part and modified in part, 223 N.J. 245 (2014) (quoting Long v. Landy, 35 N.J. 44, 54 (1961)).

When a patron is injured by a dangerous condition, the business operator is liable "if he actually knew of the dangerous condition or if the condition had existed for such a length of time that [the business operator] should have known of its presence." Bozza v. Vornado, Inc., 42 N.J. 355, 359 (1964). In order to bypass the notice requirement in ordinary premises liability actions, a plaintiff may demonstrate that the defendant created a hazardous condition on its premises. See Smith v. First Nat'l. Stores, Inc., 94 N.J. Super. 462, 466 (App. Div. 1967) ("Notice, either actual or constructive, is not required where a defendant . . . creates a dangerous condition.").

Alternatively, pursuant to the mode-of-operation doctrine,[1] a plaintiff can establish constructive notice of the hazard by showing a link between the hazard and the defendant's method of conducting business. Prioleau, supra, 223 N.J. at 260 (quoting Nisivoccia, supra, 175 N.J. at 563). The rule defines a supermarket's "mode of operation to include 'the customer's

[1] Plaintiff argues because of defendant's lack of specific standards for porters throughout the store, there was a link between the hazard and the defendant's method of conducting business. Lack of specific standards for porters is not a method of conducting business requiring the mode-of-operation doctrine to apply. Prioleau, supra, 223 N.J. at 260-61.

necessary handling of goods when checking out, an employee's handling of goods during checkout, and the characteristics of the goods themselves and the way in which they are packaged.'" Id. at 260 (quoting Nisivoccia, supra, 175 N.J. at 566). The rule does not apply, however, where there is no evidence that the "plaintiff's accident . . . bears the slightest relationship to any self-service component of defendant's business." Id. at 264.

In Nisivoccia, our Supreme Court applied the mode-of-operation doctrine when a grocery store patron slipped on a grape near the store's checkout area. Nisivoccia, supra, 175 N.J. at 564-65. The Court found a nexus between the hazardous grape on the floor and the store's mode of operation, because the store "should have anticipated that careless handling of grapes was reasonably likely during customer checkout, creating a hazardous condition." Id. at 561. The present case is distinguishable from Nisivoccia as items in the frozen food aisle are not likely to spill out of a sealed container and would not reasonably create a hazardous condition in the aisle; therefore there is no nexus.

Applying these principles, we conclude the motion judge correctly rejected plaintiff's attempt to invoke the mode-of-operation doctrine. The record here lacks the necessary facts to establish a nexus between the hazardous condition and the store's mode of operation. Plaintiff cannot clearly identify the substance

that caused her fall. She described the substance as a "slippery," "whitish" "blob" located on the floor of the frozen food aisles. Without a clear description of what this substance was and how it ended up in the aisle, it cannot be connected to defendant's mode of operation. Additionally, the court correctly found defendant did not have constructive notice as plaintiff did not provide any evidence defendant knew of the condition or the condition existed for a sufficient period of time affording defendant a reasonable opportunity to discover it.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION