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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5505-12T3

RUTH ORTIZ,

Plaintiff-Appellant,

v.

RAFAEL BERNAL, FRANKLIN UCETA, ELEGANTE CAFÉ, RAFAEL BERNAL AND FRANKLIN UCETA, D/B/A ELEGANTE CAFÉ,

Defendants-Respondents.

Argued May 19, 2014 – Decided June 2, 2014

Before Judges Harris and Guadagno.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Docket No. L-4987-11.

Justin P. Brake argued the cause for appellant (Law Office of Charles H. Nugent, Jr., attorneys; Charles H. Nugent and Mr. Brake, on the brief).

Reena Shah argued the cause for respondents (Camacho, Mauro, Mulholland, LLP, attorneys; Christopher C. Mauro and Ms. Shah, on the brief).

PER CURIAM

Plaintiff Ruth Ortiz appeals from the June 7, 2013 summary judgment dismissal of her three-count premises liability complaint. We affirm.

I.

Elegante Café, a Camden nightclub, is owned and operated by defendants Rafael Bernal and Franklin Uceta. On February 21, 2010, Ortiz (who had previously been to the nightclub twice) and a friend arrived at the venue at approximately 11:00 p.m. Ortiz intended to listen to music and dance during her time there.

At approximately 11:15 p.m., Ortiz attempted to step onto the dance floor. As she did so, her foot made contact with the metal trim located at the intersection between one section of the nightclub and the tiled dance floor.[1] This contact caused Ortiz to fall forward with her face, right arm, and wrist landing on the floor. The impact rendered Ortiz unconscious for several moments until she was helped to her feet and escorted out of the nightclub. Ortiz suffered several injuries because

[1] Ortiz maintains that the dance floor was altered after her first two visits. According to her deposition testimony, Ortiz stated that on those two occasions it was comprised of beige ceramic tiles surrounded by gold metal trim. However, at the time of Ortiz's deposition, in March 2013, the dance floor appeared to be constructed of laminated wood with the same gold trim in place. Because this motion was decided under Rule 4:46-1, we recite the facts presented by non-moving party Ortiz. Robinson v. Vivirito, 217 N.J. 199, 203 (2014) ("We derive the facts viewed in the light most favorable to plaintiff from the record submitted in support of and in opposition to defendants' motion for summary judgment."). Regardless of the disagreement surrounding the composition of the dance floor (ceramic tile versus laminated wood), there is no dispute that the only flooring component involved in Ortiz's fall was the metal trim.

of the fall. At the time of the incident, the nightclub featured an atmosphere that was dimly lit with flashing disco lights, a dry ice machine creating a smoky mist, and blaring music.

At Bernal's deposition, he contended that the nightclub was regularly inspected and properly maintained. He explained the extensive daily preparation efforts undertaken by him and the Elegante Café staff to ready the nightclub each evening. Ortiz offered no contrary evidence.[2]

Bernal acknowledged that other fall-down incidents had previously happened in the nightclub. Bernal revealed that a fall had occurred near, but not on, the dance floor prior to Ortiz's occurrence, but it did not involve the supposed tripping hazard created by a transition between floor surfaces. There, a woman "fell while she was dancing and it wasn't on the dance floor. The thing is that she fell on her knees while she was taking photographs."

Despite these mishaps, Bernal indicated that no one had ever complained about the metal trim, and he consistently maintained that no alterations were made to the dance floor or nearby floor area after Ortiz's incident.

[2] Bernal additionally insisted that no accident had actually occurred on the evening of Ortiz's alleged injury.

Ortiz filed the present action on October 3, 2011. After discovery was complete, Bernal and Uceta moved for summary judgment. In opposition, Ortiz submitted her answers to interrogatories, a photograph of the nightclub's interior, selected pleadings, and excerpts from the deposition testimony of Ortiz and Bernal. Ortiz neither proferred nor sought permission to supplement the record with an expert's opinion relating to the incident.

On June 7, 2013, following oral argument, the Law Division entered an order granting the motion. In explaining its decision, the motion court rejected Ortiz's reliance on Campbell v. Hastings, 348 N.J. Super. 264 (App. Div. 2002), concluding that Campbell was a "social host liability case," and the present matter involved commercial premises. Furthermore,

> [Ortiz] has to prove a dangerous condition, it can't just be that somebody slips or falls at a dance club because of the poor lighting, loud music, raised trim, misty air. [Ortiz] had an opportunity [to obtain an expert opinion]. [Ortiz] [is] right, it's not a construction negligence case, it's a premises liability case but there has to be some demonstration by someone other than the fact of a fall that there's something wrong with the premises.
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> [T]he nature of the intended risk is a risk that's assumed when someone goes to a dance club, hears loud music, sees strobe lights, goes on to a dance floor. The opportunity

> and ability to exercise care, there needs to be a transition. There's no testimony that the transition is improper, incorrectly installed, not in compliance with code. Those are all the obligations of [Ortiz] to prove.
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> She's at a dance club. She's wearing shoes that she doesn't have anymore, doesn't know whether they were stiletto heels or a wedge, thinks the heel was about an inch. [Ortiz] would like me to make every inference in h[er] favor to not grant it and that's the obligation under Brill, but there is no evidence but for the occurrence of a fall —— the allegation of the occurrence of a fall, and the premises are the premises that [Ortiz] chose to —— the circumstances that are alleged by [Ortiz] as defects, the lighting, the music, the smoke machine, smoke, are none of which are blamed for the fall. The transition is blamed for the fall. There's insufficient testimony with regard to that.
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> The summary judgment is granted.

This appeal followed.

II.

"In reviewing a grant of summary judgment, we apply the same standard as the motion judge." Fedor v. Nissan of N. Am., Inc., 432 N.J. Super. 303, 311 (App. Div. 2013) (citing EMC Mortg. v. Chaudhri, 400 N.J. Super. 126, 136 (App. Div. 2008)); see also Henry v. Dep't of Human Servs., 204 N.J. 320, 330 (2010). We first ascertain whether the moving party has

demonstrated that no genuine dispute regarding material facts existed in the matter. Atl. Mut. Ins. Co. v. Hillside Bottling Co., 387 N.J. Super. 224, 230 (App. Div.) (citing Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995)), certif. denied, 189 N.J. 104 (2006). Pursuant to Rule 4:46, we then "consider whether the competent evidential materials, 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, supra, 142 N.J. at 540. Finally, we then decide "whether the motion judge's application of the law was correct." Atl. Mut. Ins. Co., supra, 387 N.J. Super. at 231. When undertaking this analytical step, we afford no deference to the motion judge's conclusions on legal issues, which receive plenary review. Ibid. (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

The party opposing summary judgment "'must do more than simply show that there is some metaphysical doubt as to the material facts[,]'" Triffin v. Am. Int'l Group, Inc., 372 N.J. Super. 517, 523-24 (App. Div. 2004) (quoting Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3rd Cir. 1992), cert. denied, 507 U.S. 912, 113 S. Ct. 1262, 122 L. Ed. 2d 659 (1993)), as "[c]ompetent opposition requires 'competent

evidential material' beyond mere 'speculation' and 'fanciful arguments.'" Hoffman v. Asseenontv.Com, Inc., 404 N.J. Super. 415, 426 (App. Div. 2009) (quoting Merchs. Exp. Money Order Co. v. Sun Nat'l Bank, 374 N.J. Super. 556, 563 (App. Div.), certif. granted, 183 N.J. 592 (2005), appeal dismissed, (Jan. 3, 2006)).

To establish premises liability, Ortiz bears the burden of proving that the premises' owners breached the duty of care owed to her. Jerista v. Murray, 185 N.J. 175, 191 (2005). "Business owners owe to invitees a duty of reasonable or due care to provide a safe environment for doing that which is within the scope of the invitation." Nisivoccia v. Glass Gardens, Inc., 175 N.J. 559, 563 (2003). This duty arises out of the fact that business owners "are in the best position to control the risk of harm. Ownership or control of the premises, for example, enables a party to prevent the harm." Kuzmicz v. Ivy Hill Park Apartments, Inc., 147 N.J. 510, 517 (1997) (citation omitted).

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. For that reason, "[o]rdinarily an injured plaintiff . . . must prove, as an element of the cause of action, that the defendant[s] had actual or constructive

knowledge of the dangerous condition that caused the accident." Ibid.

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).

Ortiz was unable to point to any objective standard, such as a building or maintenance code, demonstrating that the metal trim between floor surfaces constituted a dangerous condition. Indeed, the record is barren of any evidence that shows a measurable height differential between the dance floor and adjacent surface. The photographic evidence is a poor proxy for actual measurement. Additionally, there is no objective evidence that the usual (and expected) conditions of the nightclub —— dim illumination, loud music, smoky atmosphere —— created a dangerous condition.

Here, a determination of whether the height differential created a hazard sufficient to constitute a dangerous condition is "beyond the ken of the average juror." State v. Kelly, 97 N.J. 178, 208 (1984). Expert testimony is needed to exclude other possible causes of the accident, particularly since Ortiz had

previously been to the nightclub without incident. The motion judge properly granted summary judgment because without expert proof, no reasonable jury could have found negligence on the part of defendants.

Ortiz relies on Campbell in arguing that the grant of summary judgment was improvident and that she does not need an expert opinion to support her claims. We disagree.

In Campbell, the seventy-five-year-old plaintiff —— visiting a friend at the Hastings home for the first time —— tumbled into a sunken foyer due to her unfamiliarity with the premises and its poor illumination. Campbell, supra, 348 N.J. Super. at 266. We determined that the touchstone of the duty analysis was the foreseeability of harm, id. at 271, and observed,

> Given the modest effort that would satisfy reasonable care to guard against dangers caused by darkness, however, we do not conclude that imposition of such a duty would be unjust or unfair. Such a modest obligation for homeowners would protect against accidents and discourage negligent conduct by encouraging the minimization of risks to visitors. Therefore, we conclude that a duty of reasonable care to safeguard against foreseeable harm is present in this case.
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> [Ibid.]

We do not find Campbell relevant to Ortiz's claims in the present appeal because the question in this case is not the

existence of a duty —— defendants indubitably owed Ortiz a duty of reasonable care —— but, rather, whether Ortiz demonstrated that there were any questions of material fact suggesting a breach of that duty of care. She did not.

Defendants hid nothing from Ortiz. She had been to the nightclub on two prior occasions, and the metal trim was in place at all times. In the absence of any objective evidence that the nightclub's internal environmental conditions were inappropriate or unsound, Ortiz can only point to the happening of the incident as evidence of another's negligence. This is not sufficient to create even an inference of negligence, and a jury was unnecessary to resolve the parties' dispute. Summary judgment was properly granted to defendants.[3]

Affirmed.

[3] Ortiz's mode-of-operation theory of liability, see, e.g., Prioleau v. Ky. Fried Chicken, Inc., 434 N.J. Super. 558 (App. Div. 2014) is meritless. R. 2:11-3(e)(1)(E). "[T]he unifying factor in [mode-of-operation cases] is the negligence results from the business's method of operation, which is designed to allow patrons to directly handle merchandise or products without intervention from business employees, and entails an expectation of customer carelessness." Id. at 574. The nature of Ortiz's fall did not involve any aspect of other patrons' conduct, such as spilling a drink or otherwise contributing to the condition of the floor.