SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3816-21

MICHAEL RACINE,

Plaintiff-Appellant,

v.

RITE AID PHARMACY[1]
and UNION MILL RUN, LLC,

Defendants-Respondents,

and

NATIONAL JANITORIAL
SOLUTIONS,

Defendant.

Argued May 16, 2023 – Decided June 14, 2023

Before Judges Messano and Gummer.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-5868-19.

[1] Defendant Rite Aid of New Jersey, Inc., d/b/a Rite Aid (i/p/a) Rite Aid Pharmacy, assumed the defense of its landlord, Union Mill Run, LLC.

John D. Gagnon, Jr. argued the cause for appellant (Rabb, Hamill, PA, attorneys; Edward K. Hamill, of counsel and on the brief).

Vicki Shea Connolly argued the cause for respondents (Bolan Jahnsen Dacey, attorneys; Vicki Shea Connolly, on the brief).

PER CURIAM

Plaintiff Michael Racine slipped and fell as he entered defendant Rite Aid's Irvington store and walked toward a hair-gel product he intended to purchase. Plaintiff suffered a fractured left tibia and filed a complaint against defendant alleging negligent maintenance of and failure to conduct reasonable inspections of the premises.[2] Defendant moved for summary judgment following discovery. The motion judge granted the motion, concluding plaintiff had failed to demonstrate defendant had actual or constructive notice of a dangerous condition on its premises.

Plaintiff now appeals, contending the motion judge "drew all inferences against plaintiff rather than the reverse," and he presented sufficient evidence

[2] Plaintiff amended his complaint to name National Janitorial Solutions as an additional defendant, alleging it had been "hired, employed or contracted" by Rite Aid "to maintain, repair and inspect the subject premises." Plaintiff subsequently voluntarily dismissed the complaint against National Janitorial Solutions.

demonstrating defendant had "constructive notice of the condition that caused [plaintiff] to slip." We disagree and affirm.

We review a grant of summary judgment de novo, Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021) (citing Barila v. Bd. of Educ. of Cliffside Park, 241 N.J. 595, 611 (2020)), "under the same standard that govern[ed] the court's determination," Goldhagen v. Pasmowitz, 247 N.J. 580, 593 (2021) (citing Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016)). We "must '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.'" Meade v. Twp. of Livingston, 249 N.J. 310, 327 (2021) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)).

"Summary judgment should be granted . . . '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. 449, 472 (2020) (emphasis added) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)). "The 'trial court's interpretation of the law and the legal consequences that flow from

established facts are not entitled to any special deference.'" Town of Kearny v. Brandt, 214 N.J. 76, 92 (2013) (quoting Manalapan Realty, LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

In his deposition, plaintiff testified that he had not noticed anything on the floor as he approached the hair gel, which was located on the first shelf as customers entered the store. After the fall, plaintiff noticed a "dark greasy spot" on the floor, which he surmised was "[p]robably dirt mixed with grease or . . . hair gel," but he remained unsure. Plaintiff used his phone to call for an ambulance because none of defendant's employees assisted him.

Plaintiff retained an expert engineer who inspected the store's flooring more than one year after the fall. He opined that the vinyl tile would "become slippery when exposed to liquids" and should have had a "slip resistant" surface to conform to the "2015 International Building Code, New Jersey Edition." The report contained another industry standard, however, that stated interior walkways that were not slip resistant "shall be maintained dry during periods of pedestrian use."

Plaintiff offered no proof that defendant's employees were aware of any substance on the floor in the area of his fall. Nothing in the record indicates that

defendant either did or did not have a routine inspection program in place at the store.[3]

Recently, in Jeter v. Sam's Club, the Court succinctly summarized the general legal principles that guide our review:

> Under New Jersey's general premises liability law, a proprietor owes "his invitees due care under all the circumstances." When an invitee is injured by a dangerous condition on the business owner's premises, the owner is liable for such injuries if the owner had actual or constructive knowledge of the dangerous condition that caused the accident. "A defendant has constructive notice when the condition existed 'for such a length of time as reasonably to have resulted in knowledge and correction had the defendant been reasonably diligent.'" "Constructive notice can be inferred" from eyewitness testimony or from "[t]he characteristics of the dangerous condition," which may indicate how long the condition lasted. However, "[t]he mere '[e]xistence of an alleged dangerous condition is not constructive notice of it.'"
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> [250 N.J. 240, 251–52 (2022) (alterations in original) (first quoting and then citing Prioleau v. Kentucky

[3] Plaintiff's brief does not comply with Rule 2:6-1(a), which requires that when the appeal is from "a disposition of a motion for summary judgment, the appendix shall . . . include a statement of all items submitted to the court on the summary judgment motion and all such items shall be included in the appendix." See Lombardi v. Masso, 207 N.J. 517, 542 (2011) (noting that on appeal, we "confine ourselves to the original summary judgment record"). Although plaintiff's appendix does not include such a statement, we presume the appellate record includes all items provided to the motion judge. Although the motion judge noted that discovery was complete, nothing in the appendix includes any discovery that was furnished by defendant.

> Fried Chicken, Inc., 223 N.J. 245, 257 (2015); then twice quoting Troupe v. Burlington Coat Factory Warehouse Corp., 443 N.J. Super. 596, 602 (App. Div. 2016); and then quoting Arroyo v. Durling Realty, LLC, 433 N.J. Super. 238, 243 (App. Div. 2013)).]

The Court has sometimes "relieve[d] a plaintiff of the burden of proving actual or constructive notice . . . 'in circumstances in which . . . a dangerous condition is likely to occur as the result of the nature of the business, the property's condition, or a demonstrable pattern of conduct or incidents.'" Id. at 252 (quoting Nisivoccia v. Glass Gardens, Inc., 175 N.J. 559, 563 (2003)). The "nature of the business" exception, also known as the "[m]ode of operation rule," "alters a plaintiff[-]invitee's burden of proof" and relieves a plaintiff of the need to prove actual or constructive notice of the dangerous condition on the proprietor's premises. Ibid.

Plaintiff does not contend that the mode of operation rule applies in this case or that defendant had actual notice of a dangerous condition on the store's floor. Rather, plaintiff contends that by according him all the favorable evidence and inferences in the record, a jury could find defendant had constructive notice of a dangerous condition. He reasons that "the characteristics of the spill on the floor" — "the substance appeared dirty" — would permit the factfinder to logically infer "the substance had been on the floor for a significant time."

Plaintiff supports the argument with several unreported cases and our decision in Parmenter v. Jarvis Drug Store, Inc., 48 N.J. Super. 507 (App. Div. 1957). The unpublished cases are of no import, see Rule 1:36-3 (unpublished cases are neither binding nor precedential), and the facts in Parmenter are entirely distinguishable, except that the fall in that case also occurred in a drug store. Id. at 509.

In Parmenter, as the plaintiff entered the defendant's store at noon, she slipped and fell on the linoleum-covered floor just inside the entrance. Ibid. It had been raining "very hard," "coming down heavy," "all . . . morning." Ibid. The plaintiff described the condition of the floor as "'all wet' and 'all dirt.'" Ibid. A witness "testified that the floor was 'very wet because the rain had been coming in. Every time the door opened the wind blew the rain in.'" Ibid. The motion judge dismissed the case at the close of the plaintiff's evidence "on the ground of lack of notice of the wet condition on the part of the store operator." Id. at 510.

In reversing, we first noted that a "jury could easily have inferred that the slippery condition was due to the wetness of the floor," and the witness' testimony "supported the idea that the wetness of the floor was attributable to the entry of rain blown or carried in when the door was opened by customers."

Id. at 511. Additionally, "[t]he dirtiness of the water tended to be corroborative of the length of time it lay on the floor. So, too, was the testimony as to the severity and duration of the storm . . . ." Ibid. We concluded "[i]t was for [a jury] to say whether the wet condition, inferably the cause of the slipperiness, had lasted for such a period of time that reasonable attention thereto would have both apprised defendant of the danger to its invitees and led to the remedying thereof." Ibid.

Importantly, in Parmenter, the cause of water on the floor just inside the store's entrance was directly traceable to an all-morning weather event that had caused wind-blown rain to enter the store every time the door opened and a customer entered or exited. In other words, the cause and duration of the dangerous condition were so obvious that we had no problem concluding the defendant was on constructive notice. Unlike the plaintiff in Parmenter, even after the fall, plaintiff could not identify what had caused him to slip. He described a spot on the floor as being "greasy" or "dirt mixed with hair gel." There was no evidence that any products on the shelves near the area were opened or in broken containers, nor was there any evidence that some other customer may have caused the condition.

Unlike the plaintiff in Parmenter, plaintiff did not demonstrate that the substance was on the floor for a significant period, or that it worsened whenever another customer entered defendant's store. In Parmenter we took note of the dirtiness of the water at the store's entrance as "corroborative of the length of time it lay on the floor," 48 N.J. Super. at 511, but this was in the context of "the severity and duration of the storm" and the wind-blown water's location just inside the front door. Ibid. That plaintiff said the substance contained "dirt" is woefully inadequate to permit a speculative inference that it had been on the floor for an adequate period of time to have placed defendant on constructive notice of a dangerous condition that needed to be addressed.

Lastly, during argument before the motion judge, plaintiff pressed the issue of the lack of any evidence that defendant had routine procedures in place to inspect the premises. We have no idea whether defendant did or did not have those procedures in place because, as noted, nothing in the record demonstrates that information was requested or produced in discovery. In any event, plaintiff bore the burden of proving that defendant's claimed lack of notice of the condition was attributable to its lack of diligence in inspection of the conditions on the premises. Plaintiff failed to do so.

Affirmed.