NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

STEPHONE BOOKHART Appellant v. CHEUNG ENTERPRISES Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2008 MDA 2012

Appeal from the Order Entered October 16, 2012
In the Court of Common Pleas of Cumberland County
Civil Division at No(s): 09-7816 Civil Term

BEFORE: BOWES, J., OTT, J., and FITZGERALD, J.*

MEMORANDUM BY OTT, J.: **FILED SEPTEMBER 25, 2013**

Stephone Bookhart appeals from the order entered on October 16, 2012, in the Court of Common Pleas of Cumberland County granting summary judgment in favor of defendant, Cheung Enterprises (Cheung).[1] Bookhart claims the trial court erred in granting summary judgment for numerous reasons. After a thorough review of the submissions by the parties, the certified record, and relevant law, we affirm.

The trial court accurately related the factual history of this matter in its order and opinion granting summary judgment in favor of Cheung:

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* Former Justice specially assigned to the Superior Court.

[1] Both parties filed motions for summary judgment. The trial court denied Bookhart's motion.

[Cheung] is a corporation registered to do business in the Commonwealth of Pennsylvania, with an office in Middletown, Pennsylvania. [Cheung] owns a McDonald's restaurant (the "Restaurant"). On August 28, 2009, [Bookhart] slipped and fell at the Restaurant.

[Bookhart] had an interview scheduled for 2:00 p.m. on that day with Jacobson Staffing in Camp Hill, Pennsylvania. At about 1:30 p.m. [Bookhart] and his friend, Kenneth Rice, traveled by bus to the Restaurant, located about a block from Jacobson Staffing. It began "misting" rain as [Bookhart] and Mr. Rice got off the bus at the Restaurant. [Bookhart] went into the Restaurant and purchased an order of french fries while Mr. Rice waited outside. It was still "misting" rain when [Bookhart] exited the Restaurant carrying the french fries and walked down a ramp. The ramp in question is comprised of a mix of cement and pebbles that are imbedded in the cement. The ramp is built on a downward grade in a westerly direction leading from a doorway of the Restaurant. There were no puddles or running water either on or nearby the ramp on the day in question. [Bookhart] was wearing leather soled shoes.

[Bookhart] slipped and fell on the portion of the ramp located about a foot and a half to two feet away from where the cement ramp turns to asphalt. [Bookhart's] photographs of record depict the asphalt as the end of the ramp and the beginning of the parking lot. [Bookhart] alleged in his amended complaint that he slipped on the wet surface of the ramp. At his deposition, however, [Bookhart] could not explain the exact cause of his fall, stating, "I was just walking normally with my fries in my hand. And I really don't know what was – at that time I don't know exactly if the sidewalk was level or whatever but I just slipped. My shoes just (indicating)." [Bookhart's] right foot slipped and he fell in a straight position with his arm back in an attempt to break his fall. Mr. Rice, who was waiting outside, witnessed the fall.

After his fall, [Bookhart] walked to his interview at Jacobson Staffing. At 3:30 p.m. [Bookhart] walked back to the Restaurant and [Bookhart] and Mr. Rice filed an incident report with the manager of the Restaurant regarding [Bookhart's] slip and fall on the ramp. At about 4:00 p.m. [Bookhart] took a bus to Harrisburg Hospital. [Bookhart] arrived at Harrisburg Hospital at about 4:30 p.m.

> Tim Tansmore, whom [Bookhart] intended to call as an expert at trial, was not previously qualified as an expert in litigation, but is a certified construction engineer. Mr. Tansmore is employed by Pints Bar and Grill. Mr. Tansmore is [Bookhart's] friend who does the maintenance and cooking at the building where [Bookhart] lives. In Mr. Tansmore's opinion, there was a drop of approximately a half-inch to one inch at the end of the ramp. Based on his assessment of the ramp's dimensions and construction, Mr. Tansmore concluded that "the ramp was not laid correctly" and "the ramp in question could cause one to fall on its surface when wet or otherwise." [Bookhart's] alleged injuries from the fall included: cervical myopasm; narrowing of the disc spaces in the cervical spine; myopasm of the thoracic spine; narrowing of the disc spaces in the thoracic spine; neck pain; back pain; bruising of the sternum; pain in the sternum area; left shoulder strain; and emotional distress. [Bookhart] has alleged the fall and his resultant injuries were caused solely by the negligence of [Cheung] by: (1) failing to keep the ramp free of rain water; (2) constructing the ramp of pebbles and cement when it knew or should have known that the surface of the ramp, when wet, created a dangerous condition which could cause business patrons to slip and fall on it; (3) failing to warn business patrons that the ramp, when wet, created a dangerous condition; and (4) failing to remove the rainwater from the ramp prior to Plaintiff's fall and resultant injuries.

Trial Court Opinion and Order, 10/16/12, at 2-5 (footnotes omitted).[2]

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[2] Bookhart's expert, Tim Tansmore, who was never deposed and for whom Bookhart did not provide a curriculum vitae, authored a handwritten report that states, in entirety:

> Finding on Conc. Ramp
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> Location: McDonalds @ PA
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> Subject: Conc. Ramp w/ Stone Surface
>
> Facts: 1) Ramp Leading to Entrance of Building on right Side had drop of 3'4" from the beginning of ramp to the Point of distance 3'4".

(Footnote Continued Next Page)

The trial court determined Bookhart had not provided sufficient evidence supporting the allegation that a dangerous condition existed on or as a part of the ramp. Further, the trial court concluded that even if such a dangerous condition existed, Bookhart provided no evidence that Cheung knew or should have known about the defect.

Bookhart now argues the trial court erred: (1) in granting summary judgment where genuine issues of material fact existed as to the existence of a dangerous condition; (2) in misapplying the rules of constructive notice; (3) in failing to consider whether the dangerous condition was a substantial factor in causing the fall; and (4) in failing to consider the doctrine of *res ipsa loquitur*.[3]

(Footnote Continued) ———————————

> 2) On right Side of ramp next to building in the Last section which the distance is 3'4" is higher than the left side of the 3'4" which is approx. 2'8" in width.
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> 3) Protaing [sic] to the 3'4" There is a drop of ½" - 1" approx. @ the end of the section of the 3'4" 6" in diameter.
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> 4) In my Professional Opinion the ramp was not laid correctly.
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> 4) [sic] In conclusion the ramp in question could cause one to fall on its surface when wet or otherwise.

See Tansmore Report, 2/22/10, attached to Plaintiff's Answer to Defendant's Motion to Compel Discovery, filed 4/30/2010.

[3] We have restated the claims for ease of understanding. We also note that in his brief, Bookhart raises a number of other issues that were not included in the Pa.R.A.P. 1925(b) statement of matters complained of on appeal. The *(Footnote Continued Next Page)*

> Our standard of review of a challenge to the grant of summary judgment is well established:
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> [We] may disturb the order of the trial court only where it is established that the court committed an error of law or abused its discretion. As with all questions of law, our review is plenary.
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> In evaluating the trial court's decision to enter summary judgment, we focus on the legal standard articulated in the summary judgment rule. *See* Pa.R.C.P., Rule 1035.2. The rule states that where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law, summary judgment may be entered. Where the nonmoving party bears the burden of proof on an issue, he may not merely rely on his pleadings or answers in order to survive summary judgment. Failure of a non-moving party to adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof establishes the entitlement of the moving party to judgment as a matter of law. Lastly, we will review the record in the light most favorable to the nonmoving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party.

E.R. Linde Const. Corp. v. Goodwin, 68 A.3d 346, 349 (Pa. Super. 2013) (citation omitted).

The first three issues can be addressed together. There is no dispute that Bookhart was a business invitee of Cheung. Section 343 of the Restatement (Second) of Torts sets forth the duty owed to such invitees:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(Footnote Continued) ———————————

four claims noted herein are the four claims raised in the 1925(b) statement and are the only issues we will address.

> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
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> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
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> (c) fails to exercise reasonable care to protect them against the danger.
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> ***Myers v. Penn Traffic Co.***, 414 Pa.Super. 181, 606 A.2d 926 (1992), *appeal denied*, 533 Pa. 625, 620 A.2d 491 (1993). The owner of the store, however, is not an insurer of the safety of its patrons. ***Id.*** Additionally, "the mere existence of a harmful condition in a public place of business, or the mere happening of an accident due to such a condition is neither, in and of itself, evidence of a breach of the proprietor's duty of care to his invitees, nor raises a presumption of negligence." ***Moultrey v. Great A. & P. Tea Co.***, 281 Pa.Super. 525, 422 A.2d 593, 596 (1980). In order to recover damages in a "slip and fall" case such as this, the invitee must present evidence which proves that the store owner deviated in some way from his duty of reasonable care under the existing circumstances. ***Id.*** This evidence must show that the proprietor knew, or in the exercise of reasonable care should have known, of the existence of the harmful condition. ***Id.*** Section 343 also requires the invitee to prove either that the store owner helped to create the harmful condition, or that it had actual or constructive notice of the condition. ***Id.***

Zito v. Merit Outlet Stores, 647 A.2d 573, 574-75 (Pa. Super. 1994).

Therefore, based upon Section 343 of the Restatement (Second), in order to prevail, a claimant must demonstrate both the existence of a hazardous condition and knowledge by the business that the hazardous condition exists. Here, we need not address whether Tansmore's statements - that the ramp was not laid properly and that the ramp could cause one to fall – constitute sufficient evidence to establish a hazardous condition,

because we agree with both the trial court and Cheung that even assuming arguendo the ramp was slippery when wet, Bookhart has provided no evidence that Cheung knew or should have known of the condition at the time he fell.

Bookhart supplied photographs of the ramp in question. There are no obvious defects in the ramp. The "drop" of ½ inch to one inch mentioned in the report cannot be visually detected in the evidentiary photographs. Neither Bookhart nor Tansmore claimed the alleged defect was grossly observable nor that Cheung had any notice of the alleged defect of construction.

Further, Bookhart has provided no documentary evidence, such as accident reports, that demonstrate there had been previous incidents on the ramp. Similarly, Bookhart has not provided any anecdotal evidence demonstrating that Cheung should have been aware that the ramp was unreasonably dangerous. Neither was there any showing that any relevant governmental agency had cited Cheung for a defect in the ramp.

Given there was no obvious defect in the ramp, and no indication that anyone other than Bookhart had ever encountered a problem with the ramp regardless of weather conditions, the certified record is devoid of evidence that Cheung had either actual or constructive notice of the alleged hazardous condition. Because Bookhart must prove notice to prevail and he did not, none of Bookhart's first three claims can overcome this deficiency.

Bookhart has also claimed that the doctrine of *res ipsa loquitur* applied to the accident. The hallmark of *res ipsa loquitur* is that the event complained of ordinarily does not occur in the absence of negligence on the part of the alleged tortfeasor. ***See*** Restatement (Second) of Torts, Section 328(D)(1)(a). Bookhart's only argument on this issue is that Cheung owed him a duty of care and yet he fell down. ***See*** Bookhart's Brief, at 10-12. As noted in Restatement (Second) of Torts, Section 343 and ***Zito***, ***supra***, the mere happening of an accident is not proof of negligence. Bookhart has provided no substantive argument that slipping and falling while walking is an event that does not ordinarily occur in the absence of negligence. Therefore, *res ipsa loquitur* does not apply to this matter.

Order affirmed.

Judgment Entered.

Mary A. Hoyle

Deputy Prothonotary

Date: 9/25/2013