24th JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON

STATE OF LOUISIANA

NO. 797-419 **DIVISION "P"**

ASHLEY DUNNING

VERSUS

TRAVELERS INSURANCE COMPANY, BURGER KING CORPORATION AND JANE DOE

FILED:_____ **DEPUTY CLERK**

REASONS FOR JUDGMENT

This matter came before the Court on May 17, 2022 for hearing on the ***Motion for Summary Judgment*** filed by Defendant, GPS Hospitality Partners IV, LLC ("GPS Hospitality"), and against Plaintiff, Ashley Dunning. Defendant represents that there are no genuine issues of material fact at issue and that it is entitled to summary judgment in its favor as a matter of law on the grounds that Plaintiff cannot meet her burden of proof against Defendant because Plaintiff cannot produce a "positive showing" that GPS Hospitality had actual or constructive notice of the liquid on the floor. Following the hearing, the Court granted summary judgment in favor of Defendant.

This case involves a claim for damages against Defendant as a result of a slip and fall that allegedly occurred on or about August 7, 2018 on the premises of a Burger King operated by GPS Hospitality. Plaintiff alleges that she was an invited guest at the Burger King located in Marrero, Louisiana, and was taking her child to the restroom. After entering Burger King, Plaintiff slipped and fell due to an allegedly unreasonably dangerous condition resulting from various acts of negligence on the part of Defendant. Plaintiff contends that she slipped and fell on a slippery wet tile floor. Plaintiff testified that she did not see a puddle and there appeared to be a sheen on the floor. A wet floor sign and bucket were approximately 10-15 feet away[1] from the area where the slip and fall occurred. The bucket was placed in the store due to a roof leak in the area. Plaintiff's

[1] Plaintiff testified that the bucket and cone were 10 feet away from where she fell. Plaintiff's husband testified that the bucket and cone were 15 feet from where Plaintiff fell.

husband, Jonathon Dunning, entered the store after the incident and observed water where Plaintiff fell. He stated that there was "not exactly a puddle" but "everything was wet." Mr. Dunning testified that the floor appeared "shiny" like there was a film on the floor and believed it could be "condensation" possibly from the HVAC system that caused the floor to become wet.

Plaintiff testified in her deposition that she stopped at Burger King in the morning, around 9:00 a.m. After she entered the Burger King, Plaintiff walked to the bathroom with her daughter. Neither Plaintiff nor her daughter slipped as they walked toward the bathroom. Plaintiff did not see any substance on the floor as she and her daughter walked toward the bathroom. After Plaintiff exited the bathroom with her daughter, they traversed the same path to the front of the restaurant. As they walked across a black mat in front of the drink machine, Plaintiff slipped and fell. Plaintiff testified that, if she had to guess, she thinks she slipped in water. Perry Andras witnessed the subject incident, and testified via affidavit that he has no information to establish: (1) the source of the water on the floor, (2) that any Burger King employee caused the water to be on the floor, (3) how long the water was on the floor prior to the incident, and (4) that any Burger King employee knew the water was on the floor prior to the incident. Mr. Andras did not see any substance on the floor. Brenden Kelley, the Burger King assistant manager on duty at the time of Plaintiff's accident, admitted that she was aware of a roof leak prior to the accident, that a bucket was placed underneath the leak, and that Plaintiff's accident occurred approximately 10 feet away from the roof leak area. Ms. Kelley stated during her deposition that there was no water on the floor and no water in the bucket, which was located 10-15 feet away from the area where Plaintiff fell.

Defendant contends that Plaintiff produces no evidence to create a "positive showing" that Defendant or Defendant's employee had notice of the alleged condition. Plaintiff has no information to establish that Defendant knew the liquid was on the floor before the fall; that Defendant caused the liquid to be on the floor; or how long the liquid was on the floor prior to Plaintiff's fall. Plaintiff merely contends that she sustained injuries when she slipped and fell.

Plaintiff opposes summary judgment and contends that genuine issues of material fact exist as to whether the water on the floor created an unreasonably dangerous condition that defendant knew about. Plaintiff's fall was caused by the slippery and wet floor. Plaintiff retained the services of Neil Hall, a premises liability expert. Mr. Hall determined that the ceramic tile floor where the incident occurred is not slip-resistant when wet, which constitutes a hazardous condition. Further, due to the lengthy distance from the floor sign and bucket, a pedestrian would not likely consider the sign as indicative of a slip hazard at the location where the incident occurred. Plaintiff alleges that Defendant had notice of the water in the area given the fact that it placed a bucket under the roof leak. At a minimum, Mr. Hall's expert report creates genuine issues of material fact as to whether the wet floor presented an unreasonably hazardous condition. Further, Plaintiff does not have to prove that Defendant had notice of the defective condition because Defendant created it by failing to use slip-resistant flooring. Plaintiff further argues that summary judgment should be denied as more time is needed to conduct additional pertinent discovery. [2]

Defendant responds that the presence of an alleged roof leak in a different area of the restaurant does not create a genuine issue of material fact as to actual notice. Plaintiff has presented no evidence that the roof was leaking at the time of her fall. The area where the roof was allegedly leaking was approximately 10-15 feet away from the subject incident. Plaintiff's theory that she fell because of a leaking roof is based solely on circumstantial evidence and Plaintiff would have to foreclose every other reasonable hypothesis to prevail on this theory, which she cannot do. In response to Plaintiff's alternative theory of liability under Articles 2317 or 2317.1, these Articles do not apply to this case. Plaintiff alleges that the floor was not slip-resistant when wet. However, even if the Court were to entertain the inapplicable Articles, Plaintiff still must show that Defendant knew of the defect and offers no evidence.

[2] The Court granted the parties additional time to conduct depositions after the initial hearing on the Motion for Summary Judgment.

SUMMARY JUDGMENT

The Louisiana Code of Civil Procedure, article 966 provides that the summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of actions. It is favored and shall be construed to accomplish these ends. Summary judgment shall be rendered, however, only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits show that there is no genuine issue of material fact and mover is entitled to judgment as a matter of law. Moreover, the summary judgment procedure is favored, and shall be construed, as it was intended, to secure the just, speedy, and inexpensive determination of most actions, *Dauzat v. Thompson Construction Company*, 02-989 (La.App. 5 Cir. 1/28/03), 839 So.2d 319. A defendant may file a motion for summary judgment at any time. La. C.C.P. art. 966(A)(1). When a motion for summary judgment is filed, "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any, admitted for the purpose of the motion for summary judgment, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law." La. C.C.P. art. 966(B)(2).

If the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. La. C.C.P. art. 966(C)(2). Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. *Id.* The failure of the non-moving party to produce evidence of a material factual dispute mandates the granting of the motion. *Babin v. Winn-Dixie Louisiana, Inc.*, 00-0078 (La. 6/30/00), 764 So.2d 37.

Under Louisiana law, a store owner has a duty to take reasonable care for the safety of its patrons, but the store is not the insurer of their safety. *Rodriguez v. New Orleans Public Service, Inc.*, 400 So.2d 884 (La. 1981). Accordingly, the merchant has no duty to keep its entrances, aisles, and passageways in perfect condition. *Smith v. Winn Dixie Stores of Louisiana, Inc.*, 389 So.2d

900 (La.App. 4th Cir. 1980). Rather, the duty of the merchant to protect its customers from foreign substances is one of "reasonable care under the circumstances." *Robinson v. F.W. Woolsworth Co.*, 420 So.2d 737 (La.App. 4th Cir. 1982). Louisiana Revised Statute 9:2800.6 legislatively codified the above cited jurisdiction, providing in pertinent part:

> (A) A merchant owes a duty to persons who use his premises to exercise reasonable care to keep his aisles, passageways, and floors in a reasonably safe condition. This duty includes a reasonable effort to keep the premises free of any hazardous conditions which reasonably might give rise to damage.
>
> (B) In a negligence claim brought against a merchant by a person lawfully on the merchant's premises for damages as a result of an injury, death, or loss sustained because of a fall due to a condition existing in or on a merchant's premises, the claimant shall have the burden of proving, in addition to all other elements of his cause of action, all of the following:
>
> > (1) The condition presented an unreasonable risk of harm to the claimant and that risk of harm was reasonably foreseeable.
> >
> > (2) The merchant either created or had actual or constructive notice of the condition which caused the damage, prior to the occurrence.
> >
> > (3) The merchant failed to exercise reasonable care. In determining reasonable care, the absence of a written or verbal uniform cleanup or safety procedure is insufficient, alone, to prove failure to exercise reasonable care.
>
> (C) Definitions:
>
> > (1) "Constructive notice" means the claimant has proven that the condition existed for such a period of time that it would have been discovered if the merchant had exercised reasonable care. The presence of an employee of the merchant in the vicinity in which the condition exists does not, alone, constitute constructive notice, unless it is shown that the employee knew, or in the exercise of reasonable care should have known, of the condition.
> >
> > (2) "Merchant" means one whose business is to sell goods, foods, wares, or merchandise at a fixed place of business. For purposes of this Section, a merchant includes an innkeeper with respect to those areas or aspects of the premises which are similar to those of a merchant, including but not limited to shops, restaurants, and lobby areas of or within the hotel, motel, or inn.

Accordingly, under La. R.S. 9:2800.6, Plaintiff must not only prove that he sustained damages as a result of a hazardous condition existing on the merchant's premises, but also that "the merchant either created or had actual or constructive notice of the condition which caused the damage, prior to the occurrence; and, that the merchant failed to exercise reasonable care." La. R.S. 9:2800.6. Because fault of the merchant is not based on strict liability, Plaintiff cannot recover

simply because there was a substance on the floor in which she slipped. The plaintiff must also prove the defendant breached the duty of reasonable inspection and care of the premises. *Id.*

Plaintiff bears the burden to prove each element of his or her cause of action under La. R.S. 9:2800.6. The Plaintiff must come forward with positive evidence showing that the damage-causing condition existed for some period of time prior to the plaintiff's fall, and that such time was sufficient to place the merchant defendant on notice of its existence. *White v. Wal-Mart Stores, Inc.*, 97-C-0393 (La. 9/9/97), 699 So.2d 1081. At no point does the burden of proof shift to the defendant. The failure to prove any one of these elements negates a plaintiff's cause of action. *Davenport v. Albertson's, Inc.*, 774 So.2d 340, 343 (La.App. 3 Cir. 2000). A claimant who simply shows that the condition existed without an additional showing that the condition existed for some time before the fall has not carried the burden of proving constructive notice. *Id.* A plaintiff's speculation that the condition may have existed for some period of time prior to his fall is not a "positive showing" that the condition did exist for some time period prior to his fall. *Id.*

In the instant matter, Plaintiff has offered no evidence to show how long the alleged water was on the floor.[3] There may have been a known leak in another area of the Burger King. However, there is no evidence that indicates that a leak occurred at the location of Plaintiff's fall.

The Court finds that based upon the information supplied by counsel and La. C.C.P. art. 966(C) and 967(B), there are no material facts in dispute and Defendant-Mover is entitled to judgment in its favor as a matter of law.

For all of the above stated reasons, the Court **GRANTS** the ***Motion for Summary Judgment*** filed by Defendant, GPS Hospitality Partners IV, LLC, and against Plaintiff, Ashley Dunning. Plaintiff's claims against Defendant be and are hereby **DISMISSED WITH PREJUDICE** at Plaintiff's cost.

[SIGNATURE BLOCK ON NEXT PAGE]

---

[3] Plaintiff has attempted to make an issue with a Burger King employee subsequently falling in the Burger King on the same day. Forty minutes after Plaintiff's fall, a Burger King employee fell in a different area of Plaintiff's fall. The Court finds that a subsequent fall in a different area of the store is a post-accident event and wholly irrelevant to the question of Defendant's prior awareness of the allegedly hazardous condition.

SIGNED on this 23rd day of May, 2022 at Gretna, Louisiana.

LEE V. FAULKNER, JR.
DISTRICT JUDGE