NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2014 CA 1577

PAMELA BURNETT

VERSUS

LUCKY NAILS, LLC & THEIR INSURER STATE FARM INSURANCE COMPANY

Judgment Rendered: JUN 05 2015

Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Docket Number C623654

Honorable Michael Caldwell, Judge Presiding

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BEFORE: WHIPPLE, C.J., McCLENDON AND HIGGINBOTHAM, JJ.

McClendon, J. Concurs

WHIPPLE, C.J.

In this slip and fall case, plaintiff appeals a summary judgment dismissing her suit. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

On August 21, 2012, plaintiff, Pamela Burnett, entered Lucky Nails salon in Baton Rouge, Louisiana, to get a polish change. After choosing a nail color, plaintiff was proceeding toward the pedicure chairs in the rear of the salon when she slipped and fell, striking her head on the foot rest of a pedicure chair.

Thereafter, plaintiff timely filed the instant suit against Lucky Nails, LLC, and its insurer State Farm Fire & Casualty Company,[1] alleging that her fall and resulting injuries were caused by "the negligent state of defendant's property, namely the floor in the Lucky Nail[s] shop." After answering the petition for damages, defendants filed a motion for summary judgment, asserting that they were entitled to judgment in their favor dismissing plaintiff's action with prejudice because plaintiff could not meet her burden to prove: (1) the existence of a foreign substance or hazardous condition on the floor, (2) that Lucky Nails either created or had actual or constructive notice of a hazardous condition, and (3) that Lucky Nails failed to exercise reasonable care.

Following a hearing on the motion, the trial court found that the evidence did not demonstrate that there was "anything obvious" on the floor, noting that plaintiff herself had testified that there was no water on the floor. The trial court further concluded that plaintiff's testimony that the floor "felt ... slippery" without identifying any substance or how it got there was

[1] As set forth by State Farm in its answer, it was incorrectly named in the petition as "State Farm Insurance Company."

insufficient to carry her burden of proof herein. Accordingly, by judgment dated September 9, 2014, the trial court granted defendants' motion for summary judgment and dismissed plaintiff's suit in its entirety with prejudice.

From this judgment, plaintiff appeals.

SUMMARY JUDGMENT

A motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine issue of material fact. All Crane Rental of Georgia, Inc. v. Vincent, 2010-0116 (La. App. 1st Cir. 9/10/10), 47 So. 3d 1024, 1027, writ denied, 2010-2227 (La. 11/19/10), 49 So. 3d 387. Summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits, if any, admitted for purposes of the motion for summary judgment, show that there is no genuine issue of material fact, and that mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(B)(2). Summary judgment is favored and "is designed to secure the just, speedy, and inexpensive determination of every action." LSA-C.C.P. art. 966(A)(2).

The mover bears the burden of proving that he is entitled to summary judgment. However, if the moving party will not bear the burden of proof on the issue at trial, he need only demonstrate an absence of factual support for one or more elements essential to the adverse party's claim, action or defense. Then, the non-moving party must produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial. LSA-C.C.P. art. 966(C)(2). If the opponent of the motion fails to do so, there is no genuine issue of material fact and summary judgment will be granted. McCorkle v. Gravois, 2013-2009 (La. App. 1st

Cir. 6/6/14), 152 So. 3d 944, 947, writ denied, 2014-2179 (La. 12/8/14), 153 So. 3d 446.

Moreover, as consistently noted in LSA-C.C.P. art. 967(B), when the motion for summary judgment is supported as provided above, the opposing party cannot rest on the mere allegations or denials of his pleadings, but must present evidence showing that there is a genuine issue for trial. McCorkle, 152 So. 3d at 947. As this court has previously recognized:

> In ruling on a motion for summary judgment, the trial court's role is not to evaluate the weight of the evidence or to determine the truth of the matter, but instead to determine whether there is a genuine issue of triable fact. A trial court cannot make credibility decisions on a motion for summary judgment. [Citations omitted.]

All Crane Rental of Georgia, Inc., 47 So. 3d at 1027.

Appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. Boudreaux v. Vankerkhove, 2007-2555 (La. App. 1st Cir. 8/11/08), 993 So. 2d 725, 729-730. An appellate court thus asks the same questions as does the trial court in determining whether summary judgment is appropriate: whether there is any genuine issue of material fact, and whether the mover-appellant is entitled to judgment as a matter of law. All Crain Rental of Georgia, Inc., 47 So. 3d at 1027.

DISCUSSION

We first address plaintiff's contention that the trial court "committed reversible error ... by failing to review the most critical evidence surrounding this case," i.e., a video recording of her slip and fall. In its oral reasons for judgment, the trial judge did indicate that he had not "been able to" see the video. However, as the judge further noted, he did review the still photographs taken from the video recording, which were made a part of

defendants' memorandum in support of their motion. Given the absence of a transcript of the hearing on the motion, we are unable to ascertain why the trial court was unable to view the video filed by defendants in support of their motion. However, we note that the copies of the still photographs viewed by the trial court depict the entire area of the floor of the nail salon traversed by plaintiff prior to her fall, which appears to be free of any substance or liquid, as well as her actual slip and fall.

Moreover, as set forth above, this court reviews summary judgments *de novo*, Boudreaux, 993 So. 2d at 729-730, and we have been able to view, and have, in fact, viewed, the video recording of the slip and fall in rendering our opinion herein. Accordingly, for these reasons, we find no merit to the argument that the trial court's inability to view the video warrants reversal on the grant of summary judgment, and we turn now to our *de novo* review.

The general rule is that the owner or custodian of property has a duty to keep the property in a reasonably safe condition. The owner or custodian must discover any unreasonably dangerous conditions on the premises and either correct the condition or warn potential victims of its existence. Henry v. NOHSC Houma #1, L.L.C., 2011-0738 (La. App. 1st Cir. 6/28/12), 97 So. 3d 470, 473, writ denied, 2012-1761 (La. 11/2/12), 99 So. 3d 677. Under

theories of negligence or strict liability,[2] the plaintiff has the burden of proving, among other things, that the property had a condition that created an unreasonable risk of harm to persons on the premises. LSA-C.C. art. 2315, 2317, and 2317.1; Montague v. E. Federal Credit Union, 2012-0912, (La. App. 1st Cir. 2/15/13), 2013 WL 595537, *2 (unpublished); Henry, 97 So. 3d at 474. Thus, in a traditional slip and fall claim, a threshold requirement that the plaintiff must establish is the existence of a hazardous substance or condition on the floor. Samuels v. United Fire and Casualty Insurance Company, 2014-0505 (La. App. 4th Cir. 10/15/14), 2014 WL 5310497, *7 (unpublished).

Concerning the burden of proof in claims against "merchants," LSA-R.S. 9:2800.6 provides in pertinent part that "[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." Under the merchant liability statute, the plaintiff must prove, among other things, that the fall was due to a condition existing in or on the merchant's premises and the condition presented an unreasonable risk of harm to the plaintiff. LSA-R.S. 9:2800.6(B)(1); Henry, 97 So. 3d at 474.

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[2]We note that the Second Circuit Court of Appeal has held that an unreasonably slippery floor that resulted from frequent waxing and buffing is a defect ***on*** the premises, instead of a defect ***in*** the premises and, thus, that strict liability under LSA-C.C. art. 2317 is not applicable. As noted by the appellate court, in such a circumstance, the floor alone, which was part of the premises, was not defective, as it was suitable for its intended use. Choyce v. Sisters of Incarnate Word, 25,958 (La. App. 2nd Cir. 8/19/94), 642 So. 2d 287, 291, writ denied, 94-2510 (La. 12/9/94), 647 So.2d 1119.

Additionally, we note that this court has held that the 1996 amendment enacting LSA-C.C. art. 2317.1 abolished the concept of strict liability governed by prior interpretations of LSA-C.C. art. 2317 and that the more appropriate term now for liability under LSA-C.C. arts. 2317 and 2317.1 might be "custodial liability." Nevertheless, this court concluded that such liability is predicated upon a finding of negligence. Jackson v. Brumfield, 2009-2142 (La. App. 1st Cir. 6/11/10), 40 So. 3d 1242, 1243.

In support of their motion for summary judgment, defendants presented a video of the accident, as well as plaintiff's deposition testimony, to demonstrate the lack of any factual support that a hazardous substance was present on the floor or that a condition existed on the floor that presented an unreasonable risk of harm. The video of the accident demonstrates that there was no liquid substance on the floor prior to plaintiff's fall. Additionally, while plaintiff, who was wearing 3 and 7/8-inch heels at the time of her slip and fall, testified that on this particular day, the floor "felt slippery," she acknowledged that she did not notice anything unusual about the floor. She also did not notice any water or liquid on the floor that day. Indeed, she admitted that there was no water on the floor when she slipped.

In light of this evidence, we conclude that defendants pointed out that there was an absence of support for one of the essential elements of plaintiff's claim, i.e., the existence of a condition on the floor that created an unreasonable risk of harm to persons on the premises. Thus, plaintiff's response, by affidavits or otherwise, had to set forth specific facts showing that there was a genuine issue for trial. LSA-C.C.P. art. 967(B); Bufkin v. Felipe's Louisiana, LLC, 2014-0288 (La. 10/15/14), ___ So. 3d ___, ___, 2014 WL 5394087, *6. In opposition to the motion, plaintiff filed her own affidavit, wherein she attested that: "she slipped on a slippery substance" at Lucky Nails, which caused her to fall; the floor "appeared to be" improperly maintained; and the floor "appeared to have some substance making it slippery as ice."[3] This affidavit contains only conclusory allegations of fact rather than specific facts based on personal knowledge. Affidavits with

[3]We note that plaintiff also filed an affidavit of an individual allegedly at the salon that day. However, that affidavit is unsigned and will not be considered by this court.

conclusory allegations of fact which are devoid of specific facts are not sufficient to defeat summary judgment. Christakis v. Clipper Construction, L.L.C., 2012-1638 (La. App. 1st Cir. 4/26/13), 117 So. 3d 168, 170-171, writ denied, 2013-1913 (La. 11/8/13), 125 So. 3d 454.

Plaintiff also cited to portions of her deposition that had been filed by defendants, wherein she testified about the slipperiness of the floor. In her deposition, plaintiff testified that she felt the floor as she got up after the fall and that it was "slippery" and "felt differently," "like wax." However, she acknowledged that she did not know what made the floor slippery. She speculated that the floor may have been slippery from whatever substance the employees used to clean the floor or wipe their work areas after pedicures. Other than when she placed her hand on the floor to get herself up, plaintiff did not rub the floor with her hands or feet to inspect it. Other than her own speculation, plaintiff did not offer any factual evidence to establish that excessive wax or a cleaning solution was present on the floor that day.

Plaintiff also agreed, when questioned by her attorney, that it was possible that pedicure solution "could get on the floor" as customers took their feet in and out of the pedicure tubs or that some disinfectant spray used to clean the tubs could have gotten on the floor. However, plaintiff acknowledged that there was no water on the floor.

Moreover, this testimony is mere speculation. Speculative allegations as to the presence of a substance on a floor are insufficient to defeat summary judgment. See Trench v. Winn-Dixie Montgomery LLC, 14-152 (La. App. 5th Cir. 9/24/14), 150 So. 3d 472, 476-477; also see generally Kinchen v. J.C. Penney Company, Inc., 426 So. 2d 681, 683-684 (La. App. 1st Cir. 1982), writ denied, 431 So. 2d 774 (La. 1983) (The mere fact that a

floor has a "high shine" is not sufficient to establish liability. Rather the plaintiff must prove that floor was in fact unreasonably slippery, such as from an excessive or uneven application of wax or an improper application of wax.).

Finally, we note that in her appellate brief, plaintiff makes various statements that: the floors in the building at issue had an "inherent slippery nature"; ceramic tile floors "may be slippery unless non-slip measures are taken"; "[t]hese slippery floors were made more slippery by applying polymer over wax dressing"; and "the sea salt aroma therapy mixture and cuticle lotion commonly used for pedicures if left on the floor creates an unreasonable risk of harm." However, there is no evidence in the record to support any of these allegations. Argument or allegations in briefs, no matter how artful, are not sufficient to raise a genuine issue of material fact. Rapp v. City of New Orleans, 95-1638 (La. App. 4th Cir. 9/18/96), 681 So. 2d 433, 437, writ denied, 96-2925 (La. 1/24/97), 686 So. 2d 868.

Accordingly, considering the foregoing and upon our *de novo* review of the record, we conclude that defendants pointed out that there was an absence of support for one of the essential elements of plaintiff's claim. The evidence presented by plaintiff in response to the defendants' motion failed to disclose any evidence to establish the existence of a condition on the floor that created an unreasonable risk of harm to persons on the premises or that a genuine issue of material fact existed as to this element. Thus, we find that plaintiff failed to establish that she would be able to satisfy her evidentiary burden of proof at trial and conclude that defendants established their entitlement as a matter of law, to summary judgment in their favor, dismissing plaintiff's suit with prejudice. See generally Allen v. Lockwood, 2014-1724 (La. 2/13/15), 156 So. 3d 650, 653 (where defendants produced

evidence that complained-of condition was obvious and apparent and plaintiff then failed to produce *any* evidence to rebut defendants' evidence, defendants were entitled to summary judgment in their favor as a matter of law).

CONCLUSION

For the above and foregoing reasons, the September 9, 2014 judgment of the trial court, granting defendants' motion for summary judgment and dismissing plaintiff's case with prejudice, is affirmed. Costs of this appeal are assessed against plaintiff, Pamela Burnett.

AFFIRMED.