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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5109-04T15109-04T1

GERMANIA GONZALEZ,

Plaintiff-Respondent,

v.

EUSEBIO MARTINEZ, VICTORIA MARTINEZ, AND MARIA MARTINEZ,

Defendants-Appellants,

and

PEDRO ALBUJA, CARMEN COSTAS, FAMILY LAUNDRY, THEIR AGENTS, SERVANTS AND/OR EMPLOYEES, MOISES HERNANDEZ, ELEUTERIO GONZALEZ AND LA VICTORIA GROCERY, THEIR AGENTS, SERVANTS AND/OR EMPLOYEES, JOHN DOE AND JANE DOE (FICTITIOUS NAMES WHO OWNED AND/OR MAINTAINED PREMISES), XYZ CORP. (FICTITIOUS CORPORATION WHO OWNED AND/OR MAINTAINED PREMISES IN QUESTION),

Defendants.

Submitted March 6, 2006 - Decided May 23, 2006

Before Judges Parrillo and Gilroy.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-3891-02.

Methfessel & Werbel, attorneys for appellants (Edward L. Thornton, on the brief).

Lefkowitz, Murphy, Peluso & Cicala, attorneys for respondent (W. Scott Murphy, on the brief).

PER CURIAM

This is a personal injury negligence action arising out of a slip and fall accident that occurred on a public sidewalk on April 10, 2001. Defendants, Eusebio Martinez, Victoria Martinez, and Maria Martinez (the Martinez defendants), appeal from an amended order of judgment entered on March 15, 2005, in the amount of $200,000, together with pre-judgment interest and costs, after a three-day jury trial and from an order entered on December 3, 2004, denying their motion for a new trial. We affirm.

The Martinez defendants are the owners of premises located at 3513 Park Avenue, Union City. Located on the first floor of the building is a grocery store, operated by defendant Euterio Gonzalez, and a laundromat, managed by defendant Moises Hernandez, each commercial unit having its own entrance onto the public sidewalk fronting Park Avenue. Located on the floors above the two businesses are five residential apartments, ingress and egress to which is through a single door located between the two commercial units. None of the rental units are occupied by the Martinez defendants.

During the evening of April 9, 2001, one of the residential tenants, pursuant to Eusebio Martinez's instructions, placed household garbage on the public sidewalk in front of the residential entrance near the street for pickup by the City's garbage collectors the next morning between the hours of 5:00 a.m. and 6:00 a.m. Placed between several plastic bags of household garbage were two transparent plastic light fixture covers, measuring approximately five feet in length by two feet in width. Although the City's garbage collectors removed the balance of the household garbage, they left the two pieces of plastic lying on the sidewalk. Because it rained sometime earlier that day, or during the evening before, the plastic panels "were very slippery."

On April 10, 2004, at approximately 8:00 a.m. to 8:15 a.m., plaintiff, Germania Gonzalez, parked her motor vehicle in front of the grocery store with the passenger side of the vehicle next to the curb. Plaintiff exited, walked behind the motor vehicle, crossed the public sidewalk, and entered the grocery store where she remained for approximately forty-five minutes drinking coffee and purchasing items that she needed for home that day. Finished shopping, plaintiff left the store intending to return to her motor vehicle. As she crossed the sidewalk with the purchased goods in her left hand and her automobile keys in her right hand, she slipped on the two plastic light covers that were lying on the sidewalk in front of the residential entranceway, one on top of the other. Plaintiff never noticed the light covers prior to her fall.

Plaintiff was transported by ambulance to St. Mary's Hospital where she was diagnosed as having suffered a broken right arm. At the hospital, plaintiff underwent a closed reduction of the fracture, and temporary immobilization of the arm. After her release from the hospital, plaintiff came under the care of Dr. Piz Lopez, an orthopedic surgeon who, determining that the closed reduction was unsuccessful, conducted an open reduction of the fracture inserting a plate and six screws on April 17, 2001. Because Dr. Lopez retired from practice prior to trial, plaintiff presented medical testimony from Dr. Paul Foddai, an examining orthopedic surgeon. After reviewing her medical records from the hospital and Dr. Lopez, Dr. Foddai examined plaintiff for trial testimony on December 9, 2003. He testified that she has a permanent ten centimeter scar located on the anterior lateral side of her right arm. He determined that she has a loss of motion in the elevation, adduction, and internal rotation of the right arm, together with "decreased sensation predominately over the dorsal lateral aspect of the thumb." Dr. Foddai opined that her residuals were permanent and causally related to the slip and fall accident of April 10, 2001.

Defendants countered with testimony of Dr. Ralph Riccardi, Jr., an orthopedic surgeon who examined plaintiff for purpose of trial on December 2, 2002. Dr. Riccardi testified that plaintiff has a residual scar from the open reduction, measuring thirteen centimeters

in length. X-rays taken at Dr. Riccardi's office disclosed that the fracture "has healed without any residual at all," but there remains "a plate which has six screws through it and the plate is secured to the humeral bone by the screws." He also found "some decreased motion" in the shoulder, that any pain that she complains of is "consistent, that [is] to be expected with the fracture of this [type]," and that the decrease in motion "will probably stay basically what it was when I examined her."

The testimony of the parties concerning maintenance of the sidewalk in front of the residential entranceway differed. Eusebio Martinez, one of three owners of the property, testified that each individual tenant places his/her own garbage on the sidewalk for collection by the City garbage collectors for the residential tenants and by private collectors for the commercial tenants. He instructed all the tenants concerning the placement of garbage, advising the residential tenants that it was to be placed on the sidewalk after 6:00 p.m. on Monday and Thursday evenings for pickup by the City garbage collectors the following day. The operators of the commercial stores are to maintain the sidewalks free of debris; and upon his arrival at the property, each day at approximately 8:00 a.m., if he observes any trash left upon the sidewalk by the garbage collectors, he removes it from the sidewalk. He testified he arrived at approximately 8:00 a.m. on the date of the fall, after the accident had occurred. After being advised of plaintiff's testimony concerning the time of the fall, he admitted that he must have been wrong concerning the time that he arrived at the property.

A portion of the deposition of Victoria Martinez, one of the defendant-owners and the wife of Eusebio Martinez, was read during trial. When asked "who was in charge of maintaining and cleaning that area [of the public sidewalk] in front of the entranceway for the [residential] tenants?" Mrs. Martinez responded that it was: "My husband and the tenants. The tenants also clean."

Euterio Gonzalez testified that generally he only maintains the sidewalk immediately in front of his grocery store, and does not maintain the sidewalk in front of the private entranceway to the apartments or the laundromat. However, if he observed something

out of place, he would pick it up, even if it was in front of the door to the residential apartments. On arriving at his store at 6:30 a.m. on the date of the accident, he made a visual inspection of the sidewalk in front of his store, and did not observe any debris. After plaintiff, his cousin's wife, finished shopping in his store, he heard a scream, and went outside where he observed plaintiff lying on the sidewalk in front of the doorway to the residential apartments. He also observed the two clear pieces of plastic. "[B]ecause the objects were transparent and it had rained . . . the objects had the same color as the sidewalk, as the cement." He has only seen Eusebio Martinez at the building a few times, and has never seen him clean the sidewalk in front of the door to the apartments.

Pedro Albuja, one of the residential tenants who placed the plastic light covers on the sidewalk the day prior to the accident, testified that he has only observed Eusebio Martinez at the premises when he was there collecting rent. Concerning maintenance of the sidewalk, Albuja stated "that was for the owner of the house to clean, no one in the building," and that he never observed the owner clean the sidewalk area "not even when it snowed." On the morning of the accident, when he left the apartment, he did not realize that the plastic covers had been left upon the sidewalk by the City garbage collectors.

Defendant Moises Hernandez, the manager of the laundromat, testified that she arrived at the premises at 8:00 a.m., and did not observe any garbage, including the sheets of plastic, as she entered the laundromat. After the accident, Hernandez observed plaintiff lying on that portion of the public sidewalk in front of the door to the residential apartments. Concerning prior observations of defendant Eusebio Martinez, Hernandez testified he visits the property each day, not in the morning, but in the afternoon between the hours of 1:00 p.m. and 2:30 p.m. While managing the laundromat, Hernandez observed that there were prior occasions when the garbage collectors had left items of debris upon the sidewalk after removing the tenants' garbage. Concerning Mr. Martinez's maintenance of the property, Hernandez stated that she has never seen him inspect or clean the sidewalk.

At the conclusion of the trial, the judge instructed the jury concerning the duty owed to

an invitee by defendant-owners (Martinez); the operator of the grocery store (Euterio Gonzalez); the operator of the laundromat, including its employee (Moises Hernandez); and the residential tenants involved in placement of the two plastic light covers upon the sidewalk (Pedro Albuja and Carmen Costas, his wife). The jury returned a verdict finding only the defendant-owners Martinez liable in negligence to plaintiff, and awarded plaintiff $200,000 in damages.

On appeal, the Martinez defendants argue:

> POINT I.
>
> PLAINTIFF WAS ON THE PUBLIC SIDEWALK WHEN THE INCIDENT OCCURRED.
>
> POINT II.
>
> THE DAMAGE AWARD WAS [DISPROPORTIONATE] TO THE INJURIES SUSTAINED.
>
> POINT III.
>
> THE COURT SHOULD HAVE DISMISSED PLAINTIFF'S CASE AGAINST DEFENDANT LANDLORD AS A MATTER OF LAW.

Defendants argue that the trial judge erroneously determined that plaintiff held the status of a business invitee at the time of the accident because plaintiff had left the grocery store and was using the sidewalk as a member of the general public to gain access to her automobile. We disagree. "A negligence cause of action requires proof that a defendant owed a duty of care, the defendant breached that duty, and injury was proximately caused by the breach." Siddons v. Cook, 382 N.J. Super. 1, 13 (App. Div. 2005). "The duty of an owner or possessor of land to a third person coming onto his property derives from the common law." Parks v. Rogers, 176 N.J. 491, 497 (2003) (footnote omitted). "The scope of the landowner's duty is defined by that person's status as a business visitor, social guest, or trespasser." Ibid. "An invitee, in the legal sense, is 'one who is on the premises to confer some benefits upon the invitor other than purely social.'" Filipowicz v. Diletto, 350 N.J. Super. 552, 558 (App. Div.) (quoting Daggett v. Di Trani, 194 N.J. Super. 185, 189-90 (App. Div. 1984)), certif. denied, 174 N.J. 362 (2002). The owner or occupier of premises owes a duty to an invitee "to provide a

'reasonably safe place to do that which is within the scope of the invitation.'" Ibid. (quoting Butler v. Acme Markets, Inc., 89 N.J. 270, 275 (1982)). "The duty includes the obligation to 'use reasonable care to make the premises safe, including the duty to conduct a reasonable inspection to discover defective conditions.'" Ibid. (quoting Handleman v. Cox, 39 N.J. 95, 111 (1963)).

Defendants, by leasing their premises to commercial tenants, impliedly extended an open invitation to the general public to enter the commercial premises for the purpose of shopping therein and bestowing a direct economic benefit upon the store operators and indirectly upon the owners. "Among the substantial benefits to commercial landowners is the ease of access to and from their establishments by the pedestrian public who have a right 'to safe and unimpeded passage along the sidewalk . . . .'" Bedell v. Saint Joseph's Carpenter Soc'y, 367 N.J. Super. 515, 520 (App. Div. 2004) (quoting Stewart v. 104 Wallace St., Inc., 87 N.J. 146, 152 (1981)). The duty to render the premises reasonably safe for the purpose embraced in the invitation (shopping) includes a duty to provide a reasonable means of ingress and egress to and from the premises. Generally, a landowner's duty of care is non-delegable. Jimenez v. Maisch, 329 N.J. Super. 398, 402 (App. Div. 2000).

Plaintiff did not lose her status of an "invitee" by merely tendering payment to the proprietor of the store upon purchase of the seller's goods. She continued to be cloaked with the status of an invitee for such reasonable distance on defendant's sidewalk as to provide a safe means of egress from the grocery store. See Ivins v. Town Tavern, 335 N.J. Super. 188, 194 (App. Div. 2000) (holding that "a proprietor of a business owes to the patron a duty of ensuring a reasonably safe premise, including [ingress] and egress thereto, to engage in that which is commercially offered"). Defendants owed a duty to provide a safe egress from the grocery store. Here, the sidewalk provided such means of egress. The trial judge properly instructed the jury as to plaintiff's status and the duty owed by an owner of property to an invitee of a commercial tenant.

Even assuming the trial judge mistakenly determined that plaintiff held the status of a

business invitee at the time of the accident and incorrectly instructed the jury concerning the duty of care owed by a landowner to a business invitee, we find no reversible error under the general principles of negligence charged. The Martinez defendants, as commercial landowners, were "responsible for maintaining in reasonably good condition the sidewalks abutting their property and are liable to pedestrians injured as a result of their negligent failure to do so." Stewart, supra, 87 N.J. at 157. Because the premises contained two commercial properties on the first floor, and five non-owner occupied apartments on the upper floors, Stewart controls. Id. at 160 n.7; Hambright v. Yglesias, 200 N.J. Super. 392, 394-95 (App. Div. 1985). "[I]t was the nature of the ownership that mattered, not the use to which the property is put." Hambright, supra, 200 N.J. Super. at 395.

The dangerous condition may be caused by objects or material dropped upon the sidewalk. Mirza v. Filmore Corp., 92 N.J. 390, 394 (1983). "A property owner is under a duty to clean up, within a reasonable time, material that he dropped, negligently or otherwise, upon the walk that might impede safe passage and cause a pedestrian to fall and injure [him or herself]." Ibid. "A similar obligation would exist if the foreign substance had been deposited on the sidewalk by some third person." Ibid. "The abutting commercial owner's responsibility arises only if, after actual or constructive notice, he has not acted in a reasonably prudent manner under the circumstances to remove or reduce the hazard." Id. at 395. Accordingly, defendants' duty to use reasonable care in maintaining the sidewalk is the same whether considered under the principles of premises liability by an owner to a business invitee, or under general negligence by a property owner to a pedestrian upon a public sidewalk abutting a commercial building.

Defendant argues next that the trial judge should have "ordered a new trial on the issues of damages or remittur, as clearly under Rule 4:49-1[,] there was a miscarriage of justice under the law." As a threshold matter, we note that the standard that controls our disposition is well-settled. We do not reverse a trial court's ruling on a motion for a new trial "unless it clearly appears that there was a miscarriage of justice under the law." R.

2:10-1; Baxter v. Fairmont Food Co., 74 N.J. 588, 599 (1977). We defer to the trial court's determination of a witness's credibility and demeanor. Dolson v. Anastasia, 55 N.J. 2, 7 (1969); see also Carey v. Lovett, 132 N.J. 44, 66 (1993) (quoting Baxter, supra, 74 N.J. at 600) (noting that "an appellate court should . . . defer[] to the trial court's 'feel of the case'"). As do trial courts, we also defer to the "quantum of damages" that a jury assesses "unless it is so disproportionate to the injur[y] and resulting disabilit[y] shown as to shock [the] conscience and to convince [the judge] that to sustain the award would be manifestly unjust." Taweel v. Starn's Shoprite Supermarket, 58 N.J. 227, 236 (1971); see also Ryan v. KDI Sylvan Pools, Inc., 121 N.J. 276, 297 (1990); Baxter, supra, 74 N.J. at 596; Sweeney v. Pruyne, 67 N.J. 314, 315 (1975); Tonelli v. Khanna, 238 N.J. Super. 121, 130 (App. Div.), certif. denied, 121 N.J. 657 (1990); Tronolone v. Palmer, 224 N.J. Super. 92, 97 (App. Div. 1988).

The jury awarded plaintiff $200,000 in damages after suffering a broken right arm, requiring an open reduction with the insertion of a metal plate and six screws, leaving plaintiff with a loss of motion in the elevation, adduction, and internal rotation of the right arm, as well as a residual scar measuring ten to thirteen centimeters in length. There was no miscarriage of justice in this case.

Lastly, defendants argue that the trial judge should have granted their motion for judgment at the conclusion of the evidentiary stage of the trial because defendants had no actual knowledge of debris being left behind by the City garbage collectors, and that there was insufficient time between when the garbage collectors picked up the tenants' garbage and the happening of the accident for defendants to have discovered the pieces of plastic, and taking action by removing the debris.

Motions for judgment, whether made under Rule 4:37-2(b), at the close of the plaintiff's case, under Rule 4:40-1, at the close of evidence, or under Rule 4:40-2(b), after the verdict, are "governed by the same evidential standard: '[I]f, accepting as true all the evidence which supports the position of the party defending against the motion and according him [or her] the benefit of all inferences which can reasonably and legitimately

be deduced therefrom, reasonable minds could differ, the motion must be denied .Â .Â .Â .'" Verdicchio v. Ricca, 179 N.J. 1, 30 (2004) (citations omitted). This is the same standard which applies to trial courts, Frugis v. Bracigliano, 177 N.J. 250, 269 (2003), and which governs a motion for summary judgment. Schneider v. Simonini, 163 N.J. 336, 360 (2000); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995).

This court will review the findings de novo, using the same standard applied in the trial court. See Turner v. Wong, 363 N.J. Super. 186, 198-99 (App. Div. 2003) (appellate courts review grants of summary judgment de novo under standard that was applied at trial).

We are satisfied that the trial judge correctly denied defendants' motion for judgment, determining that the issues of constructive notice and defendants' abilities to make reasonable inspections of their property were questions of fact for the jury.

Affirmed.

Although the order is dated December 3, 2004, it was not filed until January 7, 2005, the date of oral argument on the motion.

Although the order of judgment refers to defendant Gonzalez by the first name "Eleuterio," the defendant, upon being sworn at trial, spelled his name as "Euterio."

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May 23, 2006