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Mellott v. Shively Motors

MABEL MELLOTT, Plaintiff,
v. Shively Motors, Defendant
In the Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Civil Action — Law, No. 2532 of 2007

Judgment; On Motion or Summary Proceeding; motion or Other Application; Evidence in General; Presumptions and Burdens of Proof
Negligence; Liability of Possessors of land to Persons on the land; Invitee defined
Negligence; Liability of Possessors of Land to Persons on the land; Special Liability of possessors of land to invitees; Known or obvious dangers; Factors
Negligence; Liability of Possessors of Land to Persons on the land; Special liability of possessors of land to invitees; Known or obvious dangers; Question for jury

1. Because an order favorable to the moving party will prematurely end and action, summary judgment is only appropriate in the clearest of cases. Credibility of evidence is not a proper consideration at the summary judgment stage because the trial court may not summarily enter judgment when the evidence depends on oral testimony.

2. A business invitee is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.

3. A possessor of land is liable to business invitees only if the possessor 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. This duty of care is in proportion to the apparent risk. A danger is deemed to be obvious when both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising normal perception, intelligence, and judgment.

4. The law requires that a person exercise reasonable care and diligence in crossing the street, walking a sidewalk, or entering a commercial establishment.

5. Some of the factors to determine liability include the purposes of the invitation, the obviousness of the danger, the likelihood that the invitee will realize the danger and will take steps to protect himself, the nature of the land and the purposes for which it is used.

6. A determination of if a possessor of land owes a duty to the invitee in involve an objective as well as subjective standard for judging the plaintiff’s appreciation of the risk, and p[lace the burden of proof on the plaintiff since the duty of the defendant is an element of the plaintiff’s prima facie case.

7. The question of whether a danger was known or obvious is usually a question for the jury, the question may be decided by the court whether reasonable minds could not differ as to the conclusion.

8. Reasonable minds could differ on the conclusion that the placement of the flower pot in question posed an unreasonable risk of harm to the business invitee. The flower pot is twenty (20) inches high with a diameter of twenty-one (21) inches at the crow. As indicated by expert opinion, objects under twenty-seven (27) inches tall in walkways are often unobserved by a person’s peripheral vision.

Appearances:

Michael E. Kosik, Esquire, *Attorney for Plaintiff*

William Dengler, Esquire, *Attorney for Defendant*

MEMORANDUM OPINION

Krom, J., September 21, 2010

Presently before the Court is Defendant, Shively Motors, Inc.'s Motion for Summary Judgment, as to all claims asserted in Plaintiff's Complaint. For the reasons that follow, the Court denies the Motion.

Facts

On July 22, 2005, the Plaintiff, Mabel Mellott, went to Defendant, Shively Motors's auto dealership with her niece, Deborah Mellott[1] to help Deborah purchase a vehicle. As they were walking into the showroom, Deborah pointed to a vehicle "a good fifty yards" off to their left. (Notes of Testimony, October 17, 2008[2], at 37). The Plaintiff was not watching where she was walking because "I was listening to my niece with my dumb head to the left." (N.T. 45). As a result, the Plaintiff tripped over a flower pot with her right leg suffering injuries.

Procedure

The Plaintiff instituted this action by way of Writ on July 23, 2007. A Complaint was filed on September 5, 2007 against Shively Motors and Daimler Chrysler LLC alleging negligence of the part of the Defendants. The Defendant filed an Answer with New Matter on October 15, 2007. The Court, upon stipulation from the parties, ordered the action against Daimler dismissed on October 12, 2009. The Plaintiff filed this Motion for Summary Judgment on March 24, 2010 and both sides filed briefs. The court heard oral arguments on September 3, 2010.

Discussion

The Defendant's Motion for Summary Judgment seeks judgment in favor of the Defendant against Plaintiff as to all claims asserted in Plaintiff's Complaint as the flower pot which the Plaintiff tripped over was a known and obvious condition on Defendant's property. The Plaintiff, conversely, requests this Court deny the Defendant's Motion, as a genuine issue of material fact exists with respect to whether the flower pot was a known and obvious hazard. In deciding a Motion for Summary Judgment this Court must "determine the question of whether there is a genuine issue as to any material fact. On this critical question, the party who brought the motion has the burden of proving that no genuine issue of fact exists. All doubts as to the existence of a genuine issue of a material fact are to be resolved against the granting of summary judgment." Penn Ctr. House, Inc. v. Hoffman, 553 A.2d 900, 903 (Pa. 1989). Further, "a record that supports summary judgment will…contain insufficient evidence of facts to make out a prima facie cause of action or defense and, therefore, there is not issue to be submitted to the jury." Lineberger v. Wyeth, 894 A.2d 141, 146 (Pa. Super. 2006). A trial court "must examine the entire record, including the pleadings, depositions, answers to interrogatories, any admissions to the record, and affidavits that were filed by the parties before ruling on a summary judgment motion." White v. Owens-corning Fiberglass, Corp., 668 A.2d 136, 142 (Pa. Super. 1005). Additionally, "[b]ecause an order favorable to the moving party will prematurely end an action, summary judgment is only appropriate in the clearest of cases." Scopel v. Donegal Mut. Ins. Co., 698 A.2d 602, 205 (Pa. Super. 1997); See also Samarin v. GAF Corp., 571 A.2d 398, 402 (Pa. Super. 1989) ([o]nce a motion for summary judgment is made and is properly supported…the non-moving party may not simply rest upon the mere allegations or denials in his or her pleadings."). Finally, "credibility of evidence is not a proper consideration at the summary judgment stage because the trial court may not summarily enter judgment when the evidence depends on oral testimony." Gutteridge v. A.P. Green Services, Inc., 804 A.2d 643, 652 (Pa. Super. 2002).

In the present case the Plaintiff is a business invitee because she "is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land." Restatement (Second) of Torts § 332 (1965). The Plaintiff and Deborah went onto the Defendant's parking lot for the purpose of purchasing a vehicle which is directly connected with the business dealings of Shively Motors, the possessor of the land.

The duty of care owed to the Plaintiff is established by the Restatement (Second) of Torts § 343 which provides,

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

(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
(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
(c) fails to exercise reasonable care to protect them against the danger.

The duty of care" is in proportion to the apparent risk." Beary v. Pennsylvania Elec. Co., 469 A.2d 176, 180 (Pa. Super. 1983). A "danger is deemed to be obvious when both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising normal perception, intelligence, and judgment." Carrender v. Fitterer, 469 A.2d 120, 124 (Pa. 1983) (internal quotation marks omitted); See also Skalos v. Higgins, 449 A.2d 601, 604 (Pa. Super. 1982) ("A person may not recover for injuries which are received as a result of a failure on his part to observe and avoid an obvious condition which ordinary care for his own safety would have disclosed"); Villano v. Security Sav. Ass'n, 407 A.2d 440, 441 (Pa. Super. 1979) ("The law requires that a person exercise reasonable care and diligence in crossing the street, walking a sidewalk, or as in the instant case, entering a commercial establishment."). Some of the factors to determine liability include "the purposes of the invitation, the obviousness of the danger, the likelihood that the invitee will realize the danger and will take steps to protect himself, the nature of the land and the purposes for which it is used." Atkins v. Urban Redevelopment Authority of Pittsburgh, 414 A.2d 100, 104 (Pa. 1980).

These cases together with the Restatement, establish that a possessor of land has a duty only of the object or cause of the injury posed an unreasonable risk of danger to the party. Berman v. Radnor Rolls, Inc., 542 A.2d 525, 532 (Pa. Super. 1988). The "no duty" cases[3] "involve an objective as well as subjective standard for judging the plaintiff's appreciation of the risk, and place the burden of proof on the plaintiff since the duty of the defendant is an element of plaintiff's prima facie case." Id. The "question of whether a danger was known or obvious is usually a question for the jury, the question may be decided by the court where reasonable minds could not differ as to the conclusion." Kaplan v. Exxon Corp., 126 F.3d 221, 225 (3d Cir. 1997).

In the present case, reasonable minds could differ on the conclusion that the placement of the flower pot in question posed an unreasonable risk of harm to the Plaintiff. The flower pot is twenty (20) inches high with a diameter of twenty-one (21) inches at the crown. The flower pot is a white/grey color and Deborah described the flower pot as "huge." (Notes of Testimony, October 17, 2008, Deborah Mellott[4] , at 17). The Plaintiff could not remember whether the flower pot contained flowers at the time of the incident. (N.T. 51). At the time the Plaintiff was not carrying anything. The Plaintiff's expert, Richard T. Hughes, issued a report stating, "[t]he hazard did not have sufficient color or contrast or warning to draw Ms. Mabel Mellott's primary field of view toward her peripheral." This conclusion was derived from building codes that Pennsylvania has adopted and research that has shown objects under twenty-seven (27) inches tall in walkways are often unobserved by a person's peripheral vision. For an object to enter a person's peripheral vision, "it takes an exciter color (red, orange, yellow, white stripe), a color contrast, or a visual cue such as a handrail."

The location of the flower pot is a source of uncertainty in this case. The Plaintiff testified that the flower pot was located about fie (5) feet from the building on the right side of the ramp while Deborah testified, "[a]s I recall, there was space between the pot and the wall" and "[y]ou could open the door" without hitting the flower pot. (N.T. 38-43); (N.T. Deborah Mellott, 20-21). At the very minimum, since the flower pot was twenty (20) inches high and Mr. Hughes's report avers that objects under twenty-seven (27) inches high are often unobserved by a person's peripheral vision, reasonable minds could differ as to the flower pot posing an unreasonable risk of harm to the Plaintiff. Further, like the Court in Berman held, because the "no duty" cases involve an objective as well as subjective standard for judging the Plaintiff's appreciation of the risk, the jury must ascertain the Plaintiff's subjective ability to see out of her right eye together with Mr. Hughes's expert testimony to objectively determine whether the Defendant had a duty to warn the Plaintiff of the flower pot.

There is considerable disagreement as to appearance of the accident scene because the accident scene has been modified between the time of the accident and the time of taking photographs[5] . The Plaintiff testified that a six (6) foot long and "two and half, three, maybe three and a half feet wide" handicap ramp that was a different color than the rest of the parking lot led up to the door of the showroom. (N.T. 39, 41). However, Bryan Burkholder, the Vice President at Shively Motors testified that the ramp never existed. (Notes of Testimony, April 28, 2009, Bryan Burkholder[6] , at 22). Plaintiff also avers there was a hand railing two to four feet from the wall "on the left side [of the ramp] next the building that juts out." (N.T. 38, 40). The photographs introduced into evidence do not show either a ramp or a hand railing. Burkholder testified that a soda machine was located to the left of the showroom door at the time of the accident while Deborah does not remember seeing the soda machine. (N.T. Bryan Burkholder, 27)' (N.T. Deborah Mellott, 25).

All of this oral testimony and ultimately the result of this case hinges on the credibility of the Plaintiff, Deborah Mellott and

Bryan Burkholder as to the locations of objects at the accident scene and the events immediately prior to the accident. A jury will also need to consider the credibility of Mr. Hughes and his report to determine the soundness of his conclusions. These matters are not for the Court to decide in resolving Summary Judgment. Therefore, because reasonable minds could differ as to the conclusion that the flower pot did or did not pose an unreasonable risk harm to the Plaintiff, the Court is constrained to deny the Motion for Summary Judgment.

September 21, 2010, the Court having reviewed Defendant, Shively Motors Motion for Summary Judgment, the Plaintiff's Answer to Defendant's Motion for Summary Judgment, the briefs advocating and opposing the Motion, the record, the arguments, and the law, it is hereby ordered that the Plaintiff's Motion for Summary Judgment is denied.

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[1] Hereinafter "Deborah."

[2] Hereinafter "N.T."

[3] The court also held that the "no duty concept…unquestionably remains as a viable doctrine."

[4] Hereinafter "N.T. Deborah Mellott."

[5] Bryan Burkholder, Vice President at Shively motors testified, "[w]e did some remodeling to the front. We put new siding on the building, but materially this is the way it looked at the time of the incident." (Notes of Testimony, April 28, 2009, at 22).

[6] Hereinafter, "N.T. Bryan Burkholder."