2013 WL 12087189
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United States District Court,
N.D. Georgia, Newnan Division.

Brenda Marie **MCCANN** and
Charles **McCann**, Plaintiffs,
v.
J.C. **PENNEY** CORPORATION, INC., Defendant.

CIVIL ACTION FILE NUMBER 3:12-cv-137-TCB
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Signed 03/11/2013

Attorneys and Law Firms

Alex L. Dixon, Dixon, Mallory, & Chewning, P.C., Lagrange, GA, for Plaintiffs.

James Theodore Hankins, III, Joshua Sims Stein, Goodman McGuffey Lindsey & Johnson, Atlanta, GA, for Defendant.

ORDER

Timothy C. Batten, Sr., United States District Judge

***1** This case comes before the Court on Defendant **J.C**. **Penney** Corporation, Inc.'s motion for summary judgment [10].

I. Background

Along with its motion for summary judgment, JCP filed a statement of material facts in accordance with Local Rule 56.1(B)(1). Plaintiffs Brenda Marie and Charles **McCann** failed to file a response that complies with Local Rule 56(B)(2)(a)(2), i.e., they failed to directly refute some of JCP's facts with specific citations to evidence. Consequently, these facts are deemed admitted. *See also* FED. R. CIV. P. 56(e)(2). In addition, Plaintiffs have filed a statement of disputed facts; however, they have failed to support any of their facts with citations to evidence, and some of their facts are stated as an issue or legal conclusion. Thus, pursuant to Local Rule 56.1(B)(1), the Court will not consider their statement of facts. The facts are as follows.

JCP operates a department store in LaGrange, Georgia. On May 26, 2010, Brenda and his sister, Shirley Posey, entered the store and turned right to head towards the lingerie department. As a result of a prior injury and nerve damage to her left foot, Brenda walked with a limp, had a brace on her left foot and had to use a cane.

The store entryway has a tile floor that is a light tan color with a faint pattern. The lingerie department has carpet with a fourteen-inch rust brown border and an off-white color in the middle. The two types of floors are joined by rubber transition molding that is medium brown in color.

As Brenda walked from the tile to the carpet, she tripped on the molding. She tried to catch herself on a merchandise rack, but the rack could not support her weight and she fell to the ground. As a result of her fall, Brenda was injured.

Several minutes later, JCP employees arrived to assist Brenda. They offered to call an ambulance; however, Brenda wanted to wait for her husband, Charles, to arrive before calling 911. Brenda then called Charles, and he arrived at the store approximately ten minutes later. Soon thereafter, medical personnel arrived.

The store is managed by Dan Peecher, who has been in this role since 2009. He is not aware of any prior incidents involving individuals tripping in the area where Brenda's accident occurred. He is also not aware of any problems with, nor has he received complaints about, the transition molding where Brenda fell. There have been no changes to the molding since Peecher took over as store manager.

According to Peecher, employees are trained to constantly look for potential trip hazards. If an employee locates a potential trip hazard, he is supposed to either correct the hazard if he can or report the hazard to the appropriate personnel. JCP employees also conduct monthly store inspections, and on April 29, 2010, Peecher inspected the store and concluded, inter alia, that the floor surface was in good condition and that the walkways and aisles were clear and free of obstructions.

Brenda admits that she visited this JPC store quite frequently and had entered through the same door as the one she entered on the day of her accident. Brenda testified that on the day she fell, she did not notice the molding because "it's one of those things ... you don't pay no attention to really until something like this happens." She also testified at her deposition that she did not know of anyone else who had tripped on the molding and fallen in that part of the store.

***2** Brenda, her husband and her sister subsequently testified in affidavits filed in support of Plaintiffs' brief in opposition that the molding and carpet were similar in color, implying that this is why Brenda fell. Charles also testified that he inspected the molding the day after his wife's accident, and he noted that the molding and carpet border were similar in color and that the molding was taller than the tile and carpet. He otherwise does not testify about any apparent defects or issues with the molding.

On May 24, 2012, Plaintiffs filed this action in the Superior Court of Troup County. They aver claims for negligence and loss of consortium.

On September 13, JCP timely removed the action to this Court, and on January 23, 2013, it filed its motion for summary judgment.

II. Discussion

A. Legal Standard

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). There is a "genuine" dispute as to a material fact if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *FindWhat Investor Grp. v. FindWhat.com*, 658 F.3d 1282, 1307 (11th Cir. 2011) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). In making this determination, however, "a court may not weigh conflicting evidence or make credibility determinations of its own." *Id.* Instead, the court must "view all of the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor." *Id.*

"The moving party bears the initial burden of demonstrating the absence of a genuine dispute of material fact." *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). If the moving party would have the burden of proof at trial, that party "must show *affirmatively* the absence of a genuine issue of material fact: it 'must support its motion with credible evidence ... that would entitle it to a directed verdict if not controverted at trial.' " *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1438 (11th Cir. 1991) (quoting *Celotex*, 477 U.S. at 331). "If the moving party makes such an affirmative showing, it is entitled to summary judgment unless the nonmoving party, in response, 'come[s] forward with significant, probative evidence demonstrating the existence of a triable issue of fact.' " *Id.* (quoting *Celotex*, 477 U.S. at 331).

B. Analysis

Plaintiffs contend that JCP negligently maintained its premises by failing to discover and remedy a dangerous and unsafe condition in its store and that its negligence caused Brenda's injuries. Plaintiffs similarly contend that JCP breached its duty of care to her as an invitee on its premises. JCP responds that Plaintiffs have not shown that the molding Brenda tripped on was in any way damaged or defective and that Plaintiffs therefore cannot show that Brenda's injuries were caused by the molding.

In order to prevail on their negligence claim, Plaintiffs must show:

> (1) [a] legal duty to conform to a standard of conduct raised by the law for the protection of others against unreasonable risks of harm; (2) a breach of this standard; (3) a legally attributable causal connection between the conduct and the resulting injury; and, (4) some loss or damage flowing to the plaintiff's legally protected interest as a result of the alleged breach of the legal duty.

Bradley Ctr., Inc. v. Wessner, 296 S.E.2d 693, 695 (Ga. 1982) (citation omitted). JCP, as the store owner, owes a duty of ordinary care to an invitee such as Brenda. O.C.G.A. § 51-3-1; *see also Freeman v. Eichholz*, 705 S.E.2d 919, 922 (Ga. Ct. App. 2011). Therefore, a customer who is injured on store premises may recover under a theory of either negligence or premises liability if she can show that her injuries resulted from the owner's breach of that duty, i.e., as a result of the owner's negligence in maintaining unsafe premises caused the injuries.

***3** Necessarily, however, "[t]he plaintiff's first burden ... is to show the premises were defective or hazardous." *Carroll v. Ga. Power Co.*, 523 S.E.2d 896, 898 (Ga. Ct. App. 1999) (citation omitted). Only when a plaintiff can show that the injury resulted from an unsafe condition can issues of fault and superior knowledge be considered.

With respect to the knowledge requirement, "[i]t is not sufficient to simply show that an unfortunate event occurred and the plaintiff was injured." *Henson v. Ga.-Pac. Corp.*, 658 S.E.2d 391, 394 (Ga. Ct. App. 2008). Rather, Plaintiffs must present competent evidence that at the time of Brenda's injury, JCP had "superior knowledge of the perilous instrumentality and the danger therefrom to persons going upon the property." *Freeman*, 705 S.E.2d at 924.

1. Hazardous Condition

JCP argues that Plaintiffs have not met their initial burden of showing that a hazardous condition existed in its store. JCP asserts that the molding at issue complied with all state building codes and that Plaintiffs have not shown that the molding Brenda tripped over was in any way damaged, defective or installed improperly.

In support of its arguments, JCP relies on the report and testimony of its expert, Jeff Gross, a premises-liability consultant with over thirty years of experience. Gross inspected the store on August 17, 2012 and took various measurements. He determined, among other things, that (1) the molding had a fifteen-degree rate of incline, which is well under the twenty-six-degree rate of incline allowed under Georgia law; (2) there was nothing inherently dangerous about the molding he inspected; (3) there was no indication that the lighting was improper; and (4) the tile and molding colors sufficiently contrasted to adequately inform invitees of the floor transition. Based on Gross's findings, JCP concludes that the molding was not hazardous, and Plaintiffs therefore cannot show that Brenda's injuries were caused by a hazardous condition on its premises, which bars their recovery.

"[W]hether a hazardous condition exists is the threshold question in a slip and fall case." *Carroll v. Krystal Co.*, 692 S.E.2d 869, 871 (Ga. Ct. App. 2010) (citation omitted). To carry their burden, Plaintiffs must present competent evidence that a hazard existed, which could include an expert affidavit regarding the construction or maintenance of the hazard; evidence that the condition was in violation of some rule, ordinance, or recognized standard; or even evidence that other invitees had been injured in a manner similar to the plaintiff. *See Cohen v. Target Corp.*, 567 S.E.2d 733, 735 (Ga. Ct. App. 2002). In the absence of such evidence, a plaintiff's "[m]ere speculation ... is not enough to defeat summary judgment." *Bryant v.DIVYA, Inc.*, 628 S.E.2d 163, 165 (Ga. Ct. App. 2006).

In this case, the record contains no evidence that the molding was a hazardous condition. There is no expert evidence that the transition molding is inherently unsafe or that the molding was in any way defective or damaged. Plaintiffs have also not shown that the molding violated a rule, ordinance or building code. Moreover, there is no evidence of any similar accidents involving other JCP customers and the transition molding.

In response to Gross's report, Plaintiffs have offered only their and Posey's testimony that the molding was taller than the tile and carpet and too similar in color to the carpet border. However, they do not address in their affidavits or provide other evidence to rebut Gross's testimony that the rate of incline was within the allowable limits, and that the tile and molding sufficiently contrasted to show the floor transition. Plaintiffs have not provided any case law that shows their testimony alone is sufficient to create a genuine dispute of material fact as to whether the molding was a hazardous condition. Consequently, all that is in the record are the unfortunate facts that an accident occurred and Brenda was injured, and Plaintiffs' speculation that the molding was defective or hazardous. This is not enough to survive JCP's motion for summary judgment. [1] *See Tillman v. Winn-Dixie Stores, Inc.*, 526 S.E.2d 146, 148 (Ga. Ct. App. 1999) (no evidence that three-tiered flower display was negligently designed or constructed, thus entitling defendant to summary judgment).

2. JCP's Knowledge

***4** Plaintiffs also cannot show that JCP had actual or constructive knowledge of the alleged defect. It is undisputed that JCP did not have actual knowledge that the molding was defective. Peecher, the store manager, did not observe anything wrong with or unusual about the molding during the prior month's inspection; the molding has not changed since he took over as manager; no other JCP patron has been injured when walking across the molding where Brenda fell; and JCP has not received any complaints about its molding being defective. *See Ballew v.Summerfield Hotel Corp.*, 565 S.E.2d 844, 846 (Ga. Ct. App. 2002) (finding defendant did not have actual knowledge of defect where defendant had not received any complaints about carpet or lighting and was not aware of anyone falling in same location as plaintiff).

Plaintiffs argue that JCP had constructive knowledge that the molding was defective because it would have discovered the defect if its employees had properly inspected floor. They contend the JCP must come forward with copies of inspection procedures that would have discovered any potential defects on its premises. However, Plaintiffs have not presented any case or statutory law to support their contention.

Moreover, Plaintiffs' arguments all assume that the molding was defective, presumably because it was taller than the tile and carpet and too similar in color to the carpet. However, Plaintiffs must show—not speculate—that the molding *had* a defect, i.e., the height difference and color are defects. *Henson*, 658 S.E.2d at 394. As discussed above, Plaintiffs have failed to make this showing. There is no evidence in the record establishing that the molding's height or color is a defect. *Freeman*, 705 S.E.2d at 924. Indeed, there is no evidence establishing "exactly how the [molding] was defective, whether the defect was one which would be visible during an inspection, or how long the defect existed." *Id.*

In addition, Brenda did not observe anything unusual or wrong with the molding before she traversed it, and Charles did not see anything unusual or wrong with the molding (aside from the height and color which have been rejected as defects) when he inspected it the next day. If the alleged defect was difficult for them to see, they cannot establish that JCP's employees could have seen it and remedied it. *Ballew*, 565 S.E.2d at 847.

All Plaintiffs have offered is the fact that Brenda tripped when she walked from the tile to the carpet, and their speculation that the molding was defective. Thus, there is no evidence from which a jury could infer that JCP had constructive knowledge that the molding was defective. *Freeman*, 705 S.E.2d at 924. In the absence of such evidence, Plaintiffs' "[m]ere speculation ... is not enough to defeat summary judgment." *Bryant*, 628 S.E.2d at 165. Accordingly, JCP is entitled to summary judgment on Plaintiffs' negligence claim. *See Henson*, 658 S.E.2d at 395 (defendant entitled to summary judgment because plaintiff failed to offer evidence elevator doors were defective and in hazardous condition at time of his injury).

C. Loss of Consortium Claim

Charles's loss of consortium claim is derivative of Plaintiffs' negligence claim, and as stated above, the negligence claim fails as a matter of law. Accordingly, JCP is also entitled to summary judgment on Charles's loss of consortium claim. *See Behforouz v. Vakil*, 636 S.E.2d 674, 676 (Ga. Ct. App. 2006).

III. Conclusion

JCP's motion for summary judgment [10] GRANTED. The Clerk is DIRECTED to enter judgment in favor of JCP and to close the case.

IT IS SO ORDERED this 11th day of March, 2013.

All Citations

Not Reported in Fed. Supp., 2013 WL 12087189

Footnotes

1 Even assuming as the Court must for purposes of this motion that the molding caused Brenda to fall, Plaintiffs must still show that the molding was defective. Simply saying that it was a defective or a hazardous condition by its mere presence, without more, is not enough to defeat JCP's motion.