SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5594-15T2

AKUA OSEI-AMOAKO,

Plaintiff-Appellant,

v.

STAFFORD FEC, d/b/a FUNPLEX, LP PARTNERS, and RANDY LAHAN,

Defendants-Respondents.

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Argued October 3, 2017 – Decided December 12, 2017

Before Judges Fisher and Sumners.

On appeal from Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-0039-14.

Brian P. McElroy, attorney, argued the cause for appellant (Levinson Axelrod, PA, attorneys; Brian P. McElroy, on the brief).

Dennis M. Marconi, attorney, argued the cause for respondents (Barnaba & Marconi, LLP, attorneys; Dennis M. Marconi, on the brief).

PER CURIAM

Plaintiff broke her ankle from a slip and fall accident on foam balls while supervising her four-year-old son's play in an

amusement attraction, Foam Frenzy at the Funplex, owned and operated by defendants. Judge Yolanda Ciccone granted summary judgment to defendant, determining plaintiff's injury was not caused by defendant's breach of duty but due to her own conduct. On appeal, plaintiff contends the judge erred because the facts support plaintiff's theory that defendants breached their duty of providing a safe premise by permitting too many foam balls to remain on the floor, which were the proximate cause of plaintiff's accident. We disagree and affirm substantially for the reasons stated by Judge Ciccone in her opinion placed on the record on August 5, 2016. We add the following comments.

The Foam Frenzy is an attraction for children, ages four through twelve, to play in the midst of 8000 to 10,000 foam balls throughout the attraction, with adult supervision, if necessary. Participants chase each other, throw the foam balls at each other and attempt to dodge the foam balls while playing in the attraction. Plaintiff was supervising her son when she alleged she was walking towards him and slipped on one of more than fifty foam balls in her immediate area, which blended into the carpeted floor. Plaintiff contends that before she fell, she saw two employees trying to fix an inoperable vacuum that is used by participants to suck up and recirculate the loose foam balls back onto designated areas.

Plaintiff's expert believed defendants created a dangerous condition. He opined that plaintiff's fall resulted from the lack of clear pathways, which prevented plaintiff to avoid stepping on the over-accumulation of foam balls that were difficult to distinguish from the black and multicolored patterned carpet.

Following completion of discovery, defendants filed motions for summary judgment and to bar plaintiff's expert's report as net opinion. As for the summary judgment motion, Judge Ciccone recognized that plaintiff was an invitee and that defendants owed her a "duty of reasonable care to maintain [a] safe environment for doing the acts which [were] within the scope of the initiation." The judge found that defendants did not breach that duty and there was no dangerous condition in the Foam Frenzy, which caused plaintiff to break her ankle. Since the main component of the attraction was to play in an area overfilled with foam balls and plaintiff's injury was the result of slipping on a foam ball, the judge determined that no reasonable juror could find defendants breached its duty of care when plaintiff was engaged in the very activity that she and her son expected. In reviewing photos of the attraction, the judge rejected the contention by plaintiff's expert that the pastel-colored foam balls were camouflaged by the black carpeted floor. She also dismissed the expert's argument that the concrete floor was

inappropriate; reasoning that the floor had been inspected and approved by the State of New Jersey. Judge Ciccone did not address the motion to bar plaintiff's expert's report, finding it was unnecessary after granting summary judgment.

Appellate review of a ruling on a motion for summary judgment is de novo, applying the same standard governing the trial court. Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 405 (2014). Thus, we consider, as the motion judge did, "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 406 (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)). "If there is no genuine issue of material fact," an appellate court must then "decide whether the trial court correctly interpreted the law." DepoLink Court Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013) (citation omitted). We accord no deference to the trial judge's legal conclusions. Nicholas v. Mynster, 213 N.J. 463, 478 (2013) (citing Zabilowicz v. Kelsey, 200 N.J. 507, 512-13 (2009)).

In a negligence action, a plaintiff bears the burden of proving four elements: (1) a duty of care, (2) a breach of that duty, (3) proximate cause, and (4) actual damages. D'Alessandro

v. Hartzel, 422 N.J. Super. 575, 579 (App. Div. 2011) (citation omitted). "The duty owed to a plaintiff is determined by the circumstances that brought [her] to the property." Ibid. (citation omitted). The mere occurrence of an incident causing an injury is not alone sufficient to impose liability. Long v. Landy, 35 N.J. 44, 54 (1961). The plaintiff must establish facts proving negligence, not inferences "based upon a foundation of pure conjecture, speculation, surmise or guess." Ibid.

In the context of a business establishment, the owner "owe[s] to invitees a duty of reasonable or due care to provide a safe environment for doing that which is within the scope of the invitation." Nisivoccia v. Glass Gardens, Inc., 175 N.J. 559, 563 (2003). This duty of care "requires a business owner to discover and eliminate dangerous conditions, to maintain the premises in safe condition, and to avoid creating conditions that would render the premises unsafe." Ibid.

Guided by these principles, Judge Ciccone's decision to grant summary judgment is legally unassailable. Plaintiff's appellate arguments are without sufficient merit to warrant further discussion. R. 2:11-3(e)(1)(E).

Affirmed.