Campos v. Costco Wholesale Corp.

United States District Court for the Central District of California

December 21, 2018, Decided; December 21, 2018, Filed

Case No. CV 18-2043-MWF (PLAx)

Reporter
2018 U.S. Dist. LEXIS 222831 *

Sonia ***Campos v. Costco Wholesale Corporation***, et al.

Core Terms

floor, non-moving, dangerous condition, summary judgment, summary judgment motion, inspection, premises, burden of proof, foreign object, expert report, registers, slippery, wax, wet

Counsel: **[*1]** For Sonia Campos, Plaintiff: Mauro Fiore, Jr, LEAD ATTORNEY, Krystale Lee Rosal, Law Offices of Mauro Fiore Jr APC, Monrovia, CA USA.

For Costco Wholesale Corporation, Defendant: Lisa D Angelo, LEAD ATTORNEY, Brian Robert Satter Shaw, Kent Grover, Murchison and Cumming LLP, Los Angeles, CA USA; Scott J Loeding, Murchison & Cumming, LLP, San Diego, CA USA.

Judges: Honorable MICHAEL W. FITZGERALD, United States District Judge.

Opinion by: MICHAEL W. FITZGERALD

Opinion

CIVIL MINUTES—GENERAL

Proceedings (In Chambers): ORDER RE: MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION, BY DEFENDANT COSTCO WHOLESALE CORPORATION [16]

Before the Court is Defendant Costco Wholesale Corporation's ("Costco") Motion for Summary Judgment or in the Alternative, Summary Adjudication (the "Motion"), filed on November 16, 2018. (Docket No. 16). Plaintiff Sonia Campos filed a belated Opposition on December 6, 2018. (Docket No. 18). Costco filed a Reply on December 7, 2018. (Docket No. 26).

The Court reviewed and considered the papers submitted on the Motion and held a hearing on December 17, 2018.

For the reasons discussed below, the Motion is **GRANTED**. Plaintiff fails to create a triable issue of fact that a dangerous condition **[*2]** existed. Costco is therefore entitled to summary judgment as a matter of law.

I. BACKGROUND

The following facts are based on the evidence, as viewed in the light most favorable to Plaintiff as the non-moving party. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* (On a motion for summary judgment, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his [or her] favor."). The relevant facts set forth below are undisputed.

On October 5, 2015, Plaintiff slipped and fell on her way out of a Costco store while reaching to throw away a tissue in a trash can near the cash register. (Plaintiff's Statement of Genuine Disputes ("SGD") Nos. 1, 6 (Docket No. 19)). Plaintiff felt like she slipped, and felt moisture like water or wax on her ankle after the fall. (*Id.* Nos. 2-3). However, Plaintiff's pants were not wet after the fall. (*Id.* No. 3).

Karen Halkovich, a Front-End Supervisor at Costco, responded to the accident in the front of the store, near registers 16 and 17, by calling her manager with a walkie-talkie and rendering aid to Plaintiff. (*Id.* No. 4). Halkovich did not observe any water, wax, foreign objects, or debris in the area where Plaintiff fell, other than the tissue that Plaintiff **[*3]** attempted to throw away in a nearby trash can. (*Id.* No. 5). Patrick Gilbert,

an Administrative Manager at Costco, responded to the accident and took a photograph with his cell phone of Plaintiff and the general area where she fell. (*Id.* No. 7). The Los Angeles Fire Department received a call regarding Plaintiff's accident at 1:35 p.m. (*Id.* No. 6).

Costco maintains a policy where an employee conducts floor-walks and safety inspections of the store on an hourly basis. (*Id.* No. 9). On October 5, 2015, Costco employee Olivia Rangel conducted a floor-walk/safety inspection beginning at 1:27 p.m. in the front-end area of the store where Plaintiff fell. (*Id.* No. 10). Rangel was trained to remedy any potential hazards or unsafe conditions immediately if she was able to or otherwise notify a supervisor or manager. (*Id.* No. 11). Rangel's floor-walk safety inspection included inspecting the floor area between cash registers, including cash registers 16 and 17, to note whether there are any liquids, foreign objects, debris, or boxes that could be potentially unsafe for customers. (*Id.* No. 12). Rangel's inspection that day did not reveal any liquids, foreign objects, debris, or other hazards located **[*4]** in Zone 1, the front-end area of the store, which includes registers 16 and 17. (*Id.* No. 13).

The store's floor is concrete and was cleaned with soap and water prior to the store opening that morning. (*Id.* No. 14). No wax products were used on the concrete floor. (*Id.*).

On October 3, 2017, Plaintiff filed a Complaint against Costco in Los Angeles County Superior Court, asserting claims for premises liability and negligence. (Complaint (Docket 1-1)). On February 12, 2018, Plaintiff's counsel informed Costco that Plaintiff had incurred $212,503.37 in medical bills as a result of the slip-and-fall. (Notice of Removal ¶ 3 (Docket No. 1)). On March 12, 2018, Costco, a Washington corporation with its principal place of business in Issaquah, Washington, removed the action, invoking this Court's diversity jurisdiction. (*Id.* ¶¶ 1-12).

Costco now seeks summary judgment as to both of Plaintiff's claims. Since premises liability is a form of negligence, the Court's analysis, below, applies to both claims. *See* Carter v. Nat'l R.R. Passenger Corp., 63 F. Supp. 3d 1118, 1144 (N.D. Cal. 2014) ("Under California law, premises liability is a form of negligence.") (citing Brooks v. Eugene Burger Mgmt. Corp., 215 Cal. App. 3d 1611, 1619, 264 Cal. Rptr. 756 (1989)).

II. EVIDENTIARY OBJECTIONS

Costco objects to the expert report of Eris J. Barillas that Plaintiff cites in support **[*5]** of her Opposition to the Motion. (*See* Objection to Plaintiff's Exhibit 2 (Docket No. 25)). Costco argues that the expert report is unsworn, and therefore inadmissible under Rule 56 to oppose the Motion. (*Id.* at 1 (citing AFMS, LLC v. UPS Co., 105 F. Supp. 3d 1061, 1070 (C.D. Cal. Apr. 30, 2015))). Costco further objects to the expert report on lack of foundation and hearsay grounds. (*Id.* at 2).

While these objections may be cognizable at trial, on a motion for summary judgment, the Court is concerned only with the ***admissibility*** of the relevant ***facts*** at trial, and not the ***form*** of these facts as presented in the Motion. *See* Burch v. Regents of Univ. of Cal., 433 F. Supp. 2d 1110, 1119-20 (E.D. Cal. 2006) (making this distinction between facts and evidence, Fed. R. Civ. P. 56(e), and overruling objections that evidence was irrelevant, speculative and/or argumentative). "If the contents of the evidence could be presented in an admissible form at trial, those contents may be considered on summary judgment even if the evidence itself is [inadmissible]." O'Banion v. Select Portfolio Servs., Inc., No. 1:09-CV-00249-EJL, 2012 U.S. Dist. LEXIS 135813, 2012 WL 4793442, at *5 (D. Idaho Aug. 22, 2012) (citing Fraser v. Goodale, 342 F.3d 1032, 1036-37 (9th Cir. 2003)). There is no reason to think that Plaintiff would not be able to call Barillas to testify as to the contents of his expert report.

Therefore, to the extent the Court relies upon evidence to which Costco objects, the objections are **OVERRULED**.

III. LEGAL STANDARD

In deciding **[*6]** a motion for summary judgment under Federal Rule of Civil Procedure 56, the Court applies *Anderson, Celotex*, and their Ninth Circuit progeny. Anderson, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202; Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). "The court shall grant summary judgment if the movant shows that 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).

The Ninth Circuit has defined the shifting burden of proof governing motions for summary judgment where the non-moving party bears the burden of proof at trial:

> The moving party initially bears the burden of

> proving the absence of a genuine issue of material fact. Where the non-moving party bears the burden of proof at trial, the moving party need only prove that there is an absence of evidence to support the non-moving party's case. Where the moving party meets that burden, the burden then shifts to the non-moving party to designate specific facts demonstrating the existence of genuine issues for trial. This burden is not a light one. The non-moving party must show more than the mere existence of a scintilla of evidence. The non-moving party must do more than show there is some "metaphysical doubt" as to the material facts at issue. In fact, the non-moving party must come forth with evidence from **[*7]** which a jury could reasonably render a verdict in the non-moving party's favor.

Coomes v. Edmonds Sch. Dist. No. 15, 816 F.3d 1255, 1259 n.2 (9th Cir. 2016) (quoting *In re Oracle Corp. Sec. Litig., 627 F.3d 376, 387 (9th Cir. 2010)*). "A motion for summary judgment may not be defeated, however, by evidence that is 'merely colorable' or 'is not significantly probative.'" *Anderson, 477 U.S. at 249-50*.

"When the party moving for summary judgment would bear the burden of proof at trial, 'it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial.'" *C.A.R. Transp. Brokerage Co. v. Darden Restaurants, Inc., 213 F.3d 474, 480 (9th Cir. 2000)* (quoting *Houghton v. South, 965 F.2d 1532, 1536 (9th Cir. 1992)*).

IV. DISCUSSION

To prevail on her negligence and premises liability claims, Plaintiff must establish: "(a) a legal duty to use due care; (b) a breach of such legal duty; (c) that the breach was the proximate or legal cause of the resulting injury; and (d) damages." *Alvarez v. Jo-Ann Stores, LLC, No. EDCV 17-1804 JGB (SHKx), 2018 U.S. Dist. LEXIS 149427, at *14 (C.D. Cal. Aug. 29, 2018)* (citing *Ortega v. Kmart Corp., 26 Cal. 4th 1200, 114 Cal. Rptr. 2d 470, 36 P.3d 11 (2001)*).

"It is well established in California that although a store owner is not an insurer of the safety of its patrons, the owner does owe them a duty to exercise reasonable care in keeping the premises reasonably safe." *Ortega, 26 Cal. 4th at 1205* (citing, *inter alia, Restatement (Second) of Torts § 332*). "The cases require that an owner must have actual or constructive notice of the dangerous condition before incurring liability." *Id. at 1203*. Store owners have "an affirmative duty to exercise ordinary **[*8]** care to keep the premises in reasonably safe condition, and therefore must inspect them or take other proper means to ascertain their condition. And if, by the exercise of reasonable care, the landowner would have discovered the dangerous condition, he or she is liable." 6 B.E. Witkin, *Summary of California Law*, Torts § 1121 (10th ed. 2005).

Costco argues, and the Court agrees, that summary judgment must be granted in its favor because there is no evidence in the record of a dangerous condition. (Mot. at 6).

Plaintiff offers only speculative evidence that ***something*** must have been present on the floor, either a water- or wax-like substance, to cause her to slip and fall given that she felt moisture on her ankle. Indeed, Plaintiff testified in her deposition that, "[a]ll I know is that I felt that I slipped and then I fell. I don't know what happened." (Declaration of Scott J. Loeding, Ex. H at 46:4-7 (Docket No. 16-7)). In fact, the undisputed evidence undermines Plaintiff's claim that a dangerous condition existed. For instance, Plaintiff testified that the pants she was wearing at the time of the accident did not get wet. (*Id.* at 48:21-24). Moreover, in the aftermath of the fall, Halkovich, **[*9]** a Costco employee, did not observe any water, wax, foreign objects, or debris in the area where Plaintiff fell, other than the tissue Plaintiff attempted to throw away in a nearby trash can. (SGD No. 5).

Other courts have rejected similar speculative arguments on summary judgment. *See Alvarez, 2018 U.S. Dist. LEXIS 149427, at *18* (finding plaintiff's explanation that she felt something slippery under her heel coupled with "speculation that she slipped on a foreign object of some kind" insufficient to overcome a motion for summary judgment); *Ellis v. Target Corp., No. 2:16-cv-00118-SVW-RAO, 2016 U.S. Dist. LEXIS 189518, at *11 (C.D. Cal. July 19, 2016)* (finding plaintiff's evidence that her dress was wet after fall insufficient to establish dangerous condition); *Peralta v. The Vons Companies, Inc., 24 Cal. App. 5th 1030, 1036, 235 Cal. Rptr. 3d 212 (2018)* ("The mere *possibility* that there was a slippery substance on the floor does not establish causation. Absent any evidence that there was a foreign substance on the floor, or some other dangerous condition created by or known to Vons, [the] Peraltas cannot sustain their burden of proof.") (emphasis in original); *Vaughn v. Montgomery Ward & Co., 95 Cal. App. 2d 553, 557, 213 P.2d 417 (1950)* (finding no evidence of foreign substance of the floor

where plaintiff did not observe foreign material on the floor, even though plaintiff had greasy substance on her stocking after the fall). Therefore, absent non-speculative evidence **[*10]** that a dangerous condition existed on the floor at the time of the accident, Plaintiff cannot establish that Costco breached its duty of care.

At the hearing, Plaintiff urged the Court to consider a recently-obtained declaration from Plaintiff's sister-in-law, who was present during the accident, stating that she witnessed a brownish wax roughly the size of an orange on the floor where Plaintiff fell. Plaintiff, however, offered ***no*** justification why this evidence could not have been presented in her Opposition to the Motion. Accordingly, the Court declines to consider this evidence now.

Plaintiff argues further that the floor ***itself*** presented an inherently dangerous condition because it lacked a slip-resistant coating, causing the floor's slip resistance coefficient to fall below industry standards. (Opp. at 3, 6). In support, Plaintiff cites Barillas's expert report, which Plaintiff argues concludes that the floor "presented a substantial slip hazard for customers exercising reasonable care." (Declaration of Krystale L. Rosal, Ex. 2 at 4 (Docket No. 20)). However, the report plainly explains that Barillas's conclusion is based on his assessment that the "subject floor was unreasonably slippery ***[*11] with contaminants present***." (*Id.* at 5 (emphasis added)). Therefore, Plaintiff's evidence that the floor itself fell below industry standards, without evidence that the floor was wet or otherwise contaminated by some other slippery substance, is insufficient to establish that Costco breached its duty of care. *See* *Peralta, 24 Cal. App. 5th at 1036* ("Peraltas's evidence suggests, at best, that Vons may have breached a duty of care by installing flooring that falls below industry standards when wet. Without any evidence showing that a slippery substance was in fact on the floor at the time she fell . . . there is no legitimate basis to support an inference that Vons's breach caused Rose to fall.").

V. CONCLUSION

For the reasons set forth above, the Motion is **GRANTED**.

This Order shall constitute notice of entry of judgment pursuant to *Federal Rule of Civil Procedure 58*. Pursuant to *Local Rule 58-6*, the Court **ORDERS** the Clerk to treat this Order, and its entry on the docket, as an entry of judgment.

IT IS SO ORDERED.

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