Online Reference: FLWSUPP 3204SHAF

Torts -- Negligence -- Premises liability -- Restaurants -- Slip and fall -- Transitory foreign substance in business establishment -- Defendant entitled to summary judgment where there is no evidence that restaurant had actual knowledge of dangerous condition; there was insufficient evidence that transitory substance was actually on floor or was on floor for sufficient period of time that restaurant, in exercise of ordinary care, should have known that it was there; and there was no evidence that transitory substance occurred with such regularity that it was foreseeable

CHRISTOPHER SHAFFER, Plaintiff, v. ANNA MARIA OYSTER BAR, INC., Defendant. Circuit Court, 12th Judicial Circuit in and for Manatee County. Case No. 2023-CA-3137. March 6, 2024. Edward Nicholas, Judge. Counsel: Benjamin L. Crawford, Brandon, for Plaintiff. Catherine V. Arpen, Jacksonville, for Defendant.

ORDER ON DEFENDANT'S MOTION

FOR SUMMARY JUDGMENT

THIS CAUSE having come on for hearing pursuant to the Defendant's Motion for Final Summary Judgment, said motion having been filed on November 6, 2023, and the Court having reviewed and considered said Motion, having reviewed and considered, as well, the Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment, said Response having been filed on February 6, 2024, having considered the deposition transcript of the Plaintiff, Christopher Shaffer, and the Plaintiff's interrogatories, having considered the argument of counsel and the case law provided and being otherwise fully advised in the premises, finds as follows:

Standard of Review

In 2021, the Florida Supreme Court revised Florida Rule of Civil Procedure 1.510, saying in effect, that Florida's summary judgment standard should be construed and applied in accordance with the Federal summary judgment standard as spelled out in *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986) and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986). The Court indicated that it agreed with the Supreme Court that "[s]ummary judgment is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of [our rules] as a whole." *Celotex,* 477 U.S. at 327. The Court explained that "embracing the Celotex trilogy means abandoning certain features of Florida jurisprudence that have unduly hindered the use of summary judgment in our state". *See In re: Amends. to Fla. Rule of Civ. Pro. 1.510*, 2021 WL 1684095 at 2 (Fla. April 29, 2021) [46 Fla. L. Weekly S95a]. The Court found the Supreme Court's reasoning compelling, saying, "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose". *Id.* at 323-324.

Analysis

Applying the above-referenced standard, while certainly recognizing the high burden that attaches to a motion of this nature and with a clear understanding that a motion for summary judgment is not a substitute for the trial of disputed facts, the Court does hereby find that the Plaintiff's claim is, in fact, one of those "factually unsupported" claims contemplated by revised Rule 1.510. Said another way, as will be explained herein, while the determination of whether a transitory foreign substance was on a floor for a sufficient period of time such that a Defendant "should have known" of its existence is generally a jury question, there is simply no evidence here that the Defendant had any actual or constructive knowledge of the presence of any substance on the floor. Indeed, based upon the Plaintiff's own deposition testimony there is no evidence that

there was, in fact, a liquid on the floor at the time of his fall. In other words, the Plaintiff's claim is not supported by the facts, nor the law, and, as indicated, is, in fact, one of those "unsupported claims' contemplated by the revised Rule 1.510. As will be explained herein, there is no genuine issue of material fact, no evidence to indicate how "transitory" the transitory substance was here or even if there was a transitory substance, and the Defendant's Motion for Summary Judgment is well taken and must be granted.

The Plaintiff's cause of action arises as a result of the Plaintiff's claim that he slipped on an alleged substance on the floor of Anna Maria Oyster Bar. The Plaintiff argues "the record evidence shows that the defendant had at least constructive knowledge of a substance being on the ground right in front of the hostess station. At all times there was an employee at the hostess station and any spill should have been observed immediately as it happened in front of the hostess if the hostess was exercising ordinary care. Under these facts, summary judgment should fail" (*see* Response).

The Defendant argues that "[H]ere, plaintiff wants to infer there was a transitory foreign substance on the ground despite admitting that he did not know what made him fall. This inference then asks the court to draw additional inferences to the exclusion of all other possible inferences which is prohibited" (*see* Motion). The Defendant goes on to suggest that "there is no evidence from which a factfinder could find that Anna Maria Oyster Bar, Inc. was negligent without impermissibly stacking inferences, and Anna Maria Oyster Bar, Inc. is entitled to entry of final summary judgment" (Again, *see* Motion).

When a premises liability action is grounded on an individual's slip and fall on a transitory foreign substance in a business establishment, Section 768.0755, Florida Statutes (2010), applies and controls. *Encarnacion v. Lifemark Hospitals of Florida,* 211 So.3d 275 (Fla. 3d DCA 2017) [42 Fla. L. Weekly D304a]. Section 768.0755 reads:

> **768.0755. Premises liability for transitory foreign substances in a business establishment**
>
> (1) If a person slips and falls on a transitory foreign substance in a business establishment, the injured person must prove that the business establishment had actual or constructive knowledge of the dangerous condition and should have taken action to remedy it. Constructive knowledge may be proven by circumstantial evidence showing that:
>
> (a) The dangerous condition existed for such a length of time that, in the exercise of ordinary care, the business establishment should have known of the condition; or
>
> (b) The condition occurred with regularity and was therefore foreseeable.
>
> (2) This section does not affect any common-law duty of care owed by a person or entity in possession or control of a business premises.[1]

Thus, in every slip and fall case involving a negligence claim, the plaintiff must prove that the establishment had actual or constructive knowledge of the dangerous condition. There is no evidence of actual knowledge here. The question, then, is whether the Defendant had constructive knowledge of a liquid on the floor prior to the Plaintiff's fall.

When the Legislature enacted § 768.0755, it indicated that proof of such constructive knowledge can be established by circumstantial evidence that the "dangerous condition" existed for such a length of time that, in the exercise of ordinary care, store personnel should have known of its existence, or (2) Plaintiff may prove by circumstantial evidence that the "dangerous condition" occurred with such regularity that it was foreseeable. Section 768.0755, Florida Statutes (2010).

Ultimately, based upon the Plaintiff's own deposition testimony, there simply is insufficient evidence that a

wet substance was on the floor, or that the substance was on the floor for a sufficient length of time that the Defendant, in the exercise of ordinary care, should have known that it was there. Additionally, there is no evidence that established that the transitory substance occurred with such regularity that it was foreseeable. This conclusion is, indeed, as indicated, largely based upon the Plaintiff's own testimony. This is, indeed, one of those few instances wherein there is simply no evidence to indicate that there was definitively a substance on the floor or that the condition existed for such a period of time sufficient to put the Defendant on notice of its existence. The Plaintiff's theory of liability is quintessential speculation, and, as such, summary judgment is appropriate.

The Court points specifically to page 15, lines 4-7 and page 16, line 25, and page 17 through line 7:

> "I walked back in, came around the hostess station. Next thing I knew, I was on the floor. So I immediately jumped up feeling embarrassed and went to the table clutching my shoulder."
>
> "Q. Did you look down at the floor prior to you falling?
>
> A. No, ma'am.
>
> Q. Did you see any substance on the floor prior to you falling?
>
> A. No, ma'am, not that I recall.
>
> Q. Do you know what caused you to fall?
>
> A. No, ma'am, I'm not a hundred percent certain."

The Court points, as well, to page 17 lines 11-20:

> "Q. All right. And did your arm catch your fall, or attempt to catch your fall?
>
> A. Honestly, I really don't know. It happened so quickly, I just -- down I went and --
>
> Q. Okay. When you got back up -- or once you collected yourself on the floor, did you look around and see anything wet on the floor?
>
> A. No, ma'am, I wasn't looking. My shoulder was killing me. I just went back to the table, sat down and was talking with my parents."

As indicated, at no time did Mr. Shaffer state during his deposition that there was a liquid on the floor or that his clothes were wet. Nothing in his testimony establishes that there was a liquid on the floor and, as such, the Plaintiff has failed to establish the necessary prerequisite of constructive notice on the part of the Defendant.

The Court points, as well, to page 17, lines 6-7, wherein the Plaintiff, himself, did not know what caused him to fall:

> "Q. Do you know what caused you to fall?
>
> A. No, ma'am, I'm not a hundred percent certain."

The Plaintiff argued at the hearing that there "could have been employees" that could have corrected the condition or warn patrons of the condition. This, like the Plaintiff's theory generally, is pure speculation. Plaintiff's counsel argued at the hearing that the failure of the Plaintiff to say that he slipped on a liquid substance is of no consequence. This Court does not agree, particularly in light of the revised summary judgment standard. At the risk of repetition, simply stated, there is no circumstantial evidence from which a

conclusion can be reasonably drawn that the Defendant had constructive notice of a liquid, a liquid that the Plaintiff failed to state existed at his deposition, was on the floor of the Anna Maria Oyster Bar.

Generally, issues regarding proof of constructive knowledge typically come down to the presence of some proof as to how long the liquid or substance was on the floor. Courts have consistently held that while proof that the substance was on the floor for 15 to 20 minutes or more was sufficient to survive summary judgment, direct evidence that the substance was on the floor for less than 10 minutes often entitled a defendant to summary judgment. See *Hernandez v. Sam's East, Inc.,* 2021 WL 1647887 (S.D. Fla. 2021); see also and compare *Thomas v. NCL (Bahamas) Ltd.,* 203 F. Supp. 3d 1189, 1193 (S.D. Fla. 2016); with *Pussinen v. Target Corp.,* 731 F. Appx. 936, 938 (11th Cir. 2018) and *Hill v. Ross Dress for Less, Inc.,* 2013 WL 6190435 (S.D. Fla. 2013).

Hernandez, supra, is particularly persuasive. In that case, the plaintiff slipped and fell on a foreign substance on the floor of the produce department. 2021 WL 1647887 at 1. She had no knowledge as to how the substance got on the floor, the length of time it was on the floor, the source of the substance or whether Sam's employees knew it was on the floor prior to her accident. *Id.* A Sam's employee testified that he walked through and inspected the area where Ms. Hernandez fell approximately 10 minutes prior to the accident and the floor was clear. *Id.* at 3. The surveillance video also confirmed the employee's inspection, establishing that the substance that caused Plaintiff's fall must have been on the floor less than 10 minutes. *Id.* The Southern District, applying Florida law and the Federal summary judgment standard of review now employed by Florida trial courts, held that where there is direct evidence that the substance was on the floor less than 10 minutes, there is no constructive notice as a matter of law and summary judgment is proper. *Id.* In its reasoning, the Court cited and compared a host of other cases in which proof the substance was on the floor at least 15 to 20 minutes was sufficient to show constructive knowledge but that evidence the substance was on the floor less than 10 minutes was insufficient as a matter of law to charge the defendant with constructive knowledge. *Id.* citing to (*Thomas v. NCL (Bahamas) Ltd.,* 203 F. Supp. 3d 1189, 1193 (S.D. Fla. 2016); with *Pussinen v. Target Corp.,* 731 F. Appx. 936, 938 (11th Cir. 2018) and *Hill v. Ross Dress for Less, Inc.,* 2013 WL 6190435 (S.D. Fla. 2013). See also *Jenkins vs. Brackin,* 171 So. 2d 589 (Fla. 2nd DCA 1965), which held that "[T]here was sufficient circumstantial evidence presented, regarding how long the green bean was on the floor to preclude summary judgment. Fifteen minutes prior to the accident, the defendant store had not examined the floor where the green bean was located", *id*. at 590. In this case, there is a fatal lack of evidence as to how long the alleged liquid was on the floor and, indeed, whether such transitory liquid actually was present. See also *Encarnacion v. Lifemark Hospitals of Florida,* 211 So. 3d 275, 277 (3rd DCA 2017) [42 Fla. L. Weekly D304a], wherein the Third District granted summary judgment because "there was no indication in the record suggesting the existence of a foreign substance on the floor was known to the hospital, and the record did not establish how long the substance had been on the floor".

In paragraph eight (8) of his complaint, the Plaintiff alleges that the negligent conditions (i.e. the liquid on the floor) "were known to Anna Maria or had existed for a sufficient length of time so that they should have corrected or warned of said conditions". Problematic, however, is that there is a woeful lack of evidence to support same.

This Court certainly recognizes that, by entry of this Order, Mr. Shaffer is unable to seek redress for the injuries he sustained when he slipped in Anna Maria Oyster Bar on June 12, 2018, due to the alleged negligence of Defendant's employees. The evidence, however, to support his theory of negligence simply does not exist.

Ultimately, although revised, Rule 1.510 indicates that summary judgment must be granted only "if the pleadings and summary judgment evidence on file shows that there is no genuine [dispute] as to any material fact and that the moving party is entitled to a judgment as a matter of law". Fla. R. Civ. P. 1.510(c); *In re: Amendments to Fla. Rule of Civil Procedure 1.510*, No. SC20-1490, 2020 WL 7778179 at *4, 309 So.3d 192 (Fla. 2020) [46 Fla. L. Weekly S6a] (*amending language to replace "genuine issue" with "genuine dispute").

Based upon the foregoing, there is no "genuine dispute" here. Therefore, the Defendant's Motion for Summary Judgment is GRANTED.

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[1]See *Woodman v. Bravo Brio Restaurant Group, Inc.,* 6:14-cv-2025-Orl-40TBS; 2015 WL 1836941 (M.D. Fla. Apr. 21, 2015). The *Woodman* court held Plaintiff's argument "that [§ 768.0755](2) of the statute is construed to allow claims based on mode of operation theory would effectively read subsection (1) out of the statute. 'A basic rule of statutory construction provides that the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless.' *State v. Goode,* 830 So.2d 817, 824 (Fla. 2002) [27 Fla. L. Weekly S860a]. Rather than reading subsection (2) to effectively repeal subsection (1), the Court concludes that subsection (2) means that the duty owed by premises owners to invitees is the same as it has always been under Florida law: "to exercise reasonable care to maintain their premises in a safe condition." (citing *Owens v. Publix Supermarkets, Inc.,* 802 So.2d 315, 332 (2001) [26 Fla. L. Weekly S756a]).

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