United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
February 28, 2023
Lyle W. Cayce
Clerk

No. 22-40461

ROSS BROWN,

Plaintiff—Appellant,

versus

DOLGENCORP OF TEXAS, INCORPORATED, *doing business as Dollar General*,

Defendant—Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
4:21-cv-270

Before STEWART, DUNCAN, and WILSON, *Circuit Judges*.

PER CURIAM:*

This case arises from Plaintiff Ross Brown's slip and fall on a walkway outside a Dollar General store in Sherman, Texas. The question on appeal is whether Defendant Dolgencorp of Texas, which leased the building and operated the Dollar General store, sufficiently controlled the walkway to bear

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

liability for Brown's injury. Answering this question in the negative, the district court granted summary judgment to Dolgencorp. We affirm.

I.

Dolgencorp of Texas leased the Sherman Dollar General store building from property owner Sherman Investments of WA, LLC.[1] While Dollar General employees regularly swept the parking lot and removed trash, Sherman Investments handled all maintenance outside the building, pursuant to the lease.

Sometime in mid-February 2019, the walkway outside the store was painted blue by a contractor hired by Sherman Investments. Soon thereafter, Brown visited the store to shop. While on the premises, he slipped and fell on the newly painted walkway, which was also wet with rain. Shortly after Brown fell, a Dollar General employee placed a mat on the walkway to provide more traction.

Brown sued Dolgencorp in Texas state court. Dolgencorp removed the case to federal court based on diversity jurisdiction. In his complaint, Brown alleged that he fell because the paint made the walkway slick and slippery. He asserted that Dolgencorp was liable based on negligence and sought $1 million in damages.

Dolgencorp moved for summary judgment. The magistrate judge recommended granting the motion, concluding that Dolgencorp did not control the walkway. The district court adopted the magistrate's

[1] Dolgencorp originally leased the property from M&D Interests Inc. on June 5, 2006. But M&D Interests sold the property to Lamar Partnership, Ltd., which later sold it to Sherman Investments. With each sale, the lease was assigned to the new owner. At the time of the slip and fall here, Sherman Investments owned the property and was lessor under the lease.

recommendation and granted summary judgment for Dolgencorp. Brown timely appealed.

II.

We review a summary judgment de novo, applying the same legal standards as the district court. *Boudreaux v. Swift Transp. Co.*, 402 F.3d 536, 540 (5th Cir. 2005); *see also Rockwell v. Sprouts Farmers Market Tex., L.P.*, No. 21-20354, 2022 WL 1532639 at *1 (5th Cir. May 16, 2022) (unpublished). Summary judgment is appropriate when "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). "We construe all facts and inferences in the light most favorable to the nonmov[ant.]" *Murray v. Earle*, 405 F.3d 278, 284 (5th Cir. 2005).

When "the nonmoving party bears the burden of proof[,] . . . the burden on the moving party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp v. Catrett*, 477 U.S. 317, 325 (1986). After the moving party has met its burden, "[t]he party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his or her claim." *Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998).

III.

It is undisputed that Dolgencorp leased only the building, not the outside premises. But "even if it did not own or physically occupy" the walkway, Dolgencorp may still be liable "for a dangerous condition on the property if it assumed control over and responsibility for the premises[.]" *United Scaffolding, Inc. v. Levine*, 537 S.W.3d 463, 473 (Tex. 2017). "The relevant inquiry is whether the defendant assumed sufficient control over the part of the premises that presented the alleged danger so that the defendant

had the responsibility to remedy it." *Cnty. of Cameron v. Brown*, 80 S.W.3d 549, 556 (Tex. 2002). So we consider whether Dolgencorp assumed such control of the walkway where Brown fell.

Control "may be expressed by contract or implied by conduct." *United Scaffolding*, 537 S.W.3d at 473. Contractual control is not at issue here because the lease does not give contractual control of the walkway to Dolgencorp. It requires that Sherman Investments, as lessor, "maintain at its cost and expense in good condition and shall perform all necessary maintenance, repair, and replacement to the exterior [of the premises] . . . including, but not limited to . . . all paved . . . areas[.]"

Rather, Brown contends that Dolgencorp's control over the walkway was implied by conduct. As proof, Brown points to three alleged Dolgencorp actions: (1) its employees swept the parking lot; (2) it displayed merchandise outside the store; and (3) its employees regularly placed mats on the walkway.

The first two fail to forestall summary judgment for the same reason. Even if these actions show that Dolgencorp exercised control over some areas outside the store, they fail to show that Dolgencorp controlled the walkway itself. Neither sweeping the parking lot nor displaying merchandise outside the store shows that Dolgencorp exercised "sufficient control over the *part of the premises* that presented the alleged danger[.]" *Cnty. of Cameron*, 80 S.W.3d at 556 (emphasis added).

If true, Brown's third contention—that Dollar General employees regularly placed mats on the walkway—could suggest control of the walkway itself, but it is only partly true. In reality, the record provides no support for Brown's contention that Dolgencorp "normally" placed mats on the walkway both before and after Brown fell. Rather, the record shows a mat was "traditionally" placed near the doorway behind the walkway and was only moved onto the walkway after Brown fell. We agree with the district

court that "this temporary remedial measure is insufficient to create a material fact issue as to control" of the walkway.

In a premises liability case, "the [P]laintiff bears the burden of proof on . . . control[,] and absence of any such evidence is fatal to the [P]laintiff's claim[.]" *United Scaffolding*, 537 S.W.3d at 478. Brown has not carried his burden because he has failed to produce evidence to create a genuine dispute about whether Dolgencorp controlled the walkway. Accordingly, summary judgment was appropriate.

AFFIRMED.