

LOIS J. TATE

*

NO. 2017-CA-0714

VERSUS

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COURT OF APPEAL

TOURO INFIRMARY, ET AL

*

FOURTH CIRCUIT

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STATE OF LOUISIANA

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2014-02308, DIVISION "0"
Honorable Robin M. Giarrusso, Judge

JAMES F. MCKAY III
CHIEF JUDGE

(Court composed of Chief Judge James F. McKay III, Judge Daniel L. Dysart,
Judge Tiffany G. Chase)

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AFFIRMED

FEBRUARY 21, 2018

In this personal injury action, sounding in negligence and strict liability, the plaintiff, Lois J. Tate, appeals the trial court's granting of summary judgment in favor of defendants, Touro Infirmary and Louisiana Children's Medical Center. We affirm.

FACTS AND PROCEDURAL HISTORY

Lois J. Tate alleges that she tripped over a defective threshold and fell face first on to a terrazzo floor at the medical office of Dr. Shelton Barnes on March 11, 2013. The space where Dr. Barnes's office was located at 3600 Prytania Street, Suite # 50 in New Orleans, Louisiana and leased from Touro Infirmary. Ms. Tate alleges that she was injured as a result of her fall.

On March 6, 2014, Ms. Tate filed a petition for damages based on negligence and strict liability, naming Touro Infirmary (owner/lessor), Louisiana Children's Medical Center (owner/lessee)¹, Dr. Shelton Barnes (tenant/lessee) and XYZ Insurance Company as defendants. After extensive discovery, Touro

¹ Louisiana Children's Medical Center is mistakenly named as an owner of the premises when it in fact has no ownership interest in the property.

Infirmery and Louisiana Children's Medical Center, on February 21, 2017, filed a motion for summary judgment on the basis that Ms. Tate could not meet her burden of proof against them.² Specifically, said motion was based upon the fact that Ms. Tate could not meet an essential element of her claim; that is that Touro had notice of an alleged defect which Ms. Tate claims existed on the date of her fall.

The trial court granted Touro's motion for summary judgment on May 5, 2017 and dismissed Ms. Tate's claims against Touro and Louisiana Children's Medical Center. It is from this judgment that Ms. Tate now appeals.

DISCUSSION

A summary judgment is reviewed *de novo*, with the appellate court "using the same criteria that govern the trial court's consideration of whether summary judgment is appropriate, i.e., whether there is a genuine issue of material fact and whether the mover is entitled to judgment as a matter of law." Simon v.

Hillensbeck, 2012-0087, p. 6 (La.App. 4 Cir. 9/19/12), 100 So.3d 946, 950.

A motion for summary judgment is a procedural device used when there is no genuine issue of material fact for all or part of the relief prayed for by the litigant. *See* La. C.C.P. art. 966(A)(1). La. C.C.P. Art. 966(A)(1) also provides that a plaintiff or a defendant may move for summary judgment in his/her favor for all or part of the relief for which he/she has prayed. La. C.C.P. art. 966(A)(3)

² Dr. Barnes previously filed a motion for summary judgment on September 29, 2016, which was denied by the trial court, and he did not seek relief from that decision. Dr. Barnes still remains as a defendant in this matter. Ms. Tate also previously filed a motion for summary judgment, which was denied at the same time the trial court granted Touro's motion for summary judgment.

further provides summary judgment shall be rendered if the motion, memorandum, and supporting documents show there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law.

Pursuant to La. C.C.P. art. 966(D)(1), the mover has the initial burden of proof to present that there are no genuine issues of material fact. However, if the mover does not bear the burden of proof at trial, the mover's motion must only point out the absence of factual supportive elements essential to the adverse party's claim. La. C.C.P. art. 966(D)(1).

Once the mover does this, the burden of proof shifts to the adverse party to show that there are genuine issues of material fact. See Samaha v. Rau, 2007-1726, p. 4 (La. 2/26/08), 977 So.2d 880, 887- 88. "In defending against a well-taken motion for summary judgment, the plaintiff may not rely upon the allegations contained in his pleadings, simply speculate, or otherwise posit the hypothetical existence of a genuine issue of material fact." Simon, 2012-0087, p. 6 100 So.3d at 950.

In the instant case, a lease agreement was entered between Touro Infirmary and Dr. Barnes on April 17, 2006, wherein Touro Infirmary agreed to lease Suite #50 of 3600 Prytania Street, New Orleans, LA 70115 to Dr. Barnes for a term of one year which could be extended by agreement of the parties. The lease agreement was extended for several years by way of amendment and continued to be in effect on March 11, 2013, the date of Ms. Tate's alleged fall.

The express language of the lease agreement provides that Dr. Barnes accepts the premises “as is” with any defects present. The lease agreement also provides that all responsibility for an incident occurring on the leased premises as a result of an alleged defect falls to Dr. Barnes. Specifically, in Section 10.0 of the lease agreement, Dr. Barnes agrees to indemnify, defend, and hold harmless Touro Infirmary from any claims asserted against Touro arising out of injury to any person in the leased premises. Furthermore, Dr. Barnes agrees to indemnify, defend, and hold harmless Touro Infirmary from “any existing or future condition, defect, matter to thing, whether hidden or apparent” in the leased premises.

Louisiana law expressly allows the owner of a property to contractually shift responsibility to a lessee for any injuries occurring on the premises. La. R.S. 9:3221 provides:

Notwithstanding the provisions of Louisiana Civil Code Article 2699, the owner of premises leased under a contract whereby the lessee assumes responsibility for their condition is not liable for injury caused by any defect therein to the lessee or anyone on the premises who derives his right to be thereon from the lessee, unless the owner knew or should have known of the defect or had received notice thereof and failed to remedy it within a reasonable time.

Louisiana courts have consistently granted summary judgment for owners/lessors when the lease agreement shifts responsibility to the lessee, and the plaintiff cannot show that the owners/lessors had notice of an alleged defect and failed to remedy it within a reasonable time. *See Raines v. Colley*, 2003-1630 (La.App. 4 Cir. 4/7/04), 872 So.2d 537; *Jones v. Gatusso*, 2000-1654 (La.App. 5 Cir. 2/14/01), 782 So.2d 11; *Marcades v. Cleanerama, Inc.*, 2002-0357 (La.App. 4

Cir. 9/25/02), 831 So.2d 288; and Smith v. French Market Corp., 2003-1412 (La.App. 4 Cir. 10/6/04), 886 So.2d 527.

In the instant case, Touro Infirmary shifted any duty (absent notice) it had to maintain the premises to Dr. Barnes through the lease agreement. There is also no indication that Touro had any notice of the alleged defect in the premises before Ms. Tate's alleged accident. Therefore, no genuine issue of material fact exists and Touro is entitled to judgment as matter of law.

CONCLUSION

For the above and foregoing reasons, we find that the trial court properly granted summary judgment in favor of Touro Infirmary (and Louisiana Children's Medical Center) and against Lois J. Tate. Accordingly, we affirm this judgment.

AFFIRMED