

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

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Jul 26 2021

2020-CP-26-04430

SC Court of Appeals

Priscilla Peterkin,

Plaintiff,

v.

Bummz Beach, LLC, City of Myrtle Beach, and Bummz on the Beach, Inc., Individually and d/b/a Bummz on the Beach Café,

Defendants.

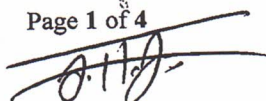
ORDER GRANTING MOTION FOR SUMMARY JUDGMENT FOR BUMMZ ON THE BEACH, INC., INDIVIDUALLY AND D/B/A BUMMZ ON THE BEACH CAFÉ

This matter came before the Court upon the motion for summary judgment filed March 23, 2021 by Defendant Bummz on the Beach, Inc., Individually and d/b/a Bummz on the Beach Café (“Defendant”). The Court heard the Motion on June 8, 2021. Plaintiff Priscilla Peterkin (“Plaintiff”) and Defendant were represented by counsel. Upon careful consideration of the arguments and submissions from counsel for Plaintiff and Defendant, a review of the pleadings, and applicable law, the Court rules as follows:

FACTUAL AND PROCEDURAL HISTORY

This is a trip and fall case. Plaintiff alleges she fell on or about November 24, 2018, while traversing a sidewalk in Myrtle Beach. As a result of the fall and alleged subsequent injuries, Plaintiff asserted causes of action in her Amended Complaint which are styled, “Duty Owed to Licensee,” a general negligence cause of action, and a tort liability cause of action specific to the City of Myrtle Beach.

As to the City of Myrtle Beach, the record before the Court shows that the City has admitted in its responses to Requests for Admission that it maintains the sidewalks that are within the right-of-way of North Ocean Boulevard where Plaintiff fell. Defendant leases the restaurant adjacent to



the sidewalk where Plaintiff fell. The record is further illustrative of the fact that Plaintiff was not a customer nor a patron of Defendant, did not intend to be a customer, and there is no evidence in the record showing she intended to do business with Defendant in any capacity whatsoever. Rather, this incident occurred in the late evening hours when Defendant's restaurant was closed.

LEGAL STANDARD

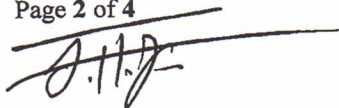
Rule 56(c), SCRPC provides for judgment as a matter of law where "there is no genuine issue as to any material fact." The Supreme Court of the United States has stated that the purpose of summary judgment is to dispose of factually unsupported claims. *Celotex v. Catrett*, 477 U.S. 317, 322 (1986). Additionally, "[s]ummary judgment is appropriate in those cases in which plain, palpable[,] and indisputable facts exist on which reasonable minds cannot differ." *Thompkins v. Festival Ctr. Group I*, 306 S.C. 193, 194, 410 S.E.2d 593, 593-94 (S.C. App. 1991).

As to affidavits procured and submitted at the summary judgment stage, "A trial court may exclude an affidavit when it was submitted 'to contradict that party's own prior sworn statement' in 'an attempt to create a sham issue of material fact.'" *McMaster v. Dewitt*, 411 S.C. 138, 149, 767 S.E.2d 451, 456 (Ct. App. 2014) (quoting *Cothran v. Brown*, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004)). In *Cothran*, the South Carolina Supreme Court laid out a six-factor test to help courts distinguish between a sham affidavit and a mere correcting or clarifying affidavit:

(1) whether an explanation is offered for the statements that contradict prior sworn statements; (2) the importance to the litigation of the fact about which there is a contradiction; (3) whether the non-movant had access to this fact prior to the previous sworn testimony; (4) the frequency and degree of variation between the statements in the previous sworn testimony and statements made in the later affidavit concerning this fact; (5) whether the previous sworn testimony and statements indicate the witness was confused at the time; and (6) when, in relation to summary judgment, the second affidavit is submitted.

The Court has considered each of these factors as set forth below.

DISCUSSION

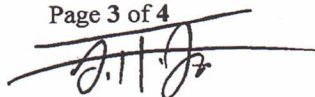


“To recover damages for injuries caused by a dangerous or defective condition on a storekeeper’s premises, the plaintiff must show either (1) that the injury was caused by a specific act of the respondent which created the dangerous condition; or (2) that the respondent had actual or constructive knowledge of the dangerous condition and failed to remedy it.” *Garvin v. Bi-Lo, Inc.*, 343 S.C. 625, 628, 541 S.E.2d 831, 832 (2001).

Here, Plaintiff alleges she fell on a City sidewalk adjoining property leased by the Defendant. She was not a customer of the Defendant at the time of the alleged injury. For purposes of this order, the Court will view the evidence and all inferences in the light most favorable to the Plaintiff and will assume, without deciding, that the Defendant owed some duty to the Plaintiff. Even so, there is no evidence in the record of what “specific act . . . created the dangerous condition” or that Defendant “had actual or constructive knowledge of the dangerous condition and failed to remedy it.” *Id.* Rather, Plaintiff has been unable to articulate what caused her to fall, there has been no evidence set forth by an expert to opine as to any specific condition, and no testimony has set out a code or standard that was not followed. In addition, there is no evidence that the Defendant was on notice of any allegedly dangerous condition.

Rather, Plaintiff has argued at summary judgment that a palm tree bush on the premises leased by Defendant overhung the sidewalk causing Plaintiff to fall. Defendant’s owner does not dispute the palm tree bush is on lands he leases, that it overhangs the sidewalk, and that he has a duty to maintain as much. Nonetheless, the Plaintiff was clearly asked and unambiguously answered the following questions as to that very palm tree bush in her deposition and under oath said:

Q: All right. Just one little quick follow-up. I’ll throw this picture up here. All right. This is back to that picture we were looking at earlier. It’s marked as Plaintiff’s Exhibit Four, but I’ll – I think it’s Number 1 for our transcript purposes.



Do you see on the right-hand side a palm bush or some other shrubbery. Do you see that on the right?

A: Uh-huh.

Q: Did that cause you to fall?

A: I can't say that it did.

Q: Just so I understand that, is that a no it did not cause –

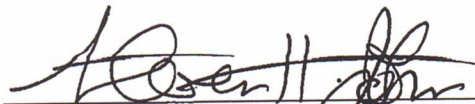
A: No.

Notwithstanding this clear testimony, mere days before the hearing on the motion for summary judgment, Plaintiff filed an affidavit, stating, "Since it was both dark, and because a Bummz palm tree bush was hanging over the raised concrete I couldn't see the danger and I tripped."

The Court has examined the sworn deposition testimony and the filled affidavit of the Plaintiff in conjunction with the six (6) *Cothran* factors. There has been no explanation for the direct contradiction between the sworn deposition testimony and the affidavit submitted in response to the Defendant's motion for summary judgment mere days before the hearing. While the facts set forth are important, the plaintiff had access to these facts before her deposition. Further, no confusion is alleged by the Plaintiff. The Court therefore gives the affidavit no credence and hereby rules that the affidavit is excluded as a sham. As a result, the Plaintiff has not established that there is any genuine issue of material fact for trial. Thereby, the Court grants Defendant's Motion for Summary Judgment as to all claims brought against it by the Plaintiff.

IT IS SO ORDERED.

6/18/, 2021
Conway, South Carolina


The Honorable Steven H. John
Resident Judge, Fifteenth Judicial Circuit