Affirmed and Opinion filed February 7, 2002.

In The

Fourteenth Court of Appeals

NO. 14-00-01336-CV

DON G. POE, Appellant

V.

NESSA'S MEXICAN RESTAURANT INC., INDIVIDUALLY and d/b/a NINFA'S MEXICAN RESTAURANT, Appellee

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On Appeal from the 151st District Court
Harris County, Texas
Trial Court Cause No. 99-45458

O P I N I O N

After a dinner meeting on September 8, 1997 at a Ninfa's Mexican Restaurant in Houston, Texas, appellant, Don G. Poe, allegedly slipped on grease around a sewer drain in the parking lot. He filed this premises liability action almost two years later in August of 1999, opting to limit damages and discovery by designating the action as a Level 1 case. *See* TEX. R. CIV. P. 190.2 . The trial court issued a scheduling order providing a deadline for summary judgment motions of September 5, 2000, and setting the case for trial on November 6, 2000. Appellant, Don G. Poe, appeals from the granting of the summary

judgment in favor of appellee, Ninfa's Mexican Restaurant. We affirm.

Appellee filed a motion for summary judgment on April 25, 2000, asserting it had no actual or constructive knowledge of the allegedly dangerous condition prior to the incident. Although he did not move to continue the summary judgment hearing, Poe objected that there had not been an adequate time for discovery. *See* TEX. R. CIV. P. 166a(i). At the hearing on May 22, 2000, the trial judge ordered Ninfa's to send Poe the names and addresses of employees on duty that evening, and reset the hearing to July 24, 2000 to give appellant 60 days to depose them.

On May 23, 2000, Ninfa's sent Poe's attorney a list of current employees who had been on duty, and on June 11, 2000, followed up by faxing a list of former employees with their last known addresses. Apparently, no depositions were taken of any of the employees.

The trial court heard the summary judgment on July 24, 2000, and granted it the next day. Thirty days later, Poe filed a motion for reconsideration and for a new trial, attaching an affidavit by a former Ninfa's employee who stated it was common practice to wash down greasy kitchen mats and sweep the oily material out the restaurant's back door toward the parking lot sewer drain. The ex-employee further stated that the restaurant's managers were aware of the practice but did nothing to stop it. The trial court denied both motions. Poe appeals, challenging the orders granting the summary judgment and denying a new trial.

The Motion for Summary Judgment

We review a no-evidence summary judgment under the same legal sufficiency standard as a directed verdict, viewing all the evidence in the light most favorable to the nonmovant. *Specialty Retailers, Inc. v. Fuqua*, 29 S.W.3d 140, 146 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). A no-evidence summary judgment is properly granted if the nonmovant fails to bring forth more than a scintilla of probative evidence as to an essential

element of his case. TEX. R. CIV. P. 166a(i).[1]

In a slip and fall case, the element of "knowledge" can be established by showing (1) the defendant put the foreign substance on the floor or area; (2) the defendant knew that it was on the floor and negligently failed to remove it; or (3) the foreign substance was on the floor so long it should have been discovered in the exercise of ordinary care. *Keetch v. Kroger Co.*, 845 S.W.2d 262, 265 (Tex. 1992). Although circumstantial evidence may prove constructive knowledge, that evidence must make it more likely than not that the dangerous condition existed long enough to give the owner a reasonable opportunity to discover it. *Wal-Mart Stores, Inc. v. Gonzalez*, 968 S.W.2d 934, 936 (Tex. 1998). Proof that the hazard *possibly* existed long enough for the owner to notice it is not enough. *Id*. at 937-38.

In response to Ninfa's motion, Poe filed photographs of the area where he fell and affidavits establishing the conditions in the parking lot as of a few days after his injury. There is no evidence establishing the conditions *as of the time of his accident.* Conditions after the incident are no evidence of conditions as they existed earlier. Thus, Poe failed to present evidence that raised a genuine issue of material fact as to Ninfa's actual or constructive knowledge of the alleged premise defect at the time of the incident. The no-evidence summary judgment was properly granted.

The Motion for New Trial

Poe also complains the trial court should have granted a new trial to consider the former employee's affidavit he filed thirty days after the summary judgment was granted. Whether a motion for new trial should be granted because of newly-discovered evidence is

[1] Ninfa's also moved for a traditional motion for summary judgment. Although the court's order does not state the grounds, the court's docket sheet indicates it reset only the no-evidence motion. We agree with Poe that a traditional summary judgment would have been improper, because Ninfa's evidence established only that the manager on duty had no knowledge of the condition alleged. But because of the no-evidence motion, the burden shifted to Poe to show some employee who did.

a matter addressed to the sound discretion of the trial court, and the trial court's action will not be disturbed on appeal absent an abuse of such discretion. *Jackson v. Van Winkle*, 660 S.W.2d 807, 809 (Tex.1983). A party seeking a new trial on the ground of newly-discovered evidence must show that the evidence has come to light after the judgment, that the delay in discovering it was not due to lack of diligence, that the evidence is not cumulative, and that it is so material that it would probably produce a different result. *Id*.

Ninfa's contends that Poe failed to show due diligence. We agree. Poe's motion did not include any affidavit establishing due diligence in attempting to locate witnesses. Although Poe asserts in his motion that he "was able to locate" the former employee after the summary judgment hearing, it is silent as to why he was unable to do so during the previous year the case had been on file, or during the 60-day continuance the trial court allowed for this purpose. *Cf. Lynd v. Wesley*, 705 S.W.2d 759, 762 (Tex. App.—Houston [14th Dist.] 1986, no writ) (affirming refusal to grant new trial when record did not reflect attempts by appellant to effect pre-trial discovery). We cannot say the trial court abused its discretion in denying the motion for new trial for lack of due diligence on the part of Poe. *Jackson v. Van Winkle*, 660 S.W.2d at 810.

We overrule appellant's points of error, and affirm the summary judgment.

/s/ Scott Brister
Chief Justice

Judgment rendered and Opinion filed February 7, 2002.
Panel consists of Chief Justice Brister and Justices Fowler and Seymore.
Do Not Publish — TEX. R. APP. P. 47.3(b).