Affirmed and Opinion filed November 16, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00713-CV

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THEODORE S. SMYLIE, Appellant

V.

FIRST INTERSTATE BANK, TEXAS, AND METRO NATIONAL CORPORATION, Appellees

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On Appeal from the County Civil Court at Law No. 2
Harris County, Texas
Trial Court Cause No. 686,621

O P I N I O N

This is an appeal from the trial court's grant of summary judgment in a premises liability case. Appellant, Theodore S. Smylie, raises two issues for our review. First, whether the trial court erred in granting summary judgment in favor of appellee, First Interstate Bank, Texas ("the Bank"), because there existed some evidence of a condition that posed an unreasonable risk of harm that a premises owner of ordinary prudence would not have allowed to remain. Second, whether the trial court erred in granting summary judgment in favor of appellee, Metro National Corporation ("Metro"), because the statute of limitations was tolled when Metro was brought into the lawsuit as a third-party defendant. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On October 11, 1996, Smylie, a customer of the Bank, was injured when he tripped and fell on the stairs outside of the Bank. Smylie claimed he fell when the heel of his shoe became caught in a gap in the pavement. On September 16, 1997, Smylie filed suit against the Bank as the occupier of the premises. On September 8, 1998, the Bank filed a third- party action against Metro, the owner of the premises, claiming Metro was liable for Smylie's injuries. Smylie amended his petition on March 10, 1999, to include Metro as a defendant.

The Bank filed a no-evidence motion for summary judgment asserting there was no evidence that (1) a condition of the premises posed an unreasonable risk of harm, or (2) the Bank failed to use ordinary care to reduce or eliminate an unreasonable risk of harm. Metro filed a motion for summary judgment contending Smylie's claim was barred by the statute of limitations. The trial court granted both motions. This appeal followed.

THE BANK'S NO-EVIDENCE SUMMARY JUDGMENT

In a "no evidence" motion for summary judgment the movant must specify the elements of the nonmovant's cause of action to which there is no evidence. *See* TEX. R. CIV. P. 166a(i). The burden then shifts to the nonmovant to produce more than a scintilla of evidence as to the challenged elements. *See id*. If the nonmovant is unable to meet this burden, the trial court must grant the motion. *See id*.

When reviewing the grant of a "no evidence" summary judgment, we review the evidence in the light most favorable to the nonmovant, disregarding all contrary evidence and inferences. *See Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997), *cert. denied*, 523 U.S. 1119 (1998); *Lampasas v. Spring Center, Inc.*, 988 S.W.2d 428, 432 (Tex. App.—Houston [14th Dist.] 1999, no pet.). We apply the same legal sufficiency standard applied in reviewing a directed verdict. *See Moore v. K Mart Corp.*, 981 S.W.2d 266, 269 (Tex. App.—San Antonio 1998, pet. denied). "A no evidence point will be sustained when (a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla, or (d) the evidence

conclusively establishes the opposite of the vital fact." *Havner*, 953 S.W.2d at 711.

A trial court cannot grant a "no evidence" summary judgment if the nonmovant brings forth more than a scintilla of proof to raise a genuine issue of material fact. *See* TEX. R. CIV. P. 166a(i); *Moore*, 981 S.W.2d at 26. Proof that is so weak that it only creates a mere surmise or suspicion of a fact is less than a scintilla. *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983). On the other hand, when the proof "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions," the nonmovant has provided more than a scintilla of proof and survives summary judgment. *Havner*, 953 S.W.2d at 711.

When the injured party is an invitee, the elements of a premises liability cause of action are: (1) the owner /operator had actual or constructive knowledge of some condition on the premises; (2) the condition posed an unreasonable risk of harm; (3) the owner/operator did not exercise reasonable care to reduce or eliminate the risk; and (4) the owner/operator's failure to use such care proximately caused the plaintiff's injuries. *See Keetch v. Kroger Co.*, 845 S.W.2d 262, 264 (Tex. 1992); *Corbin v. Safeway Stores, Inc.*, 648 S.W.2d 292, 296 (Tex. 1983).

As noted above, the Bank's motion alleged there was no evidence that the condition posed an unreasonable risk of harm or that the owner/operator did not exercise reasonable care to reduce or eliminate the risk. Smylie responded with evidence in the form of excerpts from his deposition and from the deposition of a bank representative. In Smylie's deposition excerpts, the pertinent testimony revealed that (1) Smylie believed he fell as a result of his heel becoming caught on rocks that were "sticking out" and (2) a Bank employee assured appellant that his injuries would be taken care of. The pertinent excerpts from the bank representative's deposition revealed that (1) the bank was responsible for normal maintenance, while Metro was responsible for major repairs called to their attention by the Bank, and (2) it appeared that the bank employee had authority to assure appellant that his injuries would be taken care of. These excerpts are the only summary judgment evidence Smylie musters to support the challenged

elements.[1]

A condition presents an unreasonable risk of harm if there is such a probability of a harmful event occurring that a reasonably prudent person would have foreseen it or some similar event as likely to happen. *See Wyatt v. Furr's Supermarkets, Inc.*, 908 S.W.2d 266, 269 (Tex. App.—El Paso 1995, writ denied) (citing *Seideneck v. Cal Bayreuther Assoc.*, 451 S.W.2d 752, 754 (Tex. 1970)). Smylie's summary judgment evidence shows only that he fell on the Bank's premises and that the Bank was responsible for the maintenance of the premises. The mere happening of an accident is not, of itself, evidence that there was an unreasonable risk of such an occurrence. *See Dabney v. Wexler-McCoy, Inc.*, 953 S.W.2d 533, 537 (Tex. App.—Texarkana 1997, pet. denied) (citing *Thoreson v. Thompson*, 431 S.W.2d 341, 344 (Tex. 1968)). Nor is a premises owner or occupier strictly liable for conditions that result in injury. *See CMH Homes, Inc. v. Daenen*, 15 S.W.3d 97, 101 (Tex. 2000). Here, Smylie presented no evidence that the condition of the rocks adjacent to the walkway was inherently dangerous or had become dangerous through deterioration after prolonged use. *See id.* at 102. Smylie's testimony that his fall was due to rocks sticking up is some evidence that a condition existed on the premises. However, whether that condition posed an unreasonable risk of harm is an issue not supported by the summary judgment evidence. Smylie did not produce evidence describing the attributes of the condition that rendered it an unreasonable risk of harm. For example, there is no evidence indicating (1) how big the rocks were or whether they were visible, (2) whether the condition had caused other individuals to fall, (3) whether the surface had deteriorated, or (4) whether the surface was not in compliance with building or other applicable standards.

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[1] In his brief Smylie asks this court to consider portions of his deposition testimony, including photographs, which were contained in the trial court record, but which were not included as part of Smylie's response to the no-evidence summary judgment. Rule 166a(i) states "[t]he court must grant the motion [for summary judgment] unless the respondent *produces evidence* raising a genuine issue of material fact." Lampasas, 988 S.W.2d at 433 (emphasis added). Thus, on appeal, we are precluded from considering evidence in the trial record that was not pointed out or produced in response to the motion for summary judgment. *See Saenz v. Southern Union Gas Co.*, 999 S.W.2d 490, 494 (Tex. App.—El Paso 1996, writ denied) (holding that a nonmovant does not meet the requirements of Rule166a(i) by the mere existence in the court's file of a response to an earlier summary judgment motion).

Even when viewed in a light most favorable to appellant, we find he has not produced any evidence to support the element that the condition complained of posed an unreasonable risk of harm. There is no evidence that the condition presented a probability of harm that a reasonable person would have foreseen. We therefore hold that Smylie has not met his burden of bringing forward more than a scintilla of proof as to the first challenged element.[2]

METRO'S SUMMARY JUDGMENT

The standard for reviewing the granting of summary judgment under Texas Rule of Civil Procedure 166a(c) is well established. *See Nixon v. Mr. Property Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985). Summary judgment is proper only when the movant meets his burden of establishing there are no genuine issues of material fact and proves he is entitled to judgment as a matter of law. *See* TEX. R. CIV. P. 166a(c); *Nixon*, 690 S.W.2d at 548. In deciding whether there exists a disputed fact issue precluding summary judgment, we must accept all proper summary judgment evidence favorable to the nonmovant as true, indulge every reasonable inference in favor of the nonmovant, and resolve all doubts in its favor. *See Nixon*, 690 S.W.2d at 548–49. To be entitled to summary judgment, a defendant must bring forth evidence that either (1) conclusively negates at least one essential element of each of the plaintiff's causes of action, or (2) conclusively establishes each element of an affirmative defense to each claim. *See American Tobacco Co., Inc. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997). Because Metro moved for summary judgment on limitations, an affirmative defense, Metro was required to conclusively establish that the statute of limitations bars Smylie's claim. *See Rowntree v. Hunsucker*, 833 S.W.2d 103, 104 (Tex. 1992).

Smylie was required to bring suit for his personal injury not later than two years after the day his injury occurred. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (Vernon Supp. 2000). The record reveals that the injury in question was incurred on October 11, 1996. Smylie did not plead a cause of action against Metro until March 10, 1999—more than two years after the injury occurred.

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[2] Having found that Smylie produced no evidence as to the first challenged element, we need not address the second element.

Smylie argues that this is an unusual situation in which the statute of limitations should be tolled in equity. He claims that Metro was cognizant of the facts and was not misled or placed at a disadvantage in obtaining relevant evidence to defend the suit.[3] He bases this argument on the fact that Metro was brought into the case as a third-party defendant before the running of limitations and, therefore, was aware of appellant's claims.

The Waco Court of Appeals was faced with this very issue in *J.G. Boyd's Good Housekeeping Shops, Inc. v. General Securities Service, Inc.*, 483 S.W.2d 826 (Tex. App.—Waco 1972, no writ). J.G. Boyd's sued General Securities. *See id*. at 827. Within the limitations period, General Securities impleaded Lectro Systems, Inc., as a third party defendant. *See id*. More than a year after limitations had run, J.G. Boyd's amended its petition to name Lectro as a defendant. *See id*. The trial court granted Lectro's motion to dismiss, relying on the statute of limitations. *See id*. J.G. Boyd's then appealed, arguing that Lectro was in the case for all purposes since it was brought into the case before the running of limitations. *See id*. at 828. Affirming the trial court's dismissal of Lectro, the Waco Court held that the filing of the third- party complaint did not toll the running of the statute of limitations on a cause of action between the plaintiff and the third-party defendant. *See id*.

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[3] In support of his argument, Smylie relies primarily on two cases involving Enserch Corporation. In *Enserch Corp. v. Parker*, 794 S.W.2d 2 (Tex. 1990), a wrongful death plaintiff sued Lone Star Gas Company within the two year limitations period. *See id*. at 4. After the running of limitations, Lone Star asserted a defect in parties. *See id*. Plaintiff then amended its pleadings to name Enserch Corporation, d/b/a Lone Star Gas Company as a defendant. *See id*. Enserch asserted the affirmative defense of statute of limitations. *See id*. The Texas Supreme Court categorized the case as one of misidentification, which necessarily requires a business relationship exist between the two defendants. *See id*. at 5–6.

In *Palmer v. Enserch Corp.*, 728 S.W.2d 431 (Tex. App.—Austin 1987, writ ref. n.r.e.), the plaintiff sued the Enserch Corporation for damages sustained due to seismic exploration. *See id*. at 433. After the running of limitations, Enserch Corporation asserted that it was not a proper party. *See id*. Plaintiff then amended his pleadings to name Enserch Exploration, Inc. as a defendant. *See id*. Enserch Exploration then asserted the affirmative defense of limitations. *See id*. The Austin Court of Appeals stated the general rule that when the *wrong* defendant is sued, limitations will not bar suit against a proper defendant who is (1) aware of the facts, (2) not misled or placed at a disadvantage in obtaining relevant evidence for its defense. *See id*. (citing *Continental Southern Lines, v. Hilland*, 528 S.W.2d 828, 831 (Tex. 1975)).

These two Enserch cases are distinguishable from Metro's situation. The Enserch cases dealt with a plaintiff who sued the wrong defendant or misidentified the defendant. There is no evidence, nor does Smylie assert, that he sued the wrong entity.

We agree with the Waco Court in *J.G. Boyd's*, and hold that Smylie was not entitled to a tolling of the statute of limitations due to Metro's status as a third-party defendant.

A plaintiff must exercise diligence in the prosecution of his cause of action. *See Palmer*, 728 S.W.2d at 434. He must plead and prove that he exercised due care to prevent the running of the statute or else he cannot overcome the properly asserted defense of limitations. *See id*. In this case, Smylie was aware of Metro's existence before the running of the statute of limitations by virtue of the Bank's third-party claim against Metro. However, Smylie did not amend his petition to name Metro as a defendant until after limitations had run. Thus, Smylie's cause of action against Metro was barred by limitations as a matter of law. Accordingly, the trial court properly granted Metro's motion for summary judgment.

The judgment of the trial court is affirmed.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed November 16, 2000.

Panel consists of Justices Yates, Fowler and Edelman.

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