

[Cite as *Fernandez v. Outback Steakhouse*, 2009-Ohio-5384.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92912

CARMEN FERNANDEZ

PLAINTIFF-APPELLANT

vs.

OUTBACK STEAKHOUSE, ET AL.

DEFENDANTS-APPELLEES

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-658237

BEFORE: Sweeney, J., Kilbane, P.J., and Stewart, J.

RELEASED: October 8, 2009

JOURNALIZED:

ATTORNEY FOR APPELLANT

Stephen S. Vanek
Friedman, Domiano & Smith Co.
55 Public Square, Suite 1055
Cleveland, Ohio 44113-1901

ATTORNEYS FOR APPELLEES

Jennifer R. Becker
Timothy T. Reid
Reid Wargo, Ltd.
2000 Illuminating Building
55 Public Square
Cleveland, Ohio 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

JAMES J. SWEENEY, J.:

{¶ 1} Plaintiff-appellant, Carmen Fernandez (“Fernandez”), appeals from the trial court’s order that granted summary judgment to defendant-appellee Outback Steakhouse (“Outback”) on her claims against it. For the reasons that follow, we affirm.

{¶ 2} Fernandez commenced this action against Outback after falling on the sidewalk that is in front of Outback’s business located in Parma, Ohio.

Outback filed its Answer and Third Party Complaint that named the city of Parma as an additional defendant. Outback averred that it did not own, and was not responsible to maintain, the sidewalk where Fernandez’s injuries had occurred.

{¶ 3} The city of Parma filed a Motion for Summary Judgment maintaining that Parmatown South Association owns the parcel where Fernandez fell. In support, the city of Parma submitted Cuyahoga County property records.

{¶ 4} Outback also moved for summary judgment maintaining that it did not own the sidewalk. In support, Outback submitted the affidavit from the city of Parma’s Engineer and Building Commissioner (the “Commissioner”) whose duties include reviewing property maps and determining who owns specific parcels of property. The Commissioner averred that Parmatown South Association owned the property where Fernandez fell.

{¶ 5} In response, Fernandez relied upon the May 2008 Notice of Violation issued by a Building Inspector for the city of Parma to OSF Real Estate L.L.C. The Notice listed a compliance date of June 12, 2008 to correct alleged defects. According to an affidavit of the managing partner of Outback, the city had incorrectly sent the Notice to Outback because Outback is “not the owner or abutting land owner of the sidewalk.” Outback only made the repairs in order to comply with the Notice. Nonetheless, Outback denied owning, maintaining, causing, or permitting defects on the sidewalk.

{¶ 6} Fernandez requested leave to file a second amended complaint to name Parmatown South Association as a new party defendant. The trial court denied this motion and Fernandez commenced a separate action against Parmatown South Association, and others; which was stayed in the trial court pursuant to the agreement of the parties and pending the outcome of this appeal.

{¶ 7} The trial court granted Outback’s motion for summary judgment and Fernandez appeals from this ruling assigning the following error for our review:

{¶ 8} “The trial court erred by granting summary judgment in favor of appellee Outback Steakhouse.”

{¶ 9} An appellate court reviews a trial court's grant of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. De novo review means that this Court uses the same

standard that the trial court should have used, and we examine the evidence to determine if, as a matter of law, no genuine issues exist for trial. *Brewer v. Cleveland City Schools* (1997), 122 Ohio App.3d 378, 701 N.E.2d 1023, citing *Dupler v. Mansfield Journal* (1980), 64 Ohio St.2d 116, 119-120, 413 N.E.2d 1187.

{¶ 10} Summary judgment is appropriate where it appears that: (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co., Inc.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46; Civ.R. 56(C)).

{¶ 11} The burden is on the movant to show that no genuine issue of material fact exists. Id. Conclusory assertions that the nonmovant has no evidence to prove its case are insufficient; the movant must specifically point to evidence contained within the pleadings, depositions, answers to interrogatories, written admissions, affidavits, etc., which affirmatively demonstrate that the nonmovant has no evidence to support his claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264, 1996-Ohio-107; Civ.R. 56(C). Unless the nonmovant then sets forth specific facts showing

there is a genuine issue of material fact for trial, summary judgment will be granted to the movant.

{¶ 12} An owner or occupier of the premises ordinarily owes its business invitees a duty of ordinary care in maintaining the premises in a reasonably safe condition and has the duty to warn its invitees of latent or hidden dangers. *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203. They “must also inspect the premises to discover possible dangerous conditions of which [the owner or occupier] does not know, and take reasonable precautions to protect the invitee from dangers which are foreseeable from the arrangement or use.” *Perry v. Eastgreen Realty Co.* (1978), 53 Ohio St.2d 51, 52.

{¶ 13} The evidence establishes that Parmatown South Association is the owner of the parcel of property where Fernandez fell. While an inspector for the city of Parma issued the Notice of Violation to OSF Real Estate L.L.C., there is no evidence that this inspector is responsible for determining who owns specific parcels of property. Conversely, the Parma city employee who is responsible for identifying parcel ownership indicated that Parmatown South Association owns the property. The Cuyahoga County property records also reflect that Parmatown South Association owns the property. As a result, Fernandez’s reliance on the Notice of Violation as creating a genuine issue of material fact as to ownership is misplaced. Outback’s compliance with the Notice of Violation does not alter the fact that they do

not own the subject parcel. Because ownership is not genuinely in dispute, Evid.R. 407 does not apply.

{¶ 14} Alternatively, Fernandez speculates that Outback may have had a contractual obligation with Parmatown South Association to maintain the sidewalk. Even assuming that is the case, that would at most give rise to an indemnification claim between the contracting parties and would not effect Fernandez's ability to pursue her claims against the property owner. Indeed, Fernandez has commenced suit against Parmatown South Association.

{¶ 15} Because Outback is not the owner or occupier of the premises where Fernandez fell, it did not owe her a duty and the trial court did not err in granting Outback's motion for summary judgment on her negligence claim against it.

Judgment affirmed.

It is ordered that appellees recover from appellant their costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, JUDGE

MARY EILEEN KILBANE, P.J., and
MELODY J. STEWART, J., CONCUR