IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

PATRICIA BROWN,	:	
	:	**C.A. No: K13C-10-011 RBY**
_____Plaintiff,	:	
	:	
v.	:	
	:	
WALGREEN CO.,	:	
	:	
Defendant.	:	

Submitted: November 18, 2014
Decided: December 9, 2014

Upon Consideration of Defendant's
Motion for Summary Judgment
GRANTED

ORDER

Patricia Brown, *Pro se.*

Stephen F. Dryden, Esquire, Dryden, LLC, New Castle, Delaware for Defendant.

Young, J.

SUMMARY

Patricia Brown ("Plaintiff") alleges negligence on the part of Walgreen Co. ("Defendant"). While visiting one of Defendant's locations in Dover, Delaware, Plaintiff allegedly suffered a slip and fall accident, after stepping on to a wet or waxed floor. After filing her Complaint, Plaintiff has refused to engage appropriately in the litigation process. Defendant has repeatedly sought discovery to determine, among other things, the existence of the wet floor, and whether this condition caused Plaintiff's injuries. Plaintiff has neglected to respond, despite this Court's Order. Defendant moves for summary judgment on the grounds that Plaintiff has failed completely to prove essential elements of her claim. Thus, Defendant's Motion for Summary Judgment is **GRANTED**.

FACTS AND PROCEDURES

On November 21, 2011, Plaintiff allegedly sustained injuries while a business invitee of Defendant's store. Plaintiff claims to have slipped and fallen on the wet or waxed floor of Defendant's establishment. Plaintiff avers that this was a dangerous condition, proximately causing her injuries.

On October 4, 2013, Plaintiff filed a Complaint with this Court, represented by Silverman, McDonald & Friedman. Plaintiff's counsel withdrew from representation on May 15, 2014. Prior to that time, and continuing on to the present, Defendant has attempted to elicit discovery from Plaintiff. The discovery process has required the intervention of this Court, following Plaintiff's failure to respond timely to Defendant's discovery requests. On September 24, 2014, this Court granted Defendant's motion for sanctions, ordering Plaintiff to respond to all of Defendant's

discovery by October 14, 2014. Included in this Order was the requirement that Plaintiff provide a medical expert report. Plaintiff never complied.

STANDARD OF REVIEW

Summary judgment is granted upon showing that there is no genuine issue of material fact, where the moving party is entitled to judgment as a matter of law.[1] The Court views the evidence in the light most favorable to the non-moving party.[2] The moving party bears the burden of showing that no material issues of fact are present, but once a motion is supported by such a showing, the burden shifts to the non-moving party to demonstrate that there is a genuine dispute as to material issues of fact.[3] In addition, where the non-moving party bears the ultimate burden of proof at trial, the moving party succeeds on her motion for summary judgment by showing a "complete failure of proof concerning an essential element" on the part of the non-movant, thereby "rendering all other facts immaterial."[4]

DISCUSSION[5]

In general, the entry of summary judgment in negligence actions is a rare

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[1] Super. Ct. Civ.R. 56(c).

[2] *Windom v. Ungerer*, 903 A.2d 276, 280 (Del. 2006).

[3] *Moore v. Sizemore*, 405 A.2d 679, 680-81 (Del. 1979).

[4] *Kanoy v. Crothall American, Inc.*, 1988 WL 15367 at *1 (Del. Super. Ct. Feb. 8, 1988) (citing *Celotex Corporation v. Catrett*, 477 U.S. 317 (1986)).

[5] As the Plaintiff has not filed a response, the Court considers only the Defendant's arguments.

occurrence.[6] This is because the movant must show "not only that there are no conflicts in the factual contentions of the parties but that, also, the only reasonable inference to be drawn from the uncontested facts are adverse to the plaintiff."[7] However, there are instances in which the plaintiff has so completely failed to prove an essential element of her case, that Superior Court Civil Rule 56© "mandates the entry of summary judgment."[8] This is especially so, after plaintiff has had adequate time to conduct discovery.[9] Such is the situation presently before the Court.

Plaintiff alleges that she sustained injuries from a slip and fall incident, while visiting Defendant's store. To succeed upon such a negligence claim, Plaintiff must prove that "there was a dangerous or defective condition on the [premises] that caused her to fall and that [Defendant], in the exercise of reasonable care, should have known about the condition and corrected it."[10] Furthermore, "negligence is never presumed from the mere fact that the [plaintiff] has suffered an injury."[11]

By its motion, Defendant appears to challenge Plaintiff's proof concerning both

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[6] *Upshur v. Bodie's Dairy Market*, 2003 WL 21999598, at *3 (Del. Super. Ct. Jan. 22, 2003).

[7] *Id.* (internal quotations omitted).

[8] *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).

[9] *Collier v. Acme Markets*, *Inc.*, 1995 WL 715862, at *2 (Del. Nov. 16, 1995) ("[n]otwithstanding the fact that [Plaintiff] had ample opportunity to take discovery, she was unable to make a sufficient showing to establish all the essential elements of her case...[Defendant] is entitled to the entry of summary judgment as a matter of law").

[10] *Id.*, at *1.

[11] *Id.* (internal quotations omitted).

a defective condition and causation. Highlighting the frequent instances throughout the discovery process, in which Plaintiff has failed to respond to requests for evidence of the fall/injury, Defendant contends that there is a complete failure of proof, with regard to an essential element. In particular, Defendant points to Plaintiff's inability to provide expert medical testimony "interrelating any claimed injuries...to the incident claimed to have occurred."[12] In so arguing, Defendant cites *Burkhart v. Davies*, in which the Delaware Supreme Court held that the "production of expert medical testimony is an essential element of plaintiff's medical malpractice case..."[13] The Court notes, as an initial matter, that *Burkhart* was a medical malpractice action, involving18 *Del. C.* § 6853, which *mandates* medical testimony to support a claim. Plaintiff's case, by contrast, is based on a theory of premises liability. However, the Court does take Defendant's point, by *analogy*, that without expert testimony regarding Plaintiff's injuries, the causal connection between the "wrongful conduct and the alleged injury"[14] is plainly lacking from Plaintiff's case. As the relationship between Defendant's alleged negligence and Plaintiff's slip and fall is an essential element of the claim, Plaintiff's action is missing necessary proof.

Indeed, Delaware courts faced with similar summary judgment motions, have ruled in movants' favor, where essential elements of premises liability suits were

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[12] Defendant's Summary Judgment Motion at ¶ 4.

[13] *Burkhart*, 602 A.2d at 59.

[14] *Id.*

missing.[15] The Delaware Supreme Court in *Collier v. Acme Markets, Inc.*, for example, found that where "there is no evidence in this record from which a jury could decide what caused [plaintiff] to fall...there is no showing of proximate cause."[16] As in *Collier*, Plaintiff has, despite claiming that she slipped on a "waxed/wet floor,"[17]and despite efforts by Defendant to elicit such evidence, failed to provide proof of a dangerous condition causing her fall. The *Collier* Plaintiff was, similarly, able to point only to feeling something "as slippery as ice."[18] As the Supreme Court has articulated, however, "negligence is never presumed from the mere fact that [defendant] has suffered an injury."[19] In the instant matter, without the testimony of a medical expert, Plaintiff has failed to establish even the *existence* of an injury.

The Plaintiff has had ample time to conduct discovery, especially in light of the extensions provided her by this Court.[20] Making merely the allegations set forth in her

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[15] *See e.g.*, *Collier*, 1995 WL 715862 at *1; *Price v. Acme Markets, Inc.*, 2010 WL 4062007, at *1 (Del. Super. Ct. Sept. 29, 2010); *Austin ex. Rel. Austin v. Happy Harry's Inc.,* 2006 WL 3844076, at *1 (Del. Super. Ct. Nov. 27, 2006).

[16] *Collier*, 1995 WL 715862 at *1.

[17] Plaintiff's Complaint at ¶ 3.

[18] *Id.*

[19] *Id.*

[20] The Court notes that by Order dated September 24, 2014, Plaintiff had until October 14, 2014 to fully respond to Defendant's discovery requests. It is the Court's understanding that Plaintiff never complied with this Order.

complaint, Plaintiff has not provided any proof to support the elements of her claim.[21] Plaintiff has completely failed to support essential elements of her claim. Defendant is, therefore, entitled to an entry of summary judgment in its favor. Defendant's motion is **GRANTED**. __

CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment is **GRANTED**.

IT IS SO ORDERED.

/s/ Robert B. Young
J.

RBY/lmc
oc: Prothonotary
cc: Counsel
Patricia Brown, *Pro se*
Opinion Distribution
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[21] *See e.g.*, *Collier*, 1995 WL 715862 at *1 (plaintiff testified to feeling something, "as slippery as ice"); *Price*, 2010 WL 4062007, at *1 (plaintiff testified to slipping she "thinks on ice"); *Happy Harry's Inc.,* 2006 WL 3844076, at *1(evidence included testimony by store employee and a memo written by another employee as to cause of plaintiff's accident).