IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

DONNA E. PRICE,	)	
	)	
Plaintiff,	)	C.A. No. 09C-10-250 MMJ
	)	
v.	)	
	)	
ACME MARKETS, INC.,	)	
	)	
Defendant.	)	

OPINION

On Defendant Acme Markets, Inc.'s Motion for Summary Judgment GRANTED

Submitted: September 9, 2010
Decided: September 29, 2010

Raymond D. Armstrong, Esquire, Wilmington, Delaware, Attorney for Plaintiff

Stephen F. Dryden, Esquire, Robinson, Grayson, Dryden & Ward, Wilmington, Delaware, Attorneys for Defendant Acme Markets, Inc.

JOHNSTON, J.

FACTUAL AND PROCEDURAL CONTEXT

In November 2007, plaintiff Donna Price slipped and fell on the exterior sidewalk of an Acme Market located in Middletown, Delaware, and sustained injuries. On October 28, 2009, plaintiff brought a negligence suit against Acme claiming that it caused her injuries by allowing a dangerous condition on its premises. On September 2, 2010, defendant moved for summary judgment.

On June 16, 2010, defendant's counsel deposed plaintiff. Plaintiff testified:

> Q. What caused your fall?
> A. I'm not sure.
> Q. O.K. Can you describe what was on the ground, if anything, that you believe may have caused your fall?
> A. I didn't see anything on the ground.
> Q. O.K. So you walked out of the store, you slipped, you fell, and you don't know what caused your fall. Would that be fair?
> A. Yes.[1]
>
> * * *
>
> Q. I am looking at a November 12, 2007 Middletown Internal Medicine Associates record signed by Dr. Renzulli and it references, fell one week ago in Acme. References your complaints and it says, I'll quote this, "slipped in parking lot at about 6:00 a.m.—thinks on ice." Do you know where Dr. Renzulli may have gotten the reference to "thinks on ice"?

[1] Pl.'s Dep. 4:6-22, Jun. 16, 2010.

A. I may have told her that, because that was the first morning of frost, that we had frost. I heard it on the news and there was frost out on the grass when I went down to get my car that morning.
Q. But, again, that was just speculation on your part that you may have passed on to the doctor. Is that right?
A. Yes. [2]

Defendant supported its summary judgment motion with sworn deposition testimony and the affidavit of an Acme employee. The employee stated under oath that he assisted plaintiff after her fall, but did not see "any sort of substance debris or condition on the ground which may have contributed to Ms. Price's fall."[3] Plaintiff did not support her response with any affidavit, or other evidence from any other source as to the existence of a dangerous condition.

PARTIES' CONTENTIONS

Defendant argues that summary judgment is appropriate because plaintiff has failed to identify the dangerous condition that caused her fall. Therefore, defendant asserts, plaintiff has not shown that defendant's negligence was the proximate cause of her injuries as a matter of law. Defendant contends that *Collier v. Acme Markets, Inc.*[4] controls. In *Collier*, the Delaware Supreme Court affirmed summary judgment against the

[2] *Id*. at 25:13-24; 26:1-5.
[3] Tiller Aff. ¶ 5.
[4] 670 A.2d 1337 (Del. 1995).

plaintiff because she could not "establish that there was a dangerous or defective condition on the sidewalk that caused her to fall . . .."[5]

Plaintiff concedes that she is unable to identify the dangerous condition on which she allegedly slipped. However, plaintiff argues that if she had been given an opportunity at her deposition—and she contends that she was not due to defendant's counsel's objections—she would have stated that she felt a "slipping sensation." Plaintiff maintains that evidence of a slipping sensation is sufficient to withstand summary judgment pursuant to *Rowan v. Toys "R' Us, Inc.*[6]

ANALYSIS

Summary Judgment Standard

Summary judgment is granted only if the moving party establishes that there are no genuine issues of material fact in dispute and judgment may be granted as a matter of law.[7] All facts are viewed in a light most favorable to the non-moving party.[8] Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if there is a need to clarify the application of law to the specific circumstances.[9] When the facts permit a reasonable person to draw only one inference, the question becomes

[5] *Id*. at 1337.
[6] 2004 WL 1543238, *2 (Del. Super.).
[7] Super. Ct. Civ. R. 56(c).
[8] *Hammond v. Colt Indus. Operating Corp.*, 565 A.2d 558, 560 (Del. Super. 1989).
[9] Super. Ct. Civ. R. 56(c).

one for decision as a matter of law.[10] If the non-moving party bears the burden of proof at trial, yet "fails to make a showing sufficient to establish the existence of an element essential to that party's case," then summary judgment may be granted against that party.[11]

Superior Court Civil Rule 56(e)

To prevail on her claim, plaintiff "must establish that there was a dangerous or defective condition on the sidewalk that caused her to fall and that [defendant], in the exercise of reasonable care, should have known about the condition and corrected it."[12] To establish this element, plaintiff must proffer specific facts, rather than merely set forth allegations.[13] Rule 56(e) provides in part:

> When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.[14]

Plaintiff, who bears the burden at trial, has failed to set forth specific facts to establish an essential element to her negligence claim—that there

[10] *Wootten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).
[11] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).
[12] *Collier*, 670 A.2d at 1337 (citing *Howard v. Food Fair Stores*, 201 A.2d 638, 640 (Del. 1964)).
[13] Super. Ct. Civ. R. 56(e).
[14] *Id*.

was a dangerous condition on the sidewalk. At her deposition, plaintiff admitted that she could not identify what it was that she slipped on. In response to defendant's motion for summary judgment, plaintiff alleged that she planned to assert that she felt a slipping sensation, but was denied the opportunity. Plaintiff has failed to file an affidavit in support of this allegation. Pursuant to Rule 56(e), plaintiff cannot rely on mere allegations to establish the existence of a dangerous condition. The Court finds that plaintiff has not shown that defendant breached its duty of care by failing to make the condition safe. Plaintiff has failed to establish a *prima facie* case that a dangerous or unsafe condition existed and caused her fall and resulting injuries. Therefore, summary judgment must be granted against plaintiff.

Distinguishing **Collier** ***and*** **Rowan**

In *Collier*, the plaintiff slipped on something that she described as being "as slippery as ice . . .."[15] However, the plaintiff did not recall what she slipped on, and conceded that she could not identify the dangerous condition that she claimed was on the defendant's premises.[16] The Delaware Supreme Court affirmed summary judgment for the defendant because by failing to identify a dangerous condition, the plaintiff did not

[15] *Collier*, 670 A.2d at 1337.
[16] *Id*.

establish proximate cause.[17] Further, the plaintiff failed to prove that the defendant breached its duty of care because, as there was no evidence regarding the existence of a dangerous condition, the plaintiff could not show that defendant was on notice of the condition and failed to remedy it.[18]

In *Rowan*, the plaintiff entered a store on a rainy day.[19] The areas immediately preceding the entrance to the store were wet.[20] Normally, when it rained, the store manager placed caution signs in and around the entrance, and placed a mat on the tile floor just inside the entrance.[21] However, that day, those precautions were not in place.[22] The plaintiff entered the store and slipped and fell, sustaining injuries.[23] Neither the plaintiff and her companion nor several store employees saw a dangerous condition on the floor before or after the plaintiff slipped and fell.[24] However, the plaintiff claimed that she felt a slipping sensation.[25] Despite the fact that the plaintiff could not establish the existence of a dangerous condition, the Delaware Superior Court denied the defendant's motion for summary judgment.[26] The

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[17] *Id*.
[18] *Id*.
[19] *Rowan*, 2004 WL 1543238, *1.
[20] *Id*.
[21] *Id*. at *2.
[22] *Id*.
[23] *Id*. at *1.
[24] *Id*.
[25] *Id*.
[26] *Id*. at *2-3.

Court held that the rainfall, the store manager's failure to place caution signs or a mat on the tile floor, and the plaintiff's slipping sensation support the inferences that the defendant was aware of the potential danger and that the plaintiff's shoes were wet, which may have caused her fall.[27] By setting forth facts that led to those inferences, the plaintiff satisfied her burden to establish the essential elements to her claim. The Court explicitly distinguished *Rowan* from *Collier* by noting that *Collier* did not involve a plaintiff that had slipped after entering a store during a period of rainfall.[28]

Unlike *Rowan*, plaintiff in this case has not produced evidence, as required by Rule 56(e), that would support the inferences that defendant was generally aware of potential danger on its sidewalk or that dangerous conditions existed on the day plaintiff slipped and fell. Plaintiff has not established that defendant normally took precautions to warn and protect pedestrians on its exterior sidewalk. Plaintiff has not established that conditions were generally hazardous, perhaps due to rain or snow. Even if plaintiff had properly opposed the summary judgment motion with sworn testimony that she felt a slipping sensation, such evidence alone is not sufficient to establish the essential element that a dangerous condition existed on defendant's sidewalk.

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[27] *Id*. at *2.
[28] *Id*.

CONCLUSION

Plaintiff has failed to establish the essential element of her claim that a dangerous condition existed on defendant's sidewalk. Plaintiff did not present evidence (as opposed to allegations unsupported by sworn testimony), as required by Superior Court Civil Rule 56(e), in opposition to sworn testimony supporting defendant's motion for summary judgment. Plaintiff has failed to show that defendant breached its duty of care and that its negligence was the proximate cause of her injuries.

THEREFORE, Defendant's Motion for Summary Judgment is hereby **GRANTED**.

IT IS SO ORDERED.

/s/ *Mary M. Johnston*
The Honorable Mary M. Johnston