Superior Court
of the
State of Delaware

Jan R. Jurden
Judge

New Castle County Courthouse
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Date Decided: October 29, 2010

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RE: Nadine Britt v. V.H.S. Realty, Inc. and Cumberland Farms Inc., C.A. No. 07C-10-296-JRJ
***Upon V.H.S. Realty, Inc. and Cumberland Farms Inc.'s Motion for Summary Judgment*: GRANTED**
***Upon V.H.S. Realty, Inc. and Cumberland Farms Inc.'s Motion to Dismiss for Lack of Prosecution:* DENIED AS MOOT**

Dear Counsel:

Before the Court is V.H.S. Realty, Inc.'s and Cumberland Farms Inc.'s (collectively "Defendants") Motion for Summary Judgment and Motion to Dismiss for Lack of Prosecution. Defendants argue they are entitled to summary judgment because there is no duty under Delaware law that would require them to install concrete barriers around a retail building to protect business invitees inside the building from errant motor vehicles.

The material facts in this case are not in dispute. On March 12, 2006, the Plaintiff was injured while shopping at a Cumberland Farms convenience store, located at 1120 S. Broom Street in Wilmington Delaware.[1] A motor vehicle driven by the third party defendant, Earl

[1] V.H.S. Realty, Inc., a Division of Cumberland Farms, Inc., owned the store at issue. Pursuant to a 1984 merger within Cumberland Farms, Inc., V.H.S. Realty, Inc. no longer exists as a legal entity. V.H.S. Realty, Inc. leased the property on August 1, 2001, to Wilmington Foods, Inc. which operated the convenience store.

Simmons,[2] crashed through the front of the store while the Plaintiff was shopping inside. Plaintiff concedes there is no evidence "of any prior motor vehicle accidents of a similar nature at the Cumberland Farms store."[3] The Defendants represent, and Plaintiff does not refute, that "[t]here were no accidents similar in nature to the alleged accident within the ten years preceding this accident [and] a complete search of [Cumberland Farms'] claims data base" reveals "no reports of claims made against this property or against V.H.S. Realty, Inc. or Cumberland Farms, Inc. concerning any automobiles colliding with the building/property."[4] Plaintiff has offered no expert testimony as to the industry standard of care with respect to protecting business invitees from runaway motor vehicles crashing into a convenience store.[5]

The Cumberland Farms store at issue has four "parking stops" in front of the parking spaces parallel with the store's frontage. These "parking stops," which are similar to wheel stops,[6] are concrete blocks six feet long and five inches high. A sidewalk approximately four and a half inches in height is located between the parking stops and the store.[7]

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[8] In considering a motion for summary judgment, the Court must view the record in a light most favorable to the

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[2] Cumberland Farms, Inc. filed a Third-Party Complaint against Earl Simmons on April 28, 2008, D.I. 7; Simmons failed to answer or otherwise respond after proper service, and a default judgment was entered against him on August 8, 2008, for any and all damages Plaintiff may recover from Cumberland Farms, Inc., D.I. 14.
[3] D.I. 37 (Letter from Plaintiff's attorney acknowledging that there had been no evidence of prior similar motor vehicle accidents at the Cumberland Farms store).
[4] Defendants' Answers to Plaintiff's Interrogatories ¶ 30, 32.
[5] Oral Argument.
[6] *Achtermann v. Bussard*, 2007 WL 901642, at *1 (Del. Super. Mar. 22, 2007), *aff'd,* 957 A.2d 1 (Del. 2008) (TABLE) ("Wheel stops 'are used to designate parking areas and to prevent vehicle intrusions. Typically, concrete wheel stops are made of pre-cast reinforced concrete, and measure 72 inches long by 8 to 9 inches wide by 5 to 7 ½ inches high.'").
[7] Peterson Aff. ¶ 3. D.I. 18, Ex. B. It appears from photographs submitted during discovery that the vehicle drove over both a "parking stop" and the curb before crashing into the convenience store, *See* Ex. Attached to Defendants' Resp. to Plaintiff's Request for Production.
[8] Super. Ct. Civ. R. 56(c).

non-moving party,[9] and the moving party bears the initial burden of establishing that material facts are not in dispute.[10]

After Plaintiff argued in opposition to this summary judgment motion that he "should be permitted an opportunity . . . to determine whether the Defendants were aware of any similar accidents on their premises such that the risk of the harm was reasonably foreseeable,"[11] the Court allowed additional discovery on this issue. After the additional discovery, Plaintiff admitted he "could not find any evidence in reviewing [the submitted discovery] carefully of any prior motor vehicle accidents of a similar nature at the Cumberland Farms store."[12]

"[T]he court must determine whether a landowner owes a duty to prevent errant vehicles from crashing through their store's walls potentially injuring its business invitees."[13] This determination must be made as a matter of law.[14] Landowners owe a general duty of care to business invitees, but are under no duty to protect from all potential dangers and must only protect invitees from danger that is reasonably foreseeable.[15] In *Achterman*, the Court held as a matter of law that when there are no prior accidents, a landowner does not owe a duty to protect invitees from errant vehicles crashing into its store.[16] The *Achtermann* Court held that as long as there is some protection for invitees, such as a curb, landowners are under no obligation to install "wheel stops" to protect invitees from cars crashing into the premises.[17] In this case, not only is there no evidence of any prior incidents involving vehicles crashing into the store, but the

[9] *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).
[10] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).
[11] Plaintiff's Resp. ¶ 6, D.I. 23.
[12] D.I. 37.
[13] *Achtermann*, 2007 WL 901642, at *2.
[14] *Naidu v. Laird*, 539 A.2d 1064, 1070 (Del. 1988) ("[D]etermining the existence and parameters of a duty is a question of law").
[15] *Achtermann*, 2007 WL 901642, at *4.
[16] *Id*. ("To impose potential liability . . . under the specific facts of this case would impose too broad of an affirmative duty on [the Plaintiff].").
[17] *Id*. at 5 ("There was a curb, a sidewalk, and a wall between the parking lot and the injured plaintiff in this case. [T]he Court does not view that as evidence of their negligence in this case.").

parking lot in question had "parking stops" in place *and* a curb to protect invitees from potential "errant vehicles."

After considering the facts in the light most favorable to Plaintiff, the Court finds that there are no genuine issues of material fact in dispute and that the moving Defendants are entitled to a judgment as a matter of law. Therefore, Defendants' Motion for Summary Judgment is **GRANTED.** Based on the foregoing, Defendants' Motion to Dismiss for Lack of Prosecution is **DENIED** as moot.

IT IS SO ORDERED.

Jan R. Jurden, Judge