NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2009 CA 0249

CAROL & EDGAR PITTS

VERSUS

FELCOR LODGING TRUST INCORPORATED D/B/A EMBASSY SUITES HOTEL, RALPH NEY, FELCOR/CSS HOLDINGS, L.P., ABC INSURANCE COMPANY & DEF INSURANCE COMPANY

Judgment Rendered: September 11, 2009

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket Number 544,850

The Honorable R. Michael Caldwell, Judge Presiding

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BEFORE: WHIPPLE, HUGHES AND WELCH, JJ.

Hughes, J., concurs.

WHIPPLE, J.

This matter is before us on appeal by plaintiffs, Carol and Edgar Pitts, from a judgment of the trial court granting summary judgment in favor of defendants, Felcor/CSS Holdings, L.P. DJONT Operation, Inc., Promus Hotels, Inc. and Ralph Ney. For the following reasons, we reverse and remand.

BACKGROUND FACTS AND PROCEDURAL HISTORY

Although this case is before us on summary judgment, the following facts are essentially undisputed. On July 2, 2005, Carol Pitts and her husband, Edgar Pitts, arrived at the Embassy Suites Hotel in Baton Rouge, Louisiana, to pick up relatives who were in town for a family reunion. The Pitts arrived at the hotel between 4:00 and 5:00 in the afternoon and the weather conditions were cloudy. After visiting with family members in the lobby for a short while, Mr. and Mrs. Pitts and other family members exited the hotel to go to dinner. At the time the family departed from the hotel, it had begun to rain and was windy and cloudy. Further, while assisting her mother-in-law into her vehicle, which was near the front entrance of the hotel, Mrs. Pitts was hit in the back of the head and shoulder by a light fixture from the exterior wall of the hotel. However, as the record reflects, the parties do dispute whether the evidence presented in support of and against summary judgment resolves the issues of causation and the defendants' actual or constructive knowledge or notice of the vice or defect.

On June 30, 2006, the Pitts filed a suit for damages, contending that as a result of the defendants' negligence, Mrs. Pitts sustained severe and permanent physical injuries and mental damages rendering her disabled from her occupation as a home health nurse. Mr. Pitts asserted a claim for loss of consortium. The defendants responded by filing a motion for summary judgment, contending that under the undisputed facts, plaintiffs could not prove that the defendants knew or should have known that the light fixture would become detached from the facade

of the hotel during high winds on July 2, 2005. As such, the defendants contended, the plaintiffs could not prove the requisite notice, an essential element of their cause of action. The motion was argued before the trial court on December 1, 2008. At the conclusion of the hearing, the trial court granted defendants' motion for summary judgment. A written judgment was signed by the trial court on December 18, 2008.

Plaintiffs then filed the instant appeal, contending that the trial court erred: (1) in finding that defendants met their burden of proof on summary judgment; (2) in granting summary judgment where the record shows unresolved genuine issues of material fact remain as to the defendants' liability; and (3) in failing to apply the doctrine of *res ipsa loquitur*.

SUMMARY JUDGMENT

A motion for summary judgment is a procedural device used when there is no genuine issue of material fact for all or part of the relief prayed for by a litigant. Duncan v. U.S.A.A. Insurance Company, 2006-0363 (La. 11/29/06), 950 So. 2d 544, 546. In determining whether summary judgment is appropriate, appellate courts review the evidence *de novo*. Costello v. Hardy, 2003-1146 (La. 1/21/04), 864 So. 2d 129, 137. This standard of review requires the appellate court to look at "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits," in making an independent determination that there is no genuine issue of material fact, and that the movant is entitled to summary judgment as a matter of law. See LSA-C.C.P. art. 966(B). Further, a motion for summary judgment should only be granted if the filings show there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. See LSA-C.C.P. art. 966(B).

The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on

the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. LSA-C.C.P. art. 966(C)(2). Once the motion for summary judgment has been properly supported by the moving party, the failure of the non-moving party to produce evidence of a material factual dispute mandates the granting of the motion. Babin v. Winn-Dixie Louisiana, Inc., 2000-0078 (La. 6/30/00), 764 So. 2d 37, 40; see also LSA-C.C.P. art. 967(B). However, the law is clear that the burden to present evidence in a motion for summary judgment does not shift to the party opposing the motion until the moving party first presents evidence that no genuine issue of material of fact exists. Sharp v. Harrell, 99-0737 (La. App. 1st Cir. 5/12/00), 762 So. 2d 1119, 1122, writ denied, 2000-2458 (La. 11/3/00), 773 So. 2d 150. Moreover, when determining whether a "genuine" issue exists, courts cannot consider the merits, weigh the evidence, evaluate testimony, or make credibility determinations. Williams v. Storms, 2001-2820 (La. App. 1st Cir. 11/8/02), 835 So. 2d 755, 759.

DISCUSSION

In plaintiffs' first and second assignments of error, they contend that the trial court erred in finding that the defendants met their burden of proof on summary judgment where the entire record discloses that genuine issues of material fact remain as to the cause of the accident as well as the defendants' liability based on actual or constructive knowledge.

Regarding the plaintiffs' burden of proof at trial, in order to establish a negligence claim against defendants pursuant to LSA-C.C. art. 2317.1, plaintiffs would be required to show that the defendants knew, or in the exercise of reasonable care, should have known of the ruin, vice, or defect that caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that defendants failed to exercise such reasonable care. LSA-C.C. art. 2317.1.[1] Moreover, we note that an innkeeper has a duty to exercise reasonable and ordinary care, including maintaining the premises in a reasonably safe and suitable condition and to warn guests of any hidden or concealed perils that are **known** or **reasonably discoverable** by the innkeeper. Brasseaux v. Stand-By Corporation, 402 So. 2d 140, 144 (La. App. 1st Cir.), writ denied, 409 So. 2d 617 (La. 1981); Gray v. Holiday Inns, Inc., 99-1292 (La. App. 1st Cir. 6/23/00), 762 So. 2d 1172, 1175.

In their motion for summary judgment, defendants contended that "the pleadings, evidence, and affidavits show that there are no genuine issues of material fact that defendants had no notice that the high winds on the date of the incident would dislodge a light fixture from the facade of the building and that Movers are entitled to summary judgment as a matter of law."

In support of the motion, defendants cited excerpts of Mrs. Pitts' deposition testimony and the affidavit of Ralph H. Ney, the general manager of the Embassy Suites. Contending that plaintiffs would be unable to make the required showing of knowledge, the defendants relied upon the deposition testimony of Mrs. Pitts that she saw nothing upon entering the hotel that caused

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[1]We note that with respect to any potential liability under LSA-R.S. 9:2800.6, the trial court properly acknowledged that actual or constructive knowledge is required under either theory of liability. (Cf. Jones v. Hyatt Corporation of Delaware, 94-2194 (La. App. 4th Cir. 7/26/95), 681 So. 2d 381, 385, where the Fourth Circuit Court of Appeal, relying on Neyrey v. Touro Infirmary, 94-0078 (La. App. 4th Cir. 6/30/94), 639 So. 2d 1214, held that LSA-R.S. 9:2800.6 does not apply to innkeepers.)

her concern for her safety, that upon her departure from the hotel neither she nor anyone in her party observed any conditions that she considered to be hazardous or potentially dangerous, and that she had not seen or heard anyone complain of any hazardous or dangerous conditions. Further, defendants pointed to Mrs. Pitts' testimony setting forth that it was windy and raining upon her departure and her description of the incident as "sudden" and "without any notice" to her.

Defendants further relied on the affidavit of Mr. Ney, who has been employed as the general manager of the Embassy Suites since June 25, 1999, wherein he stated that in his capacity as the general manager of the Embassy Suites, he oversaw maintenance of the entire hotel property and was familiar with the light fixtures on the property, including the one that allegedly struck Mrs. Pitts. He further stated that prior to this incident, the light fixture at issue had never been loose and had never detached from the hotel facade. Mr. Ney stated that at the time of the incident, the hotel had no notice or knowledge or reason to believe that the light fixture at issue was loose or unstable or would detach. Mr. Ney stated that prior to July 2, 2005, he had not received any complaints that the light fixture was loose or unstable, nor had anyone from the hotel witnessed that the light fixture was loose or unstable. Finally, according to Mr. Ney, no one had ever warned the hotel that the light fixture at issue could or would become loose or detach from the wall.

Instead, Mr. Ney averred that a severe wind storm swept through Baton Rouge on July 2, 2005, which he averred was the cause of the accident. He additionally attested that "[t]he cause of the detachment of the light fixture was the severe wind storm of July 2, 2005[,] which swept through Baton Rouge and, specifically, the area surrounding the Hotel; [that] no other cause for the detachment of the light fixture has been detected[;]" and that "[t]he Hampton Inn, a hotel directly adjacent to the Embassy Suites, lost a portion of its facade due to

the severe wind storm" that day. However, at the hearing on the motion for summary judgment, the trial court properly excluded the portion of his affidavit containing these statements, finding these statements to be "conclusory" and noting that such assertions could only be established through expert testimony, which Mr. Ney was not capable of providing. Nonetheless, the trial court granted summary judgment in the defendants' favor.

On *de novo* review, we acknowledge that plaintiff clearly concedes in her testimony that there were strong winds on the day in question. However, in our view, none of the evidence presented establishes that the wind, and not a vice or defect in the premises, (or some combination thereof) caused the light fixture to break off and fall from the facade of the building as claimed by the defendants. Moreover, while Mr. Ney attested that he "oversaw maintenance of the entire [h]otel property[,]" his affidavit is devoid of any testimony establishing whether or when the lights were regularly inspected or maintained. Notably, the defendants did not present any evidence such as maintenance logs or other records to establish the nature, scope or timing of the inspections, if any. Thus, on the record before us, genuine issues of material fact remain as to whether the defendants exercised reasonable and ordinary care in inspecting and maintaining the lights in a reasonably safe and suitable condition, such that they knew or **should have known**, and thus should have warned guests, of any hidden or concealed perils that were reasonably discoverable. See Brasseaux v. Stand-By Corporation, 402 So. 2d at 144.

In sum, the conclusory statements of the defendants that they had no **actual** knowledge are insufficient to establish that plaintiffs will be unable to establish **constructive** knowledge. Instead, the evidence set forth by the defendants requires that the trier of fact make assumptions and reach conclusions on genuine issues that are not fully supported by or developed in the record herein.

Accordingly, because genuine issues of material fact remain, the burden never shifted to plaintiffs to present evidence to satisfy their evidentiary burden of proof at trial. See Sharp, 762 So. 2d at 1122.

Further, pretermitting whether plaintiffs should be relieved of the obligation of establishing notice because of the applicability of *res ipsa loquitur*, we find that the trial court erred in granting summary judgment, given the unresolved issues of causation, actual notice, constructive notice, and the duty to exercise reasonable care. Thus, we pretermit further discussion of plaintiffs' remaining assignment of error.

CONCLUSION

Based on the above and foregoing reasons, the December 18, 2008 judgment of the trial court, granting summary judgment in favor of defendants and dismissing plaintiffs' claims, is reversed. The matter is remanded to the trial court for further proceedings consistent with the views expressed herein. Costs of this appeal are assessed against the defendants/appellees, Felcor/CSS Holdings, L.P. DJONT Operation, Inc., Promus Hotels, Inc. and Ralph Ney.

REVERSED AND REMANDED.