COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1712

GENNARO ROBERTO, personal representative,[1]

vs.

CUISINE DE ASIA, INC.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Following a jury trial, Terese Cappello recovered damages for injuries she sustained when she fell down an unmarked step in the dining room of defendant Cuisine De Asia, Inc.'s, restaurant in Boston's North End neighborhood. The defendant appealed.[2] We affirm.

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[1] Of the estate of Terese Cappello.

[2] The defendant filed its sole notice of appeal while its posttrial motion was pending. Although the defendant should have filed a new notice of appeal after the judge decided the pending motion, see Mass. R. A. P. 4 (a) (3), as appearing in 481 Mass. 1606 (2019) ("A notice of appeal filed before the disposition of any timely motion listed in Rule 4 [a] [2] shall have no effect"), we nonetheless have jurisdiction to decide the appeal of the judgment. See Roch v. Mollica, 481 Mass. 164, 165 n.2 (2019) (deciding merits of appeal where sole notice of appeal was filed before timely filed motion for reconsideration was decided). Because no notice of appeal was filed after the denial of the motion for a new trial and consequently the notice of appeal does not address the denial of the motion for a new

1. Overview. Much of the defendant's argument on appeal is premised upon the faulty assumption that the plaintiff proceeded solely on a failure to warn theory. In fact, the plaintiff argued both that the defendant failed to warn Cappello about the step and that the defendant failed to maintain the restaurant in a safe condition given the level change in the middle of the restaurant. To clarify the significance of framing the case in this manner, we begin by reviewing the legal principles relevant to premises liability claims.

> "An owner or possessor of land owes a common-law duty of reasonable care to all persons lawfully on the premises. This common-law duty includes an obligation to maintain the 'property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk.' It also includes an obligation to warn visitors of any unreasonable dangers of which the landowner is aware or reasonably should be aware" (citations omitted).

Quinn v. Morganelli, 73 Mass. App. Ct. 50, 52 (2008). If a danger is "open and obvious," however, a possessor of land is relieved of its duty to warn. Id. That is because the law presumes that a visitor exercising reasonable care for her own safety will not be injured by blatant hazards, and therefore, a "warning would be superfluous for an ordinarily intelligent plaintiff." Dos Santos v. Coleta, 465 Mass. 148, 154 (2013),

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trial, that denial is not before us. See New Bedford Hous. Auth. v. Olan, 435 Mass. 364, 372 (2001).

quoting Papadopoulos v. Target Corp., 457 Mass. 368, 379 (2010). For that reason, the open and obvious nature of a hazard is a complete defense to a failure to warn claim. See Dos Santos, supra at 158.

Even where a defendant is relieved of its duty to warn, it still may have a duty to remedy. Dos Santos, 465 Mass. at 158. "A [possessor of land] has a duty to remedy an unreasonably dangerous yet obvious condition when [it] knows or has reason to know that visitors might nonetheless proceed to encounter the danger for a variety of reasons, including being distracted, forgetful, or even negligent, or deciding that the benefits of encountering the conditions outweigh the risks." LaForce v. Dyckman, 96 Mass. App. Ct. 42, 46-47 (2019). Accordingly, if a plaintiff proceeds on theories other than failure to warn, such as negligent design or failure to maintain the premises, the open and obvious nature of a hazard is not a complete defense to liability. See Dos Santos, supra at 158. With these principles in mind, we address each of the defendant's arguments in turn.

2. Jury instructions. The defendant first argues that the jury instructions were erroneous because the judge instructed that a possessor of land may have a duty to remedy an open and obvious danger. This argument is not preserved because the defendant did not make a "specific objection on point" to the trial judge. Matsuyama v. Birnbaum, 452 Mass. 1, 35 (2008).

The record on appeal reflects that the defendant objected to the judge's draft jury instructions on the grounds that they presupposed the existence of a dangerous condition. The judge then revised the instructions. There is nothing in the record to suggest that the defendant objected to the jury instructions on the grounds the defendant advances on appeal, see Carrell v. National Cord & Braid Corp., 447 Mass. 431, 442 (2006) (issue not preserved where party's objection below was on grounds other than those argued on appeal), or that the defendant objected to the instructions after the judge revised them. See Chokel v. Genzyme Corp., 449 Mass. 272, 279 (2007) (appellant has duty of providing court with adequate record, and "[w]hen a party fails to include a document in the record appendix, an appellate court is not required to look beyond that appendix to consider the missing document"). The defendant's arguments as to the accuracy of the instructions therefore are waived. See Anderson-Mole v. University of Mass., 49 Mass. App. Ct. 723, 726 (2000) (objection waived when counsel let "judge understand that he had remedied" concern that prompted initial objection).

3. Special verdict slip. The defendant also waived its objection to the judge's decision not to include a question on the special verdict slip regarding whether the step was an open and obvious danger. As with the jury instructions, the judge agreed to make certain changes to the verdict slip based upon

the defendant's objections. There is nothing in the record to suggest that the defendant objected to the special verdict slip after the judge revised it. Accordingly, this claim too is waived.

4. Sufficiency of the evidence. "The denial of a motion for directed verdict . . . present[s] questions of law reviewed under the same standard used by the trial judge." O'Brien v. Pearson, 449 Mass. 377, 383 (2007). We "construe the evidence in the light most favorable to the nonmoving party and disregard that favorable to the moving party. In other words, the standard to be employed is whether the evidence, construed against the moving party, justif[ies] a verdict against him" (quotation and citation omitted). Id. Here, the evidence at trial supported the verdict.

Based upon witness testimony that the step in the dining room did not have hand rails or a warning sign visible from the restaurant's upper level and photographs showing the step from above, the jury could have found that the step was not an open and obvious danger and that the defendant did not adequately warn patrons of the danger. Alternately, the jury could have found that the step was an open and obvious danger, but that the defendant had a duty to remedy the step because it was likely to cause harm.

In either case, there was sufficient evidence of the circumstances surrounding Cappello's fall to conclude that the step caused her injuries. According to witness testimony, Cappello was seated on the upper level of the restaurant and fell while walking towards the door. She landed in the lower level of the restaurant. That Cappello could not remember how she fell does not prevent a finding of causation given the other evidence demonstrating the circumstances of the fall. See Quinn, 73 Mass. App. Ct. at 53 (photographs, witness testimony, and expert opinion regarding building code sufficient to allow jury to find that use of same tile in hallway and sunken living room made unmarked step dangerous).

5. Denial of summary judgment motion. The defendant also argues that the judge improperly denied its summary judgment motion because the plaintiff had no evidence at the summary judgment stage that anything in the defendant's restaurant caused her fall. The denial of a motion for summary judgment cannot be reviewed on appeal after a trial on the merits. See Elles v Zoning Bd. of Appeals of Quincy, 450 Mass. 671, 674 (2008); Deerskin Trading Post, Inc. v. Spencer Press, Inc., 398 Mass. 118, 126 (1986).

6. Attorney's fees. Having found no merit to the defendant's appeal, we now turn to the plaintiff's request for attorney's fees. The plaintiff's request does not comply with

Mass. R. A. P. 16 (a) (10), as appearing in 481 Mass. 1628 (2019), which requires that a "request for fees and costs identify the specific source (e.g., statute, court rule, or case law) which authorizes the request." Reporter's Notes to Mass. R. A. P. 16, Massachusetts Rules of Court, at 261 (Thomson Reuters 2019). See Preferred Mut. Ins. Co. v. Gamache, 426 Mass. 93, 95 (1997) (prevailing party generally not entitled to attorney's fees unless specific statute, court rule, or contractual provision provides for their recovery); Curtis v. Surette, 49 Mass. App. Ct. 99, 107 (2000) (same). In any event, we discern no basis for awarding attorney's fees. "Although the . . . appeal is unsuccessful, it is not frivolous." Gianareles v. Zegarowski, 467 Mass. 1012, 1015 n.4 (2014).

Judgment affirmed.

By the Court (Meade, Wolohojian & Ditkoff, JJ.[3]),

Joseph F. Stanton

Clerk

Entered: March 17, 2021.

[3] The panelists are listed in order of seniority. The case was originally submitted to a panel comprised of Justices Wolohojian, Maldonado, and Ditkoff. Following the retirement of Justice Maldonado, Justice Meade was substituted on the panel and participated in this decision.