United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
March 30, 2022
Lyle W. Cayce
Clerk

No. 21-30492
Summary Calendar

DARREL THORN,

Plaintiff—Appellant,

versus

RACETRAC PETROLEUM, INCORPORATED,

Defendant—Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:20-CV-2509

Before ELROD, OLDHAM, and WILSON, *Circuit Judges*.

PER CURIAM:*

Darrel Thorn filed a pro se complaint in Louisiana state court seeking damages and relief in a retail slip-and-fall case. He asserted that he sustained injuries when he slipped and fell on a wet floor at a RaceTrac store. The case was removed to federal court per diversity jurisdiction, and the district court

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

granted summary judgment to the defendant after concluding that Thorn did not establish under the Louisiana statute governing merchant liability that the wet floor presented an unreasonable risk that RaceTrac did not take reasonable care to address. The district court denied Thorn leave to proceed in forma pauperis (IFP) on appeal and certified that the appeal was not taken in good faith.

Thorn now moves this court for leave to proceed IFP. By moving to proceed IFP, he is challenging the district court's certification decision. *See Baugh v. Taylor*, 117 F.3d 197, 202 (5th Cir. 1997). Our inquiry is limited to whether the appeal "involves legal points arguable on their merits (and therefore not frivolous)." *Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983) (internal quotation marks and citation omitted).

On appeal, Thorn argues that the district court unexpectedly applied the local rules and did not permit him to file an opposition before granting summary judgment to RaceTrac. Thorn's pro se status did not excuse him from following the local rules, *see Hulsey v. Tex.*, 929 F.2d 168, 171 (5th Cir. 1991), which provided him adequate notice of his obligations, *see Martin v. Harrison Cty. Jail*, 975 F.2d 192, 193 (5th Cir. 1992). Accordingly, the district court did not abuse its discretion in enforcing the filing deadlines established by the local rules. *See Klocke v. Watson*, 936 F.3d 240, 243 (5th Cir. 2019). After Thorn failed to file a timely response, the district court was entitled to accept as undisputed the facts offered in support of RaceTrac's summary-judgment motion. *See Eversley v. MBank Dallas*, 843 F.2d 172, 174 (5th Cir. 1988).

His claim that the district court wrongly granted summary judgment in favor of RaceTrac is also unavailing. The unrefuted summary-judgment evidence, which included a videotape of the incident, supported that the wet floor was an obvious and apparent risk and that RaceTrac's placement of wet-

floor signs at the entrance, along with the fact that it was raining, made it clear to the public that the floor might be wet and that the hazard was open and obvious. *See Melancon v. Popeye's Famous Fried Chicken*, 59 So. 3d 513, 515–516 (La. Ct. App. 2011).

To the extent Thorn argues that the district court erred in not granting his motion for a protective order, his mere contention that the motion should have been granted does not constitute adequate briefing of the issue. *See Brinkmann v. Dallas Cnty. Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987). His assertion that the district court judge was biased for denying various motions is unavailing. *See Liteky v. United States*, 510 U.S. 540, 555 (1994).

Because Thorn has not shown that the district court erred in certifying that his appeal was not taken in good faith, his IFP motion is denied. *See Baugh*, 117 F.3d at 202. The appeal lacks arguable merit and is dismissed as frivolous. *See id.* at 202 n.24; *Howard*, 707 F.2d at 219-20; 5TH CIR. R. 42.2. Thorn's motion for a hearing is denied.

MOTIONS DENIED; APPEAL DISMISSED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DARREL THORN	CIVIL ACTION
VERSUS	NO. 20-2509
RACETRAC PETROLEUM, INC.	SECTION M (5)

ORDER & REASONS

Before the Court is a motion for summary judgment by defendant RaceTrac Petroleum, Inc. ("RaceTrac") seeking dismissal of plaintiff's slip and fall claims.[1] The motion was set to be submitted to the Court on July 15, 2021.[2] Local Rule 7.5 requires that a memorandum in opposition to a motion be filed no later than eight days before the noticed submission date, which in this case was July 7, 2021. Plaintiff Darrel Thorn, proceeding *pro se*, has not filed an opposition. Although the Court construes *pro se* filing liberally, *pro se* parties are still required to "abide by the rules that govern the federal courts." *EEOC v. Simbaki, Ltd.*, 767 F.3d 475, 484 (5th Cir. 2014). Accordingly, because the motion for summary judgment is unopposed, and it appearing to the Court that the motion has merit,[3]

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[1] R. Doc. 61.

[2] R. Doc. 61-7.

[3] Racetrac argues that Thorn cannot prove any of the three elements required under the Louisiana merchant liability statute. La. R.S. 9:2800.6(B) provides that "[i]n a negligence claim brought against a merchant ... because of a fall due to a condition existing in or on a merchant's premises, the claimant shall have the burden of proving, in addition to all other elements of his cause of action, all of the following: (1) The condition presented an unreasonable risk of harm to the claimant and that risk was reasonably foreseeable. (2) The merchant either created or had actual or constructive notice of the condition which caused the damage, prior to the occurrence. (3) The merchant failed to exercise reasonable care." Assuming there was a puddle (which RaceTrac disputes), it was clearly marked for Thorn as to be an open and obvious condition. The Louisiana supreme court has explained that "[i]f the facts of a particular case show that the complained-of condition should be obvious to all, the condition may not be unreasonably dangerous, and the defendant may owe no duty to the plaintiff." *Caserta v. Wal-Mart Stores, Inc.*, 90 So. 3d 1042, 1043 (La. 2012). As it was a rainy day, RaceTrac employees had placed wet-floor signs near the entrance and had mopped the area. R. Doc. 61-1 at 8-10. If the floor was slippery, it was an open and obvious condition that Thorn should have avoided. As one Louisiana appellate court explained, "[t]o require a merchant to keep the entrance/exit areas completely dry during rainy weather, or to hold the merchant responsible for every slick place due to tracked in water

IT IS ORDERED that the motion for summary judgement of defendant RaceTrac Petroleum, Inc. (R. Doc. 61) is GRANTED, and plaintiff Darell Thorn's claims are DISMISSED WITH PREJUDICE.

New Orleans, Louisiana, this 20th day of July, 2021.

BARRY W. ASHE
UNITED STATES DISTRICT JUDGE

would, in effect, make him an insurer of his customer's safety. Clearly this is not required under La. R.S. 9:2800.6." *Ferlicca v. Brookshire Grocery Co.*, 175 So. 3d 469, 473 (La. App. 2015) (citations omitted). Therefore, RaceTrac exercised reasonable care in maintaining its floor during rainy weather, so Thorn has not met his burden of proof to establish a claim under the Louisiana merchant liability law, and summary judgment is appropriate.