

VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 24-CV-3034

SALLY M. LEMNAH, Plaintiff v. HOME DEPOT U.S.A., INC., Defendant	DECISION ON MOTION
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RULING ON DEFENDANT’S MOTION FOR SUMMARY JUDGMENT

Plaintiff Sally M. Lemnah brings this action against Defendant Home Depot for negligence after she was struck by a shopping cart being pushed by another customer. Pursuant to Rule 56 of the Vermont Rules of Civil Procedure, Home Depot moves for summary judgment, arguing that Plaintiff cannot prove the elements of her negligence claim, including that her injury was foreseeable. Plaintiff opposes the motion, asserting there are material issues of fact to be determined by a jury, and requesting relief under Rule 56(d). Plaintiff is represented by Attorney Michael J. Gannon, Esq. and Defendant is represented by Attorney James M. Dunphy, Esq. For the reasons discussed below, the motion is GRANTED.

Facts

The following facts are undisputed for purposes of the summary judgment motion. On July 14, 2023, Lemnah entered the Home Depot in Williston and walked through the store looking for someone to help her find a particular product. An unidentified male customer pushed a flat cart into Lemnah. The impact knocked her onto the floor, and she sustained injuries. The customer who pushed the flat cart had a tall water heater on the cart. A photo of the type of flat cart that was pushed into Lemnah is attached as part of Exhibit B (Lemnah Depo. at 26:1-5). Lemnah did not see the other customer before he struck her with the flat cart, and the customer pushing the flat cart did not see Lemnah before he hit her with the cart. The incident was captured on store surveillance. *See* Ex. F (available on Vermont Digital Evidence Portal). After the incident, Lemnah spoke with assistant store manager Christina Lund and a person named “Kiley” who helped bandage her.

Lemnah had previously seen flat carts used in Home Depot and in other stores, and is unaware of other customers who have been struck by flat carts at the Williston Home Depot or at other stores. During the five years before Lemnah’s injury, no other customer was struck by a flat cart pushed by another customer at the Williston Home Depot.

Discussion

Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” V.R.C.P. 56(a). “Where the moving party does not bear the burden of persuasion at trial, it may satisfy its burden of production by showing the court that there is an absence of evidence in the record to support the nonmoving party’s case.” *Caldwell v. Champlain Coll. Inc.*, 2025 VT 17, ¶ 7 (quotation omitted). “The nonmoving party may survive the motion if it responds with specific facts raising a triable issue,” and courts “give the nonmoving party the benefit of all reasonable doubts and inferences.” *Id.* (quotations omitted). Summary judgment is “mandated,” however, “where, after an adequate time for discovery, a party fails to make a showing sufficient to establish the existence of an element essential to the party’s case and on which the party has the burden of proof at trial.” *Id.* (quotation omitted). Where a jury could find for the plaintiff “only . . . by relying on speculation, the defendant is entitled to summary judgment.” *Id.* (quoting *Boyd v. State*, 2022 VT 12, ¶ 19, 216 Vt. 272).

In an action for common law negligence, the plaintiff must prove four elements: “a legal duty owed by defendant to plaintiff, a breach of that duty, actual injury to the plaintiff, and a causal link between the breach and the injury.” *Demag v. Better Power Equip., Inc.*, 2014 VT 78, ¶ 6, 197 Vt. 176. Under a premises liability theory,

a “possessor of land” is liable “for physical harm caused to his invitees by a condition on the land if” the possessor satisfies three requirements: (1) knows or should know that the condition presents an unreasonable risk of harm to invitees; (2) “should expect that they will not discover or realize the danger, or will fail to protect themselves against it”; and (3) does not exercise reasonable care to protect the invitees from the danger.

LeClair v. LeClair, 2017 VT 34, ¶ 11, 204 Vt. 422 (quoting Restatement (Second) of Torts § 343 (1965)).

“In order to impose liability for injury to an invitee by reason of the dangerous condition of the premises the condition must have been known to the owner or have existed for such a time that it was his duty to know it.” *Forcier v. Grand Union Stores, Inc.*, 128 Vt. 389, 393, 264 A.2d 796, 799 (1970) (quoting *Dooley v. Economy Stores, Inc.*, 109 Vt. 138, 142, 194 A. 375, 377 (1937))¹; *see also Bernasconi v. City of Barre*, 2019 VT 6, ¶ 13, 209 Vt. 419 (noting that, “without evidence as to how long the hole existed, plaintiff cannot prove that any lack of diligence by the City in failing to timely inspect for and repair holes caused his injury”); 89 Am. Jur. Proof of Facts 3d 329 (2006) (“The general rule is that constructive notice of a hazardous condition is chargeable only where the hazard has existed for a sufficient length of time to allow a vigilant owner an opportunity to discover and remedy the situation,” and such notice “cannot be found in the absence of evidence as to the length of time the condition has existed.”).

¹ *Forcier* established an exception for “slip-and-fall” cases involving particular “self-service” sales methods that is not applicable here. *Forcier*, 128 Vt. at 394, 264 A.2d at 799.

“The landowner owes a duty of reasonable care to an invitee, such that the invitee is not unnecessarily or unreasonably exposed to danger.” *Demag v. Better Power Equip., Inc.*, 2014 VT 78, ¶ 11, 197 Vt. 176 (quotation omitted). “Whether a defendant is negligent depends on whether his or her action was objectively reasonable under the circumstances; that is, the question is whether the actor either does foresee an unreasonable risk of injury, or could have foreseen it if he conducted himself as a reasonably prudent person.” *Id.* ¶ 27; *see also Edson v. Barre Supervisory Union # 61*, 2007 VT 62, ¶ 10, 182 Vt. 157 (“[T]he degree of care that a reasonably prudent person would exercise, and thus the scope of the legal duty of ordinary care, is determined by the foreseeability of the consequences of an individual’s acts or omissions.”). As a leading treatise explains:

[F]oreseeability of harm, though not sufficient, is necessary to show negligence. No actor can be counted as negligent unless he either actually foresaw, or a reasonable person in a similar position would have foreseen that harm to someone’s interests was an unreasonably likely outcome of his conduct. What is foreseeable depends in large part on what facts the defendant actually knew or those he should have known, based on his obligation to know and act as a reasonable person.

Dan B. Dobbs, *Hornbook on Torts* § 159 (2d ed. 2015).

Plaintiff’s theory is that Home Depot “provided carts to presumably untrained individuals to transport their own loads, thus endangering all other customers.” Pl.’s Resp. to Def.’s Interrog. No. 5 (Ex. C). She argues that “Home Depot created or increased the risk by allowing customer use of flat carts for large, obstructive loads in customer areas without reasonable safeguards” and that “[t]he risk was that a customer pushing a tall water heater or similar object on a flat cart would not see another customer in a shared area and would knock that customer down.” Pl.’s Opp’n at 5-6. In addition to Home Depot’s undisputed facts, Plaintiff contends that a reasonable jury could find breach from the following additional evidence in the record:

- Home Depot supplied the flat cart involved in the incident and permits customers to use such carts to move large, bulky merchandise through shared customer areas;
- Home Depot’s “Critical Operating Safety Standards” relate to cart use;
- All Home Depot employees have knowledge of a “4260 KD cart training video” and the Critical Operating Safety Standards;
- Employees on duty are responsible for monitoring or inspecting the premises and taking remedial measures as needed; and
- There were no signs, warnings, markings, notices, or precautions concerning customer cart use or the potential dangers of carts.

See Pl.’s Opp’n at 7-8. She maintains that “[f]rom those facts, a reasonable jury could conclude that Home Depot should have used employee assistance, supervision, warnings, cart-use

restrictions, traffic control, aisle or service-desk controls, load-height guidance, or other reasonable measures when customers moved tall and visually obstructive loads through shared customer areas.” *Id.* at 8.

Despite Plaintiff’s assertions, on this record, there is no evidence of foreseeability. Therefore, no reasonable jury could conclude that Home Depot was negligent. Effectively, Plaintiff’s theory amounts to a circular argument that this incident was foreseeable because it happened. She identifies no past examples of customers getting hit by shopping carts either at this particular Home Depot location or anywhere. *Cf. Gransbury v. K Mart Corp.*, 646 N.Y.S.2d 406, 407 (App. Div. 1996) (“That over one million individuals have walked past this row of posts without a single reported incident in the seven years between the time of their installation and the time of plaintiff’s accident further persuades us that defendant cannot be held liable, as a matter of law, for plaintiffs’ injuries”). And while the lack of prior instances of similar conduct does not by itself foreclose her claim, Plaintiff offers no alternative basis to demonstrate how this event was foreseeable. Plaintiff points to an internal Home Depot “Critical Operating Safety Standard” which merely says that “Flat carts should be used for large or bulky items” and that employees should encourage customers to use the correct cart for their load. However, this does not establish that the type of event that injured Plaintiff was reasonably foreseeable. On the contrary, it appears that the customer who injured Plaintiff was using the correct cart for his bulky water heater. She also references a “4260 KD cart training video” of which all Home Depot employees supposedly have knowledge, but that video is not in the record and so the Court has no indication of its substance other than the vague “cart training” description. And the unremarkable fact that Home Depot employees on duty are responsible for monitoring or inspecting the premises and taking necessary remedial measures does not establish that the incident in question was foreseeable to Home Depot.

Nor is it remarkable that Plaintiff’s injury was a *possibility*. An immeasurable number of results are *possible* from all sorts of actions and inactions. A mere possibility of harm, by itself, is not enough to establish negligence. “A person is not necessarily negligent merely because he can foresee the possibility of harm resulting from his acts.” Dobbs, *Hornbook on Torts* § 159; *see also Bernasconi*, 2019 VT 6, ¶ 11 (“Evidence which merely makes it possible for the fact in issue to be as alleged, or which raises a mere conjecture, surmise or suspicion, is an insufficient foundation for a verdict” (quotation omitted)).

Moreover, Plaintiff identifies no authority suggesting that shopping carts are inherently dangerous products or that defendants are generally held liable under similar facts. Rather, the pertinent authority has generally reached the contrary conclusion. *See* “Liability of Storekeeper to Customer Injured by Shopping Cart, Baby Stroller, or Similar Vehicle Handled or Controlled by Another Customer,” 94 A.L.R.3d 439 (“a shopping cart is not inherently dangerous”); *see, e.g., Plunkett v. Best Buy Co.*, No. 3:16-CV-05832-DWC, 2017 WL 4958579, at *6 (W.D. Wash. Oct. 31, 2017) (granting summary judgment for store in shopping cart negligence case where “no evidence to show (1) the row of nested shopping carts in a main aisle of Defendant’s . . . store posed an unreasonable risk of harm to Plaintiff or (2) Defendant knew or should have known the carts posed an unreasonable risk of harm”), *aff’d sub nom. Plunkett v. Best Buy, Inc.*, 745 F. App’x 725 (9th Cir. 2018); *Franklin v. Wal-Mart Stores, Inc.*, 590 So. 2d 1346, 1346-47 (La. Ct. App. 1991) (affirming dismissal of negligence action brought by mother of three-year old toddler

injured when his head struck bottom shelf of shopping cart where there was no evidence that “protruding metal rendered the shopping cart unreasonably dangerous”); *Znoski v. Shop-Rite Supermarkets, Inc.*, 300 A.2d 164, 165-67 (N.J. Super. Ct. App. Div. 1973) (reversing jury verdict for plaintiff who was hit by shopping cart propelled by “unknown youth” at entrance to store, where “[n]o proof was offered to show that the use of shopping carts in the area around the doors created a foreseeable danger or hazard requiring special precautions to be taken by Shop-Rite” or “that Shop-Rite had actual or constructive knowledge that patrons, or other third parties, used the carts for any purpose or in any manner other than those for which they were designed”); *but see Di Franco v. Golub Corp.*, 660 N.Y.S.2d 514, 515 (App. Div. 1997) (finding that, “the confluence of the string of shopping carts in the small vestibule, together with the presence of defendant’s employee, raises questions of fact as to whether defendant was negligent in the direction and control of its employees or the maintenance of its store and whether its negligence was the proximate cause of plaintiff’s accident”).

In an effort to avoid summary judgment, Plaintiff seeks additional discovery under Rule 56(d). She has filed an affidavit in support of such relief. *See* V.R.C.P. 56(d) (“If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may” defer or deny the motion, allow time for additional discovery, or “issue any other appropriate order.”). The purpose of this rule “is to prevent railroading the non-moving party through a premature motion for summary judgment before the non-moving party has had the opportunity to make full discovery.” *Kakeh v. United Plan. Org., Inc.*, 537 F. Supp. 2d 65, 71 (D.D.C. 2008) (quotation omitted). While courts often allow such relief, “[t]here are a variety of . . . factors that will result in the denial of relief under Rule 56(d)” including “when the party opposing summary judgment has been less than diligent in employing discovery.” Charles A. Wright & Arthur R. Miller, 10B Fed. Prac. & Proc. Civ. § 2741 (4th ed. 2008); *see also Kakeh*, 537 F. Supp. 2d at 71 (observing that such “[r]equests for additional discovery . . . are routinely granted, but ‘the rule is not properly invoked to relieve counsel’s lack of diligence’” (quoting *Berkeley v. Home Ins. Co.*, 68 F.3d 1409, 1414 (D.C. Cir. 1995))).

Plaintiff has not demonstrated that she is entitled to Rule 56(d) relief here. This is not a case where a party seeks summary judgment early and before adequate time for discovery has passed. Discovery has been closed since June, prior to the filing of the summary judgment motion. Plaintiff had almost two years to take the discovery she now claims she needs, and offers no persuasive explanation why she could not have done so earlier. For example, Plaintiff seeks to depose the Home Depot assistant manager who responded to the incident, but she knew who that person was right from the start of the case. “[A] request for relief under Rule 56(d) is extremely unlikely to succeed when the party seeking the delay has failed to take advantage of discovery.” Wright & Miller, 10B Fed. Prac. & Proc. Civ. § 2741 & nn.13, 16-17 (collecting cases); *see also Citizens for Appropriate Rural Roads v. Foux*, 815 F.3d 1068, 1082 (7th Cir. 2016) (affirming denial of request for additional discovery where “Plaintiff was not diligent in pursuing discovery” and “had every opportunity to seek discovery prior to the summary judgment stage”); *Garcia v. U.S. Air Force*, 533 F.3d 1170, 1180 (10th Cir. 2008) (affirming denial of additional discovery where plaintiffs failed to “identify what steps had been taken to obtain such facts and a plan for the future” and “already had six months to conduct discovery prior to their request”); *Messina v. Ski Bromley, LLC*, No. 2:25-CV-00012, 2026 WL 1878422, at *7 (D. Vt. June 30, 2026) (denying Rule 56(d) request where “Plaintiff had ample time to

conduct discovery” and failed to “explain[] why she was unable to obtain the desired evidence” before “the close of discovery”), *appeal docketed*, No. 26-1871 (2d. Cir. July 10, 2026); *Bank of Am., N.A. v. Fischer*, 927 F. Supp. 2d 15, 28 (E.D.N.Y. 2013) (denying non-movant’s request to defer summary judgment motion and allow additional discovery under Rule 56(d) where non-movant “declined to take a single deposition and elected not to attend most of the depositions . . . conducted”); *Kakeh*, 537 F. Supp. 2d at 71 (denying request where “Plaintiff had more than ample opportunity to obtain the requested discovery . . . , but chose not to do so”).

Order

For the foregoing reasons, Defendant’s motion for summary judgment (Mot. #6) is GRANTED.

Plaintiff’s motion for leave to file a sur-reply (Mot. #7) is GRANTED, and the Court has reviewed and considered the sur-reply in deciding the summary judgment motion.

Electronically signed on October 19, 2026 at 11:31 AM pursuant to V.R.E.F. 9(d).



Megan J. Shafritz
Superior Court Judge