

NOTICE
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NO. 4-10-0720

Filed 6/1/11

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

JENNIE LIKENS,)	Appeal from
Plaintiff-Appellant,)	Circuit Court of
v.)	Sangamon County
CONCEPT INVESTMENTS OF ILLINOIS,)	No. 08L126
Defendant-Appellee.)	
)	Honorable
)	Mark A. Schuering,
)	Thomas J. Brannan,
)	Judges Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Steigmann and Pope concurred in the judgment.

ORDER

Held: The possessor of premises owes no duty to protect invitees against a dangerous condition of the premises that is open and obvious, except in two circumstances: (1) the possessor knows or should know the invitee may be distracted from paying attention to the open and obvious danger, or (2) the possessor has reason to expect that the invitee will choose to encounter the open and obvious danger because, to a reasonable person in the invitee's position, the advantages of doing so would outweigh the apparent risk.

Plaintiff was not distracted from an open and obvious danger that the excessive high landing allegedly posed, considering that her attention was directed at the landing when she tripped on its overhanging slab.

Even if defendant had reason to expect that invitees would choose to encounter the danger of a landing that was one and three-quarters of an inch higher than steps typically are, the danger of the landing was not extreme, and defendant was entitled to assume that reasonable invitees, exercising ordinary attention, perception, and intelligence, would lift their feet high enough to step on top of the landing.

Plaintiff, Jennie Likens, was stepping up onto the landing outside the front door of an apartment building, and her foot caught on the overhanging slab of the landing, causing her to fall and break her arm. She sought to recover from defendant, Concept Investments of Illinois, because the landing was one and three-quarters of an inch too high, the underside of the overhanging slab was jagged and therefore especially apt to snag the foot, and the landing lacked a railing. The trial court granted summary judgment in defendant's favor, and we affirm the judgment because all of these allegedly dangerous conditions of the landing were open and obvious.

I. BACKGROUND

Defendant owns an apartment building at 3241 South Douglas Street in Springfield, Illinois, and there is an elevated landing beneath the front door of this building. The landing consists of a rectangular concrete slab on top of a brick foundation or base. The slab, which extends out one and three-quarters of an inch beyond the base on the front and sides, is smooth on the top and grainy or lumpy on the bottom. About midway on the front side of the slab, some of the concrete has chipped off from the bottom of the overhang, so that while the top of the slab, where one steps, remains smooth and stable, there is a notch in the bottom of the slab, near the brick base. Also, the landing is a somewhat high step from the sidewalk. It is 9 1/2 inches high instead of 7 3/4 inches, which is the standard dimension, according to plaintiff's expert, an architect named Tom Steen. There is no handrail.

On a clear, sunny day on November 1, 2006, plaintiff arrived at the apartment building to visit some friends. She approached the landing to the front door, the only entrance into the building. She did not lift her foot high enough when attempting to step

onto the landing. Her shoe caught on the lip of the slab, underneath, where the notch had been chipped out, and she fell, fracturing her arm. She was looking at the landing when this accident occurred, but her shoe got snagged on the jagged underside of the concrete lip. If that had not happened and if there had been a railing, she would not have fallen.

On May 8, 2008, plaintiff sued defendant on the theory that the excessive height of the landing, the overhanging lip of the slab, the jagged notch in the bottom of the overhang, and the lack of a handrail all combined to make the landing unreasonably dangerous and that defendant had been negligent in failing to eliminate this danger or to warn her of it.

Defendant filed a motion for summary judgment, and on July 27, 2010, Judge Mark A. Schuering granted the motion, noting that according to plaintiff's own deposition testimony, she had been to the apartment building on five previous occasions and she knew, from previous experience, that the landing was high. Besides, Judge Schuering observed, the height of the landing was plainly visible on November 1, 2006. It was an open and obvious defect. The sun was shining, and nothing obscured plaintiff's view. As for the overhang of the slab, Judge Schuering reasoned that the problem was not with the notch on the underside; rather, the problem was that, by her own admission, plaintiff failed to lift her foot high enough to step on top of the slab.

Plaintiff filed a motion to reconsider the summary judgment. On August 31, 2010, after reviewing the record, including the depositions and a photograph of the landing, Judge Thomas J. Brannan concluded that the summary judgment in defendant's favor was correct, and he declined to vacate it.

This appeal followed.

II. ANALYSIS

A trial court should grant a motion for summary judgment only if the pleadings, affidavits, depositions, and admissions of record show there is no genuine issue of material fact and only if the moving party is entitled to judgment as a matter of law. *Morris v. Margulis*, 197 Ill. 2d 28, 35 (2001). We review summary judgments *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

In our *de novo* review, we find no genuine issue of material fact in this case, and we conclude that defendant is entitled to judgment as a matter of law. The reason for our conclusion is that the allegedly dangerous conditions, *i.e.*, the height of the landing, the overhanging lip of the slab with the notch chipped out of its gravelly bottom edge, and the lack of a handrail, were open and obvious conditions. We can see all these conditions in photographic exhibits from the depositions. For example, the photograph labeled "exhibit 3," which is included in the appendix of defendant's brief, appears to have been taken by someone standing upright about 20 to 30 feet away from the front of the building. (Actually, this is a black and white photocopy of a photograph.) The landing is plainly visible in this photograph, all the way from the ground to the top. One can see that the concrete slab, chipped a couple of places on its underside, extends slightly beyond the brick base. Someone has drawn a circle around the offending notch. And manifestly, there is no handrail. In exhibit No. 1, which appears to have been taken by someone standing in front of the landing, the grainy, gravelly texture of the slab is clearly evident all along its front edge. A reasonable observer would have to assume that the bottom of the overhang (chipped or not) is rough. The only part of the slab that is smooth is its top surface. If all these conditions are visible in photocopies of photographs, one must assume they were

visible from plaintiff's vantage on November 1, 2006.

Illinois courts have held that possessors of premises have no duty to protect invitees against open and obvious dangers. *Buerkett v. Illinois Power Co.*, 384 Ill. App. 3d 418, 422-23 (2008). There are two exceptions to this rule. One exception is for distractions. "Foreseeability will be found where a landowner knows or should know an entrant may be distracted [from paying attention to the open and obvious condition]." *Buerkett*, 384 Ill. App. 3d at 423. This exception is inapplicable because plaintiff admitted she was looking at the landing as she approached it, and the record appears to contain no evidence that anything distracted her as she was in the act of stepping up onto the landing.

The other exception is the "deliberate-encounter exception," which "provides that harm may also be reasonably anticipated when the possessor of land has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk." (Internal quotation marks omitted.) *Buerkett*, 384 Ill. App. 3d at 423. Even though defendant had reason to expect that an invitee would choose to enter the building despite the high landing with its overhanging slab, jagged and gravelly on the underside, the danger posed by these conditions was not extreme--which is why an invitee would choose to encounter them.

The smallness of the danger militates against a finding of duty. Comment g of section 343A of the Restatement (Second) of Torts explains that when a defendant opens up its premises to the public, the defendant "may reasonably expect the public, in the course of the entry and use to which they are entitled, to proceed to encounter some known or obvious dangers which are not unduly extreme, rather than to forego the right."

Restatement (Second) of Torts §343A, Comment g, at 221 (1965). In other words, to use an example from the present case, a landing one and three-quarters of an inch too high (according to plaintiff's expert), with a slab overhanging by 1 1/2 inches, is such an inconsiderable danger that defendant could reasonably expect that visitors, doing the risk-benefit calculus, would choose to encounter that danger rather than forgo visiting friends. (Granted, the apartment building is not a public building, but the landing is a semipublic area, and comment g is relevant by analogy.)

Because visitors, however, can easily protect themselves against this risk by lifting their foot one and three quarters of an inch higher, defendant owes them no duty of protection against the open and obvious danger of height. See *Buerkett*, 384 Ill. App. 3d at 422-23. Comment g says: "Even such defendants, however, may reasonably assume that members of the public will not be harmed by known or obvious dangers which are not extreme, and which any reasonable person exercising ordinary attention, perception, and intelligence could be expected to avoid." Restatement (Second) of Torts §343A, Comment g, at 222 (1965). The danger of the landing is not extreme, and defendant was entitled to assume that reasonable visitors, exercising ordinary attention, perception, and intelligence, would lift their feet high enough to step on top of the landing.

III. CONCLUSION

For the foregoing reasons, we affirm the trial court's judgment.

Affirmed.