

2012 IL App (2d) 110447-U  
No. 2-11-0447  
Order filed February 24, 2012

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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RHONDA RODRIGUEZ,	)	Appeal from the Circuit Court
	)	of Kane County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 10-L-54
	)	
JANET LEVITT, Individually and d/b/a	)	
Janet Levitt Rela Estate Investments, LLC,	)	Honorable
	)	Robert B. Spence,
Defendant-Appellee.	)	Judge, Presiding.

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JUSTICE BURKE delivered the judgment of the court.  
Justices Bowman and Schostok concurred in the judgment.

**ORDER**

*Held:* The trial court properly granted defendant summary judgment on plaintiff's complaint that defendant failed to maintain a gutter: the lease obligated plaintiff to maintain the property, and despite making sporadic repairs in other respects defendant did not otherwise assume a duty to repair.

¶ 1 Plaintiff, Rhonda Rodriguez, rented a house from defendant, Janet Levitt. Plaintiff was injured when she slipped and fell on a patch of ice on the pavement outside the house. She filed a complaint in negligence, alleging that defendant's failure to maintain the gutter located above where she fell caused an unnatural accumulation of water that drained onto the property, froze, and caused

her accident. The trial court granted defendant summary judgment (735 ILCS 5/2-1005(c) (West 2010)), holding that, under the parties' lease, defendant was not liable for any failure to maintain the allegedly defective gutter. Plaintiff appeals, contending that there is a genuine issue of whether defendant had a duty to maintain the gutter. Defendant contends that the trial court correctly construed the lease. She argues further that plaintiff failed to raise a genuine issue of whether the ice that caused her fall was an unnatural accumulation. We affirm on the first ground.

¶ 2 Plaintiff's complaint alleged as follows. On February 6, 2008, she lived in a house at 744 Houston in Carpentersville. Defendant, individually or through her real estate investment company, owned and operated the property. Defendant owed plaintiff a duty of care, which, on February 6, 2008, she breached by (1) failing to maintain the roof gutters so as to prevent water and ice from overflowing onto the pavement; (2) failing to remedy the gutters' design defects, which caused excessive water and ice to flow onto the pavement; and (3) not properly slating or clearing the area where the ice formed. As a proximate result of defendant's negligence, plaintiff slipped and fell.

¶ 3 Defendant filed an answer and moved for summary judgment. Her motion attached plaintiff's discovery deposition, several photographs, and a copy of the lease. We summarize the contents of the exhibits, then set out defendant's arguments.

¶ 4 In her deposition, plaintiff testified as follows. From November 2004 to July 2008, she lived in a single-family house at 744 Houston with her two sons, daughter, and granddaughter. A driveway ran alongside the house. There were two entrances to the house, one in the rear and the other adjacent to the driveway. Between the side door and the driveway was a stoop (a cement block). On the evening of February 6, 2008, plaintiff exited the side door. No one else had fallen there before. It had snowed earlier that day; there was snow on the ground. Plaintiff's son's father

and her daughter's boyfriend were shoveling snow. Plaintiff stepped on and down from the stoop and "went to the right towards the street." She took two or three steps, then fell and landed on her arm.

¶ 5 Asked at her deposition what made her fall, plaintiff responded, "I assume there was ice that collected there from the gutters because I had noticed the rain pouring through there prior to this day." She had not observed ice in that spot on previous occasions. About a week after her accident, she took photographs and videos that were submitted in discovery.

¶ 6 Plaintiff testified that, late in February 2008, she called defendant, told her about her accident, and complained about several maintenance problems, including that the downspout of the gutter "wasn't connected so it wasn't flowing toward the street." Some time later, defendant's handyman, Ron Straub, came out and inspected the house. Straub had sometimes done repair work at 744 Houston, but he had been out about three times in the whole time that plaintiff had lived there. Plaintiff had never paid him to do work and had not had his phone number.

¶ 7 Plaintiff testified that, starting in the summer of 2007, she had called defendant "several" times, "[m]aybe two or three times," about the gutters. She had told defendant that "[t]he downspout that connects the water flow was disconnected from being rusted. It wasn't connected, and the water was running in between the gutters of the house. It wasn't going down the gutters like it should. It was just pouring down." There had been no apparent problems with the gutters in the winter of 2006-07, but, in summer 2007, plaintiff noticed that water "was really pouring in between the gutter and the house. It wasn't going down the gutter." She never tried to do anything herself about the gutters. She did not check to see whether the gutters had screens, as she had believed that the lease

made defendant responsible for checking the gutters. Plaintiff had cleaned the gutters, but, when she saw that part of a gutter had pulled away from the house, she did not try to fix it herself.

¶ 8 Plaintiff testified that, before February 2008, Straub never worked on the gutters. However, before that date, probably in the summer of 2007, she had shown him the gutters, specifically mentioning that the bottom of the downspout needed to be reattached. Straub never reconnected the gutter. Between plaintiff's accident and when she moved out, the gutters were never worked on.

¶ 9 Plaintiff did not recall how much snow had fallen on February 6, 2008. Snow had covered the ice where she fell. Asked whether any water had been dripping from the gutter on the evening of the accident, plaintiff said that she did not remember. Asked the last time before the accident that she had noticed water dripping from the gutter, plaintiff did not remember. When she did notice water dripping from the gutter, the water was falling both onto the stoop and "further toward the front of house." Defendant had never provided plaintiff with snow shovels or salt for the pavement.

¶ 10 The photographs attached to defendant's summary judgment motion show the house, including the side door, the stoop, and the area where plaintiff fell. The lease contains the following provisions pertinent here:

**Repair.** 4. The Lessee covenants and agrees with the Lessor to take good care of and keep in clean and healthy condition the Premises and their fixtures, and to commit or suffer no waste therein; that no changes or alterations of the Premises shall be made or partitions erected, nor walls papered without the consent in writing of Lessor; that Lessee will make all repairs required to the walls, windows, glass, ceilings, paint, plastering, plumbing work, pipes, and fixtures belonging to the Premises, whenever damage or injury to the same shall have resulted from misuse or neglect; and Lessee agrees to pay for any and all repairs that

shall be necessary to put the Premises in the same condition as when he entered therein, reasonable wear and loss by fire excepted, and the expense of such repairs shall be included within the terms of this lease and any judgment by confession entered therefore [*sic*].

**Limitation of Liability.** 5. The Lessor shall not be liable for any damage occasioned by failure to keep the Premises in repair, and shall not be liable for any damage done or occasioned by or from plumbing, gas, water, steam, or other pipes, sewerage, or the bursting, leaking, or running any [*sic*] cistern, tank, washstand, water closet, or waste pipe in, above, upon, or about the Premises, nor for damage occasioned by water, snow, or ice, being upon or coming through the roof, skylight, trap door or otherwise, nor for any damage arising from acts or neglect of any owners or occupants of adjacent or contiguous property.” (Emphasis in original.)

¶ 11 As pertinent here, defendant’s motion for summary judgment argued first that plaintiff had failed to establish that defendant owed her a duty.<sup>1</sup> Defendant reasoned that, under case law including *Gilley v. Kiddell*, 372 Ill. App. 3d 271 (2007), a landlord is not ordinarily liable for an injury caused by dangerous or defective conditions on premises that are leased to a tenant and under the tenant’s control. Defendant asserted that plaintiff had controlled the premises, and defendant had assumed no duty to keep the gutters in good repair. Defendant argued second that plaintiff could not prove that the ice that she fell on was an unnatural accumulation.

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<sup>1</sup>Defendant also argued that plaintiff’s suit was barred by the Snow and Ice Removal Act (745 ILCS 75/1 *et seq.* (West 2010)), but the trial court rejected this contention, and defendant does not rely on it here.

¶ 12 Plaintiff filed a response to defendant's motion, attaching defendant's discovery deposition and a video that plaintiff had made after the accident. In her deposition, defendant testified as follows. Starting November 1, 2004, plaintiff resided at 744 Houston. To defendant's knowledge, the lease made plaintiff responsible for maintaining the gutters. Defendant recalled going over the lease with plaintiff and explaining paragraph 4 but did not recall whether she specifically mentioned the gutters.

¶ 13 Defendant testified that, in the four years that plaintiff lived at the property, defendant inspected it at least twice a year. The last time before plaintiff's accident that defendant did so was in April 2007, when plaintiff had called about a malfunctioning toilet. At that time, defendant and Straub looked over the property and neither saw anything structurally amiss, although defendant could not specifically recall examining the gutters.

¶ 14 Defendant testified that she did not recall plaintiff calling her in summer 2007 about the gutters. Further, she did not recall any time before February 6, 2008, that plaintiff called her about water running in between the gutters and the roof. After viewing the video that plaintiff had made, defendant testified that she could not remember seeing, at any time before February 6, 2008, a puddle form in front of the door (as seen on the video). In September 2007, when plaintiff signed the new lease, she did not complain about the condition of the gutters or the downspout. Before February 6, 2008, plaintiff never complained to defendant about any problems with the gutters.

¶ 15 Defendant recounted that Straub made several repairs to the property, including adjusting closet doors, fixing a toilet, removing a Franklin stove, and replacing the bathroom floor.

¶ 16 Plaintiff's video is in two parts, totaling slightly more than two minutes. They show rain pouring through a gap between the roof and a part of the gutter.

¶ 17 Plaintiff's response to defendant's summary judgment motion argued as follows. First, under *Gilley*, a landlord is freed from liability to a tenant for a dangerous condition only if the landlord has relinquished control over the condition; here, defendant had retained control, as demonstrated by her numerous entries onto the property to make repairs. Nothing in the lease specifically made plaintiff responsible for repairing the gutters, in contrast to lease provisions making her responsible for repairing the walls, windows, pipes, and other parts of the house.

¶ 18 In reply, defendant argued that her occasional entries to make repairs did not establish any duty to repair; the lease made plaintiff responsible for keeping the property in good condition. Also, plaintiff had not shown that an unnatural accumulation had caused her injury.

¶ 19 At the hearing on defendant's motion, the trial judge concluded that paragraphs 4 and 5 of the lease, read together, established that plaintiff was responsible for keeping the house in proper repair and that defendant was not liable for any harm caused by the defects in the gutters. The trial court granted defendant summary judgment. Plaintiff timely appealed.

¶ 20 On appeal, plaintiff argues that summary judgment was improper because it cannot be held as a matter of law that defendant had no duty to fix the allegedly defective gutter. We agree with defendant that the trial court correctly held that defendant owed plaintiff no such duty.

¶ 21 A grant of summary judgment is reviewed *de novo*. *People ex rel. Director of Corrections v. Booth*, 215 Ill. 2d 416, 423 (2005). Summary judgment is proper when the pleadings, depositions, admissions, and affidavits on file, viewed in the light most favorable to the nonmoving party, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2010); *People ex rel. Madigan v. Lincoln, Ltd.*, 383 Ill. App. 3d 198, 204 (2008). To recover for negligence, a plaintiff must plead and prove the existence

of a duty; the breach of that duty; and an injury proximately caused by that breach of duty. *Rusch v. Leonard*, 399 Ill. App. 3d 1026, 1031 (2010). The existence of a duty is a question of law that is appropriate for resolution by summary judgment. *Id.*

¶ 22 The general rule in Illinois is that a landlord does not owe a tenant a duty to repair dangerous conditions on property that is leased to the tenant and under the tenant's control; thus, the landlord will not be liable for injuries caused by the condition. *Lamkin v. Towner*, 138 Ill. 2d 510, 518 (1990); *Gilley*, 372 Ill. App. 3d at 275. Plaintiff recognizes the general rule, but she contends that in this case, defendant retained control by entering onto the premises on "numerous occasions" to make various repairs, *e.g.*, adjusting closet doors, replacing damaged flooring, fixing the broken toilet, and removing a Franklin stove. However, these entries prove only that, on several occasions over a span of approximately four years, defendant exercised her right under the lease to make repairs. A right to repair is not, and does not create, a duty to repair. *Id.* at 277; *Bielarczyk v. Happy Press Lounge, Inc.*, 91 Ill. App. 3d 577, 580 (1980). By plaintiff's admission, defendant's handyman Straub had gone to the property only about three times to make repairs of any kind. To equate this limited exercise of the right to repair with a duty to repair would collapse the established distinction between the right and the duty.

¶ 23 The situation might be different had defendant voluntarily undertaken to repair the gutter and then failed to do so properly, or had defendant contracted in the lease to keep the gutter in repair. See *Gilley*, 372 Ill. App. 3d at 275; *Klitzka v. Hellios*, 348 Ill. App. 3d 594, 597 (2004). Neither exception to the no-duty rule applies here.

¶ 24 The voluntary undertaking exception does not apply, as there is no dispute that defendant never actually tried to fix the gutter; indeed, plaintiff's suit is based on defendant's inaction. Also,

to the extent that plaintiff is arguing that defendant's sporadic repairs in other respects established a course of conduct from which it could be maintained that she assumed a duty to repair (see *Gilley*, 372 Ill. App. 3d at 277), that argument fails because (a) defendant did not engage in a "course of conduct in making *all necessary repairs*" (emphasis added) (*id.*); and (b) an express agreement—*i.e.*, a covenant in the lease—will control over the course of conduct (*id.* at 277-78).

¶ 25 The lease did not obligate defendant to fix the gutter—and, indeed, gave plaintiff that duty. This conclusion is compelled by both paragraphs 4 and 5. Paragraph 4 required plaintiff "to take good care of and keep in clean and healthy condition the premises and their fixtures." In *Gilley*, the court held that language requiring the tenant to " 'maintain and keep the [premises] in as good condition and repair as the same shall be upon taking possession thereof' " placed the duty to repair upon the tenant, not the landlord. *Id.* at 276. In *Bielarczyk*, the lease required the tenant to keep the premises " 'in a clean, sightly and healthy condition, and in good repair.' " *Bielarczyk*, 91 Ill. App. 3d at 580. The court held that this language established that the duty to repair was the tenant's, not the landlord's. *Id.* Here, the quoted language of paragraph 4 is indistinguishable from the crucial language in *Gilley* and *Bielarczyk* and compels a similar result.

¶ 26 Moreover, even were any doubt created by paragraph 4, it would be resolved by paragraph 5, which states generally that defendant is not liable "for any damage occasioned by failure to keep the Premises in repair" and specifically that defendant is not liable "for any damage occasioned by water, snow, or ice, being upon or coming through the roof, skylight, trap door, or *otherwise*." (Emphasis added.) These limitations bar liability for the damage that plaintiff claims.

¶ 27 The judgment of the circuit court of Kane County is affirmed.

¶ 28 Affirmed.