

2013 IL App (1st) 123680-U

SIXTH DIVISION
August 23, 2013

No. 1-12-3680

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SAMUEL MORELAND,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 11 L 5765
)	
SHANG GUO a/k/a GUO SHANG,)	Honorable
)	Kathy M. Flanagan,
Defendant-Appellee.)	Judge Presiding.

PRESIDING JUSTICE LAMPKIN delivered the judgment of the court.
Justices Hall and Reyes concurred in the judgment.

ORDER

- ¶ 1 *Held:* Summary judgment properly granted where plaintiff failed to put forth evidence showing that defendant had actual or constructive knowledge of the existence of a hole on his property.
- ¶ 2 Plaintiff, Samuel Moreland, appeals from an order of the circuit court of Cook County granting summary judgment in favor of defendant, Shang Guo, on plaintiff's complaint alleging negligence. He contends that defendant had constructive notice of a defect in his property which caused him injury, and that his claim should be submitted to a jury.

¶ 3 On June 3, 2011, plaintiff, a former FedEx driver, filed a complaint against defendant, the owner of the property at 15234 Myrtle Avenue in Harvey, Illinois. He alleged that, as a result of defendant's negligent acts and/or omissions, he was severely injured by a defect in defendant's property, namely, a "two foot hole, overgrown with grass" where he fell while delivering a package in the course of his employment. In his answer, defendant admitted that he owned the property at issue, but denied defendant's claims of negligence. He also set forth an affirmative defense based on plaintiff's contributory negligence.

¶ 4 After depositions were taken and other discovery was completed, defendant filed a motion for summary judgment, alleging that he was not liable to plaintiff because the fall occurred in the municipal parkway, and because there was no evidence to suggest that he had actual or constructive knowledge of the existence of the hole in which plaintiff fell. Plaintiff filed a response asserting that a question of fact existed on both issues. The depositions of plaintiff, defendant, and defendant's wife were attached as exhibits to defendant's motion and plaintiff's response.

¶ 5 In his deposition, plaintiff stated that in June 2009, he was employed as a delivery driver for FedEx. He could not recall the exact date of the accident, but stated that one morning in June 2009, he parked his delivery truck on the street outside of defendant's property and walked across the lawn to get to defendant's house. Plaintiff stated that it was a "normal June day" and he did not remember any lighting conditions that would have caused him difficulty in seeing where he was walking. The lawn was "unkempt" and it did not appear to have been mowed. He stated that the grass length was somewhere between his ankle and knee level. As plaintiff was walking on the grass, he stepped into a hole with his left foot. The hole was large enough that his size 13 shoe went into the hole, and deep enough that when he fell, only his knee remained above ground. He stated that his body "twisted" and he fell face first. Plaintiff pulled his foot

out, but his shoe remained stuck in the hole. He retrieved his shoe, emptied it of dirt, put it back on, and continued his delivery route. He did not seek medical attention that day.

¶ 6 The next morning, however, plaintiff had pain in both knees, and his left knee was "tremendously swollen." He went to an urgent care facility, where he was examined and directed to see a joint specialist. Plaintiff subsequently underwent multiple surgeries, and continues to have knee pain. He was unable to continue his employment with FedEx due to his injuries, and has been unable to secure other employment.

¶ 7 Plaintiff stated that he did not see the hole at any time before he fell, and he had no knowledge as to how long it had been there or what had created it. He was also shown five photographs of defendant's property at the deposition, and although he recognized the general area, he was unable to identify the location where he fell. He stated, however, that the hole was located in the grassy area between the curb and the sidewalk and was not between the sidewalk and defendant's home.

¶ 8 Defendant stated in his deposition that on the date of plaintiff's accident, he owned the property at issue, but did not live there and leased the property to a tenant. Defendant acknowledged that he was responsible for repairs and maintenance to the property, and stated that he had a verbal agreement with a tenant to mow the lawn on a regular basis in exchange for a reduction in rent.

¶ 9 Defendant further stated that around the fifth day of every month, he would go to the house to collect rent, and would often return other days to collect the remainder of the rent if it had not been paid in full, or to do repairs, maintenance or "checkups" of the property. When he was there, he would check the condition of the lawn, and never saw any holes. If he had seen one, he would have tried to fix it. He also stated that he did not know anything about plaintiff's accident until he received plaintiff's complaint.

¶ 10 Defendant's wife, Hongbo Wang, confirmed that her husband owned the property at issue, and that he would go there at least twice a month to collect rent or make repairs and maintain the property. Wang and her husband fixed many things at the property over the years for the tenant, so she expected that the tenant would have called them if there was a defect in the yard. Wang visited the property on many occasions and never noticed a hole in the lawn.

¶ 11 Wang also confirmed that she and her husband had an agreement with the tenant to mow the lawn in exchange for a reduction in rent. Before the deposition, Wang contacted the tenant who had occupied the property at the time of the incident. The tenant told Wang that she had cut the grass and that she never saw a hole on the property.

¶ 12 On August 22, 2012, the court entered an order granting summary judgment to defendant. In doing so, the court initially noted that defendant failed to provide any definitive evidence showing that the area at issue was a municipal parkway, and therefore declined to grant summary judgment on that basis. The court found, however, that there was nothing in the record raising an issue of fact as to defendant having actual or constructive notice of the hole. Plaintiff testified that he had no knowledge of how long the hole had been there, and defendant denied ever seeing the hole.

¶ 13 Plaintiff now challenges that ruling on appeal. He asserts that there was ample evidence to show that defendant had constructive notice of the hole on his property.

¶ 14 Summary judgment is a drastic means of ending litigation and should be granted only when the right of the moving party is free from doubt. *Adames v. Sheahan*, 233 Ill. 2d 276, 296 (2009). Summary judgment is proper, however, where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Adames*, 233 Ill. 2d at 295. When determining whether a genuine issue of a material fact exists, the court must construe all pleadings, depositions, admissions, exhibits, and affidavits strictly against the movant and in

favor of the nonmoving party. *Adames*, 233 Ill. 2d at 295-96. In opposing a motion for summary judgment, a party must present a factual basis which would arguably entitle him to a judgment. *Hornacek v. 5th Avenue Property Management*, 2011 IL App (1st) 103502, ¶ 25. We review the circuit court's grant of summary judgment *de novo*. *Adames*, 233 Ill. 2d at 296.

¶ 15 In this case, plaintiff filed a claim in negligence alleging that as a result of defendant's careless acts and/or omissions, he suffered serious injuries and sought compensation for medical care and services "to become healed and cured of said injuries." To recover on a negligence claim, plaintiff must establish that defendant owed plaintiff a duty of care, that defendant breached that duty, and that an injury proximately resulted from that breach. *Bajwa v. Metropolitan Life Insurance Co.*, 208 Ill. 2d 414, 421 (2004). If plaintiff cannot establish each element of the cause of action, summary judgment for defendant is proper. *Wallace v. Alexian Brothers Medical Center*, 389 Ill. App. 3d 1081, 1085 (2009).

¶ 16 Here, plaintiff primarily focuses on the breach of duty element. In order to demonstrate that defendant breached his duty of maintaining the premises under his control in a reasonably safe condition, it is necessary to establish that defendant had actual or constructive knowledge of the existence of the dangerous condition that caused the injury. *Smolek v. K.W. Landscaping*, 266 Ill. App. 3d 226, 228 (1994). Plaintiff does not claim that defendant had actual knowledge of the existence of the hole, but instead argues that he had constructive knowledge. To prove constructive knowledge, plaintiff must establish that the dangerous condition existed for a sufficient time or was so conspicuous that defendant should have discovered the condition through the exercise of reasonable care. *Smolek*, 266 Ill. App. 3d at 228-29.

¶ 17 Plaintiff contends that he presented evidence sufficient to allow a jury to determine whether defendant had constructive notice of the existence of the hole. He does not claim that the condition existed for a sufficient period of time, but maintains that the hole was so

conspicuous that defendant should have discovered it when he was inspecting and maintaining his lawn, summarily stating that defendant "had to have seen it." In support of this argument, plaintiff claims that "the hole was large and could be seen by the naked eye, *** when the grass was mowed or not mowed, based on pictures in the record." He also asserts that the size and depth of the hole, which was large enough to trap plaintiff's size 13 shoe, made it clearly conspicuous.

¶ 18 These contentions, however, are positively rebutted by the record, which contains no evidence to show that the hole was plainly visible. The photographs to which plaintiff refers were taken at some point subsequent to the incident, and there is no indication that the hole still existed at that time or that it was visible in the photos. Additionally, plaintiff stated in his deposition that he had not seen the hole before his fall, and, when provided with photos of the area, he was unable to identify where the hole had been.

¶ 19 Under these circumstances, we find that plaintiff failed to set forth evidence showing that defendant had actual or constructive knowledge of the existence of a hole on his property, and that defendant was entitled to summary judgment in his favor.

¶ 20 In reaching that conclusion, we find plaintiff's attempt to distinguish *Smolek*, 266 Ill. App. 3d at 226-27, misplaced, and find the case analogous to the one at bar. In *Smolek*, plaintiff sustained injuries after falling into an 18 by 12 inch hole on defendant's property. This court found that summary judgment was appropriate where the evidence showed that grass and vegetation had grown over and concealed the hole, there was no evidence that anyone, including plaintiff, knew of the hole's existence before the accident, and even after plaintiff gave her husband a description of the hole's location, he had difficulty locating it. *Smolek*, 266 Ill. App. 3d at 230. Under the circumstances, we found that defendant could not be charged with

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knowledge of its existence, and that plaintiff thus failed to present any evidence supporting a claim of constructive knowledge. *Smolek*, 266 Ill. App. 3d at 229.

¶ 21 As in *Smolek*, plaintiff here contended that the grass surrounding the hole was overgrown and that he did not see the hole before his fall. Further, he presented no evidence to show that anyone knew of the hole's existence, and in fact, there is no evidence that anyone ever located the hole after plaintiff's fall. On these facts, we reach the same conclusion as in *Smolek*, and affirm the grant of summary judgment in favor of defendant.

¶ 22 Affirmed.