2014 IL App (1st) 131249-U

FIFTH DIVISION
May 16, 2014

No. 1-13-1249

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THOMAS DELOREY,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County, Illinois.
v.	)	
	)	No. 09 L 3711
VICORP RESTAURANTS, INC., d/b/a	)	
BAKER'S SQUARE RESTAURANTS,	)	Honorable
	)	Kathy M. Flanagan,
Defendant/Counter-Plaintiff/Appellant.	)	Judge Presiding.

JUSTICE TAYLOR delivered the judgment of the court.
Presiding Justice Gordon and Justice Palmer concurred in the judgment.

ORDER

HELD: Plaintiff brought suit against restaurant for personal injuries sustained when he slipped and fell on the sidewalk outside the restaurant. The trial court granted summary judgment for defendant. We affirmed, finding that (1) summary judgment was proper where plaintiff could not identify the cause of his fall and there was no evidence of an unnatural accumulation of ice, snow, or water in the area of his fall, and (2) the trial court did not err in denying plaintiff's motion for discovery sanctions against defendant where plaintiff had no evidence that the requested documents ever existed and there was no indication that defendant acted in bad faith.

¶ 1 This case arises from a slip and fall accident on a sidewalk. On the evening of February 29, 2008, plaintiff Thomas Delorey had dinner at a Baker's Square Restaurant operated by

defendant Vicorp Restaurants, Inc. After exiting the restaurant, plaintiff slipped and fell on the sidewalk outside, fracturing his femur. He brought suit against defendant, alleging that a poorly designed overhanging roof and gutter created an unnatural accumulation of water and ice on the sidewalk that caused his fall.

¶ 2 The trial court granted summary judgment for defendant. Plaintiff now appeals. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 In plaintiff's fourth amended complaint, which frames the instant action, plaintiff alleged the following. On February 29, 2008, plaintiff was patronizing a Baker's Square Restaurant (hereinafter "the restaurant") that was used, possessed, operated, and controlled by defendant. Plaintiff alleged that he slipped and fell on an unnatural accumulation of water and ice on the sidewalk outside the restaurant. He suffered various injuries in the fall, including a fractured femur which was exacerbated by his previous injuries from childhood polio.

¶ 5 Plaintiff sought relief in two counts. In count I, negligence, he alleged that defendant negligently allowed the sidewalk outside the restaurant to become slippery; it had a poorly designed overhanging roof that unnaturally conducted water from the roof of the restaurant to the sidewalk in front of the restaurant; and it failed to warn patrons of the danger caused by the overhanging roof conducting water to the sidewalk.

¶ 6 In count II, plaintiff sought recovery under a theory of *res ipsa loquitur*. He alleged that it was neither raining nor snowing within one hour prior to his fall. He also alleged that prior to his fall, water dripped from the roof and gutter onto the sidewalk area where he fell, and ice

accumulated at the sidewalk area where he fell. He claimed that in the absence of negligence, these acts would not normally occur. He further stated that defendant had exclusive control of the sidewalk, building, roof, and gutter for over a year prior to his accident.

¶ 7 It is undisputed that on April 3, 2008, after plaintiff's fall but before he filed the instant suit, defendant filed for bankruptcy in the United States Bankruptcy Court for the District of Delaware. On March 26, 2009, also prior to plaintiff's suit, the bankruptcy court approved the purchase of defendant's remaining assets by American Blue Ribbon Holdings, LLC (Blue Ribbon). Plaintiff filed his suit on March 30, 2009.

¶ 8 On December 6, 2011, plaintiff moved for discovery sanctions against defendant. In his motion, plaintiff stated that he had asked defendant to produce all documents relevant to his accident, including all documents concerning the construction, maintenance, and repairs of the sidewalk, roof, and gutter at issue. Defendant produced only the incident report for plaintiff's accident and a single inspection report. In various phone conversations, counsel for defendant indicated to plaintiff that it no longer was in possession of any remaining records.

¶ 9 Plaintiff stated that this production response by defendant was "paltry and incomplete." In particular, plaintiff claimed that the following documents were missing:

> "The missing records include a complete accident file expected to contain [the restaurant manager's] original accident report and the follow up investigation by the safety departments of Baker's Square and Vicorp; the complete maintenance file, before and after the accident, including the roof and gutters, for the building and for the sidewalk on and before the accident date; the safety check reports of the City of Palos Heights, IL for

> the restaurant property and building; and any construction, repair or rehabilitation done to the sidewalk and building as well as a statement of the record keeper that the response is true and complete."

Plaintiff asserted that defendant's failure to produce such documents prejudiced his ability to prove that defendant's poor maintenance of its sidewalk, roof, and gutters was a cause of his fall. He therefore requested that the court grant sanctions against defendant pursuant to Supreme Court Rule 219(c) (Ill. S. Ct. R. 219(c) (eff. July 1, 2002) (permitting trial court to enter sanctions against any party who unreasonably fails to comply with discovery)). He did not specify exactly what sanctions he sought.

¶ 10 Defendant filed a response to plaintiff's motion for sanctions. Defendant stated that, in response to plaintiff's written discovery, defendant provided what documentation it could gather and explained that it lacked possession of many of the requested documents due to its bankruptcy status. As a courtesy, defendant issued a subpoena to Blue Ribbon, the company that bought defendant's assets, that mirrored plaintiff's production requests. Blue Ribbon provided documents in response to that subpoena which defendant forwarded to plaintiff's counsel. Defendant also invited plaintiff to issue its own subpoena to Blue Ribbon, but plaintiff declined to do so.

¶ 11 Defendant argued that, under these facts, discovery sanctions were inappropriate for two reasons: first, plaintiff had no evidence that the requested documents ever existed, and second, defendant's conduct was not unreasonable where it was not in control of the requested documents and had filed for bankruptcy and sold its assets before plaintiff filed his suit.

¶ 12 The trial court denied plaintiff's motion for sanctions in an order dated August 23, 2012. No reasoning is given in its order.

¶ 13 On September 13, 2012, defendant moved for summary judgment. In its motion, defendant argued that plaintiff could not establish proximate cause, since he was unable to identify the cause of his fall. According to defendant, plaintiff's deposition testimony established that did not actually see any ice on the sidewalk, and there was no other evidence in the record which established the presence of ice. Additionally, defendant contended that even if the plaintiff could show that he fell on ice, he could not show that the accumulation was unnatural, because there was no evidence beyond speculation that water leaked from the roof and gutters onto the sidewalk at the place where plaintiff fell.

¶ 14 In support of its motion for summary judgment, defendant attached plaintiff's deposition. Plaintiff stated that on the day of his fall, February 29, 2008, he and his wife arrived at the restaurant at around 5 p.m. He stated that it had been a sunny day, with no rain or snow. When he arrived, he observed that both the surface of the parking lot and the sidewalk were wet.

¶ 15 Plaintiff testified that he and his wife spent approximately 45 minutes in the restaurant. By the time they exited, the sun had gone down and it was night. He did not see whether the sidewalk was still wet, but he was able to see where he was walking. When plaintiff and his wife were near the parking lot, one of plaintiff's feet slid out from underneath him and he fell onto his left leg. Counsel for defendant asked plaintiff what caused his foot to slide out. Plaintiff stated that the sidewalk was slippery. He also stated that the area had not been slippery as he was walking into the restaurant 45 minutes earlier. The following colloquy then occurred:

"COUNSEL FOR DEFENDANT: You said that the sidewalk was slippery. Do you know what caused the sidewalk to be slippery for your foot to slide out as you've described it?

PLAINTIFF: I would assume that it had ice on it.

Q. When you say you would assume, at any time did you notice one way or the other if there was any ice in the area where you had fallen?

A. Did I reach out and run my fingers over it, is that the question?

Q. Yes.

A. No, I was in pain.

Q. Did you at any time, whether it be by your body or a feeling determine whether or not there was any ice in the area where you fell?

A. No. Once I fell, I really had other things on my mind.

Q. So it would be a fair statement, correct me if I'm wrong, you don't know one way or the other if there was any ice in the area where you fell; is that accurate?

A. I cannot testify that there was ice on the sidewalk. If there was, it was under my boot or under my coat."

Plaintiff stated that as he was lying on the pavement, he felt water droplets falling on his head. He described them as scattered droplets, not a heavy stream. He did not look to see where the water was coming from. He admitted that at no time prior to his accident did he observe any water coming from the roof.

¶ 16 Counsel for defendant asked plaintiff whether he had any problems with his left leg prior

to the date of the accident. Plaintiff stated that he had polio in 1950 which seriously affected his left leg, both arms, and various other muscles. He estimated that he had one fall a year on average as a result of muscle weakness due to postpolio syndrome. However, he could not recall any other falls within two years of his accident at the restaurant.

¶ 17 In addition to plaintiff's deposition, defendant also supported its summary judgment motion with the deposition of Verrinda Dennis, the manager on duty at the restaurant at the time of plaintiff's fall. Dennis testified that prior to plaintiff's fall, at around 4 p.m., she had directed a restaurant employee to salt the sidewalk and the parking areas. Regarding the weather on that day, Dennis stated, "I can't remember the weather on that particular day. But obviously something was going on where I needed to add salt." She explained that she would add salt when it was wet and slippery. She then said that there was "probably light snow" on that day.

¶ 18 When plaintiff's accident occurred, Dennis was inside the restaurant. She testified that plaintiff's wife came into the restaurant and stated that her husband had slipped outside. Dennis went outside and saw plaintiff lying on his back, calling 911 on his cell phone. She did not see any water on plaintiff, in the area where he lay, or dripping from the building on or near him.

¶ 19 Dennis testified that she remained outside with the plaintiff until an ambulance arrived to take him to the hospital. After he was taken to the ambulance, Dennis checked the area where he had been lying, and she did not see any water or ice. "[T]here wasn't any water or anything like a puddle to cause him to slip or fall there," she said. Additionally, she did not observe any ice on the sidewalk between the door and the place where plaintiff fell.

¶ 20 Defendant finally attached the deposition testimony of Rene Cabanas and Manuel

Sanchez, two employees at the restaurant. Cabanas testified that he regularly performed snow removal and salting on the sidewalk outside the restaurant. He did not specifically remember if he was working on February 29, 2008, but he did not recall taking any time off around that date. Counsel for plaintiff asked him whether he remembered ever seeing water dripping from the gutters around the building onto the sidewalk. Cabanas replied, "We have leaking from the front door, wasn't the gutters, was when the snow melts." He stated that the leaking would occur in the area near the door. Cabanas further stated that he never saw any water dripping from the roof or the gutters near the area where plaintiff fell. He also never observed any problems with ice accumulation in that area.

¶ 21 Sanchez, like Cabanas, testified that he regularly shoveled and salted the sidewalk outside the restaurant. He stated that in the winter of 2008, he observed a "very little leak" around a gutter on the side of the front door. When he saw it, he placed extra salt in the area and reported the leak. He stated that "they" told him that the leak would be fixed, but he did not know if it was ever actually fixed. Counsel for defendant asked Sanchez whether he ever observed water dripping from the roof onto the sidewalk in the area where plaintiff fell. Sanchez said, "No, never. I never seen ice on the floor." However, he did not specifically remember the condition of the sidewalk on February 29, 2008.

¶ 22 On December 14, 2008, the trial court granted defendant's motion for summary judgment. The court explained:

> "The Plaintiff testified that his foot slipped because the sidewalk was slippery. He also testified that while he saw no ice on the ground, he 'assumed' that he fell on ice.

> Thus, the Plaintiff here cannot identify the cause of his fall. Further, he contends that circumstantial evidence of the water dripping from the gutter or roof shows that he slipped on ice. However, neither the Plaintiff nor anyone else actually saw water dripping from the roof or gutter in the location of his fall on the day of the accident. *** In addition, as there is no evidence that the roof or gutter was leaking on the day of the accident in the location of the Plaintiff's fall, even if the Plaintiff could identify ice as the cause of his fall, there is no evidence of an unnatural accumulation."

The court further found that since plaintiff could not show proximate cause or an unnatural accumulation of water or ice, he could not prevail on either a theory of negligence or *res ipsa loquitur*.

¶ 23 Plaintiff now appeals the trial court's grant of summary judgment.

¶ 24 II. ANALYSIS

¶ 25 On appeal, plaintiff argues that the trial court erred in granting summary judgment to defendant where a material issue of fact existed as to whether he slipped on an unnatural accumulation of water or ice. Plaintiff also argues that the trial court committed reversible error in denying his motion for Rule 219(c) sanctions against defendant for failure to produce accident and maintenance records related to the sidewalk, roof, and gutter at issue.

¶ 26 A. Summary Judgment

¶ 27 We begin by considering plaintiff's contention that the trial court erred in granting summary judgment for defendant. In considering this contention, we are mindful that summary judgment is appropriate where, "when viewed in the light most favorable to the nonmoving

party, the pleadings, depositions, admissions, and affidavits on file reveal that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *General Casualty Insurance Co. v. Lacey*, 199 Ill. 2d 281, 284 (2002) (citing 735 ILCS 5/2-1005(c) (West 2006)). We review the trial court's entry of summary judgment *de novo*. *General Casualty*, 199 Ill. 2d at 284.

¶ 28 In order to recover in a slip and fall case, a plaintiff must show that (1) he fell due to an unnatural accumulation of ice, snow, or water and (2) the property owner had actual or constructive knowledge of the condition. *Gilberg v. Toys R Us, Inc.*, 126 Ill. App. 3d 554, 557-58 (1984). An accumulation of ice, snow, or water is unnatural if it is caused by the design or construction of the building or premises, or the landowner otherwise caused the accumulation to develop in an unnatural way. *Bloom v. Bistro Restaurant Ltd. Partnership*, 304 Ill. App. 3d 707, 711 (1999). Conversely, it is well established that a landowner has no liability for injuries that result from merely natural accumulations of ice, snow, or water. *Lohan v. Walgreens Co.*, 140 Ill. App. 3d 171, 173 (1986) (as a matter of law, store owners were not liable to customer who slipped and fell upon floor that was wet due to rainfall that was tracked inside by other customers); *Shoemaker v. Rush-Presbyterian-St. Luke's Medical Center*, 187 Ill. App. 3d 1040, 1043 (1989) (in order to recover as a consequence of a fall on ice, snow, or water, plaintiff must show that the accumulation was unnatural in origin); *Wilson v. Gorski's Food Fair*, 196 Ill. App. 3d 612, 617-18 (1990) (rejecting plaintiffs' argument that court should depart from rule that landowner has no liability for injuries resulting from a natural accumulation of ice, snow, or water). In a summary judgment hearing, although plaintiff does not need to prove his case, he

must present some facts to show that he fell on an accumulation of ice, snow, or water that was unnatural and caused by defendant. *Gilberg*, 126 Ill. App. 3d at 558 (summary judgment was correctly entered for defendant where plaintiff slipped on ice in defendant's parking lot but no facts indicated that the ice was anything other than a natural accumulation).

¶ 29 We begin by considering the negligence count of plaintiff's complaint. The trial court entered summary judgment for defendant on this count for two main reasons: First, plaintiff could not identify the cause of his fall, and there was no evidence of ice or water on the ground in the area where he slipped. Second, even if plaintiff could establish that he fell on ice or water, he had no evidence indicating that it was an unnatural accumulation. We agree on both counts.

¶ 30 It is well established that liability cannot be based on mere conjecture or surmise as to the cause of injury. *Kimbrough v. Jewel Companies, Inc.*, 92 Ill. App. 3d 813, 817 (1981); *Strutz v. Vicere*, 389 Ill. App. 3d 676, 679 (2009). Thus, in a slip and fall case, summary judgment for defendant is proper where plaintiff has no evidence regarding the cause of his fall. *Kimbrough*, 92 Ill. App. 3d at 817. For instance, in *Kimbrough*, plaintiff slipped and fell on a ramp after leaving the defendant's store. *Id.* at 815. The plaintiff stated that she did not know why she fell, although she saw something that looked like grease in the area. *Id.* at 815-16. Upon these facts, the *Kimbrough* court affirmed summary judgment for defendant, explaining that, even if there was some defect or some object lying on the ramp, plaintiff could not produce any evidence that the defect or the object was the proximate cause of her fall. *Id.* at 817. Similarly, in *Strutz*, 389 Ill. App. 3d at 677, the plaintiff's decedent fell down a stairway and subsequently died from his injuries. Plaintiff brought suit against the building owners, alleging that the condition of the

staircase was unreasonably dangerous. However, plaintiff lacked any evidence as to the cause of the decedent's fall. *Id.* at 681. Accordingly, the *Strutz* court affirmed summary judgment for defendants, finding that plaintiff could not establish the necessary causal relationship between defendants' alleged negligence and the decedent's injuries. *Id.*

¶ 31 In the present case, plaintiff testified as follows regarding the cause of his fall:

"COUNSEL FOR DEFENDANT: You said that the sidewalk was slippery. Do you know what caused the sidewalk to be slippery for your foot to slide out as you've described it?

PLAINTIFF: I would assume that it had ice on it.

Q. When you say you would assume, at any time did you notice one way or the other if there was any ice in the area where you had fallen?

A. Did I reach out and run my fingers over it, is that the question?

Q. Yes.

A. No, I was in pain.

Q. Did you at any time, whether it be by your body or a feeling determine whether or not there was any ice in the area where you fell?

A. No. Once I fell, I really had other things on my mind.

Q. So it would be a fair statement, correct me if I'm wrong, you don't know one way or the other if there was any ice in the area where you fell; is that accurate?

A. I cannot testify that there was ice on the sidewalk. If there was, it was under my boot or under my coat."

From this testimony, it is apparent that plaintiff could not personally identify the cause of his fall. Although he "assume[d]" that he fell on ice, such conjecture cannot form the basis for liability. *Kimbrough*, 92 Ill. App. 3d at 817; *Strutz*, 389 Ill. App. 3d at 679. Moreover, no other witness observed any ice or water on the ground at the location where plaintiff slipped. On the contrary, Dennis, the restaurant manager, testified that after plaintiff was taken to the ambulance, she checked the area where he had been lying and did not see any water or ice. Two other restaurant employees, Cabanas and Sanchez, testified that they had never observed any ice accumulation in the area where plaintiff fell.

¶ 32 Plaintiff argues that his testimony that he felt water droplets falling on his head after his fall is sufficient to create a material issue of fact as to whether he slipped on water or ice. In effect, plaintiff invites us to speculate that, because he felt water droplets on his head after his fall, there might also have been water dripping at some earlier, unspecified time, and that water might have caused his fall. However, as has been discussed above, speculation and conjecture are insufficient to create a material issue of fact as to the cause of a plaintiff's injury. *Kimbrough*, 92 Ill. App. 3d at 817; *Strutz*, 389 Ill. App. 3d at 679.

¶ 33 Moreover, even if we did find that plaintiff's testimony created a material issue of fact as to whether he slipped on ice or water, there is no evidence that such accumulation was unnaturally caused by the defendant. As noted above, a landowner has no liability for injuries resulting from a natural accumulation of ice, snow, or water. *Wilson*, 196 Ill. App. 3d at 617-18; see *Gilberg*, 126 Ill. App. 3d at 558 (in slip-and-fall case, summary judgment for defendant was proper where plaintiff slipped on ice in defendant's parking lot but no facts indicated that the ice

was anything other than a natural accumulation). In this case, although plaintiff felt water dripping on his head after his fall, he stated that he did not see where it came from, and he admitted that at no time prior to his accident did he observe any water coming from the roof. Indeed, there is no testimony that anyone ever saw water coming from the roof or the gutter in that area.

¶ 34 Plaintiff nevertheless argues that the testimony of Cabanas and Sanchez creates a material issue of fact as to whether water dripping from a negligently maintained gutter caused an unnatural accumulation of water and ice in the area where he fell. We disagree. Cabanas testified that he had observed leaking from the front door of the restaurant due to melting snow. However, plaintiff did not fall near the front door; his deposition testimony clearly indicates that he fell some distance away, when he was near the parking lot. Cabanas explicitly testified that he never saw any water dripping from the roof or the gutters in that area, nor did he ever observe any problems with ice accumulation in that area. Similarly, Sanchez testified that he had seen a "very little leak" on the side of the front door, but he never observed water dripping from the roof onto the sidewalk in the area where plaintiff fell, nor did he observe any ice accumulation in that area. Thus, contrary to plaintiff's contention, the testimony of Cabanas and Sanchez does not support his allegation that there was an unnatural accumulation of water or ice in the area where he slipped. Indeed, their testimony serves as evidence against his allegation, since both employees affirmatively testified that they had never seen dripping water or an accumulation of ice in that area.

¶ 35 Plaintiff next argues that the instant case is analogous to *Durkin v. Lewitz*, 3 Ill. App. 2d

481 (1954), and *Lapidus v. Hahn*, 115 Ill. App. 3d 795 (1983), in which the unnatural accumulation issue was held to be a question of fact for the jury. However, *Durkin* and *Lapidus* are both distinguishable from the instant case because, in both cases, the plaintiff presented testimony that, if true, clearly established that dripping water from a negligently maintained fixture created an accumulation of ice that led to her fall.

¶ 36 In *Durkin*, plaintiff slipped and fell on ice on a second-story landing, and she brought suit against the building's owners. *Durkin*, 3 Ill. App. 2d at 483. Plaintiff's theory was that the ice accumulated because of defendants' negligence in failing to repair a defective roof gutter which dripped water onto the landing. *Id.* In support, plaintiff's witness testified that she had seen the holes in the gutter and that water from the gutter created a half-inch sheet of ice upon the landing. *Id.* The court found that this testimony was sufficient to create a question of fact as to whether plaintiff slipped on an unnatural accumulation of ice. *Id.* at 493. However, no such testimony was adduced in the case at hand; as previously discussed, no witness testified that he observed water dripping from the roof or gutter near the place where plaintiff fell, or that there was an accumulation of ice in that area.

¶ 37 Likewise, in *Lapidus*, plaintiff was injured when she slipped on ice while leaving her apartment building, and she brought suit against her landlord. *Lapidus*, 115 Ill. App. 3d at 796. Five witnesses all testified that, when it rained or snowed, water would drip from the building's roof onto the platform in front of the door. *Id.* at 796-99. Plaintiff's husband testified that on the day before the accident, he observed water pouring off the roof and onto the landing, and on the day of the accident itself he observed a half-inch accumulation of ice in that same area. *Id.* at

798. Based upon this testimony, the *Lapidus* court found that the jury could reasonably have concluded that the ice was caused by the defective nature of the roof and was not a natural accumulation. *Id.* at 800-01. Again, no such testimony was presented in the case at bar. Thus, neither *Lapidus* nor *Durkin* supports plaintiff's contention that, under the facts of this case, a material issue of fact exists regarding an unnatural accumulation of ice or water.

¶ 38 Plaintiff's final argument on the issue of negligence is that, since defendant failed to produce accident and inspection reports for the area in question, there is a presumption that the contents of those reports would be adverse to defendant. In particular, plaintiff states that defendant failed to produce the following documents: reports regarding alleged prior slip and fall accidents on December 12, 2007, and January 3, 2008, and any inspection and maintenance reports that were generated after Sanchez reported a leak near the front door in 2008.

¶ 39 As his sole authority on this point, plaintiff cites *Beery v. Breed*, 311 Ill. App. 469 (1941), for the proposition that a party's failure to produce evidence gives rise to a presumption that the evidence would be adverse. This is a misstatement of *Beery's* holding. The *Beery* court held that where a plaintiff has made a *prima facie* case, the defendant's failure to call witnesses or otherwise present evidence in its control gives rise to a presumption that the evidence is adverse. *Id.* at 474-75. However, the court also expressly stated that no such presumption arises where plaintiff has failed to make a *prima facie* case:

> "There is no presumption against a defendant for failure to call witnesses, when the plaintiff, carrying the burden of proof, has not made a prima facie case, and such presumption cannot be used to relieve the plaintiff from the burden of proving his case.

> [Citations.] On the other hand, where the plaintiff makes a prima facie case, the failure of the defendant to produce any evidence warrants the inference that the testimony would be unfavorable to him [citation], and may be considered by the jury." *Id.* at 475-76.

In the present case, for all the reasons discussed above, plaintiff has failed to create a material issue of fact as to whether he slipped on an unnatural accumulation of ice or water, which is a necessary part of his *prima facie* case. See *Wilson*, 196 Ill. App. 3d at 617-18; *Gilberg*, 126 Ill. App. 3d at 558. Under *Beery*, he is not entitled to a presumption that would relieve him from the burden of proving his case. Accordingly, the trial court did not err in granting summary judgment for defendant on plaintiff's negligence claim.

¶ 40 We next consider the trial court's grant of summary judgment on plaintiff's *res ipsa loquitur* claim. *Res ipsa loquitur* is not a separate theory of liability; rather, it is a doctrine which permits the trier of fact to infer negligence by circumstantial evidence when the precise cause of the injury is not known by the plaintiff. *Wilson v. Michel*, 224 Ill. App. 3d 380, 386 (1991); *Briones v. Mobil Oil Corp.*, 150 Ill. App. 3d 41, 45 (1986). In order to raise an inference of negligence under this doctrine, a plaintiff must show "(1) that the occurrence is one that ordinarily does not occur in the absence of negligence and (2) that the defendant had exclusive control of the instrumentality that caused the injury." *Dyback v. Weber*, 114 Ill. 2d 232, 242 (1986).

¶ 41 In this case, plaintiff has failed to establish that his fall is the kind of occurrence that does not ordinarily occur in the absence of negligence. Even in the absence of negligence, people may slip and fall, especially in the winter months in the Chicago area. This is particularly true given

plaintiff's past history of falls due to muscle weakness from postpolio syndrome. As this court has stated before, "[r]es ipsa loquitur cannot be applied where the condition causing injury can be accounted for as readily on the hypothesis of pure accident as on the ground of negligence." *Hunter v. Alfina*, 112 Ill. App. 2d 432, 436 (1969).

¶ 42 In this regard, the present case is analogous to *Rinck v. Palos Hills Consolidated High School District No. 230*, 82 Ill. App. 3d 856 (1979). The *Rinck* plaintiff, a high school student, received an electric shock when a fellow student plugged in an electric frying pan in a home economics class. *Id.* at 858. She brought suit against the school district to recover for her injuries. *Id.* The *Rinck* court found that plaintiff's allegations were insufficient to state a cause of action based on the *res ipsa loquitur* doctrine. *Id.* at 862. The court explained:

> "[T]he facts as alleged do not necessarily infer negligence on the part of defendants. There are several possible causes for the accident apart from any negligence by defendants; for example, the student using the frying pan could have been negligent, or the frying pan may have had an inherent defect for which the manufacturer would potentially be liable, or there may have been a defect in the electrical system for which the power company, not the school, would potentially be liable." *Id.*

See also *Britton v. University of Chicago Hospitals*, 382 Ill. App. 3d 1009, 1012 (2008) ("Clearly if two reasonable inferences are deducible from the same facts, one of which comports with defendant's responsibility and the other is directly contra thereto, neither should be indulged to permit recovery by use of the doctrine of *res ipsa loquitur*").

¶ 43 Likewise, in the instant case, the facts as alleged do not necessarily imply negligence on

the part of defendant. Rather, there are multiple reasonable inferences that are deducible from the same facts, some of which do not necessitate defendant's responsibility. For instance, plaintiff may have fallen due to his muscle weakness from postpolio syndrome. Alternately, plaintiff testified that when he entered the restaurant, the parking lot and the sidewalk were wet; thus, if he did, in fact, slip on ice, it is entirely possible that it resulted from a natural accumulation rather than a leaking gutter. The existence of these alternate possibilities negates the possibility of recovery under the doctrine of *res ipsa loquitur*, and, consequently, the trial court did not err in entering summary judgment for defendant. See *Hunter*, 112 Ill. App. 2d at 436.

¶ 44 B. Plaintiff's Motion for Sanctions

¶ 45 Plaintiff next contends that the trial court erred by denying his motion for Rule 219(c) sanctions against defendant for failure to produce documents relating to the construction, maintenance, and repair of the sidewalk, roof, and gutter at issue. Plaintiff states that this court should sanction defendant by ordering that defendant's answer be stricken "as it pertains to liability and notice."[1]

¶ 46 Rule 219(c) authorizes a trial court to impose sanctions upon any party who unreasonably refuses to comply with any provisions of the court's discovery rules or any order entered pursuant to these rules. Ill. S. Ct. R. 219(c) (eff. July 1, 2002); *Shimanovsky v. General Motors Co.*, 181 Ill. 2d 112, 120 (1998). However, no sanction should be imposed unless the

[1] Plaintiff seeks this particular relief for the first time on appeal. In his motion for sanctions before the trial court, plaintiff did not specify what sanctions he sought.

noncompliance is unreasonable and the resulting order is just. *Wyrick v. Time Chemical, Inc.*, 191 Ill. App. 3d 1041, 1044 (1989). A "just" order in the context of Rule 219(c) is an order which ensures both discovery and a trial on the merits to the greatest degree possible. *Id.* The decision of whether or not to impose sanctions is within the broad discretion of the trial court and will not be reversed absent an abuse of that discretion. *Cyclonaire Corp. v. ISG Riverdale, Inc.*, 378 Ill. App. 3d 554, 562 (2007); *Wyrick*, 191 Ill. App. 3d at 1044. An abuse of discretion occurs only where no reasonable person would take the view of the trial court. *Dawdy v. Union Pacific R.R. Co.*, 207 Ill. 2d 167, 177 (2003).

¶ 47 In *Shimanovsky*, our supreme court set forth six factors to be considered in determining whether a particular sanction is appropriate:

> "(1) the surprise to the adverse party; (2) the prejudicial effect of the proffered testimony or evidence; (3) the nature of the testimony or evidence; (4) the diligence of the adverse party in seeking discovery; (5) the timeliness of the adverse party's objection to the testimony or evidence; and (6) the good faith of the party offering the testimony or evidence." *Shimanovsky*, 181 Ill. 2d at 124 (citing *Boatmen's National Bank of Belleville v. Martin*, 155 Ill. 2d 305, 314 (1993)).

¶ 48 In this case, application of the *Shimanovsky* factors does not support a conclusion that the trial court abused its discretion in denying sanctions. We begin by considering the prejudicial effect of the evidence at issue. Plaintiff has not shown that the requested documents ever existed, let alone that they contained information that would be both relevant to this case and favorable to him. This is shown in his motion for sanctions before the trial court, in which he

stated that the allegedly missing records were "expected to contain" certain documents, but he provided no basis for this expectation. Indeed, plaintiff has never provided any evidence regarding the existence or the contents of the documents he now seeks. Thus, any prejudice he claims from their absence is merely speculative. See *City of Champaign v. Sides*, 349 Ill. App. 3d 293, 302-03 (2004) (trial court did not abuse its discretion by refusing to compel plaintiff to produce documents where the defendant never offered evidence that the documents existed).

¶ 49 Moreover, with regard to the issue of good faith, defendants assert that they complied with plaintiff's discovery requests to the fullest extent possible under the circumstances. Nor do we find any evidence in the record to the contrary. The record shows that before plaintiff filed his suit, defendant had already filed for bankruptcy, and the bankruptcy court had already approved the sale of defendant's assets to Blue Ribbon. After plaintiff filed suit and issued his discovery requests, defendant promptly provided what documents it had in its possession and explained that it lacked possession of many of the requested documents due to its bankruptcy status. Defendant also took the initiative to issue a subpoena to Blue Ribbon that mirrored plaintiff's document requests, and it forwarded all documents it obtained to the plaintiff. From these facts, we can see that defendant did, in fact, attempt to cooperate with the discovery process. There is no indication that its failure to retain the documents at issue was deliberate or done in anticipation of litigation. See *Apa v. National Bank of Commerce*, 374 Ill. App. 3d 1082, 1086 ("A trial court has the discretion to impose sanctions for a deliberate or unreasonable failure to comply with discovery, but when that failure is not shown to be deliberate or unreasonable, the court's refusal to impose a sanction is neither an abuse of discretion nor a basis

for reversal").

¶ 50 In this regard, we find *Cohen v. Keane*, 105 Ill. App. 3d 298, 305 (1982), to be instructive. The *Cohen* plaintiff sought sanctions against defendants for destroying, disposing of, or obliterating records, including certain partnership tax returns. *Id.* At a hearing on plaintiff's motion, defendants testified that they had turned over all requested documents that were in their possession. *Id.* With regard to the partnership tax returns, one of the defendants stated that she had turned them over to her personal accountant, and she was unable to locate any copies of those returns. *Id.* Upon these facts, the trial court denied sanctions, finding that the defendants complied as fully as possible with plaintiff's discovery requests, and the *Cohen* court affirmed. *Id.* at 305-06. Similarly, the instant defendant claimed that it turned over all of the requested documents that were in its possession, and the trial court apparently found this assertion to be credible, insofar as it chose not to impose sanctions. We cannot say that this decision was an abuse of discretion.

¶ 51 Notwithstanding the foregoing, plaintiff cites *Stegmiller v. H. P. E., Inc.*, 81 Ill. App. 3d 1144 (1980), for the proposition that sanctions may be imposed even where evidence is inadvertently lost. *Stegmiller* is readily distinguishable on its facts. In *Stegmiller*, plaintiff filed a product liability suit alleging that a pool filter electrocuted and killed her son. *Id.* at 1145. After suit was filed, the defendants requested the production of the pool filter multiple times through formal discovery requests. *Id.* Plaintiff ignored each of the requests as well as multiple court orders directing her to produce the pool filter. *Id.* Only after the trial court dismissed plaintiff's suit did plaintiff attempt to explain that the filter was lost while in the possession of

her attorney. *Id.* at 1146. This explanation came nearly three years after defendants' initial request for the filter. *Id.* at 1147. The *Stegmiller* court upheld the dismissal of plaintiff's suit under Rule 291(c), explaining that "[n]othing in the record demonstrates a willingness to comply with the court ordered discovery which militates against the sanction of dismissal." *Id.*

¶ 52 By contrast, in the present case, the record demonstrates a willingness on the part of defendant to comply with discovery. Unlike the *Stegmiller* plaintiff, who blatantly ignored repeated production requests and court orders for years on end, the defendant in this case promptly explained its inability to produce the requested documents both to the plaintiff and to the court. In sum, defendant has not displayed "a deliberate, contumacious or unwarranted disregard for the court's authority" (*Shimanovsky*, 181 Ill. 2d at 118) so as to warrant the severe sanctions that plaintiff calls for in this appeal.

¶ 53 Finally, the remaining *Shimanovsky* factors – surprise to the adverse party, the nature of the evidence at issue, the diligence of the adverse party, and the timeliness of the adverse party's objection to the evidence – do not weigh strongly in favor of sanctions. In fact, the diligence of the adverse party arguably weighs against sanctions, insofar as plaintiff was invited to issue his own subpoena to Blue Ribbon to obtain the documents he sought, but he declined to do so.

¶ 54 In light of all these considerations, particularly the lack of demonstrated prejudice to the plaintiff and the evidence of defendant's good faith, we cannot say that no reasonable person would take the position of the trial court in denying plaintiff's request for sanctions. See *Cyclonaire*, 378 Ill. App. 3d at 562; *Dawdy*, 207 Ill. 2d at 177 (defining abuse of discretion standard).

¶ 55 III. CONCLUSION

¶ 56 For the foregoing reasons, we affirm the trial court's grant of summary judgment in favor of defendant. We also affirm the trial court's decision not to impose sanctions upon defendant under Rule 219(c).

¶ 57 Affirmed.