FOURTH DIVISION
July 23, 2015

No. 1-14-1772

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

EVELIA RODRIGUEZ, Plaintiff-Appellant, v. ROYAL FINANCIAL, INC., a Delaware Corporation and bank holding company for ROYAL SAVINGS BANK, and ROYAL SAVINGS BANK, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County, Illinois. No. 12L003195 The Honorable Eileen Mary Brewer, Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.

Justices Howse and Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: In negligence cause, grant of summary judgment is proper where there is no evidence that the defendant bank or its servants had actual or constructive notice of a hazardous condition present in its parking lot. Affirmed.

¶ 2 Plaintiff Evelia Rodriguez was injured in a Royal Savings Bank (defendant) parking lot when she slipped and fell on what appeared to be dog poop as she approached a walk-up

bank teller window from the bank parking lot. She filed a complaint, alleging that defendant failed to inspect its premises, it failed to maintain a safe zone through which customers could walk on approach to the walk-up bank teller window, and that defendant knew or should have known of the existence of the unsafe condition, that is, dog excrement near the walk-up window. Defendant responded by filing a motion for summary judgment pursuant to section 2-1005 of the Code of Civil Procedure (735 ILCS 5/2-1005 (West 2010)), claiming that it lacked actual or constructive notice of the allegedly unsafe condition. After briefing and arguments, the circuit court granted defendant's motion. Plaintiff appeals.

¶ 3 I. BACKGROUND

¶ 4 In her complaint, plaintiff alleged that, on March 25, 2010, she was a customer at defendant's bank and was visiting the bank branch located at 10555 South Ewing Avenue in Chicago. While there, she slipped and fell on dog excrement located outside the bank building near the walk-up window. She alleged that defendant was careless and negligent in that it, in part: failed to maintain the areas near the walk-up window in a safe condition; failed to inspect the area for defects and hazardous conditions which it knew or in the exercise of ordinary care should have known were present; failed to warn plaintiff of the dangerous and defective condition on the premises; and failed to remove the dog excrement from the premises when, through its agents and/or employees, it knew or should have known of the existence of the excrement.

¶ 5 Defendant filed an affirmative defense, alleging that the proximate cause of plaintiff's injuries was her own negligence and failure to keep a proper lookout. Discovery ensued.

¶ 6 In plaintiff's deposition,[1] she stated that, at the time of injury, she had been a longtime customer of defendant's bank. She lives three blocks from the bank and, on the morning of the incident, walked to the bank from her home. She approached the bank at approximately 8:50 AM, crossing through the parking lot to get to the walk-up bank teller window. The bank was not yet open, but the walk-up window was open. Plaintiff did not have trouble walking through the parking lot. Although there is a sidewalk by which customers could approach the walk-up window, plaintiff instead approached the walk-up window via the parking lot and planned to maneuver behind a railing to reach the walk-up window.

¶ 7 Near the bank teller walk-up window, plaintiff's right foot slipped and she fell down, injuring her right knee. She testified:

> "[DEFENSE COUNSEL] Q: What caused you to slip?
>
> [THE PLAINTIFF] A: It was a thing that was there.
>
> Q: What was the thing?
>
> A: It was a thing. It was a thing that was there that did not smell, but it was slippery.
>
> Q: Do you know what the thing was?
>
> A: What was that thing?
>
> Q: That's my question.
>
> A: It was dog shit."

¶ 8 Plaintiff testified that the dog excrement was "several inches big" and was "very slippery." She testified she thought the dog excrement had been on the ground "for days" before she slipped on it because of how it looked and that it no longer smelled. She also testified:

[1] Plaintiff testified at her deposition with the assistance of a language translator.

"[DEFENSE COUNSEL] Q: Do you know [the dog excrement had been there for days] for a fact?

[THE PLAINTIFF] A: When I saw it there - - As I saw it there, I suppose that's how it was.

Q: Do you know that for a fact or are you guessing that?

A: Well, there was nobody there. There was no animal, no dog that had just gone there at the time.

Q: Are you just guessing that the dog shit had been on the ground for several days?

A: No. No, it's not a guess. I just told you it had been there for days, but I don't know - - I cannot tell you exactly how long.

Q: Had you ever seen it before this day?

A: Of course not. I had not been to the bank.

Q: So you don't know how long it had been on the ground before you slipped, do you?

[Plaintiff's counsel objected to this question.]

A: Exactly no, sir, how would I know?"[2]

¶ 9 Bank manager Erika Alvarez, who was on duty at the time of plaintiff's fall, provided an affidavit in which she attested that neither she nor any other bank employees knew about the dog excrement in the parking lot prior to plaintiff's fall. She attested that she arrived at

[2] The interpreter stated for the record that plaintiff answered this question before the interpreter finished interpreting plaintiff's counsel's objection.

the bank at 9 AM that morning and that the maintenance person who normally cleans the parking lot each morning had not yet arrived. She attested:

> "5. On the morning of March 25, 2010, myself, Cheryl Tavares and Evelina Alvarez were all working at Royal Savings Bank and none of us had any knowledge of dog remains being located in the parking lot. We have all been deposed in this lawsuit.
>
> 6. After investigating the incident at issue, there was no employee of Royal Savings Bank that had knowledge of dog remains in the parking lot prior to Plaintiff's alleged slip and fall."

¶ 10 Erika Alvarez testified to this in deposition, as well. She also testified plaintiff's fall occurred before Alvarez arrived at work, explaining that plaintiff was sitting in the bank lobby when she arrived at the bank that morning.

¶ 11 Bank teller Evelina Alvarez testified that she saw plaintiff crossing the parking lot on her way to the bank teller walk-up window. She did not see plaintiff fall. When plaintiff did not ring the service bell, Alvarez looked out the window and saw plaintiff on the ground. She notified her teller supervisor, Cheryl Tavarez, who went outside to check on plaintiff.

¶ 12 Bank teller supervisor Tavarez testified at her deposition that, after plaintiff fell, she looked around the parking lot at the area where plaintiff fell. She saw what "could have been anything, mud, leaves, I don't know what it was." She did not touch it.

¶ 13 Bank maintenance worker Nate Walker testified that he was responsible for maintenance at two bank branches. He would come to the bank every day, generally at 10:30 AM, and sweep the parking lot and sidewalks. He had not yet swept the parking lot on the day plaintiff fell.

¶ 14 Defendant filed a motion for summary judgment, claiming that it lacked actual or constructive notice of the allegedly unsafe condition. After briefing and arguments, the circuit court granted the motion. Plaintiff filed a motion to reconsider, which the circuit court denied.

¶ 15 Plaintiff appeals.

¶ 16 II. ANALYSIS

¶ 17 On appeal, plaintiff contends the circuit court's grant of summary judgment was in error because there were genuine issues of material fact as to whether defendant had actual or constructive notice of the hazardous condition. Specifically, plaintiff argues that "facts and circumstances support that the slippery substance had been there for a substantial period of time," and the parking lot was not adequately monitored for such dangerous conditions. For the following reasons, we affirm.

¶ 18 Summary judgment is proper where the " 'pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *Robinson v. Point One Toyota, Evanston*, 2012 IL App (1st) 111889 at ¶ 5 (quoting 735 ILCS 5/2-1005(c) (West 2008)); see also *Fidelity National Title Insurance Co. of New York v. West Haven Properties Partnership*, 386 Ill. App. 3d 201, 212 (2007) (citing *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 315 (2004)). The purpose of summary judgment is not to try an issue of fact, but to determine if one exists. *Frye v. Medicare-Glaser Corp.*, 153 Ill. 2d 26, 31 (1992). While this relief has been called a "drastic measure," it is an appropriate tool to employ in the expeditious disposition of a lawsuit in which " 'the

right of the moving party is clear and free from doubt.' " *Morris v. Margulis*, 197 Ill. 2d 28, 35 (2001) (quoting *Purtill v. Hess*, 111 Ill. 2d 229, 240-41 (1986)).

¶ 19 In determining whether the moving party is entitled to summary judgment, the court must construe the pleadings and evidentiary material in the record strictly against the moving party. *Happel v. Wal-Mart Stores, Inc.*, 199 Ill. 2d 179, 186 (2002). If the plaintiff cannot establish each element of his or her cause of action, summary judgment for defendant is proper. *Wallace v. Alexian Brothers Medical Center*, 389 Ill. App. 3d 1081, 1085 (2009). Although the burden is on the moving party to establish that summary judgment is appropriate, the nonmoving party must present a *bona fide* factual issue and not merely general conclusions of law. *Caponi v. Larry's 66*, 236 Ill. App. 3d 660, 670 (1992). A genuine issue of material fact exists where the facts are in dispute or where reasonable minds could draw different inferences from the undisputed facts. *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 114 (1995); *In re Estate of Ciesiolkiewicz*, 243 Ill. App. 3d 506, 510 (1993).

¶ 20 We review the circuit court's decision to grant a motion for summary judgment *de novo* (*Morris*, 197 Ill. 2d at 35), and we will only reverse if we find that a genuine issue of material fact exists (see *Addison v. Whittenberg*, 124 Ill. 2d 287, 294 (1988)). In so doing, we may affirm on any basis found in the record, regardless of whether the circuit court relied on those grounds or whether its reasoning was correct. *Illinois State Bar Association Mutual Insurance Co. v. Coregis Insurance Co.*, 355 Ill. App. 3d 156, 163 (2004).

¶ 21 To properly state a cause of action for negligence, the plaintiff must show that the defendant owed him a duty, that the defendant breached that duty, and that this breach was the proximate cause of his resulting injuries. See *Heastie v. Roberts*, 226 Ill. 2d 515, 556

(2007); *Bermudez v. Martinez Trucking*, 343 Ill. App. 3d 25, 29 (2003). Although a business owner is not the insurer of his customer's safety, he does owe the customer the duty of exercising ordinary care in maintaining the premises in a reasonably safe condition. *Olinger v. Great Atlantic & Pacific Tea Co.*, 21 Ill. 2d 469, 473 (1961). Where a customer is injured by slipping on a foreign substance, liability may be imposed if it appears that the proprietor or its servant knew of its presence, or that the substance was there a sufficient length of time so that in the exercise of ordinary care its presence should have been discovered. *Olinger*, 21 Ill. 2d at 474.

¶ 22 In the case at bar, there is no evidence that the proprietor or its servants had actual notice of the hazardous condition. Plaintiff opines that, because bank teller Evelina Alvarez saw plaintiff walking across the lot and then saw her on the ground after she fell, "[l]ogic dictates that she could have also seen the item which caused the Plaintiff to fall prior to her actually falling." This is pure conjecture, which will not support her claim for negligence. See, *e.g.*, *McCormick by McCormick v. Maplehurst Winter Sports, Ltd.*, 166 Ill. App. 3d 93, 100 (1988) ("[S]urmise is not an adequate basis for establishing liability for negligence. Nor can an inference of negligence by established on inferences which are themselves speculative in nature.") We will, therefore, focus our analysis on whether the dog excrement was in the bank parking lot for a sufficient length of time such that, in the exercise of ordinary care, its presence should have been discovered, *i.e.*, whether defendant had constructive notice of the dog excrement.

¶ 23 Where a plaintiff alleges constructive notice, the time element is a material factor, and the plaintiff must "establish that the foreign substance was on the floor long enough to constitute constructive notice to the proprietor." *Hayes v. Bailey*, 80 Ill. App. 3d 1027, 1030

(1980); *Ishoo v. General Growth Properties, Inc.*, 2012 IL App (1st) 110919, ¶28 ("Constructive notice can also be shown where the dangerous condition is shown to exist for a sufficient length of time to impute knowledge of its existence to the defendants" (citing *Pavlik v. Wal-Mart Stores, Inc.*, 323 Ill. App. 3d 1060, 1065-66 (2001))). In *Hayes*, the Appellate Court, Third District, affirmed a directed verdict where the plaintiff slipped and fell in a puddle of water in a restaurant bathroom. *Hayes*, 80 Ill. App. 3d at 1029. The bathroom had been inspected earlier that evening by the defendant's employee. *Id*. There was no evidence of how long the water had been on the floor or how it got there. *Id*. at 1030. The court held that the time element to establish constructive notice is a material factor and that it was incumbent on the plaintiff to establish that the water had been on the floor long enough to constitute constructive notice to the defendant, stating:

> "In the instant case, there is no evidence at all as to how long the water had been on the floor of the restroom. Plaintiff simply testified that she slipped and fell and that after she was on the floor she noticed she was wet. In the absence of any evidence tending to show constructive notice we believe it was proper not to submit the case to the jury and to direct a verdict for the defendant." *Id*.

¶ 24 Similarly here, plaintiff has offered no evidence to establish that the dog excrement was on the bank parking lot long enough to constitute constructive notice. Plaintiff herself admits she does not know how long the substance had been on the ground. Bank manager Erika Alvarez provided an affidavit in which she averred that on the day of plaintiff's fall and prior to plaintiff's fall, neither she nor any other employees of the bank had knowledge that there was dog excrement in the parking lot. In addition to plaintiff, four of defendant's employees were deposed, none of whom testified to having been aware, prior to plaintiff's

fall, that there was dog excrement in the parking lot. The only evidence provided in this case regarding time is that of plaintiff herself, who testified, essentially, that probably the substance was dog poop and probably it had been there "for days" because it no longer smelled and because plaintiff did not see a person with a dog, nor a dog who had just defecated at the time she fell. The fact that there was no dog in the vicinity at the time of plaintiff's fall does not lead to an inference that the dog excrement was on the ground for several days, as plaintiff insists. See *McCormick by McCormick*, 166 Ill. App. 3d at 100 ("[S]urmise is not an adequate basis for establishing liability for negligence. Nor can an inference of negligence by established on inferences which are themselves speculative in nature").

¶ 25 Plaintiff relies on *Canales v. Dominick's Finer Foods*, 92 Ill. App. 3d 773 (1981), apparently to show that a court can reasonably infer that a slippery substance left on the floor has been there for a substantial amount of time such that constructive notice can be imputed to the business. *Canales*, however, is factually distinct from the case at bar and, thus, is unhelpful to plaintiff's argument. In *Canales*, which involved an appeal of a jury verdict, the plaintiff slipped and fell on an open and crushed tube of Ben-Gay ointment that was left on the defendant grocery store's floor. *Id.* at 773-74. As to the appealing defendant's argument that it did not have constructive notice of the slippery ointment on the grocery store floor, the Appellate Court, Third District, noted:

> "[T]here was testimony by plaintiff or her husband that the Ben-Gay tube was on the floor out of its package; that there was an empty Ben-Gay packaging container nearby; that the tube had been crushed in such manner that its contents were forced out of the bottom; that the contents were spread on the floor over an area

> about one foot wide and three feet long; that the contents were described as being greasy and pasty; that there were five or six footprints extending out from the ointment; that the footprints were greasy[.]" *Id.* at 775.

¶ 26 The employee responsible for inspecting and cleaning the area had not worked on the day of the plaintiff's fall. *Id*. at 775. The Appellate Court affirmed the circuit court's denial of the defendant's motion for a directed verdict and judgment notwithstanding the verdict, finding that, based on the particular facts of the case, it was reasonable to infer that the Ben-Gay ointment was on the floor for more than a few minutes. *Id*. at 776-77.

¶ 27 *Canales* differs from the case at bar, where there is no evidence whatsoever to support an inference that the substance had been on the bank parking lot or bank teller walk-up window area for a substantial period of time. Unlike the substance at issue in *Canales*, there is no evidence here of footprints tracking through the substance, nor any evidence of the substance being spread in any manner that might lead to a reasonable inference that it had been on the parking lot for a substantial period of time. As noted above, the only purported evidence as to this time period is plaintiff's hypothesis that, because she did not see a dog nearby and because she did not see a person nearby and because the substance on which she slipped did not stink, then the substance must have been there for "many days," such that defendant should have known of its existence. This conjecture is insufficient to withstand a motion for summary judgment.

¶ 28 Moreover, plaintiff's failure to establish how long the substance was on the parking lot does not only fail to establish constructive notice, but also fails to establish proximate cause. See *Hayes*, 80 Ill. App. 3d at 1031. Plaintiff argues that defendant should have had a "regular inspection system in place" of its parking lot and premises and, if it had such a

system in place, the inspecting employee would have found the substance, removed the substance, and prevented plaintiff's fall and resulting injury. However, even if defendant had a regular inspection system in place and even if defendant's employee had properly performed the required inspection, plaintiff still cannot establish proximate cause without knowing how long the substance had been on the parking lot surface. In the absence of any evidence showing that the substance had been on the parking lot surface "a substantial period of time," there is no evidence that defendant's alleged failure to have a regular inspection system in place caused the substance to remain on the parking lot surface, causing plaintiff to slip and fall. Therefore, there was no evidence of proximate cause. See *Hayes*, 80 Ill. App. 3d at 1031.

¶ 29 Although plaintiff need not prove her case at the summary judgment stage, she must present some evidentiary facts to support her cause of action. *Nowak v. Coghill*, 296 Ill. App. 3d 886, 895 (1998) ("Although a plaintiff need not prove his case at the summary judgment stage of the proceedings, if he fails to present sufficient evidentiary facts to support the elements of his cause of action, including the proximate cause element, then summary judgment in favor of the defendant is appropriate"). Here, based on plaintiff's failure to present an adequate factual basis to support her negligence claim, we conclude that the circuit court properly granted defendant's motion for summary judgment.

¶ 30 III. CONCLUSION

¶ 31 For all of the foregoing reasons, the decision of the circuit court of Cook County is affirmed.

¶ 32 Affirmed.