2015 IL App (2d) 140735-U
No. 14-0735
Order filed March 16, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

STEVEN SMOLA,	)	Appeal from the Circuit Court
	)	of Lake County.
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 09-L-1167
	)	
GREENLEAF ORTHOPEDICS, S.C.,	)	
BQMCC, LLC, TOMASSETTI	)	
LANDSCAPING, INC.,	)	Honorable
	)	Margaret J. Mullen,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Zenoff and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: In this slip-and-fall case, plaintiff did not plead that Greenleaf voluntarily assumed a duty to remove ice or snow and that theory was not before the trial court on summary judgment. Further, plaintiff presented no evidence that the accumulated snow and ice on Greenleaf's property was of unnatural origin, and therefore, the "natural accumulation" rule was invoked. Thus, the trial court did not err in granting Greenleaf summary judgment and we affirmed.

¶ 2 In 2009 plaintiff, Steven Smola, filed a two-count complaint alleging negligence against defendants, Greenleaf Orthopedics, S.C., BQMCC, LLC, and Tomassetti Landscaping, Inc. The matter stemmed from an incident where plaintiff slipped on black ice while on property owned

by Greenleaf. Plaintiff sought in excess of $100,000 in damages for his alleged injuries. The parties agreed to dismiss BQMCC and the trial court granted Tomassetti's motion to dismiss, and those entities are not parties to this appeal.

¶ 3 Thereafter, the trial court granted summary judgment in Greenleaf's favor and plaintiff now appeals that determination. Plaintiff contends that the trial court erred in granting Greenleaf summary judgment. We affirm.

¶ 4 I. BACKGROUND

¶ 5 The pleadings, depositions, and affidavits on file reflect that plaintiff was a patient of Greenleaf, which maintained an office at 151 West Golf Road in Libertyville. On December 7, 2007, at approximately 7 a.m., plaintiff parked his vehicle in the parking lot. Shortly after exiting his vehicle, plaintiff slipped and fell on his left shoulder. When plaintiff fell, there was a thin layer of ice on the asphalt and "an inch or so of snow," which plaintiff thought was "fresh snow." Plaintiff did not see any indication that the parking lot had been shoveled or plowed.

¶ 6 On December 3, 2009, plaintiff filed a negligence complaint against Greenleaf. Plaintiff alleged that he slipped on "black ice" in Greenleaf's parking lot. Plaintiff alleged that Greenleaf had a duty to maintain the property in a "prudent fashion" and "free from unreasonably dangerous conditions." Plaintiff alleged that Greenleaf breached this duty by allowing the unnatural accumulation of ice or snow in the parking lot. Plaintiff alleged that he suffered injuries resulting from the fall.

¶ 7 On January 6, 2011, Greenleaf filed a motion for summary judgment. Greenleaf argued that it had "no legal duty to warn of a natural accumulation of ice or snow" and that plaintiff failed to present any evidence demonstrating that the area where he slipped "consisted of an

unnatural accumulation of ice or snow *** ." Before the matter proceeded on summary judgment, the parties agreed to binding arbitration.

¶ 8 On February 24, 2011, the trial court dismissed the action, but retained jurisdiction to enforce an arbitration award. The arbitrator rendered an award in Greenleaf's favor, which Greenleaf sought to enforce in the trial court. Plaintiff opposed the motion, requesting that the trial court defer ruling on Greenleaf's motion until after the arbitrator ruled on plaintiff's motion to reconsider the award, which plaintiff had previously filed in the arbitration proceeding. The trial court granted Greenleaf's motion to enforce and, after plaintiff timely appealed that ruling, we reversed. See *Smola v. Greenleaf Orthopedic Associates*, S.C., 2012 IL App (2d) 111277.

¶ 9 Thereafter, the matter was reinstated and remanded to the arbitrator, who had passed away before he could rule on plaintiff's motion to reconsider. The case returned to the trial court's litigation docket, and the parties proceeded on the pending summary judgment motion.

¶ 10 On October 11, 2013, plaintiff filed a motion for leave to amend his complaint. The amended complaint sought to allege that, pursuant to various lease agreements, Greenleaf and BQMCC assumed a duty to maintain the parking lot in a safe and hazard-free condition, including free from the natural accumulation of ice and snow. Plaintiff further sought to allege that a local ordinance imposed a duty to maintain the parking lot in a hazard-free condition. On November 26, 2013, the trial court denied plaintiff's motion.

¶ 11 On May 6, 2014, the trial court granted Greenleaf's summary judgment motion. Plaintiff timely appealed after the trial court denied his motion to reconsider.

¶ 12 II. ANALYSIS

¶ 13 The only issue in this appeal is whether the trial court erred in granting Greenleaf's motion for summary judgment. In support of his contention of error, plaintiff argues that

Greenleaf had entered into lease agreements with tenants and agreed to be responsible for snow and ice removal from common areas. As a result, according to plaintiff, Greenleaf voluntarily assumed a duty to remove accumulating snow and ice. Plaintiff, without citation to authority, further urges us to conclude that "an amalgam of orthopedic surgeons and physical therapists prescribing physical therapy for their patients and providing a parking locale for those patients" has a duty to maintain the parking lot in a safe condition. Finally, plaintiff urges us to follow an opinion issued by the Massachusetts Supreme Court that disavowed the "natural accumulation rule," which rule plaintiff characterizes as an "antiquated precept."

¶ 14 A trial court will enter summary judgment if the pleadings, depositions, admissions, and affidavits show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2010); *Jones v. Chicago HMO Ltd. of Illinois*, 191 Ill. 2d 278, 291 (2000). We review *de novo* an order granting or denying summary judgment. See *Millennium Park Joint Venture, LLC v. Houlihan*, 241 Ill. 2d 281, 309 (2010).

¶ 15 In Illinois, there is no common-law duty to remove natural accumulations of snow and ice. *Chamisone v. Professional Property Management*, 2011 IL App (2d) 101115, ¶ 18. The rationale for this rule is that " ' it is unrealistic to expect property owners to keep all areas where people may walk clear from ice and snow at all times during the winter months.' " *Id.* ¶ 21 (quoting *Ordman v. Dacon Management Corp.*, 261 Ill. App. 3d 275, 281 (1994)). There are, however, exceptions to this general rule. For example, liability can arise if a defendant caused an unnatural accumulation of ice or snow, or aggravated the natural condition; negligently removed the snow from property; or is contractually obligated to remove the ice or snow. *Williams v. Lincoln Towers Associates*, 207 Ill. App. 3d 913, 916 (1991).

¶ 16 In this case, the trial court did not err in granting summary judgment in Greenleaf's favor. The only exception to the "natural accumulation rule" that plaintiff seeks to invoke is that Greenleaf was contractually obligated to remove the ice and snow from the parking lot. However, plaintiff's complaint alleged that Greenleaf had a general duty to maintain the property in a "prudent fashion" and keep it "free from unreasonably dangerous conditions." Plaintiff's complaint failed to allege that Greenleaf had a contractual obligation to remove ice and snow. We note that, although plaintiff sought leave to file an amended complaint alleging that, by entering into a lease with a tenant, Greenleaf voluntarily assumed a duty to remove ice and snow from the parking lot, the trial court denied plaintiff's request. Plaintiff does not challenge that ruling, and therefore, the only complaint on file is plaintiff's original complaint. Thus, because plaintiff did not plead that Greenleaf had voluntarily assumed a duty to remove ice and snow pursuant to a contract, that theory was not at issue before the trial court. See *Pagano v. Occidental Chemical Corp.*, 257 Ill. App. 3d 905, 911 (1994) (noting that the plaintiff fixes the issues and theories of recovery in his complaint, and when ruling on a summary judgment motion, a court looks to the pleadings to determine the issues).

¶ 17 We find support for our holding in *Perona v. Volkswagen of America, Inc.*, 2014 IL App (1st) 130748. In *Perona*, the plaintiffs brought suit over the alleged unintended acceleration of the Audi 500 automobiles. *Id.* ¶ 3. The plaintiffs filed six amended complaints, with the theory of their case being that the defendants had withheld known information about specific defects in the Audi 500 class of vehicles. *Id.* ¶¶ 4, 40. While cross-motions for summary judgment were under advisement, the plaintiffs sought leave to file a seventh amended complaint. *Id.* ¶ 15. The amended complaint sought to delete allegations relating to a specific defect and instead allege that there were "unusually high incidences" of unintended acceleration that the defendants

fraudulently and deceptively concealed, or in other words, the plaintiffs sought to allege deceptive concealment of a known propensity of unintended acceleration. *Id.* ¶¶ 15, 40. The trial court denied the plaintiffs' request for leave. *Id.* ¶ 15. Thereafter, the trial court granted the defendants' summary judgment motion and denied the plaintiffs' motion. In doing so, the trial court concluded that the plaintiffs' theory of the case, as alleged in the sixth amended complaint, had been that the defendants withheld information about specific defects in the class of vehicles. Therefore, the plaintiffs were not entitled to summary judgment on their new theory, deceptive concealment of a known propensity of unintended acceleration, which had not been pled. *Id.* ¶17. The trial court concluded that there was no genuine issue of material fact regarding the allegations in the plaintiffs' sixth amended complaint. *Id.*

¶ 18 On appeal, the reviewing court affirmed the trial court's determination to deny the plaintiffs' summary judgment motion. The court noted that because the plaintiffs' theory of the case, as alleged in their sixth amended complaint, "had always been" that the defendants withheld information about *specific defects*, the plaintiffs could not recover on their new theory of the tendency or propensity of unintended acceleration because that theory had never been pled. (Emphasis in original.) *Id.* ¶ 40 (citing *Pagano*, 257 Ill. App. 3d at 911).

¶ 19 The reasoning in *Perona* is persuasive here. Like *Perona*, plaintiff sought leave to amend his complaint while a summary judgment motion was pending, and the amended complaint sought to allege a new theory, *i.e.*, that Greenleaf had a contractual duty to remove accumulating ice and snow. The trial court denied plaintiff's motion for leave to amend his complaint. Thus, plaintiff's new theory was not part of a validly filed complaint and he could not rely on that theory at summary judgment. See *Perona*, 2014 IL App (1st) 130748 ¶ 41 ("We find that the

plaintiffs could not seek to recover on summary judgment on a theory that had never been part of a validly filed complaint *** ").

¶ 20 Having determined that plaintiff could not rely on the theory that Greenleaf voluntarily assumed a duty to remove accumulated ice and snow pursuant to a contract because the theory was not properly pled, we further conclude that Greenleaf was entitled to summary judgment. Plaintiff testified during a deposition that there was between 1 and 1 ½ inches of snow covering the parking lot, which he thought was fresh snow. Plaintiff further testified that he did not see any indication that the parking lot had been shoveled, plowed, or salted. Thus, the record is devoid of any evidence that would allow a fact finder to conclude that the snow and ice upon which plaintiff fell was of an unnatural origin, and therefore, there are no genuine issues of material fact. See *Shoemaker v. Rush-Presbyterian-St. Luke's Medical Center*, 187 Ill. App. 3d 1040, 1044 (1989) (holding that the defendant was entitled to summary judgment because there was no evidence that the water that the plaintiff had slipped on was from an unnatural origin).

¶ 21 In reaching our determination, we decline plaintiff's request to conclude that Greenleaf, as an "amalgam of orthopedic surgeons and physical therapists" had a duty to maintain the parking lot in a safe and non-hazardous condition due to the "obvious fact" that its clients are in a diminished physical state. We further decline plaintiff's invitation to disavow the natural accumulation rule. We recognize, as plaintiff notes, that the Massachusetts Supreme Court did away with the rule in *Papadopoulos v. Target Corp.*, 457 Mass. 368 (2010). However, in *Krywin v. Chicago Transit Authority*, 238 Ill. 2d 215 (2010), our supreme court applied the natural accumulation rule to conclude that the Chicago Transit Authority did not have a duty to remove the natural accumulation of snow and ice from its platform or to warn of such accumulation. *Id.* at 232. Tellingly, the Massachusetts Supreme Court issued *Papadopoulos*

within one week of our supreme court issuing *Krywin*. Nonetheless, our supreme court declined to revisit its holding on rehearing in light of *Papadopolous*. See *id.* at 245 (Freeman, J., dissenting). Because our supreme court had the opportunity to address the natural accumulation rule after the Massachusetts Supreme Court disavowed it, but declined to do so, we are bound to follow *Krywin*. See *DuPage County Airport Authority v. Department of Revenue*, 358 Ill. App. 3d 476, 486 (2005) ("It is fundamental to our judicial system that once our supreme court declares the law on any point, its decision is binding on all Illinois courts, and we cannot refuse to follow it, because we have no authority to overrule or modify supreme court decisions").

¶ 22 III. CONCLUSION

¶ 23 For the reasons stated, we affirm the judgment of the circuit court of Lake County.

¶ 24 Affirmed.