2015 IL App (2d) 141214-U
No. 2-14-1214
Order filed September 24, 2015

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ANNA SCHEPLEY,	)	Appeal from the Circuit Court
	)	of Boone County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 10-L-15
	)	
THE CONDOMINIUMS OF LOGAN	)	
SQUARE,	)	
	)	
Defendant and Third-Party	)	
Plaintiff-Appellee	)	
	)	
(Howlett Companies, Inc., Chris Morley,	)	
Individually and d/b/a A.J. Morley &	)	
Associates, Inc., Mary Ann Ivey, Individually	)	
and d/b/a A.J. Morley & Associates, Inc.,	)	Honorable
Defendants; United Parcel Service, Third-	)	Brendan A. Maher,
Party Defendant).	)	Judge, Presiding.

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

ORDER

¶ 1 *Held*: The trial court erred in granting defendant summary judgment on plaintiff's negligence claim, as plaintiff presented evidence from which a jury could find that defendant had constructive notice of the hole into which plaintiff fell.

¶ 2 Plaintiff, Anna Schepley, appeals the trial court's order granting summary judgment to defendant the Condominiums of Logan Square (Logan Square). She contends that issues of material fact exist on the issue of whether defendant had constructive notice of a hole in a common area of defendant's condominium complex. We reverse and remand.

¶ 3 Plaintiff sued Logan Square and other defendants. The complaint alleged that plaintiff stepped in a hole at defendant's complex while delivering packages for United Parcel Service (UPS). Plaintiff alleged that the area where she fell was in a common area of the complex and that defendant, as the condominium board, had a duty to safely maintain the common areas. Plaintiff further alleged that defendant should have had at least constructive notice of the hole, which existed for some time prior to her fall.

¶ 4 Deposition testimony showed that, on December 2, 2009, plaintiff was working as a seasonal UPS driver's helper, assisting Chad Corcoran. She had been a seasonal helper to Corcoran during the Christmas season of the previous three years. When she fell, plaintiff was delivering a package to 2057 Derby Lane, which was part of defendant's 84-unit complex. The unit was one of five in its building. A sidewalk in front of the building wrapped around to the back. In previous seasons, Corcoran delivered packages twice a week to that building.

¶ 5 On the day in question, Corcoran parked his truck across the street from the unit, intending to walk across a grassy area to the sidewalk in front of 2057 Derby Lane. Plaintiff and Corcoran each carried two packages. They walked briskly from the truck through the grassy area toward the unit's front door. As they approached the sidewalk, plaintiff stepped into a hole, which caused her to lose her balance and fall. As she began falling, she stepped back with her right foot and heard her left leg snap. She never saw the eight-inch-deep hole, because it was

covered by grass. Plaintiff returned to the scene in October 2010. She saw that the hole was still present but was visible because the grass was not as long at that time.

¶ 6 Jennifer Costanza testified in a deposition that she owned the unit at 2057 Derby Lane. The hole near the sidewalk and porch of her unit had been there for at least 10 months before plaintiff's fall. She was familiar with the area because she let her dog out through the front door each day. She could see the hole while standing on her porch, her front steps, or the adjacent sidewalk. She estimated the distance from her porch to the hole at 15 feet.

¶ 7 Thomas Pyszka owned Lawn Maintenance Service, which mowed the grass in the common areas at the complex. He testified that the hole was caused by water coming through the buried drain tile attached to a downspout on 2057 Derby Lane. Water from the drain tile washed away the dirt and caused the lawn to deteriorate. Pyszka was aware of about six holes at the complex, all caused by the same problem. He testified that, to remedy the problem, additional drain tile could be used, extending the drain tile farther away from the sidewalk, with a pop-up valve at the end of the drain tile. This would be in line with industry standards.

¶ 8 Kristina Blume, an officer of the association, and other board members inspected the complex in May or June 2009. They were looking for charcoal grills and fire pits on the wooden decks. Blume did not recall if any holes in the common areas were noted.

¶ 9 Defendant moved for summary judgment, alleging that it had neither actual nor constructive notice of the hole in front of 2057 Derby Lane. The trial court granted defendant's motion, and plaintiff timely appeals.

¶ 10 Plaintiff contends that material issues of fact exist on the question of whether defendant had constructive notice of the hole. She notes that there was evidence that the hole existed for at least 10 months before her accident, the landscaping contractor was aware of several such holes

throughout the complex, and Costanza testified that she could see it from her front porch. Accordingly, plaintiff contends that whether defendant reasonably should have discovered the unsafe condition is a question for the jury.

¶ 11 Summary judgment is proper where the pleadings, depositions, admissions, and affidavits establish 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© (West 2014); *Gaylor v. Village of Ringwood*, 363 Ill. App. 3d 543, 546 (2006). In deciding whether a genuine issue of material fact exists, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 43 (2004). "The purpose of summary judgment is to determine whether a genuine issue of material fact exists, not to try a question of fact." *Thompson v. Gordon*, 241 Ill. 2d 428, 438 (2011). Accordingly, the trial court may not weigh the evidence or make credibility determinations at the summary-judgment stage. *AYH Holdings, Inc. v. Avreco*, 357 Ill. App. 3d 17, 31 (2005). We review *de novo* an order granting summary judgment. *Adams*, 211 Ill. 2d at 43.

¶ 12 An entity that owns, maintains, or controls premises is liable for conditions on the land if it knows of, or in the exercise of reasonable care would discover, the condition and should realize that it involves an unreasonable risk of harm to those on the land, should expect that such persons will not discover or realize the danger, and fails to exercise reasonable care to protect those lawfully on the land. *Genaust v. Illinois Power Co.*, 62 Ill. 2d 456, 468 (1976) (citing Restatement (Second) of Torts, § 343 (1965)). Thus, a landowner has a duty to exercise reasonable care to discover defects or dangerous conditions existing on the premises and to either correct them or give sufficient warning to those lawfully on the land to enable them to avoid the

danger. *Gerwig v. Bruere*, 181 Ill. App. 3d 609, 615 (1989). "It is not necessary for the plaintiff to show that the owner had actual knowledge of the dangerous condition." *Id*. (citing *Chapman v. Foggy*, 59 Ill. App. 3d 552, 555 (1978)). If, in the exercise of ordinary care, the owner could have discovered the condition, *i.e.*, if he had constructive notice of it, he may be held liable. *Id.* Constructive notice can be shown only where the dangerous condition is shown to exist for a sufficient length of time to impute knowledge of its existence to the defendants. *Ishoo v. General Growth Properties, Inc.*, 2012 Il App (1st) 110919, ¶ 28.

¶ 13 Here, there was evidence from which a jury could conclude that the hole had existed for a sufficient time that defendant should have been aware of it and, further, that the hole was readily visible for at least a portion of that time. Specifically, Costanza testified that the hole had existed for at least 10 months prior to plaintiff's fall and that she could see it from her front porch and the sidewalk. The trial court found it significant that Costanza did not think the presence of the hole important enough to bring it to defendant's attention, but Costanza's failure to give defendant actual notice of the hole is not relevant to constructive notice—*i.e.*, whether defendant reasonably could have discovered the hole. Moreover, Pyszka testified that he was aware of at least six such holes throughout the complex, although he similarly did not communicate this information to defendant.

¶ 14 The trial court discounted Costanza's testimony, finding that it was "positively rebutted by the record, which contains no evidence to show that the hole was plainly visible on December 2, 2009." This was error. Pyszka's testimony, that he was aware of several such holes at the complex, at least arguably corroborates Costanza's. More to the point, however, even if the record contain**ed** no evidence corroborating Costanza's testimony, that **would** not mean that Costanza's testimony was "positively rebutted." Whether to accept Costanza's testimony was an

issue for the trier of fact. As "[t]he purpose of summary judgment is to determine whether a genuine issue of material fact exists, not to try a question of fact" (*Thompson*, 241 Ill. 2d at 438), a trial court may not make credibility determinations at the summary-judgment stage (*AYH Holdings, Inc.*, 357 Ill. App. 3d at 31). Accordingly, the trial court erred in discounting Costanza's testimony.

¶ 15 We note that the hole was directly in front of Costanza's unit and that she testified that she let her dog out in that area daily. Thus, Costanza was very familiar with the area and it is perhaps not surprising that no one else made a similar observation. Moreover, the issue is not whether the hole was plainly visible on December 2, 2009 (the parties agree that it was not), but whether it was plainly visible at some point prior to plaintiff's fall such that defendant should have discovered it.

¶ 16 Defendant, as well as the trial court, relied on *Smolek v. K.W. Landscaping*, 266 Ill. App. 3d 226 (1994). That case, however, is distinguishable.

¶ 17 In *Smolek*, plaintiff Dorothy Smolek was injured when she stepped in a hole while walking her dog. The hole was located on a berm 50 feet from her unit. Although she had walked her dogs in this area several times per day for about three years, she had not noticed the hole before. The trial court granted a directed verdict for defendants, and this court affirmed. We noted that grass and other vegetation concealed the hole and there was no evidence that anyone knew of its existence prior to the accident. *Smolek*, 266 Ill. App. 3d at 230. We further noted that the defendant association was in no better position to discover the hole's existence through the exercise of reasonable care than was plaintiff, who frequented the area. *Id.* at 231.

¶ 18 Here, by contrast, there was testimony from which a factfinder could infer that the hole was visible at least part of the time prior to plaintiff's fall. Costanza testified that she could see

the hole from her porch and from the sidewalk, and Pyszka was aware of several such holes throughout the complex. This testimony allows for the inference that the hole was plainly visible at least part of the time.

¶ 19 Moreover, unlike in *Smolek*, plaintiff here was not particularly familiar with the area. The *Smolek* plaintiff's failure to notice the hole despite walking in the area several times per day led to the inference that the hole was always or nearly always obscured. Here, by contrast, plaintiff had, at most, visited the area occasionally during her previous employment as a seasonal UPS driver's helper. That she had not previously noticed the hole thus does not lead to the same inference that it was always inconspicuous. To the contrary, Costanza, who like the *Smolek* plaintiff lived in the nearby unit, testified that she had seen it. Thus, *Smolek* is factually distinguishable.

¶ 20 In this case, the deposition testimony created an issue of material fact as to whether defendant had constructive notice of the hole. Accordingly, summary judgment for defendant was improper.

¶ 21 The judgment of the circuit court of Boone County is reversed, and the cause is remanded.

¶ 22 Reversed and remanded.