2015 IL App (3d) 140820-U

Order filed July 17, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

ALYCE ANN FIORITTO,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
Plaintiff-Appellant,	)	Will County, Illinois,
	)	
v.	)	Appeal No. 3-14-0820
	)	Circuit No. 12-L-988
MENARD, INC., a foreign Corporation,	)	
and TOVAR SNOW PROFESSIONALS, INC.,	)	
an Illinois Corporation,	)	Honorable
	)	Michael J. Powers,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justice Lytton concurred in the judgment.
Justice Schmidt dissented.

ORDER

¶ 1 *Held*: Summary judgment in favor of Menard, Inc. is inappropriate where evidence creates genuine issues of material fact as to the cause of plaintiff's fall, the cause of the accumulation of ice, and Menard, Inc.'s knowledge of the condition.

¶ 2 This case arises from a slip and fall accident. On December 20, 2012, plaintiff, Alyce Ann Fioritto, parked her vehicle at defendant, Menard, Inc.'s (Menards) store. Plaintiff slipped and fell in the Menards parking lot. She brought suit against Menards and the snow removal

company it hires to plow the surface of its parking lot, Tovar Snow Professional, Inc. (Tovar), alleging negligence. The circuit court granted summary judgment in favor of both defendants. We reverse and remand for further proceedings.[1]

¶ 3 FACTS

¶ 4 Plaintiff filed a two-count complaint against Menards and Tovar to recover damages for injuries sustained when she slipped and fell on ice which had accumulated on the surface of Menards parking lot. The complaint alleges Menards negligently operated and maintained its premises by allowing a hazardous unnatural accumulation of ice to form and also failing to warn its patrons of the hazardous condition.

¶ 5 Menards contracts Tovar to plow the store's parking lot after snow accumulations. By contract, Tovar was responsible for plowing the Menards parking lot, but was not responsible for clearing snow or salting the sidewalks of the Menards store. The owner of Tovar testified that Tovar plowed the Menards parking lot three days prior to plaintiff's injury.

¶ 6 According to plaintiff, she parked in the Menards parking lot in a space next to a sidewalk which ran along the front entrance of the store. When plaintiff exited her vehicle, she slipped on a patch of ice that had formed on the parking lot surface. Plaintiff was the only witness to her fall. Plaintiff stated that she was certain that an ice formation on the surface of the parking lot caused her to slip and fall and that there was no other possible explanation for her fall. Plaintiff could not explain and did not know how the ice had formed. Plaintiff sustained a torn rotator cuff, bulging disc and a hand deformity when she slipped and fell on the patch of ice.

[1] Plaintiff does not challenge the circuit court granting summary judgment in favor of Tovar.

¶ 7 Plaintiff further testified her daughter returned to the scene of the accident and took photographs of the area where plaintiff was injured. Plaintiff believes the photographs were either taken the day of the accident, the following day, or both, but could not recall precisely when each photograph was taken. The photographs depicted a wooden box on the sidewalk near the area where plaintiff parked her vehicle and fell. The pictures appeared to show ice touching the wooden box and continuing downhill to the surface of the parking space where plaintiff slipped and fell. Plaintiff could not recall seeing the wooden box on the day she fell.

¶ 8 Several months later, plaintiff returned to the Menards store and took a photograph of the same area where she fell. The wooden box does not appear in the image. Plaintiff cropped the photograph into two additional images to highlight a downspout that appears on the roof of the store near the area above where the wooden box previously sat.

¶ 9 On the day of the occurrence, Menards was notified of plaintiff's injury. The manager of Menards on that day could not recall the details of the incident but did complete an accident report summarizing the occurrence. The manager was not asked about the wooden box in the front of the store, but did testify that she took photographs of the area of the parking lot where plaintiff fell shortly after plaintiff's injury. The photographs depict a closeup of the parking space where plaintiff's car was parked. The photographs appear to show ice and snow on the sidewalk and parking lot surface. The wooden box does not appear in the manager's photographs.

¶ 10 Menards filed a motion for summary judgment arguing no genuine issue of material fact existed as to the cause of the accumulation of ice. Specific to this appeal, Menards contended plaintiff failed to establish a factual basis to support her claim that the ice formation was an

unnatural condition created by an act or omission on Menards behalf and that plaintiff also failed to establish that Menards had notice of the condition.

¶ 11 In response, plaintiff argued that circumstantial evidence raised a genuine issue of material fact. Plaintiff contended a trier of fact could infer from the photographs of the scene that the ice formation was unnatural and created by a wooden box placed by a Menards employee near the front of its store and that the condition was present long enough for Menards to discover its existence.

¶ 12 The trial court granted Menards' motion for summary judgment finding it "too much of a stretch" and that the court was not required to engage in "conjecture and surmise" and without any facts plaintiff's theory was "too much of a leap of logic" to tie plaintiff's claim to any act or omission on the part of Menards.

¶ 13 ANALYSIS

¶ 14 On appeal, plaintiff argues that the circuit court erred in granting summary judgment to Menards where a material issue of fact existed as to whether she slipped on an unnatural accumulation of ice and whether Menards had knowledge of the condition. Because plaintiff produced sufficient evidence to create genuine issues of material fact as to the cause of her fall, the cause of the accumulation of ice, and Menards' knowledge of the condition, we reverse and remand for further proceedings.

¶ 15 Summary judgment is a drastic means of disposing of litigation and should be allowed only when the right of the moving party to summary judgment is clear and free from doubt. *Crane v. Triangle Plaza, Inc.*, 228 Ill. App. 3d 325, 328 (1992). In making this determination, the evidence is to be construed strictly against the moving party and liberally in favor of the opponent. *Id*. If the pleadings, depositions and affidavits reveal no genuine issue of material

fact, then the moving party is entitled to summary judgment as a matter of law. 735 ILCS 5/2–1005(c) (West 2008). A trial court's grant of summary judgment is reviewed *de novo*. *Hornacek v. 5th Avenue Property Management*, 2011 IL App (1st) 103502, ¶ 25.

¶ 16 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). To withstand defendant's motion for summary judgment, plaintiff must establish a genuine issue of fact with regard to both the above prongs. *Id*.

¶ 17 First, we consider whether a genuine issue of material fact exists as to whether plaintiff slipped on ice in the Menards parking lot. Plaintiff's deposition revealed she was certain she slipped on ice when she fell. Further, when plaintiff authenticated the photographs of the scene taken by her daughter, she testified that the images, which arguably show a patch of ice, accurately reflect the condition of the parking lot at the time she fell. Construing the evidence strictly against Menards, a trier of fact may reasonably infer that plaintiff's fall was caused by a patch of ice on the surface of Menards parking lot. Consequently, a genuine issue of material fact exists as to the cause of plaintiff's fall.

¶ 18 Next, we consider whether the evidence creates a genuine issue of material fact as to whether the patch of ice plaintiff slipped on was an unnatural condition. It is plaintiff's theory that a wooden box was placed by a Menards employee at the store entrance and the box contained liquid or was used to collect liquid draining from the downspout on the store's roof. At some point, the liquid leaked from the box downhill to the parking lot where it eventually froze. In our view, the photographs and plaintiff's testimony, when considered together, create a genuine issue of material fact as to whether the patch of ice was an unnatural accumulation.

¶ 19 The fact that plaintiff was unable to explain at her deposition how the ice formed is not fatal to her claim. Direct evidence is not required to survive a motion for summary judgment, as such evidence will often be impossible to obtain in slip and fall cases. *Olinger v. Great Atlantic & Pacific Tea Co.*, 21 Ill. 2d 469, 475 (1961). Circumstantial evidence can be sufficient when it is "of such a nature and so related as to make the conclusion more probable as opposed to merely possible." *Majetich v. P.T. Ferro Construction Co.*, 389 Ill. App. 3d 220, 225 (2009). However, to survive summary judgment circumstantial evidence "need not exclude all other possible inferences." *Taliaferro v. One Grand Place Venture*, 256 Ill. App. 3d 429, 433 (1993).

¶ 20 In the instant case, the factual nexus tying the patch of ice to an unnatural condition created by Menards are the photographs taken by plaintiff's daughter soon after plaintiff's injury. The photographs depict the wooden box near the store entrance and the area of the parking lot where plaintiff claims she fell. In the photographs, it is clear the box is connected to a damp area which arguably appears to be a patch of ice. The sheet of ice extends downhill to the surface of the parking lot where plaintiff claims she fell. From this, a trier of fact may reasonably infer that the box was placed by a Menards employee at the entrance where it leaked and formed the patch of ice that caused plaintiff to fall and become injured.

¶ 21 Finally, we consider whether there is a genuine issue of material fact as to Menards' actual or constructive knowledge of the condition. Again, looking to the photographs, the box appears to be movable because it does not appear in the photograph taken by plaintiff a few months later. Consequently, a trier of fact may reasonably infer the box was placed at the entrance by a Menards employee. According to Tovar's owner, the lot had been plowed and salted three days prior to plaintiff's injury. Therefore, it is possible that there was a three-day period where the ice spread from the box and to the parking lot. We note the condition was

readily discoverable as it was located at the store's main entrance. Construing the evidence strictly against Menards, plaintiff has created a triable issue because a trier of fact may reasonably infer that Menards had actual or constructive knowledge of the condition.

¶ 22 CONCLUSION

¶ 23 The judgment of the circuit court of Will County is reversed and remanded for further proceedings.

¶ 24 Reversed and remanded.

¶ 25 JUSTICE SCHMIDT, dissenting.

¶ 26 As the majority points out, it is plaintiff's "theory that a wooden box was placed by a Menards employee at the store entrance and the box contained liquid or was used to collect liquid draining from the downspout on the store's roof. At some point, the liquid leaked from the box downhill to the parking lot where it eventually froze. " *Supra* ¶ 18. The majority then concludes that "the photographs and plaintiff's testimony, when considered together, create a genuine issue of material fact as to whether the patch of ice was an unnatural accumulation." *Id.*

¶ 27 I, too, have reviewed the testimony and photographs. The photographs of the lot show other snow and ice in the area of plaintiff's fall. As to whether it was naturally accumulated snow and ice that caused plaintiff's fall, or liquid leaking from a box that froze, would require pure speculation on the part of a jury. I do not know how jurors would resolve that issue other than flipping a coin or deciding whose attorney they liked the best. I concede that it was possible that somehow this box contributed. However, as the majority aptly observed, circumstantial evidence can be sufficient when it is " 'of such a nature and so related as to make the conclusion more probable as opposed to merely possible.' " *Supra* ¶ 19 (quoting *Majetich v. P.T. Ferro Construction Co.*, 389 Ill. App. 3d 220, 225 (2009)). I do not believe that either the testimony or

the photographs support the notion that it is more probable that this box contributed to an unnatural accumulation of ice upon which plaintiff fell.

¶ 28 We live in a snow belt. Our laws recognize that fact and also recognize that it is against public policy to allow lawsuits every time someone falls on snow or ice simply because the property owner may have done something to contribute to an unnatural accumulation. I believe that plaintiff did not come forth with enough evidence to survive summary judgment.

¶ 29 I would affirm; therefore, I respectfully dissent.