2016 IL App (1st) 143169-U
No. 1-14-3169
Order filed March 31, 2016
Modified Upon Denial of Rehearing filed May 3, 2016

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

MAXCINE HARVEY, Plaintiff-Appellant, v. AGUIRRE BUILDING MAINTENANCE, INC., an Illinois Corporation, and THE CITY OF CHICAGO, a Municipal Corporation, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 11 L 011120 The Honorable John P. Callahan, Jr., Judge, presiding.

JUSTICE HYMAN delivered the judgment of the court.
Presiding Justice Pierce and Justice Neville concurred in the judgment.

ORDER

¶ 1 *Held*: When a plaintiff presents no evidence that a floor has been negligently waxed but merely presents eyewitness testimony about the floor's appearance, summary judgment is proper as speculation about the floor's waxed condition is insufficient evidence to establish a material question of fact. We affirm.

¶ 2 Plaintiff Maxcine Harvey slipped and fell in the lobby of the building where she worked. She brought suit for negligence against the City of Chicago, the building's owner, and Aguirre Building Maintenance, the company that maintained the floors. Defendants moved for summary

judgment, and the trial court entered judgment in their favor. Harvey challenges this ruling and argues issues of material fact remain in dispute. We affirm, finding Harvey submitted no evidence other than speculative assertions that defendants created a condition exposing her to an unreasonable risk of injury.

¶ 3 BACKGROUND

¶ 4 We briefly summarize the facts relevant to this appeal. The City owns the Goldblatt building and contracted with Aguirre to maintain the building's floors. Under the terms of the contract, Aguirre retained discretion when selecting appropriate floor care materials. Should a disagreement arise, the City's selection applies.

¶ 5 Ramon Aguirre, owner of Aguirre Building Maintenance, testified that a part of the lobby floor was terrazzo, a type of marble and granite mix that gives the floor a marbled look. According to Ramon, Aguirre stripped and waxed the floors at least quarterly. Ramon noted that Aguirre would not strip and wax floors until the City confirmed and approved the procedure. He admitted Aguirre's contract with the City provided that Aguirre mop up any rainwater that gets tracked into the building. Lottie Czerwien, Aguirre's supervisor at the Goldblatt building, testified that Aguirre normally stripped and waxed floors between 7 p.m. and midnight. She also testified that it normally takes 30 minutes for the wax to dry.

¶ 6 On November 3, 2010, Harvey, who worked in the Goldblatt building, went outside. Although it was raining, Harvey did not have an umbrella when she walked out through the front entrance. She testified that she thought that the floor looked shiny and possibly waxed. Harvey admitted she was wet from the rain when she returned. Harvey walked about seven feet, or steps, slipped, and fell. Harvey confirmed in her deposition that she did not notice any moisture, water, or other substance on the ground when she fell.

¶ 7 STANDARD OF REVIEW

¶ 8 This court reviews the trial court's ruling on the motions for summary judgment *de novo*. *Abrams v. City of Chicago*, 211 Ill. 2d 251, 258 (2004). The purpose of summary judgment is to determine whether a genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Adams v. Northern Illinois Gas Company*, 211 Ill. 2d 32, 42-43 (2004). If the party moving for summary judgment supplies uncontradicted facts that warrant judgment in its favor as a matter of law, the opposing party cannot solely rely on its pleadings to create a genuine issue of material fact. *Adams*, 211 Ill. 2d at 257. The trial court relies on the pleadings, depositions, admissions, and affidavits on file, and construes them in the light most favorable to the nonmoving party. 735 ILCS 5/2-1005(c) (West 2010). We may affirm the trial court's ruling on any basis appearing in the record. *People v. Olsson*, 2015 IL App (2d) 140955, ¶17 (appellate courts review the trial court's judgment rather than its reasoning).

¶ 9 ANALYSIS

¶ 10 *Negligence*

¶ 11 Harvey argues that the trial court erred in granting summary judgment because an issue of fact exists regarding whether the lobby had been recently waxed. Although Harvey does not have to prove her case at the summary judgment stage, she must present evidentiary facts to support the elements of her cause of action. *Richardson v. Drug Bond Company of Illinois*, 387 Ill. App. 3d 881, 885 (2009). "To recover damages based on negligence, plaintiff must allege and prove that defendant owed a duty to plaintiff, that defendant breached that duty, and that the breach was a proximate cause of plaintiff's injuries." *Id*. at 884.

¶ 12 Illinois law provides that a recently waxed floor by itself is not inherently dangerous. See *Mack v. Women's Club of Aurora*, 303 Ill. App. 217, 220 (1940) (noting that waxing of floors is

common and a too well-known practice to attach liability for negligence absent some positive act or omission by owner of premises). The plaintiff in *Mack* slipped and fell on a waxed floor. Witnesses testified that the floor's wax appeared scraped by the plaintiff's shoe where she fell. *Id*. at 219. Despite visible evidence that the floor had been waxed, the court held that keeping a floor cleaned and waxed was not negligence. *Id*. at 220. *Dixon v. Hart*, 344 Ill. App. 3d 432, 435 (1951), still one of the leading cases in this area of the law, held that the mere treatment of a floor with a substance that gives it a polished surface is not negligence *per se*.

¶ 13 *Dixon* requires that a positive act of negligence must be shown. *Id*. at 435. But Harvey provided no evidence that the floor was freshly waxed. Instead, Harvey asks this Court to infer the floors were freshly and negligently waxed based on speculation about the timing of the waxing combined with Aguirre's poor performance reviews. The *Dixon* court, however, emphasized that the creation of dangerous conditions must be shown by competent objective evidence. *Id*. at 436-37. Harvey argues that her testimony, along with "the testimony of several witnesses corroborating the fact that one can tell by looking at the floor if it had just been waxed," sufficiently establishes a material question of fact. But, "testimony that a floor is slick, slippery, or polished is insufficient to establish negligence because it does not give the trier of fact a basis for balancing the defendant's conduct against the requisite standard of care." *Lucker v. Arlington Park Race Track Corp.*, 142 Ill. App. 3d 872, 874 (1986). The *Dixon* court described testimony that a floor is slick or polished, without more, as "hopelessly lacking in precision of meaning" because "what is 'slippery' to one person might not be 'slippery' to others." *Dixon*, 344 Ill. App. at 437. Nor may liability be based on speculation or conjecture. *D'Olier v. General Motors Corporation*, 145 Ill. App. 3d 543, 548 (1986). Put another way,

"[t]he circumstances must justify an inference of probability as distinguished from mere possibility." *Salinas v. Werton*, 161 Ill. App. 3d 510, 515 (1987).

¶ 14 Harvey presents no facts that would lead a finder of fact to conclude the floor was either recently or improperly waxed other than speculation and conjecture. Indeed, Harvey's testimony undermines her claim. She said nothing about the floor feeling slippery or unsafe on her way outside and admitted to being wet from the rain on returning inside, walking only about seven feet before slipping. In addition, she first testified that "because [she] walked from the elevator to go outside, [she] knew that the floor was slippery." But she later testified during the same deposition that "[she] didn't know if [the floor] was slippery coming in." Also, Harvey failed to provide evidence indicating that Aguirre waxed the lobby on that specific day or the evening before. In fact, Harvey failed to present any evidence that Aguirre had recently or improperly waxed the lobby floor that would give rise to a negligence claim. Other than her testimony that the floor appeared slippery or slick, she presents no facts or arguments that would lead a trier of fact to conclude that the lobby floor had not been properly waxed.

¶ 15 Assuming Harvey's fall was not due to a poorly waxed floor but Aguirre's negligence in failing to warn about the rainwater or in failing to mop it up, her claim still fails. Property owners and business operators are not liable for injuries from an accumulation of ice, snow, or water that is tracked into the premises from the outside. To overcome a motion for summary judgment, a plaintiff must provide sufficient evidence to permit the trier of fact to find that the defendant was responsible for the unnatural accumulation that caused injury. *Reed v. Galaxy Holdings, Inc.*, 394 Ill. App. 3d 39, 42 (2009).

¶ 16 Well-settled Illinois law does not attach a duty to remove residue left on a floor in a building by people who have walked through natural accumulations outside. For example, the

plaintiff in *Reed* slipped and fell on a puddle of water at the entrance of a laundromat. *Id*. at 40. At the time, it was drizzling. *Id*. The trial court granted summary judgment in favor of the defendant, rejecting the plaintiff's contentions, like Harvey's, that the defendant had a duty to remove the water on the floor or provide a warning about the floor's condition. *Id*. at 42. Therefore, neither the City nor Aguirre would be responsible for removal of residue on the floor by people who had walked in from the rain.

¶ 17 The court in *Reed* noted that under the voluntary undertaking doctrine, a property owner who voluntarily assumes a duty to remove a natural accumulation of snow, ice or water is held to a standard of ordinary care and liability attaches when the undertaking is performed negligently. *Id.* at 47. But "[w]hen the accumulation of water is a natural one, there is no duty to continue a voluntary undertaking to remove it." *Id*. Harvey failed to present any facts or evidence that would lead a trier of fact to conclude that Aguirre did not use reasonable care. It is just as likely that Harvey could have slipped and fell on the rainwater she tracked in on the sole of her shoes. This rainwater would have been impossible for Aguirre to mop up. But since Harvey confirmed in her deposition that there was no natural accumulation on the floor when she fell, an analysis of the voluntary undertaking doctrine does not apply. We find that, as a matter of law, neither Aguirre nor the City had a duty to warn.

¶ 18 Harvey's claim that the City knew, or should have known, that Aguirre recently waxed the floor also lacks evidentiary support. There is no evidence that Aguirre notified the City that it would perform a routine waxing on that particular day or at any time proximate to the incident. Nor is there any evidence that the City specifically requested Aguirre wax the floors around that time. Moreover, Harvey's contention that the City perform routine daily inspections to determine

if the floors may, by chance, have been waxed on any particular day is onerous and unreasonable.

¶ 19 Harvey also claims the City's zone manager was responsible. This is inaccurate. Sections 9.11 and 9.12 of the City and Aguirre's contract specifies that Aguirre, not the City, must provide on-site working supervisors and an operations manager responsible for overseeing the custodial operations at facilities within Aguirre's assigned areas. Harvey even alleges in her appeal, "it was the responsibility of [Aguirre] under the contract to take all necessary safety precautions, to make sure the floors were safe for people to walk on, and to report any hazardous conditions." In addition, Harvey's initial claim that the City should have been ultimately responsible is inconsistent with her later assertion that it was Aguirre's responsibility to take any necessary precautions and report those conditions. We find as a matter of law that the contract does not obligate the City.

¶ 20 *Res Ipsa Loquitur*

¶ 21 Harvey contends that under the doctrine of *res ipsa loquitur* a reasonable inference can be made that the floor had been recently waxed, proper warning signs had not been put up, or the waxing had been done improperly. Harvey asserts that this theory applies to both Aguirre and the City.

¶ 22 Because the doctrine of *res ipsa loquitur* presents a question of law, *de novo* review is appropriate. *Heastie v. Roberts*, 226 Ill. 2d 515, 531 (2007). The doctrine of *res ipsa loquitur* allows proof of negligence by circumstantial evidence when direct evidence concerning a cause of injury is primarily within the knowledge and control of the defendant. *Id*. A plaintiff seeking to rely on the doctrine must prove that she was injured: "(1) in an occurrence that ordinarily does not happen in the absence of negligence; and (2) by an agency or instrumentality within the

defendant's exclusive control." *Id*. at 531-32. The doctrine permits, but does not require, the trier of fact to draw an inference of negligence from the happening of an accident. See *Dyback v. Weber*, 114 Ill. 2d 232, 238 (1986).

¶ 23 For Harvey to prevail, she must satisfy both prongs of the test. The first prong involves determining whether the incident is one that does not ordinarily occur in the absence of negligence. *Heastie*, 226 Ill. 2d at 533. Slipping and falling on a floor happens quite commonly in the absence of negligence. Harvey's fall could have been caused by a number of factors, such as the bottom of her shoes being wet or her sudden loss of footing. We cannot draw a conclusion of negligence based on the *res ipsa* doctrine when a number of other plausible explanations exist for the cause of her injury. Because the first element of the doctrine of *res ipsa* is not present, Harvey's claim fails.

¶ 24 Even if the first element of *res ipsa* was present, the second element requires Harvey to prove she was injured by an agency or instrumentality within the defendants' exclusive control. *Heastie*, 226 Ill. 2d at 531-32. But she presents no evidence that her injury came about due to a poorly waxed floor. Accordingly, she did not satisfy either prong of the test and, therefore, cannot prevail.

¶ 25 Affirmed.