2016 IL App (1st) 151056-U
No. 1-15-1056
June 7, 2016

SECOND DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

BYRON TAYLOR, Plaintiff-Appellant, v. 525 BAR & GRILL, INC., an Illinois Corporation, Defendant-Appellee.	))))))))))	Appeal from the Circuit Court Of Cook County. No. 13 L 1064 The Honorable Kathy M. Flanagan, Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Pierce and Justice Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err when it granted the defendant's motion for summary judgment because the plaintiff failed to present any evidence which established (1) that the defendant's negligence was the proximate cause of the plaintiff's fall; (2) that the defendant had notice of code violations on the premises; or (3) that the code violations were a proximate cause of plaintiff's fall. Because the plaintiff failed to present any evidence which established that the defendant's negligence or that the premises caused his injury, there are no material issues of fact in dispute and the defendant is entitled to a judgment as a matter of law.

¶ 2 The plaintiff, Byron Taylor, filed a complaint against the defendant, 525 Bar & Grill Inc. (the Bar). Taylor alleged in his complaint that he slipped and fell on a ramp outside of the Bar because the Bar was negligent in maintaining its premises. The Bar filed a motion for summary judgment on August 5, 2014, and the circuit court granted the motion on March 13, 2015.

¶ 3 We find that Taylor's complaint complained about the Bar's premises and alleged that there were code violations, but he failed to present any evidence which established: (A) a causal connection between the Bar's premises and his fall, or (B) that the Bar's alleged code violations were a proximate cause of his fall. *Strutz v. Vicere*, 389 Ill. App. 3d 676, 681 (2009). Taylor's failure to present any evidence connecting the Bar's premises to his fall causes this court to find that there are no issues of material fact in dispute, and that the Bar is entitled to a judgment as a matter of law. Therefore, we affirm the circuit court's order granting the Bar's motion for summary judgment.

¶ 4 BACKGROUND

¶ 5 On January 31, 2013, Taylor filed a complaint against the Bar and alleged that it failed to exercise reasonable care in maintaining its premises in a reasonably safe condition. Specifically, Taylor alleged that the Bar caused his fall and was negligent by constructing, installing, and maintaining an unsafe ramp, by having an improper handrail, by maintaining a rear doorway that exits onto a ramp with an excessive slope, by having a door without a closer mechanism, by failing to warn of the danger, and by failing to provide adequate lighting.

¶ 6 The Bar filed an answer and affirmative defenses on March 14, 2013. In its answer, the Bar denied that it was negligent. The Bar maintained in its affirmative defenses: (1) that Taylor failed to state a claim upon which relief could be granted; (2) the damages and claims asserted by Taylor may have been caused, in whole or in part, by the negligence of third parties; (3) the negligence of third parties was an intervening and superseding act of negligence over which the Bar had no control; (4) the third parties' negligence is a substantial contributing factor and the Bar is entitled to indemnity, contribution, offset, and apportionment; (5) Taylor was more than 50% responsible for his injury; (6) Taylor had a duty to mitigate damages and his damages must be reduced to the extent that he failed to meet that duty; (7) Taylor's claims are barred by his own contributory negligence; and (8) the Bar, if liable, is only severally liable with the exception of medical expenses, pursuant to section 2-1117 of the Illinois Code of Civil procedure, if the Bar's liability is less than 25% of the total fault attributable to Taylor, the Bar or any other party.

¶ 7 On August 5, 2014, the Bar filed a motion for summary judgment maintaining that: (1) Taylor did not testify that the door caused his fall and even if he had, the door contained a closure mechanism and there was no evidence that the door or the closure mechanism was unreasonably dangerous; (2) there is no evidence that the Bar's conduct caused Taylor's injury; (3) Taylor cannot identify the cause of his fall; (4) there is no evidence that the alleged building code violations caused Taylor's fall; (5) there is no evidence that the defendant had notice of any building code violations or dangerous conditions associated with the ramp or handrail; and (6) there is no evidence that the ramp was inadequately lit. In

support of its motion for summary judgment, the Bar attached the depositions of Byron Taylor, Anthony Disabato and Don Garcia.

¶ 8 The Bar's Evidentiary Materials

¶ 9 Taylor testified at his deposition that on February 5, 2012, he visited the Bar to check on the disc jockey that he referred to the bar. At closing time, the disc jockey exited the back door to get crates to pack up his equipment. The door locked behind the disc jockey and a security guard asked Taylor to let the disc jockey inside. Taylor exited the back door and took one step onto the sloped surface of the ramp and fell. Taylor was asked if he knew "what actually caused [him] to fall" and he answered "No." Taylor testified that he did not recall actually falling, but he remembers getting hit by the door and waking up after a short time when the disc jockey yelled at him. Taylor also testified that he did not see any ice, snow, liquid or other debris on the ramp prior to his fall and does not recall seeing anything on the ramp after his fall. Taylor informed the owner about his fall, and testified that the area around the ramp was not lit and that no one besides the disc jockey witnessed his fall.

¶ 10 Disabato, the manager of the Bar, testified at his deposition that Taylor walked into the bar and informed him that he had fallen outside on the concrete near the end of the ramp. Disabato also testified that he did not see Taylor fall and he had no information on whether anyone else witnessed Taylor's fall. Disabato testified that the ramp, beer garden and parking lot were lit by four street lights with metal halogen bulbs on the day of Taylor's fall. Finally, Disabato testified that there was no snow or ice on the ramp.

¶ 11 Garcia testified at his deposition that he is the director of code enforcement and the health department and that prior to serving as the director, he was a code inspector and health inspector for a number of years. Over the last five years Garcia had visited the Bar both professionally for health inspections as well as socially. While the Bar had been issued a violation notice and citation for building code violations in the past, Garcia testified that the bar was never issued a violation notice or a citation for building code violations for the back entrance door or the ramp.

¶ 12 Taylor's Response to the Motion for Summary Judgment

¶ 13 Taylor responded to the Bar's motion for summary judgment and maintained that: (1) he established that the Bar owed him a legal duty to provide a safe means of ingress to and egress from the premises; (2) the Bar had notice that the rear exit door did not open properly and was unsafe; (3) the defective rear exit door, the improper landing area on the ramp, the lack of adequate lighting and the failure to have handrails on both sides of the ramp violated numerous building codes and was the proximate cause of his fall; (4) the Bar had notice that the building code violations presented an unreasonable risk of harm to invitees; and (5) the defective rear exit door, the improper landing area on the ramp, the lack of adequate lighting and the failure to have handrails on both sides of the ramp were the proximate cause of his injury. In support of his response, Taylor filed his deposition and the report of his expert, Architect John Van Ostrand.

¶ 14 The Bar's Reply to Taylor's Response

¶ 15 The Bar replied to Taylor's response and maintained that (1) Taylor could not identify the cause of his fall; (2) there was no evidence that the building code violations caused Taylor's fall; (3) Van Ostrand's deposition testimony is based on speculation, conjecture and contains inadmissible legal conclusions; (4) the door's failure to open a full 90 degrees is not a building code violation and did not cause Taylor's fall; (5) the ramp is not unreasonably dangerous; (6) there is no evidence that the lighting or lack of lighting caused Taylor's injury; and (7) there is no evidence that the Bar had notice of any building code violations. The Bar attached Van Ostrand's deposition to its reply.

¶ 16 Van Ostrand testified at his deposition that he is a licensed architect who was hired to inspect the ramp and surrounding structures at the Bar. He conducted his inspections on three different occasions. Prior to preparing his report, Van Ostrand reviewed the depositions of Taylor, Disabato, and Garcia. Van Ostrand testified that the knowledge he has surrounding Taylor's fall is based only on what Taylor's counsel shared with him or what he read in the depositions. Finally, Van Ostrand testified that he has no personal knowledge as to what caused Taylor's fall.

¶ 17 The Circuit Court's Decision

¶ 18 The circuit court granted the Bar's motion for summary judgment, finding that: (1) Taylor could not identify any problem with the door and his testimony does not implicate the ramp, handrails, or lighting as a causative factor in his fall; (2) the failure of the door to open 90 degrees does not violate any code and Taylor's expert witness failed to provide any evidence

that would establish the door was defective; (3) there was no evidence that the landing on the ramp was unreasonably dangerous or caused plaintiff's fall; (4) Taylor's testimony failed to provide a causal connection between the fall and the inadequate lighting or lack of a handrail on the ramp; (5) there is no evidence that any of the cited code violations proximately caused Taylor's injury; and (6) even if the cause of the fall could have been established, there is no evidence in the record that the Bar had notice. Taylor filed a timely notice of appeal on April 9, 2015.

¶ 19 ANALYSIS

¶ 20 The purpose of summary judgment is not to try an issue of fact, but rather to determine whether a genuine issue of material fact exists. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 42–43 (2004). A motion for summary judgment should be granted only where "the pleadings, depositions, and admission 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." 735 ILCS 5/2–1005(c) (West 2010); *Adams*, 211 Ill. 2d at 43. In determining whether a genuine issue of material fact exists, the court must construe the pleadings, depositions, admissions and affidavits strictly against the movant and liberally in favor of the opponent. *Adams*, 211 Ill. 2d at 43. A genuine issue of material fact, which would preclude summary judgment, exists where the material facts are disputed or, if the material facts are undisputed, reasonable persons might draw different inferences from the undisputed facts. *Adams*, 211 Ill. 2d at 43.

¶ 21 While summary judgment is encouraged to aid in the expeditious disposition of a lawsuit, it is a drastic means of disposing of litigation and should be granted only when the right of the moving party is clear and free from doubt. *Adams*, 211 Ill. 2d at 43; *Purtill v. Hess*, 111 Ill. 2d 229, 240 (1986). A reviewing court will reverse a trial court's order granting summary judgment if it determines that a genuine issue of material fact exists. *First of America Bank, Rockford, N.A. v. Netsch*, 166 Ill. 2d 165, 176 (1995). We review a circuit court's order granting a motion for summary judgment *de novo*. *Adames v. Sheahan*, 233 Ill. 2d 276, 296 (2009).

¶ 22 Taylor maintains that the circuit court erred when it granted the Bar's motion for summary judgment because Taylor "did not know" what caused his fall. Taylor further maintains that the circuit court erred when it granted the Bar's motion for summary judgment because he failed to raise a genuine issue of material fact as to the Bar's notice of any dangerous condition on the premises.

¶ 23 Case law makes it clear that "[i]n any negligence action, the plaintiff bears the burden of proving not only duty and breach of duty, but also that defendant proximately caused plaintiff's injury. [Citations.] The element of proximate cause is an element of the plaintiff's case." *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 93 (1995); see also, *Smith v. Eli Lily & Co.*, 137 Ill. 2d 222, 232 (1990). If the plaintiff fails to establish any element of his cause of action, summary judgment for the defendant is proper. *Pyne v. Witmer*, 129 Ill. 2d 351, 358 (1989). A defendant cannot be held liable for the plaintiff's injuries when the cause of those injuries are predicated on surmise or conjecture. *Kimbrough v. Jewel Companies,*

Inc., 92 Ill. App. 3d 813, 817 (1981). Proximate cause is established only when "there is a reasonable certainty that defendant's acts caused the injury." *Kimbrough*, 92 Ill. App. 3d at 817.

¶ 24 Taylor maintains that the failure of the door to open 90 degrees, the improper landing on the ramp, the alleged construction of the ramp without a permit, and the inadequate lighting and lack of handrails on both sides of the ramp violated various building codes and collectively caused Taylor's injury. We note that Taylor did not explain during his deposition how any of the aforementioned violations actually caused his fall. In fact, when Taylor was asked, "Do you know what actually caused you to fall?" He answered, "No."

¶ 25 Taylor also admits in his brief that he "did not and could not personally testify to causation," but maintains that the expert witness provided the missing link for causation.

¶ 26 Taylor presumes that the circuit court relied on *Kimbrough* to reach its decision and attempts to distinguish the facts in *Kimbrough* from the facts in this case. *Kimbrough* is a case where the plaintiff slipped and fell on a ramp outside of a store. *Kimbrough, 9*2 Ill. App. 3d at 814. Kimbrough was unable to state in detail what caused her to fall. *Kimbrough, 9*2 Ill. App. 3d at 815. When asked if she knew what she fell on, she responded, "No, I don't." *Kimbrough, 9*2 Ill. App. 3d at 816. Kimbrough offered no evidence which explained what caused her fall – she did not know if there was something on the ramp, or if there was a defect in the ramp and there were no witnesses to the fall. *Kimbrough, 9*2 Ill. App. 3d at 817.

¶ 27 The *Kimbrough* court noted that "liability cannot be predicated upon surmise or conjecture as to the cause of the injury; proximate cause can only be established when there

is a reasonable certainty that defendant's acts caused the injury." *Kimbrough*, 92 Ill. App. 3d at 817. The *Kimbrough* court found that "it is not enough for a plaintiff to show that he or she fell on the defendant's flooring. The plaintiff must go further and prove that some condition caused the fall and that this condition was caused by the defendant." *Kimbrough*, 92 Ill. App. 3d at 818.

¶ 28 The Bar relies on *Strutz v. Vicere*, 389 Ill. App. 3d 676 (2009) to support its position. *Strutz* is a case where the decedent allegedly slipped and fell on the back staircase at his home, but there were no eyewitnesses to his fall. *Strutz*, 389 Ill. App. 3d at 677. The decedent suffered multiple injuries that culminated in his death. *Strutz*, 389 Ill. App. 3d at 677. The plaintiff, the decedent's wife, filed a complaint alleging that the defendants, the owners of the property the decedent fell on, were negligent in that they failed to maintain the stairs and the railing system in a reasonably safe condition. *Strutz*, 389 Ill. App. 3d at 677-78. The plaintiff maintained that the staircase and railing were in violation of the City of Chicago's building code based on the averments in his retained expert's affidavit. *Strutz*, 389 Ill. App. 3d at 678. The plaintiff relied heavily on expert testimony and maintained that the alleged building code violations, combined with the decedent's statements that he "fell down over the railing," are direct evidence of a causal connection between the staircase and the fall. *Strutz*, 389 Ill. App. 3d at 678.

¶ 29 Plaintiff's medical expert indicated that that the decedent's injuries were consistent with a " 'head-first' type of fall." *Strutz*, 389 Ill. App. 3d at 680. The liability expert averred in his

affidavit that the spiral design of the stairs violated the City of Chicago building code and were dangerous. *Strutz*, 389 Ill. App. 3d at 680.

¶ 30 The *Strutz* court noted that, despite the experts' opinions, there was no testimony that addressed the issue of what caused the decedent's fall and that violations of an ordinance or building code standing alone, without evidence that the violations caused the injury, do not establish proximate cause. *Strutz,* 389 Ill. App. 3d at 681. The *Strutz* court held that the possibility that the alleged unreasonably dangerous staircase caused the decedent to slip and fall is insufficient to establish the necessary causal relationship between the owners' alleged negligence and the decedent's injuries. *Strutz,* 389 Ill. App. 3d at 681.

¶ 31 Like the plaintiff in *Kimbrough*, Taylor was unable to state, with any specificity, the cause of his injury and admitted at his deposition that he did not know the cause of his injury. Moreover, like the plaintiff in *Strutz*, Taylor relied extensively on his expert witness' report to establish that the failure of the door to open 90 degrees coupled with the code violations (the improper landing on the ramp, the lack of handrails, and the inadequate lighting) caused his injury. But Taylor provided no evidence that connected his fall to the Bar's premises.

¶ 32 Taylor's testimony failed to establish proximate cause and his expert's report, which was not an affidavit or an evidentiary material within the purview of Supreme Court Rule 191 (eff. Jan. 4, 2013), does not constitute evidence that can be used to establish proximate cause. We find that Taylor failed to present any evidence which explains what actually caused his fall. We also find that Taylor's complaint alleging violations of a city's building code, standing alone, without any evidence which establishes a causal connection between the code

violations and Taylor's injury, fails to establish proximate cause. *Strutz*, 389 Ill. App. 3d at 681. We further find that the expert's report, that various code violations possibly *could have* caused Taylor's injury, (A) is based on pure speculation and conjecture because it was not based on the personal knowledge of the expert, and (B) is not admissible in evidence because it is not an affidavit that complies with Rule 191, and therefore cannot be used to establish proximate cause. Ill. S. Ct. R. 191(a) (eff Jan.4, 2013). Finally, Taylor's expert cannot provide the evidence to establish proximate cause, the missing element in Taylor's case, and because he did not witness Taylor's accident, he cannot connect the alleged building code violations to Taylor's fall. See Ill. R. Evid. 602 (A witness may not testify to a matter unless evidence is introduced to support a finding that the witness has personal knowledge of the matter).

¶ 33 Taylor also maintains that he does not have to prove notice. We disagree. Illinois law makes it clear that "[a] premises liability plaintiff must prove, among other things, that the 'landowner knew or in the exercise of ordinary care should have known of both the condition and the risk the condition posed to others lawfully on the property.' " *Hawkins v. Capital Fitness, Inc.*, 2015 IL App (1st) 133716, ¶ 33; *Smart v. City of Chicago*, 2013 IL App (1st) 120901, ¶ 46.

¶ 34 Taylor's complaint alleges that the Bar negligently maintained its premises which is a premises liability theory: he alleges that the Bar failed to maintain its premises in a reasonably safe condition by having inadequate lighting in the exterior ramp area, constructing a ramp without a landing at the top, and having a door closer mechanism that

failed to prevent the shutting speed of the door from creating a tripping hazard. By predicating the allegations in his complaint on premises liability, Taylor "fixed the issues in controversy and theories upon which recovery is sought by the allegations in his complaint." *Pagano v. Occidental Chemical Corporation*, 257 Ill. App. 3d 905, 911 (1994).

¶ 35 We note that there is no evidence in the record that the Bar had been cited for a building code violation for the back entrance door or ramp area, despite inspections of the premises each year. In addition, there is no evidence in the record of prior complaints, accidents, or injuries associated with the back entrance door, the ramp, the lighting, or the handrails. Here, there is an absence of actual or constructive notice of a defective condition, so the Bar cannot be held liable for Taylor's injury. *Hawkins*, 2015 IL App (1st) 133716 at ¶ 33.

¶ 36 Therefore, because Taylor failed to present any evidence (a deposition, an affidavit or some other evidentiary materials) which established the proximate cause of his injury, there are no material facts in dispute and the Bar is entitled to a judgment as a matter of law. Accordingly, we affirm the circuit court's order granting the bar's motion for summary judgment.

¶ 37 Motion to Strike

¶ 38 Next, the Bar filed a motion to strike which was taken with the case and argues that the portions of Taylor's reply brief which rely on *Northern Trust Co. v. Burandt & Armbrust, LLP*, 403 Ill. App. 3d 260 (2010) and *Pullia v. Builders Square, Inc.*, 265 Ill. App. 3d 933 (1994) should be stricken and the issues forfeited pursuant to Supreme Court Rule 341 (h)(7) because of Taylor's failure to raise these arguments in his appellant brief. Taylor maintains

that he is not in violation of the rule because he is permitted to cite cases for the first time in a reply brief if they are in response to the appellee's brief.

¶ 39 The law is well settled that issues raised for the first time in an appellant's reply brief are forfeited on appeal. Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016). However, arguments that are responsive to an appellee's brief are appropriately raised in a reply brief. *People v. Brownwell*, 123 Ill. App. 3d 307, 319 (1984).

¶ 40 We find that Taylor was responding to the arguments raised in the Bar's brief and therefore, his arguments were properly raised in his reply brief. *Brownwell*, 123 Ill. App. 3d at 319. Accordingly, defendant's motion to strike is denied.

¶ 41 Supreme Court Rules

¶ 42 Finally, we observe that the Bar's brief fails to comply with two requirements of Supreme Court Rule 341 (a), which dictates the "Form of Briefs." Ill. S. Ct. R. 341(a) (eff. July 1, 2008):

> (i) Text must be double-spaced (brief applied 1½ spaced lines); and
>
> (ii) Margins must be at least 1½ inch on the left side (brief is slightly under 1 inch on left side).

¶ 43 We do not condone litigants who disregard the Supreme Court Rules. The Rules are not intended as either suggestions or aspirational statements, but mandatory guidelines that must be followed. See *Voris v. Voris*, 2011 IL App (1st) 103814, ¶ 8 ("These procedural rules governing the content and format of appellate briefs are mandatory"). Nevertheless, we decided to consider the merits of this appeal. But, we admonish counsel for the Bar that

future violations of the Rules may result in the striking of their brief on this court's own motion.

¶ 44 CONCLUSION

¶ 45 We find that Taylor failed to present any evidence which established that the Bar was negligent in maintaining its premises or that there was a causal connection between the Bar's premises and his injuries. We also find that Taylor's complaint alleged code violations, but he failed to present any evidence which established that the Bar had notice of the code violations or that the code violations were a proximate cause of his injury. *Strutz v. Vicere*, 389 Ill. App. 3d 676, 681 (2009). Therefore, because Taylor failed to present any evidence which established the Bar was negligent or that the premises caused his fall, we find that there are no material issues of fact in dispute and hold that the Bar is entitled to a judgment as a matter of law. Accordingly, we affirm the circuit court's order that granted the Bar's motion for summary judgment and we deny the Bar's motion to strike.

¶ 46 Affirmed; motion to strike denied.