2017 IL App (1st) 161364-U

FIRST DIVISION
July 17, 2017

No. 16-1364

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LISBETH BLANKENSHIP,	) Appeal from the Circuit Court of
	) Cook County, Law Division
Plaintiff-Appellant,	)
	)
v.	) No. 14 L 3244
	)
ALAN J. BERNICK and BENJAMIN BERNICK,	) Honorable John Ehrlich
	) Judge Presiding
	)
Defendants-Appellees.	)

JUSTICE SIMON delivered the judgment of the court.
Justices Harris concurred in the judgment.
Justice Mikva dissented.

ORDER

¶ 1 *Held*: The trial court did not err in granting defendant's motion for summary judgment. Plaintiff presented no genuine issue of material fact as to the condition of stairs being the proximate cause of her injuries.

¶ 2 Plaintiff Lisbeth E. Blankenship appeals from a circuit court order granting summary judgment in favor of defendants Allan J. Bernick and Benjamin Bernick. On appeal, plaintiff argues that the court erred in granting defendants' motion for summary judgment when she sufficiently established that defendants' failure to install a continuous handrail on the stairway

constituted the proximate cause of her injuries sustained after she fell on the premises owned and maintained by defendants. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 On January 1, 2013, plaintiff fell down a staircase owned and maintained by defendants. The staircase consisted of fifteen wooden steps from top to bottom. Plaintiff went down the first few steps then she lost her balance and fell. At the time of petitioner's fall, the staircase did not have continuous handrails on both sides of the stairs. At her deposition, plaintiff indicated that she did not know what caused her to lose her balance and fall. Furthermore, plaintiff made the following statements:

> "Q: What happened after you lost your balance?
>
> A: I remember kind of flying through the air trying to get my grip or balance myself. But I couldn't grab anything, and I just remember going down the stairs. And the next thing that I know, I was down at the bottom of the stairs."

¶ 5 Plaintiff was asked about the positioning of the handrails at the location where she lost her balance, and testified regarding the lack of any available handrail to grab where she fell. Plaintiff stated that she would have been able to grab a handrail, if there was one, to regain her balance. She confirmed she did not know what caused her fall, but assumed it was the stairs or what the stairs looked like, or the unevenness in the stairs. Plaintiff did not know if she fell to the bottom of the landing. Afterwards, she did not remember climbing the stairs back into her apartment. Her next memory was waking up in her bed the next morning at about 7:00 a.m. There were no witnesses to plaintiff's fall.

¶ 6 As a result of the fall, plaintiff suffered a displaced fracture of the proximal humerus which required surgical intervention, and over $240,000 in related medical expenses. Plaintiff

alleged that defendants' failure to provide proper handrails on the staircase was a proximate cause of her injuries.

¶ 7 Plaintiff retained a building inspector expert who conducted an inspection of the subject stairway on December 10, 2015. Plaintiff's expert opined that the lack of a second, continuous handrail on the right side of the stairwell was a violation of the provisions of the Chicago Municipal Code 13-160-320(a) and 13-160-320(b).

¶ 8 Following plaintiff's deposition, defendants filed a motion for summary judgment arguing that plaintiff's testimony that she does not know what caused her to lose her balance on the staircase precluded her from establishing that defendants' negligence was a proximate cause of her injury. In response, plaintiff contended that her testimony regarding the lack of an available handrail at the location of her fall raised a sufficient question of fact regarding the proximate cause of her injuries for purposes of surviving a motion for summary judgment. The circuit court granted defendants' motion for summary judgment and dismissed the case with prejudice. This appeal follows.

¶ 9 ANALYSIS

¶ 10 We review the grant of summary judgment *de novo*. *Cook v. AAA Life Insurance Co.*, 2014 IL App (1st) 123700, ¶ 24. Summary judgment should only be granted if a strict construction against the movant of all the pleadings, depositions, admissions, and affidavits on file establishes no genuine issue of material fact and the entitlement of the moving party to judgment as a matter of law. *Board of Education of Township High School Dist. No. 211, Cook County. v. TIG Ins. Co.*, 378 Ill. App. 3d 191, 193 (2007). A genuine issue of material fact exists where the facts are in dispute or where reasonable minds could draw different inferences from the undisputed facts. *Libolt v. Wiener Circle, Inc.*, 2016 IL App (1st) 150118 ¶ 24. The purpose

of summary judgment is not to try a question of fact, but to determine whether one exists. *Id*. at ¶ 25. If the plaintiff fails to establish any element of the cause of action, summary judgment for the defendant is proper. *Id*.

¶ 11 On appeal, plaintiff argues that the injuries sustained as a result of the fall occurred because of defendants' failure to install a handrail where she fell. Plaintiff contends that her statements made at her deposition that she would have grabbed a handrail to prevent her from falling, if one was available, at minimum created a material issue of fact regarding proximate cause that should have precluded a summary judgment disposition.

¶ 12 Proximate cause consists of two requirements: cause in fact and legal cause. *Abrams v. City of Chicago*, 211 Ill. 2d 251, 258 (2004). For a defendant's conduct to be a "cause in fact" of the plaintiff's injury, the conduct must form "a material element and a substantial factor in bringing about the injury." *Id.* If the plaintiff's injury would not have occurred absent the defendant's conduct, then the conduct forms a material element and substantial factor in bringing about the injury. *Id.* On the other hand, "legal cause" involves an assessment of foreseeability and the court must consider whether the injury is of the type that a reasonable person would foresee as a likely result of his or her conduct. *Id.*

¶ 13 To establish proximate cause, the plaintiff bears the burden of " 'affirmatively and positively show[ing]' " that the defendant's alleged negligence caused the injuries for which the plaintiff seeks to recover. *Bermudez v. Martinez Trucking*, 343 Ill. App. 3d 25, 29 (2003) (quoting *McInturff v. Chicago Title & Trust Co.*, 102 Ill. App. 2d 39, 48 (1968)). Liability against a defendant cannot be predicated on speculation, surmise, or conjecture. *Mann v. Producers Chemical Co.*, 356 Ill. App. 3d, 972 (2005). If the plaintiff fails to establish the element of proximate cause, he has not sustained his burden of making a *prima facie* case

and summary judgment is proper. *Id.* The plaintiff may establish proximate cause through circumstantial evidence. *Id*. That is, causation may be established by facts and circumstances that, in the light of ordinary experience, reasonably suggest that the defendant's negligence operated to produce the injury. *Id.* It is not necessary that only one conclusion follow from the evidence. *Id.* But, a fact cannot be established through circumstantial evidence unless the circumstances are so related to each other that it is the only probable, and not merely possible, conclusion that may be drawn. *Wiegman v. Hitch–Inn Post of Libertyville, Inc.*, 308 Ill. App. 3d 789, 796 (1999). Indeed, where the proven facts demonstrate that the nonexistence of the fact to be inferred appears to be just as probable as its existence, then the conclusion is a matter of speculation, conjecture, and guess and the trier of fact cannot be permitted to make that inference. *Mann*, 356 Ill. App. 3d at 974.

¶ 14 Here, plaintiff's deposition testimony did not create a question of fact as to whether she fell due to defendants' failure to install a second continuous handrail on the stairway. Plaintiff stated several times during her deposition that she did not know what caused her to lose her balance and fall, and also indicated that she would have grabbed for a handrail if one had been placed there. Although a trier or fact could infer that after plaintiff lost her balance, she could have grabbed the handrail to regain her balance, it is equally likely that a jury could conclude that plaintiff could not have grabbed the handrail, if it existed, or that she fell for reasons unrelated to the existence of the handrail. But, a trier of fact cannot be permitted to make that inference. *Berke v. Manilow*, 2016 IL App (1st) 150397, ¶41; *Mann*, 356 Ill. App. 3d at 974. In other words, the mere possibility that the lack of a handrail on defendants' premises caused plaintiff's fall was not enough to create an issue of fact as to the causal relationship between defendants' alleged negligence and plaintiff's injuries. See *Berke v. Manilow*, 2016 IL App (1st)

150397, ¶41 (noting that "[t]he conclusion that the height of the threshold [on the defendant's premises] caused [the plaintiff] to fall formulates merely a possible conclusion, not a probable conclusion," insufficient to survive the defendant's motion for summary judgment).

¶ 15 We find *Chmielewski v. Kahlfeldt*, 237 Ill. App. 3d 129, 131 (1992), instructive. In *Chmielewski* the plaintiff filed a negligence action for injuries sustained after the plaintiff fell on stairs located on the property of the defendants while being chased by a dog. *Chmielewski v. Kahlfeldt*, 237 Ill. App. 3d at 131. The defendants moved for summary judgment on the basis that the stairs were not the proximate cause of the plaintiff's injuries. *Id.* The plaintiff's mother testified that she observed the plaintiff "stumble" when the dog jumped on him and that there was loose gravel on the stairs and no handrails. *Id.* As in this case, the plaintiff testified at his deposition that he did not know why he fell on the stairs. In light of this statement, the court indicated that plaintiff could not establish that a defect caused him to fall. *Id.* at 137. According to the *Chmielewski* court, "[l]iability cannot be predicated upon surmise or conjecture as to the cause of the injury, [and] proximate cause can only be established where there is a reasonable certainty that defendants' acts caused the injury." *Id.* at 137; *Gyllin v. Coll. Craft Enterprises, Ltd.*, 260 Ill. App. 3d 707, 714 (1994).

¶ 16 Just as in *Chmielewski*, plaintiff here could not identify what caused her to fall. When asked whether the condition of the stairs caused her to lose the balance, plaintiff stated the following:

> "Q: As I understand your testimony, you're not claiming that any of the condition of the stairs caused you to lose your balance; is that right?
>
> A: I don't know what caused me to fall. I'm assuming it's the stairs, what the stairs looked like, the unevenness of the stairs.

Q: But you don't know?

A: No, I don't know."

Later in her deposition, plaintiff stated that she would have grabbed a handrail to regain her balance if one was there. Based on this record, plaintiff merely *assumed*, did not explain the cause of her fall, and we cannot say that her statements created a genuine issue of material fact as to causation in this case.

¶ 17 Furthermore, as the *Chmielewski* court noted, the decisions in *Doran v. Boston Store of Chicago*, 307 Ill. App. 456 (1940) and *O'Donnell v. Barach*, 1 Ill. App. 2d 157 (1953), relied to by defendant, were based on evidence from which a factual question of proximate cause was presented. See *Chmielewski v. Kahlfeldt*, 237 Ill. App. 3d at 139. Here, there are no disputed material facts. Plaintiff repeatedly stated that she does not know what caused her to fall. What plaintiff could or might have done in regard to her fall and a handrail is not a disputed material fact, is merely an answer to a hypothetical question. See *Kimbrough v. Jewel Companies, Inc.*, 92 Ill. App. 3d 813, 818 (1981) ("Since the plaintiff has admitted that she does not know what caused the fall, and she has at no time mentioned other known witnesses who could present evidence as to this question, it is clear that plaintiff cannot prove her case and at trial a directed verdict for the defendant would be required."). This is not a case in which plaintiff and defendant both presented evidence of proximate cause and a jury should be called on to resolve the dispute. See *Mann*, 356 Ill. App. 3d at 974. Thus, absent direct or circumstantial evidence of proximate cause, plaintiff failed to make a *prima facie* case of negligence, and summary judgment was proper. See *id.* at 972.

¶ 18 Plaintiff's reliance on *Murphy v. Messerschmidt*, 68 Ill. 2d 79, 86 (1977), is misplaced. The supreme court in *Murphy* found that the appellate court erred in finding the lack of handrails

was not a cause of the plaintiff's fall. *Id.* The plaintiff had testified that both of her hands were filled with something when she fell and "apparently" made no attempt to grasp the posts next to the steps. *Id.* The appellate court held that the accident was caused by the severity of the rain and not by any inherent condition of the porch or steps. *Id*. at 87. The supreme court found the appellate court had improperly interpreted the evidence presented at trial to determine that the severity of the rain caused the accident when these were questions of fact for the jury. *Id.* at 87.

¶ 19 Unlike *Murphy*, where the supreme court found that the appellate court improperly weighted the evidence presented before the trier of fact, the evidence before the trial court did not have to be "interpreted." Due to the speculative nature of her statements, plaintiff's deposition testimony failed to connect defendants' failure to have a continuous handrail on the stairway to her injuries.

¶ 20 We similarly find *Kalata v. Anheuser-Busch Companies, Inc.*, 144 Ill. 2d 425, 430 (1991), a case relied to by the dissent, distinguishable from the instant case. In *Kalata*, the plaintiff fell down a snow and ice-covered stairway while exiting a warehouse owned by the defendant. *Id.* The plaintiff testified that, after he walked out the door, he took two steps toward the left-hand side of the stoop in order to reach the left handrail, and that his fall occurred as he was taking those steps on the icy stoop. *Id.* Plaintiff further testified that, if a right handrail had been provided, he would not have crossed the icy stoop to reach the left handrail. *Kalata*, 144 Ill. 2d at 436. Following a bench trial, the trial court found the defendant negligent and awarded damages in favor of plaintiff. The appellate court reversed. The supreme court reversed the appellate court's order finding that it was the function of the trial judge to weigh the evidence and that the trial court reasonably inferred from plaintiff's testimony that the absence of a right handrail resulted in plaintiff's taking those two steps which led to his fall. *Id.* at 438.

¶ 21 Unlike the plaintiff in *Kalata* who testified that he fell because he had to take two additional steps on the icy stoop when trying to reach the left handrail due to the lack of a handrail on the right side, here, plaintiff's deposition testimony merely raised the possibility that the lack of the handrail might have helped her regain her balance. Plaintiff stated that she lost her balance, but did not know what caused her to lose her balance, or what caused her to fall, and she merely assumed that it was the condition of the stairs. Therefore, unlike *Kalata*, where there was evidence to connect the plaintiff's injuries to the handrail, there was no evidence which directly connected the missing handrail to plaintiff's injuries other than plaintiff's assumption that she would have regained her balance if a continuous handrail existed when she fell.

¶ 22 We also note that plaintiff contends that she presented expert evidence that the lack of a second, continuous handrail on the right side of the stairway was in violation of the Chicago Municipal Code 13-160-320(a) and 13-160-320(b) and constitute*d prima facie* evidence of negligence. Even if, as plaintiff asserts, defendants breached their duty of reasonable care by failing to install a continuous handrail, this does not constitute evidence of causation. Violations of an ordinance or a failure to comply with the building code, by themselves, without evidence that the violations caused the injury, do not establish proximate cause. *Strutz*, 389 Ill. App. 3d at 681. The mere possibility that the lack of the handrails caused plaintiff to fall, after she lost her balance, fails to provide the necessary causal relationship between defendants' alleged negligence and plaintiff's injuries. Therefore, the trial court did not err in granting defendants' motion for summary judgment.

¶ 23 CONCLUSION

¶ 24 Based on the foregoing, we affirm.

¶ 25 Affirmed.

¶ 26 JUSTICE MIKVA, dissenting.

¶ 27 I respectfully disagree with the majority's decision to affirm the circuit court's grant of summary judgment in favor of defendants, and would instead find that there was a genuine issue of material fact as to whether the lack of a handrail in the stairwell was a proximate cause of plaintiff's injuries. I emphasize that the relevant question is not whether the lack of a handrail proximately caused plaintiff to lose her balance, but whether it proximately caused her to fall all the way down the stairs, resulting in her severe injuries.

¶ 28 Based on plaintiff's deposition testimony and the other materials submitted on summary judgment, the undisputed facts are that plaintiff had walked down about five stairs when she lost her balance for some unknown reason. She was on the right side of the stairwell at the time and there was no handrail at the point where she lost her balance. As plaintiff fell, she "tr[ied] to get [her] grip ***. But [she] couldn't grab anything." She awoke lying on the floor at the bottom of the stairway, another nine or ten stairs further. As a result of the fall, plaintiff fractured her humerus, a serious injury which, as the majority points out, required surgery and "over $240,000 in related medical expenses." *Supra* ¶ 6. Plaintiff also testified that if there had been a handrail, she "would have been able to grab it" and she would not have fallen.

¶ 29 As the majority acknowledges, a "genuine issue of material fact exists where the facts are in dispute or where reasonable minds could draw different inferences from the undisputed facts." *Libolt v. Wiener Circle, Inc.*, 2016 IL App (1st) 150118, ¶ 24. Considering plaintiff's testimony liberally in her favor as the nonmoving party (*Melchers v. Total Electric Construction*, 311 Ill. App. 3d 224, 227 (1999)), I believe a reasonable person could infer that, regardless of what caused plaintiff to lose her balance, she attempted to grab for something to stop herself from falling and a handrail, if one had been available, would have prevented her from suffering

injuries as severe as she did. See *Kalata v. Anheuser-Busch Companies, Inc.*, 144 Ill. 2d 425 (1991) ("Where there is direct evidence or circumstantial evidence from which reasonable inferences may be made to support each element of the cause of action, then the issue of liability is properly left to the jury.").

¶ 30 I believe this conclusion is supported by our supreme court's decisions in *Murphy v. Messerschmidt*, 68 Ill. 2d 79 (1977), and in *Kalata*, 144 Ill. 2d 425. In *Murphy*, the plaintiff was injured when she fell down the steps of the defendant's building, where no handrails had been installed. *Id.* at 81-82. At trial she testified that it was raining, she approached the steps carrying a purse in one hand and an umbrella in the other, and as she stepped onto the first step her foot " 'went out' " from under her and she fell. *Id.* The jury found in favor of the plaintiff, but the appellate court reversed, in part finding that the plaintiff "failed to prove that the defendant's conduct was the proximate cause of her injury." *Id.* at 81, 85.

¶ 31 Our supreme court found that the appellate court's entry of a directed verdict in favor of the defendant was erroneous, criticizing the appellate court's finding that, because the "plaintiff admitted her hands were filled at the time of the fall and that she did not attempt to grasp the pillar post near the top step, [the] defendant's failure to install the handrails could not have been a cause of the accident." *Id.* at 87. The supreme court held that whether the accident was caused by the rain or by the condition of the steps was a question of fact for the jury to decide. *Id.*

¶ 32 In *Kalata*, the appellate court again reversed a judgment in favor of a plaintiff who slipped on a negligently maintained stairway for which the landlord failed to provide a sufficient handrail. *Kalata*, 144 Ill. 2d at 427, 429-30. Our supreme court again reversed the appellate court and reinstated the judgment in favor of the plaintiff. *Id.* at 440. Our supreme court held that the evidenced supported the trial court's finding that the absence of a handrail on the right side of the

stairway was a proximate cause of the plaintiff's injuries, despite the trial court's acknowledgment that it could not " 'know what the plaintiff would [have done]' " if a handrail on the right-hand side had been available. *Id.* As our supreme court noted, the trial court's statement simply acknowledged a court's "inherent inability to recreate all of the circumstances of a prior occurrence" and did not negate proximate cause. *Id.*

¶ 33 The evidence that a handrail may have prevented or lessened the severity of plaintiff's injuries is even stronger in this case. Plaintiff testified that she tried to get her grip and could not grab anything and even said that if there was a handrail she would have been able to grab it. Because there is some evidence suggesting that the lack of a handrail could have been a proximate cause of plaintiff's injuries, it was a question of fact more appropriately determined by a jury, and the grant of summary judgment in favor of defendants was improper. See also *Doran v. Boston Stores of Chicago*, 307 Ill. App. 456, 461 (1940) (holding that "whether the claimed negligence is the proximate cause of the injury complained of" is a question of fact for the jury if there is "any different of opinion on the question so that reasonable minds may not arrive at the same conclusion").

¶ 34 *Chmielewski v. Kahlfeldt*, 237 Ill. App. 3d 129 (1992), relied upon by the majority (*supra* ¶¶ 16-18), does not convince me otherwise. Notably in *Chmielewski*, the plaintiff attempted to file an affidavit in response to the defendant's motion for summary judgment averring that he "reached out for something to prevent him from falling onto the steps," and that he believed his injury occurred "due to a combination of facts," including "that [he] could not stop the fall by grabbing any handrails." *Chmielewski*, 237 Ill. App. 3d at 132. But in finding that the trial court had properly stricken the affidavit, the appellate court observed that the plaintiff's deposition testimony "was unequivocal and direct in that he fell on the stairs because the dog pushed him"

and was therefore improperly contradicted in the affidavit. *Id.* at 134-35. Absent the affidavit, the court found that there was "no evidence that would support a reasonable inference that the lack of a handrail was a proximate cause of [the] plaintiff's fall." *Id.* at 138.

¶ 35 Here, plaintiff's testimony that she tried to get her grip but could not grab anything provides more than the "surmise or conjecture" found wanting in *Chmielewski* (*id.* at 137); it is evidence from which a reasonable person could infer that the lack of handrail proximately caused her injuries. Moreover, in *Chmielewski*, there was clear and unequivocal testimony that something other than the condition of the stairs and the absence of a handrail—the dog—caused the fall. There is no such testimony here as to another cause. And the injury in *Chmielewski*, appears to be from the initial fall on the stairs because the claim was that the plaintiff fell on the concrete and injured his knee. *Chmielewski*, 237 Ill. App. 3d at 642. Here, in contrast, plaintiff testified at her deposition that she "lost her balance" and fell from the fifth stair to "the very bottom" of the stairs.

¶ 36 I am also not convinced that this case is similar to our recent decision in *Berke v. Manilow*, 2016 IL App (1st) 150397, also relied on by the majority. In that case, the plaintiff had "no memory of his fall" and "no recollection of anything for the next three days." *Id.* ¶ 9. There was "no circumstantial evidence to infer what happened" and no witnesses who saw or remembered it. *Id.* ¶ 28. The affidavits of plaintiffs' experts were stricken as wholly speculative. *Id.* ¶¶ 22-29. Thus, in that case we affirmed summary judgment because of the lack of "any evidence of the cause of [the plaintiff's] fall." *Id.* ¶43. Here, in contrast, plaintiff remembers "flying through the air," that she "couldn't grab anything" to stop her fall, and that there were no handrails to grab where she fell. Again, the issue is not what caused plaintiff to lose her balance. I agree with the majority that the evidence was insufficient to survive summary judgment on that

point. Rather, the issue is what caused plaintiff to fall all the way down the stairs, resulting in her severe injuries.

¶ 37 For the reasons above, I would reverse the trial court's finding of summary judgment in favor of defendants and remand to let a jury decide whether the condition of the stairs was a proximate cause of plaintiff's injuries.