2017 IL App (1st) 162221-U

FIRST DIVISION
July 31, 2017

No. 1-16-2221

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MARY CALCAGNO and GLEN CALCAGNO,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellants,	)	Cook County.
	)	
v.	)	No. 13 L 010441
	)	
THE CITY OF CHICAGO and RICE BISTRO,	)	Honorable
	)	Kathy M. Flanagan,
Defendants,	)	
	)	
(The City of Chicago, Defendant-Appellee).	)	Judge Presiding.

JUSTICE MIKVA delivered the judgment of the court.
Presiding Justice Connors and Justice Simon concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the trial court's order granting summary judgment in favor of the City. The plaintiffs failed to establish that a genuine issue of material fact existed on the element of the City's notice of the sidewalk defect that caused their injuries. We find that the trial court did not abuse its discretion in denying plaintiffs' motion to compel or in refusing to reopen discovery on the issue of notice.

¶ 2 This case began with a wife's fall on the sidewalk when she turned around to give her husband money to put in the parking meter. Plaintiff Mary Calcagno fell in front of defendant restaurant Rice Bistro. She and her husband Glen Calcagno sued the restaurant and the defendant

City of Chicago (City), seeking damages for negligence proximately related to her injury from what she deemed was uneven pavement on the patch of sidewalk at issue. They appeal from the trial court's order granting summary judgment in favor of the City. The Calcagnos contend on appeal that the trial court erred in finding that there was no genuine issue of material fact as to whether the City had actual or constructive notice of the sidewalk defect. The Calcagnos also argue that the trial court erred in denying their motion to compel and in denying their motion to reconsider the granting of summary judgment, or in the alternative, to reopen discovery on the issue of notice. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 The Calcagnos filed their complaint on September 18, 2013. On February 11, 2015, they moved to compel supplemental discovery on the issue of notice, seeking (1) all customer service reports for the property; (2) City licensing documents for the property; (3) a stipulation that the City made no repairs to the sidewalk in front of the property for five years prior to September 20, 2014, or, alternatively, all 3-1-1 records for that same time period; (4) a list of Rice Bistro employees; (5) all City permit documentation for the property; (6) any City citations related to the property from the year 2010 to the request date; and (7) any building court case documentation for the property from the year 2010 to the request date. The City produced the 3-1-1 reports, which are reports of any complaints about the sidewalk in that area or requests for repairs. The Calcagnos sought to compel production of the remaining items, to which the City objected on relevance grounds. On March 4, 2015, the trial court denied the motion to compel. No transcript of the proceedings or bystanders report in lieu of a transcript appears in the record regarding any argument by the parties on the motion to compel or on the court's ruling.

¶ 5 On January 6, 2016, both the City and Rice Bistro moved for summary judgment. The City argued that it owed no duty to Ms. Calcagno because: (1) the sidewalk defect was *de*

minimis, and (2) there was no evidence that the City had notice of the defect. The motion and response relied on the following deposition testimony.

¶ 6 Ms. Calcagno testified in her deposition that, on the morning of September 20, 2012, she was walking northbound on the sidewalk along Lincoln Avenue towards the intersection of Lincoln Avenue, Southport Avenue, and Wellington Avenue in Chicago. Ms. Calcagno described in her deposition that, as she was walking, Mr. Calcagno called to her from a parking meter a quarter of a block behind her. Ms. Calcagno stated that she turned around and her right heel "got caught," causing her to fall. According to Ms. Calcagno, the unevenness of the sidewalk and the wide cracks between the sidewalk slabs made her fall. As a result of her fall, Ms. Calcagno twisted and broke her right ankle, sustaining nerve damage to her right leg.

¶ 7 Ms. Calcagno testified in her deposition that she did not see a change in elevation or any cracks in the sidewalk before her fall. Although Ms. Calcagno returned a few weeks later with her grandson and husband to take pictures of the alleged sidewalk defect, she did not take any width, height, or elevation measurements.

¶ 8 According to Mr. Calcagno's deposition, on the morning of Ms. Calcagno's accident, he parked on the west side of Lincoln Avenue. He stated that Ms. Calcagno had already left the car and was walking towards the north intersection when he called to her for some change to put in the parking meter and, as soon as she turned around, she fell. Although Mr. Calcagno later observed the sidewalk to be "unlevel" and "on an angle," he did not take any measurements to document this alleged defect.

¶ 9 The City attached to its motion for summary judgment the deposition of Mr. John Errera, a civil engineer for the City of Chicago's Department of Transportation. Mr. Errera stated that he searched records of 3-1-1 service requests for 2964 North Lincoln Avenue, the location of Ms.

Calcagno's fall, and found no records showing any repair work or requests for repair work to the property in question within the five years before the accident.

¶ 10 The Calcagnos attached to their response to the City's motion for summary judgment the affidavit of Mr. Michael Jedzewski, an Illinois-licensed architect. Based on his investigation of the area in which Ms. Calcagno fell, Mr. Jedzewski concluded that "the change in elevation [of the sidewalk] was and is unsafe, posing a tripping hazard." Mr. Jedzejewski also found that the sidewalk "did not conform to various portions of ASTM F1636-10, Standard Practice for Safe Walking Surfaces."

¶ 11 The Calcagnos also attached to their response the deposition testimony of Mr. Thornthan Srikalayanavat, the owner of Rice Bistro, the restaurant at the location of Ms. Calcagno's accident. Mr. Srikalayanavat stated that the restaurant had been in business since March 24, 2010, and that a building inspector came to the location and checked the property before Mr. Srikalayanavat obtained the business license for Rice Bistro. Mr. Srikalayanavat stated that he was present for the inspection. According to Mr. Srikalayanavat, there had been no repairs or changes to the sidewalk in front of the restaurant since the restaurant's lease began in 2010. Mr. Srikalayanavat also stated that the sidewalk in the pictures looked the same as it did when his business first moved into the property. According to Mr. Srikalayanavat, there had never been any complaints from customers or discussions with City employees responsible for maintaining the sidewalks about the condition of the sidewalk in front of his restaurant. Although construction work was being performed on the property at the time of Ms. Calcagno's fall—as shown in the photographs attached as exhibits to Mr. Srikalayanavat's deposition—according to Mr. Srikalayanavat, this was to fix the "leaning of the building" and not any condition of the sidewalk. In his deposition, Mr. Srikalayanavat was asked "there aren't any holes or problems

with the sidewalk?" to which he answered "right," and further stated that there was "nothing to repair."

¶ 12 On May 2, 2016, the trial court granted both the City's motion and the motion of Rice Bistro, finding that there was no evidence of actual or constructive notice to the City. On May 27, 2016, the Calcagnos filed a motion to reconsider the summary judgment ruling, or in the alternative, to reopen discovery on the issue of notice. The trial court denied the motion on July 11, 2016, noting that it had found in its earlier ruling denying the motion to compel that the "plaintiffs were in possession of all of the evidence relevant to the issue of notice" because "the City had produced all of the documentation that it had with respect to the sidewalk at the subject location, including the [3-1-1] reports." The trial court ruled that, even considering all of the relevant documentation, the record as it stood failed to show a genuine issue of material fact that notice could have been imputed to the City. Thus, the court held that the Calcagnos were not entitled to further discovery and summary judgment for defendants was appropriate.

¶ 13 The Calcagnos timely filed their notice of appeal of the ruling for the City on August 10, 2016, but did not appeal the ruling for Rice Bistro. Pursuant to Illinois Supreme Court Rules 301 and 303 governing appeals from final judgments, this court has jurisdiction to review the appeal. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. May 30, 2008).

¶ 14 ANALYSIS

¶ 15 The Calcagnos raise two issues on appeal: (1) the trial court erred in finding that there was no genuine issue of material fact as to whether the City had notice of the sidewalk defect, and (2) the trial court erred in denying the Calcagnos' motion to compel and the motion to reconsider the granting of summary judgment, or in the alternative, to reopen discovery on the issue of notice. We address these two arguments in turn.

¶ 16 I. Summary Judgment

¶ 17 The Calcagnos first argue that the trial court erred in granting the City's motion for summary judgment because there was a genuine issue of material fact as to whether the City had notice of the condition of the sidewalk where Ms. Calcagno fell. We review summary judgment rulings under a *de novo* standard. *Newsom-Bogan v. Wendy's Old Fashioned Hamburgers of New York, Inc.*, 2011 IL App (1st) 092860, ¶ 13 (2011). The purpose of summary judgment is not to try an issue of fact, but to determine if one exists. *Id.* In determining whether a genuine issue of material fact exists, a court must consider "the pleadings, depositions, admissions, exhibits, and affidavits on file in the case" and construe the evidence in favor of the nonmoving party. *Storino, Ramello and Durkin v. Rackow*, 2015 IL App (1st) 142961, ¶ 16. Summary judgment is granted to the moving party when no genuine issue of material fact exists. 735 ILCS 5/2-1005(c) (West 2017). We have recognized that a defendant can get summary judgment in two different ways; by affirmatively showing that some element of the case must be resolved in the defendant's favor or by the kind of motion recognized by the United States Supreme Court in *Celotex Corp. v. Catrett,* 477 U.S. 317, 322(1986), "in which a defendant points out the absence of evidence supporting [the] plaintiff's position." *Willett v. Cessna Aircraft Co.,* 366 Ill. App. 3d 360, 368–69 (2006). If the defendant carries this initial burden of production on a *Celotex* motion, the burden shifts to the plaintiff to show a factual basis to support the elements of his or her claim. *Id.* at 369.

¶ 18 The Tort Immunity Act limits a public entity's liability for injuries on its property "unless it is proven that it has actual or constructive notice of the existence of such condition that is not reasonably safe in reasonably adequate time prior to an injury to have taken measures to remedy or protect against such condition." 745 ILCS 10/3-102(a) (West 2012). Although both parties concede that there is no evidence of actual notice, the Calcagnos argue that a genuine issue of

material fact existed as to whether the City had constructive notice of the sidewalk defect. The Calcagnos cite to *Palermo v. City of Chicago Heights*, 2 Ill. App. 3d. 1004, 1008 (1971), which held that constructive notice "is present where a defective condition exists for such a length of time that public authorities, by the exercise of reasonable care and diligence, might have known of the condition." The *Palermo* court considered as factors "the conspicuity of the defect and the length of time it existed." *Id.*

¶ 19 The Calcagnos attached photographs of the sidewalk that were taken after Ms. Calcagno's accident that they claim show the obvious defect that caused her fall. They rely on *Baker v. City of Granite City*, 75 Ill. App. 3d 157, 161 (1979), where the court concluded from a photograph that a sidewalk had been "in a defective state for a long time." Drawing on *Baker*, the Calcagnos point to the deposition of Mr. Errera—who stated that he had not seen any records showing repair work to the property in question within the five years prior to Ms. Calcagno's accident—to argue that the sidewalk defect must have existed for some time. The Calcagnos additionally rely on Mr. Srikalayanavat's statement that the sidewalk in front of Rice Bistro was in the same condition as when his restaurant started business over a year and a half before Ms. Calcagno's accident. The Calcagnos also rely on *Livings v. City of Chicago*, 26 Ill. App. 3d 850, 854 (1975), for the proposition that, generally, constructive notice is a question of fact for a jury.

¶ 20 The City argues that, if a sidewalk defect existed at all, the defect was not conspicuous. The City points to *Burke v. Grillo*, 227 Ill. App. 3d 9, 18-19 (1992), where the court held that, although the plaintiff proved through affidavits that a hole had existed for more than a year prior to the plaintiff's fall, there was no basis to conclude that the hole was conspicuous enough that the property owner should have noticed it. The City also relies on *Pinto v. DeMunnick*, 168 Ill. App. 3d 771, 775 (1988), where we reversed a jury verdict on the basis that evidence showing that a hole that injured the plaintiff was plainly visible or was apparent for a long time was

insufficient to "permit an inference that the [defendant] was constructively notified of the existence of the hole." The City relies on the testimony of the Calcagnos themselves, in which Ms. Calcagno admitted that she did not notice the defect before her accident. The City also points to the lack of any evidence as to how long the defect had existed and the fact that Mr. Srikalayanavat testified that he did not see any holes or problems with the sidewalk.

¶ 21 We agree with the trial court that the Calcagnos did not present evidence sufficient to raise a factual issue on constructive notice. Ms. Calcagno herself stated that she did not notice a crack or elevation in the sidewalk before she fell. There was no evidence that the sidewalk defect existed for a significant length of time. Unlike *Baker*, the length of time that the sidewalk condition existed is not evident from the photographs that the Calcagnos attached. In contrast to *Baker,* the record here also does not indicate the dimensions of the sidewalk defect. See *Baker*, 75 Ill. App. 3d at 161. While Mr. Srikalayanavat testified that the condition of the sidewalk had been the same for the last year and a half, he also testified that, in his view, there were not any holes or problems with the sidewalk.

¶ 22 The City also points out that, even if there could have been constructive notice, such notice would only be imputed to the City if it was notice to a City employee whose job entailed duties that made that notice material. The Restatement (Third) of Agency requires that "knowledge of the fact is material to the agent's duties to the principal" in order for notice to an agent to be imputed to the principal. Restatement (Third) of Agency § 5.03 (2006). Illinois adopted and applied section 5.03 in *In re Dar. C.*, 2011 IL 111083, ¶ 141 (2011). However, there was no evidence in this case that any City employee with duties material to the condition of the sidewalk was ever in the vicinity of where Ms. Calcagno fell.

¶ 23 Because we agree with the trial court that the Calcagnos failed to present evidence that could be a basis for constructive notice, such as a sidewalk defect that was conspicuous, or had existed for a long time, we affirm the trial court's summary judgment ruling for the City.

¶ 24 II. Supplemental Discovery

¶ 25 Having found summary judgment was warranted on the record before the trial court, we consider whether the trial court abused its discretion in either denying the motion to compel or in refusing to reopen discovery on the notice issue. The Calcagnos' argument is that the trial court erred in granting summary judgment due to the lack of evidence of notice after denying the Calcagnos' motion to compel discovery that, they contend, went to the notice issue. Although discovery orders are not appealable because they are not final orders, they are reviewable on appeal from the final judgment. *Reda v. Advocate Health Care*, 199 Ill. 2d 47, 54 (2002). We also review the trial court's refusal to reopen discovery after it granted the City's motion for summary judgment.

¶ 26 Trial courts are afforded broad discretion in ruling on discovery matters, and the exercise of this broad discretion will not be overturned on appeal unless there was a clear abuse of that discretion. *Kic v. Bianucci*, 2011 IL App (1st) 100622, ¶ 16. Similarly, the trial court had broad discretion as to whether to reopen discovery after it had granted the motion for summary judgment. *Ruane v. Amore*, 287 Ill. App. 3d 465, 471 (1997) (finding no abuse of discretion in discovery ruling where trial court was "afforded great latitude in ruling on discovery matters," including "whether to reopen discovery" after cutoff).

¶ 27 The Calcagnos argue that their motions to compel supplemental discovery or to reopen discovery should have been granted because the additional discovery might have provided them with information identifying a City employee who was present near the location of Ms. Calcagno's accident. From this, they argue, they could have shown either actual or constructive

notice to the City. They contend that the trial court ruled inconsistently in first denying their motion to compel and then granting the City's motion for summary judgment based on the lack of notice to the City. The City responds that the trial court's rulings were not an abuse of discretion and that any further information obtained through the Calcagnos' additional discovery requests would likely not have led to relevant evidence. The additional discovery included customer service reports for the property, along with City licensing, permitting, and building court documents for the property.

¶ 28 We note that we do not have a complete record regarding the trial court's initial reasons for denying the motion to compel this discovery. The Calcagnos, as the appellants, had the obligation to "present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Here, there was no court reporter present for the ruling on the motion to compel, so we cannot review the record of the proceedings denying that motion.

¶ 29 However, when the trial court denied the motion to reconsider, it gave its reasoning. We find that reasoning persuasive. The trial court noted in the reconsideration order that "the City had produced all of the documentation that it had with respect to the sidewalk at the subject location, including the [3-1-1] reports, and so the Plaintiffs were in possession of all the evidence produced *vis-à-vis* establishing constructive notice." As the trial court noted, in initially denying the motion to compel this additional discovery, it did not suggest that the Calcagnos had enough evidence to establish notice, but only that the City had produced the relevant documents.

¶ 30 In addition to the 3-1-1 reports, the Calcagnos sought City licensing, permitting, and building court documents. None of this additional discovery was directly related to any sidewalk defects. At most, this additional discovery would have let the Calcagnos know of other City

employees who had been in the area and could have theoretically seen the crack. This was at best completely speculative and would only be relevant if those employees, who just happened to be in that area, had duties material to the condition of the sidewalk. *Dar. C.*, 2011 IL 111083, ¶ 141 (adopting the Restatement (Third) of Agency § 5.03 (2006)). On the record before us, we cannot say the trial court abused its discretion in denying the motion to compel or reopen for discovery that was wide ranging and had only the slightest possibility of being relevant to the notice issue.

¶ 31 The cases that the Calcagnos rely on are distinguishable. *Yuritech v. Sole,* 259 Ill. App. 3d 311, 317 (1994), is different because the trial court in that case dismissed the complaint before allowing *any* discovery. In *Hanes v. Orr & Associates*, 53 Ill. App. 3d 72, 74 (1977), the trial court granted summary judgment for the defendants, although a defendant had refused to produce an employee for deposition that was directly related to a "central" issue in the case. The discovery sought here was peripheral at best, not central, and the trial court's denial of the motion to compel and refusal to reopen discovery were not abuses of discretion.

¶ 32 CONCLUSION

¶ 33 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 34 Affirmed.