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2017 IL App (2d) 170024-U
No. 2-17-0024
Order filed September 21, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

CHANEL THOMAS, Plaintiff-Appellant, v. M.A. DYNASTY INC., formerly EXCLUSIVELY YOURS SALON & DAY SPA, d/b/a MITZI'S HAIR SALON, Defendant, (M.A. DYNASTY, INC., formerly EXCLUSIVELY YOURS SALON & DAY SPA, d/b/a MITZI'S HAIR SALON, Third-Party Plaintiff-Appellee, v. JOHN KUT, as Trustee for T.E. KUT TRUST, Third-Party Defendant.)	)	Appeal from the Circuit Court of Du Page County. No. 14-L-910 Honorable Kenneth L. Popejoy, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Jorgensen and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted summary judgment to defendant on the basis that, as a tenant in a commercial complex, its duty to provide safe ingress and egress to its patrons did not extend beyond the physical boundaries of the leased premises to the common sidewalk owned and controlled by the landlord.

¶ 2 Plaintiff, Chanel Thomas, filed a lawsuit against defendant, M.A. Dynasty Inc., formerly Exclusively Yours Salon & Day Spa, d/b/a Mitzi's Hair Salon (M.A. Dynasty), after she slipped and fell on a sidewalk outside of M.A. Dynasty's storefront that it leased from T.E. Kut Trust. The trial court granted summary judgment in favor of M.A. Dynasty, finding that its duty to provide a safe ingress and egress to its patrons did not extend beyond the boundaries of the leased premises. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 M.A. Dynasty operated a hair salon at 18122 Martin Avenue in Homewood, Illinois. The salon was located in a three-story building called the Courthouse Square Professional and Executive Offices complex, which was owned by T.E. Kut Trust. M.A. Dynasty leased the commercial suite from T.E. Kut Trust. The lease provided as follows. M.A. Dynasty was responsible for all "interior (non-structural)" maintenance and repairs of the leased premises. T.E. Kut Trust, on the other hand, was required to provide maintenance for the exterior and all "structural parts of the Leased Premises, and Complex, the sidewalks and the parking lot." T.E. Kut Trust was further required to provide "snow removal of parking lot and sidewalks, on a daily basis, when snowfall accumulates to more than two (2) inches."

¶ 5 Plaintiff testified at her deposition as follows. On March 8, 2013, she went to M.A. Dynasty's salon to get her hair cut at around 10:00 a.m. The weather was clear when she arrived, but there had been a "snowstorm" earlier that morning. Plaintiff parked in the parking lot and walked up a short set of stairs onto a sidewalk that ran in front of the salon's storefront; she fell when she began walking on the sidewalk. Plaintiff did not see ice before or after she fell, but she felt ice while she was on the ground. She did not know where the ice came from or how large an area it covered, but she fell near a downspout/gutter that ran vertically along the entire

three-story building. According to an exhibit that she marked, she fell on the sidewalk on the opposite end from M.A. Dynasty's entrance. After she fell, plaintiff entered the salon and told her hairstylist that she fell. The hairstylist told plaintiff that someone once previously slipped on ice in the building's parking lot. Plaintiff also knew that her hairstylist had once fallen, but she did not know where, when, or how the fall occurred. Plaintiff proceeded with her hair cut, which took about an hour. During that time, the owner of the salon called the property manager and requested that salt be put down on the sidewalk. After her haircut, plaintiff and her hairstylist took pictures of the area where she fell. Plaintiff did not see any ice on the ground. She then drove herself to the hospital.

¶ 6 Mitzi Achille, the owner of M.A. Dynasty's salon, testified at her deposition as follows. M.A. Dynasty leased the "inside premises" of a commercial suite from T.E. Kut Trust. The suite had two doors on opposite sides of the storefront, with one marked 18122 and the other marked 18122 ½. The salon used only the 18122 door, while the other door always remained locked. There was a downspout/gutter near door 18122 ½. Under the terms of the lease, M.A. Dynasty was responsible for the interior premises, while the trust was responsible for the exterior parts of the premises, which included the parking lot and sidewalks. M.A. Dynasty employees never shoveled or salted the sidewalk in front of the salon, but Achille would "sweep" the welcome mat at the 18122 door so that patrons would not track snow into the salon.

¶ 7 Achille testified about the incident in question as follows. March 8, 2013, was a nice, "fair weather" day. There was a "light dusting" of snow early that morning that "quickly melted" when Achille arrived at work. Around the time of her 10:00 a.m. appointment, plaintiff came into the salon and announced that she had fallen. After learning about the fall, Achille examined the sidewalk, but she did not see any ice on the sidewalk in front of the storefront. Nor

had Achille ever noticed ice accumulate on the sidewalk in front of door 18122 ½, the area where plaintiff said that she fell. Achille testified that she had previously seen ice on the "hole" at the bottom of the downspout/gutter, but never on the sidewalk near the downspout/gutter. After plaintiff left the salon, M.A. Dynasty employees agreed that they did not see any ice.

¶ 8 Bruce Moorhouse testified at his deposition as follows. Moorhouse was the property manager for the Courthouse Square Professional and Executive Offices complex. The first floor of the complex contained eleven business offices, while the second and third floors were apartments. T.E. Kut Trust was responsible for snow and ice removal for the sidewalks and parking lot. Moorhouse examined the complex every morning to determine whether the sidewalks or parking lots needed to be shoveled or salted. He would also shovel or salt the premises if contacted by a tenant. T.E. Kut Trust also provided each business tenant with a salt bucket, but the trust did not expect tenants to use the salt buckets because "that's not their job." Instead, the trust provided the salt buckets in the event that it snowed "in the middle of the night."

¶ 9 Additionally, Moorhouse testified that the complex had a downspout/gutter that ran vertically along the building, under the sidewalk, and then drained into the parking lot. The downspout/gutter had a series of "clean-out" holes along its length to help clear debris that was caught. The downspout/gutter ran near the 18122 ½ door of M.A. Dynasty's storefront. T.E. Kut Trust did not expect tenants to perform maintenance on the downspout/gutter in any manner. Moorhouse had never seen or been notified of any ice forming on the sidewalk as a result of the downspout/gutter.

¶ 10 Moorhouse further testified that March 8, 2013, was a "cool, sunny day." When he inspected the premises early that morning, the complex was clear of snow and ice. Later that

morning, he received a call from Achille notifying him that a patron had fallen on the sidewalk. Moorhouse went to the premises about an hour later but did not notice any ice on the sidewalk; he testified that the sidewalk was "dry."

¶ 11 Paris Butler, a hairstylist for M.A. Dynasty, testified at her deposition that it was a cold day on March 8, 2013. Butler testified that there was no ice on the sidewalk, but there was "a little snow that was on the grass." She also testified that M.A. Dynasty employees never salted or shoveled the sidewalk in front of the salon. Butler never saw ice form on the sidewalk as a result of the downspout/gutter running along the building.

¶ 12 On January 20, 2016, plaintiff filed her second amended complaint. The complaint alleged that, pursuant to the lease between M.A. Dynasty and T.E. Kut Trust, M.A. Dynasty had a duty to maintain the salon's ingress and egress in a reasonably safe manner. It further alleged that M.A. Dynasty breached that duty when it "knew, permitted, and allowed a gutter pipe with a hole in it" to splash water and form ice near the entrance to the salon. As a proximate result of the breach, ice formed "on the entrance and egress," which caused plaintiff to fall and sustain injuries.

¶ 13 On January 26, 2016, M.A. Dynasty filed a third-party complaint against the trustee of T.E. Kut Trust. M.A. Dynasty brought claims for contribution and breach of contract, alleging that, under the lease, the trust was responsible for the exterior of the premises where plaintiff fell. M.A. Dynasty further alleged that T.E. Kut Trust, not M.A. Dynasty, owed a duty to plaintiff and that any damages were a result of the trust's breach of that duty.

¶ 14 On September 27, 2016, M.A. Dynasty filed a motion for summary judgment, arguing that it did not owe plaintiff a duty because the alleged fall occurred on a sidewalk that was not within its control and was not on the leased premises. M.A. Dynasty referenced the lease which

explicitly stated that T.E. Kut Trust was responsible for the maintenance of the exterior premises, including the sidewalks, along with snow and ice removal. M.A. Dynasty also argued that landowners have no duty to remove natural accumulations of snow and ice, and that no evidence suggested that plaintiff fell on anything other than a natural accumulation of ice.

¶ 15 On October 24, 2015, plaintiff filed her response, arguing that M.A. Dynasty and T.E. Kut Trust "inherited mutual duties" because the trust gave tenants buckets of salt. Additionally, plaintiff appeared to argue that the fall occurred on an unnatural accumulation of ice. Specifically, she noted that the fall occurred next to the downspout/gutter with the clean-out hole. She also appeared to argue that this constituted a design defect.

¶ 16 In its reply, M.A. Dynasty argued that general principles of landlord duties with respect to unnatural accumulations of ice were irrelevant, because they did not apply to tenants who had no control over the design or construction of the property. Relying on *Hougan v. Ulta Salon, Cosmetics and Fragrance, Inc.*, 2013 IL App (2d) 130270, M.A. Dynasty further argued that its duty as a commercial tenant to provide safe ingress and egress to business invitees did not extend beyond the leased premises for three reasons: (1) it did not take affirmative action to appropriate the sidewalk for its exclusive use, (2) the walkway was not in disrepair and exclusively used to access the salon, and (3) it did not immediately contribute to the injury by pushing or forcing plaintiff into a known dangerous area.

¶ 17 Plaintiff was granted leave to file a sur-response concerning the application of *Jones v. Live Nation Entertainment, Inc.*, 2016 IL App (1st) 152923. In her sur-response, plaintiff argued that *Jones* "disagreed" with *Hougan*. Relying on *Jones*, plaintiff argued that her claim against M.A. Dynasty was not precluded by the lease between M.A. Dynasty and T.E. Kut Trust.

Plaintiff argued that the lease only pertained to the apportionment of liability between M.A. Dynasty and the trust.

¶ 18 In its sur-reply, M.A. Dynasty argued that there was no conflict between *Jones* and *Hougan*. M.A. Dynasty noted that the *Jones* court explicitly distinguished *Hougan* on the basis that the injury in *Jones* occurred on the leased premises.

¶ 19 On December 14, 2016, the trial court granted M.A. Dynasty's motion for summary judgment. The court found that M.A. Dynasty did not owe plaintiff a duty. As the basis for its finding, the court noted that plaintiff did not fall near the entrance to M.A. Dynasty's salon, but instead fell "further down" the sidewalk near the downspout/gutter. The court also noted that T.E. Kut Trust assumed full responsibility of the common sidewalk in front of the salon where plaintiff fell, as evidenced by the lease. Furthermore, the court found that M.A. Dynasty's duty to provide a safe ingress and egress to the leased premises did not extend beyond the boundaries of the premises, because it did not undertake care of the sidewalk or commandeer the sidewalk for its exclusive use. Finally, the court found that there was no conflict between *Hougan* and *Jones*. The court found *Jones* was distinguishable because the injury in that case occurred within the leased premises. As part of its ruling, the court granted Illinois Supreme Court Rule 304(a) language (eff. Mar. 8, 2016).

¶ 20 II. ANALYSIS

¶ 21 Plaintiff argues that the trial court erred in granting summary judgment in favor of M.A. Dynasty. Summary judgment is appropriate where the pleadings, depositions, admissions, and affidavits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a

matter of law. *Hougan*, 2013 IL App (2d) 130270, ¶ 19. We review a trial court's grant of summary judgment *de novo*. *Hougan*, 2013 IL App (2d) 130270, ¶ 19.

¶ 22 To prevail on a claim for negligence, the plaintiff must establish that (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, and (3) the breach proximately caused the plaintiff's injury. *Hougan*, 2013 IL App (2d) 130270, ¶ 20. Whether a duty exists under a particular set of circumstances is a question of law. *Hougan*, 2013 IL App (2d) 130270, ¶ 20. If the defendant does not owe a duty, the plaintiff cannot recover as a matter of law. *Hougan*, 2013 IL App (2d) 130270, ¶ 20. Whether the defendant breached that duty and whether the breach was the proximate cause of the plaintiff's injury are factual matters reserved for the trier of fact, provided that there is a genuine issue of material fact as to those issues. *Hougan*, 2013 IL App (2d) 130270, ¶ 20.

¶ 23 Plaintiff argues that a genuine issue of material fact remains as to whether she fell on an accumulation of ice "which some entity had a duty to correct." In support of her argument, plaintiff cites boilerplate case law identifying a landlord's liability for natural or unnatural accumulations of ice or snow. See, *e.g.*, *Bloom v. Bistro Restaurant Limited Partnership*, 304 Ill. App. 3d 707, 711 (1999) (generally, a landlord cannot be held liable for injuries resulting from natural accumulations of ice or snow, unless the accumulation of ice or snow becomes unnatural due to the design and construction of the landlord's building.). Here, plaintiff appears to suggest that the downspout/gutter that was located near the spot where she fell created an unnatural accumulation of ice. It is undisputed that T.E. Kut Trust was the landowner of the property where plaintiff fell, not M.A. Dynasty. It is also undisputed that M.A. Dynasty was not involved with the design, construction, or maintenance of the downspout/gutter and building. Many of the cases that plaintiff cites are thus inapplicable.

¶ 24 Instead, the issue on appeal concerns the extent of M.A. Dynasty's duty to provide a safe ingress and egress into its salon. Indeed, plaintiff's second amended complaint alleged only that, under the lease, M.A. Dynasty had a duty to "maintain the premises for ingress and egress to the hair salon in a reasonably careful manner."[1] Additionally, it is undisputed that plaintiff fell on the common sidewalk outside of the premises leased by M.A. Dynasty.

¶ 25 An owner or occupier of premises has a duty to provide a safe ingress and egress from the premises. *Friedman v. City of Chicago*, 333 Ill. App. 3d 1070, 1073 (2002). In limited circumstances, that duty may extend beyond the precise boundaries of such premises. *Hanks v. Mount Prospect Park District*, 244 Ill. App. 3d 212, 217 (1993). *Decker v. Polk Brothers*, 43 Ill. App. 3d 563, 565 (1976). The duty to provide a safe ingress and egress will extend beyond the respective property lines where (1) the business took affirmative action to appropriate the sidewalk, (2) the sidewalk was in disrepair and exclusively used to access the business, or (3) the business directly and immediately contributed to the injury. See *Hougan*, 2013 IL App (2d) 130270, ¶ 44.

¶ 26 *Hougan* is controlling. In that case, the plaintiff exited an Ulta cosmetics store and waited on the sidewalk under the store's awning for a ride. *Hougan*, 2013 IL App (2d) 130270, ¶ 3. A vehicle drove over a curb and hit the plaintiff. *Hougan*, 2013 IL App (2d) 130270, ¶ 3. Ulta leased the store from Fridh Corporation, and the lease specifically provided that the parking lot and sidewalks were "common facilities" to be maintained and repaired by Fridh. *Hougan*,

[1] To the extent that plaintiff raises other possible theories of liability, we decline to discuss them. Plaintiff pleaded negligence based only on the theory of M.A. Dynasty's duty to provide a reasonably safe ingress and egress; she cannot raise new theories for the first time on appeal. *Daniels v. Anderson*, 162 Ill. 2d 47, 58 (1994).

2013 IL App (2d) 130270, ¶ 8. This court held that Ulta did not owe a duty to the plaintiff because the sidewalk and parking lot were under Fridh's exclusive control. *Hougan*, 2013 IL App (2d) 130270, ¶ 44. Ulta's duty did not extend beyond its premises because it did not take affirmative action to control or appropriate the sidewalk, the sidewalk was used by multiple tenants, and Ulta did not contribute to the injury. *Hougan*, 2013 IL App (2d) 130270, ¶¶ 31, 35. As further evidence that Ulta did not owe a duty to the plaintiff, we noted that the lease gave Fridh "sole discretion" over the areas outside of Ulta's leased premises. *Hougan*, 2013 IL App (2d) 130270, ¶ 40. With respect to the lease, we noted that "Ulta is not relying on the lease to attempt to create an exception to a duty to [the plaintiff] while she stood on the sidewalk, but rather the terms of the lease are relevant to determining whether there was such a duty in the first place." *Hougan*, 2013 IL App (2d) 130270, ¶ 40.

¶ 27 As in *Hougan*, M.A. Dynasty did not owe a duty of care to plaintiff when she fell, because the sidewalk on which she fell was under T.E. Kut Trust's exclusive control. Like in *Hougan*, the lease specifically provided that T.E. Kut Trust was solely responsible for the sidewalk where plaintiff was injured. The lease further provided that T.E. Kut Trust was responsible for snow and ice removal. Contrary to plaintiff's assertion, M.A. Dynasty did not "inherit mutual duties" by virtue of the trust giving the tenants a bucket of salt. Moorhouse explicitly testified that the trust was responsible for snow and ice removal, and the trust did not expect the tenants to use the salt buckets. Both Achille and Butler testified that M.A. Dynasty employees never used the salt bucket. Similarly, plaintiff's statement that it was Achille's "responsibility" to salt and shovel the sidewalks is a misrepresentation of the record. Achille testified that she "swept" the welcome mat at the entrance to avoid snow being tracked into the salon, but that she never shoveled the sidewalk or used the salt bucket. Moreover, as the trial

court found, plaintiff did not fall on or near the entrance to the salon. Plaintiff's fall occurred further down the sidewalk near the downspout/gutter, which was on the opposite side of the storefront.

¶ 28 As in *Hougan*, no evidence in the record suggests that M.A. Dynasty controlled the sidewalk, appropriated the sidewalk for its exclusive use, or otherwise directly contributed to the injury. Indeed, plaintiff does not attempt to argue that any of those scenarios apply. Instead, the record shows that the sidewalk was a common walkway for the use of multiple tenants and residents of the building complex. The record also shows that T.E. Kut Trust, as owner of the complex, retained exclusive control over the maintenance, repair, and snow and ice removal of the exterior premises, including the sidewalk and downspout/gutter. Thus, under the circumstances, M.A. Dynasty's duty to provide a safe ingress and egress did not extend beyond the leased premises. See also See *Friedman*, 333 Ill. App. 3d at 1073 (the occupier of premises ordinarily "will not be held liable for any injuries incurred on a public sidewalk under the control of a municipality, even though the sidewalk may also be used for ingress or egress to the premises"); *Decker v. Polk Brothers*, 43 Ill. App. 3d 563, 566 (1976) ("The sidewalk in question is owned, controlled, and maintained by the City of Chicago and is used by the public at large-not just by patrons of defendant. No evidence was adduced showing that defendant ever exercised any control over the area"); *Strauch v. United States*, 637 F.2d 477, 480 (7th Cir. 1980) ("The mere fact that postal patrons must foreseeably use the sidewalk does not represent sufficient control by the postal station to justify departure from [Illinois'] general rule that public sidewalks are not the responsibility of owners or occupiers of abutting land.").

¶ 29 Plaintiff contends that *Jones* is in direct conflict with *Hougan*. We disagree. In *Jones*, the plaintiff's injuries "occurred *on* the premises leased (or licensed)" by the defendant.

(Emphasis in original.) *Jones*, 2016 IL App (1st) 152923, ¶ 41. The *Jones* court thus explicitly distinguished *Hougan* "on its face." *Jones*, 2016 IL App (1st) 152923, ¶ 41. The *Jones* court also noted that premises liability was not the only theory under which the plaintiff could recover, as the plaintiff sought to impose liability upon the defendant under the theory of *respondeat superior*. *Jones*, 2016 IL App (1st) 152923, ¶ 41. Hence, *Jones* is inapposite.

¶ 30 Furthermore, plaintiff relies on *Jones* for the proposition that the lease between M.A. Dynasty and T.E. Kut Trust did not preclude her cause of action, because she was not a party to the contract. But as we explained in *Hougan*, M.A. Dynasty is not relying on the lease to create an exception to a duty owed to plaintiff while she walked on the sidewalk. Instead, the terms of the lease are relevant to determining whether M.A. Dynasty owed a duty to plaintiff in the first place. Specifically, the terms of the lease are relevant to determining who owned the common sidewalk, who controlled it, and who was responsible for maintenance and ice removal. The lease specified that T.E. Kut Trust, not M.A. Dynasty, had exclusive control over the sidewalk. Therefore, M.A. Dynasty did not owe a duty to plaintiff. See *Hanks v. Mount Prospect Park District*, 244 Ill. App. 3d 212, 218 (1993) ("Where, however, the landowner has exercised no control over the adjacent property, he will not be held liable for injuries which occur on adjacent property"). We thus affirm the trial court's grant of summary judgment in favor of M.A. Dynasty.

¶ 31 III. CONCLUSION

¶ 32 For the reasons stated, we affirm the judgment of the circuit court of Du Page County.

¶ 33 Affirmed.