2017 IL App (3d) 150833-U

Order filed October 5, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

MARY M. MORSOVILLO, Plaintiff-Appellant, v. LEE D. PATTERSON, SUSAN M. PATTERSON, BARBARA L. WESTLAKE, and GARY W. WESTLAKE, Defendants-Appellees.	))))))))))))	Appeal from the Circuit Court of the 13th Judicial Circuit, LaSalle County, Illinois, Appeal No. 3-15-0833 Circuit No. 13-L-48 Honorable Troy D. Holland, Judge, Presiding.

PRESIDING JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Schmidt and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: Tenant who was injured when she fell off of a ladder after emptying a container she had placed in her drop ceiling grid to collect leaking rainwater failed to raise a genuine issue of material fact that her landlords' allegedly negligent failure to repair the leak was a proximate cause of her injuries where no reasonable person would foresee the plaintiff's injury as a likely result of the defendants' failure to repair the leak. Summary judgment for defendants affirmed.

¶ 2 Plaintiff, Mary M. Morsovillo (Morsovillo), a tenant who rented an apartment from defendants Lee D. Patterson, Susan M. Patterson, Barbara L. Westlake, and Gary W. Westlake (collectively, defendants), sued the defendants for negligence. Morsovillo was injured when she slipped off of a ladder inside her rental unit after emptying a container she had placed above the drop ceiling in her bedroom to collect leaking rainwater. She alleged that the defendants proximately caused her injuries by negligently failing to repair the leak and by negligently failing to maintain the roof and the claimant's living area in a reasonably safe condition. The defendants moved for summary judgment, arguing that, as a matter of law, any alleged breach of duty on the defendants' part was not a proximate cause of Morsovillo's injury. The trial court granted the defendants' motion and entered judgment in their favor. This appeal followed.

¶ 3 FACTS

¶ 4 From November 2010 through July 2013, Morsovillo lived in an apartment she rented from the defendants in Sandwich, Illinois. During the first winter she resided in the apartment, the ceiling in her bedroom apartment began leaking. Throughout the year prior to her accident, Morsovillo spoke with another resident of the defendant's apartment building, Donald Fredres (Fredres), about the leak on three or four occasions. Fredres preformed various management and maintenance duties for the defendants (*e.g.*, collecting rents, making bank deposits, painting, shoveling snow, and cleaning apartments after other tenants moved out) in exchange for a discount on his rent payments.[1] Fredres relayed the information about the leak in Morsovillo's apartment to defendant Barbara Westlake (Barbara), one of the owners of the apartment building. Morsovillo also texted Barbara about the leak on two occasions approximately four months prior

[1] During his discovery deposition, Fredres testified that he was not employed by the defendants. Fredres stated that he had previously served as a liaison between tenants and the owners of the building, but that the tenants now take their concerns directly to defendant Lee Patterson.

to her accident. She told Barbara that the dripping made it very difficult for her to sleep, and she asked Barbara to fix the leak or to have someone look at it. Barbara responded that she was sorry and promised to check into the leak and see what could be done to fix it.

¶ 5 During her discovery deposition, Barbara testified that, from the time that she and the other defendants purchased the building, there was an "off and on" problem with the roof leaking. The defendants would fix the leak and the roof would eventually start leaking again. Barbara stated that the building had a flat roof which made it very difficult to pinpoint the spot on the roof that was causing the leaking. According to Barbara, each time Morsovillo complained about the roof leaking into her apartment, the defendants had it repaired. Prior to Morsovillo's accident, the defendants had the entire area over Morsovillo's apartment completely re-tarred in an effort to stop the leak.

¶ 6 During his discovery deposition, defendant Gary Westlake (Gary), Barbara's husband and a co-owner of the building, corroborated Barbara's testimony in several respects. Specifically, Gary testified that: (1) the defendants had an off-and-on problem with the roof leaking into some of the apartments; (2) the defendants attempted to fix the roof several times, but the leak would come back; (3) each time Morsovillo complained about water leaking through the ceiling of her apartment, the defendants immediately sent someone to investigate why the problem was occurring and to pinpoint where the water was coming from so this information could be conveyed to the roofers the defendants hired to fix the leak; (4) each time Morsovillo complained about a leak, the problem was addressed and corrected for a time, but the leak would eventually recur. It was Gary's understanding that, during the winter, the roofer was unable to do anything but apply a cold patch, which would not entirely fix the problem. Gary testified that this fact was communicated to Morsovillo. According to Gary, the defendants did not ask

Morsovillo to do anything to address the leak other than to move her furnishings to the side so they would not get wet.

¶ 7 Defendant Lee Patterson, another co-owner of the building, testified during his discovery deposition that he went to Morsovillo's apartment to repair a roof leak in late December 2012 or early 2013, prior to Morsovillo's accident. At that time, Patterson went up on the roof and patched every potential source of the leak he could find. He then removed and replaced two water-stained tiles from the drop ceiling in Morsovillo's apartment. Patterson testified that he told Morsovillo to call him directly if the leaking recurred, but Morsovillo did not contact him. Patterson stated that Barbara called him approximately one or two months later (or sometime before Morsovillo's accident) and told him that the roof was leaking again. Thereafter, Patterson reexamined the roof but was unable to find the source of the leak, so he told Barbara to call a roofer to fix the leak. Patterson never offered Morsovillo a short term solution regarding the water leaking into her apartment.

¶ 8 Morsovillo testified that, by December 2012, the leak had eroded the ceiling tile in her bedroom. Accordingly, she removed the waterlogged ceiling tile and placed a container above the ceiling grid (*i.e.*, on the frame of the drop down ceiling) to collect the water that was dripping from the ceiling. Morsovillo testified that she had emptied this container on at least two occasions prior to her accident. On each of those occasions, she stood on her son's bed (which was located in Morsovillo's bedroom immediately underneath the leak) in order to reach the container. She then dumped the container into a bucket that she had placed on the paint can shelf of a ladder she had positioned near the leak.[2]

[2] Morsovillo had taken the ladder from an unlocked storage closet located in a common area of the apartment building. She did not ask the defendants for permission to use the ladder or tell them that she was using it.

¶ 9 Morsovillo testified that, on January 29, 2013, the container in the grid of the drop down ceiling was completely filled up and was pouring out of the top of the container. Morsovillo could no longer reach the container by standing on her son's bed because she had moved the bed away from the leak pursuant to Barbara's suggestion.[3] Accordingly, Morsovillo climbed up the ladder and tipped the container in the ceiling grid, dumping the water into the bucket she had placed on the ladder's paint stand. Morsovillo testified that this was the first time she had climbed the ladder in order to empty the ceiling container. After emptying the container into the bucket, Morsovillo began climbing down the ladder. When she attempted to place her right foot on the third step, her foot slipped off the step and she fell to the floor, injuring her right foot. When asked what caused her to fall, Morsovillo testified that her foot "simply slipped." She did not lose her balance and the ladder did not "wiggle." Morsovillo acknowledged that the ladder itself was fine; the problem was "just where she put her foot." Morsovillo agreed that, as she attempted to place her right foot on the third step, she caught part of the step with the front of her right foot, but not enough of it to make her foot plant on the step. Accordingly, her foot slipped off that step, causing her to fall. She did not claim that she slipped on water from the leak or from the ceiling container. As a result of her fall, Morsovillo broke her right foot and had to undergo surgery on that foot.

¶ 10 During his discovery deposition, Fredres testified that he once went to Morsovillo's apartment at Morsovillo's request to empty a container she had been using to catch water leaking from the roof. Fredres could not recall whether this incident occurred before or after the January 29, 2013, accident. However, he testified that he "would have to assume" that it happened before the accident because he did not recall Morsovillo wearing a cast at the time and he "would

[3] After Morsovillo texted Barbara about the leak approximately four months prior to the accident, Barbara texted Fredres and told him that the best solution for the time being was to move Morsovillo's son's bed to keep it from getting wet. Morsovillo saw that text and followed Barbara's advice.

have remembered [a] cast." When Fredres entered Morsovillo's bedroom, he observed that Morsovillo had taken the defendant's ladder and had placed a container on top of the ladder to catch water that had been leaking from the roof. Fredres could not specifically recall whether he saw a container in the grid portion of the drop ceiling. However, he believed that the container he saw and emptied was located on top of the ladder, and not in the ceiling, because he was able to grab and remove the container easily. Fredres testified that he would not have collected the leaking water the way Morsovillo was collecting it because "if you slipped * * * you [would be] wearing that water." He claimed that he called Morsovillo a "dummy" for collecting the water on top of the ladder. However, Fredres did not provide Morsovillo with any alternative methods to deal with the leak other than collecting the rainwater, and he stated that, until the weather improved, there were really no other options other than covering up the leak. Fredres stated that, prior to the January 2013 accident, he was not aware of what Morsovillo was doing to collect the rainwater that was coming into her bedroom, and he had never seen her transporting rainwater out of her apartment.

¶ 11 Fredres stated, on night that he went to Morsovillo's apartment and emptied the container, he called Barbara immediately to report the leak in Morsovillo's apartment because it was raining and water was "leaking pretty good" from Morsovillo's ceiling in a "pretty steady drip." When asked whether the dripping in Morsovillo's bedroom was noisy, Fredres stated that he had not been in the bedroom long enough to notice, but he "imagine[d] it would be bothersome" and that it "would probably drive you nuts after a while." Barbara told Fredres that she would call Lee Patterson.

¶ 12 Prior to Morsovillo's accident, the defendants did not have a policy regarding tenants using the defendants' ladder. However, Barbara testified that she was not aware of any tenant

using the ladder prior to Morsovillo's accident other than Fredres, who had permission to use it. Fredres testified that no tenant had ever asked him to use the ladder, but he was aware of one other tenant aside from Morsovillo who had used the ladder on a prior occasion.

¶ 13 The defendants moved for summary judgment, arguing that, as a matter of law, any alleged breach of duty on their part was not a proximate cause of Morsovillo's injury.

¶ 14 The trial court granted the defendants' motion. The trial court found that Morsovillo had raised a genuine issue of material fact as to factual causation because "absent the leak in the roof [Morsovillo] would not have been on a ladder and the injury would not have occurred." However, the court held that Morsovillo had failed to raise a genuine issue of material fact as to legal (or proximate) causation because the claimant's injury was not sufficiently foreseeable, *i.e.*, it was not the type of injury that a reasonable landlord would see as the likely result of his or her failure to fix a leaking roof. The court noted that the claimant testified that: (1) she had taken the ladder from the common area "without anyone knowing"; and (2) the day she was injured was the "first time [she] had used a ladder to climb up and empty a container that she had placed in the ceiling grid to catch a leak in the ceiling." Thus, the court concluded that, "by [Morsovillo's] own admissions, the defendants could not have known she was using the ladder to empty the container." The court further noted that there was no evidence that the water from the leak played any role in causing Morsovillo to slip off the ladder or to lose her balance; rather, Morsovillo testified that she fell because she "did not get her full foot [on]to the third step" of the ladder. The trial court found as a matter of law that it was "not a likely result" of the defendant's failure to fix the leak that Morsovillo "would place a container in the ceiling grid, then procure a ladder that was not her property, climb that ladder to empty the container she put up there to catch the water and then miss a step on the ladder and fall." The court held that Morsovillo's

actions were "an intervening event that was not foreseeable and broke the causal connection to the leak." In other words, the court found that Morsovillo's actions were "simply too remote and not a likely result of defendant's alleged failure to fix and repair the roof."

¶ 15 This appeal followed.

¶ 16 ANALYSIS

¶ 17 Morsovillo argues that the trial court erred in granting summary judgment to the defendants on the issue of proximate causation. Summary judgment is proper where the pleadings, affidavits, depositions, admissions, and exhibits on file, when viewed in the light most favorable to the nonmovant, reveal that there is no issue as to any material fact and that the movant is entitled to judgment as a matter of law. 735 ILCS 5/2–1005(c) (West 2012); *Abrams v. City of Chicago,* 211 Ill. 2d 251, 257 (2004). We review a trial court's grant of summary judgment *de novo*. *Abrams*, 211 Ill. 2d at 258.

¶ 18 To withstand a motion for summary judgment in an action based in negligence, a plaintiff must allege facts sufficient to show that the defendant owed her a duty, that defendant breached that duty, and that her injury proximately resulted from that breach. *Lajato v. AT & T, Inc.*, 283 Ill. App. 3d 126, 135 (1996). The term "proximate cause" describes two distinct requirements: "cause in fact" and "legal cause." *Abrams*, 211 Ill. 2d at 258; *First Springfield Bank & Trust v. Galman*, 188 Ill. 2d 252, 257–58 (1999). A defendant's conduct is a "cause in fact" of the plaintiff's injury only if that conduct is a material element and a substantial factor in bringing about the injury. *Abrams*, 211 Ill. 2d at 258; *Galman,* 188 Ill. 2d at 258. A defendant's conduct is a material element and substantial factor in bringing about the injury if, absent that conduct, the injury would not have occurred. *Abrams,* 211 Ill. 2d at 258; *Galman*, 188 Ill. 2d at 258. "Legal cause," by contrast, is largely a question of foreseeability. *Abrams*, 211 Ill. 2d at 258.

The relevant inquiry is whether "the injury is of a type that a reasonable person would see *as a likely result* of his or her conduct." (Emphasis in original.) *Galman*, 188 Ill. 2d at 260, citing *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 456 (1992); see also *Abrams*, 211 Ill. 2d at 258. Although the issue of proximate cause is ordinarily a question of fact determined by the trier of fact, it may be determined as a matter of law by the court where the facts as alleged show that the plaintiff would never be entitled to recover. *Abrams*, 211 Ill. 2d at 257-58.

¶ 19 In this case, the trial court held that Morsovillo had failed to create a genuine issue of material fact as to proximate causation, and that the defendants were therefore entitled to summary judgment. We agree. Given the undisputed evidence presented, no reasonable person would foresee the injury suffered by Morsovillo as a likely result of the defendants' failure to repair Morsovillo's leaking ceiling. Morsovillo was injured when she fell from a ladder after emptying a container she had placed in the drop ceiling grid above her bedroom. She did not slip on water leaking from the ceiling; rather, she testified that she fell when she failed to place her foot fully on the third step of the ladder as she was descending the ladder. Thus, the dispositive question in this case is whether a reasonable landlord would have foreseen that his or her failure to repair a leaking roof dripping into a tenant's bedroom would likely cause the tenant to: (1) place a container to catch the water into the grid of the drop ceiling; (2) climb a ladder to reach and empty the container; and (3) fall off the ladder because of her failure to secure her foot on one of the steps. The trial court correctly ruled that this unlikely chain of events was not sufficiently foreseeable to establish proximate causation. Although it is reasonably foreseeable that a tenant would attempt to collect and empty rainwater dripping into her apartment in some manner (for example, by placing a container on the floor under the leak), the unorthodox and somewhat risky method chosen by Morsovillo and the particular circumstances of her fall were

not a reasonably foreseeable result of the defendants' failure to repair the leak. Morsovillo's decision to place a container in the drop ceiling grid and her failure to place her foot fully on the step as she was descending the ladder were unforeseeable intervening acts by Morsovillo that broke the chain of causation between the defendants' failure to repair the leak and Morsovillo's injury. See, *e.g.*, *Galman*, 188 Ill. 2d at 254-55, 259-62 (defendant's illegal parking of a tanker truck near an intersection was not the proximate cause of a pedestrian's fatal injuries where the pedestrian was injured while attempting to jaywalk blindly across the street in the middle of the block immediately in front of the parked tanker truck, and where the defendant "neither caused [the pedestrian] to make that decision, nor reasonably could have anticipated that decision as a likely consequence of [his] conduct"); *Moreno v. Balmoral Racing Club, Inc.*, 217 Ill. App. 3d 365, 369-70 (1991) (landlord's failure to provide heat in tenant's apartment was not a proximate cause of the tenant's death by carbon monoxide poisoning after the tenant operated a charcoal grill in her apartment to provide heat; although "the use of an alternative heating source was a foreseeable event resulting from defendant's failure to provide heat," "the [tenant's] act of operating a charcoal grill indoors without ventilation [was] an intervening force, which [was] in itself not reasonably foreseeable, therefore breaking the causal link between defendant's failure to provide heat and [the tenant's] resulting death from carbon monoxide asphyxiation").

¶ 20 Relying upon our supreme court's decision in *Felty v. New Berlin Transit, Inc.*, 71 Ill. 2d 126 (1978) and other cases, Morsovillo argues that "the precise nature of the intervening cause need not be foreseen" in order to establish proximate causation. *Felty*, 71 Ill. 2d at 131; see also *Knauerhaze v. Nelson*, 361 Ill. App.3d 538, 556 (2005) (ruling that "the extent of the harm or the exact manner in which it occurs need not be foreseeable"). However, the cases relied upon by Morsovillo are distinguishable. In *Felty*, the plaintiff was injured when he fell off a large oil

circuit breaker as it was being transported by truck after the circuit breaker was struck by a low-hanging telephone cable that extended across the roadway. The evidence showed that the defendant telephone company had allowed the cable to extend across the road at a height of less than 18 feet, the minimum height permissible under Illinois Commerce Commission regulations. Although the evidence also suggested that the driver of the truck was negligent, our supreme court held that a jury "may well have felt that if a cable was negligently placed below the minimum height over a roadway * * * it was foreseeable that someone, although it might involve negligence on his part, would run into it." Thus, our supreme court held that proximate cause may be established when the risk of a particular type of harm is a foreseeable consequence of the defendant's conduct, even if the exact mechanism of the plaintiff's injury is not.[4] Here, by contrast, the defendants' conduct did not foreseeably expose the claimant to a risk of the particular type of harm that she suffered. Unlike the defendant's negligent conduct in *Felty* (which created a foreseeable risk that a passing motorist would strike the defendant's low-hanging telephone cable), it was not reasonably foreseeable that the defendants failure to repair the leak in this case would have led the defendant to store a container in the ceiling, use a ladder to empty the container, and then fall off the ladder when she failed to properly plant her foot on the ladder's step.

¶ 21 Similarly, in *Knauerhaze*, the plaintiff suffered inner ear damage and hearing loss due to blood leakage into his inner ear that the jury determined was a consequence of his ear surgeon's violation of the applicable standard of care. Our appellate court affirmed the jury's finding of

[4] See also *Mangan v. F. C. Pilgrim & Co.*, 32 Ill.App.3d 563, 570 (1975) (defendant landlord's failure to rid apartment building of mice "gave rise to a variety of reasonably foreseeable risks of harm to occupants or visitors in the building," and "it is not uncommon" for a woman to be startled or frightened by the unexpected appearance of a rodent; thus, jury could have reasonably found that defendant's negligence was a proximate cause of injuries sustained by 83-year-old tenant who fell when a mouse jumped out of her oven door, regardless of whether the particular circumstances of her injury were foreseeable).

proximate causation even though the standard of care that the surgeon was found to have violated "focused on the possible risk of the penetration of the prosthesis" rather than the risk of blood leakage. Our appellate court reasoned that it "[did] not seem an undue burden to impose liability for damages that were consequential to [the defendant surgeon's] breach of duty under these circumstances," because the case before it was "not a case where the injuries or the manner of their occurrence [were] far-fetched or wholly unforeseeable," given that there was "a known risk that blood could infiltrate the inner ear and cause damage").

¶ 22 In this case, by contrast, the injuries suffered by Morsovillo and the manner of their occurrence were "far-fetched and wholly unforeseeable," and the defendants' failure to repair the leak did not subject Morsovillo to a known or obvious risk of injury. Unlike the *Knauerhaze* plaintiff's injury, the type of injury Morsovillo sustained was not reasonably traceable to the defendant's negligence. If Morsovillo had slipped on rainwater that dripped onto her floor, or tripped over a container placed on floor to collect the leaking rainwater, we might have ruled otherwise. However, as in *Galman* and *Moreno*, the injuries Morsovillo sustained and the manner of their occurrence in this case were simply too remote from any negligent acts by the defendants (*i.e.*, too unlikely and unforeseeable) to justify a finding of proximate causation.

¶ 23 One final point bears mentioning. In her opening brief on appeal, Morsovillo asserts that, after Fredres came to Morsovillo's apartment and emptied the container she had placed on the ladder, the defendants had actual knowledge of: (1) "[Morsovillo] using a container in the ceiling to catch he water"; and (2) Morsovillo's use of the defendants' ladder." She suggests that, because the defendants had this knowledge prior to the accident, the injuries she sustained during were reasonably foreseeable. We disagree. As an initial matter, Fredres could not recall for certain whether his visit to Morsovillo's apartment occurred before or after Morsovillo's

accident. But even assuming *arguendo* that Fredres visited Morsovillo before the accident (and that the defendants were actually or constructively aware of everything Fredres saw on that occasion), Fredres' testimony does not support Morsovillo's claims. Fredres merely testified that he saw Morsovillo collecting rainwater in a bucket on top of the ladder. He did not testify that he saw a container placed in the drop ceiling grid. In response to questioning during his deposition, Fredres testified that he could not specifically recall whether he saw a container in the grid portion of the drop ceiling but he believed that the container he saw and emptied was located on top of the ladder (and not in the ceiling) because he was able to grab and remove the container easily. In her reply brief, Morsovillo concedes that, when Fredres saw Morsovillo using a ladder to collect rainwater, the container was on top of the ladder; she does not argue that Fredres saw the container in the drop ceiling or knew it was there. Accordingly, Morsovillo appears to have abandoned the argument that Fredres knew she was collecting leaking rainwater in a container above the drop ceiling or that she was using a ladder to reach such a container. Regardless, Fredres testimony does not support any such inference. Nor does the evidence suggest that Fredres or the defendants knew or should have known that Morsovillo might climb the ladder in order to empty a container located in the drop ceiling grid. Accordingly, contrary to Morsovillo's argument, the facts in the defendants' possession prior to the accident did not render Morsovillo's accident reasonably foreseeable.

¶ 24 CONCLUSION

¶ 25 For the foregoing reasons, the judgment of the circuit court of LaSalle County is affirmed.

¶ 26 Affirmed.