2018 IL App (1st) 171234-U
Order filed: May 18, 2018

FIRST DISTRICT
FIFTH DIVISION

No. 1-17-1234

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MICHAEL HAWKINS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 2015 L 5873
	)	
CAPITAL FITNESS, INC., d/b/a X-PORT FITNESS,	)	Honorable
	)	William E. Gomolinski,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Reyes and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: In an earlier appeal in this case, we reversed the grant of summary judgment in favor of defendant on plaintiff's negligence complaint and remanded. On remand, defendant filed a second summary judgment motion, seeking relief on a basis different than the first motion. The circuit court granted the second summary judgment motion. In this appeal, we affirmed the grant of the second summary judgment motion, rejecting plaintiff's argument that the law of the case doctrine barred litigation of the issues underlying the motion.

¶ 2 Plaintiff-appellant, Michael Hawkins, filed a one-count complaint sounding in negligence against defendant-appellee, Capital Fitness, Inc., after he was injured while trying to avoid being struck by a mirror falling from a wall at one of defendant's fitness centers. The circuit court granted summary judgment for defendant based on an exculpatory clause in the membership agreement and on defendant's lack of notice of any defect concerning the mirror. On review, we

reversed and remanded. On remand, defendant filed a second summary judgment motion, arguing that the deposition testimony indicated that the mirror fell after a patron in the fitness center struck the mirror, or the wall upon which the mirror was affixed, with a weight. Defendant argued that it owed plaintiff no duty to protect him from the negligence of the unidentified patron. The circuit court granted the motion. Plaintiff now appeals the grant of the second summary judgment motion. We affirm.

¶ 3 I. PLAINTIFF'S COMPLAINT

¶ 4 Plaintiff filed a complaint alleging that he was on the second floor of defendant's fitness center (facility), when a mirror fell off a wall. Plaintiff was injured while attempting to avoid the falling mirror.

¶ 5 Plaintiff alleged that defendant knew or should have known that the mirror was loose and not adequately attached to the wall. Plaintiff contended that defendant acted negligently by failing to adequately secure the mirror to the wall, warn patrons that the mirror was loose and likely to fall, and cordon off the area around the mirror.

¶ 6 II. DEPOSITION TESTIMONY

¶ 7 A. Plaintiff

¶ 8 Plaintiff testified that on January 5, 2010, he signed a membership agreement with defendant. The membership agreement included an exculpatory clause by which plaintiff assumed all risk of injury from using the equipment and facility and released defendant from liability for injury resulting from the negligent acts of anyone at the facility.

¶ 9 On January 27, 2010, plaintiff was at the facility. He picked up two dumbbells, one in each hand, and sat down on a bench in front of a three-foot by eight-foot mirror hanging from a protruding portion of a wall.

¶ 10 As plaintiff sat facing the mirror, somebody walked in front of him holding a weight in one hand. Plaintiff saw him bump the side of the wall to the left of the mirror.

¶ 11 Plaintiff started doing curls, then saw that the mirror was falling toward him. Plaintiff tried jumping out of the way, but his feet hit some weights scattered on the floor and he landed on a weight rack, at which point the mirror hit his head.

¶ 12 An unidentified fitness club patron or employee told plaintiff that a maintenance crew had been working on the mirror before the accident. Plaintiff then noticed that, below where the mirror had been hanging, there was a hole where some tiles had fallen out and wire mesh had been pulled out of the plaster.

¶ 13 B. Hank Trinidad

¶ 14 Hank Trinidad was the general manager at the facility. Mr. Trinidad did not see the mirror fall, but he was told by the operations manager, John Rowles, that another member had bumped into the wall or mirror, probably with a dumbbell, causing the mirror to fall. Mr. Trinidad did not know how the tiles came to be missing from underneath the mirror, but he noted that the bottom of the mirror was above the area where the tiles were located, and that the tiles did not provide any support for the mirror. Mr. Trinidad had no knowledge of the mirror being loose prior to the time that it fell.

¶ 15 C. Dennis Pierro

¶ 16 Dennis Pierro is employed with defendant out of its corporate office in Big Rock, Illinois. He visited the facility within five days of the occurrence. Mr. Pierro was told by the regional maintenance technician, Jamie Soderberg, that an unidentified person hit the mirror with a weight, causing it to fall. Mr. Pierro was told that, at some point prior to the incident, work was

done on two decorative tiles on the wall below the mirror. However, these tiles did not provide any support function for the mirror.

¶ 17 There have been no other incidents of mirrors falling off the walls of any other health clubs owned by defendant.

¶ 18 III. THE FIRST SUMMARY JUDGMENT MOTION

¶ 19 On July 26, 2013, defendant filed its first summary judgment motion. Defendant argued that: (1) the exculpatory clause of the membership agreement barred plaintiff's claim for personal injury damages; and (2) defendant could not be held liable without proof of notice of an actual defect in the premises that proximately caused plaintiff's accident.

¶ 20 After a hearing, the circuit court granted defendant's summary judgment motion. The circuit court enforced the exculpatory clause, finding: (1) no substantial disparity in bargaining power between the parties; (2) no public policy bar to enforcement; and (3) nothing in the social relationship between the parties that would militate against upholding the clause. The court further ruled that plaintiff failed to provide evidence that defendant had actual or constructive notice of any defect concerning the mirror.

¶ 21 On March 4, 2015, the appellate court filed an opinion reversing the circuit court's grant of summary judgment and remanding for further proceedings, finding that there was a genuine issue of material fact as to whether the exculpatory clause in the membership agreement includes potential injury due to a mirror falling off a wall. See *Hawkins v. Capital Fitness, Inc*., 2015 IL App (1st) 133716, ¶ 31. With regard to the circuit court's ruling regarding defendant's lack of notice of any defect concerning the mirror, the appellate court held that such notice is required to be shown in a premises liability action but that plaintiff's one-count complaint "sounds in

negligence, not premises liability, and therefore, lack of evidence concerning notice is both inapplicable and irrelevant." *Id*. ¶ 34.

¶ 22 IV. THE SECOND SUMMARY JUDGMENT MOTION

¶ 23 On remand, defendant filed a second summary judgment motion on February 9, 2017, arguing that defendant owed plaintiff no duty to protect him from the negligence of the unidentified patron who had struck the wall/mirror, causing the mirror to fall.

¶ 24 In its memorandum order, the circuit court recited how it had granted defendant's first summary judgment motion based on the exculpatory clause and lack of notice, but had been reversed by the appellate court. The circuit court then noted that, on remand, defendant had brought a second summary judgment motion premised on lack of duty. The court proceeded to examine whether defendant owed plaintiff a duty to protect him from the negligence of the unidentified patron.

¶ 25 In its analysis, the circuit court noted that whether a duty exists is a question of law for the court to decide. *Marshall v. Burger King Corp*., 222 Ill. 2d 422, 430 (2006). The circuit court cited supreme court case law holding that the relevant factors to consider are: (1) the reasonable foreseeability of the injury; (2) the likelihood of the injury; (3) the magnitude of the burden of guarding against the injury; and (4) the consequences of placing that burden on defendant. *Simpkins v. CSX Transportation, Inc*., 2012 IL 110662, ¶ 18. The circuit court also cited supreme court case law holding there is no general duty to anticipate and guard against the negligence of others. *Ziemba v. Mierzwa*, 142 Ill. 2d 42, 52 (1991).

¶ 26 The circuit court found:

> "The facts here do not support a finding of any duty on [d]efendant's part to protect patrons from individuals knocking weights into and causing mirrors to dislodge. There is

> no evidence here of any prior similar incidents, or that anything about the location or hanging method of the mirror would have made [p]laintiff's injuries foreseeable. *** Plaintiff has failed to show that his injury was foreseeable or likely to occur."

¶ 27 The court next found:

> "Regarding the next two elements of the duty analysis—the magnitude and consequences of the burden to the defendant—if this court were to agree with [p]laintiff that cordoning off the mirror or placing warning signs instructing patrons to avoid the area [were necessary], the consequences for [d]efendant would be absurd. *** Plaintiff would have [d]efendant—and perhaps all gyms—cordon off a mirror on the off-chance that someone might knock it down. This is an unreasonable measure to take where there is absolutely no indication that the mirror is at risk of falling. While this might very well prevent patrons from knocking into mirrors, that is not a precaution which the law requires parties in [d]efendant's position to take. This would create a broad duty for [d]efendant to anticipate and prevent the negligence of its patrons, in direct contradiction to established Illinois law."

¶ 28 The circuit court next considered whether plaintiff had shown that defendant's conduct was the proximate cause of his injury. The court noted while 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 plaintiff would never be entitled to recover. See *Abrams v. City of Chicago*, 211 Ill. 2d 251, 257-58 (2004). Proximate cause requires plaintiff to prove that defendant's negligence was: (1) the cause in fact of his injury, that is, but for defendant's conduct, the accident would not have occurred; and (2) the legal cause of his injury, which is essentially a question of whether the injury is of a type that was reasonably

foreseeable as resulting from defendant's conduct. *Trigsted v. Chicago Transit Authority*, 2013 IL App (1st) 122468, ¶ 52.

¶ 29 The circuit court found, as a matter of law, that plaintiff failed to establish that defendant was the cause in fact of his injury. The court stated:

> "[E]ven if [p]laintiff could show that a duty existed, the record is devoid of any connection between the condition of the mirror and the maintenance work being done on the tiles below it. *** Here, [p]laintiff cannot show that, but for [d]efendant's actions alleged in his complaint, the mirror would not have fallen. *** While it is undisputed that there was work being done on the tiles and that some were missing from the wall, there is no evidence that the mirror's fastening was at all related to or affected by this work. Nobody testifie[d] to say that the wire mesh or the tiles supported the mirror in any way. *** It is also uncontested that the mirror did not hang on the tiled portion of the wall.*** [Therefore,] [d]efendant's maintenance work, or failure to warn thereof, can never be the proximate cause of [p]laintiff's accident."

¶ 30 Accordingly, the court granted defendant's second motion for summary judgment. Plaintiff appeals.

¶ 31 V. ANALYSIS

¶ 32 On appeal, plaintiff argues that the facts in this case are the same now as they were when this court reversed the circuit court's grant of defendant's first motion for summary judgment. As such, plaintiff contends that the law of the case doctrine dictates that the circuit court's granting of defendant's second motion for summary judgment be reversed and the cause remanded.

¶ 33 The law of the case doctrine bars relitigation of an issue that has already been decided in the same case, such that the resolution of an issue presented in a prior appeal is binding and will control upon remand in the circuit court and in a later appeal before the appellate court. *American Service Insurance Co. v. China Ocean Shipping Co., Inc*., 2014 IL App (1st) 121895, ¶ 17. The doctrine applies to questions of law and fact and encompasses a court's explicit decisions, as well as those decisions made by necessary implication. *Id*.

¶ 34 In the appeal from the circuit court's order granting defendant's first summary judgment motion, we examined and decided issues regarding whether plaintiff's injury fell within the contractual limits of the exculpatory clause as a matter of law and whether plaintiff's cause of action sounded in premises liability such that he was required to show that defendant knew or should have known of the defective condition of the mirror. *Hawkins*, 2015 IL App (1st) 133716, ¶¶ 25, 34. We answered both questions in the negative. *Id.* The law of the case doctrine bars relitigation of those same issues. *American Service Insurance*, 2014 IL App (1st) 121895, ¶ 17. However, in that first appeal, the parties never argued, and we never decided, the issues of whether summary judgment should be granted to defendant because plaintiff failed to establish defendant's duty to plaintiff as a matter of law under a balancing of the *Simpkins* factors and/or because plaintiff failed to establish the cause-in-fact element of proximate cause. As these issues of duty and proximate cause were newly raised for the first time during proceedings on the second summary judgment motion, the law of the case doctrine does not apply to bar litigation thereof.

¶ 35 As discussed earlier in this order, in granting defendant's second summary judgment motion, the circuit court here made an extensive analysis of the *Simpkins* factors used to determine the existence of a duty, and concluded that no such duty existed as a matter of law.

The circuit court also examined the causation elements (*i.e.*, whether, but for defendant's actions, the mirror would not have fallen) and determined as a matter of law that plaintiff's injuries were not proximately caused by any negligent acts of defendant. Plaintiff makes no arguments on appeal that the circuit court erred in its analysis, under *Simpkins*, of defendant's duty toward plaintiff or that the court erred in its analysis of the proximate cause of his accident. Instead, plaintiff focuses his argument on the law of the case doctrine which we have found does not apply in this appeal. In the absence of any argument that the court erred in granting summary judgment for defendant based on plaintiff's failure to show that defendant owed him a duty or that defendant proximately caused the accident, plaintiff has forfeited review thereof. Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1, 2017).

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

¶ 37 Affirmed.