2018 IL App (1st) 172150-U

SIXTH DIVISION
Order filed: March 9, 2018

No. 1-17-2150

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

DUANE McCARVILLE, Plaintiff-Appellant, v. JOON LEE'S TAE KWON DO, JOON LEE'S TAE KWON DO SCHOOL, INC., JOON LEE, HEE SOOK LEE, MASTER JOON LEE'S INC., and MASTER MARTIAL ARTS ACADEMY OF OAK LAWN, INC., Defendants, (Joon Lee, Hee Sook Lee, Master Joon Lee's, Inc., and Master Martial Arts Academy of Oak Lawn, Inc., Defendants-Appellees).	)	Appeal from the Circuit Court of Cook County No. 14 L 008086 Honorable Daniel T. Gillespie, Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Connors and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court properly granted the defendants' motion for summary judgment on the plaintiff's negligence and premises liability claims where the plaintiff failed to raise a genuine issue of material fact that the defendants had actual or constructive knowledge of an allegedly defective or dangerous condition on their premises.

¶ 2 The plaintiff, Duane McCarville, appeals from an order of the circuit court of Cook County granting summary judgment in favor of the defendants, Joon Lee, Hee Sook Lee, Master Joon Lee's, Inc., and Master Martial Arts Academy of Oak Lawn, Inc., in a negligence and premises liability action arising from injuries he sustained while attempting to repair a sink on the defendants' property.[1] For the reasons that follow, we affirm.

¶ 3 According to the plaintiff's second amended complaint, on September 16, 2012, he was lawfully at Joon Lee's Tae Kwon Do School (premises or gym) when he cut his finger on a sink that he was attempting to repair. The plaintiff's 12-count second amended complaint asserted two claims against each defendant: negligence and premises liability. Both claims alleged that the defendants had a duty to exercise ordinary and due care in managing, maintaining, and controlling the premises, and to keep it reasonably safe and free from dangerous conditions. Each negligence count alleged that the defendants breached that duty by: (1) improperly requesting, directing, and allowing the plaintiff to repair a damaged and unsafe sink; (2) failing to provide the plaintiff with tools and safety equipment; (3) failing to inspect the sink; and (4) failing to warn the plaintiff of the unsafe and dangerous nature of the sink. Each premises-liability count claimed that the defendants breached their duty by the following acts or omissions: (1) failing to keep the "sink or washbasin" in a reasonably safe condition; (2) permitting liquids to pool, thereby creating an environment for microbial diseases and other organisms to grow; (3) failing to clean liquids that had spilled and sanitizing surfaces; (4) failing to inspect the premises; and (5) failing to warn the plaintiff of a dangerous condition. Both the negligence and premises-

[1] Joon Lee's Tae Kwon Do and Joon Lee's Tae Kwon Do School, Inc. were never served with process and never filed an appearance in this case. Although they remained parties to the complaint, they were not parties to the motion for summary judgment and take no part in this appeal.

liability counts asserted that the plaintiff sustained severe and permanent injuries as a direct and proximate result of the defendants' acts or omissions.

¶ 4 The following facts are taken from the pleadings, depositions, and other filings. In his deposition, the plaintiff testified that he took tae kwon do lessons with Joon Lee (Joon) for eight years, beginning in 1985. During that time, he volunteered at various events and competitions, and assisted Joon by teaching tae kwon do classes. In 2010 or 2011, the plaintiff enrolled his 10-year-old son in tae kwon do lessons. The plaintiff stated that he had a background in construction and performed odd jobs at the gym, including fixing a loose door handle, hanging a punching bag from an exposed beam, advising Joon about the building's masonry, and assisting with "demo work." He also plowed snow and performed gardening work at Joon's private residence. The plaintiff explained that he offered to perform these jobs and did not expect to get paid.

¶ 5 The plaintiff testified that, on the date of the accident, he was at the gym observing his son's tae kwon do class when he was approached by Jane Lee (Jane), a manager at the gym, who asked him if he was willing to "check out" a loose sink in one of the bathrooms. The plaintiff stated that he followed Jane to a bathroom located in the rear of the premises and watched as she "wiggled" the faucet. Jane inquired if "it could be fixed," and the plaintiff replied that he would "take a look *** and try." Although he could not see under the sink, the plaintiff testified that he used to his hands to "feel around," and ultimately determined that a washer was missing from one of the bolts. The plaintiff testified that Jane asked Mike Pendleton (Pendleton), a tae kwon do instructor, to retrieve a coffee can with spare parts from a maintenance room. The plaintiff went to the maintenance room with Pendleton, retrieved the coffee can, and returned to the

bathroom.[2] After identifying a washer that might fit, the plaintiff kneeled, used his hand to remove the nut from the bolt, and then attempted to fasten the washer and nut back onto the bolt. When asked what happened next, the plaintiff explained, in pertinent part, as follows:

> "I was trying to start the nut and hold the washers, it was a very tedious thing if it was possible, and I was trying to start them and I kept trying to start and stop and start and one would fall and I picked it up and I tried again and I was holding it and the next thing I know, my hand started getting wet.
>
> I thought *** it was leaking maybe water or something from the sink. I didn't know. And I finally got it to start and I was holding it and I was feeling a little bit of like a stinging pain but I got it to start and I got it started like this and I went to take a break and I took my hands down and I looked and I said whoa."

The plaintiff observed blood and noticed that he had cut his index finger. The plaintiff testified that he immediately notified Jane of the accident who then provided first-aid treatment by rinsing his finger with water, pouring hydrogen peroxide over the cut, and wrapping the cut with gauze.

¶ 6 The plaintiff admitted that he never saw the piece of hardware that cut his finger and conceded that neither Jane nor Pendleton were in the bathroom at the time the accident occurred. He also acknowledged that he never expressed any concern about looking at the sink and never asked Jane or Pendleton for any tools or safety equipment. The plaintiff further testified that he returned to the gym after the accident and took photographs of the sink with his cell phone; he conceded, however, that none of the photos depict the bolt or the piece of hardware that caused

[2] Later in his testimony, the plaintiff was confronted with the fact that Pendleton was teaching a tae kwon do class at the time. In response, the plaintiff stated that Pendleton stopped teaching the class and his son began teaching. The plaintiff also testified that he could not remember if he went to the maintenance room with Pendleton or if Pendleton retrieved the coffee can and set it down on the bathroom floor.

his injury. At the conclusion of his deposition, the plaintiff stated that his finger became infected and he detailed the medical treatment he received following his injury. At no time during his testimony did the plaintiff mention anything about the presence of water or liquids pooling on or around the sink.

¶ 7 Jane testified that she worked as a manager at the gym and was aware the sink in the private bathroom was loose, though she did not know what component of the sink was loose, why it was loose, or how long it had been in that condition. Jane testified that she regularly used the private bathroom and, aside from noticing that it was loose, she did not recall having any problems or issues with the sink. Jane testified that Joon and Pendleton also used the private bathroom and, on occasion, parents and children used it "if necessary." Jane further testified that, on the date of the accident, she saw the plaintiff in the lobby and asked him if he was willing to look at the sink. She stated that she showed him where the sink was located, left the bathroom, and returned to a class that was being taught by Pendleton. According to Jane, she observed the plaintiff exit the bathroom a "few minutes" later with his hand covered and gesturing toward her. When the plaintiff informed her that he cut his finger, she provided him with band-aids and hydrogen peroxide, and told him that she had to "go back" because it was "really busy." Jane stated that she does not know how the accident happened and does not know what the plaintiff did, or did not do, while he was in the bathroom.

¶ 8 Although Jane acknowledged that she asked the plaintiff to look at the sink, she did not expect him to fix it; rather, her expectation was that he would tell her what was needed to repair the sink, not to perform the work. Jane also disputed the plaintiff's testimony that Pendleton retrieved a coffee can from the maintenance room. She stated that the plaintiff had been in the maintenance room on prior occasions and "if he ever needed something, he would go and find it

himself." At no time did the plaintiff express any concern about his ability to look at or fix the sink; nor did the plaintiff ask for any tools, safety equipment, or a flashlight.

¶ 9 Pendleton testified that he was an instructor at the gym and acknowledged that the sink in the private bathroom was "loose from the wall," though he could not say how long it had been in that condition. He estimated that the bathroom was remodeled "a few months to one year" before the accident at issue occurred, but he did not observe the installation of the sink and does not know who installed it or how it was installed. Pendleton never inspected or looked under the sink. He testified that, in the year before the plaintiff's accident, he used the sink in the private bathroom and never had "any issue[s], problem[s], [or] concern[s] with the faucet." He stated that Jane and Joon also used the private bathroom and a maintenance worker cleaned it two times per week, but he never had any conversations with anyone regarding the sink and never requested that anyone make repairs to the sink because it did not "seem like *** a problematic situation" and he was not "concerned about it." Pendleton testified that he was teaching a class in the main gym at the time the accident occurred. He denied retrieving a coffee can from the maintenance room, setting a coffee can on the bathroom floor, or otherwise assisting the plaintiff in finding a washer. Pendleton stated that he never left the class he was teaching and never saw the plaintiff in the bathroom.

¶ 10 In his deposition, Joon testified that he hired a construction company in 2011, approximately one year prior to the plaintiff's injury, to remodel the private bathroom at the gym. Shortly after the renovations, he noticed that the sink was not tightly secured to the wall; he also believed the sink was of "cheap" quality because it was "smaller than normal." Nevertheless, Joon stated that he did not complain to the construction company, did not look under the sink or otherwise inspect it, and did not ask anyone to fix it because he did not view it

as an "emergent issue." He explained that: the private bathroom was used by employees as well as students and parents; the bathroom was cleaned two times per week by a maintenance worker; and he never received any complaints about the sink. Joon further testified that he was not at the gym when the accident took place, but learned of the accident more than a week later when the plaintiff called him from the hospital. He stated that the plaintiff could not identify what caused his cut and he questioned whether the plaintiff's subsequent infection and need for surgery was a result of the accident or a pre-existing medical condition.

¶ 11 In March 2016, the defendants moved for summary judgment pursuant to section 2-1005 of the Code of Civil Procedure (735 ILCS 5/2-1005 (West 2016)). The defendants argued that summary judgment was appropriate because, *inter alia*, the plaintiff failed to raise a genuine issue of material fact that an unsafe condition existed under the sink. They also argued that even if a defect or condition existed under the sink, the parties had "equal knowledge" that the sink was loose and, absent a showing of unequal knowledge, no duty was owed by the defendants to the plaintiff.

¶ 12 The plaintiff filed a response to the defendants' motion for summary judgment, arguing *inter alia*, that he injured his finger as a result of a defect in the construction of the sink, or due to disrepair and deterioration, presenting a question of material fact. The plaintiff further asserted that the defendants knew or should have known of the defect on the sink based upon their own observations that it was loose, constructed of cheap materials, and not properly installed. He contended, therefore, that the parties had unequal knowledge as to the defective condition of the sink.

¶ 13 On June 16, 2016, the circuit court entered summary judgment in favor of the defendants, finding no genuine issue of material fact as to whether the defendants knew or should have

known that a defect or dangerous condition existed under the sink. The court reasoned that the defendants had "less knowledge" than the plaintiff regarding "handy-work" and "construction" and that they "relied on the [p]laintiff's expertise to look at [the sink] and let them know what [they] can do to fix the issues ***." The court further noted that the defendants "were only aware of the issue on top of the sink (loose faucet), and whatever cut the [p]laintiff was allegedly underneath the sink."

¶ 14 The plaintiff filed a notice of appeal and, on June 19, 2017, this court dismissed the appeal for lack of appellate jurisdiction because the order appealed from did not satisfy the requirements of Supreme Court Rule 304(a) (eff. March 8, 2016). See *McCarville v. Joon Lee's Tae Kwon Do*, 2017 IL App (1st) 161912-U. On remand, the circuit court entered an order, which included an express written finding that "Pursuant to Illinois Supreme Court Rule 304(a) there is no just reason for delaying either enforcement or appeal of this order, or both." This appeal followed.

¶ 15 On appeal, the plaintiff argues that the circuit court erred in granting the defendants' motion for summary judgment. He maintains that numerous issues of material fact existed, precluding summary judgment on his premises liability claims, including whether the defendants had actual or constructive notice of the defective condition of their sink. He also contends that summary judgment was improperly granted in the defendants' favor on his negligence claims because he was not required to prove notice. We address each argument in turn.

¶ 16 Summary judgment is appropriate when the pleadings, depositions, and admissions, together with any affidavits, show that there is no genuine issue of material fact such that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2016). A reviewing court will construe the record strictly against the movant and liberally in favor of the

nonmoving party. *Forsythe v. Clark USA Inc.*, 224 Ill. 2d 274, 280 (2007). "A genuine issue of material fact precluding summary judgment exists where the material facts are disputed or, if the material facts are undisputed, reasonable persons might draw different inferences from the undisputed facts." *Marshal v. City of Chicago*, 2012 IL 112341, ¶ 49. "[U]nsupported conclusions, opinions, or speculation are insufficient to raise a genuine issue of material fact." *Valfer v. Evanston Northwestern Healthcare*, 2016 IL 119220, ¶ 20. "[T]o survive a motion for summary judgment, a plaintiff need not prove [his] case, but [he] must present a factual basis that would arguably entitle [him] to a judgment." *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 12. A circuit court's decision to grant a motion for summary judgment is reviewed *de novo*. *Forsythe*, 224 Ill. 2d at 280.

¶ 17 In a negligence action, the plaintiff must prove (1) the existence of a duty owed by the defendant to the plaintiff, (2) a breach of that duty, and (3) injury proximately resulting from that breach. *Bruns*, 2014 IL 116998, ¶ 12. "Whether a duty exists is a question of law for the court to decide." *Id.* ¶ 13. Factors used to determine the existence of a duty include: "(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 the defendant." *Id.* ¶ 14.

¶ 18 "Pursuant to the theory of premises liability, an owner or occupier of land *** owes a duty of reasonable care under the circumstances to all entrants upon the premises except to trespassers." *Choate v. Indiana Harbor Belt R.R. Co.*, 2012 IL 112948, ¶ 24. In *Genaust v. Illinois Power Co.*, 62 Ill. 2d 456, 468 (1976), our supreme court adopted section 343 of the Restatement (Second) of Torts, which provides:

> "A possessor of land is subject to liability for physical harm caused to his

> invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger." Restatement (Second) of Torts § 343 (1965)).

Thus, "there is no liability for a landowner for dangerous or defective conditions on the premises in the absence of the landowner's actual or constructive knowledge." *Tomczak v. Planetsphere, Inc.*, 315 Ill. App. 3d 1033, 1038 (2000). "If the gist of a complaint is that the landowner did not create the condition, the plaintiff must be required to establish that the landowner knew or should have known of the defect." *Id.* Generally, when asserting that a defendant had constructive knowledge of a dangerous condition, the plaintiff "must establish that the dangerous condition existed for a sufficient time or was so conspicuous that the defendant should have discovered the condition through the exercise of reasonable care." *Smolek v. K.W. Landscaping*, 266 Ill. App. 3d 226, 228-29 (1994). "One will be considered to have constructive knowledge if he receives facts that would make the dangerous condition known to any ordinary prudent person." *Stackhouse v. Royce Realty & Management Corp.*, 2012 IL App (2d) 110602, ¶ 30.

¶ 19 In his second amended complaint, the plaintiff alleged that the gym had an "unsafe, dangerous sink." He did not specify the defect and, at his deposition, he was unable to identify either the nature of the alleged defect or how he cut his finger as he attempted to fasten a washer and nut onto a bolt. In his brief on appeal, the plaintiff argues that the defendants knew or should

have known that a dangerous or defective condition existed under the sink because they were aware the sink was loose, had "some kind of problem," and was improperly installed. He maintains that, had an inspection been performed, the defendants "could have warned [him] that an irregular, sharp bolt existed on the sink" and "may have also discovered the cause of the microbial growth that led to [his] infection." Thus, the plaintiff argues the defendants had constructive knowledge. We disagree.

¶ 20 At the outset, we note that there is no evidence of record supporting the plaintiff's assertion that "an irregular, sharp bolt existed on the sink." Throughout his deposition, the plaintiff repeatedly testified that he could not see under the sink and that he had to use his hands to feel around. As illustrated by the following colloquy, the plaintiff does not know what caused him to cut himself:

> "Q. All right. Okay. Now, the process between the time that you get those washers securely in your fingers and then the nut in your fingers and you are now trying to get them onto the—is it a bolt?
>
> A. I believe it was a—I don't know. I can't see it. I don't know.
>
> Q. Did you ever see the metal on which you cut yourself?
>
> A. I could—I couldn't see. I try—looked—I couldn't physically, I couldn't see it.
>
> Q. Right, no, and that's my only question. Did you ever see the piece—
>
> A. I could not see it.
>
> Q. Okay.
>
> A. I could not.
>
> Q. You never saw the piece of hardware that cut you, true?

A. True."

The plaintiff was "not positive" that the object was metal and he stated that the "best description" he could give was "something under the sink" caused his cut. Put simply, there is no evidence in the record identifying the existence of a defect under the sink.

¶ 21 Even assuming a defect or dangerous condition existed under the sink, nothing demonstrates that the defendants had actual or constructive knowledge that the sink posed a danger to the plaintiff. The record reveals that the sink in the private bathroom was used by Jane, Joon, and Pendleton without incident. There is no evidence of water or liquids leaking from or pooling around the sink; nor is there any evidence that anyone complained about the sink. Significantly, the plaintiff was the only person who testified that he looked under the sink and he himself could not see "up there." He did not specify the defect and, at his deposition, he was unable to identify either the nature of the alleged defect or how he cut his finger as he attempted to fasten a washer and nut onto a bolt. The plaintiff did not provide evidence that anybody else was aware of it, either. Regular cleaning of the bathroom was performed by a maintenance worker and parents and children also used the private bathroom, but no one reported any defects. See *Britton v. University of Chicago Hospitals*, 382 Ill. App. 3d 1009, 1012 (2008) ("[W]here a structure not obviously dangerous has been in daily use for an extended period of time and has proven adequate, safe, and convenient for the purposes to which was being put, it may be further continued in use without the imputation of negligence."). On this record, any defect under the sink was neither obvious nor conspicuous.

¶ 22 Nonetheless, the plaintiff argues that the defendants were aware the sink was loose shortly after renovations were complete, approximately one year prior to his accident, and they should have performed a reasonable investigation. The plaintiff maintains that, had an inspection

been performed, they *could have* warned him about the defect and "*may have* also discovered the cause of the microbial growth that led to his infection." Again, we disagree. The fact that the sink's faucet was loose does not necessarily put the landowner on inquiry as to whether a dangerous condition existed under the sink. Moreover, we have already noted that the plaintiff's evidence demonstrates that the alleged defect was highly inconspicuous. Even if the defendants were aware that a defect might exist under the sink, there is no evidence indicating that they would have discovered the defect after conducting a reasonable inspection of the sink. In fact, the plaintiff returned to the gym after his injury, took photographs of the sink, and still could not identify the alleged defect that caused his injury. Considering the inconspicuous nature of the defect, hidden from anyone's view, its discovery was not a consequence that would have flowed naturally from any information the defendants may have gleaned from an investigation as to why the sink was loose. See *Smolek*, 266 Ill. App. 3d at 229 (noting that where a condition has existed for a considerable period of time, constructive notice cannot exist where the dangerous condition is so well concealed that it is unlikely to be discovered through the exercise of reasonable care); see also *Burke v. Grillo*, 227 Ill. App. 3d 9, 19 (1992). We conclude that, even if the defect under the sink existed for one year prior to the accident, it was so inconspicuous that the defendants cannot be charged with knowledge of its existence.

¶ 23 In a related argument, the plaintiff contends that the circuit court "invade[d] the province of the jury" when it found that the defendants had "less knowledge" than the plaintiff. In our view, the circuit court was not focusing solely on whether the plaintiff had more or less knowledge than the defendants. Instead, it concentrated on the condition of the defect and whether the defendants should have known of its existence. To be sure, a plaintiff's lack of knowledge about an inconspicuous danger will not bar recovery where the landowner is in a

better position to discover the condition or is aware of some fact that puts him or her on notice of the potential existence of the condition. What makes this case unique is that Jane asked the plaintiff if he could look at the sink to determine why it was loose and he, therefore, was in an equally good position to discover the defect. The circuit court was merely observing that the plaintiff's failure to discover the defect indicates that the defendants would not have discovered it through the exercise of reasonable care.

¶ 24 Therefore, because the plaintiff failed to establish a genuine issue of material fact on the issue of whether the defendants knew or should have known that a defect existed under the sink, the defendants are entitled to judgment as a matter of law on the plaintiff's premises liability claims.

¶ 25 Finally, the plaintiff argues in the alternative that even if he failed to create a genuine issue of material fact that the defendants knew or should have known of the defect on their premises, summary judgment in the defendants' favor on his general negligence claims was improper because he was not required to prove that the defendants had notice of the defect. We disagree.

¶ 26 In *Tomczak*, 315 Ill. App. 3d at 1038, this court stated that "[i]f the gist of a complaint is that the landowner did not create the condition, the plaintiff must be required to establish that the landowner knew or should have known of the defect." See also *Reed v. Wal-Mart Stores, Inc.*, 298 Ill. App. 3d 712, 715 (1998). As such, if the defendants caused the defect, the plaintiff need not show that they had knowledge of it. In this case, however, there is no evidence as to what the defect is, how it got there, or who created it. Nor does the plaintiff contend that the defendants caused the defect under the sink. Because the plaintiff has failed to point to any evidence

establishing that the defendants' conduct created the defect under the sink, he was required to show that they had actual or constructive notice.

¶ 27 Having found that no genuine issue of material fact exists on the question of whether the defendants knew or should have known that the sink presented a danger to the plaintiff, the defendants are entitled to judgment as a matter of law the plaintiff's general negligence claims. In so holding, we find it unnecessary to address the plaintiff's alternative arguments regarding whether the defendants breached their duty of care and whether the breach proximately caused the plaintiff's injuries.

¶ 28 For the foregoing reasons, we affirm the judgment of the circuit court which granted summary judgment in the defendants' favor.

¶ 29 Affirmed.