2018 IL App (2d) 170144-U
No. 2-17-0144
Order filed February 15, 2018

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| JOSH ORENSTEIN | ) | Appeal from the Circuit Court |
| | ) | of Lake County. |
| Plaintiff-Appellant, | ) | |
| | ) | |
| v. | ) | No. 15-L-251 |
| | ) | |
| REAL URBAN BARBEQUE V.H., LLC, | ) | |
| SHAKER APARTMENTS, LLC, | ) | |
| & VHTC LOTS 7&8, LLC, | ) | Honorable |
| | ) | Diane E. Winter, |
| Defendants-Appellees. | ) | Judge, Presiding. |

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JUSTICE HUTCHINSON delivered the judgment of the court.
Presiding Justice Hudson and Justice Zenoff concurred in the judgment.

**ORDER**

¶ 1 *Held*: We affirmed the trial court's order granting summary judgment in favor of defendant Real Urban Barbeque V.H., LLC. Defendant owed no duty to protect plaintiff against the open and obvious risks associated with the grease-laden water, and plaintiff could not establish beyond mere speculation that defendant's actions were the proximate cause of his accident.

¶ 2 Plaintiff, Josh Orenstein, brought a negligence action against defendants, Real Urban Barbeque V.H., LLC (defendant), Shaker Apartments, LLC (Shaker Apartments), and VHTC Lots 7&8, LLC (VHTC Lots). Plaintiff alleged that he sustained injuries when he fell from the roof of the building at defendant's place of business. On plaintiff's motion, Shaker Apartments

was voluntarily dismissed from the lawsuit without prejudice. Thereafter, defendant and VHTC Lots brought separate motions for summary judgment against plaintiff. The trial court entered separate orders granting both of these motions. Plaintiff now appeals from the order granting summary judgment in favor of defendant. VHTC Lots is not a party to this appeal. We affirm the trial court's ruling.

¶ 3 I. BACKGROUND

¶ 4 In his amended complaint, plaintiff alleged that he performed work on an air conditioning unit at defendant's place of business on August 9, 2013. This work required plaintiff to access the rooftop of the building using a ladder that was fixed to the premises. According to plaintiff, the ladder was covered with grease-laden water that caused him to slip and fall during the course of his work. Pictures in the record depict a metal ladder that is fixed to an interior wall of a sprinkler room. The ladder leads to a hatch in the roof of the subject premises.

¶ 5 Plaintiff offered the following testimony during his discovery deposition. At the time of his accident he was employed by Robert Elliot Mechanical, Inc (Robert Elliot). The company performed heating, ventilation, and air cooling (HVAC) work for defendant. In addition to being a shareholder in the company, plaintiff worked in sales and business development; he was not a service technician.

¶ 6 On August 9, 2013, plaintiff visited the subject premises in response to defendant's request for interior ductwork modifications. At the time, he was working in his capacity as a sales representative. During this visit, plaintiff's attention was drawn to a water leak in the kitchen. He was aware that defendant had previously reported the leak to Robert Elliot. Plaintiff believed that the leak was caused by a clogged drain in the air conditioning unit on the roof. He suspected that the clog was caused by a buildup of grease that had been discharged from

defendant's meat smokers, as Robert Elliot had sent service technicians to address that same issue in the past. The greasy contaminants tended to accumulate in the air conditioning unit and prevent the drainage of condensation. Plaintiff offered to go to the roof to address the issue. He was accompanied by defendant's employee Gina Booth.

¶ 7 Plaintiff testified that he went to the roof without the assistance of his prosthetic arm. He explained that his right arm had been amputated below the elbow when he was a child. He typically used a prosthetic, but he was not wearing his prosthetic on August 9, 2013, because it was being refitted due to an elbow injury that he had sustained months prior. According to plaintiff, this did not hinder his ability to ascend or descend the fixed ladder in the sprinkler room, as he had used the same ladder multiple times in the past without relying on his prosthetic for assistance.

¶ 8 Plaintiff observed no greasy substances on the ladder during his ascent to the roof. When plaintiff and Gina got to the roof, plaintiff observed that there was no grease or water on the flat rooftop surface around the air conditioning unit. However, just as plaintiff had suspected, the air conditioning unit was clogged by an accumulation of grease and dirt. With Gina observing, plaintiff unscrewed part of the air conditioning unit and allowed approximately two gallons of grease-laden water to drain directly onto the surface of the rooftop. The water gathered in a pool between the air conditioning unit and the access hatch to the rooftop.

¶ 9 After about 30 minutes, plaintiff replaced the part to the air conditioning unit and prepared to descend the ladder with Gina. He first observed Gina walk through the pool of grease-laden water on her way to the access hatch. He then followed Gina's path through the pool of grease-laden water. Gina descended the ladder first. Plaintiff waited until Gina was on the ground to begin his descent. Plaintiff testified, "I remember turning to face the correct

direction to put my leg down onto the ladder, and I really don't remember anything after that." The next thing plaintiff remembered was waking up in an ambulance.

¶ 10 Plaintiff could not say for certain what caused his fall. He testified that he had no memory of his foot ever making contact with the ladder. He did not remember anything unusual about Gina's descent from the roof, nor did he remember seeing any grease-laden water on the ladder rungs. However, plaintiff believed that Gina had tracked the grease-laden water to the top rung of the ladder.

¶ 11 Plaintiff made a series of admissions with respect to his conduct. He admitted that he did not use a bucket or other type of receptacle to contain the grease-laden water that he released from the air conditioning unit even though he knew it was unsafe to drain the grease-laden water directly onto the surface of the rooftop. He admitted that he could have avoided stepping in the pool of grease-laden water by walking approximately 30 feet out of his way as he returned to access hatch. He admitted that he did not take any steps to clean the bottoms of his leather loafers before he approached the ladder. He also admitted that he could have asked someone to clean the ladder rungs before he attempted his descent. Finally, he admitted that Robert Elliot had sent service technicians to defendant's place of business on two or three occasions in the past to clear the same type of grease clog from the air conditioning unit on the rooftop. These service technicians were equipped with, in plaintiff's words, "more and better tools."

¶ 12 In a signed affidavit, Gina stated that the only way to gain access to the roof was by using the fixed ladder in the sprinkler room. On August 9, 2013, she did not observe any foreign substances or hazardous conditions on the ladder when she ascended it, nor did she observe any foreign substances or hazardous conditions on the ladder when she descended it. Gina stated that

she reached the ground before defendant fell, and that plaintiff "began to descend the ladder within seconds of [her] reaching the ground."

¶ 13 It is noteworthy that the record contains a store lease agreement between defendant and VHTC Lots. The agreement establishes that defendant was leasing the subject premises from VHTC Lots on August 9, 2013. In addition to filing separate summary judgment motions against plaintiff, defendant and VHTC Lots filed cross-motions against each other for contribution in the event that judgment was entered in plaintiff's favor. Defendant and VHTC Lots disputed which party owed plaintiff a duty of care while he was on the ladder and the roof. Their arguments were based largely on the definition of a "common area" within the store lease agreement.

¶ 14 On January 24, 2017, the trial court entered separate orders granting summary judgment in favor of defendant and VHTC Lots. As a result of these rulings, the cross-motions for contribution by defendant and VHTC Lots were also dismissed. Plaintiff now timely appeals from the order granting summary judgment in favor of defendant.

¶ 15 Although the record on appeal contains no reports of proceedings from the trial court, this court granted defendant's motion to supplement the record with a bystander's report from January 24, 2017. The bystander's report was certified by the trial court. It states that defendant's motion for summary judgment was granted on four separate bases. First, defendant owed no duty to maintain the common areas of the building that were owned by VHTC Lots. Second, plaintiff created the dangerous conditions that allegedly caused his injuries by draining the air conditioning unit directly onto the roof in the area where he was walking. Third, defendant owed no duty to warn or protect plaintiff against the open and obvious risks of the grease-laden water and descending the ladder. Fourth, and finally, plaintiff could not establish

beyond mere speculation that there was any grease-laden water on the first rung of the ladder, or that he had ever stepped onto the first rung of the ladder.

¶ 16 II. ANALYSIS

¶ 17 We begin by reciting the well-known standards for reviewing a trial court's grant of summary judgment. "The purpose of summary judgment is not to try a question of fact, but rather to determine whether a genuine issue of material fact exists." *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 42-43 (2004). Summary judgment should be granted only 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 as to any material fact, and that the moving party is clearly entitled to a judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2014). "In determining whether a genuine issue as to any material fact exists, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent." *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 162-63 (2007). Summary judgment is inappropriate where the material facts are disputed, or where reasonable persons might draw different inferences from the undisputed facts. *Id.* "Although summary judgment can aid in the expeditious disposition of a lawsuit, it remains a drastic means of disposing of litigation and, therefore, should be allowed only where the right of the moving party is clear and free from doubt." *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). In appeals from summary judgment rulings, the standard of review is *de novo. Adams,* 211 Ill. 2d at 43.

¶ 18 To recover damages in a negligence action, a plaintiff must prove that: (1) defendant owed a duty to the plaintiff; (2) defendant breached that duty; and (3) the breach was the proximate cause of the plaintiff's injury. *Krywin v. Chicago Transit Authority*, 238 Ill. 2d 215,

225 (2010). "Whether a duty exists in a particular case is a question of law for the court to decide." *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 430 (2006). "On the contrary, whether a defendant breached the duty and whether the breach was the proximate cause of the plaintiff's injuries are factual matters for the jury to decide, provided there is a genuine issue of material fact regarding those issues." *Id.*

¶ 19 Here, the certified bystander's report first reflects the trial court's finding that defendant owed no duty to maintain the common areas of the building that were owned by VHTC Lots. Defendant maintains that this ruling was proper, pointing to specific language in the store lease agreement with VHTC Lots. Plaintiff counters by arguing that this issue is irrelevant because defendant created the hazardous condition that caused his accident. See *Corcoran v. Village of Libertyville*, 73 Ill. 2d 316, 324 (1978) ("It is firmly established in Illinois that a party that creates a dangerous condition will not be relieved of liability because that party does not own or possess the premises upon which the dangerous condition exists.").

¶ 20 However, the certified bystander's report also reflects the trial court's second finding: that it was *plaintiff* who created the dangerous conditions that allegedly caused his injuries by draining the grease-laden water from air conditioning unit directly onto the rooftop. Defendant again maintains that this finding was correct, noting that plaintiff voluntarily performed the task of a service technician without using a bucket or other type of receptacle to contain the grease-laden water. On the other hand, plaintiff disputes the trial court's finding, arguing that defendant created the dangerous conditions by: (1) failing to properly maintain its air conditioning unit; and (2) tracking the grease-laden water to the top rung of the ladder, through its employee Gina.

¶ 21 While these issues are compelling, we believe that the question of whether defendant owed plaintiff at duty is resolved by the open and obvious danger doctrine. To that end, we

agree with the trial court's third finding: that defendant owed plaintiff no duty to warn or protect him against the open and obvious dangers that were associated with the grease-laden water and the ladder. Therefore, we need not determine whether plaintiff's accident occurred in a common area of the building, or whether defendant created the dangerous conditions that allegedly caused plaintiff's injuries.

¶ 22 Generally, a party who owns or controls land is not required to foresee and protect against an injury if the potentially dangerous condition is open and obvious. *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 16. This rule is reflected in section 343A of the Restatement (Second) of Torts, which has been adopted by our supreme court. *Id*; see Restatement (Second) of Torts § 343A, at 218 (1965)). "A condition is open and obvious where a reasonable person in the plaintiff's position, exercising ordinary perception, intelligence, and judgment, would recognize both the condition and the risk involved." *Bezanis v. Fox Waterway Agency*, 2012 IL App (2d) 100948, ¶ 16. The determination of whether the condition is open and obvious does not depend on the plaintiff's subjective knowledge; rather, courts must consider the objective knowledge of a reasonable person confronted with the same condition. *Sandoval v. City of Chicago*, 357 Ill. App. 3d 1023, 1028 (2005). Whether a dangerous condition is open and obvious may present a question of fact, but where no dispute exists as to the physical nature of the condition, the issue presents a question of law. *Bruns*, 2014 IL 116998, ¶ 18.

¶ 23 Here, there is no dispute as to the physical nature of the dangerous conditions. Plaintiff testified during his deposition that he released approximately two gallons of grease-laden water from the air conditioning unit onto the flat surface of the roof. He explained that the grease-laden water gathered in a pool between the air conditioning unit and the access hatch to the roof. There is also no dispute as to the nature of the fixed metal ladder that plaintiff and Gina used to

access the roof. Thus, the issue of whether the dangerous conditions on the rooftop were open and obvious presents a question of law.

¶ 24 In determining whether there was a duty to protect against an open and obvious danger, courts must consider the four factors that apply to a traditional duty analysis. *Suchy v. City of Geneva*, 2014 IL App (2d) 130367, ¶ 24. These factors are: (1) the likelihood of injury; (2) the reasonable foreseeability of such injury; (3) the magnitude of guarding against the injury; and (4) the consequences of placing that burden on the defendant. *Id.*

¶ 25 With respect to the first factor, "the law generally considers the likelihood of injury slight when the condition in issue is open and obvious because it is assumed that persons encountering the potentially dangerous condition of the land will appreciate and avoid the risks." *Bucheleres v. Chicago Park Dist.*, 171 Ill. 2d 435, 456 (1996). However, "if a danger is concealed or latent, rather than open and obvious, the likelihood of injury increases because people will not be as readily aware of such latent danger." *Id.* Here, the likelihood of injury was slight, as it can be assumed that persons standing on a rooftop will appreciate and avoid the risks associated with releasing two gallons of grease-laden water directly onto the surface of the rooftop near the place where they are standing. It can further be assumed that such persons would appreciate and avoid the risks associated with descending a metal ladder after another person walked through the grease-laden water and descended the same ladder.

¶ 26 Regarding the second factor, "the foreseeability of harm to others may be greater or lesser depending on the degree of obviousness of the risks associated with the condition." *Id.* Turning to the facts in this case, there are obvious risks associated with descending a fixed metal ladder from a rooftop. There are also obvious risks associated with servicing a grease-clogged air conditioning unit on a rooftop. However, the foreseeability of harm to others due to the

combination of these risks is even less than the slight likelihood of injury. It may be reasonably foreseeable that someone could fall while descending a fixed metal ladder, but it is not reasonably foreseeable that such a fall would be proximately caused by grease-laden water from an air conditioning unit. This conclusion is supported by plaintiff's own deposition testimony, which established that Robert Elliot service technicians had removed grease clogs from the air conditioning unit without any incident on two or three prior occasions.

¶ 27 Similar to the first two factors of our traditional duty analysis, we also find that the third and fourth factors weigh against imposing a duty on defendant. The third factor is the magnitude of guarding against the injury, and the fourth factor measures the consequences of placing that burden on the defendant. Plaintiff argues that defendant should have guarded against his injuries by calling Robert Elliot to change the filter of the air conditioning unit more frequently, thus preventing the formation of any grease clogs. We disagree. Robert Elliot was in the business of installing and servicing HVAC units. Robert Elliot service technicians had proved able to remedy defendant's clogged air conditioning unit without any safety complications. Defendant had no burden to retain Robert Elliot for additional maintenance services for the purpose of preventing a problem that could be safely and successfully remedied otherwise. A holding to the contrary would have such far-reaching and adverse consequences on everyday business decisions that we need not articulate them.

¶ 28 However, our consideration of the traditional duty factors does not end our analysis, as Illinois recognizes two exceptions to the open and obvious danger doctrine. First, the "distraction exception" applies where the possessor of land has a reason to expect that an invitee's attention may be distracted, such that he would not discover the obvious danger, or that he would forget his discovery or otherwise fail to protect himself against it. *Bruns*, 2014 IL

116998, ¶ 20. Second, the "deliberate encounter exception" applies where the possessor of land has reason to expect that the invitee will proceed to encounter the known obvious danger because a reasonable person in the same position would determine that the advantages of doing so outweighed the obvious risk. *Id.* Plaintiff argues that both of these exceptions apply. We disagree.

¶ 29 First, plaintiff argues that there is a question of fact for a jury to decide as to whether the distraction exception applies. He asserts that his attention was not focused "immediately at his feet," but was rather focused on "gripping the ladder" and "exiting the platform." Even if this argument had merit, which it does not, it remains that "the distraction exception will only apply where evidence exists from which a court can infer that [the] plaintiff was actually distracted." *Id.* ¶ 22. Here, there is no evidence from which we can infer that plaintiff was actually distracted.

¶ 30 Second, plaintiff argues that the deliberate encounter exception applies, because he had no choice but to descend the greasy ladder. "The deliberate encounter exception has most often been applied in cases involving some economic compulsion." *Sollami v. Eaton*, 201 Ill. 2d 1, 16 (2002). While economic compulsion is not a specific requirement, there must be an indication of some compulsion or impetus under which a reasonable person in the plaintiff's position would have disregarded the open and obvious risks. See *id.* According to his deposition testimony in this case, plaintiff could have guarded against the risks associated with the pool of grease-laden water. First, he could have walked approximately 30 feet out of the way to avoid the pool of grease-laden water. Second, before attempting his own descent, he could have cleaned the bottoms of his leather loafers. Third, upon seeing Gina walk through the grease-laden water and descend the fixed metal ladder, he could have requested that someone wipe off the ladder rungs.

We are not persuaded that defendant was under such great compulsion to exit the rooftop that the advantages of descending the ladder—without taking any safety measures—outweighed the risks associated with the grease-laden water. See *Bruns*, 2014 IL 116998, ¶ 20.

¶ 31 For all of these reasons, we affirm the trial court's finding that, as a matter of law, defendant owed plaintiff no duty to warn or protect him against the open and obvious dangers that were associated with the grease-laden water and the ladder. However, even if we were to agree with plaintiff that the open and obvious danger doctrine presents questions of fact that are best left for a jury to decide, we would nonetheless affirm the trial court's grant of summary judgment in defendant's favor, as plaintiff cannot establish that defendant's actions were the proximate cause of his injuries. This issue relates to the trial court's fourth finding in the certified bystander's report: that plaintiff could not establish beyond mere speculation that there was any grease-laden water on the first rung of the ladder, or that he had ever stepped onto the first rung of the ladder.

¶ 32 The term "proximate cause" encompasses two distinct requirements: cause in fact and legal cause. *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 395 (2004). First, cause in fact is established when there is a reasonable probability that the defendant's acts caused the plaintiff's injury. *Id.* If there are multiple factors that may have combined to cause the injury, courts must determine whether the defendant's conduct was a material element and a substantial factor in bringing about the injury. *Id.* "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 v. City of Chicago*, 211 Ill. 2d 251, 258 (2004). Second, unlike cause in fact, legal cause presents a question of foreseeability. In considering the issue of legal causation, the relevant inquiry is whether the plaintiff's injury is of a type that a reasonable person would see as

a likely result of his or her conduct. *Id.* Although proximate cause is generally a question of fact, the lack of proximate cause may be determined as a matter of law where the facts alleged do not sufficiently demonstrate both cause in fact and legal cause. *Beretta U.S.A. Corp.*, 213 Ill. 2d 351 at 395-96.

¶ 33 As we explained above, plaintiff's accident was not reasonably foreseeable. This means that plaintiff cannot establish that defendant's actions were the legal cause of his injuries. However, plaintiff has also failed to show a reasonable probability that defendant's actions caused his injuries, meaning that plaintiff cannot satisfy the cause-in-fact requirement.

¶ 34 The facts establish that plaintiff offered to climb the fixed metal ladder using one arm, without the assistance of his prosthetic, and while he was wearing leather loafers. He then walked directly through the pool of grease-laden water on his way to descend the ladder without taking any care to clean the bottoms of his leather loafers. Although he has no memory of what caused his fall, Gina signed an affidavit stating that she observed no foreign substances or hazardous conditions on the ladder when she descended it. Based on these facts, we cannot say that there is a reasonable probability, as plaintiff argues, that plaintiff slipped on grease-laden water that Gina had tracked to the top rung of the ladder. Rather, it is at least equally likely that plaintiff either: (1) slipped on grease-laden water from the bottoms of his own leather loafers; or (2) fell from the roof for reasons unrelated to the grease-laden water.

¶ 35 Plaintiff argues at length that there is enough circumstantial evidence for a jury to conclude that defendant's negligence was the proximate cause of his accident. Plaintiff is correct that reasonable inferences may be sufficiently drawn from circumstantial evidence to establish proximate cause. *Majetich v. P.T. Ferro Construction Co.*, 389 Ill. App. 3d 220, 224 (2009). However, "if [a] plaintiff relies upon circumstantial evidence to establish proximate cause to

defeat a motion for summary judgment, the circumstantial evidence must be of such a nature and so related as to make the conclusion more probable as opposed to merely possible." *Id.* Here, it is merely possible that defendant's negligence was the proximate cause of plaintiff's accident; it is not probable. Thus, even if we were to agree with plaintiff that defendant was responsible for creating the dangerous conditions on the rooftop, the circumstances are insufficient to establish a reasonable inference that defendant's actions were the proximate cause of plaintiff's injuries.

¶ 36 Before concluding, we address plaintiff's reliance on *McKanna v. Duo-Fast Corp.*, 161 Ill. App. 3d 518 (1987), a case that was discussed at length during oral argument. In *McKanna*, the plaintiffs' decedent (a pipefitter) fell from a ceiling hatch that provided access to the defendant's rooftop. A fixed ladder ran from the floor of a boiler room up to the ceiling hatch. The decedent's partner testified that he was standing at the base of the ladder when the decedent fell. He saw the decedent place his hand on the hatch and turn around in preparation of descending the ladder, but the partner then turned away to move his tools. Through his peripheral vision, the partner saw the decedent fall to the boiler room floor. The jury found in favor of the plaintiffs on their common-law negligence claims and the trial court subsequently denied the defendant's motion for judgment notwithstanding the verdict. *Id.* at 522-24. In affirming the trial court's ruling, the appellate court held that there was sufficient circumstantial evidence to support the jury's reasonable inferences on the issue of proximate cause. Although the partner did not see the decedent slip from the ladder, there was evidence of dangerous defects near the top of the ladder. *Id.* at 527. Specifically, the ladder violated safety standards in that: the rungs were set too close to the wall; a beam near the top of the ladder interfered with certain rungs; the steel rungs did not have a non-skid surface; and, importantly, the ladder ended 15 or 16 inches below the roof hatch, rather than extending to the roofline. *Id.* at 522.

¶ 37 While there are obvious similarities between this case and *McKanna*, there are also critical differences. First, although plaintiff alleged in his amended complaint that defendant's ladder should have been equipped with a safety cage, and he testified during his deposition that he did not remember any non-slip material on the ladder rungs, these alleged defects do not rise to the level of the defects in the ladder in *McKanna*. Second, although plaintiff maintains that the grease-laden water rendered defendant's ladder defective to the same extent as the ladder in *McKanna*, this overlooks Gina's statements in her affidavit that she did not observe any foreign substances or hazardous conditions on the ladder. Third, and finally, *McKanna* did not address any alternative explanations—other than the defendant's negligence—for the decedent's fall. As we discussed above, it is reasonable to infer from the facts in this case that defendant either: (1) slipped on grease-laden water from the bottoms of his own leather loafers; or (2) fell from the roof for reasons unrelated to the grease-laden water. We therefore reject plaintiff's argument that the circumstantial evidence in this case is analogous to the circumstantial evidence in *McKanna*.

¶ 38 III. CONCLUSION

¶ 39 For the reasons stated, we affirm the trial court's order granting summary judgment in favor of defendant and against plaintiff.

¶ 40 Affirmed.