2019 IL App (2d) 180292-U
No. 2-18-0292
Order filed February 15, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MARY DAGOSTINO, Plaintiff-Appellant, v. RICK FRIEND PROPERTIES, INC., an Illinois Corporation, Defendant-Appellee.	))))))))))	Appeal from the Circuit Court of Winnebago County. No. 14-L-44 Honorable Eugene Doherty, Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices Burke and Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant was not entitled to summary judgment where there remained a doubt as to whether a defect in a sidewalk upon which plaintiff tripped and fell was open and obvious; question of whether a duty existed could not be addressed until this preliminary factual matter was resolved.

¶ 2 I. INTRODUCTION

¶ 3 Plaintiff, Mary Dagostino, appeals an order of the circuit court of Winnebago County granting summary judgment to defendant, Rick Friend Properties, Inc. On appeal, plaintiff contends that the trial court erred in finding the condition of a sidewalk upon which she tripped and fell was open and obvious. Alternatively, she argues that defendant owed her a duty

regardless of the open-and-obvious nature of the defect in question. For the reasons that follow, we reverse and remand.

¶ 4 II. BACKGROUND

¶ 5 Plaintiff testified via discovery deposition. She was employed as a rural mail carrier. Her job primarily involved driving and delivering mail to post boxes on the side of the road. Part of her route included an apartment building owned by defendant, which was located at 11722 Parkway Drive in Roscoe. In order to deliver mail to the apartment, plaintiff had to leave her vehicle and walk up a sidewalk to the apartment building. She had been assigned to the route covering the apartment about two months prior to the accident. During this two-month period, she had delivered mail to the apartment five or six days per week (between 40 and 48 times in total). She had not previously tripped or fallen prior to the date of the accident at issue here. On March 21, 2012, claimant was injured in a fall while delivering mail to the apartment. The date of her fall was the last day she worked as a mail carrier. Plaintiff suffered various injuries, including a wrist fracture that necessitated two surgeries.

¶ 6 Plaintiff stated that she was walking on the sidewalk leading to the apartment. She tripped on a deviation in the sidewalk slabs. There was a variation in height between two slabs. In her deposition, plaintiff testified that the pavement was visible on the day of her accident; there was no snow on the sidewalk that day. It was about 11:30 a.m., and the sun was shining. Plaintiff testified that she did not recall ever noticing the deviation prior to the accident. She was carrying mail to be delivered and keys at the time she fell, but they did not prevent her from viewing the sidewalk. There was a 90-degree turn in the sidewalk, beginning at the location of the defect. As plaintiff was approaching the building, her attention was directed to a door. No

one else was present. Plaintiff stated that there was "probably no reason" that she could not see the sidewalk.

¶ 7 Plaintiff testified that she never measured the difference in height between the two sidewalk slabs. On the day of the accident, she was "lying on the ground in pain, so [she] did not explore that sidewalk." Plaintiff testified that at the time she fell, the difference in height was two to three inches. She returned to the apartment to take pictures on January 11, 2013. Plaintiff identified five photographs of the deviation that were taken the day after the accident. She had no particular recollection of the deviation predating the accident. Claimant did not know how long the defect in the sidewalk had been there.

¶ 8 Rick Friend also testified via discovery deposition. He is the sole proprietor of defendant, Rick Friend Properties. Defendant owns the apartment complex where plaintiff was injured. It is an eight-unit building, and a sidewalk leads to the front door. Friend acknowledged that he was responsible for all upkeep and maintenance. He hired contractors to perform snow removal, but he dealt with "miscellaneous repairs" himself. Friend lived in Arizona and returned to the Roscoe area to attend to his properties for eight or nine weeks per year. He inspected the location where plaintiff was injured every time he returned, and his inspection included the walkways. He had been at the premises several times between December 18, 2011, and January 5, 2012. He next visited the premises in March 2012. He traversed the sidewalk where plaintiff was injured at that time. He did not notice anything he deemed defective at that time. In March 2014, Friend examined the sidewalk slabs. He opined that the deviation in height was between an inch and an inch-and-a-quarter. He opined that the condition of the sidewalk in March 2012 was the same as it was in the picture taken by plaintiff on January 11, 2013.

¶ 9 Bryan Saladino testified via discovery deposition that Friend hired him to repair the sidewalk where plaintiff had fallen. Saladino examined the sidewalk in May 2014 and provided an estimate for the needed work. Saladino's estimate was $500, which ended up being the amount actually charged for the work. The work was performed on May 13, 2014, and May 14, 2014. Saladino did not measure the deviation, but estimated it to be no more than half an inch. He also noted a three-quarter-inch gap between the sidewalk slabs, which he deemed a trip hazard. Saladino testified that he had no knowledge of the deviation as it existed in March 2012. He examined a photograph taken near the time of the accident and opined that, at that time, the height deviation was at least one inch, but less than four inches.

¶ 10 The trial court granted summary judgment in favor of defendant. It first considered whether the defect in the sidewalk was *de minimis* such that it was not actionable. The trial court, while expressing its disagreement with the rule, noted that the burden was on plaintiff to come forth with evidence that a defect is not *de minimis*. The trial court noted that plaintiff testified that the defect was between two and three inches. It explained that though defendant "might be able to undercut and impeach" this testimony, it nevertheless constituted evidence and, at this stage, of the proceedings could not be disregarded. As such, for the purpose of summary judgment, plaintiff had met her burden of producing evidence on this issue.

¶ 11 The trial court next considered defendant's argument that "there is no evidence of its actual notice of the condition, nor is there sufficient basis to impute constructive notice." The trial court stated that it was undisputed that defendant did not have actual notice of the defect. The court cited precedent explaining that whether to impute notice depends on whether a condition existed for a sufficient time such that the defendant, through an exercise of reasonable care and diligence, would have learned of the condition. See *Baker v. Granite City*, 75 Ill. App.

3d 157, 161-62 (1979). The trial court noted that defendant had admitted that he inspected the property during the holiday season and that he had been present on the property in March 2012. As such, evidence existed that would permit a jury to infer that defendant had constructive notice of the defect.

¶ 12 The trial court then considered the open-and-obvious doctrine, under which a party who owns or controls land has no duty to guard against injuries arising from defects that are open and obvious. The trial court noted that there was a conflict in the evidence regarding the size of the defect. If defendant's description of the sidewalk were credited, however, the defect would have been deemed *de minimis*. Plaintiff survived defendant's *de minimis* argument because of her testimony that at the time she fell, the difference in height was two to three inches. The trial court then observed that this testimony also renders the defect open and obvious.

¶ 13 The trial court next acknowledged that, even where a defect is open and obvious, a trial court must still perform a traditional duty analysis. The open and obvious nature of the defect affects the first two prongs of the analysis—foreseeability and the likelihood of injury. Regarding foreseeability, the court found that this factor was entitled to little weight toward the imposition of a duty, as one would not normally foresee an injury from an obvious danger. Likewise, the likelihood of injury is low, as persons would typically avoid an obvious danger. The trial court found that the remaining two factors favored imposition of a duty: the cost of the repair was slight, rendering the magnitude of the burden modest and the consequence of imposing this burden on defendant was minimal, as the defect was an isolated condition. The trial court further noted the nature of the defect:

> "It is in the nature of concrete that such separations may occur. It is common knowledge that the reason for scoring between the sections of poured concrete is to allow for breaks

> along the score line; it is also common knowledge to people in climates like ours that these pieces may move along with the soil underneath during temperature changes. This is a sidewalk which performed as sidewalks are commonly understood to perform."

The trial court then found that the open-and-obvious rule precluded the imposition of a duty of care upon defendant. This appeal followed.

¶ 14 III. ANALYSIS

¶ 15 Plaintiff now appeals, raising two main arguments. First, she argues that the condition of the sidewalk on which she was injured was not open and obvious. Second, she contends that even if the defect was open and obvious, defendant owed her a duty of care. We agree with her first contention. Resolution of the second issue requires resolution of the first, as the determination of whether the defect was open and obvious weighs heavily upon the first two factors of the duty analysis. See *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 19. It therefore must wait until the fact finder addresses the primary question.

¶ 16 As this case comes to us following a grant of summary judgment, our review is *de novo*. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). In ruling on such a motion, we must determine whether any genuine issue of material fact exists, necessitating a trial. *Id.* All pleadings, depositions, affidavits, and admissions must be construed strictly against the movant and liberally in favor of the party opposing the motion. *Id.* Summary judgment is a drastic remedy, as it deprives a party of a trial; therefore, it should be allowed only if the movant's right to judgment is clear and free from doubt. *Id.* With these standards in mind, we now turn to plaintiff's arguments.

¶ 17 The open-and-obvious rule provides that "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." *Rexroad v. City of Springfield*, 207 Ill. 2d 33, 44 (2003). An "obvious" danger is one where both the condition and risk would be recognized by a reasonable person exercising ordinary caution. *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 16 (quoting Restatement (Second) of Torts § 343A, at 218 (1965)). The doctrine's applicability is not limited to conditions like height, fire, and water. *Bruns*, 2014 IL 116998, ¶ 17. The supreme court has explained that, "[o]ther conditions, including sidewalk defects, may also constitute open and obvious dangers." *Id*. Whether a condition is open and obvious is typically a question of fact. *Id.* ¶ 18. We further note that "there is no simple standard to separate *de minimis* defects from actionable ones." *St. Martin v. First Hospitality Group, Inc.*, 2014 IL App (2d) 130505, ¶ 14.

¶ 18 Plaintiff argues that a material issue of fact exists regarding the nature of the defect. She points out that while she testified that there was a two to three inch deviation in height between the slabs, Friend testified that it was only an inch to an inch in a quarter. Further, Saladino opined that the height differential was one to four inches. Saladino also testified that there was a gap between the slabs that was too wide, creating a tripping hazard.

¶ 19 Indeed, as the trial court noted, there was a conflict in the evidence regarding the height of the defect. As the trial court further noted, plaintiff testified that the defect was between two and three inches. It added that though defendant "might be able to undercut and impeach" this testimony, it nevertheless constituted evidence negating defendant's argument that the defect was *de minimis*. The trial court went on to find that plaintiff's testimony led, as a matter of law, to the conclusion that the defect was open and obvious. We, however, are left with a doubt as to whether this characterization is necessarily accurate. Keeping in mind that both the condition *and* the risk must have been apparent to plaintiff (*Bruns*, 2014 IL 116998, ¶ 16), we emphasize

that even if the condition itself were obvious, we cannot conclude as a matter of law that a reasonable person would have appreciated it as such a risk as to take precautions against it.

¶ 20 In *Arvidson v. City of Elmhurst*, 11 Ill. 2d 601, 608 (1957) (citing *Parker v. County of Denver*, 128 Colo. 355 (1953)), our supreme court, addressing the *de minimis* rule, noted that "while there might be instances in which it could be held that the defect in the sidewalk was so slight that actual negligence became a question of law, in almost all instances there is a shadow zone where the facts are such that the question must be submitted to the jury, whose duty it becomes to take into consideration all of the facts and circumstances in connection with the accident." We find this logic equally applicable to the open-and-obvious issue; after all, whether a condition is open and obvious is also usually a question of fact. *Bruns*, 2014 IL 116998, ¶ 18. Moreover, there was other evidence, such as the proximity of the door of the apartment building to the defect, which would arguably militate in plaintiff's favor. Further, there does not appear to have been a high-degree of contrast around the defect that would have attracted plaintiff's attention. See *Burns v. City of Chicago*, 2016 IL App (1st) 151925, ¶ 51 ("The tiles, by design, are open and obvious to reasonable people as well as visually impaired people because of their different color and consistency to the surrounding sidewalk.").

¶ 21 Additionally, during the two months leading up to the accident, plaintiff had delivered mail to the apartment five or six days per week (at least 40 times). Plaintiff had never tripped or fallen prior to the occurrence of the accident in question in this case. Friend testified that he inspected the location where plaintiff fell every time he returned to the property, including the walkways. He was there in December 2011, January 2012, and March 2012. He did not notice any defects. In *Simmons v. American Drugstore, Inc.*, 329 Ill. App. 3d 38, 44 (2002), the court, rejecting the application of the open-and-obvious doctrine, held, "Where defendants themselves

were unable to appreciate 'any danger' presented by the gates and plaintiff had encountered the gates previously without incident, a question of fact exists as to whether a reasonable person in plaintiff's position would likewise have failed to appreciate the risk presented by the barriers at the time plaintiff fell." A similar inference may apply here.

¶ 22 Quite simply, defendant has not convinced us that there is not some point in between *de minimis* and open and obvious that a factfinder would be precluded from finding, based on the record before us, that neither doctrine would apply. In other words, questions of fact exist on these issues.

¶ 23 IV. CONCLUSION

¶ 24 In light of the foregoing, the judgment of the circuit court of Winnebago County is reversed and this cause is remanded for further proceedings.

¶ 25 Reversed and remanded.