2019 IL App (2d) 180930-U
No. 2-18-0930
Order filed July 22, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ROBERT J. HOLDEN and CHRISTINE HOLDEN,	)	Appeal from the Circuit Court of Du Page County.
Plaintiffs-Appellants,	)	
v.	)	No. 16-L-0493
WILSON MANAGEMENT, LLC,	)	Honorable Kenneth L. Popejoy,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justice Burke concurred in the judgment.
Justice McLaren specially concurred.

ORDER

¶ 1 *Held*: The trial court properly granted summary judgment in defendant's favor. Affirmed.

¶ 2 Plaintiff, Robert J. Holden, fell and was injured at work when he climbed on his desk to close the blinds in his office. In a four-count complaint, plaintiff and his wife, Christine Holden,[1] sued the building owner, defendant, Wilson Management, LLC. Pursuant to section 2-

[1] Although, technically, two plaintiffs bring this cause of action, Robert Holden is the primary subject of these proceedings. For simplicity, when we refer to "plaintiff," we mean him.

1005 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1005 (West 2016)), the circuit court granted summary judgment in defendant's favor. Plaintiff appeals, arguing that: (1) there exists a material question of fact as to whether defendant owed plaintiff a duty of care to protect against unreasonable risks of harm on its premises; (2) the evidence is not clear and free from doubt that the dangerous condition that caused plaintiff's injuries was open and obvious; and (3) the court misapplied the law on the assumption-of-risk defense. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 According to count I of the complaint, on August 3, 2009, defendant possessed and maintained property with vertical window blinds at 350 East Ogden Avenue in Westmont. Plaintiff alleged that defendant allowed the premises to become and remain in a dangerous condition and that he "was caused to fall" and was injured while attempting to close vertical window blinds on the premises, due to one or more of defendant's following careless acts and/or omissions:

> "(a) Improperly operated, managed, maintained and controlled the aforesaid premises, so that as a direct and proximate result thereof, [p]laintiff was injured.
>
> (b) Failed to make a reasonable inspection of the aforesaid premises, when the [d]efendant knew, or should have known, that said inspection was necessary to prevent injury to the [p]laintiff.
>
> (c) Failed to warn the [p]laintiff of the dangerous condition of said premises, when the [d]efendant knew, or in the exercise of ordinary care should have known, that said warning was necessary to prevent injury to the [p]laintiff.
>
> (d) Failed to provide safe access to the mechanism the [*sic*] closed the vertical window blinds.

(e) Exposed the office occupants to unreasonable risk of falls."

¶ 5 Similarly, in count II, the complaint alleged that defendant owned the property and had a duty to use ordinary care for the safety of plaintiff and others working at the office building. On August 3, 2009, plaintiff "was caused to fall" and was injured while attempting to close the vertical blinds within the office space in the building, because defendant breached its duty of ordinary care when it:

"(a) Failed to make a reasonable inspection of the aforesaid premises, when the [d]efendant knew, or should have known, that said inspection was necessary to prevent injury to the [p]laintiff.

(b) Improperly operated, managed, maintained and controlled the aforesaid premises, so that as a direct and proximate result thereof, [p]laintiff was injured.

(c) Failed to provide the [p]laintiff with a safe space within which to work.

(d) Failed to warn the [p]laintiff of the dangerous conditions then and there existing, when the [d]efendants [*sic*] knew, or in the exercise of ordinary care should have known, that said warning was necessary to prevent injury to the [p]laintiff.

(e) Failed to provide adequate safeguards to prevent the [p]laintiff from injury while lawfully upon said premises.

(f) Failed to provide fall protection.

(g) Failed to provide safe access to the vertical blinds."[2]

¶ 6 Defendant answered the complaint, admitting that it possessed an ownership interest in the office building, but essentially denying all other allegations. Further, defendant proffered three affirmative defenses, including that plaintiff's injuries resulted from 10 of his own acts

[2] Counts III and IV alleged loss of consortium.

and/or omissions, including his failure to avoid an open and obvious condition and his act of climbing on top of a desk to close blinds, when he knew or should have known that this was an unsafe activity and was not necessary to safely close the office blinds.

¶ 7 In his deposition, plaintiff testified that, on August 3, 2009, he worked for an insurance company, Corporate Risk Management (CRM), as a senior vice-president. His daily supervisor was Robert W. Wilson (Rob), although Rob's father, Robert A. Wilson (Bob), was CRM's chief executive officer (CEO). Bob was also, along with his wife, one of defendant's co-founders, and defendant owned the building. Plaintiff was compensated by CRM, not defendant, and his responsibilities included human resources, office management, and managing benefits and workers' compensation issues.

¶ 8 Plaintiff was asked if he had daily duties for "Wilson Property Management,"[3] and he answered that he was to ensure that the blinds were closed in his office and work area (half of the third floor). This responsibility was not written, but Bob told plaintiff to "make sure the effing blinds were closed. *** He would flip out if they weren't." Plaintiff explained that Bob's directive was to make sure that the blinds were closed and, if they were not, he was to physically ensure that they were closed.

¶ 9 Plaintiff's office contained a desk with a bookcase credenza. According to plaintiff, the desk was placed in a particular location within his office by Diane Wilson (*i.e.*, perhaps Bob's daughter, although the record is unclear). The closing mechanism for the blinds was located behind the bookcase. Plaintiff testified that he could not reach the closing mechanism without

[3] As the trial court eventually noted, the record reflects varying names for defendant, used interchangeably. Apparently, there is no dispute that all references, however sloppy, are meant to reference defendant.

placing a broomstick into the loop of the closing mechanism and pulling it towards him from behind the bookcase. Over the course of five years, every time he closed the blinds, plaintiff climbed on his desk while holding the broomstick to reach the chain. He would then turn to his right to face the chain. Plaintiff's desktop was covered with various items, and he agreed that it "was always cluttered," but he testified that there remained adequate space to climb on it or he possibly moved items aside and then replaced them. Plaintiff recalls that, on August 3, 2009, he climbed on his desk and was reaching for the blinds when he slipped. He vaguely recalled hearing a commotion in the office, and the next thing he knew, he was in the emergency room. The back of plaintiff's head was painful, he suffered a T12 fracture in his back, and stayed around five days in the hospital. Plaintiff thereafter had various medical appointments and treatments, including in-home health care.

¶ 10 Before the August 3, 2009, accident, plaintiff slipped, without falling, while closing his blinds on around five occasions, but was not injured and did not report the slips to a supervisor. Plaintiff never requested a different mechanism for closing the blinds, to move the desk or furniture configuration, or for any assistance closing the blinds.

¶ 11 Bob Wilson testified that he maintained an office on the third floor of the Westmont building, which served as an office for defendant. Defendant did not have any employees. Bob testified that he was familiar with plaintiff's office location and that plaintiff selected his office and where he wanted the desk placed. When asked if he knew who chose the type of blinds that would be installed in the building, Bob answered that he "probably" did. Bob did not recall ever seeing plaintiff climbing on his desk or using a broomstick to operate his blinds. Bob would have had interaction with plaintiff, possibly daily (although not necessarily), when both actively worked in the building. Bob testified that, as CEO of CRM, he had the authority to tell someone

not to climb on a desk to close blinds, if he saw such a thing. He disagreed that, as an owner of the building, he had authority to tell persons on the premises to do or not do specific acts: "Not that I know of. I never told the tenants how to act or not do anything other than it's a crime-free building." There were no rules or regulations for tenants other than those provided in the lease agreement. Bob "never" told individuals in the building that they had to open or close the blinds at certain points in the day. Bob agreed that he had the authority to tell plaintiff to move his desk, that plaintiff would be required to follow his instructions, and, if plaintiff did not comply, Bob had authority to fire him.

¶ 12 Other evidence from CRM employees included Helena Hodina's testimony that she overheard Bob tell plaintiff that he had to close the blinds. Hodina, Amy Pelton, and Janice Glasford-Ivory testified that they observed Bob in the area when plaintiff climbed onto the desk to close the blinds. Bob laughed, said "look at him," and criticized plaintiff's weight. They believed that climbing on the desk and using a pole to close the blinds was unsafe.

¶ 13 The trial court granted defendant's summary-judgment motion. In announcing its ruling, the court verified that the lease agreement between defendant and CRM did not provide rules or regulations pertaining to closing the blinds and, so, that plaintiff was relying on "oral rules." The court noted that plaintiff confirmed that he did not make reports to the owner of the building or to anyone else that the desk and blinds were unsafe and, although he claims that Bob was aware of the problem, Bob was not the defendant and there were no prayers for relief on individual liability or attempts to pierce the corporate veil. Therefore, although Bob was one of defendant's owners, he was also *CRM's owner* and there were "somewhat blurred lines where is he acting as a landlord or is he acting in regard to his role in CRM and this individual as his employee. And those are some of the questions that exist in regard to that." Indeed, the court asked defense

counsel, "is there anything in these depositions that supports that clause [in the summary judgment motion] with a cite that I could go read where someone says [plaintiff] was told to do this by his employer CRM, not the owner of the premises?" Counsel responded, "No."

¶ 14 The court continued, however, that no evidence supported plaintiff's claim that defendant provided the office furniture for the tenants and set it up prior to tenants taking possession. Further, although plaintiff claimed that Bob enforced "building rules" that tenants were required to follow, including opening and closing blinds in their work areas, plaintiff did not connect Bob's actions to those on behalf of defendant, as opposed to ones taken in his capacity as plaintiff's employer. The court noted that plaintiff had not produced any evidence that Bob (or defendant) told any other tenants in the building to close their blinds, as opposed to only tenant CRM. Despite plaintiff's assertions, the court noted, the evidence did not reflect that defendant placed the desk and bookcase in plaintiff's office directly in front of the window blocking access to the chain that opened and closed the blinds. "I don't see any deposition reference to that testimony because there isn't any." Moreover, plaintiff testified that he was responsible for closing the blinds in his area, meaning the leased premises, but it was not his responsibility to check the blinds for all areas of the buildings; "but [only] for the leased premises that he's in of which he's an employee of the lessee."

¶ 15 The court determined that there was no evidence reflecting that plaintiff was directed to perform any job for the building as a whole; rather, he was directed to care for the blinds in his area. "And these blinds, to get to them, he has to crawl up on top of a desk that he keeps cluttered, and he's been doing it for five years. And he slipped on it, and he's aware of this. And he creates the clutter and everything else, but that's how he closes the blinds. And somebody *** is telling him to do all of these things. But nobody, nobody is telling him as

[defendant.]" Further, the court found, the lease terms reflected that, once the premises were leased, defendant relinquished responsibility for the interior of the leased premises, subject to the rules and regulations existent within the lease:

> "[T]here is not one scintilla of evidence or genuine issue of material fact that the [defendant] was taking control of the blinds in the area of [plaintiff's] desk. And there is not one scintilla of evidence that [defendant] was directing, demanding or expecting people to crawl up on desks to pull blinds down. And if there's any dangerous condition that exists, it's at the top of the desk that [plaintiff] created as far as that goes. There's nothing inherently dangerous about opening and closing blinds."

¶ 16 As to the second count, the court again found that defendant had no duty to maintain the interior of this leased premises or to direct any employee of the tenant in the leased premises "to do or not do something one way or the other." There is nothing showing that defendant directed plaintiff to do something for the building:

> "Clearly plaintiff is climbing up on a desk for five years that he knows is a mess. He has a condition that has existed for five years *** yet he continued to do that. There's not one document that [plaintiff] issued to anybody saying we need to move this desk or I need to provide some other access or somebody's got to help me with this or this isn't right or someone should do something. There's no notice to the building owner, [defendant] of anything by plaintiff saying I've got a problem here. He's clearly assumed the risk on a daily basis to do what he's doing; and he's clearly following the direction of his employer, the lessee of this property, not [defendant]."

¶ 17 The court denied plaintiff's motion to reconsider. Plaintiff appeals.

¶ 18 II. ANALYSIS

¶ 19 Plaintiff argues on appeal that summary judgment was improper for three overarching reasons: (1) there exists a material question of fact as to whether defendant owed plaintiff a duty of care to protect against unreasonable risks of harm on its premises; (2) the evidence is not clear and free from doubt that the dangerous condition that caused plaintiff's injuries was open and obvious; and (3) the court misapplied the law on the assumption-of-risk defense. We disagree and affirm.

¶ 20 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 5/2-1105 (West 2016). Because summary judgment terminates the litigation, the record must be construed in favor of the nonmoving party and judgment should be granted only where the movant's right to judgment is clear and free from doubt. *Newsom-Bogan v. Wendy's Old Fashioned Hamburgers of New York, Inc.*, 2011 IL App (1st) 092860, ¶ 13. Summary judgment should be denied if there is a dispute as to a material fact or if the undisputed material facts could lead reasonable observers to divergent inferences. *Forsythe v. Clark USA, Inc*., 224 Ill. 2d 274, 280 (2007). We review *de novo* the court's grant of summary judgment. *Id.*

¶ 21 A common law negligence claim requires a plaintiff to establish: (1) that the defendant owed the plaintiff a duty; (2) a breach of that duty; and (3) an injury proximately caused by that breach. *Newsom-Bogan*, 2011 IL App (1st) 092860, ¶ 14. To succeed, therefore, a plaintiff must first establish that the defendant owed the plaintiff a duty of care. *Simpkins v. CSX Transportation, Inc*., 2012 IL 110662, ¶ 14. The existence of such a duty is a question of law, properly determined on a motion for summary judgment. *Id.*

¶ 22 Plaintiff asserts that defendant, as the property owner, owed a duty of care to protect persons on its premises from injuries due to dangerous conditions on the property it controls. See, *e.g.*, *Ward v. K Mart*, 136 Ill. 2d 132 (1990). However, with respect to landlord-tenant relationships, our supreme court has summarized:

> "It is axiomatic that if a landlord retains control of a portion of the premises leased to the tenant it has the duty, as the party in control, to use ordinary care in maintaining that part of the premises in a reasonably safe condition. (Citations.) Conversely, a landlord is not liable for injuries caused by a defective condition on the premises leased to a tenant and under the tenant's control. (Citations.) As Dean Prosser observed, '[t]he lessee acquires an estate in the land, and becomes for the time being both owner and occupier, subject to all of the responsibilities of one in possession, to those who enter upon the land and those outside of its boundaries.' (Citation.)" *Rowe v. State Bank*, 125 Ill. 2d 203, 220-21 (1998).

¶ 23 Here, as the trial court noted, the evidence does not reflect that defendant retained any *control* over the interior of CRM's leased premises. Plaintiff's injury did not occur in a common area in the building; rather, it occurred in his office in CRM's leased premises. Indeed, the trial court found that the lease terms reflected that, once the premises were leased, defendant relinquished responsibility for the interior of the leased premises, subject to the rules and regulations existent within the lease. Plaintiff asserts that defendant placed the furniture. The evidence does not support this assertion. Although plaintiff testified that Diane Wilson chose the desk location, the record is not developed as to her employment status or in what capacity she did so and, thus, the record does not reflect that *defendant* placed the furniture even if, without more, that would sufficiently reflect control over the leased premises. Further, plaintiff argues

that the location of the desk and blinds created an unsafe condition, but, again, defendant is not liable for an unsafe condition in CRM premises that was under CRM's control. See *Rowe*, 125 Ill. 2d at 220. Indeed, over the course of five years enduring this office arrangement, plaintiff never complained to even CRM, let alone defendant, about the unsafe work condition to ask for modifications in his office furniture. We note that plaintiff concedes that the burden of changing the arrangement would have been low and that the desk could simply have been moved. In any event, even if Bob "knew" what plaintiff was doing, the condition was not something that was in *defendant's* control as landlord.

¶ 24 Moreover, plaintiff's primary argument is based on the premise that his injury occurred while closing the blinds at "[d]efendant's directive." The trial court found that the evidence, viewed in plaintiff's favor, demonstrated that, although plaintiff closed the blinds at *Bob's* directive, he did not produce evidence to create a genuine issue of fact as to whether Bob's directive was issued on *defendant's* behalf. We agree that the evidence reflects the contrary: plaintiff was directed to close blinds only in his work area, *not* the entire building; no evidence established that defendant ordered other building tenants to close blinds; and the lease agreement between defendant and CRM did not direct the tenant to close blinds. Plaintiff was clearly not *defendant's* employee and received no compensation from defendant; indeed, defendant arguably would have had no direct recourse against plaintiff, had plaintiff refused to comply with the alleged directive. At his deposition, Bob testified that, as plaintiff's *boss/CEO*, he possessed authority to direct plaintiff to move his desk or not climb on it, but that he did *not* understand himself as possessing such authority as the landlord. Thus, as there is no evidence reflecting that *defendant* issued the directive to plaintiff to close blinds, there is no genuine issue of fact to be resolved.

¶ 25 We also note that, even if defendant issued plaintiff an order to close the blinds (again, we agree with the trial court that the evidence does not create a genuine issue on the point), there is no evidence to support that defendant's directive to plaintiff was to *climb on a desk and use a broom* to comply. When the only method for complying with the directive was unsafe, as plaintiff's witnesses testified and as he was aware (given prior slips on his desk), and plaintiff took no steps to seek remedy or relief from the condition, there is no connection between defendant's alleged directive (close the blinds) and the unsafe condition (climbing on a desk) resulting in plaintiff's injuries. Plaintiff notes that witnesses testified that Bob saw him climbing on the desk and laughed at him. While perhaps unkind, Bob's mere observation of plaintiff's acts does not, without more, reflect that *defendant* possessed or breached a duty to plaintiff when it issued the alleged directive.

¶ 26 As such, with no evidence that defendant retained the requisite control over the maintenance of the leased premises, there is no genuine issue of fact concerning duty or breach and plaintiff's claims (including the derivative loss-of-consortium claims) fail. We need not reach plaintiff's alternative arguments concerning whether the unsafe condition was open and obvious and, if so, whether exceptions apply to that doctrine or whether the court misapplied the assumption-of-risk doctrine.

¶ 27 III. CONCLUSION

¶ 28 For the reasons stated, we affirm the judgment of the circuit court of Du Page County.

¶ 29 Affirmed.

¶ 30 JUSTICE MCLAREN, specially concurring:

¶ 31 The following is one example among the trial judge's numerous findings:

> "[T]here is not one scintilla of evidence or genuine issue of material fact that the [defendant] was taking control of the blinds in the area of [plaintiff's] desk. And there is not one scintilla of evidence that [defendant] was directing, demanding or expecting people to crawl up on desks to pull blinds down. And if there's any dangerous condition that exists, it's at the top of the desk that [plaintiff] created as far as that goes. There's nothing inherently dangerous about opening and closing blinds." *Supra* ¶ 15.

¶ 32 I agree with what the court said and therefore believe that, at a minimum, the plaintiff should be required to explain to this court why sanctions should not be imposed in this case based upon Illinois Supreme Court Rule 375(b) (eff. Feb. 1, 1994). Rule 375(b) provides:

> "If, after consideration of an appeal or other action pursued in a reviewing court, it is determined that the appeal or other action itself is frivolous, or that an appeal or other action was not taken in good faith, for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, or the manner of prosecuting or defending the appeal or other action is for such purpose, an appropriate sanction may be imposed upon any party or the attorney or attorneys of the party or parties. An appeal or other action will be deemed frivolous where it is not reasonably well grounded in fact and not warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law. An appeal or other action will be deemed to have been taken or prosecuted for an improper purpose where the primary purpose of the appeal or other action is to delay, harass, or *cause needless expense*." (Emphasis added.)