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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PATRICIA HIGGINS,)	Appeal from the Circuit Court
)	of Cook County.
Plaintiff-Appellant,)	
)	
v.)	No. 14 L 7297
)	
UNITED CENTER JOINT VENTURE,)	The Honorable
)	John P. Callahan,
Defendant-Appellee.)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly granted UCJV's motion for summary judgment on both counts of Higgins's complaint alleging negligence and willful and wanton conduct.

¶ 2 Plaintiff, Patricia Higgins (Higgins), filed a two-count complaint against defendant, United Center Joint Venture (UCJV), alleging negligence and willful and wanton conduct, and seeking damages in excess of \$50,000 for injuries she allegedly sustained as a spectator during Game One of the 2013 Stanley Cup Finals at the United Center. The trial court granted UCJV's motion for summary judgment and dismissed Higgins's complaint with prejudice.

¶ 3 On appeal, Higgins contends that the trial court erred in granting UCJV’s motion for summary judgment because (1) her cause of action falls within the negligence exception to immunity in the Hockey Facility Liability Act (Hockey Act) (745 ILCS 52/10 (West 2014)); (2) there is a genuine issue of material fact as to the path or trajectory of the hockey puck that injured her; (3) the trial court made improper credibility determinations regarding deposition testimony; and (4) she presented evidence of UCJV’s willful and wanton conduct to preclude immunity under the Hockey Act. For the reasons that follow, we affirm.

¶ 4 **BACKGROUND**

¶ 5 On July 11, 2014, Higgins filed her initial two-count complaint against UCJV. Therein, Higgins generally alleged that on June 12, 2013, she attended Game One of the Stanley Cup Finals at the United Center, which is owned, operated, managed, and maintained by UCJV, that she sat in seat number 14, row 11, section 115, behind a safety net, and was struck by a hockey puck that was “shot off the ice.” Higgins specifically alleged in count I that UCJV “carelessly and negligently” installed, maintained, repaired, and inspected the safety nets, and in count II, that UCJV “wilful and wantonly” installed, maintained, repaired, and inspected the safety nets.

¶ 6 On August 29, 2014, UCJV filed a motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2014)), arguing that Higgins’s negligence claim is barred by the Hockey Act, which shields owners and operators of hockey rinks from liability unless the injury is attributable to a defect other than in the width or height of a safety device, and that she failed to allege sufficient facts to support the existence of any defect in the safety nets. UCJV also argued that Higgins failed to adequately plead facts to support a claim of willful and wanton conduct, namely “that UCJV deliberately intended to harm or utterly disregarded [Higgins’s] safety through its maintenance of the protective netting at the United

Center,” and, even if she could, her willful and wanton conduct claim is barred by the Hockey Act because the alleged improper maintenance of the safety nets does not constitute “any on-ice conduct connected with the game” of hockey as required by the Hockey Act.

¶ 7 Following a hearing on December 10, 2014, the trial court entered a case management order denying UCJV’s motion to dismiss as to count I (negligence), granting UCJV’s motion to dismiss as to count II (willful and wanton conduct), and granting Higgins leave to file an amended count II.

¶ 8 On January 9, 2015, Higgins amended count II of her complaint by adding the following italicized language:

“8. Notwithstanding its aforesaid duties, Defendant, UNITED CENTER JOINT VENTURE, was then and there guilty of one or more of the following acts and/or omissions:

- a. Wilfully and wantonly installed the safety net that *contained gaps, tears or improperly or overly stretched sections*, when it knew or, in the exercise of due care, should have known the net would not adequately protect spectators;
 - b. Wilfully and wantonly failed to properly inspect and maintain the safety net *by failing to discover gaps, tears or improperly or overly stretched sections*, when it knew or, in the exercise of due care, should have known the net would not adequately protect spectators;
9. Wilfully and wantonly failed to *replace* or repair the safety net *which contained gaps, tears or improperly or overly stretched sections*, when it knew or, in the exercise of due care, should have known it needed *replacing* or repairing because it would not adequately protect spectators.” (Emphasis added.)

¶ 9 On November 5, 2015, UCJV filed a motion for summary judgment pursuant to section 2-1005 of the Code (735 ILCS 5/2-1005 (West 2014)), arguing that Higgins's claims are barred by the Hockey Act. Attached to UCJV's motion for summary judgment were the discovery depositions of Higgins, her daughter Caitlin, Scott Boyke, James Koehler, Dan Johnson, KC Kaage, and Irvin Kaage.

¶ 10 Scott Boyke, who has been the conversion manager at United Center for the past 15 years, testified that he oversees the process of converting the arena for hockey, basketball, and concerts. He explained that the safety nets are fastened to a truss system "that runs the whole radius end of the rink," and when the arena is in a hockey configuration, the safety nets are lowered and attached to the tall plexiglass at the ends of the rink. He added that the dimensions of the safety nets are as mandated by the National Hockey League (NHL) and that he double-checks the safety nets hours before any hockey game. Since the introduction of the safety nets in 2002, Boyke has never seen a tear in the Kevlar safety nets and has never had to repair any safety nets.

¶ 11 James Koehler, who has been the general manager at United Center since 2000, testified that when the NHL mandated the installation of safety nets, UCJV selected Athletica Sport Systems from an NHL-approved list of vendors to engineer an automated safety net rigging system. Each year, at the end of the season, the safety nets are removed and donated to junior leagues or community rinks. Koehler testified that UCJV did not keep the safety net that was up at the time of Higgins's injury and "if there was a tear in the net, whether done inadvertently or [by] us raising or lowering or somehow there was a tear in the net, we are required to notify the NHL immediately, and that has never happened."

¶ 12 Caitlin, Higgins's daughter, testified that her family has had Chicago Blackhawks season tickets for two specific seats in the United Center since 2007. The seats are located in section 115, row 11. Caitlin testified that she sat in seat 14, next to her mom in aisle seat 15 at Game One of the 2013 Stanley Cup Finals. Before Game One, Caitlin had attended "over 100 games." Caitlin further testified that before the opening puck drop at every game, an announcement is broadcast warning spectators to be aware that pucks and sticks could come off the ice during play. She acknowledged that the same warning is printed on the back of her admission ticket. Caitlin testified that she did not see the path of the puck that struck her mom, nor did she hear the puck hit anything else before hitting her mom. She also testified that she did not observe any gaps, holes, or tears in the safety nets during the game. Caitlin viewed video footage of the play immediately preceding her mom's injury and noted Chicago Blackhawks Johnny Oduya's position at the center ice red line, near the penalty box, when he hit the puck that struck her mom.

¶ 13 Higgins testified that before Game One, she was aware of the possibility that a puck could come off the ice during play, into the seating area, and injure a spectator, having witnessed such occurrence once. She also observed four or five other occasions where no one was injured, but on all occasions, the puck entered the seating area "because it was able to go over the [short] glass in an area that the net does not cover." She added that she did not observe anything unusual about the safety nets, nor did she see a puck hit the safety net during the game. Higgins also viewed video footage of the play that resulted in her injury and testified that she did not see the path of the puck after it left Chicago Blackhawks Johnny Oduya's stick and before it struck her between the eyes.

¶ 14 Dan Johnson, a Chicago Blackhawks season ticket holder since 2008, with seats directly in front of Higgins and her daughter Caitlin, testified that he remembered “the shot going towards the glass” but lost sight of it at that time. He also testified that he did not hear the puck hit anything between when it left Oduya’s stick and when it struck Higgins, nor did he observe any holes, gaps, or tears in the safety nets throughout the course of the game. Johnson viewed video footage of Oduya’s shot and verified that it was the play immediately preceding Higgins’s injury.

¶ 15 Kent Christian Kaage (KC) testified that he attended Game One with his parents and sister and sat one row of seats in front of Higgins and Caitlin. When asked what he recalled happening on the ice just before Higgins was injured, KC answered:

“I remember Johnny Oduya, who is a left-handed shot, skating just about over the red line so that it wouldn’t be icing,^[1] and he attempted to take a slap shot and ring the puck around the glass. However, it missed the short glass; it went over by just a few inches. I saw the whole thing. I don’t know if Irv said how much he saw or he didn’t. But I saw the whole thing.

And the puck came up with pretty good force. It wasn’t tumbling or anything. It was spinning like a Frisbee. And it came and – my sister was sitting next to me so I grabbed [her with] my left hand like to kind of pull her away and then heard it hit something – I did not necessarily see it hit her – heard it hit something and tumble on the floor beneath my sister’s seat, at which point I dropped to my knees to retrieve the puck. And there

¹ “Icing is an infraction in the sport of ice hockey. It occurs when a player shoots the puck across both the centre red line and the opposing team’s goal line, and the puck remains untouched.” Wikipedia, “Icing (ice hockey),” [https://en.wikipedia.org/wiki/Icing_\(ice_hockey\)](https://en.wikipedia.org/wiki/Icing_(ice_hockey)) (last visited April 20, 2017).

was a man with hairy hands who's grabbing it, too, and I tried to rip it away from him until I realized I recognized his watch and that was my dad.

And so he grabbed it and stood up and proclaimed that he had it. And I, looking over his shoulder, saw what had happened to Patty and the blood on her jersey and everything, and I quickly ripped his arms down and said you gotta relax, you gotta sit down. And he said, 'What are you talking about? I just got a puck.' And I was like, 'Look at the woman behind you.' And we sat down and the medical people continued to take her away. And that was pretty much it."

¶ 16 KC further testified that the puck traveled no more than six inches over the short glass area and about eight to twelve feet wide of the tall glass and safety net. KC viewed video footage of Oduya's shot and testified that he never saw Oduya touch the glass and that it was a "straight shot over the top."

¶ 17 Irvin Kaage, KC's father, testified that he did not observe any holes, gaps, or tears in the safety nets after Higgins was injured. When asked what his response was to observing the puck go over the short glass, Irvin answered:

"Yeah. I mean, actually, I didn't see the puck come over the glass and make the bend around the net and hit [Higgins]. Okay? Obviously everything happened in a split second.

I remember looking down the ice and seeing Oduya take a slap shot, if you will, to ring it around the glass. Okay? And when he took that shot, for whatever reason I glanced off to my right for a second and then I heard – there was kind of a gasp in the crowd and then all of a sudden there was [a] clunk on the floor by my feet.

So I glanced away, heard the gasp, heard the clunk, looked down at my feet, saw the puck, and just instinctively went for the puck. Okay?”

¶ 18 The video footage of the play by Oduya with approximately one minute and thirty seconds left to play in the third period is contained in the common law record. The video footage depicts three different feeds of the same play wherein commentators stated, with one minute and thirty five seconds left in the third period: “Oduya sends his puck up the boards, but it climbs up the glass and out of play,” “I think we got an injury in the stands – someone got hit with that wayward puck – it doesn’t happen often anymore, but the nets can’t cover everything,” and “The shot in by Oduya went over the glass.”

¶ 19 On January 8, 2016, Higgins filed a response to UCJV’s motion for summary judgment, noting that UCJV “admits [Higgins] was behind protective glass, but only ‘partially behind’ the protective netting,” and arguing that there are genuine issues of material fact regarding the path of the hockey puck and UCJV’s failure to preserve the safety net prevents her from presenting “valuable evidence.” Higgins also argued that there is a genuine issue of material fact as to whether her injuries were caused by UCJV’s willful and wanton conduct because “UCJV alleges that the netting is not implicated to the occurrence, but the allegations of [her] Complaint and the evidence does specifically implicate the netting,” and UCJV presented no evidence that it was free of willful and wanton conduct in the installation, care, and maintenance of the safety nets.

¶ 20 On January 13, 2016, UCJV filed a reply in support of its motion for summary judgment, stating that the undisputed material facts prove that Higgins’s claims are barred by the Hockey Act. As grounds, UCJV cited the uncontradicted deposition testimony of KC that the puck crossed into the spectator area six inches above the short glass and eight to twelve feet wide of the safety nets and tall glass, and the deposition testimony of the occurrence witnesses that the

safety nets did not have any gaps, holes, or tears during the game. UCJV argued, accordingly, “the only criticisms of the spectator shielding devices in place at United Center on the evening of [Higgins’s] occurrence were that the protective glass was not tall enough and/or the spectator netting was not wide enough to cover the area where the hockey puck crossed into the seating area, neither of which are actionable theories based upon the Hockey Act.” UCJV also noted that Higgins’s arguments are “based entirely on inadmissible materials^[2] and her counsel’s speculation, that the subject hockey puck had to go through a gap, hole or tear in the spectator netting, which no one ever saw, in order to reach [her.]”

¶ 21 Following a hearing on February 19, 2016, the trial court granted summary judgment in favor of UCJV, stating as follows:

“Thank you, gentlemen, I appreciate your comments in addition to the briefing. I did spend time to read through all the depositions. It’s clear to this Court from the direct evidence that’s been elicited from witnesses, none of the witnesses other than K.C., the other ones that gave testimony, they all say they can’t disagree with K.C. in terms of the line of this puck shot. K.C.’s testimony to this Court was clear and convincing. It’s unrebutted.

I think some of the suggestions of the plaintiff rely on speculation. The only direct evidence to [*sic*] this Court has taken and has considered and given all reasonable inferences in favor of the non-moving party, I still think the motion for summary

² UCJV argued that the commentary of Dave Strader, “who was broadcasting the game for NHL International,” is hearsay and cannot be considered on summary judgment, and that the illustrative diagrams in Higgins’s response purportedly showing the path of the puck through the safety netting are inadmissible because they are not verified by any witness with personal knowledge of the occurrence.

judgment is properly brought and is going to be granted. Thank you very much, everybody.”

¶ 22

ANALYSIS

¶ 23

Summary judgment is appropriate “if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *North Community Bank v. 17011 South Park Ave., LLC*, 2015 IL App (1st) 133672, ¶ 15 (quoting 735 ILCS 5/2-1005(c) (West 2010)). “However, summary judgment requires the responding party to come forward with the evidence that it has—it is the put up or shut up moment in a lawsuit.” (Internal quotation marks omitted.) *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 14, quoted in *North Community Bank*, 2015 IL App (1st) 133672, ¶ 15; accord *Horwitz v. Holabird & Root*, 212 Ill. 2d 1, 8 (2004). Denials in an opposing party’s answer do not raise a material issue of genuine fact to preclude summary judgment. *Korzen*, 2013 IL App (1st) 130380, ¶ 49. When the party moving for summary judgment files supporting affidavits containing well-pleaded facts, and the opposing party files no counter-affidavits, the material facts set forth in the moving party’s affidavit are deemed admitted. *Id.* (construing *Patrick Media Group, Inc. v. City of Chicago*, 255 Ill. App. 3d 1, 6-7 (1993)). We review *de novo* the entry of summary judgment and may affirm on any ground appearing in the record. *Private Bank and Trust Co. v. EMS Investors, LLC*, 2015 IL App (1st) 141689, ¶ 15. In so doing, we will construe the record strictly against the moving party and liberally in favor of the nonmoving party. *Mitchell v. Village of Barrington*, 2016 IL App (1st) 153094, ¶ 25.

¶ 24

As a threshold matter, we note Higgins’s contention that the trial court made improper credibility determinations regarding deposition testimony in ruling on the motion for summary

judgment. *Coole v. Central Area Recycling*, 384 Ill. App. 3d 390, 396 (2008). Higgins “correctly points out [that] a trial court does not make credibility determinations or weigh evidence when ruling on a motion for summary judgment.” *Hollenbeck v. City of Tuscola*, 2017 IL App (4th) 160266, ¶ 34 (citing *Coole*, 384 Ill. App. 3d at 396). “However, as stated, our review on the grant of a motion for summary judgment is *de novo*, and ‘thus we are examining the depositions and pleadings anew to determine whether a material question of fact exists.’ ” *Id.* (quoting *Coole*, 384 Ill. App. 3d at 396). “As no deference is given to the trial court’s ruling, and as we are analyzing the court’s rulings on summary judgment anew, we need not address the merits of this particular issue.” *Id.* (citing *Coole*, 384 Ill. App. 3d at 396).

¶ 25 Next, Higgins contends that her cause of action falls within the negligence exception to immunity in the Hockey Act because she was seated completely behind the protective glass and netting. Higgins maintains that a strict interpretation of the word “behind” as used in the Hockey Act means that she was behind the protective glass and netting. However, Higgins ignores the plain language of the Hockey Act requiring that “the screen, protective glass, or similar device is defective (in a manner other than in width or height) because of the negligence of the owner or operator of the hockey facility,” which brings her outside of the negligence exception.

¶ 26 Section 10 of the Hockey Facility Liability Act provides:

“The owner or operator of a hockey facility shall not be liable for any injury to the person or property of any person as a result of that person being hit by a hockey stick or puck unless: (1) the person is situated behind a screen, protective glass, or similar device at a hockey facility and the screen, protective glass, or similar device is defective (in a manner other than in width or height) because of the negligence of the owner or operator of the hockey facility; or (2) the injury is caused by willful and wanton conduct, in

connection with the game of hockey, of the owner or operator or any hockey player or coach employed by the owner or operator.” 745 ILCS 52/10 (West 2016).

¶ 27 UCJV argues that Higgins’s seat was “only partially protected by the spectator netting and the portion of the rink to [her] right, where Oduya was located when he struck the puck that hit [her], was not covered by netting,” and that KC testified without dispute that the wayward puck traveled about six inches over the short glass area and eight to twelve feet wide of the tall glass and safety net. Where the undisputed deposition testimony of KC established that the wayward puck was shot six inches over the short glass and about eight to twelve feet wide of the tall glass and safety net, we agree with UCJV that the only possible “defects” with the protective devices in place during Game One were that the protective short glass was not tall enough and/or the protective netting attached to the tall glass was not wide enough to stop the puck, neither of which are actionable defects falling under the negligence exception. Because Higgins’s argument is based on the premise that the safety netting was “implicated,” a premise which we have rejected in light of KC’s undisputed deposition testimony that the puck did not pass through the safety net, we reject Higgins’s argument without further analysis. Likewise, we reject Higgins’s contention that she presented evidence of UCJV’s willful and wanton conduct to preclude immunity under the Hockey Act because it is also based on the premise that the safety netting was defective.

¶ 28 In reaching our conclusion, we necessarily reject Higgins’s contention that there exists a genuine issue of material fact as to the path or trajectory of the hockey puck that injured her because her attempt to demonstrate a genuine issue of material fact is nothing more than speculation based upon Irv Kaage’s deposition testimony “concerning the path and physical *possibility* of the puck,” and a sports commentator’s broadcast statement that the puck “climbed

the glass.” *Hollenbeck*, 2017 IL App (4th) 160266, ¶ 50; *Barr v. Cunningham*, 2017 IL 120751, ¶ 23.

¶ 29

CONCLUSION

¶ 30

For the reasons stated, we affirm the trial court’s judgment granting summary judgment in favor of UCJV.

¶ 31

Affirmed.