2013 IL App (1st) 083047-U

FOURTH DIVISION
November 7, 2013

Nos. 1-08-3047 and 1-09-2066, Consolidated



---

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

---

| | | |
|---|---|---|
| RITA DeVECCHIS,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>The CITY OF CHICAGO, a Municipal Corporation; GIBSONS, L.L.C., an Illinois Limited Liability Company; GIBSONS MANAGEMENT ASSOCIATES, L.L.C., an Illinois Limited Liability Company; RESTAURANT HOLDINGS, L.L.C., an Illinois Limited Liability Company; AMERICAN NATIONAL BANK AND TRUST COMPANY, as Trustee, Under Trust Number 55241, with LaSALLE BANK NATIONAL ASSOCIATION, as Successor Trustee Under Agreement Dated May 17, 1983; AMERICAN NATIONAL BANK AND TRUST COMPANY, Trust Number 7813 under | ) | Appeal from the Circuit Court of Cook County.<br><br>No. 03 L 10307<br>Renumbered as<br>No. 08 L 7314 |

| | | |
|---|---|---|
| agreement dated July 15, 1949, with LaSALLE BANK NATIONAL ASSOCIATION, as Successor Trustee; UNKNOWN BENEFICIARIES of Trust Number 7813 of American National Bank and Trust Company of Chicago, Under Agreement Dated July 15, 1949; UNKNOWN BENEFICIARIES of Trust Number 55241 of American National Bank and Trust Company of Chicago, Under Agreement Dated May 17, 1983; 2 EAST OAK, L.L.C., an Illinois Limited Liability Company, and HUGO RALLI, a resident of Illinois, | ) | Honorable |
| | ) | Bill Taylor, |
| Defendants-Appellees. | ) | Judge Presiding. |

PRESIDING JUSTICE HOWSE delivered the judgment of the court.
Justices Fitzgerald Smith and Epstein concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court's entry of summary judgment for defendant who failed to answer complaint, giving rise to genuine dispute of material fact, is reversed, and the trial court's judgment granting summary judgment in favor of the remaining defendants is affirmed because there is no evidence the remaining defendants appropriated a public sidewalk for their own use.

¶ 2 Plaintiff, Rita deVecchis, appeals from orders granting summary judgment to defendants Restaurant Holdings L.L.C. (RHL), Gibsons L.L.C., Hugo Ralli and trusts nos. 55241 and 7813 and their beneficiaries. The trial court found the defendants did not owe a duty of reasonable care to plaintiff because they did not control the public sidewalk where plaintiff's injury occurred. Plaintiff appeals claiming the trial court erred because there is a genuine question of material fact as to: (1) whether the defendants owned the sidewalk, and (2) whether the defendants exercised dominion and control over the sidewalk. We affirm in part and reverse in part for the reasons set forth below.

¶ 3 BACKGROUND

¶ 4 On August 27, 2003, plaintiff filed a complaint in the circuit court of Cook County seeking damages for personal injuries she received when her shoe became entangled in an area of the sidewalk in front of Gibsons Restaurant on Rush Street in Chicago. The complaint alleged the defendants were negligent in failing to inspect and maintain the sidewalk, failed to provide a safe means of ingress and egress for invitees, failed to warn plaintiff of the dangerous condition, and were otherwise careless and negligent.

¶ 5 In a discovery deposition, plaintiff, a resident of Philadelphia, testified that she was in Chicago on vacation with her husband on August 27, 2002. At about 8 p.m. that night, plaintiff and her husband walked from their nearby hotel towards Gibsons Restaurant, north on Rush Street. To reach the restaurant, the pair crossed Rush Street mid-block rather than going to the corner where there was a crosswalk. They observed at least four valets standing on the curb directly in front of Gibsons. They chose to access the curb at a point a few feet south of the valets and the entrance to Gibsons. From the street, plaintiff stepped over the curb, onto the sidewalk, and into what she described as a "depression area" where the heel of her shoe got caught. She did not remember what caught her shoe. She said her shoe was not caught in any type of sticky substance like tar or gum.

¶ 6 Plaintiff described the incident:

> "I stepped up and my husband was holding my arm, and my left foot went down, and it, the shoe that I had on just had a strap, a piece across the front, and it twisted. My foot twisted in the shoe,

> and the shoe sort of stayed there, and I started to fall because my other foot, you know, immediately went up, and I started to fall.
>
> My husband pulled me back *** and he was sort of holding me as I, you know, got my shoe and my foot were still in the thing and pulled it out."

¶ 7 Plaintiff did not fall down and does not know how her heel became wedged in the depression. She testified that her foot came partly out of the shoe, she slipped her foot back in, and was able to pull the shoe out of the depression. Plaintiff testified that she felt extreme pain in the heel of her left foot after the incident.

¶ 8 Plaintiff testified that prior to her injury, she crossed Rush Street in the middle of the block and did not use a designated crosswalk on the corner because "if we walked up to the corner and then crossed over, we would have to come all the way back down again because *** [Gibsons is] in the middle of the block."

¶ 9 Plaintiff testified that she does not look down when she walks and may have been looking at Gibsons as she stepped up from the street onto the sidewalk.

¶ 10 After plaintiff injured her foot, she testified she "hobbled" to a corner to regain her composure and "hobbled" to Gibsons. Plaintiff and her husband did not have dinner at Gibsons because the wait to be seated was about an hour. They decided to try another restaurant instead. Plaintiff's ankle did not swell and she could not recall whether the ankle hurt when touched.

¶ 11 The next day plaintiff could not put any weight on her foot and observed that the ankle had light bruising. That night they dined at Gibsons. After dinner, plaintiff informed the hostess

of her injury. She wanted to show the hostess where the injury occurred. The hostess contacted the manager John Coletti and plaintiff showed Coletti where her injury occurred.

¶ 12 Plaintiff and her husband drove back to Philadelphia on Thursday, the following day. Plaintiff did not seek medical attention during her stay in Chicago. On Friday, plaintiff went to a hospital near her home and was informed by a podiatrist that the fifth metatarsal, the bone on the left side of her left foot, was broken in two places. Plaintiff began a series of medical treatments for her injured foot.

¶ 13 Gibsons manager Coletti testified in a discovery deposition that he does not remember meeting plaintiff. Coletti testified that Gibsons' staff regularly cleans and sweeps the sidewalk where the injury occurred.

¶ 14 In its response to plaintiff's interrogatories, the city of Chicago stated that it holds the public right-of-way to the sidewalk in trust for the benefit of the public.

¶ 15 On June 3, 2005, the trial court granted defendant 2 East Oak's motion to dismiss.

¶ 16 Defendants RHL, Gibsons and the city of Chicago filed motions for summary judgment. (735 ILCS 5/2-1005 (West 2004)). Defendant Hugo Ralli subsequently filed a motion to join Gibsons' motion for summary judgment.

¶ 17 The trial court granted summary judgment for defendants RHL, Gibsons, and the city of Chicago. The trial court found RHL and Gibsons did not undertake a duty of maintaining the sidewalk because they did not appropriate a part of the sidewalk and the injury occurred in an area "quite a distance away from the entranceway." The trial court found the city was immune under section 3-102 of the Local Governmental and Governmental Employees Tort Immunity

Act (745 ILCS 10/3-102 (West 2004)). Plaintiff's motion to reconsider was denied.

¶ 18 The city filed a confession of error regarding the trial court's order granting summary judgment for it and asked that the trial court's order be vacated and the matter reinstated. The trial court vacated its order granting summary judgment in favor of the city. The trial court then made a Rule 304(a) finding (Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010)) with regard to the order granting summary judgment to RHL and Gibsons. Plaintiff appealed.

¶ 19 Ralli and the remaining defendant trusts, including trust no. 55241, then filed a motion for summary judgment. The trial court granted the motion for summary judgment on July 9, 2009 and made a Rule 304(a) finding. Plaintiff filed a timely appeal of the order. Both of plaintiff's appeals have been consolidated here.

¶ 20 ANALYSIS

¶ 21 Summary judgment is proper if, when viewed in the light most favorable to the nonmoving party, the pleadings, depositions, admissions, and affidavits on file demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2004). Summary judgment is a drastic means of disposing of litigation and should be allowed only when the right of the moving party is clear and free from doubt. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 43 (2004). Our review of the trial court's grant of summary judgment is *de novo*. *Illinois State Chamber of Commerce v. Filan*, 216 Ill. 2d 653, 661 (2005).

¶ 22 To properly state a cause of action for negligence, a plaintiff must establish that the

defendants owed her a duty of reasonable care, that there was a breach of that duty by the defendants, and that the plaintiff's injury was proximately caused as a result of the breach. *Burke v. Grillo*, 227 Ill. App. 3d 9, 14-15 (1992). In the absence of a showing of facts from which the court could infer the existence of a duty to the plaintiff, no recovery is possible as a matter of law, and summary judgment in favor of the defendant is proper. *Burke*, 227 Ill. App. 3d at 15.

¶ 23 A landowner generally owes no duty to ensure the safe condition of a public sidewalk abutting that property. *Burke*, 227 Ill. App. 3d at 16. An abutting landowner may be held responsible for the condition of a public sidewalk if he assumes control of it for his own purposes. *Burke*, 227 Ill. App. 3d at 16-17. An owner or occupier of premises has a duty to insure that a public sidewalk is safe only when it appropriates the sidewalk for its own use, or where the dangerous condition was caused by the owner or occupier of the premises. *Evans v. Koshgarian*, 234 Ill. App. 3d 922, 925 (1992).

¶ 24 Ownership and Control of the Sidewalk

¶ 25 Plaintiff claims the trial court entered summary judgment prematurely because there exists a genuine issue of material fact as to whether the defendants owned and controlled the sidewalk where plaintiff's injury occurred. In their motions for summary judgment, the defendants maintain that the area where plaintiff's injury occurred was on a public sidewalk which they do not own or control. Defendants rely upon the deposition testimony of John Coletti, the affidavit of Hugo Ralli, and the answer to interrogatories submitted by the city to show they did not own or control the sidewalk.

¶ 26 Coletti, Gibsons' general manager, testified that if there is trouble with the sidewalk he would contact the city [because] "[i]t's a city sidewalk."

¶ 27 In Ralli's affidavit, he attested that Gibsons did not have control over the area where plaintiff's injury occurred.

¶ 28 In answers to interrogatories propounded by plaintiff, the codefendant city of Chicago (not a party to this appeal) admitted it "holds the public right of way in question in trust for the benefit of the public." When asked in another interrogatory for the identity of the person or entity responsible for the management and control of the sidewalk at or near Gibsons, the city responded: "Upon notice given to the City of Chicago and if and when repairs are needed, the Department of Transportation would handle such repairs."

¶ 29 Defendants presented evidence, including the Coletti deposition, the city of Chicago admission, and the Ralli affidavit, to show that the sidewalk is owned by the city. Plaintiff argues the trial court's grant of summary judgment was improper because trust no. 55241 has admitted ownership and control of the sidewalk by (1) failing to answer the complaint and (2) in its motion for summary judgment. Plaintiff argues that the trust admitted ownership because the trust failed to answer the complaint and, under the law, all well-pled allegations made in a complaint are deemed admitted when a party fails to file an answer. In the complaint plaintiff alleged that trust no. 55241 owned, operated and maintained the sidewalk and surrounding premises.

¶ 30 Plaintiff's second amended complaint contains the following allegations:

"6. At all times relevant herein, Defendant [trust no. 55241] was, and still is, the owner of record for some or all of the subject premises herein described, and, upon information and belief, was possessed of an ownership and operational interest in the subject premises, located at and commonly known and described as 1028 North Rush Street, Chicago, Illinois 60611.

***

35. Pleading in the alternative, at all times relevant herein, [trust no. 55241] owned, operated, controlled, and maintained Gibson's Steakhouse and the surrounding cement and walkways located at 1028 North Rush Street, Chicago, Illinois 60611.

36. Pleading in the alternative, [trust no. 55241] were charged with the duty of inspecting and maintaining the sidewalk surrounding Gibson's Steakhouse, including, but not limited to, the sidewalk at or near the ingress and egress to the restaurant, in such a manner as to avoid causing injury, damage or harm to the Plaintiff.

37. Pleading in the alternative, contrary to and in breach of said duties, [trust no. 55241] were guilty of one or more of the following negligent acts:

(a) Failed to properly inspect and maintain the walkways surrounding the restaurant building;

(b) Failed to provide a safe means of ingress and egress for its invitees;

(c) Failed to warn Plaintiff of the dangerous condition of the walkways surrounding the restaurant property; and

(d) was otherwise careless and negligent."

¶ 31 Also, in trust no. 55241's motion for summary judgment, its attorney stated the trust "does not control, possess or manage the premises in question and merely *holds title* pursuant to the provisions of the trust agreement." (Emphasis added.) Based on the foregoing two admissions, plaintiff argues a genuine issue of material fact exists concerning the ownership of the sidewalk and the extent of control exercised over the sidewalk by trust no. 55241.

¶ 32 Turning to the first admission based on trust no. 55241's failure to answer, defendants respond the failure to answer the complaint is not an admission because plaintiff only alleged ownership of the subject property "on information and belief" and a "failure to answer a statement made on information and belief in the pleading is not an admission." *Terminal-Hudson of Illinois, Inc. v. Goldblatt Brothers, Inc.*, 51 Ill. App. 3d 199, 204 (1977). Defendants also argue that a failure to answer a complaint is not an admission of allegations pled in the

alternative. Finally, defendants argue that the trust did not admit the statement in the complaint that the trust failed to properly inspect and maintain the sidewalk because those are legal conclusions.

¶ 33 First, plaintiff's only allegation on information and belief was that trust no. 55241 was possessed of an ownership and operational interest in the subject premises. Although plaintiff argued that trust no. 55241 admitted the well-pled facts in paragraphs 35 and 37 of plaintiff's second amended complaint, we find that the operative allegations in the complaint for purposes of determining defendants' right to summary judgment which the trusts have admitted are found in paragraph 35, in which plaintiff affirmatively alleges that trust no. 55241 "owned, operated, controlled, and maintained Gibson's Steakhouse and the surrounding cement and walkways."

¶ 34 A failure to answer a compliant results in an admission of all well-pled allegations in the complaint. *Charter Bank v. Eckhart*, 223 Ill. App. 3d 918, 924 (1992). We note that plaintiff here filed an unverified complaint. Admissions in unverified pleadings are considered admissions against interest, which are not conclusive against the pleader and may be explained or contradicted. *Bartsch v. Gordon N. Plumb, Inc.*, 138 Ill. App. 3d 188, 197 (1985). This type of admission constitutes a non-binding evidentiary admission as opposed to a judicial admission. *Bartsch*, 138 Ill. App. 3d at 197. Here, as a result of the failure of trust no. 55241 to answer the unverified complaint, there is an evidentiary admission by the trust that it owns and controlled the sidewalk.

¶ 35 The failure to file an answer does not result in an admission of the truth of legal

conclusions alleged, and is not an admission that the facts alleged constitute a cause of action. *Eckhart*, 223 Ill. App. 3d at 924. Plaintiff alleged that trust no. 55241 breached their alleged duties in one or more of several enumerated ways. "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). "Whether a defendant's action or omission represented a breach of duty and whether such action or omission proximately caused the plaintiff's injury or death are generally issues of fact to be decided by a jury." *Calloway v. Bovis Lend Lease, Inc.*, 2013 IL App (1st), ¶78. However, "[i]n any negligence action, it must first be determined as a matter of law whether defendant owed a duty to plaintiff. Such determination is for the court alone. [Citations.] Only after the trial court determines the existence of a duty does the trier of fact consider the breach of that duty, injury to the plaintiff by the breach of the duty, proximate cause and damages." *Trucco v. Walgreen Co.*, 219 Ill. App. 3d 496, 498 (1991). Plaintiff's legal conclusions are not admitted by defendant's failure to answer the complaint. *Eckhart*, 223 Ill. App. 3d at 924. Trust no. 55241's failure to answer does not result in an admission it either owed plaintiff a duty or breached a duty to plaintiff. Nonetheless, the failure to answer the allegation that trust no. 55241 "owned, operated, controlled, and maintained Gibson's Steakhouse and the surrounding cement and walkways" is an evidentiary admission of those facts.

¶ 36 Defendants' only argument in support of the conclusion that a failure to answer allegations pled in the alternative is not an admission of those allegations is that, because the allegations are pled in the alternative, plaintiff is in doubt as to the truth of those allegations. See

735 ILCS 5/2-613 (West 2004). Defendants take the position that the failure to answer an allegation about which the plaintiff has doubt should not constitute an admission. We find no authority for defendants' conclusion and reject it as untenable. First, neither *Heastie v. Roberts*, 226 Ill. 2d 515, 557-58 (2007), or *Daehler v. Oggoian*, 72 Ill. App. 3d 360, 369 (1979), hold that the failure to answer an alternate allegation in a complaint does not constitute an admission of the factual allegation. In *Heastie*, our supreme court held that "Illinois law unquestionably allows litigants to plead alternative grounds for recovery, regardless of the consistency of the allegations, as long as the alternative factual statements are made in good faith and with genuine doubt as to which contradictory allegation is true." *Heastie*, 226 Ill. 2d at 557-58. The *Heastie* court did not hold that the making of alternative factual statements would negate the effect of an admission as to one of them. The court did, however, state that it could see no reason why the plaintiff could not use facts adduced or admitted by the defendants to buttress an alternative theory of recovery. *Id*. at 556. Thus, *Heastie* actually supports finding that an admission is effective even as to alternative allegations.

¶ 37 In *Daehler*, the court held that "[a] party may plead inconsistently when he is not sure whether 'the facts belie the alternative.' [Citation.] This means that when a party lacks knowledge of the facts, he may plead inconsistently." *Daehler*, 72 Ill. App. 3d at 370. *Daehler* did not discuss the effect of an admission, due to failure to answer, on an alternate allegation of fact. *Daehler* does, however, support our holding that the alternate pleading does not negate trust no. 55241's admission. In *Daehler*, the court held that the trial court properly struck the

defendant's first affirmative defense because verified allegations of the second affirmative defense were "binding judicial admissions which render insufficient the allegations of the first affirmative defense." *Id*. at 365. The court held that the trial court properly struck the second affirmative defense based on the statute of frauds. *Id*. at 365-66. The court did not state that the defendant's second affirmative defense was infirm due to his alternate pleading of the first affirmative defense. That is the result defendants urge in this case. Defendants would have this court find that plaintiff's allegation of fact, which trust no. 55241 has admitted, is not a well-pled allegation for purposes of the rule that where no answer is filed, all well-pled facts are admitted. *Eckert*, 223 Ill. App. 3d at 924. See also 735 ILCS 5/2-610(b) (West 2004) ("Every allegation, except allegations of damages, not explicitly denied is admitted."). That holding would be directly contrary to section 2-613(b), which provides that "[a] bad alternative does not affect a good one." 735 ILCS 5/2-613(b) (West 2004). Therefore, we cannot say the presence of alternative allegations negates trust no. 55241's admission.

¶ 38 Defendants also cited 30 Ill. Law & Prac., *Pleading* in support of their argument that the failure to answer an allegation made on information and belief is not an admission. Illinois Law and Practice also addresses alternate pleadings, and states that:

> "The sufficiency of each count in the ultimate resolution of a claim for relief is a separate legal question. The basis of the rule is that trial proof will determine whether and upon which set of facts the plaintiff may be granted relief. Each count, in this aspect, stands

> alone, and an averment in one count is precluded from denying the validity of an averment in another." 30 Ill. Law & Prac., *Pleading* § 5 (2013).

¶ 39 Plaintiff's allegations that trust no. 55241 owns and controlled the subject property stand alone. Plaintiff's allegations that other entities owned and controlled the property are precluded from denying the validity of the allegation that trust no. 55241 owns and controlled the property. Trust no. 55241 admitted the allegations when it failed to answer, despite the fact that the allegation was pled in the alternative. In this case, the set of facts upon which plaintiff may be granted relief was determined by trust no. 55241's failure to answer.

¶ 40 Next, defendants argue that the statement in the motion for summary judgment that the trust holds title does not result in an admission of ownership of the subject property because "ownership" in this context does not mean "title." Rather, ownership requires "control" and the "admission" in the motion for summary judgment states that the trust does not "control, possess or manage" the subject property. Defendants argue there is no genuine issue of material fact as to who "controls" the subject property because the city admitted it controlled the subject property. Plaintiff responds that a reasonable inference from the trust's admission of "ownership" is that it has assumed control of the subject property, and all reasonable inferences must be drawn in favor of the non-movant. Plaintiff argues a genuine dispute of facts exits as to control of the sidewalk because of the reasonable inference of control, the fact that Gibsons fastidiously maintained the sidewalk and used it for its valet service, and the fact that the city did

not expressly admit it had exclusive control of the subject property. The city denied ownership and only admitted that it holds the public right-of-way in trust for the benefit of the public and that its Department of Transportation would make repairs.

¶ 41 We need not address defendants' argument that the statement in the motion for summary judgment is not an admission of ownership because the statement only admits to owning title and in this context ownership requires control. We have no need to address this argument because plaintiff's second amended complaint alleged that trust no. 55241 "owned, operated, *controlled*, and maintained Gibson's Steakhouse and the surrounding cement and walkways." (Emphasis added.) For the reasons set forth above, we find that trust no. 55241 admitted that allegation when it failed to answer, including the allegation that it "controlled" the area at issue. Defendants' arguments are, therefore, inapposite.

¶ 42 We acknowledge that there is an admission by the city that it makes repairs to the sidewalks when necessary and that Illinois courts have long recognized that Chicago streets and sidewalks are owned by the people of the city:

> "The streets of a city from side to side and from end to end belong to the people, and they primarily have the right to the free and unobstructed use thereof. The sidewalks are part of the street." *King v. Swanson,* 216 Ill. App. 294, 298 (1919).

¶ 43 The failure by trust no. 55241 to answer the complaint constituted an evidentiary admission that it both owned and controlled the sidewalk. There is, at minimum, a question of

fact as to both ownership and control of the subject area. "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*, 211 Ill. 2d at 43. We have determined that a material question of fact exits. Accordingly, summary judgment in favor of trust no. 55241 was improper. *Id*. ("A triable issue precluding summary judgment exists where the material facts are disputed").

¶ 44 Plaintiff also claims summary judgment was improper because the defendants conducted a business which obligated them to ensure that its invitation to come onto the premises could be safely exercised by their patrons, citing *Cooley v. Makse*, 46 Ill. App. 2d 25 (1964). In *Cooley*, the plaintiff was injured when he fell over some loose bricks in a brick walk leading from concrete steps at the front door of defendant tavern, set back about 12 feet from the inner edge of the sidewalk. *Cooley*, 46 Ill. App. 2d at 26-27. The walk had been in poor condition for a number of years. The Second District found that the brick walk was a means of ingress and egress to the tavern. Its deterioration was caused by the natural growth of a tree and its roots. *Cooley*, 46 Ill. App. 2d at 28. While the walk was located on a city easement, the general public did not traverse its path. *Cooley*, 46 Ill. App. 2d at 28. The walk was exclusively used by those entering and exiting the tavern. *Cooley*, 46 Ill. App. 2d at 30-31.

¶ 45 The instant case is distinguished from *Cooley* because the area where plaintiff's injury occurred is located on a sidewalk constructed for use by the general public; unlike *Cooley,* where the brick walk was exclusively used by tavern patrons. The sidewalk area here is not used exclusively for the ingress and egress to Gibsons, unlike *Cooley*, where it was undisputed that the

brick walk was used exclusively for the ingress and egress to the tavern. Therefore, *Cooley* does not create a duty to the plaintiff.

¶ 46 Appropriation of Sidewalk or Creation of a Dangerous Condition

¶ 47 The defendants as owners or occupiers of premises have a duty to insure that a public sidewalk is safe only when they appropriate the sidewalk for their own use, or where the dangerous condition was caused by the owner or occupier of the premises. *Evans*, 234 Ill. App. 3d at 925. We next consider whether defendants appropriated the sidewalk for their own use or whether they created a dangerous condition. Appropriation occurs where a defendant blocks the sidewalk, displays goods, or otherwise prevents the public from using it in its intended and ordinary manner. *Evans*, 234 Ill. App. 3d at 926.

¶ 48 A. Gibsons Awning

¶ 49 Plaintiff claims that Gibsons has appropriated the sidewalk for its own use by maintaining an awning over a portion of the sidewalk, citing *Gilmore v. Stanmore, Inc.*, 261 Ill. App. 3d 651 (1994). The evidence in the instant case shows that Gibsons constructed an awning over its ingress and egress, beginning at the restaurant door and ending at the curb where the valets were located when plaintiff's injury occurred. The awning shielded customers from the elements.

¶ 50 In *Gilmore*, we held that the law imposed a duty of reasonable care upon a private entity who obstructed a public sidewalk by building a construction canopy on it which extended six feet onto the street. The presence of the canopy on the street obscured the vision of both motorists and pedestrians and prevented motorists from taking evasive actions to avoid an accident.

*Gilmore*, 261 Ill. App. 3d at 653. We found that by placing the construction canopy on the street the defendants owed a duty of reasonable care to those lawfully using the street. *Gilmore*, 261 Ill. App. 3d at 657.

¶ 51 The *Gilmore* case can be distinguished from this case. Gibsons' awning is not a construction canopy as was erected in *Gilmore*. Gibsons' awning did not extend out onto the street or sidewalk as did the construction canopy in *Gilmore*, and there is no evidence that Gibsons' awning obstructed the sidewalk. In *Gilmore*, the defendant clearly appropriated part of the street by extending the canopy onto six feet of the street, taking part of the street and blocking the vision of motorists. We cannot say Gibsons appropriated the sidewalk by erecting an overhead awning because there is no evidence the awning obstructed the sidewalk or hindered the general public from using the sidewalk. The awning did not hinder ingress and egress into the restaurant, was not located on the area where plaintiff's injury occurred, and there is no evidence its placement was the proximate cause of plaintiff's injuries.

¶ 52 B. The Valets

¶ 53 Plaintiff claims that the valets proximately caused her injuries because they obstructed pedestrian access to the entrance to Gibsons and caused congestion, citing *Friedman v. City of Chicago*, 333 Ill. App. 3d 1070 (2002). In *Friedman,* the defendant restaurant blocked the path to its front door by erecting an outdoor seating area. *Friedman*, 333 Ill. App. 3d at 1072. The plaintiff was injured when she fell on uneven sidewalk as she walked around the outdoor seating area. *Friedman*, 333 Ill. App. 3d at 1072. We found the restaurant owed the plaintiff a duty of

care when it appropriated the sidewalk by erecting the outdoor seating and forcing pedestrians to walk around the seating. *Friedman*, 333 Ill. App. 3d at 1075.

¶ 54 *Friedman* is distinguishable because the valets are not stationary objects and plaintiff testified the valets would have moved aside had she made such a request. Gibsons did not erect any barrier to plaintiff's access to the front door of the restaurant. We cannot equate, as plaintiff suggests, the moveable valets, helping patrons exit their automobiles at the curb, to the stationary tables and chairs of the outdoor café in *Friedman*.

¶ 55 In *Friedman*, we discussed the following burden analysis:

¶ 56 "Generally, '[i]n considering whether a duty exists in a particular case, a court must weigh the foreseeability that defendant's conduct will result in injury to another and the likelihood of an injury occurring, against the burden to defendant of imposing a duty, and the consequences of imposing this burden.' " (Internal citation omitted.) *Friedman*, 333 Ill. App. 3d at 1073.

¶ 57 We cannot say that the placement of valets at a curb to assist patrons accessing a restaurant by motor vehicle is conduct that will even necessitate the burden analysis in *Friedman*.

¶ 58 In addition, the decision in *Friedman* applies to the particular facts of that case. As we stated in *Friedman:*

"To be clear, we are not imposing a duty upon defendants

> to repair or maintain the public sidewalk. We find that by sectioning off a portion of the sidewalk for use as an outdoor café, the defendants subjected themselves to the duty to act with reasonable care toward anyone lawfully on the sidewalk."
>
> *Friedman*, 333 Ill. App. 3d at 1075.

¶ 59 In the instant case, there is no evidence to suggest, as in *Friedman*, that Gibsons erected a barrier like an outdoor café, subjecting themselves to a duty of reasonable care to anyone lawfully on the sidewalk. As a result, we cannot say *Friedman* is applicable here.

¶ 60 C. Voluntarily Inspecting and Maintaining the Sidewalk

¶ 61 Plaintiff claims Gibsons created a duty of care to maintain the sidewalk when it voluntarily undertook a policy of daily maintenance, inspection and cleaning of the sidewalk. The trial court rejected this claim relying on *Schuman v. Pekin House Restaurant and Lounge*, 102 Ill. App. 3d 532 (1981). In *Schuman*, the plaintiff was injured after she fell on an uneven and cracked sidewalk in front of defendant restaurant. *Schuman*, 102 Ill. App. 3d at 533. We held that the defendant did not exercise control over the sidewalk by merely regularly sweeping debris. *Schuman*, 102 Ill. App. 3d at 533.

¶ 62 Plaintiff claims the trial court's reliance on *Schuman* is misplaced because Gibsons' actions in caring for the sidewalk are more extensive than merely sweeping debris. Plaintiff claims Gibsons' managers are responsible for policing the sidewalk on a daily basis. Defendant Ralli testified the managers are responsible for the maintenance of the sidewalk and that if he

observed a problem he would take care of it himself or find an employee to do so. Ralli also testified that if he was aware of a structural defect, he would ask or direct someone to attend to it.

¶ 63 However, we cannot say plaintiff's claims are persuasive because of the long established rule that an owner or occupier of premises is not liable for personal injuries that occurred on a public sidewalk not under its control unless the owner or occupier creates the unsafe condition. *Decker v. Polk Bros.*, 43 Ill. App. 3d 563, 566 (1976) ("The sidewalk in question is owned, controlled, and maintained by the City of Chicago and is used by the public at large--not just by patrons of defendant. No evidence was adduced showing that defendant ever exercised any control over the area."). With the exception of trust no. 52241, the evidence here shows the sidewalk is not under the remaining defendants' control, and there is no evidence the defendants created an unsafe condition. Thus, we cannot say the trial court erred when it relied on *Schuman* in support of its finding that defendants did not owe plaintiff a duty of reasonable care.

¶ 64 Next, plaintiff claims "[t]he trial court's ruling ignores, is at odds with, and is in direct conflict with long established Illinois law," citing *McDonald v. Frontier Lanes, Inc.*, 1 Ill. App. 3d 345 (1971). In *McDonald*, the plaintiff was injured when she stepped into a hole in a parkway, owned by the City of Elgin, and used as an ingress and egress to a parking lot maintained by the defendant for its tavern and bowling patrons. *McDonald*, 1 Ill. App. 3d at 348. The record showed that the defendant knew of the existence of the hole, its customers regularly drove or walked over the parkway to enter and exit the bowling alley parking lot, and that it was common for customers to park on the parkway. *McDonald*, 1 Ill. App. 3d at 349-50. The

Second District held that these facts revealed that the defendant controlled the sidewalk and parkway and therefore owed a duty to invitees to ensure the safe condition of the parkway. *McDonald*, 1 Ill. App. 3d at 352.

¶ 65 *McDonald* can be distinguished on the facts because the plaintiff in that case was injured after she exited the bowling alley, walked upon a parkway that acts as the only area of ingress and egress, and then fell into a hole the owner of the bowling alley knew existed. Here, unlike *McDonald,* the plaintiff's injury did not occur on the ingress and egress, and there is no evidence Gibsons controlled the area or had knowledge of a defect on the sidewalk. Further distinguishing the instant case from *McDonald* are the facts that plaintiff here chose to cross Rush Street in the middle of the block instead of using a designated crosswalk, chose not to access the regularly used ingress and egress to Gibsons, chose not to ask the valets to move, chose to access a portion of sidewalk near Gibsons, next to the ingress and egress area, a step up form the street, containing a small space between a tree, that had its base covered by a grate, and a lamppost. Plaintiff was injured when she stepped over the curb from the street apparently into a crack between the curb and the sidewalk. There is no evidence in the record to show defendants had any knowledge that a dangerous condition existed ro that a dangerous condition was obvious. As a result, we cannot say that *McDonald* is applicable.

¶ 66 D. Net Effect of Gibson's Conduct

¶ 67 Plaintiff argues that Gibson's conduct in maintaining the sidewalk, including repairing structural defects, sweeping, squegeeing, power-washing, salting, and shoveling, and the

existence of the valet stand and awning, viewed in their totality, creates a genuine issue of material fact as to whether defendants appropriated the sidewalk for its own business purposes such that a duty of care exists. In other words, defendants' right to summary judgment on the issue of appropriation is not clear and free from doubt.

¶ 68 We have already found that Gibsons did not appropriate the sidewalk by erecting an overhead awning, by the placement of valets at a curb to assist its patrons, or by its policy of daily maintenance, inspection and cleaning. Having found that *none* of these acts constitute appropriation individually, we cannot find that these acts constitute appropriation in the aggregate. See generally *People v. Doyle*, 328 Ill. App. 3d 1, 15 (2002) ("The resolution of the general argument that the cumulative effect of various trial errors warrants reversal will depend upon the appellate court's evaluation of the individual errors. [Citation.] Where the alleged errors do not amount to reversible error on any individual issue, there generally is no cumulative error.").

¶ 69 In the instant case, we cannot say Gibsons performed an affirmative act of appropriation because there is no evidence that Gibsons blocked the sidewalk, or allowed patrons to park vehicles on the sidewalk, or that the sidewalk was used exclusively for means of ingress to and egress from the restaurant, or that Gibsons displayed goods, or prevented the public from using the sidewalk in its intended and ordinary manner. Also, the injury occurred just to the south of the restaurant's designated ingress and egress area.

¶ 70 Landlord Liability

¶ 71 Finally, plaintiff argues that trust no. 52241 is not entitled to summary judgment because there is a genuine issue of material fact as to whether the trust breached is duty as a landlord to plaintiff as a guest or invitee. Defendants argue, as they did before, that the trust is not a landlord because it does not "control" the subject property. A genuine issue of fact exists as to whether trust no. 55241 controlled the subject property. As a landlord with control over the property, trust no. 55241 "owed plaintiff the duty of exercising ordinary care to keep those portions of the premises which were under his control *** in a reasonably safe condition." *Fugate v. Sears, Roebuck & Co.*, 12 Ill. App. 3d 656, 669 (1973). See also *Howle v. Aqua Illinois, Inc.*, 2012 IL App (4th) 120207, ¶58 ("It is well settled in Illinois that a landlord is not liable for injuries caused by a defective or dangerous condition on premises leased to a tenant and under the tenant's control. [Citation.] A lessor who relinquishes control of a property by leasing it to another owes no duty to a third party who is injured while on the leased property. [Citation.] The rationale underlying this policy is that conveyance of the property ends the lessor's control over the premises, which is a prerequisite to the imposition of liability.") (Internal quotation marks omitted.) Trust no. 55241 may be liable to plaintiff if it breached its duties as a landlord. Because a genuine dispute of the facts that would determine whether trust no. 55241 owed plaintiff a duty as a landlord exists, summary judgment in favor of trust no. 55241 was not appropriate. *Jones v. O'Brien Tire and Battery Service Center, Inc.*, 374 Ill. App. 3d 918, 933 (2007) ("Ordinarily, the existence of a duty is a question of law to be determined by the court. [Citation.] However, where the duty depends on the existence of facts that are in dispute, the existence of the relevant facts presents a question for the jury to resolve.").

¶ 72 CONCLUSION

¶ 73 The trial court erred when it granted summary judgment in favor of trust no. 55241. Trust no. 55241's failure to answer the second amended complaint resulted in admissions which create genuine disputes of material fact. The trial court did not err when it granted summary judgment in favor of the remaining defendants. For the foregoing reasons, we affirm the trial court's judgment in part, reverse in part, and remand for further proceedings consistent with this order.

¶ 74 Affirmed in part, reversed in part, and remanded.