2012 IL App (1st) 113448-U

THIRD DIVISION
June 29, 2012

No. 11-3448

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

HALINDA DYMORA,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 10 L 3010
	)	
JEWEL FOOD STORES,	)	The Honorable
	)	Eileen Mary Brewer,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE SALONE delivered the judgment of the court.
Justices Neville and Murphy concurred in the judgment of the court.

O R D E R

Held: The trial court properly found that plaintiff's failure to present evidentiary materials which established a breach of duty and proximate cause was a reason to grant defendant's motion for summary.

¶ 1 Plaintiff, Halina Dymora, appeals from the trial court's grant of summary judgment in favor of defendant, Jewel Food Stores, in her negligence action for injuries she sustained as a result of a slip and fall accident in defendant's grocery store in Niles, Illinois.

¶ 2 Plaintiff fell in the produce department of a store owned by defendant on March 9, 2008. At her deposition, plaintiff testified she sustained injuries after she slipped and fell on an object that was light in color, six inches in length and one inch wide, made of plastic or metal. Plaintiff was unsure how long the object was present on the floor or what the object was. She did not believe it was a stick from a sucker. Plaintiff stated that when she fell, Robert Jakobsze, a store employee came over and picked up the object that caused her fall. When plaintiff asked for the object, Mr. Jakobsze refused, stating he was going to give it to the store manager. Plaintiff testified that despite her requests, Mr. Jakobsze refused to allow her to view the object.

¶ 3 Michael Vallejo, the Assistant Store Director, investigated the incident after being summoned to the scene by a call from the Service Desk. He testified at his deposition that plaintiff fell in the produce department, approximately 40 to 50 feet from the store entrance. Robert Jakobsze, a grocery bagger, was the first store employee to respond to plaintiff's fall. Mr. Vallejo described Mr. Jakobsze as having "learning difficulties," stating he was "easily confused" and "instructions usually given to [Mr. Jakobsze] are simple and straightforward." Once on the scene, Mr. Vallejo offered plaintiff his assistance, took her personal information, and completed an incident report[1]. Mr. Vallejo recalled plaintiff stating she slipped on something on the floor.

[1] This report was reviewed *in camera* by the court and determined to be privileged after plaintiff filed a motion to compel.

He found an object he described as looking like a "Tootsie Roll stick." He described it as four to five inches long, white in color, dirty and not completely round. It appeared to him that someone may have stepped on it. Mr. Vallejo was unable to identify where the stick came from. Mr. Vallejo testified he had never seen an employee walking around the store with a sucker in their mouth and that store policy prohibits employees from eating outside designated areas. He testified he put the stick and his report on the Store Director's desk, and left her a message. Mr. Vallejo was unsure what the store director did with the stick.

¶ 4 Plaintiff testified that a woman arrived on the scene after Mr. Jakobsze and she "introduced herself as a manager and she said that nothing had happened. What do I want." Plaintiff showed the woman her knee, which was bleeding. The woman summoned Mr. Vallejo. Plaintiff described her fall and complained to Mr. Vallejo about her back, left arm, ankle, and knee. Plaintiff asked to make an incident report, but Mr. Vallejo refused to write anything down. Plaintiff threatened to call the police, which she claims prompted Mr. Vallejo to write the report. Within ten minutes of her fall, plaintiff purchased the onion she had come in to the store for and left. The following day, she sought medical treatment for her injuries. Plaintiff testified she hurt her hand, knee and ankle. She began physical therapy and was prescribed Vicodin. She acknowledged the "orthopedic doctor" told her "it was probably my age that caused all that." After seeing a few doctors, an MRI confirmed a torn tendon in plaintiff's ankle. Plaintiff had surgery on her ankle in 2010.

¶ 5 Plaintiff filed her original complaint on March 9, 2010, alleging defendant's negligence caused her to slip and fall on "a piece of wood," resulting in her injury. Defendant filed a

motion for summary judgment contending plaintiff could not prove what caused her fall or how long the object existed on the floor. The court granted defendant's motion for summary judgment finding "no genuine issue of material fact as to actual or constructive notice" and granted plaintiff leave to file an amended complaint alleging spoilation of evidence.

¶ 6 On August 11, 2011, plaintiff filed her first amended complaint. Defendant filed a motion to strike plaintiff's amended complaint and plaintiff filed a motion to reconsider the trial court's order granting defendant's original request for summary judgment. In its motion to strike, defendant argued plaintiff failed to plead that she had a reasonable probability of succeeding in her underlying negligence suit, but for defendant's loss of the evidence, an essential element of a spoilation of evidence claim. Defendant contended that because plaintiff failed to establish a genuine issue of material fact as to actual or constructive knowledge of the foreign object, the absence of the object did not fatally hinder her case. In her motion for reconsideration, plaintiff admitted she agreed with defendant's analysis with regard to the spoilation count. She acknowledged "[t]he circumstances surrounding [her] fall do not fit into the parameters for a spoilation claim." Plaintiff asked the court to reconsider its ruling granting summary judgment in favor of defendant. The court considered the motions simultaneously and granted defendant's motion to strike plaintiff's amended complaint alleging spoilation of evidence, and denied plaintiff's motion to reconsider. On December 2, 2011, plaintiff filed her timely appeal.

¶ 7 DISCUSSION

¶ 8 Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005 (West 2010). The

trial court may grant summary judgment after considering "the pleadings, depositions, admissions, exhibits, and affidavits on file in the case" and construing that evidence in favor of the non-moving party. *Purtill v. Hess*, 111 Ill. 2d 229, 240 (1986). We review the circuit court's decision to grant summary judgment *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶ 9 To survive summary judgment on a negligence claim for a slip and fall case, a plaintiff must establish the existence of a duty, breach of that duty and injury resulting from the breach. *Pavlik v. Wal-Mart Stores, Inc.*, 323 Ill. App. 3d 1060, 1063 (2001). If the plaintiff fails to establish one of the elements of her cause of action, summary judgment in favor of the defendant is proper. *Pavlik*, 323 Ill. App. 3d at 1063. Proximate cause is an essential element of a negligence claim. *Bermudez v. Martinez Trucking*, 343 Ill. App. 3d 25, 30 (2003). The plaintiff bears the burden to " 'affirmatively and positively show' " the defendant's alleged negligence caused the plaintiff's injuries. *Bermudez*, 343 Ill. App. 3d at 30, quoting *McInturff v. Chicago Title & Trust Co.*, 102 Ill. App. 2d 39, 48 (1968).

¶ 10 There is no dispute that defendant owed plaintiff a duty to exercise ordinary care in maintaining its store in a "reasonably safe condition." *Thompson v. Economy Super Marts, Inc.*, 221 Ill. App. 3d 263, 265 (1991). The issue here is whether plaintiff established defendant breached its duty and that the breach was the proximate cause of plaintiff's injuries sufficient to survive defendant's motion for summary judgment.

> "A business owner breaches its duty to an invitee who slips on a foreign substance if: '(1) the substance was placed there by the

> negligence of the proprietor; (2) its servant knew of its presence; or (3) the substance was there a sufficient length of time so that, in the exercise of ordinary care, its presences should have been discovered, i.e., the proprietor had constructive notice of the substance.' " *Pavlik*, 323 Ill. App. 3d at 1063, quoting *Hayes v. Bailey*, 80 Ill. App. 3d 1027, 1030 (1980).

¶ 11 If a plaintiff is injured in a slip and fall and there is no way of showing how the foreign object that caused the fall became located on the floor, liability may be imposed if the defendant or its employees had constructive notice of the foreign object's presence. *Thompson*, 221 Ill. App. 3d at 265. A defendant is put on constructive notice if the foreign object was there for a long enough period of time that the exercise of ordinary care would have made it known. *Thompson*, 221 Ill. App. 3d at 265. Liability cannot be based on guess, speculation, or conjecture as to the cause of the injury. *Bermudez*, 343 Ill. App. 3d at 30. Proximate cause can only be established if it is reasonably certain the defendant's acts caused the plaintiff's injury. *Bermudez*, 343 Ill. App. 3d at 30.

¶ 12 Defendant claims the trial court properly granted summary judgment in its favor because plaintiff failed to offer, nor can she offer, the evidence necessary to establish the *prima facie* elements of a negligence claim, specifically, that defendant's actions proximately caused plaintiff's injuries. We agree.

¶ 13 Although plaintiff need not prove her case during the summary judgment proceeding, she must present some evidentiary facts to support the elements of her cause of action. *Krueger v.*

Oberto, 309 Ill. App. 3d 358, 367 (1999). Here, plaintiff failed to present evidentiary facts from which proximate cause could be genuinely disputed such that she was entitled to judgment as a matter of law.

¶ 14 Plaintiff acknowledges she did not present evidence to establish defendant's negligence caused the foreign object to be on the floor of the store or that defendant had constructive notice of the dangerous condition; rather, plaintiff argues she was prevented from establishing sufficient facts to prove either proposition through the affirmative actions of defendant. Plaintiff argues defendant's employees prevented her from determining what caused her fall and, therefore, we must infer from defendant's actions "that they are responsible for the condition." Plaintiff argues she "should be entitled to an inference that the evidence would have been detrimental to the Defendant based on their failure to produce the object which caused the fall." Moreover, plaintiff contends defendant had a duty to maintain the object which caused her fall.

¶ 15 In *Boyd v. Travlers Insurance Co.*, our supreme court articulated a two-prong test for determining when a defendant bears the burden to preserve evidence. In doing so, the court declined to recognize spoilation of evidence as its own tort, holding instead that such a claim may be incorporated into the plaintiff's negligence action. *Boyd v. Travlers Insurance Co.*, 166 Ill. 2d 188, 192-93 (1995).

> "The general rule is that there is no duty to preserve evidence; however, a duty to preserve evidence may arise through an agreement, a contract, a statute [citation] or another special circumstance. Moreover, a defendant may voluntarily assume a

> duty by affirmative conduct. [Citation.] In any of the foregoing instances, a defendant owes a duty of due care to preserve evidence if a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action." *Boyd*, 166 Ill. 2d at 195.

¶ 16 Because a spoilation of evidence claims falls under the general principles of negligence, to prevail under such a theory, the plaintiff must show that defendant owed her a duty, breached that duty and that the breach proximately caused the plaintiff's injuries. *Dardeen v. Kuehling*, 213 Ill. 2d 329, 335-36 (2004), citing *Boyd*, 166 Ill. 2d at 192-95. To show causation, "plaintiff is required to allege that a defendant's loss or destruction of the evidence caused the plaintiff to be unable to prove an otherwise valid, underlying cause of action." *Boyd*, 166 Ill. 2d at 197.

¶ 17 Although plaintiff acknowledged in her motion to reconsider that "[t]he circumstances surrounding [her] fall do not fit into the parameters for a spoilation claim," she appears to be making such a claim here.

¶ 18 Plaintiff contends defendant voluntarily assumed a duty to preserve the evidence when its employees took possession of the object, which caused her fall. She further argues that because defendant is a frequent party to slip and fall cases, it should have known that a customer falling on an object and sustaining an injury could give rise to a negligence claim. Plaintiff acknowledges she did not ask defendant to preserve the object, but claims defendant prevented her from determining what caused her fall by denying her the opportunity to examine it. Plaintiff argues the trial court improperly granted summary judgment in favor of defendant where she met

the causation element by properly alleging defendant's loss of the evidence caused her to be unable to prove her negligence action.

¶ 19 We agree with defendant that based on plaintiff's detailed description of the object that caused her fall, it appears she had ample opportunity to look at it despite her testimony that defendant denied her such an opportunity. Moreover, even if we accept as true that the difference in the description of the object which caused plaintiff's fall is meaningful, plaintiff failed to offer any evidence as to the source of the object or how long it was present on the floor. Plaintiff offered no testimony that there were store employees within the vicinity of her fall and, therefore, she was unable to establish actual notice. Moreover, because plaintiff offered no evidence to show how long the object was present, she was not able to establish constructive notice either. Summary judgment is proper because without such evidence, allowing the case to continue would invite speculation on behalf of the factfinder as to whether defendant knew or should have known of the presence of the foreign object on the floor of its store, an essential element to state a negligence cause of action. Accordingly, there is no reasonable probability that plaintiff could have proved her case had defendant maintained the object which caused her fall. As such, she is unable to rely on her spoilation of evidence claim to defeat defendant's motion for summary judgment, a proposition she recognized in her motion to reconsider.

¶ 20 To defeat defendant's motion for summary judgment as a matter of law, plaintiff needed to show a factual link between the foreign object that caused her fall and defendant's conduct or knowledge; the plaintiff offers no evidentiary materials containing facts from which defendant's liability can be premised. We hold the trial court properly found that plaintiff's failure to present

evidentiary materials which establish a breach of duty and proximate cause was a reason to grant defendant's motion for summary judgment.

¶ 21 CONCLUSION

¶ 22 Plaintiff offered no evidence defendant caused the foreign object to be placed on the floor of its store or that it had knowledge, either actual or constructive, of its presence; absent such evidence, plaintiff failed to show defendant proximately caused her injuries. Plaintiff's failure to offer evidence to establish a link between defendant's conduct and her injury was fatal to her negligence cause of action. Therefore, even if we assume defendant improperly disposed of or lost the foreign object, which caused plaintiff to fall, such evidence would not be enough for her to prevail on her negligence claim where she offered no evidence that the actions of defendant were the proximate cause of her fall and, thus, failed to establish the existence of a genuine issue of material fact. Accordingly, we affirm the trial court's grant of summary judgment in favor of defendant.

¶ 23 Affirmed.