2014 IL App (1st) 131989-U
No. 1-13-1989
June 25, 2014

THIRD DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

CLAUDIA GONZALES, Plaintiff-Appellant, v. MALET DEVELOPMENT, LLC, MALET REALTY, LTD., MALET CORPORATION, ERIC MALETSKY, Individually, ERIC MALETSKY d/b/a MALET REALTY, LTD., and ERIC MALETSKY d/b/a MALET CORPORATION, Defendants-Appellees.	)	Appeal from the Circuit Court Of Cook County. No. 10 L 13731 The Honorable Kathy M. Flanagan, Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court, with opinion.
Presiding Justice Hyman and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 Held: Where plaintiff testified that she did not know why she fell or what caused her injuries and there are no witnesses, plaintiff's evidence failed to establish that defendant created a condition on the premises that proximately caused plaintiff's injuries.

¶ 2 Claudia Gonzales, the plaintiff, filed a two count amended complaint against Malet Realty[1], the defendant and manager of the building, to recover damages for injuries she sustained when she slipped and fell as she exited from the side entrance of the building where she worked. Gonzales alleged in her complaint that she fell because Malet Realty negligently failed to remove snow and ice present at the side entrance. Malet Realty filed a motion for summary judgment because Gonzales testified that she did not know why she fell and, without any witnesses, could not provide any evidence that established that there was an unnatural accumulation of snow or ice that proximately caused her fall. Therefore, Malet Realty maintained that Gonzales could not prove that a condition created by Malet Realty was the proximate cause of her injuries, and the trial court granted the motion.

¶ 3 On appeal, we find that Gonzales did not know why she fell, and therefore, without witnesses, she did not have any evidence to present at trial that would establish that Malet Realty created the condition that proximately caused her fall. Accordingly, we hold that the trial court did not err when it granted Malet Realty's motion for summary judgment.

¶ 4 Background

¶ 5 On December 2, 2008, Gonzales sustained injuries when she fell down the steps upon exiting from the office building where she worked at 975 Weiland Road in Buffalo Grove, Illinois. The office building was owned by Deerfield and Weiland Office Building LLC and

[1] The original complaint also named Malet Development, Malet Corporation and Eric Maletsky as defendants. On October 19, 2011, the trial court granted Gonzales' motion to voluntarily dismiss Malet Development, Malet Corporation and Eric Maletsky without prejudice pursuant to section 1009 of the Code of Civil Procedure. 735 ILCS 5/2-1009 (West 2010).

managed by Malet Realty. Malet Realty entered into a contract with Berg Chicago Inc. to perform snow and ice removal at the property.

¶ 6 Gonzales, in a two count amended negligence complaint, sought damages from Malet Realty for the injuries she sustained when she fell on December 2, 2008. In count I, Gonzales contended that Malet Realty failed to maintain the entrance in a reasonably safe condition, that Malet Realty was negligent in failing to remove the snow and ice from the premises, and that Malet Realty failed to provide proper illumination in and around the entrance to the building where she fell. Count II alleged that Malet Realty had violated the Premises Liability Act because the premises posed an unreasonable risk of harm to persons walking on the premises.

¶ 7 Gonzales testified at her deposition that she arrived at work on December 2, 2008, between 9:00 a.m. and 10:00 a.m. Gonzales explained that it took approximately two hours to get to work because it had snowed the previous night. Gonzales did not recall if it was snowing or what the temperature was when she arrived at work. However, she testified that the parking lot, the walkway, and the stairs were covered with snow. The snow in the parking lot was about four to six inches high. Because of snow in the parking lot, Gonzales experienced some difficulty finding a parking space for her car. She eventually parked in the lot that ran along the side of the building and she used the side entrance to enter the building because it was closest to her parking space.

¶ 8 Gonzales finished working around 8:00 p.m. and she exited the building the same way she had entered that morning, by using the side entrance door. She did not recall if there was still snow on the concrete that was immediately outside the side entrance door, but she recalled that the concrete looked wet. Gonzales testified that the area immediately outside

the entrance door was not pitch black—there was enough light for her to see the ground where she was walking and to see her feet. In order to get to the parking lot, Gonzales had to walk down a set of stairs. On her way to the stairs, Gonzales took about three steps, but when she reached the stairs, her feet came out from under her and she fell.

¶ 9 Gonzales testified that she did not know what caused her to fall. However, on cross examination, she testified that "[a]fter I fell, obviously it was slippery I can assume it was ice." When asked to describe the surface she stated that "[T]o me it looked wet. Again, I can only assume it was ice but to me it looked wet." On redirect, when asked if she knew how ice would have formed on the concrete, Gonzales testified that "[t]he only thing I can assume is it might have melted during the day and refroze." She assumed it was ice because the concrete looked wet and she slipped.

¶ 10 Finally, Gonzales testified that about two days after the accident, two of her co-workers mentioned to her that they and other smokers would go out through the side entrance to smoke and that they had complained to someone that the entrance was bad. Gonzales did not know what her co-workers meant when they said that the entrance was bad.

¶ 11 As a result of the fall, Gonzales underwent surgery to remove her tailbone and she testified that she continues to experience pain.

¶ 12 On December 20, 2011, Malet Realty filed a third party complaint against Berg Chicago for contribution. Malet Realty alleged that it contracted with Berg Chicago to remove snow and ice from the property and that Berg Chicago's failure to inspect the property for dangerous conditions and to remove the snow and ice caused or contributed to Gonzales' alleged injuries.

¶ 13 On October 11, 2012, Malet Realty filed its motion for summary judgment arguing that because Gonzales admitted in her deposition that she did not know why she fell, she was unable to make an affirmative showing that an unnatural accumulation of snow and ice occurred, and she was unable to prove that Malet Realty was responsible for her injuries.

¶ 14 Gonzales filed a response to Malet Realty's motion for summary judgment and argued that Malet Realty knew or should have known that there was an unnatural accumulation of snow and ice at the Weiland property because the snow removed by Berg Chicago was piled up and shoved into a landscaped area or pushed into the parking lot. Gonzales also argued that the outside of the building was adorned with numerous "decorative protrusions" that hung away from the outer wall of the building, that one of the decorative protrusions was above the entrance that Gonzales used on the day of her accident, that Malet Realty knew these protrusions would accumulate snow and ice, but Malet Realty failed to inspect and remove the snow and ice from the decorative protrusions.

¶ 15 Gonzales supported her response with a copy of the snow and ice accumulation report from Murray and Trettel, Inc., certified consulting meteorologists, and a copy of the invoice from Berg Chicago for the work performed at the Weiland property on Monday, December 1, 2008. The snow and ice accumulation report showed that snow began at O'Hare field on Sunday, November 30, 2008, at 9:41 a.m. and ended on Monday, December 1, 2008, at 3:26 p.m. On December 2, 2008, at 1:54 p.m., the total snow accumulation in Buffalo Grove was 4.3 inches. The invoice from Berg Chicago showed that on the morning of December 1, 2008, the parking lot at the Weiland property was plowed and then salted and all walkways were shoveled and deiced. There is no record of Berg Chicago performing snow removal at the Weiland property on December 2, 2008.

¶ 16 The trial court found that because Gonzales testified that she did not know what caused her fall, and because she could see the ground where she was walking, Gonzales could produce no evidence that she fell because of an unnatural accumulation of ice or because the light was insufficient. The trial court also found that there was no evidence that Malet Realty had notice of a problem with illumination or with an unnatural accumulation of ice, snow or water which may have caused Gonzales' fall. Therefore, the trial court granted Malet Realty's motion for summary judgment, and denied Gonzales' motion to reconsider. Gonzales filed this appeal.

¶ 17 Analysis

¶ 18 A motion for summary judgment can only be granted where there are no genuine issues of material fact and the right of the moving party is clear and free from doubt. *Thompson v. Gordon*, 241 Ill. 2d 428, 438 (2011). The trial court may grant a motion for summary judgment when 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. *Thompson*, 241 Ill. 2d at 438.

¶ 19 In an action for negligence, the plaintiff must set forth sufficient facts to establish a duty owed by the defendants to the plaintiff, a breach of that duty and an injury proximately caused by the breach. *Vesey v. Chicago Housing Authority*, 145 Ill. 2d 404, 411 (1991). Proximate cause has two distinct requirements, cause in fact and legal cause and both requirements must be met in order to establish proximate cause. *Simmons v. Garces*, 198 Ill. 2d 541, 558 (2002). A defendant's conduct is a cause in fact of the plaintiff's injuries only if that conduct is a material element and a substantial factor in bringing about the injury. *Abrams v. City of Chicago*, 211 Ill. 2d 251, 258 (2004). A defendant's conduct is a material

element and a substantial factor in bringing about injury, if absent that conduct, the injury would not have occurred. *Abrams,* 211 Ill. 2d at 258. Legal cause, by contrast, is largely a question of foreseeability. *Abrams*, 211 Ill. 2d at 258. The relevant inquiry is whether the injury is of a type that a reasonable person would see as a likely result of his or her conduct. *First Springfield Bank & Trust v. Galman*, 188 Ill. 2d 252, 258 (1999).

¶ 20 Proximate cause is generally an issue of fact to be determined by the trier of fact, but proximate cause can be determined by the court as a question of law if the facts as alleged show that the plaintiff would never be entitled to recover. Abrams, 211 Ill. 2d 257-58; see also *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 395-96 (2004). Proximate cause can only be established when there is a reasonable certainty that the defendant's acts caused the injury. *Salinas v. Werton*, 161 Ill. App. 3d 510, 514 (1987). Although a plaintiff may rely on reasonable inferences which may be drawn from the facts considered during a hearing on a motion for summary judgment, an inference cannot be established on mere speculation, guess or conjecture. *Salinas*, 161 Ill. App. 3d at 515. The evidentiary facts must justify an inference of probability as distinguished from mere possibility. *Salinas*, 161 Ill. App. 3d at 515.

¶ 21 Here, we must determine whether Malet Realty created a condition that was the cause in fact of Gonzales' injuries. In deciding whether Malet Realty's conduct was a substantial element in bringing about Gonzales' injury, we ask whether, absent the defendant's conduct, Gonzales' injuries still would have occurred. *Galman*, 188 Ill. 2d at 260.

¶ 22 Illinois case law establishes that:

> "a property owner owes no common law duty to remove natural accumulations of ice and snow from common areas which remain under his

> control, and thus cannot be found liable for injuries resulting from a natural accumulation of ice and snow. [Citation.] However, when the property owner chooses to remove ice and snow, he is charged with the duty of exercising ordinary care in the accomplishment of that task." *Webb v. Morgan*, 176 Ill. App. 3d 378, 382-83 (1988); see also *Ordman v. Dacon Management Corp.*, 261 Ill. App. 3d 275, 279 (1994).

Therefore, in order to avoid summary judgment in a slip and fall case, a plaintiff must present evidentiary facts for a trier of fact to find that the defendant was responsible for an unnatural accumulation of water, ice or snow which caused plaintiff's injuries.

¶ 23 The defendant maintains that *Richardson v. Bond Drug Company of Illinois*, 387 Ill. App. 3d 881 (2009) and *Kimbrough v. Jewel Companies, Inc.*, 92 Ill. App. 3d 813 (1981) provide support for its argument that it cannot be held liable for Gonzales' injuries because Gonzales testified that she did not know what caused her fall. In *Richardson*, plaintiff brought a negligence action for injuries sustained in a slip and fall in a drugstore. *Richardson*, 387 Ill. App. 3d at 882. On the day of the fall, a light snow had fallen. *Richardson*, 387 Ill. App. 3d at 883. The plaintiff did not know why he fell or what caused him to fall, but assumed that the store floor was wet. *Richardson*, 387 Ill. App. 3d at 883. The court found that plaintiff had not shown that defendant proximately caused his injury because plaintiff had produced facts that suggested only a mere possibility, not an inference of probability. *Richardson*, 387 Ill. App. 3d at 886. Therefore, the *Richardson* court affirmed the trial court's order granting summary judgment for the defendant because of plaintiff's inability to show that the floor inside the store was wet before his fall. *Richardson*, 387 Ill. App. 3d at 886.

¶ 24 Likewise in *Kimbrough*, the plaintiff filed a negligence action against the defendant after she fell and injured herself on a ramp upon leaving the defendant's store. *Kimbrough*, 92 Ill. App. 3d at 814. The plaintiff, however, repeatedly testified in her deposition that she did not know why she fell or what caused her to fall. *Kimbrough*, 92 Ill. App. 3d at 815-16. And, according to plaintiff's answer to interrogatories, she did not know of any other eyewitnesses to the accident. *Kimbrough*, 92 Ill. App. 3d at 815. The *Kimbrough* court found that because the plaintiff admitted she did not know why she fell and could provide no evidence explaining why she fell, she could not meet her burden of proving proximate cause, an element of her negligence action. *Kimbrough*, 92 Ill. App. 3d at 818. The *Kimbrough* court affirmed the trial court's order granting summary judgment in favor of the defendant, noting that it was not enough for the plaintiff to show that she fell on the defendant's ramp, but rather, she was required to go further and prove that some condition caused the fall and that this condition was caused by the defendant. *Kimbrough*, 92 Ill. App. 3d at 818.

¶ 25 We find, like *Richardson* and *Kimbrough*, that Gonzales did not know why she fell. Gonzales testified at her deposition that she did not know why she fell. She admitted that while the concrete looked wet, she did not know whether it was ice, or how ice would have formed on the concrete. Gonzales did not testify that she saw ice on the concrete. She, however, assumed that it must have been ice because she slipped and fell. Specifically, Gonzales testified, (1) "I can only assume it was ice," and (2) she "assume[d] [that the snow] might have melted during the day and refroze."

¶ 26 In Illinois, liability cannot be predicated upon surmise or conjecture as to the cause of the injury; proximate cause can only be established when there is a reasonable certainty that defendant's acts caused the injury. *Wiegman v. Hitch-Inn Post of Libertyville, Inc.*, 308 Ill.

App. 3d 789, 795 (1999). And although a plaintiff need not prove his or her case in response to a motion for summary judgment, plaintiff must present evidentiary facts to support the elements of the cause of action. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335 (2002). Therefore, in a slip and fall case, plaintiff must present facts to show the origin of the ice was unnatural or caused by defendant. *Tzakis v. Dominick's Finer Foods, Inc.*, 356 Ill. App. 3d 740, 745 (2005).

¶ 27 Here, because Gonzales does not know why she fell and because there were no witnesses to her fall, Gonzales failed to present any evidence to show that Malet Realty caused her injuries. Concerning the light at the premises, Gonzales testified that the area where she fell was not pitch black, but there was enough light for her to see where she was walking. Thus, no evidence was presented that Gonzales fell because the side entrance was not properly lit. Like the plaintiff in *Kimbrough*, it was not enough for Gonzales to show that she fell on premises managed by Malet Realty, but rather, she was required to go further and present evidence that would support her claim that Malet Realty caused her fall. *Kimbrough*, 92 Ill. App. 3d at 818. In this case, without evidence, Gonzales would never be entitled to recover. *Kimbrough*, 92 Ill. App. 3d at 817-18; *Richardson*, 387 Ill. App. 3d at 886. Therefore, the trial court did not err when it granted Malet Realty's motion for summary judgment.

¶ 28 Having found that Gonzales failed to present any evidence that Malet Realty created a condition on the premises that was the cause in fact of her injuries, we need not address the legal cause. *Simmons*, 198 Ill. 2d at 558 (in order to establish proximate cause, plaintiff must establish both cause in fact and legal cause). Therefore, because Gonzales failed to present any evidence that established that Malet Realty caused an unnatural accumulation of ice to accumulate at the side entrance door, which was the cause in fact or a substantial factor in

bringing about her injuries, we hold that Gonzales failed to establish that Malet Realty's conduct was the proximate cause of her injuries.

¶ 29 CONCLUSION

¶ 30 We find that Gonzales did not know what caused her injuries and, without witnesses, she failed to present any evidence which established a causal connection between her fall and a condition on the premises created by Malet Realty that proximately caused her injuries. Accordingly, we affirm the trial court's order that granted Malet Realty's motion for summary judgment.

¶ 31 Affirmed.