FOURTH DIVISION
September 30, 2015

No. 1-14-2159

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

EVAN BROWN,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 13 L 4543
	)	
RUSSO HARDWARE, INC.,	)	Honorable
	)	Kathy M. Flanagan,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices Ellis and Cobbs concurred in the judgment.

O R D E R

¶ 1 *Held*: We affirm the circuit court's decision granting defendant summary judgment where defendant owed plaintiff no duty of care because the dangerous condition was open and obvious, and the distraction exception did not apply where there was no evidence of any distraction.

¶ 2 Plaintiff Evan Brown appeals from an order of the trial court granting summary judgment to defendant, Russo Hardware Inc. d/b/a Russo Power Equipment, in his negligence action for injuries sustained in a fall near defendant's service entrance. On appeal, plaintiff claims that the

trial court erred in granting summary judgment where the condition that caused the accident was not open and obvious. Plaintiff also contends that even if the condition was open and obvious, the trial court should have granted him relief under the distraction exception. We affirm.

¶ 3 This case arises from injuries plaintiff allegedly sustained on May 19, 2011, when he tripped and fell on the forks of a forklift parked near defendant's service entrance at 1636 North Aurora Road in Naperville, Illinois. Plaintiff filed a complaint in negligence seeking damages for injuries he sustained as a result of the fall.

¶ 4 Plaintiff specifically alleged that defendant negligently placed a forklift in a driveway where pedestrian traffic was reasonably anticipated, failed to remove the forklift from the driveway area, which created a hazard for those lawfully walking in the area, failed to place a sign alerting those in the area of the forklift and the hazards that it posed, failed to prevent those on the premises from ambulating across the area when it knew or reasonably should have known of the hazards present, and failed to provide a safe means of egress for patrons to exit the garage so as to avoid the forklift. Plaintiff further alleged that one or more of the aforementioned negligent acts or omissions was a proximate cause of his tripping and sustaining severe, permanent injuries, suffering great pain, incurring medical and related expenses, a loss of normal life, and becoming severely and permanently disfigured. Plaintiff requested a judgment against defendant in excess of $50,000.

¶ 5 On July 3, 2013, defendant filed an answer to plaintiff's complaint denying any negligence on its part. Defendant also raised three affirmative defenses, specifically alleging that plaintiff failed to keep a proper lookout for his own surroundings, failed to recognize an open and obvious condition, and was otherwise careless and negligent.

¶ 6 A surveillance video captured the accident and was included in the record. The video depicted plaintiff and his brother, Robert Brown, parking their vehicle across from defendant's hardware store and walking toward the driveway leading to the service garage. Plaintiff and Robert walked past a parked forklift and entered the store. Plaintiff exited the store alone with a purchased item and walked by the forklift again on his way back to his vehicle. After leaving the item in his car, plaintiff is seen jogging towards the service driveway, tripping over the forks of the forklift, and limping into the store.

¶ 7 A deposition was taken from plaintiff who testified that on May 19, 2011, he went to defendant's store to purchase equipment for his company Forever Green. Plaintiff would go to the store a few times a week and always use the service entrance. On the date in question, plaintiff did not recall seeing a forklift parked near the service entrance when he arrived at the store with Robert. Plaintiff and Robert walked into the store, but plaintiff did not know if the forklift was parked near the service entrance. While his brother was still inside, plaintiff exited the same way he came in and returned to his car with a purchased item. He did not know if he walked in close proximity to a forklift upon exiting the store. He dropped the item off at his car, and on his walk back to the service department, he "tripped over the forklift that was *** sticking out in the walkway." In particular, plaintiff indicated he tripped on the forks of the forklift, fell, slid on the driveway, and stood up and limped into the store. He did not have anything in his hands at the time of the fall.

¶ 8 The fall resulted in injuries to plaintiff's legs and ankles. Plaintiff told employees, including store manager Mark Joutras, about the accident, and Joutras wrote down what happened. Plaintiff left the store with Robert and returned to his car in pain. That same day, plaintiff went to the emergency room because his right leg worsened. He received a prescription

for pain medicine at the emergency room, and plaintiff followed up the next day with his doctor, and then a foot specialist. The specialist gave plaintiff more pain medication, cortisone shots, and braces and shoe inserts for support. When the pain did not subside, plaintiff saw a new doctor who sent him for physical therapy, which failed to reduce his pain. The doctor recommended that plaintiff undergo surgery to repair torn ligaments in his left ankle, but plaintiff had not scheduled the surgery at the time of the deposition.

¶ 9 A deposition was taken from Robert Brown, plaintiff's brother, who testified that he did not witness plaintiff fall, but saw him talking to a store employee about the accident. When Robert and plaintiff left the store, plaintiff drove to another location, but, after exiting the car, plaintiff complained that his ankle was hurting and he started to limp. Robert drove to a restaurant where they sat and ate. Plaintiff continued to complain that his ankle was hurting, and Robert drove plaintiff home. As Robert was leaving plaintiff's home, plaintiff told him that he was going to the emergency room.

¶ 10 A deposition was taken from Mark Joutras, defendant's store manager, who testified that he was working at defendant's store when he was notified by his service associate, Andrew Guetler, that an accident occurred in the service garage area. Joutras spoke with plaintiff, and asked him if he needed medical attention. Plaintiff declined, saying that he would "walk it off," and that he was more embarrassed than anything. A few days later, plaintiff returned to the store and asked Joutras what he could get for his "pain and suffering," particularly with regard to his injured ankle and hip.

¶ 11 Joutras further testified that he expected the forklift operators to lower the forks, which were extended about five feet out of the forklift, so that they were level with the ground, but there was no designated place for the forklift. The service entrance was typically used by

customers bringing in machines or parts to be serviced, and was considered a "minor entryway." The front entrance was the main access points for customers, and many customers came in through the front even if they were going to the service department.

¶ 12 A deposition was taken from Andrew Guetler, a service writer or shop foreman for defendant, who testified that he discussed the accident with the mechanics and told them the forklift was improperly left in front of the service entrance. Guetler was not aware if defendant had a policy restricting the placement of the forklift in front of the service entrance, but maintained that it was common sense not to place a large piece of equipment in that location. Guetler also testified that, before the accident, the forks were a few inches off the ground when they should have been lowered to ground level. The area where plaintiff tripped and fell was an area where Guetler expected customers to walk. However, there was space for plaintiff to walk around the forklift. Guetler saw plaintiff after the incident and could tell he was injured, but did not know the extent of his injuries.

¶ 13 A deposition was taken from Timothy Jones, a mechanic for defendant, who testified that he was present on the day of the accident, but did not witness it. Jones most likely parked the forklift in the driveway on the day in question, as he had every day. The forklift was about seven or eight feet tall and its forks were bright silver or chrome, making them visible against the black asphalt. He explained that the driveway was not a walkway, and it was strictly for vehicles to be moved in and out of the service department. Instead, there was a sidewalk adjacent to the driveway that customers were supposed to use. According to Jones, it was possible for a person to enter the store without tripping on the forklift because there was about 10 feet around the forklift and the service entrance, as well as an entirely separate entrance to the store.

¶ 14 A deposition was taken from Andrew Heath, a store manager at a different location, who testified that he was filling in at the Naperville location a few days after the accident. Plaintiff entered the store limping and Heath asked him how he was doing. Plaintiff responded that he had been running through the store's parking lot, tripped over the forklift, and fell down. Plaintiff indicated that he was in some discomfort, but was otherwise feeling fine. Heath further testified that as a manager he would expect the forks of the forklift to be lowered completely to the ground when it was parked.

¶ 15 A deposition was taken from Eric Adams, defendant's president, who testified that the service entrance was used for customers bringing in broken landscaping equipment and carrying out parts. There was no designated place for the forklift to be kept during store hours. Adams acknowledged that, at the time of the accident, the forks of the forklift could have been lowered, and that when the forklift is in a parked position, it is typical for the forks to be lowered to the ground.

¶ 16 On April 18, 2014, defendant filed a motion for summary judgment, asserting that the forklift that plaintiff tripped over was an open and obvious condition, and that a reasonable person would recognize the forklift and the potential trip hazard and avoid walking into the forks of the forklift. Defendant maintained that neither the distraction nor deliberate encounter exceptions to the open and obvious doctrine applied to this case. Specifically, defendant maintained that plaintiff's position was not that he was distracted, or that he had to encounter the forklift to access the store, but instead that he never saw the forklift.

¶ 17 In his response, plaintiff maintained that the condition that caused his accident was not open and obvious where the forks of the forklift were left in an elevated position and allowed to extend into an area utilized by pedestrians. According to plaintiff, the forks caused the accident,

not the position or presence of the forklift, and a reasonable person in his position would surmise that he could safely pass the forklift because the forks would be lowered to the ground instead of raised. Plaintiff further maintained that even if the condition was open and obvious, defendant still owed him a duty of care because it should have anticipated the harm that might be caused by the forklift being placed in a highly traversed area and by the forks being elevated while the forklift was parked. Plaintiff also contended that it was foreseeable that people walking in the area might be distracted by the equipment they had purchased at defendant's store.

¶ 18 Defendant replied that the forklift, including the forks, was an open and obvious condition. Defendant emphasized that there was no testimony that had the forks been lowered, plaintiff would have been able to avoid the accident. It was evident from plaintiff's testimony that he was not paying attention to where he was going during any of his three occasions walking in and out of the store. This was particularly true where plaintiff testified that he did not see any portion of the forklift, and there was no testimony presented that he was distracted.

¶ 19 On July 14, 2014, the trial court entered a written order granting defendant's motion for summary judgment. Plaintiff now challenges that ruling on appeal.

¶ 20 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(c) (West 2012); *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 12. 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 grant of summary judgment *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶ 21 To prevail on a common law negligence claim, a plaintiff must establish the existence of a duty owed by the defendant to the plaintiff, the breach of that duty, and that the defendant's breach was the proximate cause of injury to the plaintiff. *Ward v. K Mart Corp*., 136 Ill. 2d 132, 140 (1990). The question of the existence of a duty is a question of law, and, in order to determine if a duty exists, the trial court considers whether a relationship existed between the parties that imposed a legal obligation upon one party for the benefit of the other party. *Sameer v. Butt*, 343 Ill. App. 3d 78, 85 (2003). In this case, the relationship between plaintiff and defendant is business invitee and landowner.

¶ 22 Our supreme court in *Ward* held that section 343 of the Restatement (Second) of Torts, accurately set forth the law regarding the liability of landowners to invitees. The section states:

> "A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger." Restatement (Second) of Torts § 343 (1965); *Ward*, 136 Ill. 2d at 145-46.

¶ 23 The court also adopted section 343A of the Restatement (Second) of Torts with respect to a landowner's duty when a danger can be considered open or obvious. Section 343A provides: "(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." Restatement (Second) of

Torts § 343A (1965); *Ward*, 136 Ill. 2d at 149. Where there is no dispute about the physical nature of the condition, the question of whether a condition is open and obvious is one of law. *Belluomini v. Stratford Green Condo Ass'n*, 346 Ill. App. 3d 687, 692-93 (2004). However, where the facts are in dispute about the physical nature of the condition, such as visibility, the question of whether the condition was open and obvious is one of fact. *Olson v. Williams All Seasons Co.*, 2012 IL App (2d) 110818, ¶ 42.

¶ 24 Here, plaintiff asserts that whether the condition was open and obvious is a question of fact because the height of the forks was not discernible from the record. Defendant disagrees and maintains that the question of whether the condition here is open and obvious is a question of law. Defendant specifically states that the deposition testimony and surveillance video are uniform as to the description of the forklift at the time of the occurrence, and thus the physical nature of the forklift is not subject to dispute.

¶ 25 We find our decision in *Ballog v. City of Chicago*, 2012 IL App (1st) 112429, instructive in determining whether the condition here is a question of fact or law. In *Ballog*, the plaintiff filed a negligence complaint against the City of Chicago after she injured herself falling in a gap in the street. *Id.*, ¶ 3. The defendant City of Chicago moved for summary judgment, arguing that because the condition was open and obvious, it owed no duty of care to the plaintiff. *Id.*, ¶ 9. The trial court granted the defendant's motion, and the plaintiff appealed. On appeal, this court found that the parties did not dispute the physical nature of the condition, and thus the issue of whether the condition was open and obvious was a matter of law. *Id.*, ¶¶ 29-30. We also found that because the photographs clearly depicted the condition of the street, any dispute over the physical nature of the condition would not be objectively reasonable. *Id.*, ¶ 30. Furthermore, we noted that the plaintiff had traversed over the same condition in a different section of the street

before her fall, showing that she was able to cross safely over the gap. *Id*., ¶ 34. We thus affirmed the circuit court's judgment granting summary judgment to the defendant where the condition causing the plaintiff to fall was open and obvious as a matter of law and no exception to the doctrine applied. *Id.* at ¶ 44.

¶ 26 Like *Ballog*, the parties here did not dispute the physical nature of the condition, making the issue of whether the condition was open and obvious a question of law. The record contains surveillance footage depicting the forklift when plaintiff tripped over its forks. The forks were clearly visible against the asphalt of the driveway leading to the service entryway, and any dispute over the physical nature of the forklift is not objectively reasonable. Furthermore, similarly to *Ballog*, plaintiff clearly demonstrated, on video, that he was able to walk past the forklift twice without any difficulty. The video thus corroborates the deposition testimony of Andrew Guetler and Timothy Jones who stated that there was space for plaintiff to walk around the forklift. It is significant to note that when plaintiff fell he was being careless as he was jogging toward the service entrance of the store.

¶ 27 Plaintiff's attempt to create an issue of fact regarding the condition of the forklift is unpersuasive. Plaintiff's argument in his brief that the forks were a "characteristic" of the forklift that was not "easy to discern at first glance" is inconsistent with his deposition testimony where he never claimed that he failed to see the forks because they were raised off of the ground, but instead denied ever seeing any portion of the forklift, which was approximately eight feet tall with two forks measuring about five feet in length. Also, despite defendant's contentions to the contrary, the deposition testimony was consistent regarding the forks of the forklift being elevated a few inches, and this fact is also apparent from the surveillance video. We find, as a

matter of law, that the condition of the forklift in the driveway near the service entrance presented an open and obvious danger and thus defendant owed no duty of care to plaintiff.

¶ 28 In reaching this conclusion, we find *Buchaklian v. Lake County Family Young Men's Christian Ass'n*, 314 Ill. App. 3d 195 (2000), a case relied on by defendant, distinguishable from the case at bar. In *Buchaklian*, the plaintiff, who was inside a woman's locker room at a YMCA, tripped on a piece of mat that stood one or two inches higher than other portions of the mat. *Id*., ¶ 198. The trial court determined that the YMCA owed no duty to the plaintiff because the condition was open and obvious. *Id*., ¶ 197. The Second District of this court reversed, disagreeing "with the trial court's conclusion that, as a matter of law, the defect in the mat was an open and obvious danger that plaintiff could have avoided had she looked down at the floor in the area where she was going instead of looking straight ahead." *Id*. at 202. Similar to this court's reasoning in *Ballog*, 2012 IL App (1st) 112429, ¶ 27, which also distinguished *Buchaklian*, we likewise have no dispute with the result reached in *Buchaklian*, but find the "defect in the mat," as described by the court, is too dissimilar to the condition here to provide any guidance.

¶ 29 Plaintiff further argues that even if the condition was open and obvious, as we have held, the distraction exception to the doctrine applies to this case. Specifically, plaintiff contends that defendant should have reasonably foreseen that a customer to its store would become distracted when walking past the garage door where the driveway near the service entrance was often used as a loading area with various types of equipment and trucks.

¶ 30 The distraction exception essentially holds that even an open and obvious condition may still be unreasonably dangerous if the landowner should have foreseen that people would fail to notice or protect themselves against the condition because they had become distracted. See *Ward*, 136 Ill. 2d at 152 ("The inquiry is whether the defendant should reasonably anticipate

injury to those entrants on his premises who are generally exercising reasonable care for their own safety, but who may reasonably be expected to be distracted, as when carrying large bundles, or forgetful of the condition after having momentarily encountered it."). However, "[d]efendants should not be confronted with the impossible burden of rendering their premises injury-proof, and they are entitled to the expectation that their patrons will exercise reasonable care for their own safety." *Richardson v. Vaughn*, 251 Ill. App. 3d 403, 409 (1993).

¶ 31 We conclude that the distraction exception does not apply in this case where plaintiff fell based on his own inattentiveness, and failed to present any evidence or cite to anything in the record explaining how he was distracted at the time of his fall. In this way, the case at bar is similar to our supreme court decision in *Bruns* where the plaintiff brought a negligence action against the city, alleging that she tripped and fell on uneven sidewalk. *Bruns*, 2014 IL 116998, ¶ 4. The supreme court held that the city had no duty to protect the plaintiff from an open and obvious sidewalk defect, and further held that the distraction exception did not apply where "the plaintiff *** failed to identify *any* circumstance, much less a circumstance that was reasonably foreseeable by the City, which required her to divert her attention from the open and obvious sidewalk defect, or otherwise prevented her from avoiding the sidewalk defect." (Emphasis in original.) *Id*., ¶¶ 18, 30.

¶ 32 Similarly, in this case, plaintiff failed to identify any circumstance that required him to divert his attention. Instead, the surveillance video shows plaintiff jogging towards the service entrance, which was an independent act for which defendant had no responsibility. See *Id*., ¶ 31 (stating that a plaintiff cannot recover for self-created distractions that a defendant could not reasonably foresee), relying on *Whittleman v. Olin Corp*., 358 Ill. App. 3d 813, 817-18 (2005); *Sandoval v. City of Chicago*, 357 Ill. App. 3d 1023, 1030-31 (2005) (stating that when a

plaintiff's attention is diverted by her own independent acts for which the defendant has no responsibility, the distraction exception does not apply). The circumstances of plaintiff's alleged injury are thus distinguishable from the plaintiff's injuries in our supreme court decision in *Deibert v. Bauer Brothers Construction Co., Inc.*, 141 Ill. 2d 430 (1990), where the supreme applied the distraction exception to the open and obvious doctrine because the defendant created the hazard that caused the distraction. See *i.d.* at 438-39 (electrician distracted from tire rut when he had to watch for construction materials being thrown off a balcony). We further note that plaintiff's contention that defendant should have anticipated customers becoming distracted by the activity of passing vehicles or equipment in the driveway area is mere speculation, not supported by the record, and insufficient to warrant application of the distraction exception.

¶ 33 For all practical purposes, where a danger is open and obvious and no exception applies, there is no duty. *Suchy v. City of Geneva*, 2014 IL App (2d) 130367, ¶ 24. However, the existence of an open and obvious condition is not a *per se* bar to finding a legal duty, and we must still apply the traditional factors in the duty analysis, *i.e.*, (1) the reasonable likelihood of injury; (2) the reasonable foreseeability of the plaintiff's injury, (3) the magnitude of the defendant's burden of guarding against the injury; and (4) the consequences of placing that burden on the defendant. *Qureshi v. Ahmed*, 394 Ill. App. 3d 883, 891 (2009). When an open and obvious condition is present, the likelihood of injury and foreseeability of harm are small. *Id*. We agree with the trial court's determination in its written order that there is no evidence in the record showing there was a reasonable likelihood of injury and foreseeability of harm from a customer tripping over a forklift. In order to guard against the injury, defendant would be required to move the forklift, or lower the blades, which would be a greater burden on defendant as the area where the forklift was parked was a service drive intended for vehicles and the

loading of trucks and equipment by forklifts. The consequences of placing that burden on defendant would also be greater for the same reason. Therefore, even under the four traditional factors, the evidence in this case does not support the imposition of a duty.

¶ 34 For the foregoing reasons, we affirm the circuit court's entry of summary judgment in favor of defendant.

¶ 35 Affirmed.