

2015 IL App (1st) 151117-U

SIXTH DIVISION
Order filed: December 23, 2015

No. 1-15-1117

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

SUSAN FIGAS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County
)	
v.)	No. 13 L 66065
)	
ALDI, INC.,)	Honorable
)	Robert J. Clifford,
Defendant-Appellee.)	Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Rochford and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court's order granting the defendant's motion for summary judgment based upon the open and obvious defense was reversed. A genuine issue of fact exists on the question of whether the plaintiff was distracted.

¶ 2 The plaintiff, Susan Figas, appeals from an order of the circuit court of Cook County which granted summary judgment in favor of the defendant, Aldi, Inc., on her single-count negligence action seeking damages for injuries that she sustained when she tripped on pallets laying in the aisle of a grocery store owned and operated by Aldi. For the reasons which follow,

we reverse the judgment of the circuit court and remand the matter for further proceedings.

¶ 3 The plaintiff filed a one-count complaint, alleging that Aldi was negligent for placing pallets on an aisle floor in one of its grocery stores, causing her to trip, fall, and injure herself. Aldi answered the complaint, denying the material allegations contained therein. Thereafter, Aldi filed a motion for summary judgment supported, *inter alia*, by the deposition of the plaintiff; the deposition of Angie Villa, its store manager; and surveillance video footage of the incident. Aldi argued that it is not liable to the plaintiff for the injuries she sustained because the pallets were an open and obvious condition. The plaintiff responded to the motion relying upon the same evidentiary material as Aldi. The circuit court granted Aldi's motion for summary judgment and denied the plaintiff's subsequent motion for reconsideration. This appeal followed.

¶ 4 The plaintiff argues that the circuit court erred in granting summary judgment in favor of Aldi as a genuine issue of fact exists on the question of whether she was distracted, thus precluding summary judgment based upon the open and obvious character of the pallets upon which she tripped. We agree.

¶ 5 Summary judgment is appropriate when the pleadings, depositions, admissions, and affidavits on file establish the absence of a genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2012); *Sollami v. Eaton*, 201 Ill. 2d 1, 6 (2002). The purpose of a motion for summary judgment is to determine the existence or absence of a genuine issue as to any material fact; it cannot be used to resolve a disputed fact. *Illinois State Bar Association Mutual Insurance Co. v. Law Office of Tuzzolini & Terpinas*, 2015 IL 117096, ¶ 14.

¶ 6 When ruling on a motion for summary judgment, the court must strictly construe all evidentiary material against the movant while liberally construing all of the evidentiary material

in favor of the opponent. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). If the evidentiary material before the court could lead to more than one reasonable conclusion or inference, the court must adopt the conclusion or inference which is most favorable to the opponent of the motion. *Brandt v. Time Insurance Co.*, 302 Ill. App. 3d 159, 164 (1998). Summary judgment is a drastic remedy which results in the disposition of a case without a trial and, as such, should not be granted unless the right of the movant is free from doubt. *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 12. We review an order granting summary judgement *de novo*. *Golden Rule Insurance Co. v. Schwartz*, 203 Ill. 2d 456, 462 (2003). In performing our *de novo* review, we apply the same analysis that the circuit court should perform in ruling on a motion for summary judgment, and we give no deference to the trial judge's conclusions or rational. *Waters v. City of Chicago*, 2012 IL App (1st) 100759, ¶ 8.

¶ 7 The facts giving rise to this litigation are taken from the evidentiary material that was before the circuit court and may be briefly summarized as follows. On November 11, 2011, the plaintiff was grocery shopping at the Aldi store located at 10532 South Indianapolis Avenue in Chicago. On her way to the checkout counter and while pushing her cart down aisle number four, the plaintiff noticed, and walked around, two empty wooden pallets that were stacked on the floor next to the shelves on the right side of the aisle. According to the deposition testimony of Angie Villa, the store manager, the pallets were left in the aisle by one of Aldi's employees who was called away from her work in the aisle to go to the front of the store to assist with customer checkout. The plaintiff testified that, after she had taken several steps past the pallets, a female customer appeared in her path pushing a shopping cart in the opposite direction. According to the plaintiff, she took one or two steps back to allow the other customer to pass

when she tripped on the pallets and fell. The plaintiff admitted that she did not look behind her before stepping backwards.

¶ 8 A surveillance video captured the plaintiff's accident and is included in the record. The video shows the plaintiff, the only person in aisle four, pushing a shopping cart toward the cash registers. The video also shows empty pallets laying on the aisle floor next to a shelf on the plaintiff's right. Two customers can be seen standing in the main aisle that runs perpendicular to, and intersects with, aisle four. The two individuals are standing in the checkout line with their backs to the plaintiff. The plaintiff can be seen pushing her cart around the pallets and toward the two customers standing in the intersecting aisle. Villa, who is also pushing a cart, appears from aisle five and walks in front of the two customers near aisle four. As Villa walks in front of the customers, the plaintiff stops, steps backwards without looking, trips on the pallets, and falls.

¶ 9 Aldi moved for summary judgment on the theory that the pallets upon which the plaintiff tripped were open and obvious, and as a consequence, it owed no duty to protect her from the danger that the pallets presented. The plaintiff does not dispute the open and obvious character of the pallets upon which she tripped. She does, however, argue that it was reasonably foreseeable to Aldi that a customer, such as herself, might be distracted and forget the pallets' presence while pushing a shopping cart down the aisle in which they were located.

¶ 10 A business operator owes its invitees a duty to exercise reasonable care to maintain its property in a reasonably safe condition for use by the invitees. *Ward v. K Mart Corp.*, 136 Ill. 2d 132, 141 (1990). However, the possessor of land is not liable to its invitees for physical harm caused by any condition on the land whose danger is known or obvious. Restatement (Second) of Torts § 343A(1) (1965); *Ward*, 136 Ill. 2d at 149. Stated otherwise, a landowner is "generally held to have no duty to warn [its] invitees of, or otherwise protect them from," open and obvious

dangers on its premises. *Ward*, 136 Ill. 2d at 142. However, the existence of an open and obvious condition is not a *per se* bar to a finding of a legal duty. *Buchaklian v. Lake County Family Young Men's Christian Ass'n*, 314 Ill. App. 3d 195, 204 (2000).

¶ 11 There are two exceptions to the open and obvious rule which serve to impose a duty on a landowner despite the existence of an open and obvious condition. *Bruns*, 2014 IL 116998, ¶ 20. Under the "distraction exception," although a condition is open and obvious, a landowner can be liable if it should have foreseen that its "invitee's attention may be distracted, so that [s]he will not discover what is obvious, or will forget what [s]he has discovered, or fail to protect h[er]self against it.'" *Sollami*, 201 Ill. 2d at 15 (quoting Restatement (Second) of Torts § 343A, cmt. f, at 220 (1965)). A plaintiff is distracted when "circumstances required *** her to focus on some other condition or hazard." *Waters*, 2012 IL App (1st) 100759, ¶ 15. The distraction exception will apply only where "evidence exists from which a court can infer that [the] plaintiff was actually distracted." *Bruns*, 2014 IL 116998, ¶ 22. It has been applied where "some circumstance was present that required the plaintiff to divert his or her attention from the open and obvious danger, or otherwise prevented him or her from avoiding the risk" and where the distractions were reasonably foreseeable by the defendant. *Id.* ¶¶ 28, 29.

¶ 12 When deposed, the plaintiff testified as follows:

"[A]s I was shopping there was a lady coming in my path. So I decided to pull back the cart to let her go by. And I tripped on the pallet [*sic*] and I fell backwards. * * * I saw her coming. I pulled my cart back to let her go through then I tripped. * * * What made me fall was pulling my cart back to let the lady go past—go through my path. I was being courteous to let her go past. And that's how I tripped and fell backwards."

The surveillance video contained in the record certainly calls the plaintiff's version of the events leading up to her fall into question. However, for purposes of determining whether Aldi is entitled to summary judgment, we accept the plaintiff's recollection of the incident as true. Accepting the plaintiff's recollection of the incident as true, we conclude that a trier of fact could infer that the plaintiff was actually distracted from the danger posed by the pallets upon which she tripped.

¶ 13 We also believe that it is reasonably foreseeable that a customer pushing a shopping cart down a grocery store aisle might momentarily forget the presence of an otherwise obvious obstruction in the aisle when maneuvering her cart around other customers or that she might become distracted when doing so. Consequently, the fact that the danger posed by the pallets upon which the plaintiff tripped was open and obvious does not conclusively determine whether Aldi acted reasonably under the circumstances.

¶ 14 In sum, we find that it is reasonably foreseeable that a customer pushing a shopping cart down a grocery store aisle might momentarily forget the presence of an otherwise obvious obstruction in the aisle when maneuvering her cart to allow another customer to pass. We also find that the evidence of record could support the conclusion that the plaintiff in this case was distracted from the danger posed by the pallets upon which she tripped. Accordingly, we conclude that a genuine issue of material fact exists on the question of whether Aldi breached its duty to exercise reasonable care to maintain its property in a reasonably safe condition for use by the plaintiff, its invitee. We, therefore, reverse the summary judgment entered in favor of Aldi and remand this cause back to the circuit court for further proceedings.

¶ 15 Reversed and remanded.