THIRD DIVISION
March 21, 2018

No. 1-17-1588

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LOUISE DAVENPORT, Plaintiff-Appellant, v. AMERICAN INVSCO CORP. and 200 NORTH DEARBORN PROPERTY MANAGEMENT OFFICE, Defendants (200 NORTH DEARBORN CONDOMINIUM ASSOCIATION, incorrectly sued as 200 NORTH DEARBORN PROPERTY MANAGEMENT OFFICE, Defendant-Appellee).	)	Appeal from the Circuit Court of Cook County. No. 16 L 2071 Honorable Jerry A. Esrig, Judge Presiding.

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

ORDER

¶ 1 *Held*: We affirm the judgment of the circuit court of Cook County granting summary judgment in favor of defendant; plaintiff failed to raise a genuine issue of material fact as to whether defendant had an agency relationship with a security guard who allegedly caused plaintiff's injuries where plaintiff failed to refute with competent evidence

defendant's affidavit it did not employ or have any involvement with security in the building where plaintiff was allegedly injured.

¶ 2 BACKGROUND

¶ 3 Plaintiff, Louise Davenport, filed a *pro se* amended complaint against defendants, American Invsco Corp. and "200 North Dearborn Property Management Office" (200 North Dearborn). Plaintiff voluntarily dismissed American Invsco Corp. as a defendant. 200 North Dearborn filed an answer and motion for summary judgment, and stated its proper name is 200 North Dearborn Condominium Association. (Plaintiff's amended complaint identifies defendant as "200 North Dearborn Condominium Association, aka 200 North Dearborn Management Office.") Plaintiff's amended complaint (hereinafter, "complaint") alleges defendant is the property manager of a building located at 201 North Clark Street in Chicago.

¶ 4 Count I of the complaint alleged false imprisonment. Plaintiff alleged a security guard was working in a food court at that location and the guard was defendant's agent. Plaintiff alleged the guard (he allegedly refused to give plaintiff his name) was acting within the scope of his employment at all times relevant when he caused plaintiff's injuries. Plaintiff alleged she purchased a cup of coffee from a fast food restaurant in the food court and sat in a large seating area outside the restaurant where she bought the coffee. The guard approached plaintiff and told her she had been there too long, there was a 30-minute time limit to consume purchases, and she had to leave. Plaintiff alleged no signs in the food court stated there was a 30-minute limit. She refused to leave, and the guard threatened to call police. Plaintiff persisted in her refusal to leave. Plaintiff alleged the guard then forcibly removed her from where she was sitting, handcuffed her tightly behind the back, pushed her through the room in view of other patrons into a small room, and pushed her down on a chair. Plaintiff alleged she was forcibly detained in

that room for approximately 40 minutes until police, who had to be called twice, arrived. When police arrived they refused to arrest plaintiff for trespassing and removed her handcuffs.

¶ 5 Count II of the complaint alleged assault. The complaint states that after she was taken to the small room and pushed down on to a chair, plaintiff stood and told the security to guard to retrieve her belongings from the seating area in the food court. Plaintiff alleged the guard refused, turned toward plaintiff angrily, and yelled at her saying he told her to sit down and used an expletive. Plaintiff alleged the guard "intended to cause and did cause Plaintiff to suffer apprehension of an immediate harmful contact."

¶ 6 Count III of plaintiff's complaint attempts to state a claim for battery. Plaintiff claimed that after the guard yelled at her, as alleged in Count II, he then "grabbed Plaintiff by the collar of her coat and threw Plaintiff on her side onto the chair." Plaintiff alleged the guard "intended and did cause a painful contact with Plaintiff." Count IV is titled "Aggravation of Pre-Existing Condition." Count IV alleged plaintiff told the guard she suffered from rheumatoid arthritis, and because of that condition the way she was handcuffed resulted in severe pain. The guard did not change the way plaintiff was handcuffed (with her arms behind her back) and did not remove the handcuffs.

¶ 7 Count V of plaintiff's complaint alleged negligent failure to train. Plaintiff alleged there were no signs indicating a 30-minute time limit to consume purchases, and she had stayed in the food court for longer than 30 minutes in the past and a different security guard did not ask her to leave on that occasion. Count V of plaintiff's complaint states: "Two different security guards in a similar situation, but they handle it differently. This shows that the Defendant did not communicate the proper procedure for this situation." Plaintiff alleged defendant breached its duty to provide properly trained security guards and that breach was the direct and proximate cause of her injuries.

¶ 8 Count VI alleged defendant was negligent for failing to post the time limit in the food court. Count VII alleged defendant violated the Americans with Disabilities Act (ADA) by failing to properly train its security guards in how to deal with people with disabilities and consequently failed to reasonably accommodate her medical condition when, instead of handcuffing plaintiff in front or to an object, the guard left her handcuffed with her arms behind her back for over 40 minutes until police arrived. Count VIII alleged defendant failed to accommodate her other medical condition: high blood pressure. Plaintiff alleged that while drinking her coffee, plaintiff started feeling symptoms of her high blood pressure and began taking medication for that condition with a bottle of juice she had with her. Plaintiff alleged the guard interrupted her and accused her of pouring the juice into the coffee cup. Count VIII stated plaintiff "should have been allowed to drink the cranberry juice as a reasonable accommodation under the ADA without being harassed by the security guard."

¶ 9 Defendant's answer to the complaint denied it was the property manager of the building located at 201 North Clark Street or that it managed and maintained the food court, and defendant denied the security guard was its agent. Shortly thereafter defendant filed a motion for summary judgment. Defendant's motion for summary judgment argued all of plaintiff's claims are predicated on the allegation defendant maintained and managed the building where the incident took place and that the security guard is its employee or agent. Defendant argued an attached affidavit from Mitchell Kessler demonstrates it "did not manage, maintain, or hire security guards for the building located at 201 N. Clark Street" and, accordingly, did not owe plaintiff a duty while she sat in the food court and did not breach any duty to plaintiff. Defendant argued Kessler's affidavit is evidence disproving plaintiff's case, and it is entitled to judgment as a matter of law. The affidavit states, in pertinent part, as follows:

"1. I [(Mitchell L. Kessler)] am employed as agent and Property Manager for 200 North Dearborn Condominium Association, an Illinois Corporation.

2. In my capacity as agent Property Manager for 200 North Dearborn Condominium Association, I am familiar with and have personal knowledge of the business purpose and activities of 200 North Dearborn Condominium Association and the matters set forth below.

* * *

4. The business purpose and activities of 200 North Dearborn Condominium Association has never involved any management, maintenance, security, or other function, whatsoever, related to the building located at 201 North Clark Street, Chicago, IL, including, but not limited to, the food court in the building located at 201 North Clark Street, Chicago, IL.

5. 200 North Dearborn Condominium Association does not, and did not on February 26, 2015 [(the date of the alleged incident)], or at any time prior or subsequent thereto, employ or otherwise retain any security guards, or other employees or independent contractors, to perform any employment-related or contractually-related function in the building located at 201 North Clark Street, Chicago, IL., including, but not limited to, the food court in the building located at 201 North Clark Street, Chicago, IL."

¶ 10 Plaintiff filed a response supported by her own affidavit. Plaintiff averred that soon after the incident she began trying to learn the identity of the property owner. She learned American Invsco owned the food court, but in her internet searches, the name 200 North Condominium Association and 200 North Dearborn Property Management Office kept coming up. Plaintiff returned to the food court to take pictures. She was standing outside the door to the food court

when a woman exited the food court carrying a broom and dustpan and began sweeping the stairs leading to the door to the food court. Plaintiff averred this woman wore a uniform with the name "200 North Dearborn Property Management Office" on the chest. Sometime later, after defendant received service of the complaint, plaintiff received a phone call, which she missed but she called back. Plaintiff averred that when she called back she reached "the front desk of 200 North Dearborn," and the person who answered stated that "it was probably someone from 'the property management office' that called." Plaintiff was transferred to a man who told her it was probably the property manager who called her, and plaintiff was transferred to an unidentified male. Plaintiff averred the unidentified male told her the food court was no longer in business and they (the property manager) were never connected to the food court. Plaintiff averred she told the man about her encounter with the employee in the 200 North Dearborn Property Management Office uniform, and the man responded we (the property manager) may have had some cleaning people there, but we never had any security guard. Plaintiff said someone must have hired "them" and the man responded "Peggy."

¶ 11 Plaintiff filed a motion to strike Kessler's affidavit. Plaintiff's motion to strike argued Kessler failed to show he can competently testify to "the events that happened at the time of the incident" because he did "not definitively state that he had a relationship with the 200 North Dearborn Condominium Association *** or in what capacity." Plaintiff also argued the affidavit should be stricken because she did not have the opportunity to depose Kessler, and she argued she has evidence that contradicts some of Kessler's averments, including her telephone conversation with the "property manager," who plaintiff presumed was Kessler. Plaintiff argued the "property manager" made statements contradicting those in Kessler's affidavit.

¶ 12 Defendant filed a reply to plaintiff's response to defendant's motion for summary judgment and a response to plaintiff's motion to strike Kessler's affidavit.

¶ 13 The trial court issued a written order in which it found plaintiff's "claim is based entirely on the actions of an unnamed security guard and plaintiff has not refuted defendant's affidavit stating that it never employed or retained a security guard to perform any function in the building where the alleged occurrence occurred. Therefore, there is no genuine issue of material fact as to agency." The trial court granted summary judgment in favor of defendant. Although the trial court initially denied defendant's motion for a finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016) that there was no just reason for delaying enforcement or appeal of the order granting summary judgment, when plaintiff voluntarily dismissed Invsco as a defendant, the trial court granted defendant's request for Rule 304(a) language.

¶ 14 This appeal followed.

¶ 15 ANALYSIS

¶ 16 Plaintiff, also appearing *pro se* on appeal, argues defendant was not entitled to summary judgment because "the issue of agency is still in dispute." Plaintiff argues she successfully countered Kessler's affidavit, in which he averred to facts establishing the guard was not defendant's agent, with her own affidavit and other evidence which, she argues, disputes Kessler's testimony and raises a genuine issue of material fact as to agency, precluding summary judgment. Plaintiff relies on her averments (a) she saw a woman who appeared to be a janitorial employee of defendant working at the food court and (b) an unidentified man in defendant's office told her defendant sometimes has cleaning people work in the food court. Other evidence on which plaintiff relies are an internet listing of amenities at the 200 North Dearborn Condominium building that includes a food court; evidence that one entity, Invsco, owned both properties; and pictures plaintiff took of advertisements in the food court for the 200 N. Dearborn condominiums, which plaintiff argues refutes Kessler's averment that defendant never had any business dealings whatsoever with the food court at 201 N. Clark Street. Plaintiff argues

defendant failed to meet its initial burden of production to affirmatively show that some element of plaintiff's case—whether the guard was defendant's agent—must be resolved in its favor.

¶ 17 "Summary judgment is proper when the pleadings, depositions, affidavits, and other matters on file establish that there is no 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)." *Cohen v. Chicago Park District*, 2017 IL 121800, ¶ 17. "A party moving for summary judgment bears the initial burden of proof. [Citations.]" *Travelers Indemnity Co. v. Rogers Cartage Co.*, 2017 IL App (1st) 160780, ¶ 28. The party moving for summary judgment may satisfy that burden by either showing that some element of the case must be resolved in its favor or that there is an absence of evidence to support the nonmoving party's case." *LM Insurance Corp. v. B&R Insurance Partners, LLC*, 2016 IL App (1st) 151011, ¶ 17. "Once the moving party satisfies that initial burden, the burden shifts to the nonmoving party to come forward with some factual basis that would entitle it to a favorable judgment. [Citation.]" *Travelers Indemnity Co.*, 2017 IL App (1st) 160780, ¶ 28. "[I]n determining a summary judgment motion, the court has the duty to review the entire record and to construe the evidence strictly against the moving party and liberally in favor of the non-moving party." *Foy v. City of Chicago*, 194 Ill. App. 3d 611, 616 (1990). "We review the circuit court's grant of summary judgment *de novo*. [Citation.]" *Cohen*, 2017 IL 121800, ¶ 17.

¶ 18 Defendant argues Kessler's affidavit[1] affirmatively shows the principal-agent element of plaintiff's claim must be resolved in its favor, meeting defendant's burden; and plaintiff failed to

---

[1] Plaintiff points this court to her motion in the trial court to strike Kessler's affidavit. However, as defendant notes, plaintiff failed to obtain a ruling on her motion in the trial court, and "it is the burden of the party objecting to the sufficiency of a Rule 191(a) affidavit to challenge the affidavit in the trial court *and obtain a ruling thereon.* [Citations.] Failure to do so results in waiver." (Emphasis added.) *Cordeck Sales, Inc. v. Construction. Systems, Inc.*, 382 Ill. App. 3d 334, 383 (2008). Plaintiff admitted she

come forward with a factual basis that would entitle her to judgment in her favor because plaintiff "failed to offer probative evidence of a principal-agent relationship between defendant and the unidentified security guard." Defendant argues plaintiff's conclusions are not reasonable inferences from her evidence but are merely plaintiff's own speculations. Defendant argues it is not reasonable to infer defendant hired the security guard based on the presence of an employee wearing a uniform that read "200 North Dearborn Property Management Office" because the predicate for that inference—that defendant employed the janitorial employee—is mere speculation.[2] Defendant argues plaintiff is merely speculating defendant employed the woman in the uniform because plaintiff presented no evidence any of defendant's employees wore uniforms with that name (which is not defendant's actual name). Defendant further argues that even if the uniform were circumstantial evidence from which it is reasonable to infer defendant hired the woman in the uniform, plaintiff presented no evidence—direct or circumstantial—the same entity hired both cleaning personnel and security personnel for the food court.

¶ 19 Initially, we address plaintiff's reliance on the statement by an unidentified male that "we may have had some cleaning people there." On appeal, plaintiff states she believes that male was Kessler because when she called the office of defendant, she was told she was being transferred to "the property manager," and Kessler identified himself as defendant's property manager in his affidavit. Defendant argues the conversation recounted in plaintiff's affidavit does not qualify as an admission by defendant it hired the woman in the 200 North Dearborn uniform because (1) the speaker is unidentified, (2) plaintiff's affidavit does not establish the

---

abandoned her motion "when she realized Mr. Kessler said he could testify to things if called upon as a witness in court."

[2] Defendant's brief cites *Olloway v. City of Chicago*, 2011 IL App (1st) 101301-U, ¶ 69. We caution defendant's counsel unpublished orders are not precedential and may not be cited by any party except in the limited circumstances allowed under Illinois Supreme Court Rule 23(3)(e)(1) (eff. July 1, 2011).

speaker was an agent of defendant, and (3) the male's statement is equivocal. We find we may not consider plaintiff's statement recounting the conversation with the unidentified male in considering defendant's motion for summary judgment. In *Zonta v. Village of Bensenville*, 167 Ill. App. 3d 354, 357 (1988), the plaintiff was injured when a plate glass window on which he was leaning shattered. *Zonta*, 167 Ill. App. 3d at 355. In response to the defendant's motion for summary judgment, the plaintiff averred that an employee of the defendant stated "This happened once before," from which the plaintiff argued the defendant had notice of the defective window. *Id.* The plaintiff offered no other evidence in opposition to the defendant's summary judgment motion. *Id.* The appellate court affirmed. *Id.* at 358. The court found that the "plaintiff's affidavit refers to a statement by an unknown woman that allegedly would show that defendant had previous knowledge of a problem with the window, but plaintiff failed to produce a deposition or affidavit from her or offer the court a satisfactory basis for this failure. While a party is not required to prove his case at the summary judgment stage, he is required to present some factual basis which would arguably entitle him to judgment. [Citation.] Without the affidavit of the witness, her purported statement consists of inadmissible hearsay which may not be considered on a motion for summary judgment. [Citations.]" *Id.* at 357. Similarly, here, plaintiff failed to provide an affidavit from the man she believed to be Kessler or an affidavit from the man[3] who told her he was transferring her call to "the property manger," and plaintiff failed state why either affidavit is not available. *Id.* at 356 (quoting *Kimbrough v. Jewel Companies. Inc.*, 92 Ill. App. 3d 813, 819 (1981) ("If persons had knowledge favorable to plaintiff, it was her right to obtain affidavits or to inform the court of the reasons why she was unable to do so." (Internal quotation marks omitted.)). Accordingly, we will not consider the

---

[3] Plaintiff's only identification of the man who transferred her call is that he said his name was "Tony."

alleged statement by the unknown male in plaintiff's affidavit in opposition to defendant's motion for summary judgment.

¶ 20 Notwithstanding defendant's argument to the contrary, it was not necessary for plaintiff to adduce evidence that defendant employed individuals who wore clothing with the "200 North Dearborn Property Management Office" inscription to connect the woman to defendant without resort to speculation. "Circumstantial evidence 'is the proof of certain facts and circumstances from which the jury may infer other connected facts which usually and reasonably follow according to the common experience of mankind.' [Citation.]" (Emphasis omitted.) *Private Bank v. Silver Cross Hospital & Medical Centers*, 2017 IL App (1st) 161863, ¶ 49.

> "To be sufficient to support an inference, circumstantial evidence must show a probability of the existence of the fact to be inferred. [Citation.] Although the circumstantial evidence need not exclude all other possible inferences, it must be of such a nature and so related as to make the conclusion reached the more probable. [Citation.] Where from the proven facts the non-existence of the fact to be inferred appears to be just as probable as its existence, then the conclusion that it exists is a matter of speculation, surmise, and conjecture. [Citation.]" *Romano v. Municipal Employees Annuity & Benefit Fund of Chicago*, 402 Ill. App. 3d 857, 864-65 (2010).

Under the facts averred here, the question simply becomes, if the worker was wearing a uniform bearing a name similar, but not identical, to that of defendant (the circumstantial evidence), is it probable defendant hired the worker (the fact to be inferred). Stated differently, the question is where the worker was wearing a uniform bearing a name similar, but not identical, to that of

defendant (the proven facts)[4], is it just as probable defendant did not hire the worker (the non-existence of the fact to be inferred). Nonetheless, we need not reach the question of the reasonable inferences to be drawn from the presence of a janitorial employee in a "200 North Dearborn Property Management Office" uniform at the food court.

¶ 21 Assuming, *arguendo*, the circumstantial evidence is sufficient to establish defendant employed janitorial staff for the food court, the question would next be whether it is reasonable to infer defendant employed security staff for the food court from the fact defendant employed janitorial staff for the food court (or is that fact reasonably probable). Defendant argues plaintiff presented no admissible evidence—direct or circumstantial—the same entity hired both the cleaning personnel and the security personnel at the food court, and offered no evidence "ruling out the possibility that the security guard at the food court was hired, for example, by an entity which operated the food court, a restaurant in the food court, or a company managing the 201 North Clark building." Thus, defendant argues, plaintiff must rely on speculation to conclude defendant hired the security guard—even if defendant hired the cleaning woman.

¶ 22 We find, construing the evidence in a light most favorable to plaintiff, it is equally probable defendant did *not* employ security staff for the food court as that it did. Plaintiff has presented no evidence defendant managed the food court or that the security guard wore similar indicia of employment by defendant as did the janitorial staff person. There could be different motives involved in keeping an amenity of defendant's building clean than from ensuring the safety and comfort of its patrons. From the record as a whole, it is equally reasonable to infer the

---

[4] "When determining whether a genuine issue of material fact exists, courts construe the pleadings liberally in favor of the nonmoving party." *Libolt v. Wiener Circle, Inc.*, 2016 IL App (1st) 150118, ¶ 24. "In ruling on a motion for summary judgment, the trial court must consider the pleadings and evidentiary matters in the record in the light most favorable to the nonmoving party and accept as true all reasonable inferences from such facts which favor the nonmovant." *Pruitt v. Schultz*, 235 Ill. App. 3d 934, 936 (1992).

restaurant from which plaintiff purchased her coffee, which she was allegedly taking too long to consume, employed the security guard. All we know of the security guard in this case is that he was concerned with keeping the flow of food court customers moving. That task arguably is more beneficial to the restaurants in the food court than occupants of defendant's building who might visit the food court (unlike, for example, its cleanliness). Thus, one could reasonably infer defendant had no interest in the security's guard's functions and, therefore, did not employ him. Further, as a practical matter it is equally probable the two entities—defendant and the food court, or defendant and the management of 201 N. Clark—separately hired the same cleaning firm. No conclusion about the security guard's employer is more or less likely than any other conclusion; therefore, any conclusion about the security guard's employer is the result of no more than conjecture and surmise. *Romano*, 402 Ill. App. 3d at 864-65 ("Where from the proven facts the non-existence of the fact to be inferred appears to be just as probable as its existence, then the conclusion that it exists is a matter of speculation, surmise, and conjecture. [Citation.]").

¶ 23 Rather than end our inquiry here, we acknowledge plaintiff's argument that her affidavit and evidence "dispute the testimony of Mitchel Kesler [*sic*] *** and it was sufficient to raise a genuine issue of material fact to preclude entry of summary judgment." We are aware of the fact contradictions in the affidavits of opposing parties can raise issues of credibility, which may preclude summary judgment. 4 Nichols Ill. Civ. Prac. § 68:36. However, in those instances the contradiction lies in statements concerning the central issue presented in the case. See *Lynch Imports, Ltd. v. Frey*, 200 Ill. App. 3d 781, 787 (1990). In *Progressive Insurance Co. v. Universal Casualty Co.*, 347 Ill. App. 3d 10, 22 (2004), the case cited by plaintiff, the central issue in the case was whether an insurer had notice of an underlying tort action. The defendant submitted an affidavit that it was not informed about a lawsuit, and the plaintiff submitted an

affidavit stating it did give the defendant notice that a lawsuit had been filed. *Id.* at 22-23. The court held "because the conflicting affidavits in this case raised an issue of fact regarding whether Universal had actual notice that the lawsuit was filed, and actual notice is vital to an assertion that a party be *estopped* from raising policy defenses, such as those raised by Universal here, summary judgment should not have been granted." *Id.* at 23. In this case, plaintiff's affidavit does not contradict Kessler's affidavit on the central issue in the case, that being whether defendant hired the arresting security guard. The only contradiction even arguably raised by the evidence is in whether defendant hired janitorial staff for the food court in the 201 N. Clark Street building. Therefore, plaintiff's affidavit fails to raise a genuine issue of *material* fact. See *Eakins v. New England Mutual Life Insurance Co.*, 130 Ill. App. 3d 65, 68 (1984) (only facts related to material issues are relevant; facts unrelated to essential issues, no matter how sharply controverted, will not warrant denial of a motion for summary judgment).

¶ 24 Defendant satisfied its initial burden to show that an element of plaintiff's case had to be resolved in its favor—specifically, whether the security guard who allegedly caused plaintiff's injuries was its agent. Defendant produced evidence demonstrating the guard was not its agent. The burden then shifted to plaintiff to come forward with some factual basis that would entitle her to a favorable judgment. Plaintiff failed to do so. Accordingly, the trial court's order granting summary judgment in favor of defendant is affirmed.

¶ 25 CONCLUSION

¶ 26 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 27 Affirmed.