2018 IL App (1st) 171823-U

No. 1-17-1823

Order filed February 28, 2018

Third Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

JENNIFER DONYA LITOWITZ,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 16 L 6698
	)	
TIME NIGHTCLUB CHICAGO and TOP CHACH, LLC.,	)	Honorable Kathy M. Flanagan,
	)	Judge, presiding.
Defendants-Appellees.	)	

JUSTICE LAVIN delivered the judgment of the court.
Justices Fitzgerald Smith and Howse concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court properly granted defendants' motion for summary judgment when there is no evidence in the record that defendants were responsible for the liquid on the floor of defendants' nightclub in which plaintiff patron slipped and fell, and plaintiff failed to establish that defendants had actual or constructive notice of the alleged dangerous condition.

¶ 2 Plaintiff Jennifer Donya Litowitz, a patron or business invitee, slipped and fell in Time Nightclub Chicago (Time). She sued defendants, Time and Top Chach LLC., alleging that their

negligent acts caused her fall. Following discovery, defendants moved for summary judgment, which the trial court granted. We affirm the entry of summary judgment in favor of defendants, finding that plaintiff failed to establish that the liquid she slipped on was placed on the floor by defendants' employees or that defendants had actual or constructive notice of the alleged dangerous condition.

¶ 3 In her complaint, plaintiff alleged that on December 12, 2015, she was present in the "private section" of Time when she slipped and fell on "an accumulation of fluid" on the floor and was injured. She alleged that defendants, through their employees, knew or in the exercise of reasonable care should have known that the liquid had accumulated, and owed a duty of reasonable and ordinary care to its patrons to ensure that the club was free from danger. She further alleged that defendants were negligent when they, *inter alia*, failed to inspect the premises for safety hazards including spilled drinks and other liquids, to warn patrons of hazards upon the ground and to light the area. The complaint also alleged a premises liability claim. The complaint originally named 873 N. Orleans L.L.C., as a defendant. Plaintiff subsequently filed an amended complaint adding defendant Top Chach, LLC., the nightclub's alleged owner, as a party. The record reveals that Time Nightclub and Top Chach, LLC., appear to be the same entity, *i.e.*, Top Chach, LLC d/b/a Time Nightclub.

¶ 4 Defendants filed an affirmative defense, alleging in pertinent part, that the proximate cause of plaintiff's injuries was her own negligence and failure to keep a proper lookout. The parties engaged in factual discovery.

¶ 5 In her deposition, plaintiff testified that she fell shortly after midnight on December 13, 2015, and that following her injury she missed a month of work because of surgery. Plaintiff was

in Chicago to attend her graduation from business school. Plaintiff had a glass of champagne around noon. She later attended a graduation event at the Drake Hotel from 7 to 10 p.m., and had one drink there. Plaintiff then went to the Godfrey Hotel where she had at least one, but possibly more drinks. Plaintiff next stopped at a karaoke bar. She did not have anything to drink there. Finally, plaintiff went to Time, arriving between midnight and 1 a.m. She was with her sister, Lindsay, and friends from school.

¶ 6 When plaintiff arrived at Time, she purchased a table. The table came with a bottle of vodka. Plaintiff had at least one vodka soda, and possibly more drinks prior to her fall. Plaintiff left the club between 2 and 2:30 a.m. She did not know what time she fell, and she "stayed for a little bit" after the fall. Plaintiff described the club as "dark, very crowded." She did not know how many people are allowed by law to be inside. Plaintiff was "mom dancing" to the music. Plaintiff was wearing booties with a three or four inch "[s]turdy wooden heel." At the time that she fell, plaintiff was standing at the outer side of the table, closer to the interior of the club.

¶ 7 Plaintiff testified that she fell due to liquid on the floor. She did not know what the liquid was, but assumed it was "people's drinks." She did not see how the liquid came to be on the floor. However, plaintiff had noticed liquid "throughout the evening and mentioned it twice to the busboy." The busboy cleaned the liquid "multiple times" and then it would "reaccumulate." Plaintiff explained that the club was "so packed that you would get bumped and everything would spill." Plaintiff did not see the liquid when she fell. The following exchange then took place:

"A: I didn't see it when I fell.

Q: Okay. You saw it after?

A: I assumed it was clean when I was dancing in that spot, and I wouldn't have danced on water if I had known it was there. I would have told somebody to clean it up.

Q: So the liquid on which you actually fell, you had not told anyone about that?

A: No."

¶ 8 Plaintiff did not see anyone spill a drink in that area between the second time it was cleaned and when she fell. Although plaintiff complained to her friends about the crowded nature of the club, she did not complain to a club employee. She did not remember how much time passed between the second time that the busboy cleaned the area and when she fell. Her sister Lindsey and friend Felix saw plaintiff on the floor, although she was not sure whether they saw "the actual fall." Plaintiff described her fall as "when I put my right foot down, it went out to the right ***, and I felt a pop in my knee, and I hit the ground." When she was on the ground, she saw "clear liquid." After she fell, her legs and pants were wet. Plaintiff was able to walk and did not feel any pain in her knee at that time. She did not seek medical treatment. When she flew to Florida the next day, she was able to walk, but limped.

¶ 9 After she fell, plaintiff told a bouncer at the front door of the club that she fell and about the liquid on the floor. Plaintiff assumed that the bouncer told someone to clean it up, because the busboy came and cleaned up the liquid. Plaintiff was then asked whether "in each of the three instances when you reported liquid on the floor, two prior to your fall and one after, Time acted to clean up that area," and plaintiff answered yes. Plaintiff did not tell the bouncer that she was hurt and did not speak to any other Time employees. Prior to her fall, plaintiff did not speak to any of her friends about liquid on the floor.

¶ 10 Lindsay Litowitz, plaintiff's sister, testified that she was present with plaintiff at the club. Lindsay, who was wearing a boot due to ankle surgery, was not "in the mood to dance and party" but went out anyway. Although plaintiff paid to have a private table at the club, Lindsay felt like the group was in a "public area." She saw plaintiff "slip and go down, and it was very hard." The group did not leave immediately leave. Lindsey described the club as "crowded" and "not the cleanest." The area was "slippery." After 15-20 minutes at the club, Lindsay saw liquid on the floor and decided to sit down. She did not talk to anyone about "the wet on the floor." She did not ask any employees to clean it up and did not see anyone spill a drink. Lindsay did not look at the area where plaintiff was after she fell and did not know what plaintiff slipped on.

¶ 11 Edgar Delgado, one of plaintiff's friends from business school, testified that that he did not see plaintiff have anything to drink at the Drake. He then went to the Godfrey Hotel, arriving around 8:30 p.m. He did not remember whether he saw plaintiff drink at the event. Around 1 a.m., a group, including Edgar and plaintiff, went to a karaoke bar. He did not have a recollection of seeing plaintiff drink there. Over the course of the evening, Edgar had four or five drinks. He met up with plaintiff at Time where plaintiff had reserved a table. Edgar saw her with "some sort of drink" in her hand, but did could not tell if it was alcoholic. He did not see plaintiff fall. Edgar described the area around the table as "pretty packed." He did not know how many people were allowed by law to be inside the club or the private area. He did not inspect the area where plaintiff fell and he did not "recall" seeing any liquid on the floor near the table.

¶ 12 Zafer Genc, the club's "owner," testified that he opened Time nightclub in 2014, and closed it in June 2016. As of December 2015, the policy regarding cleaning up spills was that if the "bussers" or servers saw a spill, a busser would be told to clean the area. Security would put

a light on the spill and call a busser on the radio. If Zafer or other managers saw a spill, that person would stay by the area to "make sure it's clean." If someone was injured at the club and informed a staff member, the security manager "in the office" would be informed and an incident report created. The incident would also be reported to Zafer if he was present. In the two years that he owned Time, he only remembered one fall. He did not become aware that plaintiff fell until the instant lawsuit. No one reported the fall to him that evening.

¶ 13 Lequoinne Rice testified that he was the general manager at Time from October 2015 until it closed in June 2016. His job entailed scheduling, "running the floor" and front of house duties. In December 2015, the busboys were responsible for, *inter alia*, setup, breakdown, cleaning up spills, and taking out the trash. Each busboy would be assigned "[n]o more than three tables." If there was a spill, "all parties" were responsible for communication and a wet floor sign would be put up. In December 2015, the policy was that the spill would be highlighted with a flashlight, and communicated over the radio so that a busser came to the table. Then, depending on whether it was broken glass or a spill, a mop, broom or dustpan would be used and someone would follow up with a towel. Additionally a caution sign would be put in place. The staff was trained on how to handle spills. If an accident happened, it would be reported to him and he would fill out a report. He did not recall if a customer reported water on the floor on December 12, 2015. He did not know plaintiff and was not aware that she fell.

¶ 14 Jorge Blanca testified that in December 2015, he handled security inside the club. When there was a spill, a security person would aim a flashlight at the spill and call a busboy on the radio. If the busboy was busy "we would personally go over and get the mop and clean up the spill." However, a lot times the busboys "would have it under control." The flashlights were used

to get people's attention so that no one walked through the spill. When he learned about a spill, he would light the area and call a busboy or have "one of the other guys grab a mop" while he blocked off the area. Sometimes there was a busboy on duty just to "literally clean and mop the area." He never saw a caution wet floor sign placed next to a spill. If an "incident" happened, the person that it was first reported to would write down the information for the incident report, and tell Blanca. Then Blanca and that person would talk to the person manning the security cameras. Blanca did not remember if he worked on December 12, 2015, but would have worked unless he was sick. Prior to this lawsuit, he had never heard plaintiff's name and did not know that she fell.

¶ 15 Defendants filed a motion for summary judgment alleging that they did not have actual or constructive knowledge of the dangerous condition, that is, the liquid that caused plaintiff's fall. The motion further alleged that there was no evidence that Time created the condition. In the alternative, defendants argued that plaintiff slipped on an open and obvious condition.

¶ 16 Plaintiff filed a response to the motion for summary judgment arguing, *inter alia*, that summary judgment was improper because defendants had actual notice of spills throughout the evening and failed to adhere to their own policies which created and maintained the dangerous environment. Attached in support was plaintiff's affidavit, in which she averred that she been asked at the deposition, she would have stated that no security personnel lit the spills that she complained of with a flashlight, no busboy used a towel after cleaning the floor and that no caution wet floor sign was placed after the floor was mopped.

¶ 17 The circuit court granted defendants' motion for summary judgment finding, in pertinent part, that the record did not contain evidence that defendants had actual notice of the liquid upon which plaintiff fell, nor did the record contain evidence of constructive notice of the spill.

¶ 18 On appeal, plaintiff contends that the court improperly granted summary judgment when it determined that defendants lacked actual or constructive notice of the liquid on the floor because there are genuine issues of material fact as to whether defendants had policies in place to address spills and overcrowding and as to whether defendants followed those policies. Plaintiff further contends that defendants created the dangerous condition when it violated its own policies to prevent and remediate spills.

¶ 19 Summary judgment is proper when the pleadings, depositions, 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 2016). 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).

¶ 20 To prevail in a negligence action, a plaintiff must plead and prove that the defendant owed her a duty, that the defendant breached that duty, and that an injury proximately resulted from that breach. *Deibert v. Bauer Brothers Construction Co.*, 141 Ill. 2d 430, 434 (1990). In the case at bar, defendants owed plaintiff, as a business invitee, a duty of reasonable care. See *Pavlik v. Wal-Mart Stores*, Inc., 323 Ill. App. 3d 1060, 1063 (2001). In order to show that a business owner breached its duty to an invitee for a slip and fall caused by a foreign substance, a plaintiff must show that " '(1) the substance was placed there by the negligence of the proprietor or (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 presence should have been discovered, *i.e.*, the proprietor had constructive notice of the substance.' " *Id.* (quoting *Hayes v. Bailey*, 80 Ill. App. 3d 1027, 1030 (1980)).

¶ 21 When there is no direct evidence as how the foreign substance got on the premises, the question becomes "what circumstantial evidence is sufficient to sustain a reasonable inference that the substance was there through the act of the defendant or his servants." *Olinger v. Great Atlantic & Pacific Tea Co.*, 21 Ill. 2d 469, 475 (1961). If the substance is unrelated to the business and the plaintiff can provide no evidence of actual or constructive notice, then the "defendant is entitled to a directed verdict, since there is no evidence from which it could be reasonably inferred that the substance was more likely to have been dropped by [the] defendant's servants than by third persons." *Id.*

¶ 22 Thus, to establish negligence on the part of the defendants, plaintiff need only bring forth facts that her fall was caused by a liquid substance on the floor attributable to the defendants. Liability on the part of the defendants may arise if (1) defendants are directly responsible for the liquid on the floor or (2) defendants had actual or constructive notice of the liquid substance on the floor. Here, plaintiff fails to present evidence to support either of these theories of recovery. Plaintiff testified that she did not know how the liquid came to be on the floor and did not know how long it had been there. Thus, there is no direct evidence that defendants' employees caused the liquid to be on the floor.

¶ 23 *Richardson v. Bond Drug Co. of Illinois*, 387 Ill. App. 3d 881 (2009), is instructive. In that case, the plaintiff argued that the trial court erred in granting summary judgment because the evidence created factual questions regarding, *inter alia*, whether a dangerous condition existed, whether the defendant had notice of the dangerous condition, and whether the defendant exercised reasonable care in maintaining its premises. *Id.* at 882. There, the plaintiff slipped on a wet floor but he did not know what caused his fall; rather, he assumed that the floor was wet

because his clothes were wet after he fell. *Id.* at 885. The court therefore concluded that because "the factual allegations in the complaint and the deposition testimony of the witnesses do not show with any measure of probability that liquid was on the floor prior to plaintiff's fall, plaintiff has failed to present sufficient evidence of a causal nexus between his injuries and defendant's conduct." *Id.* at 886.

¶ 24 As in *Richardson*, plaintiff presents no evidence as to how the liquid that she fell on came to be on the floor. Although plaintiff and her sister assumed that the liquid on the floor was from spilled drinks, neither woman testified that she saw anyone spill a drink. Moreover, plaintiff did not identify the liquid upon which she slipped, did not know how long the liquid had been on the floor when she fell and did not see the liquid before she fell. "Although plaintiff is not required to prove [her] case at the summary judgment stage, [she] must present evidentiary facts to support the elements of [her] cause of action." *Id.* at 885. In the case at bar, thus summary judgment was appropriate because plaintiff failed to present sufficient evidentiary facts to show defendants were responsible for the liquid on the floor.

¶ 25 Alternatively, defendants could be held liable for plaintiff's injuries if they had actual or constructive notice of the liquid on the floor. See *Tomczak v. Planetsphere, Inc.*, 315 Ill. App. 3d 1033, 1039 (2000) (defendant liable if owner or employees knew of hazard or should have discovered it due to length of time it was present). "Generally, if a plaintiff is relying on proof of constructive notice, she must establish that the dangerous condition existed for a sufficient time or was so conspicuous that the defendant should have discovered the condition through the exercise of reasonable care." *Smolek v. K.W. Landscaping*, 266 Ill. App. 3d 226, 228-29 (1994). "[S]ufficient notice of a dangerous condition may give rise to a breach of duty by the defendants

if the condition is left uncorrected." *Ishoo v. General Growth Properties*, 2012 IL App (1st) 110919, ¶ 26.

¶ 26 Here, plaintiff cannot show actual or constructive knowledge as she testified in her deposition that that she did not see the liquid before she fell and she did not know how long the liquid had been on the floor. To the extent that plaintiff argues that defendants should have been on notice that liquid was accumulating on the floor because she had twice requested that someone clean up liquid on the floor, we note that plaintiff acknowledged that each time that she complained about the liquid it was cleaned up by a busboy. In the absence of any evidence tending to show how long the liquid was on the floor before plaintiff fell, there is no basis for a jury to conclude that the liquid was on the floor long enough that defendants had constructive notice. See *Smolek*, 266 Ill. App. 3d at 228-29 ("if a plaintiff is relying on proof of constructive notice, she must establish that the dangerous condition existed for a sufficient time or was so conspicuous that the defendant should have discovered the condition through the exercise of reasonable care").

¶ 27 We are unpersuaded by plaintiff's reliance on *Newsom-Bogan v. Wendy's Old Fashioned Hamburgers of New York, Inc*., 2011 IL App (1st) 092860. In that case, the plaintiff sued after she slipped and fell in a Wendy's restaurant, and the trial court granted summary judgment. The plaintiff's foot slipped and she fell sideways near a trash receptacle as she stepped from carpeting to a tile floor. The plaintiff testified that she was unable to get up from the floor because her hands were greasy and therefore she assumed she had slipped on grease. The defendant's assistant manager testified that she was notified about the plaintiff's fall, but that when she looked in that area she did not observe anything on the floor. The assistant manager

also testified that the defendant's training manual required the most senior manager to walk through the restaurant every 15 minutes to make sure everything was up to par. *Id*. ¶ 7. The plaintiff submitted an affidavit attached to her response to the defendant's summary judgment motion in which she averred that she had been in the restaurant for 20 minutes before her fall and did not observe any employees do a walk-through or a customer spill anything. *Id.* ¶ 9. Therefore, the court determined that summary judgment was improper because, *inter alia*, defendant's written manual was sufficient to create a duty to inspect every 15 minutes, and the plaintiff's testimony that she was present for 20 minutes and did not observe such an inspection was sufficient to create a triable issue of fact as to constructive notice. *Id.* ¶¶ 19, 25.

¶ 28 Plaintiff argues that this case is similar to *Newsom-Bogan* because defendants had "a policy of having employees assigned to monitor for spills" and just as in *Newsom-Bogan*, defendants either failed to discover the spill that injured plaintiff or failed to have actual employees in place to monitor for spills. Defendants respond that this case is unlike *Newsom-Bogan* because defendants "had no written policy requiring a walk-through at timed intervals."

¶ 29 We agree with defendants that *Newsom-Bogan* is unlike the case at bar because the primary reason for the court's holding that an issue of fact as to constructive notice existed in that case was because the defendant's written manual was sufficient to create a duty to inspect every 15 minutes and the plaintiff testified she was present in the restaurant for 20 minutes and did not see anyone perform an inspection. Thus, the plaintiff's testimony in that case created a question of fact regarding constructive notice. In the case at bar, no such manual or time-based policy existed. Rather, here, once club employees were notified of a spill, security would light the area and busboys would be notified so that the spills could be cleaned up. Plaintiff testified

that each time that she notified club employees of a spill, a busboy cleaned the area. To the extent that plaintiff argues that defendants should have been on notice because the area was "too crowded" resulting in people spilling drinks, this argument must fail because neither plaintiff nor her sister saw anyone spill a drink.

¶ 30 Ultimately, summary judgment was properly granted when plaintiff testified she did not know how the liquid came to be on the floor, she did not know how long the liquid had been on the floor before she fell, and she did not see the liquid before she fell. There was no evidence that defendants' employees had actual notice of the liquid and in the absence of any evidence tending to show how long the liquid was on the floor before plaintiff fell, there is no basis for a jury to conclude the substance had been there long enough that defendants' employees had constructive notice. See *Ishoo*, 2012 IL App (1st) 110919, ¶ 26 ("sufficient notice of a dangerous condition may give rise to a breach of duty by the defendants if the condition is left uncorrected"). Accordingly, the entry of summary judgment in defendants' favor was warranted.

¶ 31 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 32 Affirmed.