2012 IL App (2d) 110155-U
No. 2-11-0155
Order filed April 11, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

CANDACE T. PYDO,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 10-L-529
	)	
DOMINICK'S FINER FOODS, LLC,	)	Honorable
	)	John T. Elsner,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices McLaren and Burke concurred in the judgment.

Held: The trial court properly determined that defendant had no constructive notice of water on the floor of its establishment and that defendant did not have a duty to provide a slip-free surface. We affirmed the judgment of the trial court.

ORDER

¶ 1 Plaintiff, Candace T. Pydo, brought suit against defendant, Dominick's Finer Foods, LLC, alleging that she suffered physical injury as a result of defendant's alleged breach of its standard of care. Defendant moved for summary judgment, which the trial court granted. Plaintiff appeals, contending that the trial court erred when it concluded first, that defendant had no constructive notice

of water on the floor, and second, defendant did not have a duty to provide a slip-free surface. For the reasons that follow, we affirm.

¶ 2 The pleadings, depositions, admissions, and affidavits reflect the following. On March 24, 2009, plaintiff was shopping for groceries at defendant's establishment. Upon completion of the shopping, plaintiff went to register #5 to check out. During the check out process, plaintiff left to retrieve a bag of ice from the freezer located at the front of defendant's establishment. Plaintiff walked to the area of register #6 to obtain a plastic bag and went to the freezer located in front of register #9. Plaintiff stood on a floor mat in front of the freezer, but then returned to register #5 and told the cashier that the ice bags she wanted were not available. As plaintiff walked back to the freezer, but before she reached the floor mat, she slipped and fell. Plaintiff claimed that she did not observe any water but that she felt wetness on her skin. Plaintiff fell at approximately 4:29 p.m.

¶ 3 Ammarah Shah, the cashier at register #11, was the first to approach plaintiff after the fall. Shah testified she noticed one nickel-sized drop of water and a second very small drop of water next to it near plaintiff. Shah did not know the source of the water drops. Beth Curran, the store manager, inspected the area following the fall. Curran observed two to three nickel-to-quarter-sized drops of water approximately four to five feet from the freezer. Curran did not know the source of the water. After the fall, Rutilo Randa, a utility clerk, observed two drops of water near where plaintiff fell. Maria Selvaggi, the cashier at register #5, observed drops of water around the area where plaintiff fell, but that was approximately 5 to 10 minutes after plaintiff had fallen.

¶ 4 The record reflects that inspections of the floor were performed hourly. The inspections consisted of employees walking throughout the store looking for water or other hazards. Randa performed an inspection between 3:53 and 4:08 p.m., and he specifically recalled inspecting the area

in front of the freezer. Randa testified there was no water or ice on the floor at the time of his inspection. According to the surveillance footage, at approximately 3:58 p.m., Shah walked by the freezer area to her register. Shah testified there was no water or ice on the floor when she walked past the freezer.

¶ 5 On August 14, 2009, plaintiff filed suit against defendant on the basis of premises liability. As amended, plaintiff alleged that defendant allowed a pool of water to remain on the floor; failed to inspect the premises; failed to warn of the pool of water on the floor; failed to clean and remove the pool of water on the floor; and failed to provide a reasonably slip-free surface in an area that defendant knew or should have known was frequently wet.

¶ 6 On September 17, 2009, defendant filed its answer and affirmative defense. Defendant denied the material allegations of the amended complaint. Defendant alleged that plaintiff owed a duty of care for her own safety and failed to exercise reasonable care by being inattentive and unobservant to the surrounding conditions; failing to observe and avoid conditions that were open and obvious; failing to keep a proper lookout; and being otherwise careless or negligent. Alternatively, defendant alleged that any injuries plaintiff suffered were caused by her sole negligence or that she contributed to the cause of her injuries.

¶ 7 On November 15, 2010, defendant filed a motion for summary judgment. Defendant argued that the water on the floor was not present as a result of a store employee, and plaintiff failed to establish actual or constructive notice. Defendant also argued that plaintiff failed to present any evidence that a slip-free surface was required by law and failed to present any evidence that the floors at defendant's establishment were inappropriate for a business setting.

¶ 8 On December 8, 2010, plaintiff filed her response to defendant's motion for summary judgment. Plaintiff argued that a reasonable mind could find defendant vicariously liable for its employees' failure to notice the water on the floor and that defendant was put on constructive notice of such water. Plaintiff asserted that defendant breached its standard of care by negligently performing an inspection of its floors in that more frequent patrolling of the floor was required because the establishment was crowded with customers.

¶ 9 On December 21, 2010, defendant filed its reply. Defendant countered that plaintiff failed to present any evidence supporting her version of events and highlighted various inaccurate statements alleged by plaintiff. For example, plaintiff claimed that, from 3:53 p.m. until 4:29 p.m. (when plaintiff fell), store employees were at or around the freezer. Defendant countered that the store surveillance footage established that no employees could be seen near the freezer from the time of the last store inspection, 3:53 p.m., until the time of plaintiff's fall at 4:29 p.m. Defendant argued that its inspection of the subject area 30 minutes before plaintiff's fall was appropriate and sufficient monitoring to prevent a finding of constructive notice.

¶ 10 On January 13, 2011, the trial court conducted a hearing on defendant's motion for summary judgment. Following arguments of the parties, the trial court granted summary judgment as to all allegations and counts in favor of defendant. In its ruling, the trial court stated the parties agreed that an employee of defendant's did not create, or was not responsible for, the water being on the floor. The trial court also stated that no employee of defendant had actual notice of the presence of water on the floor. The trial court further stated:

"The evidence is that neither party knows the source of the water. Neither party knows the amount of time that the water was on the floor; that [defendant] did perform inspections of the floor, and there was no water on that floor.

There were cashiers. One cashier said that another cashier's [station] could see the area of the fall.

That this is not sufficient to create constructive notice. Even when accepting the conflicting testimony that the one cashier may have been able to see the area of the fall, *** we don't know the amount of time the water was present.

*** And the duties of the cashier, it's uncontested, were to be a cashier and remain at their station."

¶ 11 Plaintiff filed a timely notice of appeal, contending that the trial court erred when it granted summary judgment in favor of defendant. Plaintiff challenges the trial court's conclusions that defendant had no constructive notice of water on the floor and that defendant did not have a duty to provide a slip-free surface.

¶ 12 Summary judgment is proper when the pleadings, depositions, and affidavits demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2010). In ruling on a motion for summary judgment, the trial court is to determine whether a genuine issue of material fact exists, not try a question of fact. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). A party opposing a motion for summary judgment "must present a factual basis which would arguably entitle" that party to a judgment. *Allegro Services, Ltd. v. Metropolitan Pier & Exposition Authority*, 172 Ill. 2d 243, 256 (1996). In adjudicating a summary judgment motion, a trial court must construe the evidence strictly against

the movant and liberally in favor of the nonmoving party. *Jackson v. TLC Associates, Inc.*, 185 Ill. 2d 418, 423-24 (1998). We conduct a *de novo* review of an order granting summary judgment. *Jackson*, 185 Ill. 2d at 424, citing *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 113 (1995).

¶ 13 To recover damages based on a negligence claim, the plaintiff must establish the existence of a duty owed by the defendant, a breach of that duty, and an injury proximately resulting from that breach. *Pavlik v. Wal-Mart Stores, Inc.*, 323 Ill. App. 3d 1060, 1063 (2001) (citing *Miller v. National Ass'n of Realtors*, 271 Ill. App. 3d 653, 656 (1994)). In the present case, neither party disputes that defendant owed a duty of reasonable care to plaintiff, a business invitee. A business owner breaches its duty to an invitee who slips on a foreign substance if: (1) the substance was placed there by the negligence of the proprietor; (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. *Pavlik*, 323 Ill. App. 3d at 1063 (quoting *Hayes v. Bailey*, 80 Ill. App. 3d 1027, 1030 (1980)). Although a plaintiff is not required to prove his or her case at the summary judgment stage, evidentiary facts must be presented to support the elements of the cause of action. *Helms v. Chicago Park District*, 258 Ill. App. 3d 675, 679 (1994). Plaintiff failed to do so in this case.

¶ 14 Plaintiff claimed that she did not observe any water but that she felt wetness on her skin. Curran, defendant's store manager, inspected the area following the fall and observed two to three nickel-to-quarter-sized drops of water approximately four to five feet from the freezer. Curran did not know the source of the water. Defendant's other employees acknowledged the drops of water after plaintiff's fall, but none knew the source of the water. Thus, there was no clarity or certainty

as to what caused the floor to be wet. Nevertheless, where a business invitee is injured by slipping and falling on the premises and there is no way of showing how the substance became located on the floor, liability may be imposed if the defendant or its employees had constructive notice of its presence. *Thompson v. Economy Super Marts, Inc.*, 221 Ill. App. 3d 263, 265 (1991). Constructive notice exists if the substance was there for a long enough time period that the exercise of ordinary care would have made it known. *Thompson*, 221 Ill. App. 3d at 265. Liability cannot be based on guess, speculation, or conjecture as to the cause of the injury. *Bermudez v. Martinez Trucking*, 343 Ill. App. 3d 25, 30 (2003). Proximate cause can only be established if it is reasonably certain the defendant's acts caused the plaintiff's injury. *Bermudez*, 343 Ill. App. 3d at 25 (quoting *Salinas v. Werton*, 161 Ill. App. 3d 510, 514 (1987)).

¶ 15 The record reflects that inspections of the floor were performed hourly. Randa performed an inspection between 3:53 and 4:08 p.m., and he specifically recalled inspecting the area in front of the freezer. Randa testified there was no water or ice on the floor at the time of his inspection. According to the surveillance footage, at approximately 3:58 p.m., Shah walked by the freezer area to her register. Shah testified there was no water or ice on the floor when she walked past the freezer. Plaintiff offered no evidence to show that there was any water on the floor before she fell or evidence suggesting how long any water might have been on the floor that should have been discovered in the exercise of ordinary care. Under these circumstances, constructive notice, and thus liability, did not attach to defendant. See *Tomczak v. Planetsphere, Inc.*, 315 Ill. App. 3d 1033, 1040 (2000).

¶ 16 Plaintiff asserts, however, that the period of time between the last inspection and the time of her fall at approximately 4:29 p.m. was sufficient to constitute constructive notice. We disagree.

In a case involving constructive notice, the time element to establish constructive notice is a material factor. *Hayes v. Bailey*, 80 Ill. App. 3d 1027, 1030 (1980). The plaintiff bears the burden to establish that the foreign substance was on the floor long enough to constitute constructive notice to the proprietor of the establishment. *Id.* Plaintiff admitted she did not see the water near the freezer. Plaintiff herself did not know how long the water had been there. Plaintiff presented no evidence that anyone knew there was water, what caused the water to be present, or how long the water was present. The best person who would have had the opportunity to discover and observe the water on the floor was plaintiff, who had walked to the freezer to retrieve a bag of ice; stood on a floor mat in front of the freezer; returned to the register; and then walked back to the freezer right before she fell. Under these circumstances, liability cannot be imposed upon defendant for the presence of a substance that no one had knowledge of immediately prior to plaintiff's fall. See *Tomczak v. Planetsphere, Inc.*, 315 Ill. App. 3d 1033, 1040 (2000) (finding no constructive notice of the presence of water despite the plaintiff's assertion that water was twice present on the floor within 45 minutes).

¶ 17 In the absence of any evidence establishing constructive notice or a causal connection between plaintiff's injuries and defendant's conduct, we conclude that the trial court properly granted summary judgment in favor of defendant.

¶ 18 In so holding, we reject plaintiff's alternative claim that the water near the freezer was a recurring incident. Initially, we note that plaintiff's claim was not presented to the trial court, so the trial court had no opportunity to make any findings or rulings on the matter. See *Lawrence & Allen, Inc. v. Cambridge Human Resource Group, Inc.*, 292 Ill. App. 3d 131, 136 (1997) (stating that, upon appellate review of a trial court's summary-judgment determination, the appellant may (1) refer to

the record only as it existed at the time the trial court ruled, (2) outline the arguments made at the time, and (3) explain why the trial court erred when it granted summary judgment). Plaintiff's claim that Randa testified that it was not unusual to discover water there is insufficient to rise to any level of a recurring condition putting defendant on constructive notice. Moreover, neither plaintiff nor defendant knew the source of the water or the cause of the alleged recurrences so as to reasonably guard against it. We also reject plaintiff's contention that the trial court erred when it determined that defendant did not have a duty to provide a slip-free surface. Although plaintiff's brief argues that defendant had a duty to provide a "safe" floor, the issue presented at summary judgment concerned a "slip-free" floor. Other than an allegation, plaintiff failed to establish that a duty to provide a slip-free floor exists and that defendant's floor was not properly slip-resistant. See *American National Bank & Trust Co. of Chicago v. National Advertising Co.*, 149 Ill. 2d 14, 26 (1992) (stating that "unless a duty is owed, there is no negligence").

¶ 19 For the foregoing reasons, we affirm the judgment of the circuit court of Du Page County.

¶ 20 Affirmed.