2011 IL App (2d) 110247-U
No. 2-11-0247
Order filed November 15, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

SANDRA ANDREEN,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 08-L-1288
	)	
INLAND COMMERCIAL	)	
PROPERTY MANAGEMENT,	)	Honorable
	)	Patrick J. Leston,
Defendant-Appellee.	)	Judge, Presiding.

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

ORDER

Held: The plaintiff filed a complaint alleging that she fell on a sidewalk that the defendant negligently maintained. The trial court properly granted the defendant's motion for summary judgment because the plaintiff could not identify the location where she fell. The trial court also properly denied the plaintiff's motion for additional discovery because the information that the plaintiff was requesting would not help her identify the location where she fell.

¶ 1 The plaintiff, Sandra Andreen, appeals from the February 8, 2011, order of the circuit court of Du Page County granting the defendant's motion for summary judgment on her complaint for personal injuries and also denying her motion for additional discovery. We affirm.

¶ 2 On November 6, 2008, the plaintiff filed a negligence action against the defendant, Inland Commercial Property Management. The complaint alleged that, on December 11, 2006, the plaintiff went to the Chestnut Court Shopping Center in Darien, which was owned and operated by the defendant. While walking outdoors on the sidewalk, the plaintiff fell on a raised and uneven portion of concrete. The complaint alleged that the defendant had breached its duty to the plaintiff by permitting the sidewalk to become uneven and raised and not warning her of the sidewalk's dangerous condition. The complaint alleged that, as a result of the fall, the plaintiff suffered physical injuries. The plaintiff sought damages in excess of $50,000.

¶ 3 On February 13, 2009, the defendant filed an answer, denying all material allegations. On November 10, 2010, the defendant filed a motion for summary judgment. The defendant argued that it was not liable for the plaintiff's injuries because the plaintiff could not (1) identify where she was at on the sidewalk when she tripped and fell nor (2) point to any defective condition on the sidewalk as the cause of her trip and fall. In support of its motion, the defendant attached a copy of the deposition transcripts of the plaintiff and the defendant's property manager Larry Maynard. The defendant also attached photographs that both the plaintiff and Maynard had taken of the general area of the sidewalk where the plaintiff fell.

¶ 4 In her deposition, the plaintiff testified that she went to the Chestnut Court Shopping Center at approximately 1 p.m. on December 11, 2006. It was a bright, sunny day and there was no snow or ice on the sidewalk at the shopping center. The plaintiff tripped over raised concrete. She could not identify which store she was in front of or near when she fell. She stated that she was somewhere on the sidewalk near the Millard's jewelry store heading south. She further stated that she was generally in front of four or five stores at the mall when she fell.

¶ 5 The plaintiff and her son returned to the shopping center the next day and took some pictures. The plaintiff also took photographs of the area two-and-a-half years later, in June 2009. The plaintiff could not identify on the photographs where she was when she fell, and she was unsure where the areas depicted in the photographs were located in the shopping center. The plaintiff never identified the precise location on the sidewalk where she tripped and fell, and she never took any measurements of the sidewalk at or near where she fell.

¶ 6 Maynard testified that he talked to the plaintiff on December 12, 2006, and the plaintiff provided him with a general description of the area where she fell. On three different occasions (December 13, 2006, December 29, 2006, and January 3, 2007), he took photographs of the sidewalk in the general area described by the plaintiff. He took pictures of the sidewalk squares that were the most uneven. The most significant elevation difference between adjacent concrete squares was a quarter of an inch. During his three inspections of the area the plaintiff described, he did not see any conditions that needed attention or repairs.

¶ 7 On January 4, 2011, the plaintiff filed a motion for additional discovery pursuant to Supreme Court Rule 191(b) (eff. July 1, 2002), which was supported by her affidavit. In her motion, the plaintiff requested records from (1) Commercial Asphalt Maintenance Company about work they had done in August 2007 removing and replacing several slabs of concrete in the general area of the plaintiff's fall; and (2) Corporate Cleaning regarding their inspections, in which inspections they noted cracks in the sidewalk, both before and after the incident. The motion also requested that the plaintiff be allowed to take the deposition of Gene Alexander of Corporate Cleaning, who had filled out many inspection reports regarding the sidewalk at issue. In her affidavit, the plaintiff stated that she "believe[d] that the testimony and documents of Gene Alexander, Corporate Cleaning and Commercial Asphalt Maintenance Company [were] material to the issues raised in Defendant's

Motion for Summary Judgment," and she therefore was requesting that information prior to her filing her response to the motion for summary judgment.

¶ 8 Also on January 4, 2011, the plaintiff filed a "provisional" response to the defendant's motion for summary judgment. The plaintiff's response was supported by the affidavit of her son, Eric Andreen. In his affidavit, Andreen testified that he went to the Chestnut Court Shopping Center on December 12, 2006, with his mother to see where she had fallen and to take pictures. His mother showed him the area where she had fallen, which was "on the pavement halfway between the curb and the covered walkway in front of the door to Millard Jewelers." In that area, he saw several pieces of concrete that were raised over the adjacent piece of concrete by one inch or more.

¶ 9 The plaintiff argued in her response that summary judgment was inappropriate because material evidence existed that had not yet been produced, which was the basis of her motion for discovery. The plaintiff also argued that both her deposition testimony and her son's affidavit established that she had tripped over the sidewalk because part of the concrete in the sidewalk was over an inch taller than the adjacent piece of concrete.

¶ 10 The trial court subsequently denied the plaintiff's motion for additional discovery, but indicated that it would reconsider the issue after it considered the defendant's motion for summary judgment.

¶ 11 On February 8, 2011, following a hearing, the trial court granted the defendant's motion for summary judgment. The trial court explained that the plaintiff would be unable to prove her case at trial because she was unable to explain where she fell. The trial court found that the area the plaintiff described as being the location of her fall covered approximately 300 square feet. The trial court also denied the plaintiff's motion for additional discovery. The plaintiff thereafter filed a timely notice of appeal.

¶ 12 The plaintiff's first contention on appeal is that the trial court erred in granting the defendant's motion for summary judgment. Specifically, the plaintiff argues that she sufficiently identified the place where she tripped and that she met her burden of establishing that the defendant's negligence was the proximate cause of her injuries.

¶ 13 The purpose of a motion for summary judgment is to determine whether a genuine triable fact exists. *Nickel v. Hollywood Casino-Aurora, Inc.*, 313 Ill. App. 3d 925, 928 (2000). Such a motion should be granted only when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2010). An order granting summary judgment should be reversed if the evidence shows that a genuine issue of material fact exists or if the judgment was incorrect as a matter of law. *Clausen v. Carroll*, 291 Ill. App. 3d 530, 536 (1997).

¶ 14 To sustain a cause of action for negligence, the plaintiff must show that a defective condition existed and that the defective condition was the proximate cause of her fall. *Brett v. F.W. Woolworth Co.*, 8 Ill. App. 3d 334, 337 (1972). Although the plaintiff is not required to prove her case at the summary judgment stage, she must present some factual basis that would entitle her to judgment under the applicable law. *Kimbrough v. Jewel Cos., Inc.*, 92 Ill. App. 3d 813, 819 (1981). Liability cannot be predicated upon surmise or conjecture as to the cause of the injury; proximate cause can only be established when there is a reasonable certainty that the defendant's acts caused the injury. *Id.* at 817. No liability can exist unless the defendant's alleged negligence is the legal cause of the plaintiff's injury and if the plaintiff fails to establish the element of proximate cause, she has not sustained her burden of making a *prima facie* case. *Id.*

¶ 15 Here, because the plaintiff cannot identify the spot where she fell, there can be no reasonable certainty that the defendant's actions in maintaining the sidewalk had anything to do with the plaintiff's injuries. The plaintiff insists that her description of the place where she fell was sufficient enough. However, the trial court specifically found that she had described a 300 square foot area. Assuming that part of the sidewalk in that area was defective, the trier of fact would have to resort to conjecture or speculation to conclude that the spot where the plaintiff fell was actually on part of the sidewalk that was defective. Such speculation, of course, would be improper. See *id*. Furthermore, such speculation would be inconsistent with the photographs that the plaintiff took of the sidewalk the day after she fell. None of those photographs identified any significant defects in the sidewalk, a point that the plaintiff's counsel acknowledged at the hearing on the defendant's motion for summary judgment. Such speculation would also be inconsistent with Maynard's testimony. He testified that he went with the plaintiff to the general area where she had fallen. In that area, he did not observe any part of the sidewalk that was in a defective condition. The photographs that Maynard took of the sidewalk in the general area that the plaintiff described also do not indicate any significant defects. Accordingly, based on the plaintiff's inability to identify where she fell, the trial court properly granted summary judgment on the defendant's behalf.

¶ 16 In so ruling, we find unpersuasive the plaintiff's reliance on *Canzoneri v. Village of Franklin Park*, 161 Ill. App. 3d 33 (1987). In that case, the plaintiff testified that she fell when a piece of broken sidewalk moved under her feet. The trial court granted summary judgment in favor of the defendant. On appeal, the plaintiff argued that summary judgment was improper because genuine issues of material fact still existed. In response, the defendant argued that summary judgment was proper because the plaintiff had failed to establish with reasonable certainty the location of the accident and because the plaintiff did not recall what had caused her to fall. The reviewing court

reversed. *Id.* at 42. The reviewing court found that the plaintiff had sufficiently described the location of her fall as she had given a specific address where it occurred and would be able to call to testify at trial a paramedic who could likely verify the location at which the plaintiff was found. *Id.* at 41. The reviewing court also found that it was "undisputed" that the sidewalk was broken. *Id.*

¶ 17 As explained above, in this case the plaintiff could not provide a specific location where she fell. Unlike the plaintiff in *Canzoneri*, the plaintiff could also not provide any witnesses who found her where she fell. Although the plaintiff's son submitted an affidavit indicating where his mother fell, because he was not with the plaintiff when she fell, he could only testify as to what she told him. Further, the photographs that the plaintiff's son took of the general area where the plaintiff claims she fell did not demonstrate any defects in the sidewalk.

¶ 18 The plaintiff's second contention on appeal is that the trial court erred in denying her motion for additional discovery. Specifically, the plaintiff points out that in August 2007, the summer following the accident, repairs and replacements were made to numerous slabs of concrete in the area of the plaintiff's fall. The plaintiff insists that before she lost her case on summary judgment, she should have been allowed to learn more information about the location and the nature of the defects of those replaced slabs.

¶ 19 Supreme Court Rule 191(b) specifies the procedure to be followed where additional discovery is needed in regard to summary judgment proceedings. The rule provides:

> "If the affidavit of either party contains a statement that any of the material facts which ought to appear in the affidavit are known only to persons whose affidavits affiant is unable to procure by reason of hostility or otherwise, naming the persons and showing why their affidavits cannot be procured and what affiant believes they would testify to if sworn,

> with his reasons for his belief, the court may make any order that may be just, either granting or refusing the motion, or granting a continuance to permit affidavits to be obtained, or for submitting interrogatories to or taking the depositions of any of the persons so named, or for producing papers or documents in the possession of these persons or furnishing sworn copies thereof."

A trial court's decision to deny a motion for additional discovery will not be disturbed absent an abuse of discretion. *Kittleson v. United Parcel Service, Inc.*, 162 Ill. App. 3d 966, 969 (1987)

¶ 20 The trial court did not abuse its discretion in denying the plaintiff's request for additional discovery. The records that the plaintiff was requesting would not help her identify the location where she fell. As such, even if the records disclosed some type of defect in the sidewalk, the trier of fact would have to resort to speculation or conjecture that the defect was in fact connected to the plaintiff's fall. As explained above, that would be improper. *Kimbrough*, 92 Ill. App. 3d at 817.

¶ 21 For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed.

¶ 22 Affirmed.