2012 IL App (2d) 120567-U
No. 2-12-0567
Order filed December 24, 2012

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

BRUCE MORRICK,	)	Appeal from the Circuit Court
	)	of Kane County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 11-L-114
	)	
SCHMITT MANAGEMENT	)	
CORPORATION, d/b/a McDonald's,	)	Honorable
	)	James R. Murphy,
Defendant-Appellee.	)	Judge, Presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices McLaren and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted defendant summary judgment on plaintiff's negligence claim, as plaintiff's theory of defendant's negligence—that one of defendant's employees tracked grease to the spot where plaintiff fell—was purely speculative.

¶ 2 Plaintiff, Bruce Morrick, sued defendant, Schmitt Management Corporation, d/b/a McDonald's, seeking damages for injuries sustained when he slipped and fell as a result of defendant's alleged negligence. The trial court granted summary judgment for defendant, and plaintiff timely appealed. Plaintiff argues that the court erred in granting summary judgment,

because there are genuine issues of fact as to (1) whether plaintiff slipped on grease, and (2) whether the grease was tracked to the location of plaintiff's fall by defendant's employee. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Plaintiff's complaint alleged that, on August 22, 2009, "the floor of the McDonald's restaurant in the vicinity of the doorway which [plaintiff] was approaching to exit the building was in a dangerous and defective condition in that a foreign, greasy substance was then and there caused to be present, and/or was then and there allowed to be present, by the acts and/or omissions of agents or employees of defendant ***, thereby constituting a dangerous slippery condition for invitees." The complaint further alleged that defendant "had actual or constructive knowledge of the substance on said floor" and carelessly and negligently:

"a. Failed to properly clean the floor;

b. Cleaned the floor with an instrument that had a greasy substance on it, thereby causing the greasy substance to be present on the floor at said location on the premises;

c. Allowed and permitted a foreign greasy substance to be present on the floor of said premises for a period of time that was greater than was reasonable;

d. Allowed and permitted a foreign greasy substance to be present on an area of the floor on the premises where it knew or should have known that an invitee *** was likely to slip on said substance; and

e. Failed to adequately warn the plaintiff *** of the presence of said substance on the floor."

¶ 5 Defendant filed a motion for summary judgment, attaching plaintiff's deposition and the depositions of three of its employees. Defendant argued that plaintiff did not know what caused him to fall and that plaintiff made no claim that defendant did anything wrong. Defendant also argued that the condition of the floor was open and obvious, as defendant's employee posted signs warning of the wet floor.

¶ 6 According to plaintiff's deposition testimony, on the morning of the accident, he entered the restaurant and saw wet-floor warning signs by the door. He looked at the floor but did not see anything on the floor. After he ordered his food, he proceed to walk toward the exit, using the same door through which he had entered the restaurant. It was then that he fell, landing on his left knee. He did not see the alleged substance on the floor either before or after the accident, but after his fall there was a "big glob of stuff" or a "film" on the knee of his pants. It was "about 5 inches in a circle." When asked what caused him to fall, plaintiff responded, "I have no idea what I fell on." He said, "[W]hen I looked at my pants, there was some kind of film of something. I don't know if it was a greasy substance or a slimy film." He never had the substance tested, but he stated that it was not water, because the film was still on his pants later in the day. He did not take pictures of his pants.

¶ 7 Josefina Alba, one of defendant's employees, testified that she was responsible for cleaning the eating area of the restaurant. The mops, buckets, and cleaning solution were kept in a small closet near the restrooms. The sink for water was behind the counter area. When she got water, she brought the bucket and mop with her. When Alba walked from the sink behind the counter back to the eating area, she passed through a door. There was a little mat on which to wipe your feet before entering the eating area. According to Alba, there was no grease on the floor where she filled up the

bucket, because the area was kept clean. On the day of the accident, about 10 to 15 minutes before defendant fell, Alba had cleaned the floor, because she had seen a small black stain or spot on the floor. It was not greasy. She mopped the floor and placed wet-floor signs in the area. The signs were still out when defendant fell. The floor was dry.

¶ 8 Gloria Tores, one of defendant's employees, testified that she worked at the restaurant and trained employees. On the day of the accident, she was working as a cashier. She saw Alba mopping the area where plaintiff fell, about 10 to 20 minutes before he fell. Tores saw plaintiff fall forward and land on his knee. When Tores was interviewed by phone, three days after the accident, she stated that the floor was still a little wet when plaintiff fell. At the time of her deposition, she could not remember what it was about the floor that led her to believe the floor was wet.

¶ 9 Ivan Acuahuitl, one of defendant's employees, testified that he was on break and sitting in the eating area of the restaurant when plaintiff fell. He did not see plaintiff fall, but he saw him get up and walk out. Acuahuitl testified that the floor surface in the food preparation area was "like rock" and that it was cleaned periodically throughout the day. A person must walk through the food preparation area to get to the "mop sink." There was no mat on the floor at the entryway to the kitchen.

¶ 10 The trial court granted summary judgment for defendant. The court found that plaintiff "presented no evidence of a dangerous condition of the floor, or of the existence of any duty beyond the placing of warning signs, or of any breach of that duty." Plaintiff timely appealed.

¶ 11 II. ANALYSIS

¶ 12 Summary judgment is appropriate where "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 a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2008).

> " 'A defendant moving for summary judgment bears the initial burden of coming forward with competent evidentiary material, which if uncontradicted, entitles him to judgment as a matter of law.' [Citation.] A defendant does not need to prove its case or disprove its opponent's case in order to prevail on its motion. A plaintiff, however, 'must come forth with some evidence that arguably would entitle him to recover at trial' in order to survive such a motion. [Citation.]" *Caburnay v. Norwegian American Hospital*, 2011 IL App (1st) 101740, ¶ 30.

A reviewing court's function is to determine whether a genuine issue of fact was raised and, if none was raised, whether judgment as a matter of law was proper. *American Family Mutual Insurance Co. v. Page*, 366 Ill. App. 3d 1112, 1115 (2006). The entry of summary judgment is subject to *de novo* review. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶ 13 We note that plaintiff's complaint did not expressly state whether he was bringing a cause of action under a premises liability theory or a general negligence theory. To maintain a premises liability claim, plaintiff must establish that defendant knew about a condition on its premises causing an unreasonable risk of harm to its customers, or that defendant would have discovered the condition by the exercise of reasonable care. See *Genaust v. Illinois Power Co.*, 62 Ill. 2d 456, 468 (1976); Restatement (Second) of Torts § 343 (1965). Notice, either actual or constructive, is an essential element of a premises liability claim. "While a plaintiff generally must prove a defendant's actual or constructive notice of a dangerous condition in order to establish liability, [citation], our courts have held that when a defendant creates that dangerous condition, that defendant's notice becomes irrelevant. [Citation]." *Caburnay*, 2011 IL App (1st) 101740, ¶ 45; see also *Reed v. Wal-Mart*

Stores, Inc., 298 Ill. App. 3d 712, 715 (1998) ("[A] plaintiff does not need to prove actual or constructive notice when [he] can show the substance was placed on the premises through the defendant's negligence."). Although plaintiff alleged in his complaint that defendant "had actual or constructive knowledge of said substance on said floor," plaintiff now argues that "[t]his is not a 'constructive notice' case, but rather one where there is circumstantial evidence that [defendant] created the dangerous condition." As plaintiff is expressly alleging in this court that defendant created the dangerous condition, we treat the complaint as one raising a general negligence cause of action.

¶ 14 The essential elements of a negligence cause of action are the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately caused by that breach. *Ward v. K mart Corp.*, 136 Ill. 2d 132, 140 (1990). The existence of a duty is a question of law. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 430 (2006). However, whether a defendant breached the duty and whether the breach was a proximate cause of the plaintiff's injury are questions of fact for the jury to decide, provided there is a genuine issue of material fact regarding those issues. *Id*., 222 Ill. 2d at 430; *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 114 (1995). Here, there is no dispute that defendant, as the operator of a business, owed plaintiff, his invitee, a duty to exercise reasonable care to maintain his premises in a reasonably safe condition for use by plaintiff. *Ward*, 136 Ill. 2d at 141; *Newsom-Bogan v. Wendy's Old Fashioned Hamburgers of New York, Inc.*, 2011 IL App (1st) 092860, ¶ 16. Instead, the question is whether there is a genuine issue of fact concerning whether defendant breached that duty.

¶ 15 Plaintiff argues that the trial court erred in granting summary judgment for defendant, because there are genuine issues of fact as to (1) whether plaintiff slipped on grease, and (2) whether

defendant's employee tracked the grease to the location of plaintiff's fall. Concerning the first point, plaintiff cites *Newsom-Bogan* and *Wiegman v. Hitch-Inn Post of Libertyville, Inc.*, 308 Ill. App. 3d 789 (1999), and argues that "[a] plaintiff need not know with certainty the substance that caused a fall in order for there to be a question of fact as to whether it is a foreign substance." Here, however, the critical issue is not whether there is a genuine issue of fact as to whether plaintiff slipped on a foreign substance; rather, it is whether there is a genuine issue of fact as to whether that foreign substance was grease from the kitchen. As plaintiff concedes, this is not a constructive notice case; it is a case where plaintiff must show that defendant's negligence caused the substance to be on the floor. To that end, as argued in this court, plaintiff's entire cause of action rests on his theory that one of defendant's employees (Alba) tracked grease from the kitchen to the location of the fall.

¶ 16 The evidence plaintiff relies on to support his argument that he slipped on grease, which was tracked from the kitchen by Alba, is entirely circumstantial and far too speculative to create a genuine issue of material fact. Plaintiff did not see the alleged substance on the floor either before or after the accident. He testified that he had "no idea" what he fell on. After he fell, there was a "big glob of stuff" or a "film" on the knee of his pants. He testified that it was "about 5 inches in a circle." He said, "[W]hen I looked at my pants, there was some kind of film of something. I don't know if it was a greasy substance or a slimy film." He never had the substance tested, but he stated that it was not water because the film was still on his pants later in the day. He did not take any pictures of his pants. While plaintiff's testimony may arguably be sufficient to show that plaintiff slipped on some type of foreign substance, it does not create a genuine issue of fact that the substance was actually grease and, more importantly, that the substance was grease from the kitchen. Plaintiff is merely speculating as to how kitchen grease came to be at that location. According to

plaintiff, Alba got grease on her shoes when she walked behind the counter to fill the bucket with water. However, there was no testimony establishing the presence of grease on the floor when Alba walked behind the counter to fill the bucket with water. In fact, Alba testified that the floor was clean. There was no testimony that Alba had grease on her shoes.

¶ 17 The cases relied on by plaintiff do not support reversal of the trial court's order. At issue in *Newsom-Bogan*, a premises liability case, was whether there was a genuine issue of fact that a substance on the floor caused the plaintiff's fall and whether there was a genuine issue of fact as to whether the defendant had constructive notice of the substance. *Newsom-Bogan*, 2011 IL App (1st) 092860, ¶ 11. The plaintiff alleged in her complaint that the defendant breached its duty of reasonable care with respect to the premises by allowing the floor near the trash receptacle to become and remain in a dangerous condition when it knew or should have known of the dangerous condition. *Id*. ¶ 4. The plaintiff testified that, although she did not know what caused her fall, when she attempted to get up from the floor, her hands became greasy after touching the floor and she was unable to get up unassisted. *Id*. ¶ 5. The defendant's training manual provided certain procedures for monitoring the premises every 15 minutes for food or drink spills. *Id*. ¶ 7. The plaintiff submitted an affidavit wherein she averred that she did not observe anyone inspecting the restaurant during the 20 minutes that she was eating prior to her fall. *Id*. ¶ 9. The trial court granted the defendant's motion for summary judgment. *Id*. ¶ 10. The reviewing court reversed on appeal, finding that the plaintiff's testimony was sufficient to raise a genuine issue of fact as to the cause of her fall and that the defendant's policy manual and the plaintiff's affidavit were sufficient to create a material issue of fact as to constructive notice. *Id*. ¶¶ 19, 25, 27.

¶ 18 *Newsom-Bogan* is distinguishable from the present case for several reasons. First, unlike in *Newsom-Bogan,* there is no testimony that there was grease on the floor. In *Newsom-Bogan*, the plaintiff expressly testified that, when she put her hands on the floor to get up, her hands became greasy and she could not get up unassisted. *Id.* ¶ 5. Here, plaintiff testified only that there was "some kind of film of something" on his pants. He did not know whether "it was a greasy substance or a slimy film." Moreover, in *Newsom-Bogan,* the plaintiff's cause of action was for premises liability. Thus, unlike here, in that case the nature of the substance and its origin was not critical; the issue was whether there was any foreign substance and whether the defendant had constructive notice of its presence.

¶ 19 *Wiegman* is similarly unpersuasive, because, as in *Newsom-Bogan,* the question was whether a foreign substance caused the plaintiff's fall and whether the defendant had notice of the substance. *Wiegman*, 308 Ill. App. 3d at 802. In *Wiegman*, the plaintiff slipped and fell at the bottom of a stairway leading from the pool area to the exercise room at the defendant's hotel. *Id*. at 792. She did not know what caused her to fall, but the back of her dress was wet. *Id*. Other witnesses testified that the area of the tile floor all around where plaintiff was lying after her fall was wet. *Id*. at 792-93. Following the presentation of evidence, the defendant moved for a directed verdict and its motion was denied. *Id*. at 794. The jury found in favor of the plaintiff. *Id.* On appeal, the defendant argued that the evidence of water on the tile floor surface, without some evidence that the plaintiff actually slipped on that surface, was insufficient to establish that the water on the floor was the proximate cause of the fall. *Id*. at 795. The reviewing court disagreed with the defendant and affirmed. The court found that the issue of the cause of the plaintiff's fall was properly before the jury given the testimony that the plaintiff slipped and the testimony that the floor was wet. *Id*. at 798. The court

further found that the question of the defendant's constructive notice was properly before the jury, where the evidence established that the water had been present for hours. *Id*. at 802. *Wiegman* is distinguishable for the same reason that *Newsom-Bogan* is distinguishable. Here, as in *Newsom-Bogan*, the nature of the substance and its origin was not at issue; the issue was whether a foreign substance caused the plaintiff's fall and whether the defendant had constructive notice of its presence.

¶ 20 The cases cited by plaintiff to support his argument that there was a genuine issue of fact concerning whether defendant caused the dangerous condition are distinguishable, because in each case there was no question as to what that condition was. In *Donoho v. O'Connell's Inc.*, 13 Ill. 2d 113 (1958), the plaintiff slipped on a grilled onion ring, which left a dark grease mark on the floor and on the sole of her shoe, as she was walking past a stand-up table in the defendant's restaurant. *Id*. at 116. The supreme court found that the issue of whether the onion ring was on the floor through the act of one of the defendant's employees was properly submitted to the jury where the evidence established that two customers had eaten hamburgers at the stand-up table 15 minutes prior to the plaintiff's fall, one of the defendant's busboys had cleaned the stand-up table, and the busboy had a practice of wiping debris off the counter. *Id*. at 123-25. In *Groten v. Marshall Field & Co.*, 253 Ill. App. 3d 122, 124 (1993), the plaintiff tripped over metal stripping used to hold down carpeting. Following her fall, she saw a piece of metal sticking up in the air. *Id*. There was testimony that, on prior occasions, pallet jacks used by the defendant had caused similar metal strips to break and caused customers to trip. *Id*. at 125. Following a verdict for the plaintiff, on appeal, the court found that the facts permitted an inference that the defective condition was more likely attributable to employee negligence than to unknown third parties. *Id*. at 126. In both cases, there

was no issue concerning what caused the plaintiff's fall. The issue, rather, was whether the defendant caused that condition.

¶ 21 In sum, to conclude that plaintiff slipped on grease that was tracked from the kitchen area to the location of his fall by defendant's employee would require pure speculation, which is insufficient to warrant reversal of summary judgment. See *Madeo v. Tri-Land Properties, Inc.*, 239 Ill. App. 3d 288, 291-94 (1992) (affirming summary judgment where the plaintiff merely speculated that she slipped on an unnatural accumulation of ice that was formed when snow piles melted and the water flowed to the area of the plaintiff's fall and froze); see also *Ishoo v. General Growth Properties, Inc.*, 2012 IL App (1st) 110919, ¶¶ 25, 30 (affirming summary judgment where the plaintiff merely speculated that she slipped on a liquid substance left on the floor of a mall by the activities of housekeeping staff). In light of this holding, we need not address defendant's argument that the condition of the floor was open and obvious.

¶ 22 III. CONCLUSION

¶ 23 For the reasons stated, we affirm the order of the circuit court of Kane County granting defendant's motion for summary judgment.

¶ 24 Affirmed.