2014 IL App (2d) 130422-U
No. 2-13-0422
Order filed January 22, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

BETTY WEEKS, Plaintiff-Appellant, v. LA-TARA PIZZA, INC., d/b/a Giuseppe's Pizza & Italian Restaurant, CARL LUTTUCCA, a/k/a Calogero Lattuca, and MARGARET LATTUCA, Defendants-Appellees.	))))))))))))	Appeal from the Circuit Court of Winnebago County. No. 10-L-107 Honorable J. Edward Prochaska, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Hudson and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted defendants summary judgment on plaintiff's negligence claim, as plaintiff did not raise a factual issue as to whether defendants had constructive notice of the dangerous condition of a pipe in the roof of their restaurant: plaintiff submitted no evidence that at the relevant time defendants had any reason to know even of the pipe's existence; even if they did, plaintiff submitted no evidence that defendants had any reason to know of its dangerous condition.

¶ 2 Plaintiff, Betty Weeks, sued defendants, La-Tara Pizza, Inc., d/b/a Giuseppe's Pizza & Italian Restaurant (the restaurant), Carl Luttucca a/k/a, Calogero Lattuca, and Margaret Lattuca,

for damages sustained when a pipe fell from the ceiling of the restaurant and struck her. The trial court granted summary judgment for defendants, and plaintiff timely appealed. The issue on appeal is whether there is a genuine issue of fact that defendants had constructive notice of the dangerous condition of the pipe. For the reasons that follow, we hold that there is no genuine issue of fact, and thus we affirm.

¶ 3 I. BACKGROUND

¶ 4 According to plaintiff's second amended complaint, plaintiff, while a patron at the restaurant, was injured when a pipe fell from the ceiling and struck her. The complaint alleged that defendants were negligent in (1) failing to warn plaintiff of the pipe, (2) allowing a hazardous condition to exist on the premises, (3) causing a hazardous condition to exist on the premises, (4) failing to discover that the pipe created an unreasonable risk of harm, (5) failing to properly maintain the plumbing on the premises, (6) placing the pipe above the dining area when it knew or should have known that it would create an unreasonable risk of harm, and (7) failing to protect the dining area when it knew or should have known that the pipe would be dangerous to patrons.

¶ 5 Deposition testimony was provided by plaintiff, Sherry Huss, defendants Calogero Lattuca and Margaret Lattuca, Seth Gallagher, and Daniel Murphy. The testimony established that, on August 31, 2008, plaintiff went to the restaurant, along with Huss, for dinner. While plaintiff and Huss were seated at a table in the dining area, a metal pipe fell through the ceiling and struck plaintiff on the head.

¶ 6 According to Calogero, he and Margaret began operating the restaurant in 1981. At that time, the restaurant had been in business for several years. They had purchased the business but rented the property. Subsequently, in 1986, Calogero and Margaret purchased the property.

Around 1990, a kitchen fire caused smoke damage to the restaurant, and the restaurant was remodeled. A suspended or drop ceiling was installed below the original drywall ceiling; the original drywall ceiling was not removed. After the repairs were completed, the City of Rockford inspected the building to make sure that it complied with code requirements. In addition, about 20 years earlier, prior to the fire, the roof of the building (which was a flat tar roof) had been replaced. Since then, repairs had been made to the roof, including retarring, from time to time.

¶ 7 Gallagher, a licensed plumber, testified that he went to the restaurant the day after the accident. He observed the pipe that had fallen from the ceiling. The pipe was cast iron and weighed about 40 pounds. It was about 18 inches long, with a diameter of 4 inches on one end and 2 inches on the other end. He estimated the pipe to be about 50 years old. Gallagher also went up on a ladder and viewed the area from where the pipe had fallen. When the pipe had fallen, it knocked off a portion of the original drywall ceiling, which allowed Gallagher to see where the pipe had been located. According to Gallagher, the pipe had been located between the roof and the original drywall ceiling (which had been covered by the drop ceiling when the restaurant was renovated). The space between the roof and the original drywall ceiling was about 12 inches. Gallagher observed a second pipe located between the original drywall ceiling and the roof; this second pipe was being held in place by a "hanger," which he described as "a piece of strap iron." Gallagher testified that the pipe had fallen when the hanger gave way. According to Gallagher, both the pipe that had fallen and the second pipe that remained in the ceiling were old "plumbing vent[s]" that had been part of the building when it was a garage. He opined that, when the building was converted from a garage to a restaurant, the vents were "just cut off" and the pipes were left in the ceiling. The pipes were not sticking through the roof;

"they had gone over the pipes on the roof." The pipes were "buried" between the drywall ceiling and the roof.

¶ 8 Defendants moved for summary judgment, arguing that plaintiff could not prove that defendants had either actual or constructive notice of the pipe. According to defendants, they performed regular maintenance on the property, including roof repairs when necessary. The building had been brought up to code and inspected by the City of Rockford prior to the accident, without any violations noted. There was no evidence that defendants failed to exercise ordinary care to discover the pipe.

¶ 9 In response, plaintiff argued that there was a genuine issue of material fact concerning whether defendants had constructive notice of the pipe. In support, plaintiff relied on the deposition testimony and written report of her expert, Murphy, who worked as a consulting engineer. According to plaintiff, Murphy's deposition established that the pipe had extended above the level of the flat roof of the building and would have been visible to anyone who had inspected or worked on the roof and thus defendants had notice of it.

¶ 10 Murphy testified that he first visited the restaurant on November 22, 2011, over three years after the incident. He examined the pipe that had fallen from the ceiling. He stated that the pipe, which he referred to as a "long pattern soil increaser," had been part of the building's plumbing vent system; he did not know whether it had been part of the restaurant's plumbing system. He stated: "It could have been part of the restaurant plumbing system, or it could have been part of whatever plumbing system was in the building at some point in time." He could not tell precisely how old the pipe was but stated that it was at least 20 years old. Murphy observed tar on the pipe. In his written report, Murphy opined that the pipe had been " 'flashed' into the roof construction *** and [had been] held in place by virtue of the roofing 'tar' (the dark

material around the barrel of the larger section of the pipe). Once the pipe was 'broken' free of the supported horizontal pipe, the only thing holding the remaining vertical pipe section in place was the friction between the roofing material and the pipe barrel." Using a photo of the pipe, he testified that the rusty half of the pipe was the bottom of the pipe, which would have been below roof level. He explained that the black half of the pipe "was flashed. This is tar and crap and gunk and God knows what else." He explained that "the codes require that this pipe extend a minimum of 12 inches above the roof, so when you do these, they're supposed to take this (indicating) and extend it up one foot above the roof, and then this (indicating) becomes flashed into the roofing system. It becomes part of the roofing system for waterproofing."

¶ 11 Murphy further testified that he disagreed with Gallagher's testimony that the pipe had been held in place by a metal strap. Murphy stated that there was no way to hold a vertical pipe in place with a strap and, further, that he saw no evidence that a strap had been used, such as resulting discoloration on the pipe. He had no idea when the attached horizontal pipe had been removed. According to Murphy, the only thing holding the remaining pipe in place was the friction between the roofing material and the pipe barrel. Murphy was asked: "Do you have any reason to believe that the pipe that struck [plaintiff] was not concealed from view by [defendants], as described by Gallagher in his deposition?" Murphy responded: "I believe the pipe that fell and struck [plaintiff] was discoverable in some fashion, be it from the roof or be it from below." When asked whether the pipe could have been discovered "[w]ithout deconstructing the premises," he responded, "I don't know. I believe it might have been discoverable. I mean, if you went up on the roof, you would have found it." Murphy did not go up on the roof when he visited the premises. Murphy did not disagree with Gallagher's testimony that the pipe, prior to falling through the drywall ceiling and drop ceiling, had been

hidden from view by the drywall ceiling. Murphy opined that defendants should have known about the pipe because they owned the building and "they are responsible for everything that goes on in that facility." Nevertheless, Murphy agreed that he was unable to point to any evidence indicating that defendants were aware of, or should have been aware of, the pipe's existence.

¶ 12 On April 22, 2013, following a hearing, the trial court granted defendants' motion for summary judgment. The trial court held that there was no evidence that defendants had constructive notice of the pipe. Specifically, the court stated:

> "The bottom line is this; these folks operated this restaurant for 30 years uneventfully. This pipe was not an issue for 30 years. It was not an issue which through logic and common sense shows that it was not sticking through the roof, that it was concealed in some fashion probably exactly as Mr. Gallagher said, by floating on hangers in the ceiling. Why that happened, no one knows. But that goes back beyond the time defendants were operating the restaurant."

The court further stated:

> "We cannot allow cases to go to a jury when the only evidence the plaintiff has proffered is expert witness testimony that has no basis. That has no credible factual basis. It's simply his opinion and even he admits it."

The court acknowledged Murphy's testimony concerning the presence of black tar on the pipe but found that the tar did not establish that the pipe was up on the roof at the time of the occurrence, especially since there was no evidence of holes in the roof ever being repaired. The court rejected Murphy's testimony as speculative.

¶ 13 Plaintiff timely appealed.

¶ 14 II. ANALYSIS

¶ 15 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 2010). However, it is a drastic means of resolving litigation and should be allowed only when the right of the moving party to judgment is clear and free from doubt. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 43 (2004). This court reviews *de novo* an order granting summary judgment. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). To prevail in a negligence action, the plaintiff must prove that the defendant owed a duty to him, that the defendant breached that duty, and that the plaintiff's injury proximately resulted from that breach. *Ward v. K mart Corp.*, 136 Ill. 2d 132, 140 (1990).

¶ 16 The law is well settled regarding the liability of a landowner where a plaintiff alleges injuries resulting from a dangerous condition on the premises. In *Genaust v. Illinois Power Co.*, 62 Ill. 2d 456 (1976), our supreme court adopted section 343 of the Restatement (Second) of Torts, which provides:

> "A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

c) fails to exercise reasonable care to protect them against the danger." Restatement (Second) of Torts § 343 (1965).

Thus, "there is no liability for landowners for dangerous or defective conditions on the premises in the absence of the landowner's actual or constructive knowledge. If the gist of a complaint is that the landowner did not create the condition, the plaintiff must be required to establish that the landowner knew or should have known of the defect." *Tomczak v. Planetsphere, Inc.*, 315 Ill. App. 3d 1033, 1038 (2000). At issue here is whether there is a genuine issue of fact that defendants, by the exercise of reasonable care, should have discovered the dangerous condition of the pipe.

¶ 17 Plaintiff argues that questions of material fact exist regarding whether defendants should have discovered the dangerous condition on their premises. According to plaintiff, Murphy's examination of the pipe supports Murphy's opinion that the pipe was clearly visible from the roof of the restaurant and therefore should have been discovered. Plaintiff further argues that, because the pipe was present for a sufficient length of time, defendants, in the exercise of ordinary care, should have discovered its presence. In response, defendants argue that Murphy's opinion that the pipe was visible from the roof is speculation. Further, defendants assert that they used ordinary care in maintaining the restaurant and that there was no evidence that defendants knew of the pipe's existence prior to the accident.

¶ 18 Arguably, Murphy's testimony raises a genuine issue of fact as to whether the pipe had extended above the roof *at some time*. In his report, Murphy opined that the pipe had been " 'flashed' into the roof construction *** and [had been] held in place by virtue of the roofing 'tar' (the dark material around the barrel of the larger section of the pipe). Once the pipe was 'broken' free of the supported horizontal pipe, the only thing holding the remaining vertical pipe

section in place was the friction between the roofing material and the pipe barrel." This opinion is supported by Murphy's testimony that the pipe was a ventilation pipe, which was required by building codes to extend vertically 12 inches above roof level, and that there was tar on half of the pipe. His opinion is also supported by his testimony that there was no evidence suggesting that the pipe had been held in place by metal straps, which are not used with vertical pipes.

¶ 19 Nevertheless, there is no evidence to support plaintiff's theory that the pipe had extended through the roof *after* defendants began operating the restaurant in 1981. Although Murphy testified concerning general venting code requirements, there was no evidence presented as to the specific code requirements during the relevant periods. There was no evidence presented that the pipe had ever been a part of the restaurant's plumbing system. Although Gallagher agreed that the pipe was an old plumbing vent that had been a part of the plumbing system when the building had been used as a garage, he opined that, when the building was converted to a restaurant, the vents were "just cut off" and the pipes were left in the ceiling. He testified that the pipes were not sticking through the roof. He stated that "they had gone over the pipes on the roof." Gallagher testified as to what he had observed on the day after the accident when he viewed the area in the ceiling from where the pipe had fallen. Gallagher testified that the pipes were "buried" between the drywall ceiling and the roof. Indeed, as defendants point out, Murphy's testimony concerning the presence of tar on the portion of the pipe that purportedly extended above the roof is consistent with Gallagher's testimony that the vents were "just cut off" and that "they had gone over the pipes on the roof," as it shows that the pipe was buried in tar.

¶ 20 In any event, regardless of whether the pipe had extended through the roof or had been concealed from view, there is simply no genuine issue of fact as to whether defendants had constructive knowledge of the dangerous condition of the pipe. According to plaintiff, liability

may be imposed on a property owner if the hazard was present for a length of time such that, in the exercise of reasonable care, its presence should have been discovered. She claims that defendants had a duty to inspect the property and discover the hazard. In support, plaintiff relies primarily on *Sparling v. Peabody Coal Co.*, 59 Ill. 2d 491 (1974). However, that case is distinguishable. In *Sparling*, the defendant sold to the plaintiff's father property that had been used for coal-mining operations from 1918 through 1945. *Id*. at 493. The property consisted of 22½ acres and contained a mine shaft, a pond, an air shaft, and a slack pile. *Id*. The slack pile was approximately 300 feet long, 200 feet wide at one end and 50 feet wide at the other, and about 5 feet high. *Id*. Almost 6½ years after the sale, the 5-year-old plaintiff was injured when she walked onto the slack pile and fell into a fire that was burning at the bottom of the pile. *Id*. At issue in *Sparling* was whether the plaintiff's father had a reasonable opportunity to discover the dangerous condition and to take effective precautions against it. *Id*. at 499. The testimony showed that the fire was not visible and that it did not emit smoke or steam. *Id*. However, the plaintiff's father and his employee both testified that they noticed a sulfur smell like that produced from a coal furnace. *Id*. at 499-500. The odor was not present every day, but they smelled it when the wind blew from the mine area toward the area where his junkyard was located. *Id*. at 500. They both thought that it came from the open coal-mine shaft next to the slack pile. *Id*. The court found that, based on the evidence, there was a question for the jury of whether the father had a reasonable opportunity to discover the dangerous condition. *Id*.

¶ 21 We find *Sparling* distinguishable because there the smell of smoke signaled a potential hazard. Here, even if the pipe had been visible, there was no evidence presented that defendants, in the exercise of reasonable care, should have been aware of the existence of the hazardous nature of the pipe. The evidence showed that defendants had operated the restaurant since 1981

and that the roof had been worked on several times. When the restaurant was repaired after the kitchen fire, the City of Rockford inspected the repairs. Nothing in the evidence suggests that defendants were ever made aware of any problems or issues with the property during this time. Indeed, Murphy was unable to point to any evidence indicating that defendants were aware of, or should have been aware of, the pipe's existence. Given the number of years that the restaurant was in use without incident and the absence of any evidence that would have alerted defendants to the existence of its potentially hazardous condition, there is no genuine issue of material fact as to whether defendants had constructive notice of the dangerous condition of the pipe. See *Britton v. University of Chicago Hospitals*, 382 Ill. App. 3d 1009, 1012 (2008) ("[W]here a structure not obviously dangerous has been in daily use for an extended period of time and has proven adequate, safe, and convenient for the purposes to which it was being put, it may be further continued in use without the imputation of negligence.")

¶ 22 III. CONCLUSION

¶ 23 For the reasons stated, we affirm the judgment of the circuit court of Winnebago County, granting summary judgment for defendants.

¶ 24 Affirmed.