2014 IL App (2d) 130480-U
No. 2-13-0480
Order filed February 25, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

GENERAL CASUALTY, a/s/o A & B Freight Line, Inc.,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellant,	)	
v.	)	No. 11-L-706
INVENSYS CONTROLS,	)	Honorable Kenneth L. Popejoy,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Burke and Justice Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted defendant summary judgment on plaintiff's negligence claim, as plaintiff submitted no evidence that a chain he leaned against broke because of a defect rather than because of his substantial weight.

¶ 2 Plaintiff, General Casualty, a/s/o A & B Freight Line, Inc., sued defendant, Invensys Controls, seeking to recover workers' compensation payments made to Ronald Hayward DeShazo, an employee of A & B Freight Line, Inc., for injuries DeShazo sustained during the course of his employment while on defendant's premises. The trial court granted summary judgment for defendant, and plaintiff timely appealed. We affirm.

¶ 3 I. BACKGROUND

¶ 4 According to plaintiff's amended complaint, on June 23, 2009, DeShazo fell from an elevated platform when a chain railing that was attached to a post on the platform "failed." According to the complaint, defendant was negligent (1) in failing to maintain the railing and post; (2) in failing to warn DeShazo of the "dangerous condition"; (3) in failing to make a reasonable inspection of its premises; and (4) in allowing the railing and post to remain in a dangerous condition. Plaintiff provided workers' compensation coverage for A & B Freight Line, Inc., and paid DeShazo damages as a result of the occurrence. Plaintiff sought reimbursement from defendant.

¶ 5 DeShazo testified at his deposition that he had been a truck driver for A & B Freight Line since 1976. He was responsible for making deliveries to the property and had done so for more than 20 years. The incident occurred in the loading dock area. On the day of the incident, DeShazo backed up the trailer of his truck to one of the large loading dock doors for unloading, exited his truck, and then walked up a ramp to a smaller "walk-in door" that was used to enter the building. The chain rail at issue was located on an elevated platform by the smaller door. The chain was "[k]ind of like a heavy dog chain" and was connected to two posts. The smaller door was usually unlocked, but, on the day of the incident, the door was locked. DeShazo rang the bell, and then he "just kind of leaned back on the chain and just kind of waited for them to unlock the door. And all of a sudden [he] went backwards and there was nothing to grab to catch [himself]." He leaned on the chain; he did not lean on the post. He did not know if it was the chain or the post that broke. Initially, DeShazo testified that he saw both the chain and the post on the ground, but he later stated that he did not remember seeing the post. He did not see any rust on the chain or post. Every time he made a delivery to the property, he had walked past the

chain rail. He was 6'7" tall and, at the time of the incident, weighed approximately 380 pounds.

¶ 6 Trevor Davies, defendant's operation manager at the time of the incident, testified that he was responsible for production, safety, and maintenance. Davies inspected the exterior of the premises on a monthly basis. In addition to Davies' inspection, defendant had a safety team, comprised of a cross-section of defendant's employees, which conducted monthly inspections focusing on different areas of the premises. Defendant also used an incentive program to encourage employees to identify potential hazards. Davies testified that the area where DeShazo was injured consisted of a concrete ramp leading up to a doorway. On one side of the ramp was a steel railing that ran from the ground to the doorway. On the other side of the ramp, there was a six-foot gap in the steel railing where a detachable chain had been placed. The space in the railing had previously been used for deliveries. The purpose of the chain was to prevent people from walking off the platform. Davies believed the chain to be safe. Defendant had hired third-party auditors to conduct safety inspections and they deemed it safe. Davies did not know if they performed tests on the chain. Davies did not observe any rust or deterioration on the chain or railing. He never identified any risk to the chain.

¶ 7 Defendant filed a motion for summary judgment. Defendant argued that any alleged defect in the chain or rail was latent. Further, defendant argued that the premises were routinely inspected and that no evidence of a patent defect was ever noted. The trial court granted defendant's motion, finding that there were no genuine issues of material fact. The court stated:

> "I find some supposition. I find some speculation. I find some questions that exist, but no facts. There is not one differing fact or genuine issue of fact. We know exactly what was done up to the time this 300 plus pound man leaned against this railing. It failed at that point. But at no time prior was there any patent condition, any facts of it, none, that

> a latent condition should have been known, defect—latent defect conditions should have been known. No facts that anything about their inspection would have done something to determine this or not and no facts that there was any defect at all even subsequent to the time that this was defective."

¶ 8 Plaintiff timely appealed.

¶ 9 II. ANALYSIS

¶ 10 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).

¶ 11 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, 468 (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 a landowner 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).

¶ 12 Plaintiff argues that the trial court erred in granting summary judgment for defendant, because there were genuine issues of material fact as to whether the "defect" on the premises was latent or patent and as to whether defendant's inspections of the premises were reasonable. According to plaintiff, "reasonable minds could differ as to the condition and maintenance of the post on the date of the accident." We disagree. As the trial court noted, plaintiff failed to present facts concerning *any* defect on the property. Indeed, plaintiff's inability to identify a discoverable defect distinguishes the present case from the cases upon which plaintiff relies.

¶ 13 Plaintiff relies primarily on *McGourty v. Chiapetti*, 38 Ill. App. 2d 165 (1962), which he claims is "on point" with the present case. There, the plaintiff was injured when he stepped on to a concrete block, which was being used as a step for egress from the loading dock, and the block slipped, causing the plaintiff to fall. *Id.* at 170-71. The jury found in favor of the plaintiff, and

the defendant appealed. *Id*. at 169. One of the issues on appeal was whether the defect, *i.e.*, the loose concrete block, was latent or patent. The defendant argued that the dangerous condition that caused the plaintiff's fall was latent, because it was covered by the snow that fell during the evening prior to the occurrence. *Id*. at 174-75. The court noted that "[a] latent defect is one hidden from the knowledge as well as from the sight and must be one which could not be discovered by the exercise of ordinary and reasonable care." *Id*. at 174. The court rejected the defendant's argument, finding that, because the condition was discoverable prior to the existence of the snow, it was a patent defect. *Id*. at 174-75. The court concluded: "There is ample basis for the finding *** that [the] defendant could by reasonable inspection have discovered that during the winter the cement block would be a dangerous means of egress from the dock." *Id*. at 175.

¶ 14 In so holding, the court cited *Smith v. Morrow*, 230 Ill. App. 382 (1923), also relied on here by plaintiff. There, the plaintiff was killed when a porch railing gave way and she fell from the porch to the sidewalk below. *Id*. at 386. The railing had been fastened to two posts with three or four finishing nails and painted over. *Id*. at 389. An examination of the railing after the occurrence revealed that the nails were rusty. *Id*. at 387. The ends of the rail, at the points of contact with the posts, had decayed and were rotten. *Id*. On appeal, the defendant argued that the defect in the railing was latent, claiming that no defects were observable in the railing prior to the occurrence. *Id*. at 389. The reviewing court disagreed, stating:

> "It is apparent from the evidence that if this rail was in the condition which the evidence shows it was in, a reasonable inspection probably would have revealed it. It is hard to understand how a piece of railing in this condition could not have been discovered by a reasonable inspection. Merely looking at it might not have revealed the rusty nails which

were concealed, but an inspection would have revealed the rotten ends of the rails, or there would have been some indication that the ends of the rails were rotten." *Id*. at 390.

¶ 15 *McGourty* and *Smith* are distinguishable for two reasons. First, as the trial court noted, plaintiff has failed to identify a defect on the premises. In *McGourty*, the loose block was discoverable. In *Smith*, the rotten ends of the rail were discoverable. Here, if plaintiff cannot identify a defect, we fail to see how plaintiff can argue that defendant should have discovered it. Although plaintiff refers to the "bending of the vertical post" as the defect, the fact that the post bent when a 380-pound man leaned on the chain to which it was attached did not, without more, render it defective. Even if there was evidence of some defect in the post, plaintiff has failed to present any evidence that it was discoverable by the exercise of reasonable care. In both *McGourty* and *Smith*, there was evidence of a discoverable defect.

¶ 16 Nevertheless, plaintiff also argues that the court erred in finding that defendant's inspections of the premise were reasonable. According to plaintiff, it is a question of fact whether a reasonable inspection should have encompassed an "actual inspection" as opposed to an inspection that "was purely ocular in nature." In support, plaintiff relies on *Chapman v. Foggy*, 59 Ill. App. 3d 552 (1978). There, the minor plaintiff was injured by a 2½–inch–long splinter on a railing at a skating rink. *Id*. at 554-55. The trial court denied the defendant's motion for a directed verdict premised on lack of notice. *Id*. at 555. The reviewing court affirmed. The court found that the defendant should have known that the wood railing had splinters. *Id*. at 556-57. The court noted that "the railing had been in a splintering condition for a period of time prior to the instant occurrence" and that the "condition would be relatively obvious to one examining the railing." *Id*. at 556. The court further noted that the defendant was aware that children who could not skate well often stopped against the rail and used it to steady

themselves and that a man exercising ordinary care would realize that the railing required constant inspection. *Id*. *Chapman* does not support plaintiff's argument. Again, as noted, plaintiff presented no evidence of any defect that caused the chain or post to give way. It is undisputed that there was no evidence of deterioration, rust, or damage to the chain or post. Thus, there is nothing about the chain or the post that defendant should have discovered by visual inspection or otherwise.

¶ 17 III. CONCLUSION

¶ 18 For the reasons stated, we affirm the judgment of the circuit court of Du Page County.

¶ 19 Affirmed.