2014 IL App (2d) 131163-U
No. 2-13-1163
Order filed June 24, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

GILBERTO PEREZ, Plaintiff-Appellant, v. SINDY M. ROGERS, Defendant and Third-Party Plaintiff-Appellee (Daniel S. Rogers, Defendant; Village of Winfield, Third-Party Defendant).	)	Appeal from the Circuit Court of Du Page County. No. 10-L-312 Honorable Patrick J. Leston, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Schostok and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted defendant summary judgment: on plaintiff's premises-liability claim, there was no evidence that defendant had actual or constructive knowledge of the alleged dangerous condition; on plaintiff's general negligence claim, there was no evidence that defendant (or the village, for whose work defendant was allegedly responsible) created the condition.

¶ 2 Plaintiff, Gilberto Perez, sued defendants, Daniel S. Rogers and Sindy M. Rogers, for injuries sustained when he stepped into a hole on defendants' premises and fell. The trial court granted summary judgment for Sindy, finding that there was no genuine issue of fact as to

whether defendants had knowledge of the hole.[1] Plaintiff timely appealed and now argues: (1) that the trial court erred in finding that there was no genuine issue of fact as to whether defendants had knowledge of the hole; and (2) that, notwithstanding the court's finding regarding knowledge, the court erred in granting judgment on count II of plaintiff's complaint, alleging general negligence, as knowledge was not required. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 According to the complaint, on October 24, 2008, plaintiff was collecting garbage on defendants' property when he stepped into a hole, causing him to fall and be injured. Plaintiff's complaint contained two counts. Count I was entitled "Premises Liability" and alleged that defendants had a duty "to maintain said real property in a reasonable safe condition so as to prevent injuries to those lawfully on said real property." Count II was entitled "Negligence" and alleged that defendants had a duty "to use reasonable care for the safety of persons who would be walking on the real property, including the Plaintiff, in the manner in which it owned and maintained the said real property premises, including the front area adjacent to the driveway." Each count alleged that defendants breached their duty to plaintiff in the following manner:

> "a. allowed the property to contain an unreasonably dangerous condition, to wit: allowed a hole to exist in the front area adjacent to the driveway that was not readily appreciable or visible;

[1] Daniel never filed an appearance in the case, and, on April 21, 2011, a default order was entered against him. Daniel remained a party to the complaint, but he was not a party to Sindy's motion for summary judgment and takes no part in this appeal.

b. allowed the property to contain an unreasonably dangerous condition, to wit: allowed a hole to exist in the front area adjacent to the driveway that was of a size and depth that one could step into it and suffer injury;

c. created an unreasonably dangerous condition on the real property, to wit: created a hole in the front area adjacent to the driveway that was not readily appreciable or visible;

d. created an unreasonably dangerous condition on the real property, to wit: created a hole to exist in the front area adjacent to the driveway that was of a size and depth that one could step into it and suffer injury;

e. failed to warn those persons lawfully on the premises, such as the plaintiff, that the hole existed in the area thus presenting a hazard to walk upon;

f. failed to repair or fill the hole so that the area could safely be walked upon without the hazard of stepping into the hole;

g. failed to tape off or block off or make visible warning of the area until the hole could be repaired or filled;

h. failed to make a reasonable and adequate inspection of the real property to ensure that it was safe and without the hazard of such a hole for use by those lawfully upon the property;

i. otherwise created or allowed to exist a dangerous condition upon the real property."

¶ 5 During his deposition, plaintiff, a garbage truck driver for Waste Management, testified that, on October 28, 2008, he was present on defendants' property to collect garbage. It was cloudy and windy, and it had rained the night before. Plaintiff parked the truck on the street in

front of defendants' house. Defendants' two trash cans were located to the right of the driveway, by the curb and next to the mailbox. He emptied defendants' trash cans into the truck. As he was returning the second can to its original location, he stepped into a hole and fell. He described the hole as being about 12 inches wide and 17 inches deep. It was in the grass. It was filled with water and covered by leaves. It was near the mailbox and appeared to be manmade. Plaintiff had picked up garbage from defendants' property during the weeks or months before the accident, but he had never seen the hole. After he fell, he called his supervisor, Shari Young. According to plaintiff, Young came to the scene and took photographs of the hole.

¶ 6 Young testified that plaintiff called her to tell her that he had gotten injured, and she went to the scene. She did not recall taking pictures. She "believed[d] there was a hole there." She stated that it was "[a] little bit away from the curb where the [trash containers] were." She could not recall the shape, depth, or width of the hole. Plaintiff told her that he thought that it was "a hole where they replaced a mailbox." She did not recall whether there was a mailbox or a mailbox post there.

¶ 7 Sindy testified that she had lived at the property for about 24 years. Daniel, Sindy's ex-husband, had moved out of the property sometime in 2001 and resided in Wisconsin. From about 2000 through 2010, Sindy was primarily responsible for taking care of the property. Sindy's stepson, Michael Rogers, lived with her at the time of the accident and would mow the lawn about half the time, including the area around the mailbox post. Michael was responsible for bringing the trash to the curb, although Sindy would sometimes do it. Sindy never saw a hole near the mailbox in October 2008. She stated that, if there had been a hole, her lawn mower wheel would have gone in it and she would have noticed it. She further stated that if she had seen a hole she would have addressed it.

¶ 8 Sindy further testified that, sometime around August 2009, she learned that plaintiff had fallen on her property, and she told plaintiff's attorney during a phone call that the hole might have been caused by the Village of Winfield (the Village) replacing a broken mailbox post.[2] At that time, she was guessing as to the cause of the alleged hole, because, according to Sindy, on past occasions she had had the Village replace her mailbox if it had been knocked over by a snow plow. She went on to testify that, when she later learned (at the deposition) that plaintiff had fallen in the month of October (rather than December or January), she was "stumped," because unless there had been snow in October she did not know why there would have been a hole. The only reason that she told plaintiff's attorney that the alleged hole on her property might have been created by the Village was that she believed that plaintiff had fallen in the winter. On past occasions when the Village replaced her mailbox post, she never saw a hole left behind. After learning about plaintiff's fall, Sindy inspected the mailbox area but did not see a hole.

¶ 9 Michael testified that he lived on the property with Sindy until about 2010. Michael thought that Sindy might have asked him to fix the mailbox at some point, but he could not specifically recall. He remembered the mailbox post being broken on one or two occasions by the Village snowplow. He did not know how to fix it. He remembered telling Sindy at some point that the post was broken, but he did not remember the date. He never saw anyone from the Village repairing the mailbox. He did not remember there ever being a hole on the property, although he could not say that there never was a hole. He shared lawn mowing duties with

[2] On May 16, 2011, Sindy filed a third-party complaint for contribution against the Village, which was nonsuited upon entry of summary judgment for Sindy.

Sindy. He never noticed anything dangerous on the property. He took the trash cans to the curb about every other week. He occasionally used a weed whacker around the mailbox post.

¶ 10 Michael Shane Mittman testified that he was a maintenance worker with the Village. A "Service Request" form produced by the Village showed that a request to repair a mailbox on defendants' property was made by Sindy on January 11, 2008. The form read: "Mailbox damage for [*sic*] last storm. Tried to put mailbox up herself but couldn't do it. Needs help." The form further showed that "Mike & Scott Reinstalled mail box" on January 15, 2008. Mittman did not have any independent recollection of the work performed on defendants' property. During the winter months, he fixed mailboxes if they were damaged by plows. Usually, all that was required was reattaching the mailbox to the post. Sometimes, the post needed to be replaced. When replacing a post, he usually used a post-hole digger and a bag of concrete. He usually had to replace one or two posts per year. Mittman could not remember a time when he installed a new post and did not have to dig a new hole. Most often, he would cut the old post down to ground level. If he removed the old post and concrete from the ground, he generally did so using a loader or a backhoe. Sometimes he had the necessary machinery with him; sometimes he returned later. When installing a new post, Mittman would use the "spoils" from the new post hole to fill the hole that had been left from the old post. If he had to come back later to remove the old post, he would use gravel to fill the old hole, because the "spoils" from the new hole would not have been left there. When asked whether he had ever forgotten the bag of gravel and had to come back later to fill the hole, he responded: "Have I ever? Probably."

¶ 11 On March 22, 2013, Sindy moved for summary judgment, arguing that there was no genuine issue of fact concerning whether she had actual or constructive knowledge of the alleged defect, a necessary requirement for a premises-liability cause of action. In response, plaintiff

argued that the evidence was sufficient to create an issue of fact as to defendants' actual and constructive knowledge of the defect. In addition, plaintiff argued that defendants had actual knowledge that the work done by the Village could result in a hole such that there was "a modicum of a duty on her to perform a cursory inspection of the work done on her property at her request." Plaintiff argued that defendants were "imputed with actual knowledge of the hole's existence because it was [defendants'] agent [that] was the author of the hole." Finally, plaintiff argued that defendants were vicariously liable for the Village's negligence.

¶ 12 On June 20, 2013, following arguments, the trial court granted summary judgment for Sindy. The court found that there was no genuine issue of fact as to whether defendants had either actual or constructive knowledge of the hole. The court noted that Sindy and Michael testified that they never saw the hole, either before or after the accident. There was no evidence that the replacement of mailbox posts involved leaving unfilled holes. The court stated: "The defendant had had mail boxes fixed and repaired in the past, but there's nothing from those instances which would lead one to believe that the plaintiff and the defendant should know that the hole existed because there is no evidence that holes existed on any of the other occasions." The court noted that, according to the Village, if it created a hole, it repaired the hole, and that the Village did not have any recollection of what it did on the particular repair for defendants. The court further stated: "The [V]illage doesn't testify that they left holes unfilled, and the defendant doesn't testify that when mail boxes have been replaced in the past, she ended up with an unfilled hole in the parkway." In addition, the court noted that no one saw the hole for 10 months after defendants' mailbox had been repaired. The court found that it was speculation to conclude that the Village created the hole. The court also found that there was no evidence that

the hole was so conspicuous that defendants should have discovered it. Finally, the court found that defendants did not have any particular duty to inspect the Village's work.

¶ 13 On October 16, 2013, the trial court found that there was no just reason for delaying appeal of the order granting summary judgment. See Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010).

¶ 14 On November 5, 2013, plaintiff filed his notice of appeal.

¶ 15 II. ANALYSIS

¶ 16 We first consider whether jurisdiction is proper. Sindy argues that we do not have jurisdiction, because plaintiff failed to appeal within 30 days of the trial court's June 20, 2013, entry of summary judgment, as required by Illinois Supreme Court Rule 303(a)(1) (eff. May 30, 2008). Plaintiff responds that jurisdiction is proper, because the judgment did not become appealable until October 16, 2013, when the trial court ordered, under Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010), that there was no just reason to delay appeal. We agree with plaintiff.

¶ 17 Plaintiff's complaint named two defendants, Daniel and Sindy. Daniel never filed an appearance in the case, and, on April 21, 2011, a default order was entered against him. Daniel remained a party to the complaint, but he was not a party to Sindy's motion for summary judgment. Therefore, when the trial court granted summary judgment on June 20, 2013, it did so as to fewer than all the parties and, as a result, the order was not appealable until the court found that there was no just reason to delay appeal of the order. See Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010). On October 16, 2013, the court made the requisite finding under Rule 304(a), and, thereafter, plaintiff had 30 days to file his notice of appeal. See Ill. S. Ct. R. 303(a) (eff. May 30, 2008). Accordingly, plaintiff's notice of appeal, filed on November 5, 2013, confers jurisdiction on this court.

¶ 18 We turn now to the merits. 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).

¶ 19 Plaintiff's complaint asserted two claims: one under a premises-liability theory and one under a general negligence theory. We address each in turn. First, 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).

¶ 20 Plaintiff argues that the trial court erred in finding that defendants did not have knowledge of the hole. According to plaintiff, because Sindy summoned the Village to repair her broken mailbox post and then later indicated to plaintiff's attorney that the hole was made from this repair, it is "evident" that "she was the author of the hole" and "intimately familiar" with it. Plaintiff further argues that Sindy should be "imputed with constructive knowledge of the hole because *** she should have inspected the work" done by an independent contractor to whom she entrusted the repair of the mailbox.

¶ 21 We agree with the trial court that there is no genuine issue of fact as to whether defendants had actual or constructive knowledge of the hole on the property. First, there is no question that defendants did not have actual knowledge of the hole. Both Sindy and Michael testified that they had never seen the hole, at any time in 2008 or after learning of plaintiff's

injury. The question is whether defendants had constructive knowledge of the hole. "Generally, if a plaintiff is relying on proof of constructive notice, [he] must establish that the dangerous condition existed for a sufficient time or was so conspicuous that the defendant should have discovered the condition through the exercise of reasonable care." *Smolek v. K.W. Landscaping*, 266 Ill. App. 3d 226, 228-29 (1994). Plaintiff's entire cause of action is premised on his theory that the Village created the hole when it repaired defendants' mailbox in January 2008 and that, therefore, the hole was present for at least nine months. However, the evidence that plaintiff relies on is entirely too speculative to create a genuine issue of fact on the matter. Although the evidence established that defendants' mailbox was repaired in January 2008, Mittman testified that he had no independent recollection of doing the work. Therefore, he could not testify that he created the hole. He testified generally that, when he replaced a mailbox post, he dug a new hole for the new post. Sometimes he removed the old post, and sometimes he cut the post down to ground level. He testified that, if he removed the old post, he filled the remaining hole with gravel. There was no testimony that the Village had ever left unfilled holes. Although Sindy initially speculated (when first contacted by plaintiff's attorney) that the Village might have created the hole that caused plaintiff's fall, she clarified during her deposition that, at that time, she believed that plaintiff had fallen during the winter, when such a hole was more likely. She never saw a hole in October 2008 or any other time. Plaintiff testified that he had been on defendants' property in the weeks or months prior to his fall and had never seen the hole. Thus, with nothing more than speculation as to the cause of the hole, we cannot say that the hole was present for a sufficient length of time or so conspicuous such that defendants may be charged with constructive knowledge of it.

¶ 22 Nevertheless, plaintiff argues that summary judgment based on his failure to establish that defendants had knowledge of the hole did not defeat his general negligence claim, which did not require a showing of knowledge. See *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."). To maintain a negligence claim, a plaintiff must establish 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 that there is a genuine issue of material fact regarding those issues. *Id.*; *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 114 (1995). Proximate cause cannot be predicated on surmise or conjecture, and, therefore, causation will lie only when there exists a reasonable certainty that the defendant's acts caused the injury. *Wiegman v. Hitch-Inn Post of Libertyville, Inc.*, 308 Ill. App. 3d 789, 795 (1999).

¶ 23 Although plaintiff is correct that he need not show that defendants had knowledge of the hole if he can establish that defendants' negligence caused the hole, we find that he cannot do so here. Because there is no evidence that defendants actually created the hole, each of plaintiff's general negligence theories depends on the premise that the Village created the hole. For instance, on appeal plaintiff argues that defendants were negligent in failing to inspect the Village's work, in giving direction to the Village, in selecting a competent contractor, in taking precautions to ensure that the work was done safely, in exercising reasonable care with respect to the control retained, and in supervising. Plaintiff maintains that the trial court erred in rejecting

his claim for defendants' lack of knowledge. However, a review of the trial court's ruling makes clear that summary judgment was based on the speculative nature of plaintiff's theory that the Village created the hole. As plaintiff cannot establish that the Village created the hole, there is no genuine issue of fact that defendants were negligent. Thus, summary judgment was properly granted.

¶ 24 III. CONCLUSION

¶ 25 For the reasons stated, we affirm summary judgment for Sindy.

¶ 26 Affirmed.