2012 IL App (3d) 110346-U

Order filed April 10, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

RALPH CALIENDO,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
Plaintiff-Appellant,	)	Will County, Illinois,
	)	
v.	)	
	)	
JEWEL FOOD STORES, INC., a New York	)	
Corporation, NEW ALBERTSON'S, INC., a	)	Appeal No. 3–11–0346
Delaware Corporation, and JETCO	)	Circuit No. 09–L–187
PROPERTIES, INC., a Delaware	)	
Corporation, as successor in interest by	)	
merger with BOLINGBROOK FIRST-	)	
PROPERTIES, INC., collectively d/b/a	)	
JEWEL-OSCO,	)	Honorable
	)	Michael J. Powers,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justice Carter concurred in the judgment.
Presiding Justice Schmidt dissented.

ORDER

¶ 1 Held: Summary judgment in favor of a store owner in a slip and fall case was reversed because questions of fact regarding whether a crack in the store's parking lot was de minimus or obvious precluded judgment as a matter of law. Also, whether the store owner breached its duty to maintain the parking lot in a reasonably safe

condition, and whether the cart corral placed on an incline and the crack in the parking lot caused the plaintiff's injuries, were questions of fact for a jury.

¶ 2 The plaintiff, Ralph Caliendo, brought a negligence action against the defendants, Jewel Food Stores, Inc. (Jewel), New Albertson's, Inc., Supervalu, Inc., and Jetco Properties, Inc., after he slipped and fell in the parking lot of Jewel. The trial court granted the defendants' motion for summary judgment. We reverse and remand.

¶ 3 FACTS

¶ 4 The plaintiff alleged that, after shopping at Jewel, he placed his shopping cart in a cart corral in the parking lot. According to the plaintiff, after he started to turn away, the cart began to roll out of the corral due to the incline in the lot. The plaintiff attempted to stop the cart, but he caught his foot in a crack in the parking lot asphalt and fell. The plaintiff alleged that he suffered a knee injury.

¶ 5 In his deposition, the plaintiff testified that when he pivoted to retrieve the cart, his foot moved to the right but then would not pivot anymore. After someone helped him up, the plaintiff walked toward his car and he noticed a crack in the parking lot where his foot stopped moving. The crack ran north and south, across a number of parking spots and under the cart corral. It was about three-eighths of an inch deep and approximately an inch wide. The plaintiff also testified that he visited this store every day and that he had previously complained to a manager at Jewel about the location of the cart corral.

¶ 6 The defendants moved for summary judgment, arguing that: (1) the plaintiff failed to introduce evidence that the rolling shopping cart caused his fall; (2) there was no evidence that the defendants had notice of the crack in the parking lot; (3) the crack was de minimus; (4) the

shopping cart and the crack in the parking lot were open and obvious conditions; and, (5) the statute of repose barred the action. The trial court granted the motion, and the plaintiff appealed.

¶ 7 ANALYSIS

¶ 8 The plaintiff contends that we should reverse the grant of summary judgment because there are questions of material fact as to every element of the plaintiff's negligence claim.

¶ 9 Summary judgment is proper "if 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 2006). In determining whether a genuine issue as to any material fact exists, pleadings, depositions, and admissions are construed against the party moving for summary judgment. Williams v. Manchester, 228 Ill. 2d 404 (2008). Summary judgment is inappropriate "where the material facts are disputed or where, the material facts being undisputed, reasonable persons might draw different inferences from the undisputed facts." Williams, 228 Ill. 2d at 417. Summary judgment is appropriate where the plaintiff cannot establish an element of the cause of action. Williams, 228 Ill. 2d at 417. We review de novo the granting of summary judgment. Williams, 228 Ill. 2d at 417.

¶ 10 To recover damages for a defendant's alleged negligence, a plaintiff must allege and prove that: (1) the defendant owed the plaintiff a duty of care; (2) the defendant breached that duty; and (3) the plaintiff's injury was proximately caused of the defendant's breach. Marshall v. Burger King Corp., 222 Ill. 2d 422 (2006).

¶ 11 The plaintiff contends that the defendants owed him a duty to exercise reasonable care to avoid placing the cart corral on a sloped surface that created a foreseeable runaway cart danger.

The plaintiff also contends that the defendants owed him a duty to exercise reasonable care to maintain the parking lot surface in a reasonably safe condition.

¶ 12 A business operator generally owes his customers a duty to exercise reasonable care to maintain his premises in a reasonably safe condition. Ward v. K Mart Corp., 136 Ill. 2d 132 (1990). The determination of whether a duty exists is a question of law. Green, 343 Ill. App. 3d at 832. In determining whether a duty exists, courts primarily consider: (1) the foreseeability that the defendant's conduct will result in injury to another; (2) the likelihood of injury; (3) the burden of guarding against injury; and (4) the consequences of placing that burden on the defendant. Green v. Jewel Food Stores, Inc., 343 Ill. App. 3d 830 (2003). The imposition of a legal duty requires not only that the occurrence be foreseeable, but reasonably foreseeable. Hartung v. Maple Inv. & Dev. Corp., 243 Ill. App. 3d 811 (1993).

¶ 13 The defendants argue that the crack in the parking lot was a de minimus defect and, thus, not actionable. The de minimus rule, which traditionally protected municipalities from liability for minor sidewalk defects, has been applied to private landowners. Alqadhi v. Std. Parking, Inc., 405 Ill. App. 3d 14 (2010). Minor defects in surface conditions are generally de minimus and not actionable. Hartung v. Maple Investment Group, 243 Ill. App. 3d 811 (1993). However, even a minor defect can be actionable depending on the circumstances, such as when there is heavy traffic or pedestrians would be distracted. Alqadhi, 405 Ill. App. 3d at 18.

¶ 14 Also, a business owner is not required to foresee injuries if the potentially dangerous condition is open and obvious. Green v. Jewel Food Stores, Inc., 343 Ill. App. 3d 830. An "obvious" condition is one where the condition and the risk are apparent to a reasonable person exercising ordinary perception, intelligence, and judgment. Restatement (Second) of Torts §

343A, Comment b, at 219 (1965); Green v. Jewel Food Stores, Inc., 343 Ill. App. 3d 830 (2003). However, a business owner's duty may extend to a risk that it reasonably could anticipate that even customers exercising ordinary care will fail to avoid the risk because they are distracted. Ward, 136 Ill. 2d at 156. When a court cannot determine as a matter of law whether a condition poses an open and obvious danger, the obviousness of the danger is for the jury to determine. Alqadhi, 405 Ill. App. 3d at 18.

¶ 15 Here, the trial court did not specify on which ground it was granting the defendants' motion for summary judgment. As to the issue of duty, the defendants owed the plaintiff a duty to maintain its parking lot in a reasonably safe condition. We cannot conclude, as a matter of law, that the crack in the parking lot was de minimus. Although the crack was only about an inch wide, it was located in a parking lot and near the cart corral. Whether the crack's size and location rendered the crack de minimus, or whether the defendants should have reasonably expected their patrons to be distracted near the cart corral, are questions of fact that cannot be determined in a motion for summary judgment. The same question of fact precludes summary judgment on the issue of whether the defect was open and obvious.

¶ 16 We also cannot conclude, as a matter of law, that the defendants did not breach their duty to the plaintiff by placing the cart corral on a sloped surface and by failing to identify and repair the crack in the parking lot. Since there are genuine issues of material fact, whether the defendants breached their duty and whether that breach was the proximate cause of the plaintiffs's injuries were questions for the jury. See Marshall v. Burger King Corp., 222 Ill. 2d 422 (2006).

¶ 17 The defendants also argue that the plaintiff's cause of action regarding the slope of the

parking lot was barred by the construction statute of repose, 735 ILCS 5/13-214(b) (West 2006). The plaintiff argues that the statute of repose was not applicable because the defendants were not parties protected by the statute and the negligent act alleged was the placement of the cart corral, not the slope of the parking lot.

¶ 18 The construction statute of repose provides:

¶ 19 "No action based upon tort, contract or otherwise may be brought against any person for an act or omission of such person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property after 10 years have elapsed from the time of such act or omission." 735 ILCS 5/13-214(b) (West 2006).

¶ 20 The statute applies to all parties involved in the construction process, and was enacted to protect parties engaged in the construction process from having to defend against stale claims. Wright v. Bd. of Educ., 335 Ill. App. 3d 948 (2002). However, it only bars those claims arising out of the construction of an improvement to real property. MBA Enters. v. Northern Ill. Gas Co., 307 Ill. App. 3d 285 (1999). The defendants argue that the statute bars the plaintiff's cause of action because the parking lot was constructed in 1973 and the plaintiff was not injured until 2007. However, the plaintiff did not allege that his injury was due to negligent construction. He alleged that the defendants were negligent in their placement of the cart corral and their failure to maintain and repair the surface of the parking lot. Neither claim is barred by the statute of repose.

¶ 21 Thus, we reverse the grant of summary judgment in favor of the defendants, and remand for further proceedings in accordance with this order.

¶ 22 CONCLUSION

¶ 23 The judgment of the circuit court of Will County is reversed.

¶ 24 Reversed and remanded.

¶ 25 PRESIDING JUSTICE SCHMIDT, dissenting:

¶ 26 I respectfully dissent. The location of the cart corral was merely a condition; it was not, by plaintiff's own testimony, a cause of plaintiff's fall. See Cannon v. Commonwealth Edison Co., 250 Ill. App. 3d 379 (1993).

¶ 27 Likewise, the small crack was both de minimus and open and obvious. Plaintiff stated he had seen the crack on prior occasions when he visited the store. The existence and location of the crack were well known to plaintiff.

¶ 28 The crack was approximately three-eighths of an inch deep and one inch wide at its widest point. See Warner v. City of Chicago, 72 Ill. 2d 100 (1978)

¶ 29 No reasonable mind could foresee that an injury would result to someone exercising reasonable care for his or her own safety. See Walker v. City of Rockford, 332 Ill. App. 243 (1947). I would affirm.