2012 IL App (4th) 110844-U

Filed 5/25/12

NO. 4-11-0844

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

SHARON DERRY,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Sangamon County
STULLER, INC., an Illinois Corporation,	)	No. 05L164
d/b/a STEAK N' SHAKE,	)	
Defendant-Appellee.	)	Honorable
	)	Leo Zappa,
	)	Judge Presiding.

JUSTICE COOK delivered the judgment of the court.
Presiding Justice Turner and Justice McCullough concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court's grant of summary judgment affirmed because the wheelchair ramp on which plaintiff tripped and fell was an open and obvious condition.

¶ 2 Plaintiff, Sharon Derry, brought a negligence action against defendant, Stuller, Inc., doing business as Steak N' Shake, seeking damages for injuries she sustained when she tripped and fell on a wheelchair ramp located on defendant's premises. The trial court granted summary judgment in favor of defendant from which plaintiff appeals. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On December 1, 2003, at approximately 6:45 p.m., plaintiff tripped and fell on a wheelchair ramp while leaving the Steak N' Shake located at 3186 South Dirksen Parkway in Springfield, Illinois. As a result of the fall, plaintiff fractured her right elbow. Plaintiff's son, Michael Derry, was with plaintiff when she fell. However, Michael did not see plaintiff fall

because he was walking in front of her. No witnesses to the fall have been identified.

¶ 5 According to plaintiff, sometime after the fall, she contacted a representative of Steak N' Shake to request that the ramp's slope be painted.

¶ 6 On June 10, 2005, plaintiff filed a complaint alleging that defendant (1) failed to install proper lighting on the exterior of the Steak N' Shake, (2) failed to properly mark the wheelchair ramp, (3) failed to maintain and inspect the restaurant's exterior for unsafe conditions, (4) should have known of the ramp's unsafe condition, and (5) should have remedied the unsafe ramp.

¶ 7 On June 14, 2005, plaintiff filed an amended complaint. In response, defendant filed an affirmative defense, alleging that plaintiff was negligent and failed to exercise ordinary care for her own safety in that "she failed to keep a proper lookout while walking on [d]efendant's premises."

¶ 8 On November 24, 2010, plaintiff filed a second amended complaint. Plaintiff added a claim alleging that defendant violated provisions of the Americans with Disabilities Act of 1990 (ADA) (42 U.S.C. §§ 12101 to 12213 (2010)), as adopted in title 71 of part 400 of the Illinois Administrative Code (71 Ill. Adm. Code § 400.110 to 400.710 (1991)), concerning detectible walking surfaces.

¶ 9 On November 30, 2010, defendant filed a motion for summary judgment pursuant to section 2-1005 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1005 (West 2008)). Defendant argued that there is no genuine issue of material fact concerning whether it proximately caused plaintiff's injuries, because plaintiff's deposition testimony refutes her allegations that the exterior of the building was not properly lit and the markings on the ramp

were faulty. In her discovery deposition, taken February 5, 2005, plaintiff admitted that she saw where she was stepping. The relevant portion of plaintiff's deposition follows:

"Q. MR. MILLS [(plaintiff's attorney)]: Okay. And you saw where you were stepping to?

A. [PLAINTIFF]: Right.

Q. And I believe that you also stated earlier that you were looking down and ahead of you?

A. Uh-huh.

Q. When you were stepping off of the curb?

A. Right."

In its motion, defendant also pointed to plaintiff's and her son's failure to "recall" whether the restaurant's exterior and parking lot were lit. The relevant portion of plaintiff's deposition follows:

"Q. MR. CLINE [(defense attorney)]: Were there lights on the exterior of the building?

A. [PLAINTIFF]: I don't recall.

Q. Were there lights in the parking lot of the restaurant?

A. Not to my knowledge. If there were they were out here (indicating).

Q. And when you say out here, take a look at that number 1 area, closer to Dirksen Parkway are you talking about.

A. Right.

Q. Okay.

A. But I don't recall any."

However, during the deposition, plaintiff also stated that there "wasn't enough" light to see by.

¶ 10 On December 30, 2010, defendant filed a motion to dismiss under section 2-615 of the Code (735 ILCS 5/2-615 (West 2008)). The trial court granted the motion and authorized plaintiff to refile.

¶ 11 On February 23, 2011, plaintiff filed a third amended complaint. Plaintiff alleged the following: (1) the ramp did not have distinctive paint or color sufficient to distinguish it from the parking lot and sidewalk; (2) the sides of the ramp were unreasonably steep; (3) defendant failed to provide adequate lighting to the sidewalk, parking lot, and ramp; and (4) defendant failed to comply with provisions of the ADA concerning detectable walking surfaces. In response, on March 24, 2011, defendant filed a motion for summary judgment.

¶ 12 On May 24, 2011, the trial court granted defendant's motion for summary judgment, finding that the ramp was open and obvious and there was no issue of material fact as to whether defendant proximately caused plaintiff's injury. Plaintiff's ADA claims were also dismissed. In making its determination, the court pointed to plaintiff's admission during her deposition testimony that she could see where she was walking. However, the court noted that regardless of the admission, plaintiff did not present sufficient evidence to support her allegations "beyond speculation." Neither plaintiff nor her son could recall the lighting of the premises. In regard to the slope of the ramp, plaintiff testified that "[t]hose things are all built alike." Last, during her deposition, plaintiff identified a photograph with painted lines around the edge of the ramp as fairly and accurately depicting the area where she fell.

¶ 13 On June 21, 2011, plaintiff filed a motion to reconsider attaching an affidavit from plaintiff's attorney, William Shaffer. In the affidavit, Shaffer testified that within approximately one week after February 27, 2004, he took photographs of the area where the fall occurred. He further stated that any photographs submitted by plaintiff showing distinctive markings were taken after February 27, 2004, and do not accurately portray the condition of the ramp when plaintiff fell. On August 4, 2011, plaintiff filed an amended motion to reconsider. The trial court denied the motion on September 1, 2011.

¶ 14 This appeal by respondent followed.

¶ 15 II. ANALYSIS

¶ 16 On appeal, plaintiff argues that the trial court erred in granting summary judgment to defendant.

¶ 17 We review a grant of summary judgment *de novo*. *Morris v. Margulis*, 197 Ill. 2d 28, 35, 754 N.E.2d 314, 318 (2001). Summary judgment is appropriate when the pleadings, depositions, and admissions, together with any affidavits, show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2010). When ruling on a motion for summary judgment, the trial court must view all evidence in a light most favorable to the nonmovant. *West v. Kirkham*, 207 Ill. App. 3d 954, 958, 566 N.E.2d 523, 525 (1991).

¶ 18 To state a cause of action for negligence, a plaintiff must plead (1) the existence of a duty owed by the defendant to the plaintiff; (2) a breach of that duty; and (3) an injury proximately caused by the breach. *Alqadhi v. Standard Parking, Inc.*, 405 Ill. App. 3d 14, 16, 938 N.E.2d 584, 587 (2010). "The factors used to determine the existence of a duty include: (1)

the likelihood of injury; (2) the reasonable foreseeability of such injury; (3) the magnitude of the burden of guarding against injury; and (4) the consequences of placing that burden on the defendant. [Citation]." *Alqadhi*, 405 Ill. App. 3d at 16-17, 938 N.E.2d at 587.

¶ 19 Defendant claims that it owes no duty of reasonable care to plaintiff because the ramp was an open and obvious condition. A condition is open and obvious if a reasonable person in the plaintiff's position exercising ordinary perception, intelligence, and judgment would recognize the condition and the risk involved. *Deibert v. Bauer Brothers Construction Co., Inc.*, 141 Ill. 2d 430, 435, 566 N.E.2d 239, 241 (1990). If there is no dispute as to the physical nature of the condition, the question of whether the condition is open and obvious is a legal one for the court. *Wilfong v. L.J. Dodd Construction*, 401 Ill. App. 3d 1044, 1053, 930 N.E.2d 511, 520 (2010). "However, where there is a dispute about the condition's physical nature, such as its visibility, the question of whether a condition is open and obvious is factual. [Citations]." *Wilfong*, 401 Ill. App. 3d at 1053, 930 N.E.2d at 520.

¶ 20 There are two exceptions to the open and obvious doctrine: the distraction exception and the deliberate-encounter exception. *Wilfong*, 401 Ill. App. 3d at 1054, 930 N.E.2d at 521. Under the distraction exception, a property owner will be found to owe a duty of care if it was reasonably foreseeable that a plaintiff might be too distracted to notice the condition. *Wilfong*, 401 Ill. App. 3d at 1054, 930 N.E.2d at 521. The deliberate-encounter exception provides that a property owner will be found to owe a duty of care if it was reasonably foreseeable that a plaintiff might deliberately encounter an open and obvious danger because doing so would outweigh the apparent risk. *Wilfong*, 401 Ill. App. 3d at 1054, 930 N.E.2d at 521. In this case, no evidence concerned the applicability of either of the exceptions to the open

and obvious doctrine.

¶ 21 Plaintiff argues that there is a dispute as to whether the ramp was open and obvious, because the premises was inadequately lighted. In her deposition, plaintiff testified that on the night of the fall there was not enough light to see by. However, during that same deposition, plaintiff also admitted that when she stepped off the curb she could see where she was stepping to. She further testified that she could not recall whether there were lights on the restaurant's exterior or in the parking lot. "Testimony at a discovery deposition may constitute a judicial admission. [Citations]." *In re Estate of Rennick,* 181 Ill. 2d 395, 407, 692 N.E.2d 1150, 1156 (1998). Judicial admissions are deliberate, clear, unequivocal statements by a party about a concrete fact within that party's knowledge. *Rennick,* 181 Ill. 2d at 406, 692 N.E.2d at 1156. To remove the temptation to commit perjury, a judicial admission may not be contradicted in a motion for summary judgment or at trial. *Rennick*, 181 Ill. 2d at 406-07, 692 N.E.2d at 1156. Plaintiff's statement admitting her ability to see on the night of the fall constitutes a judicial admission that the ramp was visible.

¶ 22 Plaintiff also claims that the ramp did not have distinctive paint or color sufficient to distinguish it from the parking lot and sidewalk. In support of her claim, plaintiff relied on a series of photographs of the ramp and surrounding area. The record on appeal contains poor quality photocopies of the photographs. The photocopies are inadequate to enable us to discern whether the ramp was distinguishable from the sidewalk and parking lot, especially due to the fact that the photocopies were in black and white. Four unmarked, colored photocopies of the exterior of a Steak N' Shake were also included in the record. The photocopies each show a ramp with markings. However, based on Shaffer's affidavit and the other information provided in the

record, the ramps featured in those photocopies do not appear to be the ramp at issue.

¶ 23 Plaintiff further failed to present sufficient evidence that the sides of the ramp were unreasonably steep. Based on a review of the record, there is no evidence as to the slope of the sides of the ramp. Moreover, during her deposition, in regard to a question concerning how she described the ramp's slope on a prior occasion, plaintiff stated that "[t]hose things are all built alike."

¶ 24 In a similar case, *Alqadhi,* 405 Ill. App. 3d 14, 938 N.E.2d 584, the First District considered whether a dispute about the lighting of a wheelchair ramp created a question of fact precluding summary judgment. In *Alqadhi*, the plaintiff sued for injuries she received when she fell on a three-fourths inch rise in concrete on a wheelchair ramp. *Alqadhi*, 405 Ill. App. 3d at 15, 938 N.E.2d at 586. Both plaintiff and her expert, an engineer, testified that the defect was not visible. Plaintiff claimed that she could not appreciate the change in elevation from the parking lot to the curb, in part, because a lack of contrast created the "illusion" of walking on a flat surface. *Alqadhi*, 405 Ill. App. 3d at 18, 938 N.E.2d at 588. In line with plaintiff's testimony, the expert testified that the lack of contrast paint "disguised" the change in vertical elevation between the parking lot and the curb, creating a tripping hazard. *Alqadhi*, 405 Ill. App. 3d at 18, 938 N.E.2d at 588. The trial court granted summary judgment to the defendants, finding that the ramp was open and obvious. On appeal, the First District reversed. In making its determination, the appellate court relied on the expert's testimony concerning the defect in the ramp, finding that the expert's testimony, in conjunction with the plaintiff's testimony, raised an issue of fact as to the condition of the ramp. This case is distinguishable from *Alqadhi* because plaintiff's observations concerning the ramp and the lighting of the premises were not supported by expert

testimony or other similar evidence.

¶ 25 We find no genuine issue of material fact in this case and conclude that defendant was entitled to judgment as a matter of law, because the condition of the ramp was open and obvious. Plaintiff admitted that she could see where she was going when she stepped off the curb and that she could not recall the lighting of the premises. Plaintiff also failed to present evidence from an expert or other similar source to support her observations as to the ramp's dangerous condition. Moreover, the photographic evidence relied on by plaintiff is of poor quality. From the photocopies of the photographs provided by plaintiff, we cannot decipher whether there were markings on the ramp at issue. Moreover, plaintiff had adequate time to submit evidence in support of her allegations. Last, we find that defendant was entitled to assume that reasonable invitees, exercising ordinary attention, perception, and intelligence, would be able to appreciate the risk involved in using the ramp.

¶ 26 III. CONCLUSION

¶ 27 For the foregoing reasons, we affirm the trial court's judgment.

¶ 28 Affirmed.