2015 IL App (4th) 140811-U

NOS. 4-14-0811, 4-14-0988 cons.

FILED
July 13, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

BRIAN BRUCE,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Sangamon County
MCGRAW ENTERPRISES, INC.; and MICHAEL HUESING, Individually and d/b/a CENTRAL ILLINOIS CUSTOM HOMES, LLC, J.R. EXCAVATING, and MIKE HUESING SNOW REMOVAL,	)	No. 12L67
Defendants-Appellees.	)	Honorable
	)	Peter C. Cavanagh,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Pope and Justice Turner concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court properly granted summary judgment to defendants; the record contains no evidence from which a jury could reasonably conclude defendants breached their duty of care or proximately caused plaintiff's injuries.

(2) Plaintiff waived his argument defendants were liable under the distraction exception to the open-and-obvious rule by not raising the matter before the trial court.

¶ 2 In January 2011, plaintiff, Brian Bruce, slipped on ice and fell in a parking lot outside a McDonald's restaurant owned by defendant McGraw Enterprises, Inc. (McGraw). Defendant Michael R. Huesing, d/b/a/ Mike Huesing Snow Removal (Huesing), provided snow removal services at the McDonald's lot. In March 2012, plaintiff filed suit against defendants, alleging their negligence in snow removal caused his injuries.

¶ 3 In September and November 2014, the trial court granted the defendants' motions for summary judgment. Plaintiff appeals, alleging genuine issues of material fact preclude summary judgment. We affirm.

¶ 4 I. BACKGROUND

¶ 5 A. Amended Complaint

¶ 6 Plaintiff's amended complaint alleges McGraw contracted with Huesing for Huesing to clear snow from the McDonald's parking lot. Plaintiff, a McDonald's customer, was walking across the lot from his vehicle toward McDonald's when he slipped on ice and fell. Plaintiff suffered injuries from his fall. The complaint alleges ice formed when snow, moved from where it fell to a high point of the lot, melted toward the entrance of the restaurant and then refroze.

¶ 7 According to the amended complaint, McGraw was negligent in failing to (1) maintain its parking lot in a safe and hazard-free condition, (2) inspect its lot after snow removal for unnatural accumulations of snow or ice caused or created by the removal and melting ice, (3) prevent the piling of snow in a place where melting snow would flow across the lot and create an unnatural accumulation of ice, (4) install a drain to catch melting snow, (5) salt or sand the ice that formed when melted snow refroze, and (6) warn customers of the hazards of ice in the parking lot. The amended complaint alleges Huesing was negligent in moving snow to a location where, when melting, the water would flow across the parking lot and refreeze into customers' paths, and in failing to inspect the parking lot for unnatural accumulations of ice caused by melting snow.

¶ 8 B. Deposition of Brian Bruce

¶ 9 Around 7:30 a.m. on January 25, 2011, plaintiff stopped at McDonald's on his way to work. Two days earlier, snow accumulated in Springfield. Plaintiff could not recall what the temperature was that morning. When plaintiff pulled into the McDonald's lot, he noticed it had been plowed. The spaces were dry. Plaintiff was impressed by the cleanliness of the lot. Plaintiff pulled into a parking space next to a median, where a snow pile had been created from the plowed snow. It was approximately three or four feet high. Plaintiff exited his vehicle and started walking toward McDonald's. He noticed a car driving through the lot faster than usual. As the car went past plaintiff, he took one step without looking and stepped on a patch of ice. The ice was hard. Plaintiff fell on his right shoulder.

¶ 10 When asked to describe the dimensions of the patch of ice, plaintiff stated he "would say a couple feet across" and "[b]asically, circular." Plaintiff did not recall the thickness of the patch. The patch of ice was touching the median, which was covered in snow.

¶ 11 Plaintiff testified he took science in high school and understood about freezing and melting. Plaintiff did not witness how the patch "came into existence." Plaintiff did not see any salt or sand or other substance in the parking lot. There was no precipitation that day.

¶ 12 C. Deposition of Michael Huesing

¶ 13 Huesing had a contract with McGraw to plow McGraw's McDonald's lots in 2011. The contract was for snow removal, not ice removal.

¶ 14 D. Deposition of Seth McGee

¶ 15 McGee was the store manager for the McDonald's at issue. On occasion, the snow would be plowed on the median. McGee could not recall whether there was snow in the lot on January 25, 2011. McDonald's employees would check the sidewalks but would not check

the parking lot. Sometimes employees would salt the area near the drive-thru window when ice made it difficult for cars to go up the incline. They would not salt the entire lot.

¶ 16 E. Deposition of Dale Naylor

¶ 17 Naylor worked as a maintenance worker for McDonald's in January 2011. When there was ice, he would clear the sidewalks and spread salt on the sidewalks. Naylor denied going into the parking lot and spreading salt but stated he would take a handful and throw it onto the parking lot for the traffic to carry around. He threw salt on the drive-thru lanes and sidewalks.

¶ 18 F. Summary Judgment

¶ 19 Huesing and McGraw filed separate motions for summary judgment. Both argued, in part, plaintiff failed to provide any evidence showing conduct by Huesing or McGraw led to the unnatural accumulation of ice in the parking lot. Both also argued neither had a duty to remove natural accumulations of ice.

¶ 20 The trial court agreed. In September 2014, the court granted summary judgment in Huesing's favor, finding "no factual testimony before it to provide the necessary causation connection between the snow pile referenced in the pleadings and the alleged formation of ice in the parking lot." In November 2014, the court granted McGraw's motion. The court found "no factual testimony before it to provide the necessary causation between the snow pile *** and the alleged formation of ice in the parking lot." The court also found "[t]he only evidence that exists in this case is that Plaintiff fell on ice created through a natural accumulation for which no duty on the part of [McGraw] can be imposed."

¶ 21 This appeal followed.

¶ 22 II. ANALYSIS

¶ 23 A. Summary Judgment

¶ 24 Summary judgment's purpose is to decide whether a genuine issue of material facts exists, not to resolve a question of fact. *Williams v. Manchester*, 228 Ill. 2d 404, 417, 888 N.E.2d 1, 8 (2008). An order granting summary judgment is proper when the depositions, pleadings, affidavits, and admissions on file, viewed in the light most favorable to the nonmovant, establish both the existence of no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Pontiac National Bank v. Vales*, 2013 IL App (4th) 111088, ¶ 29, 993 N.E.2d 463 (quoting 735 ILCS 5/2-1005(c) (West 2008)). Our review of an order granting summary judgment is *de novo*. *Rettig v. Heiser*, 2013 IL App (4th) 120985, ¶ 30, 996 N.E.2d 1220.

¶ 25 On a motion for summary judgment, the movant may satisfy the initial burden of production by establishing the absence of evidence supporting the nonmovant's case. *Hutchcraft v. Independent Mechanical Industries, Inc.*, 312 Ill. App. 3d 351, 355, 726 N.E.2d 1171, 1174-75 (2000). At this point, the burden of production then shifts to the nonmovant to come forward with evidentiary material that establishes a genuine issue of fact. *Id.*, 726 N.E.2d at 1175. Without a genuine issue of fact, the case is not triable. See generally *Pielet v. Pielet*, 2012 IL 112064, ¶ 16, 978 N.E.2d 1000. Summary judgment is a drastic means to resolve a case; summary judgment should be entered only when the right of the moving party is clear and free from doubt. *Vales*, 2013 IL App (4th) 111088, ¶ 29, 993 N.E.2d 463.

¶ 26 In this case, plaintiff contends defendants cannot meet their initial burden on summary judgment without showing plaintiff "could never prove that snow from the unnatural

pile could melt, flow downhill and refreeze where it did." In support, plaintiff relies on two sentences from the majority's decision in *Kleiss v. Bozdech*, 349 Ill. App. 3d 336, 350, 811 N.E.2d 330, 340 (2004): "A defendant does not meet its burden of production by merely asserting that the plaintiff lacks evidence. Rather, the defendant must show that the plaintiff cannot acquire sufficient evidence to make its case."

¶ 27 We are not convinced Illinois law or *Kleiss* places a burden on movants, when pointing out the absence of evidence, to present proof the nonmovant could "never" provide evidence to refute the movant's claims. The language relied on in *Kleiss* is *dicta*. The issue in *Kleiss* was not whether the summary-judgment movant produced sufficient evidence to trigger the shift of the burden of production, but whether the plaintiff had produced sufficient evidence to create a genuine issue of material fact on proximate cause. *Id.* at 350-52, 811 N.E.2d at 341-42. The *Kleiss* majority held plaintiff presented sufficient evidence and the trial court erroneously weighed evidence on the issue of proximate cause. *Id.* at 353-54, 811 N.E.2d at 343-44.

¶ 28 In addition, the two cases cited in *Kleiss*, *Williams v. Covenant Medical Center*, 316 Ill. App. 3d 682, 737 N.E.2d 662 (2000), and *Pecora v. County of Cook*, 323 Ill. App. 3d 917, 752 N.E.2d 532 (2001), do not support the holding plaintiff suggests. Both cases involved situations where discovery was not complete when the summary-judgment motions were filed.

¶ 29 In *Williams*, the movant filed a *Celotex*-type motion, a motion in which the movant asserts the nonmovant lacks sufficient evidence to prove an element of the cause of action. *Id*. at 688-90, 737 N.E.2d 662, 668-69. The *Williams* movant alleged the plaintiffs had no expert testimony to establish the standard of care. The summary-judgment motion was,

however, filed when expert discovery was ongoing and incomplete. See *Id*. at 687, 737 N.E.2d at 667. The *Williams* court held the movant was not entitled to summary judgment because the movant did not establish the plaintiffs "could not produce an admissible expert opinion on the issues of [the movant's] breach of standard of care." *Id*. at 690, 737 N.E.2d at 669. The court also held the summary-judgment motion was premature as expert discovery had not yet commenced. *Id.* The court held, in these circumstances, the movant may bring a summary-judgment motion at any time to avoid extensive discovery, but, if seeking summary judgment early in the proceedings, a traditional summary-judgment motion with an expert affidavit should be supplied. *Id*. at 691, 737 N.E.2d at 670. As an aside, the *Williams* court cites *Fooden v. Board of Governors of State Colleges & Universities of Illinois*, 48 Ill. 2d 580, 587, 272 N.E.2d 497, 500 (1971), as showing summary judgment is appropriate if all that is in the pleadings and affidavits constitutes all the evidence before the court. *Williams*, 316 Ill. App. 3d at 689, 737 N.E.2d at 668.

¶ 30 In *Pecora*, 323 Ill. App. 3d at 934, 752 N.E.2d at 545-46, the proceedings involved administrative proceedings. Expert testimony was needed to show the plaintiffs would not be able to produce admissible expert opinion at *trial* because summary judgment was sought in administrative proceedings and the evidence the plaintiffs could produce at trial would not be limited to what the plaintiffs produced before the zoning board. *Id*. at 934-35, 752 N.E.2d at 546.

¶ 31 Here, discovery was complete when the summary-judgment motions were filed. The December 2013 conference order indicates plaintiff was required to disclose his expert witnesses by February 1, 2014, and his lay witnesses as of April 1, 2014. On March 31, 2014,

plaintiff disclosed he had no expert witnesses and provided his list of lay witnesses. The summary-judgment motions followed in May 2014 and October 2014.

¶ 32 In these circumstances, defendants need not establish plaintiff "could never prove" his claims. Defendants need only allege plaintiff, who had a full opportunity to prove his claim, lacks evidence to establish an essential element of his claim. The burden then shifts to plaintiff to present some evidence to show a genuine issue of material fact exists.

¶ 33 We turn to the record to examine whether plaintiff met his burden.

¶ 34 B. Natural-Accumulation Law

¶ 35 Plaintiff contends there are genuine issues of material fact on the questions of whether defendants breached their duty to him by creating an unnatural accumulation of ice upon which he slipped and fell and whether defendants proximately caused his injuries. Plaintiff maintains defendants, by plowing the snow to a high point of the parking lot, caused an ice patch to form after the snow melted and refroze toward the entrance of the restaurant. Plaintiff points to his testimony showing the ice patch was touching the median and testimony showing Huesing plowed the snow three-to-four feet high on the median. Plaintiff also argues, "[a]nyone who has seen an icicle form on the edge of a snowy roof knows that it is possible for snow to melt even if the air temperature is below 32 degrees Fahrenheit." In addition, plaintiff points to the inconsistencies in the summary-judgment orders as proof a question of fact exists in regards to Huesing.

¶ 36 To recover under a theory of negligence, a plaintiff must prove the existence of a duty, breach of that duty, and an injury proximately caused by that breach. *Barber v. G.J. Partners, Inc.*, 2012 IL App (4th) 110992, ¶ 19, 974 N.E.2d 452. A landowner has no duty to

remove natural accumulations of ice from his property. *Id.* "Even when landowners voluntarily remove snow, they do not owe a duty to remove natural accumulations of ice underneath the snow." *Id.* If, however, a property owner voluntarily undertakes to remove snow, that owner may be subject to liability if he acts in a negligent manner. *Id.* ¶ 21, 974 N.E.2d 452. A property owner may be liable if ice accumulated because the owner aggravated a natural condition or engaged in activity that created a new unnatural condition. *Id.*

¶ 37 The record contains no evidence creating a triable issue on whether the ice resulted from defendants' conduct in clearing the parking lot. Plaintiff's case rests on the allegation the snow melted and refroze, but there is no testimony, circumstantial or direct, that makes this conclusion more likely than not. There is no testimony establishing the temperatures were above freezing in the days between the plowing and plaintiff's fall or that melting had been occurring. The only testimony is that the ice sat adjacent to a high snow pile in a clean parking lot. Such evidence is insufficient. It does not create a genuine issue of material fact the ice resulted from refreezing or defendants' conduct and thus does not create an issue of material fact on the elements of breach or proximate cause. Nor is the "anybody knows" argument convincing. The argument is speculative, absent any testimony regarding climate conditions on the days between the snowfall and plaintiff's injury. While it is, as plaintiff states in his reply brief, common knowledge "what happens when snow melts and refreezes," there is no reliable evidence from which a jury could reasonably conclude snow melted and refroze between January 23 and January 25, 2011.

¶ 38 Plaintiff's cases are factually distinguishable and unconvincing. For example, in *Hornacek v. 5th Avenue Property Management*, 2011 IL App (1st) 103502, ¶¶ 32-33, 959 N.E.2d

173, there was testimony showing the parking lot in question had a " 'big ice flow' " from melting snow piles adjacent to the lot and, on the day of the incident, the parking lot was wet from melting snow on top of ice. In *Johnson v. National Super Markets, Inc.*, 257 Ill. App. 3d 1011, 1016, 630 N.E.2d 934, 938 (1994), "[t]hree witnesses, including the plaintiff, testified that the ice was under a puddle of water which was streaming out of a large pile of snow."

¶ 39 We further find unconvincing plaintiff's argument regarding the alleged inconsistencies in the summary-judgment orders. There are no inconsistencies. The trial court found a lack of evidence to support a finding linking the snow pile to the ice in both cases. Such finding is alone sufficient to support an order of summary judgment in a negligence case. The additional finding in one order, "[t]he only evidence that exists in this case is that Plaintiff fell on ice created through a natural accumulation for which no duty on the part of [McGraw] can be imposed," does not render the orders flawed.

¶ 40 C. Distraction Argument

¶ 41 Plaintiff next argues defendants breached their duty to make their premises reasonably safe from unnatural accumulations of ice under a theory that he was distracted from seeing an open and obvious danger. Plaintiff points to his testimony showing he did not see the "puddle of ice" because he was distracted by a passing car. Defendants argue plaintiff forfeited this argument by not raising it in the trial court. In contrast, plaintiff contends defendants forfeited the argument by not raising it.

¶ 42 In support of the distraction theory, plaintiff relies on *Ward v. K Mart Corp.*, 136 Ill. 2d 132, 149-50, 554 N.E.2d 223, 231 (1990). In *Ward*, the Court observed a landowner may be liable under an exception to the general rule that he need not take precautions against dangers

that are obvious to visitors if the owner has reason to expect the visitor's attention may be distracted to the obvious danger. *Id.*

¶ 43 By making this argument, plaintiff seeks recovery on a new legal theory not raised before the trial court. To recover based on this theory, plaintiff had the burden of pleading and proving his claim. See generally *Volpe v. IKO Industries, Ltd.*, 327 Ill. App. 3d 567, 579, 763 N.E.2d 870, 880 (2002). Plaintiff, however, made no allegations in his complaint supporting this theory. Nor did he raise the theory in response to defendants' motions for summary judgment at trial. Plaintiff forfeited this argument on appeal. See *People ex rel. Ballard v. Niekamp*, 2011 IL App (4th) 100796, ¶ 40, 961 N.E.2d 288 (noting issues not raised in the trial court are forfeited and may not be raised on appeal).

¶ 44 III. CONCLUSION

¶ 45 We affirm the trial court's judgment.

¶ 46 Affirmed.