2012 IL App (1st) 123607-U

FIRST DIVISION
FILED: November 12, 2013

No. 1-12-3607



IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| WALDEMAR and ANNA PIKUL,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>VILLAS DEL REY CONDOMINIUM ASSOCIATION, d/b/a/VILLA DEL REY CONDOMINIUM ASSOCIATION, and ILLINOIS COMMERCIAL SERVICES, INC.,<br><br>Defendants-Appellees. | ) | Appeal from the Circuit Court of Cook County.<br><br>No.10 L 00532<br><br>The Honorable Jeffrey Lawrence, Judge Presiding. |

Justice Hoffman delivered the judgment of the court.
Justices Cunningham and Delort concurred in the judgment.

**ORDER**

*Held*: The trial court properly granted summary judgment in the absence of facts submitted by the plaintiffs creating a genuine issue of fact on the issue of the defendants negligent snow removal.

¶ 1 The plaintiffs, Waldemar Pikul and Anna Pikul, appeal from an order granting summary judgment under 735 ILCS 5/2-1005 (West 2010), in favor of the defendants, Villas Del Rey Condominium Association, d/b/a Villas Del Rey Condominium Association, and Illinois Commercial Services, Inc. For the reasons below, we affirm.

¶ 2 The amended complaint alleged as follows. Waldemar (hereinafter the plaintiff) owned and resided in a town house which was part of the Villas Del Rey (hereinafter Villas) condominium complex. On January 26, 2008, the plaintiff was walking through the parking lot of the Villas complex, taking his garbage to the disposal containers behind his townhouse. As he proceeded through the parking spaces, he allegedly slipped and fell on an "unnatural accumulation of ice and slush", sustaining injury. The plaintiff alleged that Villas had contracted with its condominium owners to provide snow removal services in the parking lot and common areas of the complex. In turn, Villas allegedly contracted with Illinois Commercial Services (hereinafter ICS) for "snow and ice removal" on the Villas parking lot and common areas.

¶ 3 The defendants subsequently moved for summary judgment. The evidence filed in support and in opposition to the motion established as follows The plaintiff testified in deposition that about 9 or 10 p.m. the night of his injury, he was walking through the parking lot with his garbarge. He described the parking lot as having two rows of parked cars, in the center of which was a driving lane. As the plaintiff traversed the driving lane, he slipped on a patch of ice and broke his leg. The plaintiff described the ice patch as "big and angled" and covered by snow. He did not see the ice prior to his fall. The plaintiff testified that, at the time of the fall, the parking lot contained about one inch of snow, and the ice had formed "when the snow started

melting." The plaintiff stated that there had been snow two or three days prior to his accident, and that he had seen the snow plow come through the parking lot the day before his accident. The plaintiff denied seeing any salt around the area where he fell.

¶ 4 The plaintiff stated that when he had taken out his car earlier in the day, he had noticed tire marks throughout the parking lot and had actually driven over the spot where he later fell. The plaintiff did not complain to anyone regarding the snow or ice in the parking lot. He testified that, when the snow removal company plowed the snow, it would push it off to one end of the parking lot.

¶ 5 At the time of the accident, Villas was subject to a "Declaration of Condominium Ownership and of Easements, Restrictions and Covenants", which vested each of the condominium owners with an undivided ownership as a tenants in common over the "common elements" of the property, which included driveways, walks, landscaping, and other portions not within the building itself. The Declaration established a Board of Managers which, for the benefit of the owners, was required to provide and pay for "[l]andscaping, gardening, snow removal, *** repair and replacement" of the common elements. The Declaration gave the Board the exclusive right and duty to acquire such services for the common areas.

¶ 6 Pursuant to its responsibilities under the Declaration, Villas retained ICS to perform snow removal for the parking lot of the complex. The contract between Villas and ICS provided, in relevant part, as follows:

> "[ICS] will be available on a 24 hour basis to monitor all winter storms and to provide snow plowing, salting, and if desired, a personalized service of hand shoveling and hand

> salting to your sidewalks***. The winter services will be performed as necessary. From 25 years of experience, we have statistically observed that salted parking lots have the best safety conditions for avoiding pedestrian incidents. *** Salting is a performed procedure after each snow plow/shoveling service or when the property has become hazardous due to icy conditions."

¶ 7 The contract offered several service options, and Villas selected "Plan A" which provided as follows:

> "Plan A is the most effective and most commonly chosen service plan by our concerned clients. The winter services in this plan will be performed where the property has become dangerous from either snowfall and/or icy conditions. If snow continues up to four inches, the services will be provided at that point. This plan provides you the lowest risk of someone falling down on the property."

¶ 8 The contract also contained a "terms and conditions" section, which set forth in relevant part as follows:

> "[ICS] will not be responsible for *** people cleaning off their vehicles; vehicles having large amounts of snow fall off of them; vehicles dragging snow onto the cleaned property from clogged streets or alleys; winds blowing snow onto the property from adjacent streets/roof tops, icy developments, *** personal injuries that may occur before, during or after: snow plowing, hand shoveling, hand salting, snow removal or salting, *** excessive ice that would not melt with salting, or any area that may accumulate blowing and/or drifting snow."

¶ 9 Finally, Villas selected an option that provided for the "personalized labor" of hand shovelers for sidewalks. The personalized services were to be performed "as soon as a snow accumulation or icy conditions have made these areas dangerous."

¶ 10 In his deposition, Donald McGuire testified that he is the assistant manager and a unit owner at Villas. McGuire acknowledged that Plan A required that winter services be performed on the property once it had become dangerous from either snowfall or icy conditions. According to McGuire, ICS was required to come to the complex and provide snow removal services after the snowfall reached one or two inches. McGuire was asked about the provision selected in the contract that requested "outdoor labor of the hand shovelers and hand salters to service my walkways." He stated that, in his opinion, this provision also included salting the parking lot. According to McGuire there were no complaints regarding the snow removal services prior to or on the day of the plaintiff's injury.

¶ 11 Daniel Downey had been employed by ICS as a snowplow driver for ten years. In his deposition, he testified that he performed the snow plowing services for Villas. Downey stated that he would enter the parking lot driveway between the two rows of cars and then push the snow all the way to the far end of the driveway and off to the side. Downey indicated that there was a 30 to 40 foot downward incline towards the back where he would pile the snow. When asked about his standard for clearing the lot, Downey responded that he would usually leave the blacktop "clean", and would then always salt it. Downey testified that he would not plow where the cars were parked but only in the area down the middle. Downey denied that he had any responsibility to completely remove ice from Villas's parking lot.

¶ 12 The record contains invoices submitted to Villas from ICS documenting snow removal services performed in the parking lot from January 21, 2008, until January 25, 2008, the day before the injury. The invoices reflected snow plowing and safety salting on January 21, safety salting on January 22 and 23, and snow plowing and safety salting on January 25.

¶ 13 The record also contains Chicago's weather report around the time of the fall as prepared by the National Oceanic & Atmospheric Administration and by the Midwestern Regional Climate Center. The reports show no more than trace amounts of snow on the day of the fall, wind gusts of up to 25 miles per hour, and temperatures at or below freezing. There were .9 inches of snow on January 25, .8 inches of snow on January 23, 1.4 inches of snow January 22, and 1.3 inches of snow January 21.

¶ 14 The defendants moved for summary judgment claiming that the plaintiff presented no evidence that he slipped on anything other than a natural accumulation of snow and ice. The trial agreed, and granted the defendants' motions, subsequently denying the plaintiff's motion to reconsider. This timely appeal followed.

¶ 15 The plaintiff argues that, in granting summary judgment, the court erroneously focused upon his failure to show that he slipped on an "unnatural" accumulation of ice. Rather, he asserts that the defendants were bound under the terms of the contract to remove all ice and snow from the parking lot, and it was irrelevant whether he slipped on a natural or unnatural formation.

¶ 16 Summary judgment is appropriate when the pleadings, depositions, and admissions on file, together with any affidavits, 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 (West

2010); *Williams v. Manchester,* 228 Ill. 2d 404, 417, 888 N.E.2d 1 (2008). In ruling on a motion for summary judgment, we construe the facts strictly against the movant and liberally in favor of the nonmovant. *Id.* It is essential that the party opposing summary judgment present a sufficient factual basis on which to arguably attain a judgment if the matter proceeded to trial. *Allegro Services, Ltd. V. Metropolitan Pier & Exposition Authority,* 172 Ill. 2d 243, 256, 665 N.E.2d 1246 (1996). The standard of review for a grant of summary judgment is *de novo*. *Travelers Insurance Co. V. Eljer Manufacturing, Inc.*, 197 Ill. 2d 278, 292, 757 N.E.2d 481 (2001).

¶ 17 We first set forth the established law under the facts in this case. In order to sustain an action for negligence, a plaintiff must provide sufficient facts to show that the defendant owed him a duty, the defendant breached that duty, and the breach proximately caused the plaintiff's injuries. *Tzakis v. Dominick's Finer Foods, Inc*., 356 Ill.App.3d 740, 745-46, 826 N.E.2d 987 (2005). If the plaintiff fails to establish any of the above elements, summary judgment for the defendant is proper. *Williams*, 228 Ill.2d at 417.

¶ 18 In general, a landowner has no duty to remove natural accumulations of snow or ice from its premises. *Judge-Zeit v. General Parking Corp.,* 376 Ill. App. 3d 573, 580, 875 N.E.2d 1209 (2007). It may assume such duty, however, either by a voluntary undertaking, or through privity of contract. *Claimsone v. Professional Property Management*, LLC, 2011 IL App (2d) 101115 ¶ 21, 34, 956 N.E.2d 1065; *Williams v. Lincoln Towers Associates*, 207 Ill. App. 3d 913, 916, 566 N.E.2d 501 (1991). In cases where the landowner has contractually agreed to remove snow or ice, the law mandates that he exercise ordinary care in doing so. *Hornacek v. 5th Avenue Property Management,* 2011 Il App (1st) 103502, P 28, 959 N.E.2d 173. Similarly, a party who

contracts with the landowner to provide snow or ice removal also must perform his duties under the contract with reasonable care. *Id.*; see *Williams v. Sebert Landscape Co.*, 407 Ill. App. 3d 753, 756, 946 N.E.2d 971 (2011)(duty requires only that contractor "not negligently remove the snow"). Further, it is well settled that the plaintiff cannot prove negligence by mere speculation; rather, he must show that the defendant created or aggravated an unnatural condition (*Hornacek*, 2011 Il App (1st) 103502, ¶ 28, 959 N.E.2d 173, quoting *McBride v. Taxman Corp*., 327 Ill. App. 3d 992, 996, 765 N.E.2d 51 (2002)), or that the defendant somehow caused the origination of the unnatural accumulation of ice or snow. *Judge-Zeit*, 376 Ill. App. 3d at 584; *Crane v. Triangle Plaza, Inc.*, 228 Ill. App. 3d 325, 330, 591 N.E.2d 936 (1992); *Wells v. Great Atlantic & Pacific Tea Co.*, 171 Ill. App. 3d 1012 (1988).

¶ 19 The plaintiff does not contend that different duties existed with regard to each of the defendants, so we address his argument as to both jointly. Villas's contract with ICS provided that ICS would be available on a 24-hour basis to monitor all winter storms and to provide snow plowing [and] salting". The contract stated that these "winter services", which we read to consist of snow plowing followed by salting, would be performed as necessary "where the property has become dangerous from either snowfall and/or icy conditions." The contract also contained a rather extensive "terms and conditions" section, which exempted ICS from any responsibility for "people cleaning off their vehicles; vehicles [that] have large amounts of snow fall off of them; vehicles dragging snow onto the cleaned property from clogged streets or alleys; winds blowing snow onto the property from adjacent streets/roof tops, icy developments," or personal injuries that may occur "before, during or after: snow plowing *** snow removal or salting".

¶ 20 In support of his claim of negligence, the plaintiff asserts that the contract required ICS to ensure that all snow and ice was removed from the parking lot. He points to his deposition testimony that, at the time of his injury, the parking lot was covered by about one inch of snow and he did not see salt where he fell. Thus, he argues, "[a] reasonable inference based on the weather reports is that [Downey] did his job negligently the day prior to the fall."

¶ 21 Initially, we find nothing in the language of the contract requiring the defendants to assume the somewhat unrealistic burden of ensuring that the parking lot was free of snow and ice at all times. On the contrary, the "terms and conditions" clause exempts the defendants from responsibility for a wide range of circumstances under which snow or ice could be present in the parking lot even after diligent plowing and salting. This includes snow falling from roofs, being brushed off one of cars or other vehicles in the lot, or being brought in by other cars, or ice developing from melting snow or cars being driven in and out of the lot.

¶ 22 Nor do the climatology reports create any inference of negligence here. The undisputed evidence showed that there were a little more than 4 inches of snow between January 21 and January 25, the day before the fall, and only trace snowfall on January 26. Other than for the trace snow, the parking lot had been plowed and salted on each of the days there was snowfall, and, according to Downey, left as "clean" as possible.

¶ 23 Other than testifying to the existence some snow and ice, and that he failed to see salt in the area where he fell, the plaintiff provides absolutely no proof on which to draw an inference of negligence in the part of the defendants. In fact, the plaintiff admits that he had no complaint regarding the manner in which the snow was plowed by ICS. The mere sprinkling of salt,

causing ice to melt and possibly later refreeze, does not aggravate a natural condition so as to form a basis for liability on the part of the property owner. *Harkins v. System Parking, Inc.,* 186 Ill. App. 3d 869, 873, 542 N.E.2d 921 (1989); *Hornacek*, 2011 Il App (1st) 103502, ¶ 28, 959 N.E.2d 173. See *Ordman v. Dacon Management Corp.*, 261 Ill. App. 3d 275, 281, 633 N.E.2d 1307 (1994)("it is unrealistic to expect property owners to keep all areas where people may walk clear from ice and snow at all times during the winter months").

¶ 24 With regard to ICS, the plaintiff contends that the trial court misapplied the law as set forth in *Williams*, 407 Ill. App. 3d 753. According to the plaintiff, *Williams* modified the law to no longer require a "natural versus unnatural" analysis in cases where the property owner is contractually bound to remove snow from the premises. The plaintiff misconstrues the basis for the holding in *Williams.*

¶ 25 In that case, the plaintiff proceeded to trial solely against her employer's snow removal contractor after she slipped on a patch of ice in her employer's parking lot. At trial, the plaintiff testified that she believed the ice was runoff from a pile of snow which the contractor's trucks had pushed in the center of the lot. The trial court accepted an argument by the contractor that it stood in the shoes of the owner-operator of the premises, and thus was held only to an owner-occupier's standard of care in maintaining the property. Accordingly, the court permitted the giving of a jury instruction requiring the plaintiff to prove *both* that 1) she slipped on an unnatural formation of ice, and 2) the contractor had notice of this icy condition. (See, e.g., *Ostry v. Chateau Ltd. Partnership*, 241 Ill. App. 3d 436, 444, 608 N. E.2d 1351 (1993) (no common law duty to remove snow and ice, so in event of undertaking, plaintiff must prove both

an unnatural formation and notice to landowner).

¶ 26 In reversing a verdict for the contractor, this court found that the trial court erred in concluding that the contractor amounted to an "owner-occupier" of the premises and subject to that standard of care. Instead, it was a contractor which was required under the terms if its contract to remove snow from the lot and to be "free of negligence" in performing those duties. *Williams,* 407 Ill. App. 3d at 756. As such, the giving of a jury instruction which required the plaintiff to prove both that she slipped on an "unnatural" formation and that the contractor had notice of this condition unfairly elevated her burden of proof. *Williams,* 407 Ill. App. 3d at 757. The holding on this narrow issue has little or nothing to do with the question presented in this case; namely, whether either Villas or ICS negligently performed their snow removal duties.

¶ 27 Finally, the plaintiff argues that summary judgment as to both defendants was error under section 324(a) of the Restatement (Second) of Torts. *Restatement (Second) of Torts § 324 (A)* (1965).

¶ 28 Section 324(A) states that one who undertakes to perform a service for another which he should recognize as necessary for the protection of a third party, and who fails to exercise reasonable care in protecting his undertaking, can be held liable to that third party if 1) his failure to exercise reasonable care in those services increases the risk of such harm; or 2) he has undertaken to perform a duty owed by the other to the third party; or 3) the harm suffered by the third party is caused by reliance of the other or the third party on the undertaking. *Restatement (Second) of Torts § 324 (A)* (1965).

¶ 29 For the reasons set forth above, this argument must fail. As indicated, the defendants in

this case were bound by their contract with the plaintiff to perform snow removal services in a non-negligent manner. The plaintiff has failed to submit facts creating a genuine issue of material fact on the question of whether the defendants failed in their duty under the contract.

¶ 30 The judgment of the circuit court of Cook County is hereby affirmed.

Affirmed.