2014 IL App (1st) 123450-U

FOURTH DIVISION
February 13, 2014

No. 1-12-3450

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JANE WANG,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	
	)	
THE REGATTA CONDOMINIUM	)	No. 09 L 2563
ASSOCIATION, an Illinois Corporation, and	)	
SUDLER AND COMPANY, an Illinois,	)	
Corporation, d/b/a SUDLER PROPERTY	)	
MANAGEMENT,	)	The Honorable
	)	Kathy M. Flanagan
Defendants-Appellees.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Howse and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted summary judgment in a slip-and-fall lawsuit in favor of defendants because of an absence of any genuine issue of material fact with regard to duty. In addition, defendants had no duty to preserve the surveillance video of the incident. We affirm.

¶ 2 This interlocutory appeal arises from the trial court's order granting summary judgment in a slip-and-fall lawsuit to defendants The Regatta Condominium Association and Sudler and

Company. On appeal, plaintiff Jane Wang contends that the trial court erroneously granted defendants' motion for summary judgment as to her negligence claim because a genuine issue of material fact existed regarding the element of duty. In addition, plaintiff contends the trial court erred because defendants owed plaintiff a duty to preserve the surveillance video when plaintiff put defendants on notice that litigation was foreseeable. We affirm.

¶ 3 BACKGROUND

¶ 4 This case arises from injuries sustained in a slip-and-fall in the lobby of the Regatta Condominium (Regatta), located near Chicago's lakefront. Plaintiff commenced this action in March 2009, alleging negligence against defendants. In addition, plaintiff filed an emergency motion for a protective order requesting defendants preserve all video recordings of the incident, which the trial court granted. Plaintiff later filed an amended complaint alleging, in pertinent part, that since she was a resident of the Regatta, defendants owed her a duty of care. Specifically, she alleged that defendants were negligent in allowing the surface of the lobby floor to exist in a wet and slippery condition that was not the result of any natural accumulation. Plaintiff also faulted defendants for failing to follow proper maintenance procedures and for failing to post a warning sign. In addition, apparently upon learning that defendants failed to preserve the surveillance video of the incident, plaintiff pled a spoliation claim.

¶ 5 Several depositions were taken during discovery. Plaintiff testified that she frequently utilized both the revolving door and automatic side door in the Regatta lobby. An inside mat ran the length of both doors and an outside mat covered the building entrance under a glass canopy. The lobby consisted of a black marble floor with a rug covering the seating area. Plaintiff occasionally observed the maintenance staff mopping the lobby floor, but could not recall whether the staff displayed warning signs indicating a wet floor.

¶6 On January 14, 2009, plaintiff waited in the lobby by the automatic door for her husband, Chen Kong Dong, to pull the car around. It was a very cold day and there may have been snow

on the ground. Plaintiff walked outside when her husband pulled up, and stepped onto the mat underneath the glass canopy. She was unable to specifically recall the condition of the mat, but did not remember stepping in ice or snow. She then realized she was missing a glove and turned back around into the lobby. She walked past the inside mat and then slipped on the marble floor hitting her head. She was then helped into a chair where she noticed that the lower portion of her overcoat was wet.

¶7 Plaintiff concluded that she slipped on something that was "more slippery than just water on the floor," but had "no idea" what type of liquid. Plaintiff, however, did not believe (1) her shoes were wet; (2) the floor was wet before she went outside; (3) any foreign objects were on the floor; (4) the maintenance staff had been mopping; or (5) snow or ice was on the mat due to the glass canopy.

¶8 Dong testified that he went to the garage to get his car, while plaintiff waited in the lobby. He did not get a chance to examine the marble floor before going to the garage, but did not recall seeing any foreign objects, maintenance staff mopping, yellow warning signs, or liquid. He then parked in front of the building and saw plaintiff come out, stop for one or two seconds, and turn back around into the building. Shortly thereafter, a man knocked on Dong's car window and told him plaintiff had fallen in the lobby. He then went into the lobby and saw plaintiff sitting in a chair. Dong felt a wet spot on plaintiff's overcoat. He did not notice anything on the outside mat or in the lobby when he entered. He did not remember if he, or the man who walked in behind him, tracked in water. Plaintiff pointed to the area where she fell and Dong noticed a "thin layer" of a wet substance, which he believed was "probably the size of a sink."

¶9 Dong went to the building manager, Paul Mersuois, three days after to report the incident. Mersuois said he was aware of the incident because he had watched the surveillance video. Dong never asked Mersuois to preserve a copy of the video, but assumed he would keep a copy. In addition, Dong did not tell Mersuois about the wet spot on the floor.

¶10 Blundean Kennedy, the Regatta doorman on duty at the time of plaintiff's incident, testified that she sat at her desk and spoke to James Handler, an employee of Regatta's contractor. She noticed plaintiff standing on the outside mat, which had changed colors indicating it was wet. Kennedy, however, did not know if standing water or moisture contributed to the wetness. Kennedy then saw plaintiff come back through the revolving door and fall hitting her head. Kennedy looked to see if the floor was wet to protect the other tenants, but saw no liquid on the floor. Per Regatta policy, Kennedy would call maintenance staff to mop a wet floor and display a yellow warning sign.

¶11 The Regatta's custom after an injury was to fill out an incident report, review the surveillance video, and preserve a copy of the video. The system recorded over itself every seven days. Kennedy filled out an incident report and reviewed the video with Mersuois the afternoon of the incident. The following day Mersuois asked Kennedy to preserve a copy of the video, but was unable to successfully transfer the video onto a disk. She tried about ten times and reported this to Mersuois. After two days, Mersuois asked Kennedy to call for assistance and she called Jarmal at the nearby Chandler condominium. He walked Kennedy through it to no avail. Kennedy then contacted M & R Electronics (M & R) and a technician came out, but failed to transfer the video due to a burnt out DVD player.

¶12 Handler testified that the pavement outside the Regatta was wet, but did not recall any standing puddles or falling precipitation. When plaintiff first came into the lobby he waited by

Kennedy's desk for a key with his colleague Kenny. He saw plaintiff exit the lobby, heard her walk back in, and turned to see her fall. Handler then assisted plaintiff to a chair and noticed "wet on the top of the sole" of her shoes and water under her shoes about the size of "one footprint." He did not notice any liquid on the floor before the fall, anyone doing maintenance in the lobby, and did not believe he or Kenny tracked in any accumulation.

¶13 Mierzwa testified that after the incident Kennedy filled out an incident report as part of standard procedure. Mierzwa expected employees to fill out as much information on the report as possible. He read the report, discussed it with Kennedy, and sent it to the Regatta's insurance company. He watched the surveillance video and had a conversation about the incident with Handler, Kennedy and another Regatta employee. All three told Mierzwa the lobby floor was dry. In addition, Handler told him the mat was wet. The video depicted plaintiff's head hitting the marble floor, but showed no liquid on the floor.

¶14 Mierzwa further testified the DVD recorder needed repair a month before the incident, but Regatta's Board of Directors put the repair on hold until it determined whether it would upgrade the entire system. Kennedy originally called M & R and told Mierzwa about the problems Kennedy had preserving the video and getting a technician to come out. Mierzwa spoke to the owner of M & R, Richard Superfine, about the video surveillance equipment four or five days after the incident. M & R finally came out on the 7th day with another DVD, but the system had already recorded over the video.

¶15 Scott Superfine, a resident of the Regatta at the time of the incident, testified that M & R received a call from Mierzwa about preserving a copy of the video. Scott tried to preserve the video, but it had recorded over. He believed if he had gotten there in time, he would have been able to preserve the video.

¶16 Richard Superfine did not recall whether he or someone else at M & R spoke to Mierzwa. He recalled telling Scott to take a look at the surveillance system, and believed if M & R knew it was a priority, a technician would have gotten out in time. The Regatta system was an analog system with general surveillance cameras, so the picture could not be enlarged. It would be doubtful the camera would have picked up water on the shiny marble floor.

¶17 Gerald Jackson, an engineer retained as an expert by defendants, testified that he examined Regatta's surveillance system to determine what could or could not be seen on the video. Jackson recreated the scene and determined in his report that the camera resolution, along with the heated floors, made it insufficient to show whether liquid was on the floor.

¶18 In July 2012, defendants moved for summary judgment, arguing, in pertinent part, that defendants owed no duty to plaintiff because defendants had no duty to clean up any natural accumulation in the lobby. In addition, plaintiff's negligence claim failed for want of evidence showing that defendant's conduct was the proximate cause. Defendants also had no duty to preserve the surveillance video, and regardless, the video would not have revealed the source of plaintiff's fall. The trial court granted defendants motion. Plaintiff now appeals.

¶ 19 ANALYSIS

¶ 20 Plaintiff contends that the trial court erroneously granted defendants' motion for summary judgment with regard to plaintiff's negligence claim because a genuine issue of material fact existed regarding the element of duty. Summary judgment is proper where the pleadings, admissions, depositions and affidavits demonstrate there is no genuine issue as to any material fact so that the movant is entitled to judgment as a matter of law. *Ioerger v. Halverson Construction Co., Inc.*, 232 Ill. 2d 196, 201 (2008); 735 ILCS 5/2-1005 (West 2010). In determining whether a genuine issue of material fact exists, the court must consider such items strictly against the movant and liberally in favor of its opponent. *Williams v. Manchester*, 228

Ill. 2d 404, 417 (2008). We review the trial court's order granting summary judgment *de novo*. *Weather-Tite, Inc. v. University of St. Francis*, 233 Ill. 2d 385, 389 (2009).

¶21 In order to recover damages based upon a defendant's alleged negligence, a plaintiff must prove that (1) the defendant owed the plaintiff a duty; (2) that the defendant breached the duty; and (3) that the breach was the proximate cause of the plaintiff's injuries. *Perfetti v. Marion County,* 2013 IL App (5th) 110489, ¶ 16. The general rule regarding the duty of a property owner of any premises is that it must provide a reasonably safe means of ingress to and egress from the premises. *Hornacek v. 5th Avenue Property Management*, 2011 IL App (1st) 103502, ¶ 28. Illinois law, however, is well settled that property and business owners are not liable for injuries resulting from the natural accumulation of ice, snow, or water that is tracked inside the premises from the outside. *Krywin v. Chicago Transit Authority*, 238 Ill. 2d 215, 227 (2010). Under the natural accumulation rule, property owners do not have a duty to remove the tracks or residue left inside the building by individuals who have walked through natural accumulations outside the building. *Reed v. Galaxy Holdings, Inc.*, 394 Ill. App. 3d 39, 43 (2009). It is irrelevant whether a natural accumulation remains on the property for an "unreasonable" length of time and operators have no duty to warn of such conditions. *Id.*

¶ 22 Specifically, plaintiff contends that defendants owed her a duty because the liquid plaintiff slipped on was not a natural accumulation. The record, however, overwhelmingly suggests that plaintiff slipped due to natural accumulation. The witnesses, including plaintiff, Dong, Handler, and Kennedy, all testified that no one observed liquid on the floor before plaintiff 's fall, any evidence of mopping, or the presence any yellow warning signs indicating a wet floor. Both Kennedy and Handler also testified that the outside mat, where plaintiff stood, was wet. Although the outside mat may have been covered by a glass canopy, the area was not

enclosed and could easily have become wet due to the winter elements. Handler further testified that when he assisted plaintiff, he observed water on "the top of the sole" of her shoes, as well as under her shoes about the size of "one footprint." All the evidence suggests that plaintiff's shoes became wet when she stepped on the outside mat, but is in no ways suggestive of the presence of an unnatural accumulation water or some other slippery substance. See *Frederick v. Professional Truck Driver Training School, Inc.*, 328 Ill. App. 3d 472, 476-77 (2002) (to establish a duty, the plaintiff must make an *affirmative* showing of an unnatural accumulation or an aggravation of a natural condition before recovery will be allowed). We fail to see how the circumstantial evidence demonstrates that plaintiff's fall was the result of an unnatural origin, such as someone mopping the floor or spilling something. Liability will be imposed on a defendant only where the plaintiff shows an injury that was caused by an unnatural accumulation. See *Greene v. Wood River Trust*, 2013 IL App (4th) 130036, ¶ 14. Plaintiff's only evidence suggesting this inference is that there was no snow or ice on the outside mat and Dong's testimony that he noticed a wet substance on the floor "probably the size of a sink." Dong, however, also testified that he did not notice any obvious liquid on the floor and the liquid he did notice was a "thin layer." Further, plaintiff testified that she had "no idea" what she fell on. Thus, plaintiff fails to offer any affirmative evidence showing unnatural accumulation. See *Argueta v. Krivickas*, 2011 IL App (1st) 102166, ¶ 11 (where on a motion for summary judgment, a fact will not be considered in dispute if raised by circumstantial evidence alone unless the conclusions therefrom are probable, not merely possible); *Shoemaker v. Rush-Presbyterian-St. Luke's Medical Center*, 187 Ill. App. 3d 1040, 1044 (1989) (where summary judgment was proper when no evidence in the record allowed a factfinder to find that the water upon which the plaintiff slipped was of unnatural origin); *cf. Fintak v. Catholic Bishop of*

Chicago, 51 Ill. App 3d 191, 197 (1977) (where the defendant owed plaintiff a duty when witness testimony suggested the church aisle plaintiff slipped on was mopped 10 minutes before the incident). Here, the circumstantial evidence more likely suggests that plaintiff's fall was attributed to natural accumulation.

¶ 23 Moreover, there is nothing in the record suggesting that defendants had actual or constructive notice that the floor was wet, and thus, defendants owed plaintiff no duty. See *Ishoo v. General Growth Properties, Inc.*, 2012 IL App (1st) 110919, ¶¶ 26-28 (where the plaintiff could not establish any actual or constructive notice because he failed to show that the housekeeping staff "squeegeed" cleaning solution from the escalator onto the floor or knew about any liquid on the floor). Here, plaintiff offered no evidence to support her contention that defendants had actual knowledge of liquid on the lobby floor. The witnesses all testified that no one saw any liquid on the lobby floor before plaintiff's fall, as well as anyone mopping or spilling anything. Liability can only be imposed if defendants' had actual knowledge of the liquid on the floor. See *Richardson v. Bond Drug Co. of Illinois*, 387 Ill. App. 3d 881, 885 (2009) (the reviewing court found no actual notice where the plaintiff testified that he did not know what caused him to fall, but assumed that the floor was wet because his clothes were wet, and the store manager did not notice any liquid on the floor before the fall). Thus, there was no clarity as to what caused plaintiff's fall and no evidence that defendants' employees had actual notice of any liquid on the floor before the incident. In addition, Kennedy testified that plaintiff and Dong were in the lobby for 15 minutes after plaintiff's fall. Further, no one mopped or displayed a yellow warning sign indicating a wet floor.

¶ 24 Furthermore, plaintiff provided no evidence to establish constructive notice, which can only be shown where the dangerous condition exists for a sufficient length of time to impute

knowledge of its existence to the defendants. See *Ishoo*, 2012 IL App (1st) 110919 at ¶ 28. Accordingly, plaintiff presented no evidence suggesting that the liquid was present on the floor for any length of time thereby evoking a duty that it should have been discovered by defendants in the exercise of ordinary care. Plaintiff's contention that Kennedy's duties included checking the lobby floor are insufficient to establish constructive notice, and Kennedy specifically testified that she saw no liquid on the floor prior to plaintiff's fall. Dong's testimony that a "very thin layer of something" was present is also insufficient to trigger constructive notice, because plaintiff again proffers no evidence establishing how long the liquid was present. For instance, the act of helping plaintiff to the chair may have spread the water she tracked in over a larger area. The record clearly demonstrates that no one knows the origin of the liquid including plaintiff herself. Plaintiff fails to provide any evidence of actual or constructive notice and defendants are entitled to summary judgment.

¶ 25 Plaintiff next contends that the trial court erred in granting summary judgment on the spoliation count, where plaintiff put defendants on notice that litigation was foreseeable. Plaintiff also cites to Illinois Pattern Jury Instruction 5.01 (IPI 5.01 (West 2010)) appearing to demonstrate that defendants' failure to produce the video would create an inference for the jury at trial that the video was adverse to defendants in terms of showing unnatural accumulation. The record, however, does not establish defendants' failure to preserve the video was intentional or that the video was adverse.

¶ 26 Under Illinois law, spoliation is a form of negligence. *Martin v. Keeley & Sons, Inc.*, 2012 IL 113270, ¶ 26. Accordingly, a plaintiff claiming spoliation of evidence must prove that (1) the defendant owed the plaintiff a duty to preserve the evidence; (2) the defendant breached the duty by losing or destroying the evidence; (3) the loss or destruction of the evidence was the

proximate cause of the plaintiff's inability to prove an underlying lawsuit; and (4) as a result, the plaintiff suffered actual damages. *Id.* The general rule in Illinois is that there is no duty to preserve evidence, but in *Boyd* the court set forth a two-prong test which a plaintiff must meet in order to establish an exception to the general no-duty rule. *Boyd v. Travelers Insurance Co.*, 166 Ill. 2d 188, 195 (1995). Under the "relationship" prong, a plaintiff must show that an agreement, contract, statute, special circumstance, or voluntary undertaking has given rise to a duty to preserve evidence on the part of the defendant. *Id.* Under the "foreseeability" prong, a plaintiff must show that the duty extends to the specific evidence at issue by demonstrating that "a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action." *Id.* If the plaintiff fails to satisfy both prongs, the defendant has no duty to preserve the evidence at issue. *Dardeen v. Kuehling*, 213 Ill. 2d 329, 336 (2004).

¶ 27 Plaintiff concedes that there was no agreement, contract, or statute giving rise to a duty to preserve the surveillance video. We must then decide whether a voluntary undertaking or special circumstance arose eliciting a duty owed by defendants. A voluntary undertaking requires a showing of affirmative conduct by the defendant evincing defendant's intent to voluntarily assume a duty to preserve evidence. *Martin*, 2012 IL 113270, at ¶ 31. Even if a defendant preserves evidence for its own investigative purposes or internal policy, the plaintiff must demonstrate affirmative conduct by defendants showing its intent to voluntarily undertake a duty *to the plaintiff*. *Id.*; See *Rogers v. Clark Equipment Co.*, 318 Ill. App 3d 1128, 1135 (2001) (while such company customs and policies may be relevant to defining the standard of care, they are insufficient to establish a duty). Here, plaintiff fails to show such affirmative conduct by defendants.

¶ 28 Although the Regatta's normal custom after an injury is to review and preserve a copy of the incident, there is no evidence in the record demonstrating that defendants' attempts to preserve the video were done specifically for plaintiff. The record suggests that defendants contacted M & R several times and had a technician come out twice to preserve the video for their own benefit and investigative purposes. See *Combs v. Schmidt*, 2012 IL App (2d) 110517, ¶ 35 (noting that, for a duty to be found, the plaintiff must establish that the defendant actually preserved the evidence in question for the plaintiff's benefit, not because the defendant conducted an investigation). Plaintiff's suggestion that Dong "alerted" Mierzwa to the surveillance video is disingenuous. Mierzwa may have mentioned to Dong that he saw the video, but Dong testified that he in fact did not affirmatively ask Mierzwa to preserve the video. Dong may have assumed the video would be preserved, but this does not constitute a voluntary undertaking eliciting a duty owed by defendants.

¶ 29 Similarly, we find no special circumstances triggered a duty. Special circumstances arise when the plaintiff puts the defendant on notice that the evidence should be preserved or the defendant takes steps to preserve the evidence for plaintiff's benefit. See *Kilburg v. Mohiuddin*, 2013 IL App (1st) 113408, ¶¶ 25-31. (where something more than possession and control are required, such as a request by the plaintiff to preserve the evidence and/or the defendant's segregation of the evidence for plaintiff's benefit.) Here, again plaintiff did nothing to put defendants on notice that the video should be preserved and defendants' attempts at preservation were not done for plaintiff's benefit. Also, even though plaintiff filed an emergency motion to preserve the video, it was no longer in existence at the time and impossible for defendants to produce. Thus, defendants had no clear duty to preserve the video and we need not address the foreseeabilty prong.

¶ 30 Finally, we note that even if defendants had a duty to preserve the surveillance video, plaintiff fails to prove sufficient facts to establish that the loss of the video was the proximate cause of plaintiff's inability to prove her underlying lawsuit. See *Boyd*, 166 Ill. 2d at 196. Both Richard and Jackson testified that the camera resolution was insufficient to show liquid on the floor. Kennedy and Mierzwa also testified that the video showed no liquid on the floor from the moment plaintiff walked back into the lobby until the moment she fell. Further, it is undisputed that even if defendants were able to preserve a copy, they would only have kept a copy of plaintiff's incident. Thus, the video would not have shown whether any Regatta employee mopped or spilled something earlier in the day. Because the record presents no genuine issue of material fact, defendants were entitled to summary judgment as a matter of law.

¶ 31 CONCLUSION

¶ 32 Based on the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 33 Affirmed.