SIXTH DIVISION
May 23, 2014

No. 1-13-1135

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CARMEN ZACCARIELLO, Plaintiff-Appellant, v. UNITED MAINTENANCE COMPANY, INC., an Illinois Corporation, Defendant-Counterclaim-Plaintiff, and Counterclaim-Defendant-Appellee (Metropolitan Pier and Exposition Authority, a Political Subdivision of the State of Illinois, Individually and d/b/a McCormick Place; National Restaurant Association, an Illinois Corporation; Polar Ware Company, a Wisconsin Corporation; Stoelting, LLC, a Wisconsin Limited Liability Corporation; Noble Rich Trade Shows, Inc., an Illinois Corporation; and Century Trade Show Services, Inc., an Illinois Corporation, d/b/a National Facilities Maintenance, LLC, an Illinois Limited Liability Corporation, Defendants-Counterclaim-Plaintiffs, and Counterclaim-Defendants, and GES Exposition Services, Inc., Intervenor and Counterclaim-Defendant).	)	Appeal from the Circuit Court of Cook County. No. 08 L 2203 Honorable Kathy M. Flanagan, Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hall and Reyes concurred in the judgment.

ORDER

¶ 1 *Held*: Summary judgment for defendant affirmed, where circuit court properly concluded that defendant had no duty to provide cleaning services in location and at time of plaintiff's fall.

¶ 2 Plaintiff-appellant, Carmen Zaccariello, filed the instant lawsuit in order to recover for injuries he sustained in a slip and fall that occurred while he was working as a "rigger" following a trade show. Defendant-appellee, United Maintenance Company, Inc. (United), was contractually obligated to provide cleaning and janitorial services during and after that trade show, and was alleged to have committed various negligent acts and omissions. United filed a motion for summary judgment, asserting that it could not be held liable for plaintiff's injuries because: (1) there was no evidence that it created the condition that purportedly caused plaintiff's fall, or was aware of that condition; and (2) plaintiff's fall occurred in an area of the trade show and at a time in which United did not have an obligation to provide any cleaning or janitorial services. The circuit court granted summary judgment in favor of United, and for the following reasons we affirm.

¶ 3 I. BACKGROUND

¶ 4 Plaintiff filed his initial complaint in February of 2008, and the operative first-amended complaint was filed in July of 2009. In the amended complaint, plaintiff generally alleged that in May of 2007, defendant Metropolitan Pier and Exposition Authority, a political subdivision of the State of Illinois, individually and d/b/a McCormick Place (MPEA), hosted a Hotel-Motel Show for defendant National Restaurant Association (NRA), at its McCormick Place convention facility in Chicago. Defendants Polar Ware Company, a Wisconsin Corporation (Polar Ware), and Stoelting, LLC, a Wisconsin Limited Liability Corporation (Stoelting), were exhibitors at that trade show (2007 NRA show) and occupied specific exhibit "booth spaces" in which they, among other activities, showcased soft serve freezers and frozen custard machines.

¶ 5 By May 23, 2007, the 2007 NRA show had ended the prior day, and plaintiff was employed as a rigger to assist with moving materials off of the show floor. Specifically, plaintiff had been tasked with going to one of the exhibit booth spaces assigned to Polar Ware and Stoelting and loading their "exhibit displays and food service equipment and materials onto trucks." However, due to the alleged negligence of each of the named defendants, plaintiff "was caused to slip and fall on a liquid frozen dessert mix which had accumulated on the floor of the booth space area, and was injured thereby." With respect to United, count IV of the amended complaint specifically asserted that United was "responsible for janitorial services that included but was not limited to cleaning and maintenance of" McCormick Place. Plaintiff further alleged that United had "committed one or more of the following careless and negligent acts and/or omissions:

a. Created an unreasonably dangerous condition on the floor of the booth space area by allowing frozen dessert mix and residue from food service equipment to leak or spill onto the floor;

b. Placed food service equipment and/or materials so as to obscure the leaking frozen dessert mix from people in and around the booth space area, when Defendant should have known that creating such a condition presented an unreasonable risk of harm to persons in and around the booth space in general and Plaintiff in particular;

c. Operated the food service equipment so as to allow frozen dessert mix to leak or spill onto the floor of the booth space;

d. Failed to maintain the food service equipment in such a manner as to allow the frozen dessert mix to leak and spill onto the floor of the booth space;

e. Allowed and permitted exhibitors to store excess and left-over frozen dessert mixture upon the floor of the booth space;

f. Failed to inspect the condition of the floor of the booth space and surrounding area, when Defendant knew or should have known that such inspection was necessary to prevent injury to people and workers, such as Plaintiff, who would by necessity have to perform their work in such areas;

g. Failed to clean-up or otherwise remove the accumulated frozen dessert mixture that was upon the floor of the booth area, when it knew or should have known that the presence of such a substance created a dangerous condition for persons and workers in and around the booth space area;

h. Failed to warn the Plaintiff, either by written or verbal communication or visual sign, of the presence of frozen dessert mixture on the floor of the booth space;

i. Failed to warn the Plaintiff of its policy of allowing exhibitors to abandon liquid and food refuse in their assigned booth space, when Defendant knew or should have known that such a policy could create slip and fall hazards for workers such as Plaintiff who were required to perform their work in such areas;

j. Negligently cleaned and maintained the premises."[1]

¶ 6 During the course of litigation, counterclaims were filed by the various defendants against each other. In addition, plaintiff's direct employer, GES Exposition Services, Inc. (GES), intervened in order to protect its workers' compensation subrogation and reimbursement rights to any recovery made by plaintiff. GES was then subject to a number of counterclaims filed by a number of defendants. We need not delineate the specifics of all of these various claims. For purposes of this appeal, it is sufficient to make note of two specific matters.

¶ 7 First, we note that by the time United filed the motion for summary judgment at issue on appeal, only the claims involving plaintiff, United, Polar Ware, Stoelting, and GES remained pending. All of the other claims had been dismissed pursuant to motions for summary judgment, motions to dismiss, dismissals for want of prosecution, or settlement.

¶ 8 Second, the counterclaims related to GES and the various contracts attached as exhibits thereto revealed that GES had been hired as the "general contractor and consultant" for the 2007 NRA show. GES was responsible for, *inter alia*, providing "rigging" and "special cleaning" for

[1] These exact same allegations of negligent acts and omissions were pleaded against each of the named defendants.

the 2007 NRA show. United was hired as a subcontractor by GES to provide "cleaning/janitorial services" for a number of different types of conventions and events over the course of a number of years, including the 2007 NRA show at issue in this case.

¶ 9 Specifically, the contract between GES and United (GES/United contract) provided that United agreed to "perform and supervise *** Cleaning Services," which were defined to "include all standard cleaning and janitorial functions provided according with past performance between the parties, and shall also include nightly vacuuming of aisle and exhibit space, 'porter' services and the removal of refuse materials from aisle and exhibit space before (move in), during (aisle porters) and after (move out) each Show ('trashing') where required." The GES/United contract also contained provisions regarding United's compensation for these services, which included both a general amount of compensation for general cleaning services and specific additional amounts United would receive "[i]n the case" it provided other specific services such as "porter services," "trashing," vacuuming, and "booth cleaning."

¶ 10 The parties engaged in a significant amount of discovery practice, including taking the depositions of: (1) plaintiff; (2) Robert Oonk, a vice president at Polar Ware; (3) Lynda Neuber, a sales assistant at Polar Ware; (4) Robert Lester, a general foreman for riggers at GES; (5) Veronica Rosen-Sanetra, the vice president of operations at United; (6) Michael Brown, the operations manager and a supervisor at United; (7) Kim Simoni, the former manager of exhibitor services and operations at NRA; (8) Mary Pat Heftman, the executive vice president of conventions at NRA; and (9) Louis Bruno, an EMT employed by MPEA and the Chicago Fire Department who responded to the scene of plaintiff's fall.

¶ 11 The evidence produced below generally established that, as noted in the discussion of plaintiff's amended complaint above, MPEA owned and operated McCormick Place and leased

that facility to NRA for the purposes of hosting the 2007 NRA show. That show ran from May 19, 2007, until 4:30 p.m. on May 22, 2007, and was comprised of between 1,800 and 2,200 participating exhibitors assigned to specific exhibit booth spaces. The event occupied multiple exhibit halls in both the north and south buildings of McCormick Place, and required five days of set-up time and three full days of "breakdown" time. That breakdown consisted of a number of different trade unions—including teamsters, carpenters, electricians, and riggers—working to move leftover materials and other equipment from the exhibitor's booth spaces, load those materials and equipment on to trucks, dismantle exhibit booth spaces, and clean the considerable amount of refuse produced by the event. The scene immediately after the 2007 NRA show was described as a "disaster," and the breakdown process was described as "organized chaos."

¶ 12 Hundreds of the exhibitors at the 2007 NRA show would provide food or beverage samples. Polar Ware and Stoelting were related companies (hereafter, collectively referred to as Polar Ware in most instances for convenience), and they had rented two exhibit booth spaces at the 2007 NRA show. In one of those spaces, Polar Ware was exhibiting and demonstrating its soft serve freezers and frozen custard machines by serving samples of frozen custard. The floor of that space was covered with interlocking, carpeted floor tiles that were purchased by Polar Ware. Those tiles would typically be reused for other shows, unless they were damaged or otherwise not reusable. In that case, such carpet tiles would be left behind for disposal inside Polar Ware's exhibit booth after the close of the show. Additionally, unused food product would also be left behind for disposal. Such unused food product might include bags of liquid custard mix. Neither Mr. Oonk nor Ms. Neuber, the two Polar Ware employees deposed in this matter, were aware of any liquid spills or leaking bags of custard mix inside the Polar Ware booth at issue here at the end of the show.

¶ 13 GES, as NRA's "general contractor and consultant" for the 2007 NRA show, hired United as a subcontractor to provide cleaning services, pursuant to the GES/United contract. Robert Lester, a general foreman at GES, generally testified that it was his "observation" that the aisles were the primary concern for the cleaning crews after shows such as the 2007 NRA show ended, and it was not until later that "all the mess [was] cleaned up." Ms. Rosen-Sanetra, the vice-president for operations at United, also testified that the initial obligation of United's cleaning crews employed by GES at the close of events such as the 2007 NRA show was to "[m]aintain the aisles *** [b]ecause the floor is so extensive." It was only on the "last day of move out" that United would be responsible for cleaning any refuse out of an exhibit space, and only if the exhibitor had already moved out of its space. Mr. Brown, United's operations manager and supervisor, testified that United's immediate responsibility following the 2007 NRA show was to clean the aisles and not the exhibit booths. On the day after the show closed, the day of plaintiff's fall, United would still be primarily engaged in cleaning the aisles. United would clean inside an exhibit booth space only after obtaining an express directive to do so or had received authorization to clean any possible refuse inside a booth that United had actually noticed. United could only clean an area formally occupied as an exhibit space without prior authorization at the end of the breakdown period, after that booth space had been completely dismantled.

¶ 14 Plaintiff testified that he was employed by GES as a rigger to assist with moving materials off of the show floor. On May 23, 2007, at around 4:30 p.m. plaintiff and his foreman had driven to one of the Polar Ware exhibit booth space in a forklift to remove some materials and take them to be loaded onto a truck. Noticing nothing unusual inside the exhibit booth space, plaintiff took a few steps inside, an area that was covered with carpet tiles. Plaintiff then

slipped and fell on his back after one or more of the carpet tiles slipped out from under his feet. After his fall, plaintiff was covered by some sort of liquid. Plaintiff did not independently know what that liquid was, but he had been subsequently told it was ice cream or custard mix. As a result of the fall, plaintiff had suffered a great deal of pain and had been forced to undergo a surgical procedure to fuse two of his vertebrae.

¶ 15 Both Mr. Lester and Mr. Bruno testified that they responded to the scene after plaintiff's fall. Mr. Bruno completed a written report that indicated that plaintiff said he had "stepped on a mat that was covering some liquid causing him to fall." Mr. Lester also testified that it was something under the carpet squares that caused them to become "slippery."

¶ 16 Finally, a number of deponents reviewed two photographs taken of the scene following plaintiff's fall. Mr. Bruno testified that he did not know who took those photos, but speculated that another representative of MPEA, probably one from the security department, would have taken those photos. Mr. Bruno also testified that his supervisor, Tom Goslawski, was able to amend Mr. Bruno's initial written report to include additional information. The last page of that written report indicates that two photos were "uploaded" by "tgoslawski" at 5:45 p.m. on May 23, 2007.

¶ 17 Those two photos showed a significant amount of white or pink liquid on the floor, displaced carpet tiles, and bags of liquid food product piled on the floor. At least with respect to the spill and the displaced tiles, none of the deponents indicated that the scene depicted in the photos represented the scene prior to plaintiff's fall. Moreover, Mr. Lester testified that the liquid spill and the bags of liquid food depicted in the photos would be considered a safety hazard, but only if they were located in one of the aisles United was responsible for cleaning in the aftermath of the 2007 NRA show.

¶ 18 On October 29, 2012, United filed a motion for summary judgment with respect to Count IV of plaintiff's amended complaint, the sole count pleaded against United. In the motion, United contended that it could not be held liable for plaintiff's injuries because its contract with GES and the evidence produced during discovery established no genuine issue with respect to the fact that: (1) United did not create the condition that purportedly caused plaintiff's fall, and was not aware of that condition; and (2) plaintiff's fall took place inside Polar Ware's exhibit booth space on the second day of move-out, an area and a time that fell outside United's contractual obligation to provide cleaning services.

¶ 19 Plaintiff responded by asserting that United's motion for summary judgment should not be granted because the language of the GES/United contract actually provided that United had both the contractual authority and obligation to clean inside the exhibit booth space occupied by Polar Ware. In addition, Plaintiff contended that there were material factual questions with respect to: (1) the issues of causation and notice; (2) whether plaintiff fell inside an exhibit booth space or in an adjacent aisle; and (3) the exact length of time between when the liquid leaked onto the floor and when plaintiff fell.

¶ 20 In a written order entered on March 11, 2013, the circuit court granted summary judgment in favor of United. With respect to United's contractual duties, the circuit court noted that: (1) United had no contractual obligation to "inspect" any exhibit booth spaces; (2) the GES/United contract did not specify the exact nature and extent of the cleaning services required of United; and (3) while United was required to provide cleaning services "according with past performance between the parties," it was undisputed that United historically required permission to enter and clean exhibit booth spaces following an event such as the 2007 NRA show. With respect to the evidence regarding the hazard or spill within Polar Ware's exhibit booth, the circuit

court also concluded that there was no evidence: (1) as to how the spill was actually caused; (2) that United actually caused the spill; (3) that United had any notice of the spill, or (4) that the spill was even visible prior to plaintiff's fall, as it had been concealed by the carpet tiles. The circuit court ultimately concluded that it was mere speculation that the spill was caused by leaking dessert mix, and concluded:

> "Thus, even assuming that United was hired to clean the booth spaces, as the evidence shows there was no notice of the condition and the condition was, in fact, hidden, and there was no contractual requirement to inspect under the flooring at any specific interval, under the circumstances here it cannot be said that United owed a duty with regard to the complained of condition."

Having granted summary judgment in favor of United, the circuit court also made a finding that there was no just reason to delay enforcement or appeal of its written order, pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010).

¶ 21 On March 18, 2013, the circuit court entered a written order indicating that a settlement of the remaining claims between plaintiff and defendants Polar Ware and Stoelting had been reached following a voluntary mediation. The circuit court therefore dismissed this suit "with prejudice." On April 3, 2013, plaintiff filed his notice of appeal, in which he challenged only the March 11, 2013, order granting summary judgment in favor of United.

¶ 22 II. ANALYSIS

¶ 23 On appeal, plaintiff contends that the circuit court improperly granted summary judgment in favor of United on count IV of his amended complaint. We disagree.

¶ 24 A. Jurisdiction

¶ 25 As an initial matter, we must briefly address the source of our jurisdiction to review the issues raised in this appeal. *Cangemi v. Advocate South Suburban Hospital*, 364 Ill. App. 3d 446, 453 (2006) (this court has a duty to *sua sponte* determine whether we have jurisdiction to decide the issues presented).

¶ 26 Except as specifically provided by the Illinois Supreme Court Rules, this court only has jurisdiction to review final judgments, orders, or decrees. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994) *et seq.*; *Almgren v. Rush-Presbyterian-St. Luke's Medical Center*, 162 Ill. 2d 205, 210 (1994). In the jurisdictional statement contained in his opening brief to this court, plaintiff contends that this court has jurisdiction to review the circuit court's March 11, 2013, order granting summary judgment in favor of United pursuant to Illinois Supreme Court Rule 304(a) (Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010)), which provides this court with authority to review a "final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both."

¶ 27 The record does reflect that the circuit court's March 11, 2013, order included the proper Rule 304(a) language, thus ostensibly making jurisdiction under Rule 304(a) proper. However, the record also reflects that *after* this order was entered and *before* plaintiff filed his notice of appeal from that order, the circuit court entered another order that fully resolved all of the remaining claims involved in this litigation and dismissed the entire matter with prejudice. Our supreme court has recognized that Rule 304(a) " 'does not apply to a single-claim action nor to a multiple-claims action in which all of the claims have been decided.' " *Northtown Warehouse & Transportaion Co. v. Transamerica Insurance Co.*, 111 Ill. 2d 532, 536 (1986) (quoting *Ariola v. Nigro*, 13 Ill. 2d 200, 204 (1958)). Thus, once the circuit court finally resolved all the remaining

claims in its March 18, 2013, order, plaintiff could no longer rely upon Rule 304(a) as a source for this court's jurisdiction over his subsequently filed notice of appeal.

¶ 28 Nevertheless, we do have jurisdiction over this appeal. The circuit court's March 18, 2013, order was the final, appealable judgment entered in this matter. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994). Once that order was entered, plaintiff was entitled to appeal from any prior final orders that were not otherwise appealable. *Mashal v. City of Chicago*, 2012 IL 112341, ¶ 66 ("a party can appeal an otherwise nonappealable order at the time of the entry of a final order, as all prior rulings would be final and appealable at that point as well"). Plaintiff timely did so by filing his notice of appeal on April 3, 2013. See Ill. S. Ct. R. 303(a)(1) (eff. June 4, 2008).

¶ 29 B. Standard of Review and Legal Framework

¶ 30 Turning to the merits of plaintiff's appeal, we initially note that summary judgment is properly granted where the pleadings, depositions, and admissions on file, together with any affidavits, indicate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2010). Although a drastic means of disposing of litigation, summary judgment is an appropriate measure to expeditiously dispose of a suit when the moving party's right to the judgment is clear and free from doubt. *Gaston v. City of Danville*, 393 Ill. App. 3d 591, 601 (2009).

¶ 31 A "defendant moving for summary judgment bears the initial burden of production." *Nedzvekas v. Fung*, 374 Ill. App. 3d 618, 624 (2007). The defendant may satisfy this "burden of production in two ways: (1) by affirmatively showing that some element of the case must be resolved in his favor [citation], or (2) by establishing 'that there is an absence of evidence to support the nonmoving party's case.' " *Id.* When the defendant has met this initial burden, the burden shifts to "the plaintiff to present a factual basis which would arguably entitle [him] to a

favorable judgment." *Id.* A plaintiff is not required to prove his case in response to the motion for summary judgment, but must present evidentiary facts to support the elements of the cause of action. *Richardson v. Bond Drug Co. of Illinois*, 387 Ill. App. 3d 881, 885 (2009).

¶ 32 The court must examine the evidentiary matter in a light most favorable to the nonmoving party (*Pavlik v. Wal-Mart Stores, Inc.*, 323 Ill. App. 3d 1060, 1063 (2001)), and construe the evidence strictly against the movant and liberally in favor of the nonmovant (*Espinoza v. Elgin, Joliet and Eastern Ry. Co.*, 165 Ill. 2d 107, 113 (1995)). When reviewing an order granting summary judgment, "we conduct a *de novo* review of the evidence in the record." *Id.*

¶ 33 Count IV of plaintiff's amended complaint—the only one pleaded against United—sounded in negligence. "To succeed in an action for negligence, the plaintiff must establish that the defendant owed a duty to the plaintiff, that defendant breached that duty, and that the breach proximately caused injury to the plaintiff." *Choate v. Indiana Harbor Belt R.R. Co.*, 2012 IL 112948, ¶ 22. Whether a duty is owed typically presents a question of law for the court to decide. *Thompson v. Gordon*, 241 Ill. 2d 428, 438-39 (2011). Thus, the determination of the existence of a duty presents a question of law appropriately determined by summary judgment. *Harlin v. Sears Roebuck & Co.*, 369 Ill. App. 3d 27, 32 (2006). However, where the existence of a duty is dependent on disputed underlying facts, the existence of those relevant facts is a question for a trier of fact to resolve. *Combs v. Schmidt*, 2012 IL App (2d) 110517, ¶ 32.

¶ 34 Typically, the "touchstone [of our duty analysis] is to ask whether a plaintiff and a defendant stood in such a relationship to one another that the law imposed upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff." *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 436-37 (2006). Generally speaking, the " 'relationship' between the plaintiff and

defendant need not be a direct relationship between the parties. Rather, 'relationship' is a shorthand description for the analysis of four factors: (1) the reasonable foreseeability of the injury, (2) the likelihood of the injury, (3) the magnitude of the burden of guarding against the injury, and (4) the consequences of placing the burden on the defendant. [Citations.] Any analysis of the duty element turns on the policy considerations inherent in the above factors, and the weight accorded each of the factors depends on the circumstances of the particular case. [Citation.]." *Jane Doe-3 v. McLean County Unit Dist. No. 5 Bd. of Directors*, 2012 IL 112479, ¶ 22.

¶ 35 Nevertheless, where—as is the case here—a defendant is charged with negligence because of its failure to perform an act allegedly required by contract, the question of whether the defendant actually had a duty to act will be determined by the terms of the contract. *Gilley v. Kiddel*, 372 Ill. App. 3d 271, 275 (2007) (citing *Perkaus v. Chicago Catholic High School Athletic League*, 140 Ill. App. 3d 127, 134 (1986)); *Thompson*, 241 Ill. 2d at 449-50 (same). Thus, allegations of negligence based on contractual obligations are defined by the relevant contract, and the scope of a defendant's duties will not be expanded beyond that required by that contract. *St. Paul Mercury Ins. v. Aargus Security Systems, Inc*., 2013 IL App (1st) 120784, ¶ 60. " '[W]hether a contract imposes a particular legal duty is a question of law rather than an issue of fact.' " *Frederick v. Professional Truck Driver Training School, Inc*., 328 Ill. App. 3d 472, 481 (2002) (quoting *Ivanov v. Process Design Associates*, 267 Ill. App. 3d 440, 442 (1993)).

¶ 36 C. Discussion

¶ 37 Albeit based upon slightly different reasoning, we find that the circuit court properly concluded that this matter can be resolved in United's favor by addressing only the duty element

of plaintiff's negligence claim. We, however, first address a number of specific arguments and assertions made by plaintiff with respect to the factual background developed below, as our resolution of these issues will guide our overall analysis of the issue of United's duty to plaintiff.

¶ 38 1. Preliminary Factual Matters

¶ 39 First, plaintiff contends that there is "a possible factual issue that perhaps [he] fell in a side aisle and not inside a booth space, which would negate [United's] arguments as to whether or not it had constructive notice of the hazard." In support of this contention, plaintiff asserts that Mr. Lester, plaintiff's general foreman, testified that he believed that he found plaintiff lying in a "side aisle" following the incident.

¶ 40 The deposition testimony cited by plaintiff, however, does not support this argument. In his testimony, Mr. Lester specifically stated that he did not know if the scene depicted in the two photos taken after the incident showed an exhibit booth space or an aisle location. He then testified—in response to a series of hypothetical questions regarding GES activities in shows "similar to the NRA show that we are talking about"—that a scene such as that depicted in the photos "might be like a secondary aisle, one of the side aisles." Nowhere in the testimony citied by plaintiff did Mr. Lester indicate a specific belief that plaintiff actually fell in one of the aisles.

¶ 41 Indeed, elsewhere in his deposition testimony, Mr. Lester specifically stated that plaintiff indicated he had "slipped on these squares that were left in the booth." Furthermore, plaintiff himself consistently and repeatedly testified that he stepped into the exhibit booth space and then fell on carpet tiles laid therein. In addition, the operative amended complaint specifically alleged that plaintiff had fallen "on a liquid frozen dessert mix which had accumulated on the floor of the booth space area[.]" We therefore find that the pleadings and evidence do not support plaintiff's

contention that there is a genuine issue of material fact with respect to whether or not plaintiff actually fell inside the exhibit booth space.

¶ 42 Second, plaintiff asserts that there is a factual issue with respect to: (1) whether the liquid spill in the exhibit booth was visible prior to the fall, and (2) how long the spill had existed at that time. Plaintiff supports this assertion by arguing that the deposition testimony is not conclusive on these issues, and the photos taken after the incident show a "large and gooey white puddle with definite edges, which the jury could infer *** had been there for at least several hours during which Defendant's cleaning crews canvassed the area, either willfully ignoring the mess since it was in a booth space, or failing to clean it up."

¶ 43 However, Mr. Bruno's written report indicated that plaintiff said he had "stepped on a mat that was *covering* some liquid causing him to fall." (Emphasis added.) Plaintiff specifically testified that the photos of the scene taken after the incident did not show how it looked prior to his fall, and that he did not step on a "condition that looked like" that depicted in the photos. Plaintiff later testified that he recalled that the exhibit booth was covered in "continuous carpet" at the time he stepped inside. In addition, and contrary to plaintiff's contentions on appeal, Mr. Lester specifically recalled that it was something *under* the carpet squares that caused them to become "slippery" and that he had "no recollection" of observing any liquid on top of the carpet squares. Thus, absolutely *no* evidence was produced below that *anyone* observed the liquid spill prior to the incident, nor any evidence upon which it could be properly inferred that the liquid was in fact visible. *Keating v. 68th & Paxton, L.L.C.*, 401 Ill. App. 3d 456, 473 (2010) ("where the proven facts demonstrate that the nonexistence of the fact to be inferred appears to be just as probable as its existence, then the conclusion that [it] exists is a matter of speculation, surmise, and conjecture, and the trier of fact cannot be permitted to make that inference").

¶ 44 Moreover, we decline to accept plaintiff's assertion that the photos taken of the scene after the incident constitute sufficient circumstantial evidence to support an inference that the spill had "been there for at least several hours," thus supporting his contention that United had or should have had notice of the hazardous condition prior to plaintiff's fall. Mr. Oonk and Ms. Neuber both testified that they were unaware of any spills at the time Polar Ware vacated the exhibit booth at the close of the 2007 NRA show. No other witness offered any testimony establishing how or when the spill actually occurred.

¶ 45 Plaintiff himself testified that he did not even know exactly what the liquid was, other than what was told to him after the fact. Plaintiff further testified that the scene depicted in the photos was significantly different than the scene at the time of his fall. Mr. Lester testified that he did not know how long the "condition" on the floor existed prior to the fall, and did not know how the scene looked prior to plaintiff's fall. Based upon all of this evidence, it would be no more than improper speculation to infer anything about the length of time the liquid spill existed prior to plaintiff's fall. *Ishoo v. General Growth Properties, Inc.*, 2012 IL App (1st) 110919, ¶ 28 ("notice can only be shown where the dangerous condition is shown to exist for a sufficient length of time to impute knowledge of its existence" to defendant); *Wilson v. Bell Fuels, Inc*., 214 Ill. App. 3d 868, 873 (1991) (noting that, while negligence can be shown by circumstantial evidence and a plaintiff can rely on reasonable inferences, such inferences and liability for negligence cannot be based on mere speculation, guess, surmise or conjecture).

¶ 46 Third, we reject defendant's contention that United had actual notice that Polar Ware had abandoned its exhibit booth space, thus allowing United time to inspect, observe, and correct any hazardous conditions contained therein before plaintiff's fall. In support of this factual assertion, plaintiff contends that Ms. Rosen-Senetra's deposition testimony established that "GES provided

United with a 'production schedule' that listed when certain exhibitors were moving out of their booths," and thus knew or should have known that Polar Ware and Stoelting had left their exhibit booths the night before the fall. However, this was not what Ms. Rosen-Sanetra's testimony actually established.

¶ 47 It is true that Ms. Rosen-Senetra testified that GES provided United with a "production schedule" with respect to "when the exhibitors would actually be out of their booth[s]." However, she also specifically and repeatedly clarified that this schedule was for the "entire show" and contained "nothing specific as to each specific exhibitor." Moreover, there is *no* other evidence to support any contention that United had any actual notice that the exhibit booth where plaintiff fell had been previously abandoned by Polar Ware. While Ms. Rosen-Senetra did testify that United could inquire about the status of any specific exhibitor by asking GES, we fail to see the significance of this fact. As discussed above, there was no evidence at all that United was ever aware of any hazard inside Polar Ware's exhibit booth prior to plaintiff's fall, and as will be discussed below, United was not under any obligation to become aware of any such hazards at any time prior to plaintiff's fall.

¶ 48 Lastly, we note that plaintiff repeatedly relies upon the testimony of Mr. Brown in support of his contention that United was negligent. Plaintiff specifically cites to the fact that Mr. Brown reviewed the photos of the scene during his deposition, and testified that the liquid spill and the bags of liquid material (even if not yet leaking) depicted therein should be cleaned and disposed of promptly because they were, respectively, either already a safety hazard or would likely become a safety hazard.

¶ 49 However, Mr. Brown's testimony in this regard was specifically limited by the notion that all of the above would be true only if the spill or items depicted in the photos had existed *in one*

of the aisles. Mr. Brown's testimony repeatedly indicated that he was only referring to United's responsibilities if a hypothetical spill or bags of liquid material such as those depicted in the photos existed "in the middle of the aisle" or "only in the aisle." Such comments were thus completely consistent with his testimony that United was primarily tasked with maintaining the cleanliness of the aisles in the immediate aftermath of the 2007 NRA show, and would need permission to enter any exhibit booth spaces to clean any actually observed hazards. It is furthermore irrelevant to what United would or would not do with respect to the situation actually presented here—a concealed liquid spill and/or liquid food materials located inside an exhibit booth space.

¶ 50 2. Duty

¶ 51 Having addressed a number of plaintiff's preliminary factual assertions regarding the record produced below, we now turn to the determinative question on appeal; *i.e.*, whether the circuit court properly concluded that "it cannot be said that United owed a duty with regard to the complained of condition."

¶ 52 Plaintiff specifically contends that United was contractually obligated to clean the exhibit booth spaces prior to the time he entered Polar Ware's exhibit booth, pursuant to the terms of the GES/United contract.[2] United asserts that it had no such contractual duty. Resolving this dispute is essential because, as noted above, United's duty to do so must be determined by the terms of the GES/United contract and the scope of United's duties will not be expanded beyond what was

[2] As noted above, the amended complaint contains a host of allegations of negligence against United. In his brief on appeal, plaintiff acknowledges that he did not further amend his complaint prior to the filing of United's motion for summary judgment, but that in light of the depositions "the possible acts of negligence which [he] would likely go forward to trial with were clarified" to include only those acts or omissions that involved United's performance of its contractual duties.

required by that contract. *Gilley*, 372 Ill. App. 3d at 275; *Aargus Security Systems, Inc*., 2013 IL App (1st) 120784, ¶ 60.

¶ 53 Here, the evidence produced below clearly showed that United provided cleaning services at the 2007 NRA show pursuant to the GES/United contract, which was initially executed in 2001 and subsequently renewed. That contract was a general one intended to obligate GES to hire United to perform cleaning services, and to obligate United to perform those cleaning services, for a number of different types of conventions and events over the course of a number of years. The agreement generally provided that United agreed to "perform and supervise *** Cleaning Services," which were defined to "include all standard cleaning and janitorial functions provided according with past performance between the parties[.]"

¶ 54 Mr. Lester, the only person to testify from GES, admitted that with respect to the procedure following events such as the 2007 NRA show he "really [did not] know that much about the cleaning part of it." Nevertheless, he did note that is was his "observation" smaller cleaning crews would initially focus on keeping the aisle clear after such events before larger cleaning crews were brought in to "hit it a little harder and get all the mess cleaned up."

¶ 55 Ms. Rosen-Sanetra, the vice-president for operations at United, more specifically testified that the initial obligation of United's cleaning crews employed by GES at the close of events such as the 2007 NRA show was to "[m]aintain the aisles" and that "[b]ecause the floor is so extensive, there's no expectation for the booth space. They are assigned to aisles." The reason for this was that United had insufficient manpower to clean both the aisles and the exhibit booths in the immediate aftermath of the show, with the number of United employees employed to perform cleaning services after the show established by a budget set by GES. It was only on the "last day of move out"—which would have been after plaintiff's fall—that United would be

responsible for cleaning any refuse out of an exhibit space, and only if the exhibitors had already moved out of their spaces.

¶ 56 Mr. Brown, United's operations manager and supervisor, also testified that United's immediate responsibility following the 2007 NRA show was to clean the aisles and not the exhibit booths. Indeed, Mr. Brown specifically noted that even on the second day of cleaning—the day of plaintiff's fall—United's cleaning crews were still focused on the aisles and could not enter or clean an exhibit booth without an express directive or permission from an exhibitor, to be obtained via one of the NRA "service desks" or floor managers. Further, United crews would only seek such permission to enter and clean an exhibit booth if they actually noticed a spill therein. Mr. Brown further testified that the bags of liquid material depicted in the photos would not be considered refuse or a safety issue that United would be responsible for cleaning, if they were located inside an exhibit booth and were not noticeably leaking. United would clean inside an exhibit booth only after obtaining an express directive to do so or had received authorization to clean any possible refuse inside a booth that United had actually noticed. An area formally occupied as an exhibit space would be cleaned without prior authorization only at the end of the breakdown period, after that booth space had been completely dismantled.

¶ 57 From this testimony, it is apparent that the "past performance between the parties" contract provision reflected that, pursuant to GES and United's mutual understanding, United was initially and primarily responsible for maintaining the aisles after the 2007 NRA show ended. Thus, United had no contractual obligation to clean Polar Ware's exhibit booth at the close of the 2007 NRA show and prior to the time of plaintiff's fall. While there was testimony that United would clean an exhibit booth before such booth was broken down if it was specifically directed to or it actually noticed a safety issue and received authorization to do so,

there is no evidence that either circumstance occurred here with respect to Polar Ware's exhibit booth. Nor, as discussed above, is there any evidence to support plaintiff's contention that United should have noticed a spill or other danger located inside Polar Ware's exhibit booth, where the spill was concealed by the carpet tiles. To fault United for failing to observe or clean any spill located inside that exhibit booth prior to plaintiff's fall would be to impermissibly expand the scope of United's duties beyond what was required by the "past performance between the parties" term of the GES/United contract. *Gilley,* 372 Ill. App. 3d at 275*; Aargus Security Systems, Inc.*, 2013 IL App (1st) 120784, ¶ 60.

¶ 58 Nevertheless, plaintiff argues that in addition to the "standard" cleaning services to be performed in accordance with the parties' past performance, the GES/United contract further provided that United's cleaning services "shall also" include other specific cleaning services that included "nightly vacuuming of aisle and exhibit space, 'porter' services and the removal of refuse materials from aisle and exhibit space before (move in), during (aisle porters) and after (move out) each Show ('trashing')." Plaintiff contends that this contract language creates specific, separate contractual obligations that do not depend on the parties' past performance, is inconsistent with the testimony of Ms. Rosen-Sanetra and Mr. Brown regarding United's obligations, and thus creates an issue of fact as to the full scope of United's duties.

¶ 59 Obviously, that portion of this specific contract language that applies to United's duties before and during any event or show is irrelevant to this matter. However, even if we accepted plaintiff's argument that this language did impose an additional and separate duty upon United for "the removal of refuse materials from *** exhibit space *** after (move out) each Show ('trashing')[,]" plaintiff's argument in this regard fails to acknowledge that the contract only mandates that United undertake these duties "*where required*." (Emphasis added.) It also fails

to acknowledge that the GES/United contract was clearly intended to apply to United's work on a number of different types of conventions and events over the course of a number of years. Thus, these specific services were not necessarily intended to be required of United in all instances. Indeed, the GES/United contract contained further provisions regarding the *additional* compensation United would receive *only* "[i]n the case" it provided other specific services such as "porter services," "trashing," vacuuming, and "booth cleaning." Thus, the contract language does not contemplate that such services would be provided for all events, or that they would necessarily be provided for the 2007 NRA show at issue here.

¶ 60 More importantly, even if this additional contract language did impose a separate duty upon United to remove refuse materials from exhibit booths following the 2007 NRA show or to otherwise engage in "booth cleaning" or "trashing," it says nothing about *when* such tasks were to take place. As discussed above, the evidence indicates that United was under no contractual obligation to clean the Polar Ware exhibit booth until sometime after plaintiff fell, unless United was expressly directed or authorized to do so. There is no evidence that any such circumstance presented itself here.

¶ 61 In sum, imposing a duty upon United to clean the Polar Ware exhibit booth prior to plaintiff's fall would improperly impose a duty upon it beyond what was required by the GES/United contract. To do so would also be "contrary to well-settled law, which provides that a court cannot alter, change or modify existing terms of a contract, or add new terms or conditions to which the parties do not appear to have assented." *Thompson*, 241 Ill. 2d at 449. We therefore conclude that the circuit court properly granted summary judgment in favor of United on the basis that plaintiff failed to establish the duty element of its negligence cause of action against United. *Nava v. Sears, Roebuck & Co.*, 2013 IL App (1st) 122063, ¶ 10 (noting

that this court may affirm the circuit court's grant of summary judgment for any reason that is supported by the record, regardless of whether that reason formed the basis for circuit court's judgment).

¶ 62 3. Remaining Issues

¶ 63 In so ruling we briefly note that both parties on appeal cite to and debate the significance of a number of cases discussing various aspects of general premises liability. We find such cases to be irrelevant to this matter.

¶ 64 In Illinois, the scope of premises liability is determined pursuant to section 343 of the Restatement (Second) of Torts (Restatement (Second) of Torts § 343 (1965)). *Madden v. Paschen*, 395 Ill. App. 3d 362, 374 (2009). However, "[i]t is a prerequisite to liability under section 343 that defendant be a possessor of land. The term 'possessor' with respect to possession of land is defined in the Restatement as 'a person who is in occupation of the land with intent to control it.' " *Id*. at 375 (quoting Restatement (Second) of Torts § 328E, at 170 (1965)). Furthermore, "[t]he notion of control is refined in the Restatement of Property, which defines a possessory interest in land, in relevant part, as follows: 'a physical relation to the land of a kind which gives a certain degree of physical control over the land, and an intent so to exercise such control as to exclude other members of society in general from any present occupation of the land.' " *Id*. at 375-76 (quoting Restatement of Property § 7, at 19 (1936)).

¶ 65 As discussed extensively above, the evidence produced below established that—prior to plaintiff's fall—United itself was not even allowed to *enter* an exhibit booth space unless it was expressly directed or authorized to do so. There certainly is no evidence to suggest United had any degree of physical control over the exhibit booth spaces, nor is there evidence that United had any intent or ability to exclude others from entering such areas. Therefore, United cannot be

said to be a "possessor" of the exhibit booth spaces, such that it may be subject to a claim of negligence under a theory of general premises liability.

¶ 66 We do further note that "[i]t is well established in Illinois that a defendant who creates a dangerous condition on land on behalf of the possessor can be held liable for injuries caused to third parties, even if defendant is not himself an owner or possessor of the land." *Id*. at 376; see also Restatement (Second) of Torts § 384 (1965) ("One who on behalf of the possessor of land erects a structure or creates any other condition on the land is subject to the same liability, and enjoys the same freedom from liability, as though he were the possessor of the land, for physical harm caused to others upon and outside of the land by the dangerous character of the structure or other condition while the work is in his charge."). However, we find that this rule is likewise inapplicable to this matter. There is no evidence that United did in fact take any action within any of the exhibit booth spaces at the 2007 NRA show prior to plaintiff's fall. To the extent that plaintiff contends that United's failure to clean the Polar Ware booth prior to his fall essentially caused a dangerous condition to be created, we note again that United had no contractual obligation to do so. As the comments to section 384 of the Restatement of Torts indicates, "the rule stated in this Section applies to subject the particular contractor or subcontractor to liability for only such harm as is done by the particular work entrusted to him." Restatement (Second) of Torts § 384, comment d (1965).

¶ 67 III. CONCLUSION

¶ 68 For the foregoing reasons, we affirm the judgment of the circuit court granting summary judgment in favor of United.

¶ 69 Affirmed.