

NOTICE

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2014 IL App (4th) 130486-U

NO. 4-13-0486

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

January 23, 2014
Carla Bender
4th District Appellate
Court, IL

OMAR MORALES,) Appeal from
Plaintiff-Appellant,) Circuit Court of
v.) Sangamon County
TRI STAR MARKETING, INC., d/b/a SUPER) No. 12L25
PANTRY,)
Defendant-Appellee) Honorable
) Leo J. Zappa,
) Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Presiding Justice Appleton and Justice Pope concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court erred by granting defendant's motion for summary judgment when plaintiff presented evidence showing an unnatural accumulation of ice.
- ¶ 2 On February 27, 2010, plaintiff, Omar Morales, slipped and fell on ice at the Super Pantry on West Jefferson Street in Springfield, Illinois. In January 2012, plaintiff filed a complaint, alleging the ice formed due to an "unnatural accumulation of water" and that defendant, Tri Star Marketing, Inc., doing business as Super Pantry, had sufficient time to notice the ice and correct it. In May 2013, defendant filed a motion for summary judgment (735 ILSC 5/2-1005 (West 2012)), which the trial court granted, concluding the patch of ice on which plaintiff slipped was the result of a natural accumulation. Plaintiff appeals, arguing he presented sufficient evidence to create a question of fact as to whether the ice was an unnatural

accumulation which resulted from water dripping from the canopy covering the gas pump area.
We reverse.

¶ 3

I. BACKGROUND

¶ 4

A. Plaintiff's Complaint

¶ 5

In January 2012, plaintiff filed a complaint against Tri Star. The complaint alleged on February 27, 2010, plaintiff slipped and fell on an unnatural accumulation of ice at the Super Pantry on West Jefferson Street in Springfield, Illinois. Plaintiff claimed water dripped from the canopy above the gas station's pumps to the pavement below causing an unnatural accumulation of ice, and the ice patch "was the only ice on the parking lot of the premises." Additionally, the complaint alleged the accumulation of water had been present for sufficient time for defendant or its employees to have noticed and corrected it. The complaint also alleged the ice caused plaintiff's fall and that he sustained injuries.

¶ 6

B. Discovery

¶ 7

The discovery process yielded plaintiff's deposition testimony and photographs depicting the ice patch where plaintiff fell.

¶ 8

1. *Plaintiff's Deposition Testimony*

¶ 9

During plaintiff's deposition, he testified he stopped at the Super Pantry on February 27, 2010, in the evening after it was already dark, to purchase gas. After pumping gas, plaintiff walked in front of the pump, toward the store, to pay for the gas. As plaintiff walked, he did not notice a patch of ice, on which he slipped and fell. Plaintiff never mentioned where he fell in relation to the canopy.

¶ 10

Plaintiff's wife, Amy Morales, notified the gas station attendant plaintiff had fallen. The attendant asked plaintiff if he needed an ambulance and plaintiff declined the offer

and indicated he was alright. The attendant told plaintiff and his wife that another gas station patron had notified him of the ice after the patron almost fell in the same spot earlier that day. Plaintiff took pictures and headed home. While heading home, plaintiff's arm began to bother him and after stopping in Browning, he went to the hospital, where a doctor told him he had fractured his arm.

¶ 11 Plaintiff also testified in the days before his fall the temperature had gone up and any snow had melted. Plaintiff stated he did not know how the ice formed or how long it had been present at the station before he arrived.

¶ 12 *2. The Photographs*

¶ 13 Plaintiff took photographs, showing the ice patch and its approximate location on the parking lot. In one picture, plaintiff circled the pump where he was pumping gas before he fell and approximated the location of his fall.

¶ 14 *C. Defendant's Motion for Summary Judgment*

¶ 15 In December 2012, defendant filed a motion for summary judgment, claiming plaintiff could not meet his burden of establishing he slipped on an unnatural accumulation of ice. In support of this motion, defendant argued plaintiff could not prove the ice was unnaturally created because plaintiff testified in his deposition he did not know how the ice formed.

Defendant included plaintiff's deposition testimony but did not provide any affidavits contesting plaintiff's factual allegations.

¶ 16 *1. Plaintiff's Response to Defendant's Motion*

¶ 17 In response to the motion for summary judgment, plaintiff claimed he could show the ice was an unnatural accumulation. Plaintiff included an affidavit authored by his wife, who was present when plaintiff fell, stating the ice plaintiff fell on "was right under the edge of the

canopy where water would have dripped and frozen." She also testified there had been no snow or rain for some time prior to plaintiff's fall, no snow was present anywhere else on defendant's lot, and the manager of the Super Pantry acknowledged he knew about the ice because another patron had previously slipped on it and complained about it.

¶ 18 Plaintiff argued both he and his wife stated it was not raining or snowing when he fell and the lot was otherwise clear of ice and snow, so no natural cause existed to explain the ice. Also, plaintiff claimed his photographs and his wife's affidavit showed the ice was located right under the edge of the canopy where water would have dripped.

¶ 19 *2. Defendant's Reply to Plaintiff's Response*

¶ 20 In reply to plaintiff's response, defendant argued the allegations in plaintiff's wife's affidavit contradicted plaintiff's testimony at the deposition and the allegations in the complaint. Defendant also argued plaintiff's and his wife's claims were insufficient to show a factual connection between the canopy and the ice below. Defendant did not file a counteraffidavit contesting plaintiff's wife's affidavit.

¶ 21 *D. The Trial Court's Order*

¶ 22 In May 2013, the trial court granted defendant's motion for summary judgment, concluding plaintiff did not present any evidence the patch of ice plaintiff slipped on was an unnatural accumulation. The court noted plaintiff's "unequivocal deposition testimony" was he did not know how the ice he fell on formed and he fell "well underneath defendant's canopy." The court also stated plaintiff's wife's affidavit "at most" established the ice was "near the edge of the canopy" and "this testimony, without a specific factual nexus linking the patch of ice to the canopy is simply insufficient, as a matter of law, to establish that the patch of ice was anything other than a natural accumulation" This appeal followed.

¶ 23

II. ANALYSIS

¶ 24

A. Standard of Review

¶ 25 Under section 2-1005(c) of the Code of Civil Procedure, a party is entitled to summary judgment as a matter of law when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." 735 ILCS 5/2-1005(c) (West 2012). The plaintiff does not need to prove his or her case to survive a motion for summary judgment. *Koziol v. Hayden*, 309 Ill. App. 3d 472, 476, 723 N.E.2d 321, 323 (1999). The purpose of this stage is "simply to determine whether a question of fact exists." *Id.*

¶ 26 "Summary judgment is a drastic remedy that should be granted only where the movant's right to it is clear and free of doubt." *Hutchcraft v. Independent Mechanical Industries, Inc.*, 312 Ill. App. 3d 351, 357, 726 N.E.2d 1171, 1176 (2000) As a result, "the court has a duty to construe the record strictly against the movant and liberally in favor of the nonmoving party." *Koziol*, 309 Ill. App. 3d at 476, 723 N.E.2d at 323. If "reasonable persons could draw divergent inferences from the undisputed material facts or where a dispute exists as to a material fact, summary judgment should be denied and the issue decided by the trier of fact." *Id.*, 723 N.E.2d at 324. "In determining whether the court properly granted summary judgment, the standard of review is *de novo*." *Id.*

¶ 27

B. Factual Dispute as to Where Plaintiff Fell

¶ 28 Defendant argues plaintiff's wife's affidavit directly contradicts other evidence offered by the plaintiff, claiming plaintiff "unequivocally" testified at his deposition he fell "well underneath" the canopy. We note defendant's argument distorts the record, as plaintiff never mentioned in his deposition where he fell in relation to the canopy.

¶ 29 This court must accept plaintiff fell where plaintiff's wife stated in her affidavit, because defendant filed no counteraffidavit contesting the location of plaintiff's fall. See *Carruthers v. B. C. Christopher & Co.*, 57 Ill. 2d 376, 381, 313 N.E.2d 457, 460 (1974) (holding the court must accept as true all material facts in an affidavit that are uncontested by the other party). Plaintiff's wife's affidavit stated she observed the location of the patch of ice upon which plaintiff slipped and it was located directly under the edge of the canopy. Thus, for the purpose of determining if defendant is entitled to summary judgment, this court must accept that plaintiff fell where plaintiff's wife stated the patch of ice was located, "right under the edge of the canopy where water would have dripped and frozen."

¶ 30 C. The Natural Accumulation Rule

¶ 31 In Illinois, a business owner has no duty to business invitees to remove natural accumulations of snow and ice. *Watson v. J.C. Penney Co., Inc.*, 237 Ill. App. 3d 976, 978, 605 N.E.2d 723, 724 (1992). A business owner, however, does have a duty not to leave or cause unnatural accumulations of snow or ice. *Id.* "A finding of an unnatural or aggravated natural condition must be based upon an identifiable cause of the ice formation." *Gilberg v. Toys "R" Us, Inc.*, 126 Ill. App. 3d 554, 557, 467 N.E.2d 947, 949 (1984). The plaintiff must present some facts to show the origin of the ice was unnatural or caused by defendant.

¶ 32 D. Defendant's Duty to Plaintiff

¶ 33 Plaintiff argues the ice patch was an unnatural accumulation caused by a leak in the gas station's canopy allowing water to drip and refreeze on the pavement below. Defendant argues plaintiff must be able to prove the ice was an "unnatural" accumulation because the business owner has no duty to remove or warn of natural accumulations. The trial court

concluded plaintiff did not show a "specific factual nexus linking the patch of ice to the canopy." We disagree.

¶ 34 In *Lapidus v. Hahn*, 115 Ill. App. 3d 795, 800, 450 N.E.2d 824, 828 (1983), the First District upheld a jury verdict in favor of a tenant who fell on ice which had formed from water dripping off the roof, creating an unnatural accumulation. In *Lapidus*, the plaintiff presented evidence that (1) "water repeatedly dripped in torrents from the roof onto the platform and was trapped there by the depression" and (2) there had been "no ice or snow on the street or sidewalk" when plaintiff fell. *Id.* at 800-01, 450 N.E.2d at 828. In this case, Plaintiff's wife stated there had been no weather event in the past few days that could have caused the ice, and no snow or ice was present anywhere else on the lot, as it had all previously melted. She also stated plaintiff fell directly under the edge of the canopy where water would have dripped and frozen.

¶ 35 Defendant relies on the Second District's decision *Crane v. Triangle Plaza, Inc.*, 228 Ill. App. 3d 325, 591 N.E.2d 936 (1992), and this court's decision *Koziol*, 309 Ill. App. 3d 472, 723 N.E.2d 321. We conclude both cases are distinguishable. In *Crane*, plaintiff slipped and fell on ice in a parking lot and testified she was "99 and 99/100% sure" the ice she slipped on was formed when a large snow pile at the edge of the parking lot melted, flowed into a depression, and later refroze. *Crane*, 228 Ill. App. 3d at 327, 591 N.E.2d at 938. The court granted summary judgment because the plaintiff's personal belief was the only evidence linking the snow pile and the ice. *Id.* at 331, 591 N.E.2d at 940. The court indicated the slope of the parking lot might create a factual nexus between the snow and ice but it was undisputed that the lot was generally level with no incline. *Id.* at 332, 591 N.E.2d at 941.

¶ 36 Here, plaintiff's wife's affidavit stated no weather event had occurred in the last few days that would have caused the ice and, as it had been warm in the days before the fall, no ice or snow was at any other location in the parking lot. The photographs attached to appellant's brief as appendix D, show the ice patch is surrounded by otherwise ice and snow free concrete. The affidavit explained why other natural explanations for the ice in that exact location and on the day in question were unlikely. Plaintiff's wife stated she saw the location of the patch of ice where plaintiff fell and it was located directly underneath the edge of the canopy. Thus, plaintiff did more than state a personal belief as to how the ice formed; he also presented facts, through his wife's affidavit, explaining why the ice likely formed from water dripping from the canopy.

¶ 37 In *Koziol*, plaintiff's expert architect provided only theories as to how ice on a walkway (where plaintiff slipped) could have formed unnaturally, but defendant's expert directly contested these theories. *Koziol*, 309 Ill. App. 3d at 475, 723 N.E.2d at 323. Defendant's expert explained the ice could not have formed from an unnatural accumulation of water because the walkway exceeded civil engineering standards for entrance slab drainage. *Id.* Also, in *Koziol*, it had snowed just before plaintiff's fall and at the time of the fall it was windy, making it very likely ice formed naturally from snow blowing across the walkway. *Id.* In this case, plaintiff testified it had not snowed or rained for a few days before the incident and no snow or ice was on the ground, making the conclusion the ice was caused naturally by a weather event less likely. Also, unlike *Koziol*, where the defendant presented evidence the walkway was designed to avoid unnatural accumulations of water from freezing, defendant has presented no evidence contesting plaintiff's factual allegations.

¶ 38 The fact that neither plaintiff nor his wife claimed to see water dripping is not fatal to plaintiff's case. Direct evidence is not required to survive a motion for summary

judgment, as such evidence will often be impossible to obtain in slip and fall cases. *Olinger v. Great Atlantic and Pacific Tea Co.*, 21 Ill. 2d 469, 475, 173 N.E.2d 443, 446 (1961).

Circumstantial evidence can be sufficient when it is "of such a nature and so related as to make the conclusion more probable as opposed to merely possible." *Majetich v. P.T. Ferro Construction Co.*, 389 Ill. App. 3d 220, 225, 906 N.E.2d 713, 718 (2009). However, to survive summary judgment circumstantial evidence "need not exclude all other possible inferences." *Taliaferro v. One Grand Place Venture*, 256 Ill. App. 3d 429, 433, 628 N.E.2d 815, 818 (1993). Due to the short nature of a stop to buy gas, plaintiff and his wife would likely not have had a chance to see the ice form. This court must look to what evidence plaintiff did provide to determine if it can show water dripping from the canopy caused the ice to form.

¶ 39 Plaintiff alleged that water dripped from the canopy, that he fell due to a patch of ice located directly under the edge of the canopy where water would have dripped and frozen, and that no other recent weather event could explain the presence of the ice. Defendant presented no evidence to counter these claims. Taking all of plaintiff's factual claims as true, a reasonable fact finder might infer thawing ice and snow collected on the canopy, turned to water, flowed downward, and refroze on cold ground below. Plaintiff's evidence creates a factual dispute in the record, particularly as plaintiff's factual claims were uncontested by defendant. See *Hutchcraft*, 312 Ill. App. 3d at 355, 726 N.E.2d at 1175. As plaintiff has provided facts demonstrating a dispute as to a genuine issue of material fact, the trial court erred in granting summary judgment.

¶ 40 E. Defendant's Knowledge About the Ice at the Deposition

¶ 41 Defendant also points to plaintiff's deposition testimony he had no idea how the ice he slipped on formed as evidence plaintiff cannot prove the origin of the ice. We find this

argument unpersuasive, as plaintiff's personal knowledge at the deposition is not the sole consideration in determining whether summary judgment is appropriate. Rather, the inquiry is whether, at the culmination of all the evidence plaintiff presents, plaintiff can demonstrate the existence of a genuine issue of material fact. *Koziol*, 309 Ill. App. 3d at 476, 723 N.E.2d at 323. We conclude plaintiff's uncontested factual allegations demonstrate a dispute as to a genuine issue of material fact.

¶ 42

III. CONCLUSION

¶ 43

For the forgoing reasons, we reverse the trial court's judgment.

¶ 44

Reversed.