2016 IL App (2d) 151274-U
No. 2-15-1274
Order filed August 29, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

CHRISTOPHER M. ODOM	)	Appeal from the Circuit Court
	)	of Boone County.
Plaintiff-Appellant,	)	
v.	)	No. 12-L-24
	)	
YMCA OF BELVEDERE,	)	Honorable
	)	John H. Young,
Defendant-Appellee.	)	Judge, Presiding.

PRESIDING JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted summary judgment in favor of the defendant.

¶ 2 On July 20, 2012, the plaintiff, Christopher Odom, filed a two-count complaint against the defendant, YMCA of Belvedere, alleging claims based on negligence and breach of warranty. The plaintiff alleged that he was injured on the defendant's premises when an exercise band he was using suddenly broke, snapped back, and struck him in the eye. The defendant filed a motion for summary judgment under section 2-1005 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1005 (West 2014)). On December 4, 2015, following argument, the trial court granted summary judgment in favor of the defendant. The plaintiff appeals from this order. We affirm.

¶ 3 BACKGROUND

¶ 4 On July 20, 2012, the plaintiff filed a two-count complaint against the defendant alleging that he was injured on July 28, 2010, while on the defendant's premises. The plaintiff alleged two theories of liability; negligence (count I) and breach of warranty (count II), based on the same set of facts. The plaintiff alleged that he was a member of the defendant YMCA. The defendant provided elastic exercise bands for the use of its members. During a time the plaintiff was using one of the elastic bands, the band malfunctioned, broke apart, and hit the plaintiff in the eye, causing serious injury. In count I, the plaintiff alleged that the defendant had a duty to exercise ordinary care in the furnishing of exercise equipment. The plaintiff alleged that the defendant breached that duty by failing to: inspect the elastic band; warn plaintiff of the elastic band's defective condition; perform tests on the elastic band to assure its proper operation; provide elastic bands with safety covers; and provide eye-protection equipment for its members. As a direct and proximate result of the foregoing failures, the plaintiff alleged that he suffered severe and permanent injuries to his face and eye.

¶ 5 In count II, the plaintiff alleged that the defendant had a duty to provide exercise equipment which was suitable for use by its members. The plaintiff further alleged that, by providing the elastic band at issue for the use of its members, the defendant implicitly warranted that the elastic band was fit for use. The plaintiff alleged that the defendant breached the foregoing duties and, as a proximate result thereof, the plaintiff was injured while using an elastic band when it snapped and hit him in the face.

¶ 6 The following testimony was elicited during discovery. The plaintiff testified that he had been one of the defendant's members since 2001. He would occasionally ask the defendant's staff if he did not know how to do an exercise or use a piece of equipment. When he starting using exercise bands at the defendant's facility he did not ask any staff members for instruction. Rather, a co-worker, Terry Smith, showed him how to do some exercises using bands. On the

day of the accident, the plaintiff used a green band with foam handles. The diameter of the band, without stretching, was 12 inches. He had used this type of band about eight times prior to the accident. On the day of the accident, he grabbed both foam handles on the green band, positioned his left arm straight in front of him, and pulled back with his right arm, mimicking the archery movement of pulling back on a bow. The band would stretch to approximately 30 inches in diameter when he did this exercise. On the third pull, the band broke. It broke in one place near a seam. It snapped back and hit him in the right eye. After that, he could not see out of his eye and someone drove him to the emergency room.

¶ 7 The plaintiff further testified that there were no staff members in the room when this happened. The plaintiff could not recall seeing any of the defendant's staff in the room on the eight previous occasions he did this exercise. The plaintiff testified that he would generally look over an exercise band before using it to see if it was safe. The plaintiff testified that the band he used on the day of the accident was newer looking than other bands he had used and he did not notice any cuts, nicks, or frays. After the accident one of the defendant's employees, Cheryl Dollinger, told him that he should not have used the exercise band the way he did.

¶ 8 Terrance Smith testified that he worked with the plaintiff and was also one of the defendant's members. He had experience using exercise bands both at the defendant's facility and when he attended physical therapy. He used them for shoulder exercises and also pulled them back and forth, elongated up towards the face to mimic drawing a bow. It had been three years since he did the archery exercise and he believed he used a straight band for that exercise. No one showed him this exercise; he made it up on his own. He never saw anybody else do this exercise, other than the plaintiff. The defendant's staff was always walking around, so he was sure someone saw him doing the archery exercise with the band because "we did it all the time" and he was "assuming" that the defendant's staff was "seeing thing [*sic*]." No one ever stopped

him or told him not to use the band that way. He did not teach the plaintiff to use the exercise band like a bow. They both figured it out and started doing it on the same day. They chose exercise bands that were strong and had the most resistance. He would generally look over a band for nicks or wear before performing the archery exercise. He never came across an exercise band that gave him any concern. There were two type of green bands—a darker green and a lighter green. He and the plaintiff generally used the darker green band for the archery exercise because it had more resistance. The plaintiff told him that, on the day of the accident, the plaintiff was using the lighter green band.

¶ 9 Dollinger, an employee of the defendant, testified that she was certified by the defendant as a fitness specialist. She testified that a fitness instructor was generally in the facility's fitness center at all times. However, if it was a slower period, the instructor might leave the room to go get cleaning supplies. The fitness instructor was responsible for inspecting equipment and removing any potentially hazardous piece of equipment. She was not at the defendant's facility on the day of the accident. She was there the next day and the executive director told her of the plaintiff's accident and gave her the broken band. If the band was in good condition, it should not have broken. The defendant did not post any written warnings about the condition of the exercise bands. If one of the defendant's employees noticed any frays or cuts in a band, the band was to be disposed of. After the plaintiff's accident, all the green bands with foam handles, of the type involved in the plaintiff's accident, were removed from the facility.

¶ 10 Another of the defendant's employees, Heidi Mansavage, testified that she was certified by the defendant as a group fitness instructor. Mansavage testified that the fitness center staff on duty when the defendant's facility opened in the morning was responsible for checking equipment and making sure it was working properly. As a fitness instructor teaching group classes, she was not responsible for checking the condition of equipment before her class.

However, prior to the start of any classes, she would ask participants to inspect the exercise bands they intended to use. If there were any frays or tears, she would cut the band and throw it out. Prior to the plaintiff's accident, she had never heard or seen one of the exercise bands snap or break. She personally used the bands only for leg exercises. She had no knowledge of how the plaintiff was using the exercise band on the day of the accident or whether he was misusing it. However, based on her experience in the fitness industry, she believed that using the band for an archery-style exercise would be an inappropriate use of the band. If she had seen the plaintiff using the band in an archery-style exercise on the day of the accident, she would have stopped him. She was not aware of any warning signs related to the use of the exercise bands at the time of the accident. At the time of her deposition, there were still no warning signs directed toward the use of exercise bands.

¶ 11 William Holsker testified that he started working for the defendant in 1996. He became the director in about 2005 and continued as director until he was discharged in 2011. In 2010, the defendant did not have fitness instructors or trainers that were certified in archery instruction. All of the defendant's staff members, not just one person, were responsible for inspecting equipment, on a daily basis, to make sure it was working and was clean.

¶ 12 On September 10, 2015, the defendant filed a motion for summary judgment. The defendant argued that the plaintiff failed to present expert testimony on the band's alleged defective condition or on any of the defendant's alleged duties. Specifically, the defendant argued that there was no evidence that the band was defective in any way. The plaintiff testified that it was not noticeably worn and had no nicks, cuts, or frays. Additionally, the defendant argued that the plaintiff failed to provide any expert testimony to establish that the defendant violated any standard of care. There was no evidence that the duty within the health club industry was to perform daily inspections of club equipment, to test the equipment, to provide

protective eyewear, or to provide safety coverings on elastic bands. In sum, the defendant alleged that there was no evidence that the defendant breached any duty to the plaintiff or deviated from the standard of care, nor evidence that the band was defective or that some act or omission of the defendant caused the plaintiff's injury.

¶ 13 On October 5, 2015, the plaintiff filed a response to the defendant's motion for summary judgment. The plaintiff argued that a duty existed under ordinary negligence principles because the plaintiff's injury was reasonably foreseeable. The plaintiff cited Mansavage's testimony that using the band for an archery exercise was an inappropriate use of the exercise band. The plaintiff also argued that the burden of warning YMCA members about the risks associated with the exercise bands was minimal. The plaintiff further argued that sections 343 and 343A of the Restatement (Second) of Torts (1965) supported a finding of a common law duty. According to the plaintiff, the Restatement provided that a person was "entitled to expect that the possessor will exercise reasonable care to make the land safe *** for his use for the purposes of the invitation." Pursuant thereto, the plaintiff argued that the defendant had a duty to warn him and other patrons about the hazards associated with the exercise bands.

¶ 14 The plaintiff also argued that the defendant voluntarily undertook to inspect the exercise bands and negligently inspected the band at issue on the day of the accident. The plaintiff argued that Dollinger's testimony, that the exercise band at issue should not have broken if it was in good condition, was an admission that the band was defective. Because the defendant had a duty to issue warnings and non-negligently inspect its equipment, the plaintiff argued that whether the defendant breached that duty, and whether that breach proximately caused the plaintiff's injuries, were questions of fact for a jury.

¶ 15 On December 4, 2015, following argument, the trial court granted the defendant's motion for summary judgment. The trial court found that there was no evidence of industry standards of

care, nor evidence of any duty to inspect, warn, provide safety coverings, or provide eye protection. The trial court also noted that there was no evidence that there was a defective condition of the band. On this basis, the trial court granted summary judgment on count I. As to count II, the trial court reiterated that there was no evidence of a defective condition of the band and thus no evidence of a breach of an implied warranty. On this basis, the trial court granted summary judgment in favor of defendant on count II. Finally, the trial court found that, to the extent the alleged duty to post a warning sign was raised in the summary judgment proceedings but not included in the plaintiff's complaint, there was no evidence of such a duty. The trial court granted summary judgment as to that issue as well. A written order was entered the same day. Thereafter, the plaintiff filed a timely notice of appeal.

¶ 16 ANALYSIS

¶ 17 On appeal, the plaintiff contends that the trial court erred in entering summary judgment in favor of the defendant on count I (negligence) of his complaint. The plaintiff does not raise any argument as to the propriety of summary judgment on count II (breach of warranty) of his complaint. Summary judgment is proper when the pleadings, depositions, and affidavits on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Kleinschmidt, Inc. v. County of Cook*, 287 Ill. App. 3d 312, 315-16 (1997). The purpose of summary judgment is not to try a question of fact, but to determine whether any genuine issue of fact exists to be tried. *Thompson v. Gordon*, 241 Ill. 2d 428, 438 (2011). In determining this, the court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). "Summary judgment is a drastic remedy and should be allowed only when the right of the moving party is clear and free from doubt." *Jones v. Chicago HMO Ltd. of Illinois*, 191 Ill. 2d 278, 291 (2000). We review *de novo* the propriety of an order

granting summary judgment. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶ 18 To state a cause of action for negligence, the plaintiff must show that the defendant owed him a duty, that the defendant breached that duty, and that this breach was the proximate cause of his resulting injuries. *Heastie v. Roberts*, 226 Ill. 2d 515, 555-56 (2007). Whether a duty exists under a particular set of circumstances is a question of law for the court to decide. *Vega v. Northeast Illinois Regional Commuter R.R. Corp.*, 371 Ill. App. 3d 572, 577 (2007). However, whether a defendant breached any duty is a factual matter for the jury to decide, provided there is a genuine issue of material fact regarding this issue. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 430 (2006).

¶ 19 The crux of a court's duty analysis is determining whether a relationship existed between the parties that imposed a legal obligation upon one party for the benefit of the other party. *Sameer v. Butt*, 343 Ill. App. 3d 78, 85 (2003). Our supreme court has recognized four special relationships that give rise to a duty of care: "'common carrier and passenger, innkeeper and guest, custodian and ward, and possessor of land who holds it open to the public and member of the public who enters in response to the possessor's invitation.'" *Simpkins v. CSX Transportation, Inc.*, 2012 IL 110662, ¶ 20 (quoting *Marshall*, 222 Ill. 2d at 438). The latter relationship may also be referred to as the relationship between business invitor and business invitee. *Marshall*, 222 Ill. 2d at 438. The general rule is that a business invitor owes a business invitee the duty of exercising ordinary care to protect them against the unreasonable risk of physical harm. *Id.*

¶ 20 The plaintiff first argues that summary judgment was improper because the defendant had a duty to warn against the use of the band near the face in an archery-type exercise, a duty to provide eye protection with the band, and a duty to post a warning sign about the dangers in

using the band in an archery-type exercise near the face. This argument was premised on the contention that the defendant had knowledge that its members, including the plaintiff, were using the band in an archery-type exercise near the face.

¶ 21 In arguing that the defendant had the specific duties to warn, provide eye protection, or post a warning sign, the plaintiff improperly conflates the concepts of duty and breach of duty. See *Marshall*, 222 Ill. 2d at 442 (in a duty analysis, the court should consider the general character of the event or harm, not the exact manner by which the injury occurred); *Stearns v. Ridge Ambulance Service, Inc.*, 2015 IL App (2d) 140908, ¶ 13 (noting that "purely *ad hoc* determinations that a defendant has a duty to perform or refrain from performing particular acts improperly conflates the concepts of duty and breach"). In the present case, it is clear that the defendant, as a business invitor, owed the plaintiff, as business invitee, a duty to protect against an unreasonable risk of harm. *Marshall*, 222 Ill. 2d at 438. The question of what the defendant should or could have done to protect the plaintiff bears on the question of whether the defendant *breached* its duty. *Stearns*, 2015 IL App (2d) 140908, ¶ 19. Accordingly, the issue is whether the defendant breached its duty by failing to warn patrons about the use of bands near the face, failing to require the use of eyewear when using the bands near the face, or failing to properly inspect the band.

¶ 22 We acknowledge that whether the defendant breached its duty is generally a factual matter for the jury to decide. *Marshall*, 222 Ill. 2d at 430. Nonetheless, the trial court properly granted summary judgment because the evidence in this case did not create a genuine issue of material fact regarding the defendant's breach of its duty of care. Rather, there was no evidence that the defendant breached its duty to protect the plaintiff from an unreasonable risk of harm because there was no evidence that the defendant knew or should have known of the alleged dangerous condition. See *Olinger v. Great Atlantic & Pacific Tea Co.*, 21 Ill. 2d 469, 474 (1961)

(no breach of duty to invitee where there was no evidence that invitor knew or should have known of dangerous condition); *Taake v. WHGK, Inc.*, 228 Ill. App. 3d 692, 713 (1992) (no evidence of breach of duty where there was no evidence that the defendant was aware of the alleged unsafe condition). Specifically, there was no evidence that the defendant had knowledge that its members were using the exercise bands for an archery-style exercise near the face. The plaintiff testified that he did not remember seeing any of the defendant's staff in the fitness room when the accident happened. He testified that he had performed this exercise on about eight previous occasions and that he did not recall seeing any of the defendant's staff in the room on those occasions either. The plaintiff also testified that he had never asked anyone at the defendant's facility for instruction on how to use the exercise band.

¶ 23 Smith testified that the defendant's staff was always walking around, so he was "sure" and "assumed" someone had seen him do the archery-style exercise with the band. However, Smith did not testify that a staff member had actually seen him perform the archery-style exercise. None of the defendant's employees testified that they had seen either the plaintiff or Smith perform the archery-style exercise. While Dollinger testified that a fitness instructor was generally present in all exercise rooms, she acknowledged that there were times when they would briefly leave the room. There was no evidence of an industry standard to have a fitness instructor monitor a patron's use of the exercise equipment. Additionally, there was no evidence that any of the defendant's other patrons had used the exercise band and had had it snap back into their face. Mansavage testified that, prior to the plaintiff's accident, she had never seen or heard of one of the exercise bands breaking.

¶ 24 Further, there was no testimony, expert or lay, that the bands were commonly used for this type of archery-style exercise near the face. There was also no evidence that the manufacturer recommended the band for an archery-style exercise near the face or that there was

an industry standard to warn against this type of use for the exercise band at issue. Finally, there was no evidence of any defect in the band that could have or would have been detected upon proper inspection. The defendant's employees testified that the bands were inspected on a daily basis. The plaintiff testified that the band he used on the day of the accident looked newer than other bands he had used and that he did not notice any nicks, cuts, or frays. Accordingly, while the defendant owed the plaintiff a duty of care, the trial court properly granted summary judgment on the plaintiff's claim for negligence because there was no evidence that the defendant breached that duty.

¶ 25 The plaintiff's second contention on appeal is that the trial court erred in granting summary judgment on his claim for negligence because the evidence established that the defendant voluntarily undertook to inspect the exercise bands and failed to exercise reasonable care in that undertaking. The plaintiff notes that the defendant's employees testified that they inspected equipment on a regular basis and that if a worn or frayed exercise band was found, it would be disposed of. The plaintiff argues that on the day of the plaintiff's injury, the defendant's employees negligently failed to discern that the exercise band used by the plaintiff was in poor condition.

¶ 26 Liability can arise from the negligent performance of a voluntary undertaking. *Pippin v. Chicago Housing Authority*, 78 Ill. 2d 204, 209 (1979). "It is axiomatic that every person owes to all others a duty to exercise ordinary care to guard against injury which naturally flows as a reasonably probable and foreseeable consequence of his act." *Nelson v. Union Wire Rope Corp.*, 31 Ill. 2d 69, 86 (1964). In regard to the liability for breach of the duty to exercise ordinary care, the Restatement (Second) of Torts states:

> "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things,

> is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking." Restatement (Second) of Torts § 323 (1965).

Under this theory of liability, one who voluntarily undertakes a course of action may not perform the act negligently. *Pippin*, 78 Ill. 2d at 209.

¶ 27 The plaintiff's reliance on the voluntary undertaking theory of liability is without merit as there was no evidence in this case of a negligent performance. The evidence indicated that the exercise bands were inspected on a daily basis and there was no evidence that the exercise band that broke was not inspected on the day of the plaintiff's injury. Further, the plaintiff testified that he looked at the band before using it, that it looked new, and that he did not notice any nicks, cuts, or frays. Additionally, there was no evidence that the inspection was performed negligently or that a defect could have been identified.

¶ 28 In arguing that the defendant negligently failed to discern that the band was defective, the plaintiff relies on Dollinger's testimony. Dollinger testified that the band should not have broken if it was in good condition. The plaintiff contends that this was an admission that the band was defective. We disagree. The fact that the band broke and an injury occurred is not, in and of itself, sufficient to show the existence of a product defect. *Schultz v. Hennessy Industries, Inc.*, 222 Ill. App. 3d 532, 540 (1991).

¶ 29 CONCLUSION

¶ 30 For the foregoing reasons, the judgment of the circuit court of Boone County is affirmed.

¶ 31 Affirmed.