

No. 1-15-2959

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ARLETTE PORTER,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 13 L 9502
)	
NORTHEAST ILLINOIS REGIONAL COMMUTER)	
RAILROAD CORPORATION d/b/a METRA,)	Honorable
)	Larry G. Axelrood,
Defendant-Appellee.)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Ellis and Justice Burke concurred in the judgment.

O R D E R

¶ 1 *Held:* Grant of summary judgment in favor of defendant, Northeast Illinois Regional Commuter Railroad Corporation, doing business as Metra, is affirmed because, under section 3-102(a) of the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/3-102(a) (West 2012), Metra was not liable for plaintiff's injury where plaintiff failed to show that Metra had notice of the alleged water drip that caused plaintiff's injury.

¶ 2 Plaintiff, Arlette Porter, appeals from an order of the circuit court granting summary judgment to defendant, Northeast Illinois Regional Commuter Railroad Corporation, doing business as Metra, in a negligence action arising from her slip and fall on the steps of a Metra

train car. On appeal, she contends that the court erred in granting summary judgment because a genuine issue of material fact exists as to whether Metra had notice of the alleged water dripping from the ceiling near the door of the train car that caused her to slip and fall. We affirm.

¶ 3 According to plaintiff's complaint and deposition testimony, on June 26, 2013, about 8:35 a.m., it was raining moderately and the rain was "constant." As plaintiff boarded a Metra train at the Kensington station located near the intersection of 115th Street and Cottage Grove Avenue, she slipped on the first step leading into the train car. As a result of the slip, her left knee hit the ground and her left shoulder hit the door of the train car.

¶ 4 Plaintiff's common law negligence complaint alleged that Metra carelessly and negligently failed to: (1) properly operate, manage, maintain and control the entry way of the train car; (2) keep the metal tread plate flooring inside the train car in a reasonably safe condition; (3) make proper, timely and necessary inspections of the train and metal flooring; (4) warn passengers of the presence of a dangerous, hazardous and unsafe condition of the metal flooring; (5) remove from the entry way of the train car the slippery metal flooring; (6) install an anti-slip metal flooring at the entry way of the train car; and (7) institute maintenance and safety procedures which would have prevented plaintiff's slip and fall. Plaintiff also alleged that Metra carelessly and negligently permitted and allowed for the metal flooring to remain in a hazardous and unsafe condition.

¶ 5 Metra filed an answer to plaintiff's complaint admitting that they owned and operated the train in question and denying her allegations of negligence. Metra also raised four affirmative defenses, including that it was not liable for plaintiff's injury pursuant to section 3-102(a) of the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act)

(745 ILCS 10/3-102(a) (West 2012) because plaintiff failed to show that Metra, a local public entity, had actual or constructive notice of the condition that caused plaintiff's slip and fall.

¶ 6 During discovery, plaintiff filed an answer to Metra's interrogatories. She stated that the cause of her fall was "the entryway to the train was extremely wet and there was no warning that the metal flooring was slippery when wet." She also stated that as a result of the slip and fall she sustained injuries to her left knee, left shoulder and rotator cuff. Also during discovery, Metra deposed plaintiff and Danny Frakes, a Metra train conductor, who was working onboard the train in question.

¶ 7 In her deposition testimony, plaintiff stated that on the date of her fall it was raining moderately and that the rain was "constant." As plaintiff boarded the train, she was holding her purse in her right hand and a coffee cup in her left hand. When the doors to the train opened, plaintiff attempted to step onto the train and "wetness" caused her left foot to slip off the first step of the train car. As a result of the slip, plaintiff's left knee hit the ground and her left shoulder hit the door of the train. Two passengers helped plaintiff to stand up and she then "looked up and saw dripping from the ceiling." She stated that the dripping was coming from the door frame of the train car. She acknowledged that she did not know where the drip was coming from, but that it was in the vicinity of "the door area." She stated that she could not identify the source of the drip except that it was from the ceiling "over the door area." Plaintiff testified that "the wetness plus the metal flooring" caused her to slip and fall. Plaintiff did not report the fall to Metra or seek medical care until the following day.

¶ 8 In his deposition testimony, Frakes testified that he has been a train conductor since 1992 and was assigned to work the train in question. As a conductor, one of Frakes's responsibilities

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was to set the "train up and get it ready for departure" by walking through all the train cars and checking the whole train to ensure that it was in operational condition. Frakes explained that if he found a "safety issue" with a train car that car would be removed from service. He stated that if water accumulated in the vestibule of a car he would consider that a safety issue and remove the car from service. He also stated that, when it is raining, rainwater is tracked into the train cars by passengers as they exit and board the train.

¶ 9 Frakes also stated that he walks through the train and looks for defects while the train is in service. He explained that if he observed water in a train car, other than the normal accumulation of rainwater tracked in by passengers, he would consider that a safety issue and the car would be removed from service. On the date of plaintiff's fall, Frakes did not notice water, aside from the natural accumulation of rainwater tracked in by passengers, in any of the train cars. He stated that the vestibules of the train are not heated or cooled, and that "no condensation from sweat" forms in the vestibules. Frakes did not see plaintiff fall, but acknowledged that, on the day after her fall, she told him that she slipped and fell on the train.

¶ 10 Metra filed a motion for summary judgment, attaching plaintiff's complaint, their answer to the complaint, and the deposition testimony of plaintiff and Frakes. Metra argued, in relevant part, that summary judgment was appropriate because under section 3-102(a) of the Tort Immunity Act it was not liable for plaintiff's injury where plaintiff failed to show that Metra had either actual or constructive notice of the alleged water drip that caused plaintiff's slip and fall.

¶ 11 Plaintiff filed a response to the motion for summary judgment, attaching her deposition testimony and Frakes's testimony. Plaintiff, relying on *Russell v. Village of Lake Villa*, 335 Ill App. 3d 990 (2002), argued that there was a genuine issue of material fact as to whether Metra

had actual or constructive notice where Frakes testified that he was aware that a unnatural accumulation of water in a train car posed a hazard to passengers. Plaintiff maintained that Frakes's testimony shows that Metra "effectively received constructive notice of the condition that caused [her] injury."

¶ 12 Metra replied to plaintiff's response arguing that she failed to show that Metra had notice of the alleged water leak and was therefore entitled to immunity under section 3-102(a) of the Tort Immunity Act. Metra also argued that *Russell* did not support plaintiff's argument where this court in *Russell* was not faced with the issue of determining whether the plaintiff had provided sufficient evidence that the defendant had either constructive or actual notice, but, rather, was distinguishing between an unnatural and natural accumulation of snow.

¶ 13 The circuit court granted summary judgment for Metra, finding that it was entitled to immunity under section 3-102(a) of the Tort Immunity Act because plaintiff failed to provide any evidence showing that Metra had actual or constructive notice of the condition that caused her slip and fall. Plaintiff appeals.

¶ 14 Plaintiff argues that the court erred in granting summary judgment to Metra because a genuine issue of material fact exists as to whether Metra had notice of the alleged water leak that caused her to slip and fall. For the reasons that follow, we find that summary judgment was properly granted.

¶ 15 Summary judgment is appropriate when the pleadings, depositions, and admissions, together with any affidavits, show that there is no genuine issue of material fact such that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005 (West 2012). A reviewing court will construe the record strictly against the movant and liberally in favor of the

nonmoving party. *Forsythe v. Clark USA Inc.*, 224 Ill. 2d 274, 280 (2007). Summary judgment should not be granted unless the moving party's right to judgment is clear and free from doubt.

Id. Summary judgment should be denied if there is a dispute as to a material fact or if the undisputed material facts could lead reasonable observers to divergent inferences. *Id.*

¶ 16 The elements of a cause of action based on common law negligence are the existence of a duty owed by the defendant to the plaintiff, a breach of that duty and an injury proximately caused by that breach. *Ward v. K Mart Corp.*, 136 Ill. 2d 132, 140 (1990). The Tort Immunity Act protects "local public entities and public employees from liability arising from the operation of government." 745 ILCS 10/1-101.1 (West 2012). This court has found that the Act applies to Metra. See *Del Real v. Northeast Illinois Regional Commuter R.R. Corp.*, 404 Ill. App. 3d 65, 71 (2010), citing *Smith v. Northeast Illinois Regional Commuter R.R. Corp.*, 210 Ill. App. 3d 223, 227 (1991).

¶ 17 Under section 3-102(a) of the Tort Immunity Act, Metra has a duty of ordinary care to maintain its property in a reasonably safe condition, but it "shall not be liable for injury unless it is proven that it has actual or constructive notice of the existence of such a condition that is not reasonably safe in reasonably adequate time prior to an injury to have taken measures to remedy or protect against such condition." 745 ILCS 10-3-102(a) (West 2012). Section 3-102(a) requires proof that Metra had timely notice of the specific defect that caused the plaintiff's injuries, not merely the condition of the area. *Brzinski v. Northeast Illinois Regional Commuter R.R. Corp.*, 384 Ill. App. 3d 202, 206 (2008). "The burden of proving notice is on the party charging notice." *Zameer v. City of Chicago*, 2013 IL App (1st) 120198, ¶ 14. Thus, in this case, to survive summary judgment, plaintiff needed to adduce evidence sufficient to support a jury

finding that Metra had either actual or constructive notice of the alleged water drip that caused her to fall in adequate time to have taken measures to repair it. *Id.* ¶ 16.

¶ 18 Plaintiff does not argue that Metra had actual notice of the alleged water leak. Rather, she solely contends that there is sufficient evidence to create a genuine issue as to whether Metra had constructive notice of the leak that caused her injuries. Constructive notice under section 3-102(a) of the Tort Immunity Act is established where the condition existed for such a length of time or is so conspicuous or plainly visible that the public entity should have known of its existence by exercising reasonable care and diligence. *Id.* ¶ 19.

¶ 19 Plaintiff, relying on *Russell v. Village of Lake Villa*, 335 Ill. App. 3d 990 (2002), argues that Frakes's testimony that he would consider an unnatural accumulation of water in a train car to be a safety issue shows that Metra was aware of the hazard posed by an accumulation of water in a train car. Contrary to plaintiff's argument, *Russell* is readily distinguishable from the case at bar.

¶ 20 In *Russell*, the primary issue was whether the ice upon which plaintiff slipped was a natural accumulation or an unnatural condition created by the melting of a nearby snow mound which was the result of the Village's snow plowing activities. *Russell*, 335 Ill. App. 3d at 993. The Village did not dispute that the ice caused the plaintiff to fall, but argued that the plaintiff presented an insufficient factual basis to establish a nexus between the snow mound and the ice in question. *Id.* The court in *Russell* noted that it was the plaintiff's burden to present facts indicating a "direct link" between the snow pile and the ice. *Id.* at 996. The court found that the plaintiff presented sufficient facts to indicate such a link where the ice surrounded the base of the snow pile, was contiguous with the pile, and appeared to have come from water that melted off

the pile. *Id.* Moreover, the Village's director of public works testified that the snow pile was not from a new snow event and it appeared to have melted and refrozen. *Id.* Importantly, the director also testified that he was aware of the dangers posed by the plowed snow melting and refreezing. *Id.* at 997.

¶ 21 After considering this evidence, the court in *Russell* agreed with the plaintiff that the circuit court erred in granting summary judgment for the Village because there existed a genuine issue of material fact as to whether the accumulation of ice was an unnatural condition caused by the melting snow pile. *Id.* at 997. In so finding, the court briefly noted that the Village had constructive notice of the alleged condition because the Village's director testified that he was aware of the dangers posed by the plowed snow melting and refreezing. *Id.* at 997.

¶ 22 Here, unlike *Russell*, the issue was not whether the "wetness" that caused plaintiff's fall was the result of a natural or unnatural accumulation of water. Rather, the issue here is whether Metra had notice of the alleged drip. In *Russell*, unlike in this case, there was evidence that the ice and melting snow had been present for several days. Here, there is no evidence that the alleged drip was present for a particular length of time. There is also no evidence that Metra may have created the alleged water drip by undertaking some activity, *e.g.* a repair of the vestibule, prior to plaintiff's fall and that Metra had awareness that such activity may create a water drip.

¶ 23 After examining the evidence presented, we find that plaintiff has failed to show that Metra had constructive notice of the alleged water leak and, thus, summary judgment for Metra was properly granted. In her complaint, plaintiff alleged she "slipped and fell on the metal grate plate on the entry way inside of the train vestibule," but did not identify the cause of her fall to be the alleged water drip and, thus, provided no evidence that the leak existed for a particular length

of time or was so conspicuous that Metra should have known about the alleged drip. Rather, without identifying the drip, plaintiff stated that Metra acted carelessly and negligently for eight different reasons, most of which revolved around Metra's failure to maintain the metal tread plate flooring inside the train in a reasonably safe condition.

¶ 24 In her answers to Metra's interrogatories, plaintiff stated that the cause of her fall was "the entryway to the train was extremely wet and there was no warning that the metal flooring was slippery when wet." Again, plaintiff did not identify the alleged water drip in the ceiling near the door or provide any evidence of its conspicuous nature such that Metra should have known about the drip. In her deposition testimony, although plaintiff stated that she saw dripping from the ceiling near the door area, she failed to provide any evidence that the drip was so conspicuous or that it had existed for such a length of time so as to put Metra on notice of the drip. The record shows that plaintiff herself was unable to identify the source of the drip, except that it was in the vicinity of "the door area." Accordingly, we conclude that plaintiff failed to meet her burden of providing facts to show that Metra had constructive notice of the condition that caused her injury. As no genuine issue of material fact exists regarding notice, summary judgment was properly granted for Metra. See *Id.* ¶ 24.

¶ 25 In reaching this conclusion, we are not persuaded by plaintiff's argument that the court erred in granting summary judgment because the court could "infer" from Frakes's testimony that "the temperature difference between the inside of the cars and the vestibules caused condensation to form on the ceiling and drip on the floor." The record shows that Frakes testified that the vestibules of the train are not heated or cooled, and that "no condensation from sweat" forms in

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the vestibules. This aside, there was no evidence presented to show that, on the date of plaintiff's fall, Frakes's knew or should have known of condensation in the vestibule.

¶ 26 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 27 Affirmed.