2017 IL App (1st) 160878-U

FIFTH DIVISION
March 3, 2017

No. 1-16-0878

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ELENA CONTRERAS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 15 L 804
	)	
HARVESTIME FOODS, INC., an Illinois	)	
Corporation, et al.,	)	Honorable
	)	Janet A. Brosnahan,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Gordon and Justice Lampkin concurred in the judgment.

O R D E R

¶ 1 *Held*: Grant of summary judgment in favor of defendant, Harvestime Foods, Inc., is affirmed where defendant did not owe a duty to protect plaintiff from the open and obvious danger posed by a wooden pallet protruding beneath a bin of watermelons inside defendant's grocery store.

¶ 2 Plaintiff, Elena Contreras, appeals from an order of the circuit court granting summary judgment to defendant, Harvestime Foods, Inc., in a negligence action arising from her trip and

fall over a wooden pallet that was protruding from beneath a bin of watermelons inside defendant's grocery store. On appeal, she contends that the court erred in granting summary judgment because a genuine issue of material fact exists as to whether defendant owed her a duty of care. We affirm.

¶ 3 According to plaintiff's complaint and deposition testimony, on September 27, 2013, she was shopping at defendant's grocery store at 2632 West Lawrence Avenue, and tripped and fell over a "large wooden pallet" that was protruding from under a large bin of watermelons. As a result of the fall, plaintiff fractured her left leg and wrist.

¶ 4 Plaintiff filed a common law negligence complaint naming Harvestime and Caliopes No. 2, Ltd., as defendants. In separate counts directed against each named party, she alleged negligence under a theory of premises liability. She alleged that Harvestime and Caliopes, as owner's of the grocery store, breached their duty of reasonable care to plaintiff by failing to: make a reasonable inspection of the premises to ensure the safety of the premises; warn plaintiff of the dangerous condition; exercise reasonable care to prevent the wooden pallet from protruding into the aisle; remove the pallet from the aisle despite having notice of the danger it posed; and otherwise remedy the unsafe condition posed by the protruding pallet.

¶ 5 Harvestime filed an answer to plaintiff's complaint admitting that it was the owner of the grocery store in question and denying her allegations of negligence. Harvestime also raised numerous affirmative defenses, including that plaintiff deliberately encountered an open and obvious condition which she knew, or in the exercise of ordinary due care should have known, was a dangerous condition. Caliopes did not answer plaintiff's complaint.

¶ 6 During discovery, Harvestime deposed plaintiff and she deposed Gustavo Martinez, a Harvestime employee. In her deposition testimony, plaintiff testified that she had been to

defendant's grocery store on two occasions prior to the date of her fall. She stated that when she entered the store on the date in question she saw that vegetables and fruits were stored in bins and that the bins are elevated "off the ground to some extent." Plaintiff stood by the bin of watermelons and waited for her daughter, who was grocery shopping. Plaintiff acknowledged that the bin of watermelons was on top of a wooden pallet and she is familiar with the fact that fruit in grocery stores is occasionally stored on top of wooden pallets so that it would not be on the floor. Plaintiff stated that she did not notice the wooden pallet below the watermelon bin, but "imagined that it was there because it's normal for it to be there." When confronted with a photograph of the bin (Exhibit 3), plaintiff acknowledged that it accurately depicted the bin and the wooden pallet as it appeared on the date in question. Plaintiff also identified on the photograph where, in relation to the bin, she was standing while she was waiting for her daughter.

¶ 7 When plaintiff saw her daughter, she started to walk over to her. As plaintiff tried to walk around the bin of watermelons, she tripped over the square wooden pallet that was protruding from below the rounded corner of the bin. She explained that, when she took a step, to go around the corner of the bin, her "shoe got stuck" and she fell. Plaintiff acknowledged that she was not paying attention where she stepped. She stated that there was nothing in the vicinity of the bin because it was late and the store was empty. Plaintiff also stated that she and her daughter were in a "big hurry." As a result of the fall, plaintiff fractured her left leg and wrist.

¶ 8 Martinez testified that he had been employed at defendant's grocery store for approximately eight years and that his responsibilities included filling the fruit and vegetable bins. He stated that the manager of the store was in charge of deciding how the bins are placed on the pallets. Martinez also stated that the fruit bins are "supposed to be lined up." When

confronted with photographs of the watermelon bin in question, Martinez acknowledged that the edge of the bin did not align with the edge of the wooden pallet below it. He also acknowledged that the rounded corner of the bin was adorned with a large red and white striped arrow, pointing down to the exposed corner of the wooden pallet on which the bin was situated. Martinez further acknowledged that, even though the bin and pallet were not aligned, the pallet was visible to people standing next to the bin and that there was enough room for a customer with a shopping cart to maneuver around the bin. He testified that, in his eight years with Harvestime, he has never heard of anyone complaining about the positioning of the fruit bins and pallets.

¶ 9 Martinez acknowledged that he was aware of two previous instances of a woman tripping and falling inside the store. In the first instance, a woman tripped over a box of cantaloupes. Martinez explained that the box of cantaloupes was not on a wooden pallet and that the woman was walking backwards while pulling her shopping cart. In the second instance, a woman who was also walking backwards tripped over the corner of the wooden pallet under the watermelon bin. Martinez stated that to his knowledge no one else has fallen by the watermelon bin.

¶ 10 Defendant filed a motion for summary judgment, attaching plaintiff's deposition testimony. Defendant argued that summary judgment was appropriate because it did not owe plaintiff a duty to protect her from the open and obvious dangers posed by the raised bin of watermelons.

¶ 11 Plaintiff filed a response to the motion for summary judgment, attaching photographs of the watermelon bin and Martinez's deposition testimony. Plaintiff argued that defendant owed her a duty of reasonable care when placing the fruit bins on top of the wooden pallets. Specifically, plaintiff alleged that defendant failed to properly align the fruit bins on top of the wooden pallets, which protruded from underneath the bins and created a dangerous tripping

hazard for customers. Plaintiff also argued that the wooden pallet did not present an open and obvious danger because it was located on the floor of the store and "out of the line of sight of passing customers."

¶ 12 Defendant replied to plaintiff's response, arguing that the wooden pallet was open and obvious where it was readily visible inside the store. Defendant thus maintained that it did not owe a duty to protect plaintiff from the dangers posed by the pallet where a reasonable person in her position would have noticed the pallet and appreciated the inherent dangers of walking too close to it.

¶ 13 Following argument on defendant's motion, the circuit court granted summary judgment for defendant. Plaintiff appeals.

¶ 14 Plaintiff contends that the circuit court erred in granting summary judgment to defendant because a genuine issue of material fact exists as to whether defendant owed a duty of reasonable care to protect her from the dangers posed by the protruding wooden pallet. She argues that defendant breached its duty when it failed to properly align the fruit bin with the wooden pallet below it. In setting forth this argument, plaintiff alleges that a photograph showing the bin and the wooden pallet, relied on by the circuit court in granting the motion, was designed to mislead the fact finder because it was not taken from plaintiff's vantage point immediately prior to her trip and fall. Plaintiff argues that because she was standing next to the bin, and not walking up to it, she was unable to appreciate the danger of the wood-pallet corners protruding from beneath the bin.

¶ 15 We initially note that the photograph in question, taken a few feet away from the watermelon bin, is by no means misleading where it depicts the bins and the wooden pallets in their entirety. Although not taken from plaintiff's vantage point, the photograph, as

acknowledged by plaintiff in her deposition testimony, accurately depicted the bin and the wooden pallet as they appeared on the date of her fall. See *Lambert v. Coonrod*, 2012 IL App (4th) 110518, ¶ 29, quoting *People v. Martinez*, 371 Ill. App. 3d 363, 380 (2007) ("In general photographs are admissible into evidence if they are identified by a witness who has personal knowledge of the subject matter depicted in the photographs and the witness testifies that the photographs are a fair and accurate representation of the subject matter at the relevant time").

¶ 16 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.*

¶ 17 The elements of a cause of action based on common law negligence are: (1) the existence of a duty owed by the defendant to the plaintiff; (2) a breach of that duty; and (3) an injury proximately caused by that breach. *Ward v. K Mart Corp.*, 136 Ill. 2d 132, 140 (1990). "Unless a duty is owed, there is no negligence." *Buchaklian v. Lake County Family Young Men's Christian Ass'n*, 314 Ill. App. 3d 195, 199 (2000), quoting *American National Bank & Trust Co. v. National Advertising Co.*, 149 Ill. 2d 14, 26 (1992). The existence of a duty is a question of law for the trial court to decide. *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill 2d. 107, 114 (1995). If the plaintiff fails to establish an element of the cause of action for negligence, including a duty, summary judgment for the defendant is proper. *Espinoza*, 165 Ill. 2d at 114.

¶ 18 Our supreme court has identified four factors that are relevant to determining the existence of a duty: (1) the reasonable foreseeability of injury; (2) the reasonable likelihood of injury; (3) the magnitude of the burden on the defendant in guarding against the injury; and (4) the consequences of placing that burden on the defendant. See *LaFever v. Kemlite Co. a Division of Dyrotech Industries, Inc.*, 185 Ill. 2d 380, 388-89 (1998).

¶ 19 Where, as here, plaintiff was injured inside defendant's grocery store by a condition on the property, the duty owed is determined by analyzing it under section 343 of the Restatement (Second) of Torts. See *LaFever*, 185 Ill. 2d at 389-90 (adopting section 343 of the Restatement). Section 343 states, in pertinent part:

> "A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he:
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger." Restatement (Second) of Torts § 343 (1965).

¶ 20 Notwithstanding the duty set forth in section 343, defendant maintains that the protruding wood-pallet hazard encountered by plaintiff was "open and obvious" and therefore negated any duty that defendant owed to plaintiff. Possessors of land are not ordinarily required to foresee and protect against injuries from potentially dangerous conditions that are open and obvious. *Bucheleres v. Chicago Park District*, 171 Ill. 2d 435, 447-48 (1996). This is because the law generally assumes that persons who encounter such conditions will take care to avoid any danger

inherent therein. *Bucheleres*, 171 Ill. 2d at 448. In *Ward*, our supreme court noted: "Certainly a condition may be so blatantly obvious and in such [a] position on the defendant's premises that he could not reasonably be expected to anticipate that people will fail to protect themselves from any danger posed by the condition." *Ward*, 136 Ill. 2d at 148. The *Ward* court also adopted section 343A of the Restatement, which limits the liability of possessors of land for open and obvious dangers. *Id.* at 149-51. Section 343A states, in pertinent part:

> "A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." Restatement (Second) of Torts § 343A (1965).

¶ 21 The parties disagree as to whether plaintiff's injuries resulted from an open and obvious condition. For a condition to be deemed open and obvious, an invitee must reasonably be expected to discover it and protect herself against it. *Buchaklian*, 314 Ill. App. 3d at 201-02, citing *Deibert v. Bauer Brothers Construction Co., Inc.*, 141 Ill. 2d 430, 434-35 (1990) (adopting definition of "obvious" used in the Restatement (Second) of Torts § 343A, Comment *b*, at 219 (1965)). A condition presents an open and obvious danger only where "both the condition and the risk are apparent to and would be appreciated by a reasonable person in the plaintiff's position exercising ordinary perception, intelligence, and judgment." *Deibert*, 141 Ill. 2d at 435. The issue of whether a condition is open and obvious is determined by the objective knowledge of a reasonable person, not the plaintiff's subjective knowledge. *Simmons v. American Drug Stores, Inc.*, 329 Ill. App. 3d 38, 43 (2002). Whether a condition presents an open and obvious danger is a question of fact. *Buchaklian*, 314 Ill. App. 3d at 202.

¶ 22 Plaintiff contends that the trial court erred in granting summary judgment for defendant on the basis that the wooden pallet was open and obvious.

¶ 23 After examining the record before us, we find that summary judgment was properly granted because, as a matter of law, defendant did not owe a duty to protect plaintiff from the open and obvious danger posed by the protruding wooden pallet which could have been readily discovered and avoided by plaintiff had she been paying attention while walking. The record shows that the watermelon bin was large and conspicuously placed in defendant's store next to similar large bins of fruit. Plaintiff testified that, upon entering the store, she saw that the fruits and vegetables were stored in bins, which were elevated off the ground to some extent. Moreover, the rounded-corner of the bin was adorned with a large red and white striped arrow, pointing down to the exposed square-corner of the wooden pallet on which the bin was situated.

¶ 24 Plaintiff stated that there was nothing in the vicinity of the bin because it was late and the store was empty. As such, there was nothing blocking plaintiff's view of the bin or preventing her from walking around the bin. Martinez testified that, even with the wooden pallet protruding from underneath the bin, there was enough room around the fruit bins for a customer, with a shopping cart, to maneuver around the store. He also testified, and the photographs show, that the wooden pallet was visible to people standing near the fruit bins. This record supports the conclusion that the danger posed by the wooden pallet was open and obvious which plaintiff could have, through the exercise of ordinary perception and judgment, discovered and avoided.

¶ 25 In reaching this conclusion, we are not persuaded by plaintiff's reliance on *Simmons v. American Drug Stores, Inc.*, 329 Ill. App. 3d 38 (2002). In *Simmons*, this court reversed the trial court's grant of summary judgment for the defendant, a grocery store, after finding that a genuine issue of material fact existed as to whether the "cartnapper" barrier, which caused plaintiff's fall,

presented an open and obvious danger. *Simmons*, 329 Ill. App. 3d at 44. In doing so, we pointed out that, for a condition to present an open and obvious danger, both the condition and the risk posed by the condition must be apparent and would be appreciated by a reasonable person. *Id.* at 43-4. In *Simmons*, we found that a genuine issue of material fact existed as to whether a reasonable person in the plaintiff's position would likewise have failed to appreciate the risk posed by the narrow cartbarrier. *Id.* Here, unlike *Simmons*, there is no question that the risk of tripping over an exposed wooden pallet is apparent and would be appreciated by a reasonable person in plaintiff's position.

¶ 26 We are likewise not persuaded by plaintiff's reliance on *Buchaklian*. Here, unlike *Buchaklian*, plaintiff did not trip over a small defect in a black mat which was "difficult to discover because of its size, the lack of significant color contrast between the defect and the surrounding mat, or merely the short time that a person has in which to discover the defect as he or she takes a few steps toward the mat." *Buchaklian*, 314 Ill. App. 3d at 202. Rather, as mentioned, the wooden pallet and fruit bin were conspicuously placed in defendant's store and readily visible. The corner of the bin was adorned with a red and white striped arrow, pointing to the exposed wooden pallet and plaintiff testified that, upon entering the store, it is apparent that the fruits and vegetables are stored in bins, which are elevated off the ground to some extent.

¶ 27 In the alternative, plaintiff contends that, even if the danger posed by the wooden pallet was open and obvious, the trial court nevertheless erred in granting summary judgment for defendant because defendant should have anticipated that plaintiff would become distracted while shopping.

¶ 28 The existence of an open and obvious condition is not a *per se* bar to the finding of a legal duty. See *Bucheleres*, 171 Ill. 2d at 449. Our supreme court has acknowledged an exception

for "forgetfulness or distraction" to the general rule of no liability for an open and obvious condition. *Id.* at 451. As explained in the committee comments appended to section 343A (Restatement (Second) of Torts § 343A, Comment *f*, at 220 (1965)), the distraction exception is based on determining whether the possessor of land should "anticipate the harm" despite the obviousness of the condition. *Ward*, 136 Ill. 2d at 149-50. The possessor of the premises should anticipate harm to an invitee when the possessor "has reason to expect that the invitee's attention may be distracted, so that [she] will not discover what is obvious, or will forget what [she] has discovered, or fail to protect [herself] against it." Restatement (Second) of Torts § 343A, Comment *f*, at 220 (1965)); *Ward*, 136 Ill. 2d at 149-50.

¶ 29 In support of her argument, plaintiff relies on an illustration for Comment *f* to section 343A which provides an example of when a defendant owes a duty to an invitee even if the condition is deemed open and obvious:

> "The A Department Store has a weighing scale protruding into one of its aisles, which is visible and quite obvious to anyone who looks. Behind and about the scale it displays good to attract customers. B, a customer, passing through the aisle, is intent on looking at the displayed goods. B does not discover the scale, stumbles over it, and is injured. A is subject to liability to B." Restatement (Second) of Torts § 343A, Comment *f*, at 220 (1965)).

¶ 30 Plaintiff argues that this example supports her position that, notwithstanding the open and obvious danger posed by the wooden pallet, defendant owed her a duty because it should have anticipated plaintiff's harm. Specifically, plaintiff claims that her attention was focused on the fruit bins at her eye-level, not the wooden pallet on the floor.

¶ 31 In *Ward*, our supreme court considered the distraction exception, and noted that the comments and illustrations to section 343A support the position that "while [a] defendant cannot reasonably be expected to anticipate injuries which would ordinarily only result if the customer were negligent, [a] defendant can be expected under certain circumstances to anticipate that customers even in the general exercise of reasonable care will be distracted or momentarily forgetful." *Ward*, 136 Ill. 2d at 155. The *Ward* court ultimately found for the plaintiff, a customer who was injured in the defendant's store when he collided with a concrete post while exiting the store and carrying merchandise which obscured his view of the post. *Id.* at 153-54. In so finding, the court in *Ward* explained that it was reasonably foreseeable that a customer would collide with the post where the post was located immediately outside of the entrance to the Home Center section of the defendant's store and the defendant had every reason to expect that customers would carry bulky items through that door, become distracted and fail to see the post. *Id.*

¶ 32 Here, we find no proof of a foreseeable distraction that would place a duty of care on defendant. Plaintiff did not present any evidence that she was somehow distracted by something in defendant's store and, as a result of the distraction, failed to discover the presence of the wooden pallet. The record also does not disclose that defendant had any reason to expect that plaintiff would become distracted by something in the store and fail to see the pallet. Contrary to plaintiff's argument that she was distracted by the fruit bins at her eye-level, the record shows that plaintiff testified that she was in a "big hurry" and was not paying attention as she walked. Under these circumstances, defendant had no reason to expect that plaintiff may become distracted and fail to discover or protect herself from the danger posed by the wooden pallet. See *Ward*, 136 Ill. 2d at 155 (a defendant cannot reasonably be expected to anticipate injuries which would ordinarily only result if the customer were negligent).

¶ 33 In reaching this conclusion, we are not persuaded by plaintiff's argument that defendant should have anticipated plaintiff's harm given that there were two prior instances of women tripping and falling in the fruit section of the store. We note that in both of these instances the women were walking backwards in defendant's store and were not distracted by a condition inside the store such that defendant had reason to expect that others would become similarly distracted.

¶ 34 We are likewise not persuaded by plaintiff's reliance on *Deibert*. Here, unlike *Deibert*, plaintiff was not distracted by the activities of defendant's employees which caused her to fear for her well-being and thus not notice the protruding wooden pallet. See *Deibert*, 141 Ill. 2d at 439 (the defendant had reason to anticipate that a construction worker, exiting an enclosed bathroom at a construction site, would be momentarily distracted by the fear of possible falling debris from a balcony overhead, and stumble in a rut he would have otherwise noticed and avoided).

¶ 35 Accordingly, given the open and obvious danger posed by the wooden pallet, and that defendant should not have reasonably anticipated and foreseen the injury to plaintiff, we concluded, as a matter of law, that defendant did not owe a duty to plaintiff. Therefore, the trial court did not err in granting summary judgment for defendant.

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

¶ 37 Affirmed.