2018 IL App (1st) 163063-U

SIXTH DIVISION
FEBRUARY 13, 2018

No. 1-16-3063

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

SYLVIA ROUVAS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	
	)	
THE HARLEM IRVING COMPANIES, INC.,	)	No. 14 L 4927
individually and d/b/a HARLEM IRVING PLAZA;	)	
FOREST HARLEM PROPERTIES LIMITED	)	
PARTNERSHIP; and RETAIL PROPERTY SERVICES	)	
COMPANY, LLC, f/k/a PROPERTY SERVICES	)	
COMPANY, LLC,	)	Honorable
	)	Daniel T. Gillespie,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Hoffman and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted summary judgment in favor of the defendants because there was no triable issue of fact as to whether the defendants had actual or constructive notice of the spilled substance that allegedly caused the plaintiff's injury.

¶ 2 The plaintiff, Sylvia Rouvas, seeks reversal of an order of the circuit court of Cook County granting summary judgment and dismissing her slip-and-fall negligence claim against the defendants, The Harlem Irving Companies, Inc., individually and d/b/a Harlem Irving Plaza, Forest Harlem Properties Limited Partnership, and Retail Property Services Company, f/k/a Property Services Company, LLC (together, the defendants). On appeal, the plaintiff contends that the court erred in granting summary judgment because a genuine issue of material fact exists as to whether the defendants had notice of the substance that allegedly caused her fall. She also argues that the trial court erred because it granted the defendants' motion when her counsel was not present. For the following reasons, we affirm the judgment of the circuit court.

¶ 3 According to the plaintiff's complaint and deposition testimony, on May 21, 2012, she entered a mall owned and operated by the defendants. As she passed by the mall's customer service desk, she slipped and fell on a substance on the floor, which she described as "pink ice cream." The plaintiff contends that she suffered numerous resulting injuries.

¶ 4 On May 6, 2014, the plaintiff filed a common law negligence complaint naming The Harlem Irving Companies, Inc., individually, and d/b/a Harlem Irving Plaza, as the defendant. She later amended her complaint to include the two additional defendants. She alleged that the defendants negligently failed to, *inter alia*, maintain and inspect the premises, remove the slippery substance from the premises, or warn the plaintiff of the slippery substance. The defendants' answer admitted that they were responsible for owning, managing, and maintaining the mall, but denied all allegations of negligence.

¶ 5 In her deposition, the plaintiff testified that she was pushing her daughter's stroller when she slipped and fell near the mall's customer service desk. The plaintiff described the mall as

"busy" and stated that people were "coming and going everywhere" just before she fell on pink ice cream that was on the floor. She did not see anyone drop or spill any ice cream before the fall. She described the ice cream as being liquid and agreed that it was "melted." The plaintiff recalled that after she fell, she yelled at the women at the mall's customer service desk for not coming to her aid. A mall security guard arrived and told her to "calm down." She also recalled that a "cleaning crew" arrived and that a female person cleaned up the ice cream. The plaintiff left the mall in an ambulance.

¶ 6 The plaintiff deposed two of the defendants' employees who worked at the mall on the date of the plaintiff's incident: Carmen Brazy, a customer service associate, and Debra Day, a housekeeping employee. Brazy testified that she has been a customer service associate for over eight years, and explained that on the job she is usually sitting at the customer service desk. She stated that if she notices that something has been spilled on the floor, she calls for housekeeping immediately. She stated that on an average day, she sees a housekeeping employee walk past her customer service desk every ten minutes. Brazy testified that, on the date of the plaintiff's incident, she did not see anyone spill ice cream on the floor. She did not see anyone fall, and she explained that she was facing in a different direction from where the plaintiff fell. Brazy became aware that someone was injured because of a "commotion" in her area. She saw security personnel arrive to assist someone, and then saw housekeeping arrive.

¶ 7 Debra Day testified that she has been employed by the defendants for 24 years in the housekeeping department, and that her job includes maintaining the floors of the mall. She explained that housekeeping employees are assigned to cover certain areas of the mall, which

they walk continuously to check that the floors are clean. Day explained that she walks her area in a circular pattern, which usually takes her between 10 and 15 minutes to complete.

¶ 8 Day testified that, on the date of the incident, she was the only housekeeping employee working the "central" area of the mall, which includes the area where the plaintiff fell. Day stated that she was walking towards the customer service area when she was informed that someone had just fallen nearby. She saw a pink substance on the floor, which she described as being similar in color to a smoothie sold in the mall. She stated that nothing else sold in the mall was similar to what she saw. Day described the spill as "a couple inches wide," and testified that she used a rag to wipe up the spill. Day recalled that, when she passed by the same area about 10 minutes earlier, she did not see the spilled substance on the floor.

¶ 9 The defendants filed a motion for summary judgment, attaching the deposition testimony of the plaintiff, Brazy, and Day. The defendants argued, in relevant part, that summary judgment was appropriate because the plaintiff failed to show that the defendants had actual or constructive notice of the spilled substance that caused the plaintiff's slip and fall. The plaintiff's response to the motion for summary judgment attached photographs of the area where plaintiff fell, an injury report, her deposition transcript, and Day's deposition transcript. The plaintiff argued that there was a genuine issue of material fact as to whether the defendants had constructive notice of the spilled ice cream.

¶ 10 The record shows that the plaintiff's counsel did not arrive on time to the hearing on the defendants' motion for summary judgment. The circuit court proceeded to grant the motion, without the plaintiff's counsel present. The court's written order of July 21, 2016, stated that it granted summary judgment because "there is no actual notice and no constructive notice."

¶ 11 The plaintiff filed a motion to vacate and reconsider, in which she argued that it was improper to grant summary judgment in her counsel's absence, and otherwise argued that an issue of material fact existed as to the defendants' actual or constructive notice. On October 24, 2016, the court denied plaintiff's motion. On November 17, 2016, the plaintiff filed a notice of appeal which specifies October 24, 2016 as the "Date of the judgment/order being appealed." Her notice of appeal does not also recite the July 2016 date of the underlying summary judgment order, but elsewhere it states that she seeks "Reversal of summary judgment."

¶ 12 ANALYSIS

¶ 13 We first note that, although the plaintiff's notice of appeal does not explicitly reference the July 2016 order that granted summary judgment, it otherwise seeks "reversal of summary judgment," and her appellate brief challenges the summary judgment order.[1] "The notice is jurisdictional, but where a defect in the notice is one of form rather than substance, the appellate court is not necessarily deprived of jurisdiction." *Korogluyan v. Chicago Title and Trust Co.*, 213 Ill. App. 3d 622, 627 (1991). Our court has found that a notice of appeal citing an order denying a motion for reconsideration does *not* preclude our court from reviewing the underlying summary judgment order, if the appellee was put on notice that the appellant challenged the underlying order. *Id.* (although defendants' notice of appeal specified only the order denying the motion for reconsideration, our court could review the summary judgment order where "plaintiff had adequate notice that the defendants were appealing the order granting summary judgment."). Thus, the content of the plaintiff's notice of appeal does not bar our review of the summary judgment order.

[1] The plaintiff's brief does not make any specific arguments directed to the denial of the motion to reconsider but only challenges the initial entry of summary judgment.

¶ 14 The plaintiff's brief raises two challenges to the trial court's entry of summary judgment: (1) that there was an issue of fact as to whether the defendants had notice of the ice cream on which she allegedly slipped; and (2) that the circuit court should not have granted summary judgment in the absence of the plaintiff's counsel. Before turning to the merits, we note that the plaintiff's brief fails to comply with Illinois Supreme Court Rules 341(h)(7) (eff. Jan. 1, 2016) and 342 (eff. Jan. 1, 2005). Rule 341(h)(7) provides that all appellate briefs should contain an argument "which shall contain the contentions of the appellant and reasons therefor, with citation of the authorities and the pages of the record relied on." Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016). Under Rule 342(a), an appellant's brief must include an appendix, which includes: "[T]he judgment appealed from ***, any pleadings or other materials from the record that are the basis of the appeal or pertinent to it, the notice of appeal, and a complete table of contents, with page references, of the record on appeal." Ill. S. Ct. R. 342(a) (eff. Jan. 1, 2005).

¶ 15 We stress that "[t]he rules of procedure concerning appellate briefs are rules and not mere suggestions." *Niewold v. Fry*, 306 Ill. App. 3d 735, 737 (1999). A brief that lacks any substantial conformity to the pertinent supreme court rules may justifiably be stricken. *Tannenbaum v. Lincoln National Bank*, 143 Ill. App. 3d 572, 574 (1986).

¶ 16 Here, the plaintiff's brief does not comply with Rule 341(h)(7). Its argument section does not cite to the record when making factual assertions, nor does it cite to any binding Illinois precedent. See *Gandy v. Kimbrough*, 406 Ill. App. 3d 867, 875 (2010) ("[T]his court is not a depository in which the burden of argument and research may be dumped."). Her primary argument—as to whether the defendants had notice—cites decisions from the Seventh Circuit Court of Appeals, which are not binding on this court. See *City of Chicago v. Groffman*, 68 Ill.

2d 112, 118 (1977) ("The general rule is that decisions of United States district and circuit courts are not binding upon Illinois courts."). Her second argument—that summary judgment should not have been entered in the absence of her counsel—contains *no* legal citations whatsoever. Moreover, her brief does not include the appendix required under Rule 342, which alone would justify dismissal. See *Perez v. Chicago Park Dist.*, 2016 IL App (1st) 153101, ¶ 8.

¶ 17 Our court may choose to reach the merits despite noncompliance with the Supreme Court Rules, if this court understands the issue that the appellant seeks to raise and where the opposing party has provided a cogent brief. See *Twardowski v. Holiday Hospitality Franchising, Inc.*, 321 Ill. App. 3d 509, 510–11 (2001). On that basis, we elect to reach the plaintiff's first argument, regarding the defendants' actual or constructive notice. However, we conclude that the plaintiff forfeited her second argument, regarding the absence of her attorney when the trial court granted the motion for summary judgment. The plaintiff cites no authority in support of this conclusory argument. See *Hall v. Naper Gold Hospitality LLC*, 2012 IL App (2d) 111151, ¶ 13 (finding that plaintiff's argument was forfeited where the "entire argument is one conclusory paragraph unsupported by any citations to authority").

¶ 18 Thus, we limit our review to the plaintiff's argument that summary judgment should not have been granted, due to a genuine issue of material fact as to whether the defendants had notice of the substance that caused her to slip and fall. The plaintiff argues that because her slip occurred near the customer service desk, and because there was "heavy traffic" in that area, it is reasonable to infer that "the existence of the ice cream [on the floor] was known or should have been known by" the defendants' employees. She also claims that her testimony was "evidence that the ice cream was fully melted" and that "common sense dictates that it takes a period of

time for ice cream to melt." Thus, she asserts it may be inferred that the ice cream was present for sufficient time, such that it should have been noticed by the defendants' employees, creating an issue of fact as to "constructive notice of the spillage."

¶ 19 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 2016). 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.* We review a grant of summary judgment *de novo*. *Id.*

¶ 20 "To recover on a negligence claim, the plaintiff must establish the existence of a duty owed by the defendant, a breach of that duty, and an injury proximately resulting from that breach. [Citation.] If the plaintiff cannot establish an element of her cause of action, summary judgment for the defendant is proper. [Citation.]" *Pavlik v. Wal-Mart Stores, Inc.*, 323 Ill. App. 3d 1060, 1063 (2001). "A defendant owes a business invitee on his premises a duty to exercise ordinary care in maintaining the premises in a reasonably safe condition." (Internal quotation marks omitted.) *Newsom-Bogan v. Wendy's Old Fashioned Hamburgers of New York, Inc.*, 2011 IL App (1st) 092860, ¶16. "A business owner breaches its duty to an invitee who slips on a foreign substance if: (1) the substance was placed there by the negligence of the proprietor; (2) its servant knew of its presence; or (3) the substance was there a sufficient length of time so that,

in the exercise of ordinary care, its presence[] should have been discovered, *i.e.*, the proprietor had constructive notice of the substance." *Id.* ¶ 15.

¶ 21 "Constructive notice exists if the substance was there for a long enough time period that the exercise of ordinary care would have made it known. [Citation.] Liability cannot be based on guess, speculation, or conjecture as to the cause of the injury. [Citation.] Proximate cause can only be established if it is reasonably certain the defendant's acts caused the plaintiff's injury." *Id.* ¶ 16.

¶ 22 After examining the record before us, we find that summary judgment was properly granted because the plaintiff failed to identify any evidence to create an issue of fact that the defendants had actual or constructive notice. First, there is no evidence that the defendants had actual notice of the spilled substance before the plaintiff's injury. Although the plaintiff testified that she slipped near the customer service desk, she did not present any evidence to indicate that any employees actually witnessed or were aware of any spilled substance prior to her fall. Neither of the defendants' employees deposed by the plaintiff testified to any prior knowledge of a spilled substance at the site of the fall. Brazy testified that she was seated at the customer service desk, facing in an entirely different direction from the incident. Day, the housekeeping employee, testified that she was in the same area where plaintiff fell 10 minutes before it occurred but did not see any spilled substance on the floor. In short, there is no evidence that the defendants had actual notice of any spilled substance at the site.

¶ 23 Likewise, the record does not evidence an issue of fact as to whether the defendants had constructive notice of the substance. "[W]here the plaintiff alleges constructive notice, *** it is incumbent upon the plaintiff to establish that the foreign substance was on the floor long enough

to constitute constructive notice to the proprietor." *Hayes v. Bailey*, 80 Ill. App. 3d 1027, 1030 (1980). To avoid summary judgment, the plaintiff had to identify some evidence that the substance was present for a sufficient length of time, such that it would have been discovered by the defendants' employees in the exercise of ordinary care. The plaintiff suggests that, since she testified that she slipped on liquid ice cream, we must infer that it remained on the floor long enough to melt. However, this argument relies on speculation or conjecture, which does not establish constructive notice. As noted by the defendants' brief, there is no basis to assume that the substance (whether ice cream not) was frozen when spilled and then melted on the floor; it is just as possible that the substance was already in liquid form when it was spilled. "The existence of one fact cannot be inferred when a contrary fact can be inferred with equal certainty from the same set of facts." *Richardson v. Bond Drug Co. of Illinois*, 387 Ill. App. 881, 886 (2009).

¶ 24 Further, the plaintiff cites no evidence to contradict Day's testimony that, approximately 10 minutes before Day cleaned up the spill, she walked through the same area and did not notice any spilled substance. This indicates that the substance was on the floor for no more than 10 minutes before the plaintiff slipped on it. Our court has previously held that such a short length of time is insufficient to establish constructive notice. See *Hresil v. Sears, Roebuck & Company*, 82 Ill. App. 3d 1000 (1982) (holding that human spit on the floor for 10 minutes was not a sufficient length of time to hold that the store had constructive notice). Thus, we agree with the trial court that there was no issue of material fact regarding actual or constructive notice, warranting summary judgment in the defendants' favor.

¶ 25 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 26 Affirmed.