2018 IL App (1st) 170360-U
No. 1-17-0360
Order filed March 6, 2018

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

MARGARET SANTI, Plaintiff-Appellant, v. VILLAGE OF WINNETKA, a Municipal Corporation, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 14 L 9930 The Honorable James N. O'Hara, Judge, presiding.

JUSTICE HYMAN delivered the judgment of the court.
Presiding Justice Neville and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in granting the motion for summary judgment; testimony regarding the visibility of the defect that caused plaintiff's fall creates a question of fact as to whether the defect was open and obvious.

¶ 2 Plaintiff Margaret Santi tripped on the upper deck of the Village of Winnetka's Hubbard Woods Parking Garage and sued the Village for negligence. The Village moved for summary judgment, which the trial court granted, finding the defect on the surface of the parking garage

where Santi tripped and injured herself was "open and obvious" as a matter of law and neither the distraction theory nor the deliberate encounter exceptions applied. Santi argues that an issue of material fact exists regarding whether the defect was "open and obvious." We agree and reverse the grant of summary judgment.

¶ 3 Background

¶ 4 According to Santi's deposition testimony, before September 23, 2013, she worked the evening shift at a Winnetka restaurant and that day was her first daytime shift. Her boss told her to park at the Village Garage, which she had never done.

¶ 5 After parking on the upper level, Santi briskly walked while looking ahead to locate the Village Garage exit. Suddenly, she tripped and injured herself in a defect measuring 12-inches long by 3-inches wide by 6-inches. Santi did not see the defect before falling. She stated it was along the seam of a long strip that reached across the garage floor.

¶ 6 Santi returned to the Village Garage about a week later and photographed the spot where she fell. At that time, she saw the defect went through the garage floor. She could see that the seam was not flush with the concrete floor, and there was a "kind of" bump near the defect.

¶ 7 Stephen Auth, the Village's Superintendent of Operations, Public Works, testified he was unaware of the defect before this incident, even though he generally performed an informal inspection of the garage three to five times a week. Auth also identified a February 2013 Condition Survey of Parking Garage prepared for the Village by a private engineering firm. The report does not specifically mention the seam or the defect, but states: "Site Observations: Concrete Structure - 3.b. Cracks, spalls, and delaminations exist on the top surface of the elevated deck generally coinciding with the locations of the flange-to-flange connections." In the section entitled "Conclusions and Recommendations," the report states: "Spalls (or open voids)

in the driving and walking surfaces should be repaired immediately to prevent possible tripping hazards." The Village did not make repairs until after Santi's incident.

¶ 8 The Village moved for summary judgment, arguing two points: (i) it could not be liable for Santi's injury under §3-102 of the Tort Immunity Act because the Village had no "actual or constructive notice of the [defect] in its parking lot facility;" and (ii) "there is no question that the alleged condition in this case was an open and obvious condition of property as a matter of law."

¶ 9 The trial court dismissed Santi's negligence claim, finding the defect was "open and obvious" as a matter of law and no exceptions applied. Santi filed a motion to reconsider arguing that had the defect been open and obvious, as the Village contended, inspections by Village employees should have encountered it. Santi maintained that the Village argued diametrically opposed positions; that is, the defect was open and obvious but the Village's employees who were there on a daily basis never observed it, which raised a material question of fact "and/or there [was] more than one inference that can be made from the evidence." The trial court denied the motion to reconsider**.**

¶ 10 Standard of Review

¶ 11 A court will grant summary judgment where the pleadings, depositions, admissions, and affidavits on file, viewed in the light most favorable to the nonmoving party, reveal the moving party has demonstrated a right to judgment as a matter of law on the basis of material facts as to which there is no genuine dispute. *Pepper Construction Co. v. Palmolive Tower Condominiums, LLC*, 2016 IL App (1st) 142754, ¶ 63. The party opposing summary judgment must present some factual basis that would arguably entitle it to judgment. *Chicago Transit Authority v. Clear Channel Outdoor, Inc.*, 366 Ill. App. 3d 315, 324 (2006). "The purpose of summary judgment is

not to answer a question of fact, but to determine whether one exists." *Ballog v. City of Chicago*, 2012 IL App (1st) 112429, ¶ 18 (citing *Garcia v. Wooton Construction, Ltd*., 387 Ill. App. 3d 497, 504 (2008)). This court reviews a summary judgment grant *de novo*. *Pepper Construction Co., LLC*, 2016 IL App (1st) 142754, ¶ 63. We may affirm the trial court's ruling on any basis appearing in the record. *Burns v. City of Chicago*, 2016 IL App (1st) 151925, ¶ 15.

¶ 12 Analysis

¶ 13 Santi argues that the trial court erred because the Village's proclaimed ignorance of the defect creates an issue of fact: was the defect open and obvious? Alternatively, Santi contends that either or both the distraction and the deliberate encounter exceptions to the open and obvious rule apply.

¶ 14 Illinois has adopted the rules set forth in sections 343 and 343A of the Restatement (Second) of Torts. *Deibert v. Bauer Brothers Construction Company, Inc.*, 141 Ill. 2d 430, 434 (1990). Section 343 provides that a possessor of land is not liable to invitees for physical harm caused by any "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(1), at 218 (1965). "Obvious" means both the condition and risk "are apparent to and would be recognized by" a reasonable person in the position of the visitor, "exercising ordinary, perception, intelligence, and judgment." Restatement (Second) of Torts § 343A cmt. b, at 219 (1965). The determination of whether the condition is open and obvious depends on the objective knowledge of a reasonable person confronted with the same condition, not the plaintiff's subjective knowledge. *Sandoval v. City of Chicago*, 357 Ill. App. 3d 1023, 1028 (2005).

¶ 15 The "open and obvious" rule precludes liability for injuries sustained on a defendant's property when the nature of the condition is so easily observable that it creates caution. *Burns*, 2016 IL App (1st) 151925, ¶¶ 44-45. The law expects people to avoid open and obvious risks. *Id.* ¶ *45.* Whether a dangerous condition constitutes an open and obvious condition presents a question of fact, unless the parties do not dispute the physical nature of the condition, in which case a question of law is presented. *Bruns*, 2014 IL 119998 ¶ 18. See *Wilfong v. L.J. Dodd Construction*, 401 Ill. App. 3d 1044, 1053 (2010) (citing *Belluomini v. Stratford Green Condominium Ass'n*, 346 Ill. App. 3d 687, 692-93 (2004)) ("[W]here there is a dispute about the condition's physical nature, *such as its visibility*, the question of whether a condition is open and obvious is factual.") (Emphasis added).

¶ 16 Santi argues the defect cannot be open and obvious as a matter of law—Winnetka had employees in the garage daily, including an employee whose job it was to inspect the garage, Auth, and Auth testified that he performed an inspection of the garage three to five times a week, Yet, neither Auth nor any Village employee observed the defect. The February 2013 Condition Survey of Parking Garage did not specifically mention the defect at issue, but would have alerted the Village had there been something amiss.

¶ 17 Santi argues that Village's proclaimed unawareness of the defect creates an issue of fact as to its classification as "open and obvious." We apply an objective standard of whether a reasonable person, in the position of the visitor, "exercising ordinary, perception, intelligence, and judgment" would have recognized the risk, triggering a duty to exercise ordinary care for his or her own safety. See *Ballog*, 2012 IL App (1st) 112429, ¶ 24 (reasonable to expect pedestrians will exercise reasonable care for their own safety on confronting open and obvious danger).

¶ 18 The Village cites cases in which the open and obvious danger was determined as a matter of law, and ignores the factual side of this case, except to refer to photographs of the defect taken a week later by Santi. The Village also claims that its own personnel were unaware of the defect, even with daily surveillance of the garage. At oral argument, defense counsel argued the Village lacked notice of the defect and that Santi was "self-distracted" when she tripped because she was looking for the exit, never having parked there before. This argument ignores the seminal question: was the defect on which she tripped "open and obvious" as a matter of law? The photographs show damaged pavement from various angles, but we cannot conclude from this record that the defect on which Santi tripped was open and obvious as a matter of law.

¶ 19 The cases the Village cites involve circumstances distinguishable from those present here—the parties agreed on the visibility of the open and obvious danger; in none of the cases did the defendant fail to observe an allegedly open and obvious danger in a location that it regularly inspected. See *Bruns v. City of Centralia*, 2014 IL 116998, ¶¶ 4-5 (plaintiff repeatedly noticed sidewalk defect; defendant on notice about defect); *Ballog*, 2012 IL App (1st) 112429, ¶ 31 (gap on street surface "patently visible" in photographs in record and defendant did not claim lack of awareness); *Sandoval*, 357 Ill. App. 3d at 1029 (record included photographs of four-year-old defect in sidewalk; plaintiff was aware of defect); *Prostran v. City of Chicago*, 349 Ill. App. 3d 81 (2004) (visually impaired plaintiff was aware sidewalk was under construction); *Bonner v. City of Chicago*, 334 Ill. App. 3d 481 (2002) (parties agreed light pole base was open and obvious).

¶ 20 The Village also cites to cases not involving a trip and fall, but again, there was no dispute as to existence of the open and obvious danger. For instance, in *Choate v. Indiana*

Harbor Belt R.R. Co., 2012 IL 112948, ¶ 31, the 12-year-old plaintiff was injured after intentionally trying to board a moving train; the Illinois Supreme Court held a moving train was an open and obvious danger as a matter of law. In *Bucheleres v. Chicago Park District*, 171 Ill. 2d 435, 455-456 (1996), the plaintiff was injured after diving headfirst into Lake Michigan without checking the depth of the water; the Supreme Court held the dangers involved in diving into a natural body of water were open and obvious. In another case, a swimming pool in a fenced-in yard presented an open and obvious condition; the Supreme Court noted, "obvious dangers include fire, drowning in water, or falling from a height." *Mount Zion State Bank & Trust v. Consolidated Communications, Inc.*, 169 Ill. 2d 110, 118 (1996).

¶ 21 Additionally, the Village relies on appellate court cases that addressed the issue of open and obvious danger as a matter of law. In *Park*, 2011 IL App (1st) 101283, ¶ 18, this court held a reasonable person would appreciate the danger of stepping in front of moving train, stating "[i]f there is no dispute about the physical nature of the condition, the question of whether a condition is open and obvious is a legal one for the court." The Village, however, ignores that the *Park* court in turn cited *Wilfong* and *Belluomini* for the proposition discussed in ¶ 15, that where the parties dispute the defect's physical nature, "such as its visibility" the question of an open and obvious danger is factual. *Wilfong*, 401 Ill. App. 3d at 1053; *Belluomini*, 346 Ill. App. 3d at 693; *Olson v. Williams All Seasons Co*., 2012 IL App (2d) 110818, ¶ 42-43 ("pleadings and attached documents reveal a factual dispute about the physical nature of the condition's visibility").

¶ 22 The visibility issue precludes summary judgment. See *Alqadhi v. Standard Parking, Inc.*, 405 Ill. App. 3d 14, 17-18 (2010) ("[T]he obviousness of the danger is for the jury to determine.") (citing *Duffy v. Togher*, 382 Ill. App. 3d 1, 8. (2008); *Buchaklian v. Lake County*

Family Young Men's Christian Ass'n, 314 Ill. App. 3d 195, 203 (2000) ("summary judgment is not proper when reasonable minds could differ as to whether a condition was open and obvious[;] * * * such a determination involves a finding of fact"). The trier of fact should decide this issue.

¶ 23 Our decision obviates the need to address the application of either or both the distraction and the deliberate encounter exceptions to the open and obvious rule.

¶ 24 Reversed and remanded.