2018 IL App (1st) 170606-U

No. 1-17-0606

Order filed January 18, 2018

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

JOHN ROGERS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 15 L 8518
	)	
GINA SANTORO-COTTON,	)	Honorable
	)	John H. Ehrlich,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE GORDON delivered the judgment of the court.
Presiding Justice Burke and Justice McBride concurred in the judgment.

ORDER

¶ 1 *Held*: In plaintiff's negligence action, the circuit court's order granting defendant's motion for summary judgment is affirmed where plaintiff failed to establish defendant caused his injury.

¶ 2 Plaintiff, John Rogers, appeals from an order of the circuit court granting summary judgment to defendant, Gina Santoro-Cotton, in plaintiff's negligence action for injuries he sustained when he fell while helping load defendant's son into her van. On appeal, plaintiff claims that the circuit court erred in granting summary judgment because the evidence gave rise

to more than one conclusion or inference regarding whether defendant (1) owed plaintiff a duty and (2) caused his injuries.

¶ 3 On March 5, 2011, defendant and her son, Joey, who is a quadriplegic, were guests in plaintiff's home. Plaintiff is defendant's brother-in-law. When defendant and Joey were leaving, defendant went outside to her van to prepare for their departure. Defendant opened the hatchback of her van, pulled out a wheelchair ramp, and placed Joey's wheelchair on the ramp. Plaintiff carried Joey from the house out to the van. In attempting to place Joey in the wheelchair, plaintiff fell and broke his leg and ankle. He initiated a negligence action against defendant, alleging that her failure to properly place the wheelchair on the flat ground and open the hatchback all the way caused his injury.[1]

¶ 4 Defendant filed a motion for summary judgment, arguing she was entitled to judgment as a matter of law because (1) plaintiff's driveway was slick the night of the incident, and she had no duty to warn defendant about dangerous conditions on his own property; and (2) plaintiff testified in his deposition that he did not know what caused him to fall, and therefore could not establish defendant caused his injuries. In support of her motion, defendant attached plaintiff's and her own depositions, as well as depositions from plaintiff's medical doctors. Plaintiff responded that defendant did owe him a duty and material questions of fact as to the cause of plaintiff's injuries precluded summary judgment.

¶ 5 In his deposition, plaintiff testified that, prior to March 5, 2011, Joey was at his house daily and his wife helped care for Joey, who had been wheelchair-bound his entire life. Joey was

[1] Plaintiff initially filed a complaint on February 17, 2012, under case no. 12 L 1894. Defendant moved for summary judgment, which a different circuit judge denied. On February 17, 2015, plaintiff voluntarily dismissed his case. He refiled his complaint in the instant matter on August 20, 2015.

incapable of maneuvering in and out of his wheelchair on his own. Plaintiff had assisted Joey in placing him in and out of his wheelchair hundreds of times. Whenever Joey arrived at plaintiff's house, he would drive his motorized wheelchair down a ramp from defendant's van to the side of the house where there were five to six stairs to enter the house. Plaintiff would then pick Joey up and bring him inside. The motorized wheelchair could not be brought inside the house because there was no ramp into the house and the chair was too heavy to lift. To leave, plaintiff would usually carry Joey outside to his wheelchair, which was located by the stairs leading into the house, and then Joey could enter the van using the hand control on the chair to guide the chair up the van's ramp. Joey was approximately 85 pounds at the time of the incident.

¶ 6 On the day in question, the weather was icy and freezing rain. Since it was raining, defendant did not take the wheelchair off the van's ramp and bring it to the side of the house like she normally "should have." Instead, she left the wheelchair on the ramp under the hatchback to keep it dry from the rain. Defendant asked plaintiff to place Joey in his wheelchair, but did not inform him that the wheelchair was on the ramp. Plaintiff first realized that the wheelchair was on the ramp when he walked outside. When plaintiff noticed that the wheelchair was not on the side of the house, he had to walk down the driveway while carrying Joey. Plaintiff was aware the ground was "slick" and realized he "better be careful." The hatchback of the van was not open all the way and, as a result, was close to the wheelchair, requiring plaintiff to "duck down under it."

¶ 7 Plaintiff did not fall while walking down the driveway. When he reached the van, plaintiff attempted to carefully place Joey in his wheelchair by placing his left foot on the ramp. When he stepped onto the ramp, plaintiff lost his footing and started to drop Joey. To avoid dropping Joey, he twisted his body and then fell down. He did not know how he fell because "[i]t

was over in the blink of an eye." No one observed him fall. As a result of the fall, plaintiff fractured his left leg and ankle.

¶ 8 Plaintiff did not ask anyone for help with loading Joey into the wheelchair because he was already outside. He was unaware that the hatchback was not lifted all the way, and he was unsure if he could have done something to lift it higher. Plaintiff testified he could not say "for sure" whether there was ice on the ramp. He did not know "if [his] foot slipped off," only that, when he went to step upon the ramp and bent over, he lost his footing. He subsequently testified that his foot did not slip on the ramp. As he stepped onto the ramp, he lost his balance and fell. However, he did not know what specifically caused him to lose his balance.

¶ 9 Although the wheelchair did not move, in plaintiff's opinion it was in the wrong place and would have been better if it was off of the ramp. Both the position of the wheelchair and the lowered hatchback did not leave enough room for him to stand when he reached the ramp, but he did not think about whether it would be hazardous to load Joey into the wheelchair. After plaintiff fell, Joey's father and the paramedics slipped and fell on the driveway, but plaintiff did not know what caused them to fall.

¶ 10 Defendant later apologized to plaintiff for not bringing the wheelchair to the stairs and having the hatchback too low, but plaintiff did not have any other facts from which to conclude that defendant knew the wheelchair position was dangerous. Plaintiff testified that Joey did not cause his fall.

¶ 11 It was plaintiff's opinion that Joey should not be placed in the wheelchair when it was on the ramp because it was easier to load him into the wheelchair when it was not on the ramp. Plaintiff acknowledged he was not an expert on wheelchair ramps, but he knew from experience

that the "proper positioning" for loading the wheelchair is on level ground in front of the ramp. He was not aware of any wheelchair literature that came with the chair or ramp which explains the proper positioning. The allegation in the complaint that, "For safety reasons, once the Defendant places her son into the wheelchair, the wheelchair is then advanced on to the ramp," was plaintiff's own opinion based on his own observations. He did not have literature or other facts that allowed him to conclude that the wheelchair placement was done a certain way for safety reasons.

¶ 12 In defendant's deposition, she testified that Joey required help getting into and out of his wheelchair. His wheelchair was electronic, and Joey would drive the chair up the ramp attached to her van. The van came equipped with the ramp, and she did not receive written instructions regarding the use of the ramp. On the day of the incident, she was at plaintiff's house with Joey. Normally, the wheelchair would sit by the side door at plaintiff's house because it was too big to place inside the house. However, it was cold and raining that day, so she left Joey's wheelchair inside the van. Joey was too heavy for her to lift, so plaintiff would normally lift Joey from his chair and carry him into the house and back out to his chair. Defendant normally pulled the hatchback up all the way when loading Joey in and out of the van.

¶ 13 When leaving plaintiff's house that day, defendant went outside and opened the back of the van, put the ramp down, and then wheeled the chair halfway down the ramp. She believed the hatchback was all the way up. Because it was raining and icy at the time, defendant left the wheelchair under the hatchback so that it would be dry from the rain. She did not remain outside when plaintiff brought Joey outside. She did not observe plaintiff fall. Normally, she would take the wheelchair off the ramp to load Joey into the chair. The ramp was made of metal and became

slick when it was wet. After plaintiff fell, paramedics arrived at his house and slipped and fell due to the slick driveway while running to Joey.

¶ 14 Dr. Joseph L. Silva, one of plaintiff's orthopedic surgeons, testified in his deposition that he formerly treated plaintiff for left ankle pain. Dr. Silva's recorded medical history of plaintiff indicated that plaintiff reported that he slipped on ice and twisted his ankle.

¶ 15 Dr. Eduard Sladek, one of plaintiff's orthopedic surgeons, testified in his deposition that he first examined plaintiff on May 13, 2011. Based on plaintiff's records and notes from Dr. Silva, Dr. Sladek opined that plaintiff suffered an ankle injury after he slipped and fell on some ice. Further, plaintiff informed Dr. Sladek that he slipped on ice.

¶ 16 The circuit court granted summary judgment in defendant's favor on February 7, 2017. The court found that defendant did not owe a duty to plaintiff and plaintiff could not say what caused him to fall. This appeal followed.

¶ 17 On appeal, plaintiff argues the circuit court erred by granting summary judgment in favor of defendant because more than one conclusion or inference may be drawn from the evidence. Specifically, plaintiff argues that defendant owed him a duty because she created the dangerous condition–the wheelchair's improper placement on the ramp underneath the partially opened hatchback, which proximately caused his injuries. Thus, plaintiff argues a question of fact remains as to whether there was an open and obvious condition, and whether defendant's conduct proximately caused his injuries.

¶ 18 Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West

2016). Summary judgment is a drastic measure and should be granted only when the moving party's right to judgment is "clear and free from doubt." *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). "In determining whether a genuine issue as to any material fact exists, a 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). "A triable issue precluding summary judgment exists where the material facts are disputed or where, the material facts being undisputed, reasonable persons might draw different inferences from the undisputed facts." *Williams*, 228 Ill. 2d at 417. Motions for summary judgment are not "intended to be used as a means of weighing conflicting issues of fact." *Allstate Insurance Co. v. Tucker*, 178 Ill. App. 3d 809, 812 (1989). We review a trial court's entry of summary judgment *de novo*. *Virginia Surety Co., Inc. v. Northern Insurance Co. of New York*, 224 Ill. 2d 550, 556 (2007).

¶ 19 At the summary judgment stage, a plaintiff is not required to prove his case; however, he must present evidence to support a cause of action. *Richardson v. Bond Drug Co. of Illinois*, 387 Ill. App. 3d 881, 885 (2009). To state a cause of action for negligence, "a complaint must allege facts that establish the existence of a duty of care owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately caused by that breach." *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 430 (2006).

¶ 20 Proximate cause is an essential element of a negligence claim that, if not proved, will prevent the plaintiff from establishing a *prima facie* case. *Bermudez v. Martinez Trucking*, 343 Ill. App. 3d 25, 30 (2003). The term "proximate cause" describes two distinct requirements: cause in fact and legal cause. *Simmons v. Garces*, 198 Ill. 2d 541, 558 (2002). A defendant's

conduct is a "cause in fact" of the plaintiff's injury if it is a material element and a substantial factor in bringing about the injury. *Abrams v. City of Chicago*, 211 Ill. 2d 251, 258 (2004). Legal cause, by contrast, is established only if the plaintiff's " 'injury is of a type that a reasonable person would see *as a likely result* of his or her conduct.' " (Emphasis in original.) *Abrams*, 211 Ill. 2d at 258 (quoting *First Springfield Bank & Trust v. Galman*, 188 Ill. 2d 252, 260 (1999)). While the issue of cause is generally a question of fact for the jury to decide, the lack of proximate cause may be determined by the court as a matter of law where the facts alleged do not sufficiently demonstrate both cause in fact and legal cause. *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 395-96 (2004).

¶ 21 Here, we find plaintiff failed to demonstrate that defendant caused his injuries. Plaintiff claims that he "testified that the actions of the Defendant positioning the wheelchair halfway down the ramp underneath the partially opened hatchback forced [him] to step onto the slick metal ramp while ducking, which proximately caused his injuries." However, the testimony does not show that the positioning of the wheelchair proximately caused his injuries. Plaintiff testified in his deposition that he lost his balance when he stepped onto the ramp and fell, breaking his leg and ankle. However, he also testified that the driveway was slick, he did not know "for sure" whether there was ice on the ramp, he did not know what caused him to lose his balance, and he did not know how he fell because it was over "in the blink of an eye." Plaintiff alleged he fell as a result of defendant's placement of the wheelchair and hatchback, but his own testimony shows that, even if the improper positioning caused him to step onto the ramp, he did not know that this is what caused him to fall. Defendant did not witness plaintiff fall, and plaintiff's doctors testified that he informed each of them that he sustained his injury after he slipped on ice. Based

on this evidence, we cannot conclude that the evidence supports plaintiff's assertion that his injury was the result of defendant's conduct, or was anything other than a mere accident. See *Kellman v. Twin Orchard Country Club*, 202 Ill. App. 3d 968, 974 (1990) ("The occurrence of an accident does not support an inference of negligence, and, absent positive and affirmative proof of causation, [the] plaintiff cannot sustain the burden of establishing the existence of a genuine issue of material fact.").

¶ 22 In reaching this conclusion, we reject plaintiff's argument that "based on the evidence, more than one conclusion or inference can be made" because a different judge denied defendant's motion for summary judgment on plaintiff's initial complaint. As the circuit court correctly pointed out, plaintiff voluntarily dismissed his original complaint, and the filing of the complaint in the instant case did not continue the old case. *Long v. Elborno*, 397 Ill. App. 3d 982, 989 (2010) ("The refilling of a cause of action that the party had previously and voluntarily dismissed does not constitute a continuation of the previous action.") Rather, the new complaint initiated a new case. *Long*, 397 Ill. App. 3d at 989. Accordingly, the circuit court in the instant case was not bound by a different court's ruling in the previously dismissed case. *Long*, 397 Ill. App. 3d at 990.

¶ 23 Given plaintiff's testimony that he did not know what caused him to fall and the fact that there is no evidence that defendant caused his fall, there is no genuine issue of material fact regarding causation for the trier of fact to determine. Accordingly, we affirm the circuit court's order granting summary judgment in favor of defendant.

¶ 24 Affirmed.