2018 IL App (1st) 171013-U

No. 1-17-1013

May 30, 2018

Third Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

ROGER V. COLEMAN,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 15 L 2888
	)	
FOUR SEASONS HOTEL LIMITED and 900 HOTEL	)	
VENTURE, LLC,	)	Honorable
	)	William E. Gomolinski,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Cobbs and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶ 1 *Held*: In this slip and fall negligence action, we affirm the circuit court's grant of summary judgment in favor of defendants because they did not owe a duty to protect plaintiff from the open and obvious danger posed by a wet marble bathroom floor.

¶ 2 Plaintiff, Roger Coleman, appeals from an order of the circuit court granting summary judgment to defendants, Four Seasons Hotel Limited (Four Seasons) and 900 Hotel Venture, LLC, in a negligence action arising from his slip and fall on a bathroom floor while staying in

defendants' hotel. On appeal, he contends that the court erred in granting summary judgment because a genuine issue of material fact exists as to whether defendants owed him a duty of care. We affirm.

¶ 3 According to plaintiff's complaint and deposition testimony, on November 12, 2014, he was a guest at the Four Seasons Hotel Chicago and, while exiting his room's shower stall, he slipped and fell. As a result of the fall, plaintiff suffered a fractured ankle and other injuries.

¶ 4 Plaintiff's original complaint alleged that Four Seasons violated the Premises Liability Act (740 ILCS 130/1 *et seq.* (West 2014)), because it failed to exercise ordinary care in maintaining the bathroom area by not providing a bath mat or another anti-slip measure, which caused the bathroom floor to become dangerously slippery when wet. Plaintiff then filed an amended complaint, naming 900 Hotel Venture, LLC, which operated, managed, and maintained the hotel premises, as an additional defendant.

¶ 5 Defendants filed an answer to plaintiff's complaint admitting that they owned, operated, and maintained the hotel premises. Defendants also raised numerous affirmative defenses, all of which alleged that plaintiff's negligence either contributed to, or was the sole cause of, his injuries.

¶ 6 During discovery, defendants deposed plaintiff and he deposed three hotel employees: David O'Neill, Jake Hoogeveen, and Kristen Klus. In plaintiff's deposition testimony, he testified that he checked into the Four Seasons Hotel Chicago located at 120 East Delaware Place on November 10, 2014, and checked out on November 12, 2014, the date of his injury. Plaintiff stayed in a suite, which has a different bathroom configuration than a standard room. In a suite, the bathroom features both a shower stall and a separate bath tub, whereas a standard room has a

combined bath tub and shower. Plaintiff acknowledged that he showered on each day during his stay. When asked if there was a bath mat in the bathroom on the day that he checked in, he stated initially that he "assumed" that there was one, but he could not say "yes or no." He then testified that, "to the best of [his] knowledge," there was a bath mat or towel hanging on the shower door on the day that he checked into his room. He could not recall if a fresh bath mat or towel was hanging from the shower door on the second day. He stated that "he would have used" a bath mat each time that he showered on those first two days.

¶ 7 On the third day, November 12, 2014, plaintiff again used the shower. He acknowledged that he walked across the bathroom floor to enter the shower and that there was no water on the floor. He also stated that, despite having just walked across the bathroom floor, he did not know whether there was a bath mat at the entrance of the shower at the time he entered. He testified that, although he "assumed" that one was there, he had not been paying attention because he was thinking about "meeting agendas and so on." After finishing his shower, he exited, without first drying himself with a towel or looking to see whether a bath mat was in place, and slipped on the bathroom floor. He then grabbed a towel located near the sink and dried himself before calling the front desk for help. At this point, he realized that there had not been a bath mat on the floor at the entrance of the shower. He testified that a member of the hotel's security arrived in his room and took photographs. The hotel then arranged for a taxi cab to take him to the hospital.

¶ 8 Plaintiff explained that his "preferred way to bathe" was to shower without drying off, shave in front of the sink while still wet, and then return to the shower. He conceded that the floor was wet when he slipped because he had dripped water onto it while exiting the shower. He also acknowledged that his home bathroom has marble tile and he was aware of the slipping

hazard caused by a wet marble floor. He did not recall how many towels or other linens were in the bathroom when he fell, but he stated that there was at least one because he used it to dry off after he fell. He testified that, in his experience at Four Seasons' hotels, a bath mat is placed on the floor in front of the shower by hotel staff or a bath towel is hanging on the shower door for the guest to place onto the floor. He admitted that, on the day that he fell, he had used the bathroom, but he did not notice the absence of a bath mat on the floor. He agreed that, had he noticed, he would have called the front desk for assistance.

¶ 9 O'Neill, the hotel security supervisor, testified that he responded to a radio call that a guest had been injured in room 4303. He knocked on the door, but there was no response. O'Neill then entered the room and found plaintiff in the bedroom talking on the phone. Plaintiff informed O'Neill that he had slipped getting out of the shower and had injured his ankle. O'Neill offered him an ice pack from a first aid kit. Plaintiff then told O'Neill that he was calling for a car. O'Neill had a wheelchair brought to the room and he escorted plaintiff to a taxi cab. O'Neill returned to plaintiff's room to retrieve his first aid kit and to investigate the scene.

¶ 10 O'Neill described the scene as a "usual hotel bathroom" with towels and bath rugs. He also stated that he saw towels and a robe on plaintiff's bathroom floor. Initially, he testified that he did not see water on the floor, but later stated that there was water near the sink and near either the bath tub or shower stall. He also stated that there was a towel or bath mat on the floor in front of the shower. He did not photograph the bathroom where plaintiff fell because he did not notice anything unusual or worthy of documentation. When he finished his walkthrough of the room, he returned to his desk and filled out an incident report. He acknowledged that,

although the incident report that he filled out indicated that there was "some water on the floor," it did not mention the presence of towels, robes, or other linens in the bathroom.

¶ 11 Hoogeveen testified that, on November 12, 2014, he was the guest relations manager for the Four Seasons Hotel Chicago. In the afternoon, a superior asked him to retrieve plaintiff from the hospital. Hoogeveen took a taxi cab and met plaintiff as he was leaving the hospital. Plaintiff was walking with crutches and Hoogeveen helped him into the taxi cab. The two of them then rode back to the hotel. Once they arrived at the hotel, plaintiff was provided with a wheelchair and escorted to his room. Hoogeveen and Klus, another hotel employee, then helped plaintiff pack his belongings.

¶ 12 According to Hoogeveen, plaintiff's hotel suite would have included both a bath mat and a bath rug. He explained that a bath mat is thin and more "towel-like," whereas a bath rug is thicker and "fluffy." The bath mat is usually folded and draped over the side of the bath tub and the bath rug would usually be placed on the floor in front of the sink. He agreed that a guest is expected to retrieve the bath mat and place it at the entrance of the shower stall prior to showering. Hoogeveen stated that he has never received a complaint that the bathroom floors were too slippery. He conceded that the marble tile floors would be slippery when wet.

¶ 13 Klus testified that she is the chief concierge at the Four Seasons Hotel Chicago. After plaintiff was injured, she received a request to help collect plaintiff's belongings. She proceeded to the plaintiff's room with Hoogeveen because hotel policy requires two employees to be present when handling a guest's belongings. Klus could not recall the condition of plaintiff's bathroom because her focus was on collecting all of his belongings.

¶ 14 Defendants filed a motion for summary judgment, attaching plaintiff's deposition testimony. Defendants argued that summary judgment was appropriate because they did not owe plaintiff a duty to protect him from the open and obvious dangers posed by the wet marble floor. Defendants also argued that their alleged failure to provide plaintiff with a bath mat was only a condition, rather than a cause, of plaintiff's injury.

¶ 15 Plaintiff filed a response to the motion for summary judgment, attaching his deposition testimony, the Four Seasons' operation manual, Hoogeveen's deposition, O'Neill's deposition, the Four Seasons' Security Policy, the Incident Report filled out by O'Neill, and Klus's deposition. The Four Seasons' operation manual, in relevant part, indicates that when cleaning a guest's room, a bath mat should be replaced by draping a fresh, folded bath mat over the side of the bathtub. Under "Turndown Procedures," the manual indicates that placing the bath mat on the floor in front of the shower is a "nice touch *** provided this makes sense for your property."

¶ 16 Following argument on defendants' motion, the circuit court granted summary judgment for defendants. Plaintiff appeals.

¶ 17 On appeal, plaintiff contends that the circuit court erred in granting summary judgment to defendants because a genuine issue of material fact exists as to whether the dangerous condition was open and obvious. Plaintiff also contends that defendants' argument that its conduct was a condition, rather than a cause, of his injuries fails because there was no intervening act of a third party.

¶ 18 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(c) (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.*

¶ 19 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. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 430 (2006). "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 the existence of a duty, summary judgment for the defendant is proper. *Espinoza*, 165 Ill. 2d at 114.

¶ 20 "A legal duty refers to a relationship between the defendant and the plaintiff such that the law imposes on the defendant an obligation of reasonable conduct for the benefit of the plaintiff." *Choate v. Indiana Harbor Belt Railroad Co.*, 2012 IL 112948, ¶ 22. Four factors guide our analysis of whether a duty exists: (1) the reasonable foreseeability of injury; (2) the likelihood of the injury; (3) the magnitude of the burden of guarding against the injury; and (4)

the consequences of placing that burden on the defendant. *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 14.

¶ 21 Defendants maintain that the danger posed by a wet marble floor 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 a person who encounters such conditions will take care to avoid any danger inherent therein. *Id.* at 448. "The open and obvious rule is also reflected in section 343A of the Restatement (Second) of Torts, which this court has adopted." *Bruns*, 2014 IL 116998, ¶ 16. "Under section 343A, 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.' " *Id.* (quoting Restatement (Second) of Torts § 343A (1965)).

¶ 22 Plaintiff counters that summary judgment was inappropriate because a genuine issue of material fact exits as to whether the condition was, in fact, open and obvious. He argues that the evidence shows that the risks associated with the bathroom floor were not readily apparent, which creates an issue of fact. "Whether a dangerous condition is open and obvious may present a question of fact," but "where no dispute exists as to the physical nature of the condition, whether the dangerous condition is open and obvious is a question of law." *Bruns*, 2014 IL 116998, ¶ 18.

¶ 23 After reviewing the record, we conclude that there is no dispute over the physical nature of the condition of the floors in plaintiff's hotel room. It is undisputed that the room plaintiff stayed in had marble tile floors. Plaintiff testified that he has marble tile floors in his home

bathroom and is aware that they become slippery when wet. Hoogeveen, a hotel employee, likewise testified that the bathroom floors in plaintiff's room can become slippery when wet. While plaintiff contends that bath mats were placed on the floor for him when he showered on the previous two days, he concedes that no such bath mat was in place on the day that he slipped and fell. His testimony also indicates that, on the day in question, he walked across that floor at least twice: first to use the bathroom earlier in the day and then again as he entered the shower. The condition of the bathroom floor was, therefore, readily available to him, but he admittedly took no notice. As there is no dispute regarding the physical condition of the bathroom floor on the day that he fell, we may, as a matter of law, determine whether it was an open and obvious condition.

¶ 24 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 201-2. 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." *Id.* see also Restatement (Second) of Torts § 343A, cmt. b, at 219 (1965)). 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).

¶ 25 Although this court has not previously considered whether the dangers associated with showering and walking on wet tile are open and obvious, other courts have found that plaintiffs must be charged with the knowledge that bathroom surfaces are slippery when wet. See *e.g. Brault v. Dunfey Hotel Corp*, 1988 WL 96814, 21-22 (E.D.Pa. 1988) (noting that "[t]he majority

of courts charge guests with reasonable use of their senses to keep a lookout for open and obvious conditions in bathrooms," including the fact "that water is slippery on tub or shower surfaces."); *Kutz v. Koury Corp.*, 377 S.E.2d 811, 813 (N.C.App. 1989) ("It is common knowledge that bathtub surfaces, especially when water and soap are added, are slippery and that care should be taken when one bathes or showers."); *Jones v. Abner*, 335 S.W.3d 471, 476 (Ky.Ct. App. 2011) ("We further note that the risks inherent in bathing or showering are open, apparent, and obvious to anyone who has ever taken a bath or shower.").

¶ 26 After examining the record before us, we find that a reasonable person in plaintiff's position would have recognized and appreciated the risk associated with the wet marble tile floor. The record shows that plaintiff was aware that marble tile floors are slippery when they become wet. Plaintiff testified that his home bathroom has marble tile and that he was aware of the slipping hazard caused by water on a marble floor. Despite plaintiff's familiarity with how slippery marble tiles can become when wet, he testified that he paid no mind to whether a bath mat was in place when he went to shower. On the date in question, plaintiff had, on at least two occasions, walked on the bathroom floor before he entered the shower on the third day. By his own admission, he failed to note the absence of a bath mat on the floor because his attention was on other things. Plaintiff also testified that he had a specific bathroom routine that he was intent to follow. He was aware that the floors were marble and that his routine would drip water onto the floor. Although he was aware of the attendant dangers, he again did not look to see whether he was walking on a slippery surface. Given this record, we conclude that any reasonable hotel guest in plaintiff's position exercising ordinary perception, intelligence, and judgment would have recognized and avoided the open and obvious danger posed by the marble floor.

¶ 27 Plaintiff maintains that, even if the dangerous condition was open and obvious, defendants nevertheless had a duty to exercise reasonable care. Plaintiff correctly contends that the existence of an open and obvious danger is not an automatic or *per se* bar to the finding of a legal duty on the part of a defendant. See *Bruns*, 2014 IL 116998, ¶ 19. Rather, we must still consider the four factors of the duty analysis under the facts of the case at bar to ascertain whether a duty exists.

¶ 28 Application of the open and obvious rule affects the first two factors of the duty analysis: the foreseeability of injury, and the likelihood of injury. Where the condition is open and obvious, the foreseeability of harm and the likelihood of injury will be slight, thus weighing against the imposition of a duty. Plaintiff contends that the remaining two factors—the magnitude of the burden of guarding against the injury and the consequences of placing that burden on defendants—weigh largely in favor of finding a legal duty.

¶ 29 Examining the four factors, we determine that they weigh against imposing a duty on defendants. The first two factors of the duty test point toward not imposing a duty on defendants for the same reason that the open and obvious doctrine applies: it was neither likely nor reasonably foreseeable that, without being distracted, plaintiff would be injured by a condition that was readily apparent. We conclude that the final two factors, the magnitude of the burden on defendants of guarding against injury and the consequences of placing the burden on defendants, also weigh against imposing a duty. Although plaintiff disputes that he was provided a bath mat, he admitted that there were towels and other linens in the bathroom that he could have placed on the floor had he so desired. He also admits that, had he been paying attention and noticed the lack of a bath mat, he could have called the front desk and remedied the situation. The evidence

does not support placing an additional burden on defendants beyond what they have already undertaken to provide guests with the necessary items to shower safely.

¶ 30 In the alternative, plaintiff argues that either the deliberate encounter exception or the distraction exception applies to his case, thus weighing in favor of finding a duty. If either exception applies, a landowner may still be liable for a dangerous condition on the land notwithstanding its obviousness. *Bruns*, 2014 IL 116998, ¶ 20. In other words, where the "operation of the open and obvious rule negatively impacts the foreseeability and likelihood of an injury, application of an exception to the rule positively impacts the foreseeability and likelihood of injury." *Id.* Here, we find that neither exception applies.

¶ 31 The deliberate encounter exception arises "where the possessor [of land] 'has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk.' " *Sollami v. Eaton*, 201 Ill. 2d 1, 15 (2002) (quoting Restatement (Second) of Torts § 343A(1), cmt. f, at 220 (1965)). The deliberate encounter exception applies when, as the name suggests, the encounter is deliberate. *LaFever v. Kemlite Co.*, 185 Ill. 2d 380, 394–96 (1998) (where the court formally adopted the exception, while noting that a "deliberate choice" is involved); see *Garcia v. Young*, 408 Ill. App. 3d 614, 617 (2011) (finding the deliberate encounter exception inapplicable where the "pothole" that constituted the open and obvious condition was never noticed by the plaintiff until after he was injured). The deliberate encounter exception is most often been applied in cases involving some economic compulsion, but is not limited to those circumstances. See *Sollami*, 201 Ill. 2d at 16.

¶ 32 In this case, the evidence established that plaintiff did not deliberately encounter the open and obvious condition. According to plaintiff's testimony, he did not know whether there was a bath mat present when he entered the shower, but he assumed that one was there. He admitted that, had he known there was no bath mat in place, he would have called the front desk and rectified the situation. Additionally, the testimony does not show that he was compelled to enter the shower without a bath mat, or other linen, in place. Therefore, the deliberate encounter exception does not apply.

¶ 33 The distraction exception to the open and obvious doctrine applies when " 'the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it.' " *Sollami*, 201 Ill. 2d at 15 (quoting Restatement (Second) of Torts § 343A cmt. f, at 220 (1965)). This exception is only applicable when "evidence exists from which a court can infer that plaintiff was actually distracted." *Bruns*, 2014 IL 116998, ¶ 22.

¶ 34 Here, the only distraction identified by plaintiff is that he was focused on the events of his day, rather than whether a bath mat was placed on the floor, when he walked into the shower. Although plaintiff maintains that defendants created his complacency by placing a bath mat on the floor for him on the previous two days, the record does not support his argument. Even taking the facts in the light most favorable to plaintiff, his testimony indicates, at best, that he might have encountered bath mats placed on the floor while staying at other Four Seasons hotels or that he placed a bath mat on the floor of the bathroom on previous days. Defendants' procedures call only for a bath mat to be placed on the rim of the bathtub, but allows for it to be placed on the floor at the entrance to the shower stall. Regardless, the evidence indicates that

plaintiff entered the bathroom at least twice before entering the shower, had access to towels that he could have used in place of an bath mat, could have called the front desk to obtain a bath mat, or could have modified his bathing routine to towel off prior to exiting the shower. Under these circumstances, defendants had no reason to expect that plaintiff might become distracted and fail to discover or protect himself from the danger posed by the marble tile floors. See *Bruns*, 2014 IL 116998, ¶ (finding that plaintiff's argument that she was looking at the door handle and not paying attention to the open and obvious defect in the sidewalk was a "self-made distraction" that defendant could not reasonably foresee); *Ward v. K Mart Corp.*, 136 Ill. 2d 132, 155 (1990) (finding that the defendant could not reasonably be expected to anticipate injuries which would ordinarily only result if the customer were negligent).

¶ 35 Having determined that defendants' owed no duty to plaintiff, we need not address his remaining argument that defendants' conduct was a condition, rather than a cause, of plaintiff's injuries.

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

¶ 37 Affirmed.