2019 IL App (1st) 181537-U

SIXTH DIVISION
April 26, 2019

No. 1-18-1537

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

ALEX BABICH,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 16 L 11152
	)	
COPERNICUS FOUNDATION,	)	Honorable
	)	James N. O'Hara,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Delort and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held*: Grant of summary judgment in favor of defendant in this foreign substance slip-and-fall case is affirmed where there was no dispute of material fact and plaintiff failed to prove negligence under a theory of premises liability.

¶ 2 Plaintiff, Alex Babich, instituted a negligence action against defendant, the Copernicus Foundation (Foundation), stemming from a foreign substance (wine) slip-and-fall injury that occurred on the Foundation's premises. Following discovery, the Foundation moved for summary judgment and the trial court granted that motion. Plaintiff appeals, contending the court

erred in granting summary judgment to the Foundation because it was liable for failing to exercise reasonable care in serving wine on its premises. We affirm.

¶ 3 According to plaintiff's complaint and deposition testimony, on April 3, 2016, he was attending an event at The Copernicus Center ("Center"), owned by the Foundation and located at 5216 West Lawrence Avenue in Chicago. On that date, he slipped on spilled wine and fell, breaking his right ankle.

¶ 4 Plaintiff's complaint against the Foundation alleged negligence under a theory of premises liability. He alleged that the bar area floor had not been properly cleaned and was wet causing him to slip and fall. The fall resulted in a fractured fibula in his right ankle. He alleged that the Foundation was negligent for failing to: properly supervise common areas, maintain the bar area in a safe condition, properly inspect the bar area, maintain the premises in a safe condition, and failing to exercise the degree of care required.

¶ 5 The Foundation's answer admitted ownership of the premises and denied all other allegations contained in the complaint. The Foundation also raised several affirmative defenses.

¶ 6 During discovery, the Foundation deposed plaintiff and plaintiff deposed Gregg Kobelinski, the Foundation's managing director.

¶ 7 Plaintiff testified that he was a partner in the company American Music Festivals. The company organized a tribute to Sir Georg Solti, a previous conductor of the Chicago Symphony Orchestra. One of the other partners entered into an agreement renting event space in the Center for a two-day event. On the first day, April 3, 2016, a reception followed the musical performances in the annex area of the Center. Plaintiff enlisted some volunteers to assist in setting up the food for the reception. The wine for the reception was donated, and it was

available from a self-serve bar, where the bartenders pre-poured the wine into glasses for the guests to retrieve. The bartenders were employees of the Center. There were no other employees, such as servers, at the event.

¶ 8 As the event was ending, plaintiff was walking towards the bar area to speak with the bartender and a puddle of wine caused him to slip and fall, breaking his ankle. Plaintiff testified that he did not see anything on the floor before he fell because his eyes were on the bartender and he did not see any food on the floor after he fell—only wine. Plaintiff stated that he did not know how long the wine was on the floor prior to his fall and he did not have any information as to how the wine was spilled. He stated that his "best guess [was] that somebody just spilled it" and that "[p]eople were walking around with glasses full of wine." Plaintiff testified that there were two witnesses to his fall and at the time of the accident they told him that "[he] fell and that there was a puddle."

¶ 9 In his deposition testimony, Kobelinski testified that he served previously as the president of the Copernicus Foundation and has been managing director for seven years. As managing director, he is responsible for the operations of the Foundation and the Center. The employees working the event were Jolata Jasiewicz, Agnieszka Blaszczuk, and Stephen Sulski. Jasiewicz and Blaszczuk were the bartenders and Sulski was the building supervisor, who would assist in providing whatever was needed for the event. He testified that there is no written manual for the employees. During the event, there was no custodial staff, but the bartenders were trained to address any issues if they see anything or to inform Sulski of the issue.

¶ 10 The bartenders informed Kobelinski that when the event was over plaintiff was running fruit trays back to the kitchen to load them into a car. He then moved towards the bar area

because he wanted the bartenders to give him the leftover wine. At the time, Jasiewicz was located behind plaintiff and Blaszczuk was behind the bar. Jasiewicz told him that she saw something green on plaintiff's shoe, possibly a kiwi or grape. She then saw him slip and fall. He was also told that the bartenders informed the security guard of the incident, but plaintiff refused medical attention.

¶ 11 Following discovery, the Foundation filed a motion for summary judgment, attaching plaintiff's deposition, pictures of the event space, and the event agreement. The Foundation argued that summary judgment was warranted because the undisputed material facts show that it did not owe plaintiff a duty of care on the date he was injured. In citing to plaintiff's deposition, the Foundation asserted that plaintiff was unable to prove that its employees created the wine spill through their own negligence, that its employees knew about the wine spill, or that the wine was present long enough to give constructive notice to its employees.

¶ 12 Plaintiff filed a response to the Foundation's motion, attaching his own affidavit, Kobelinski's deposition, and the Foundation's answer to interrogatories. In his affidavit, plaintiff averred that he never saw the two bartenders leave the area behind the bar and he never saw them clean the area in front of the bar. He also averred that two witnesses told him he slipped on a puddle of wine about five feet away from the bar and an MRI the following day revealed that he had broken his right ankle. The Foundation's answer to interrogatories contained a statement from Mariusz Markowski, a building supervisor who was not present at the event. Markowski stated that staff had informed him after the event that plaintiff was running leftover fruit trays back to the kitchen and that when he fell, Jasiewicz saw something green fall off his shoe, which she believed to be a grape. The staff also informed him that plaintiff was "moving around freely"

following his fall. Plaintiff argued that the Foundation breached its duty "to serve wine in a responsible manner" and "to inspect the area around where the service occurs" by "allowing an unreasonably dangerous condition of a wine spill to exist causing Plaintiff's injury." He also argued that actual or constructive notice does not need to be established "[w]here the foreign substance is on the premises due to the negligence of the proprietor or its servants."

¶ 13 The Foundation replied to plaintiff's response, arguing that summary judgment was proper because, based on the evidence in the record, plaintiff could not establish any of the three alternative methods for proving premises liability regarding a foreign substance slip-and-fall. The Foundation acknowledged that it was undisputed that plaintiff slipped and fell on a puddle of wine. The Foundation also stated, in its response, that plaintiff omitted several material facts regarding his lack of knowledge as to how the wine appeared on the floor and how long it had been there.

¶ 14 Following arguments, the trial court granted summary judgment for the Foundation, finding that it had met its burden pursuant to section 2-1005 of the Code of Civil Procedure (735 ILCS 5/2-1005 (West 2016)). In its ruling, the court noted that plaintiff had not presented any evidence "which would even permit a reasonable inference that one of defendant's employees spilled the wine" or that the Foundation had actual or constructive notice of the spilled wine. The court then concluded that there was no genuine issue of material fact.

¶ 15 Plaintiff now appeals to this court, arguing that the trial court erred in granting summary judgment to the Foundation because it was liable for failing to exercise reasonable care in serving wine. Plaintiff further contends that notice was not necessary because the Foundation had a duty to serve the wine in a responsible manner and that a genuine issue of material fact exists

as to whether the Foundation placed the substance there or it remained there due to the negligence of the Foundation.

¶ 16 The Foundation responds that summary judgment was proper because plaintiff cannot prove the elements of his claim where he is unable to show that the wine was on the floor due to the Foundation's negligence or that it knew or should have known that wine was present on the floor. We agree with the Foundation.

¶ 17 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 5/2-1105 (West 2016). "The party moving for summary judgment bears the initial burden of proof." *Milevski v. Ingalls Memorial Hospital*, 2018 IL App (1st) 172898, ¶ 27. The record must be construed in favor of the nonmoving party. *Newsom-Bogan v. Wendy's Old Fashioned Hamburgers of New York, Inc.*, 2011 IL App (1st) 092860, ¶ 13. Because summary judgment terminates litigation, it should be granted only when the moving party's judgment is clear and free from doubt. *Id.* On other hand, 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. *Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274, 280 (2007). We review the court's grant of summary judgment *de novo*. *Id.*

¶ 18 For a claim of common law negligence, a plaintiff must establish: (1) the existence of a duty owed by the defendant, (2) a breach of that duty, and (3) an injury proximately caused by that breach. *Newsom-Bogan*, 2011 IL App (1st) 092860, ¶ 14. Here, it is not disputed that defendant owed plaintiff, as a business invitee, a duty of reasonable care. See *Pavlik v. Wal-Mart Stores, Inc.*, 323 Ill. App. 3d 1060, 1063 (2001). However, it is not enough to simply

demonstrate that plaintiff slipped on a foreign substance on defendant's premises. A business owner only "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[.]" *Milevski*, 2018 IL App (1st) 172898, ¶ 29 (citing *Pavlik*, 323 Ill. App. 3d at 1063). And "[l]iability cannot be based on guess, speculation, or conjecture as to the cause of the injury." *Newsom-Bogan*, 2011 IL App (1st) 092860, ¶ 16.

¶ 19 After examining the record on appeal, we conclude that the trial court properly granted summary judgment in the Foundation's favor because plaintiff failed to demonstrate that the Foundation breached its duty or to identify any evidence that would create an issue of fact as to the Foundation's liability.

¶ 20 First, there is no evidence that the Foundation or its employees created the puddle of wine which caused plaintiff's fall. The testimony shows that the bartenders remained behind the self-serve bar throughout the event. Specifically, bartenders pre-poured the wine into glasses for the guests to retrieve. There is no evidence that a bartender or other employee was seen carrying wine or serving wine outside of the bar area. As such, there is nothing in the record that would allow for an inference that the Foundation's employees spilled the wine as opposed to one of the guests, who plaintiff testified were carrying "glasses full of wine" throughout the event space. Thus, there is no dispute of material fact that the presence of wine on the floor was caused by the Foundation or its employees.

¶ 21 Without any evidence of the puddle's origin, the Foundation can only be held liable if it knew of its presence *i.e.*, had either actual or constructive notice of the puddle. See *Tomczak v.*

Planetspehere, Inc., 315 Ill. App. 3d 1033, 1038 (2000) (stating that if "the landowner did not create the condition, the plaintiff must establish that the landowner knew or should have known of the defect"). In this case, there is no evidence of actual notice. Actual notice will be found where there is evidence that the defendant or the defendant's employee had been notified of the dangerous condition prior to the plaintiff's slip and fall. See *Pavlik*, 323 Ill. App. 3d at 1064 (finding the defendant had actual notice where plaintiff was told by employee that spilled conditioner should have been cleaned up and where her father was told by an employee that a clerk was supposed to clean it up but did not). Here, there is no testimony in the record suggesting that any employee was aware of the spilled wine prior to plaintiff's fall, and plaintiff himself testified that he did not see the puddle when he was walking towards the bar. Thus, plaintiff's theory of premises liability fails under the requirement of actual notice.

¶ 22 There is also no evidence of constructive notice. "Constructive notice can only be shown where the dangerous condition is shown to exist for a sufficient length of time to impute knowledge of its existence to the defendants." *Ishoo v. General Growth Properties, Inc.*, 2012 IL App (1st) 110919, ¶ 28. The evidence presented did not show that the puddle of wine was present for any particular length of time. No employee of the Foundation testified to being aware of the wine spill and neither did plaintiff. Moreover, there was no testimony showing that any activity of the Foundation's employees could have created the puddle or that they had awareness of any activity that could have created the puddle, such as bartenders refilling guests' glasses away from the bar. Plaintiff failed to provide any evidence showing that the wine was present on the floor for a sufficient amount of time that the Foundation's employees should have known of its existence. See *Hayes v. Bailey*, 80 Ill. App. 3d 1027, 1030 (1980) ("[I]t is incumbent upon the

plaintiff to establish that the foreign substance was on the floor long enough to constitute constructive notice to the proprietor."). Accordingly, the Foundation cannot be held liable for the presence of a substance that no one had knowledge of prior to plaintiff's slip and fall. See *Tomczak*, 315 Ill. App. 3d at 1040 ("To do so would be to make the owner the insurer of the safety of the plaintiff."). As no genuine issue of material fact exists regarding the Foundation's creation of or knowledge of the spilled wine, the Foundation's motion for summary judgment was properly granted.

¶ 23 In reaching this conclusion, we are not persuaded by plaintiff's reliance on *Donoho v. O'Connell's, Inc.*, 13 Ill. 2d 113 (1958), arguing that it was not necessary for him to prove notice in this case. This court recently discussed and rejected a similar argument in *Milevski*. 2018 IL App (1st) 172898, ¶¶ 31-34. There, we concluded that *Donoho* stands for the proposition that to remove the issue of notice from the premises liability analysis, there must be evidence that "the business owner *created* the condition." (Emphasis in original.) *Milevski*, 2018 IL App (1st) 172898, ¶ 34. Specifically, we found that in *Donoho* there was evidence that "the foreign substance was closely related to the restaurant's business and that the circumstances surrounding her fall *** could lead to the reasonable inference" that the presence of the substance was caused by the business' servant rather than by a customer. *Id.* ¶ 33.

¶ 24 Here, unlike in *Donoho*, we do not have such evidence before us. As mentioned, the bartenders never left the area behind the bar and were not serving people away from the bar. Moreover, plaintiff testified that "[p]eople were walking around with glasses full of wine" and that his "best guess [was] that somebody just spilled it." A reasonable inference herein would be

that a guest, not a bartender, spilled the wine. Accordingly, as in *Milevski*, the analysis in *Donoho*, is inapplicable here. See *Milevski*, 2018 IL App (1st) 172898, ¶ 34.

¶ 25 Finally, plaintiff attempts to demonstrate that there are material facts in dispute by pointing to the witnesses' different versions of the incident. While plaintiff claimed that he did not see any food near him after falling and he had to be helped out of the event space, the Foundation's employees stated that they saw something green on his shoe when he fell and that he was walking around freely after he fell. However, these are not material facts in dispute. The Foundation agrees with plaintiff that he fell on a puddle of wine, and whether plaintiff was moving about afterwards is not relevant to the issue of the Foundation's liability. Therefore, we decline to find that there is a genuine issue of material fact in dispute in this case. See *Kibort v. Westrom*, 371 Ill. App. 3d 247, 251 (2007) ("Summary judgment is proper where the parties agree on the relevant facts and the record presents only questions of law.").

¶ 26 Because plaintiff has failed to present sufficient evidentiary facts to support his claim of negligence or to create a dispute of material fact, summary judgment in the Foundation's favor was warranted. See *Richardson v. Bond Drug Co. of Illinois*, 387 Ill. App. 3d 881, 885 (2009).

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

¶ 28 Affirmed.