2019 IL App (1st) 182132-U

FOURTH DIVISION
July 18, 2019

No. 1-18-2132

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MATTIE LOMAX,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	
	)	No. 17 M1 302539
CITY OF CHICAGO, a Municipal Corporation,	)	
	)	Honorable
Defendant-Appellee.	)	Catherine A. Schneider,
	)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Reyes and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted summary judgment in favor of the City because no legal duty existed where plaintiff was injured due to an open and obvious condition on the sidewalk.

¶ 2 Plaintiff Mattie Lomax, appearing *pro se*, filed a small claim action based on allegations of negligence against defendant the City of Chicago (City). Plaintiff alleged that she was injured when she fell on a raised sidewalk slab in September 2017 near West 63rd Street and South Western Avenue after she exited a Chicago Transit Authority (CTA) bus. The parties proceeded

to arbitration and an award was entered in favor of the City. Plaintiff rejected the arbitration award in the trial court. The City then filed a motion for summary judgment, which the trial court granted.

¶ 3 On appeal, plaintiff, still appearing *pro se*, argues that the trial court erred in granting summary judgment because the distraction exception applies to the open and obvious nature of the raised sidewalk slab.

¶ 4 In December 2017, plaintiff filed her initial small claims negligence complaint against the City of Chicago Law Department Claims Unit and a named claims specialist. In January 2018, the City filed a motion to dismiss the complaint for naming an improper party because the City's law department is not an entity that can be sued separate and apart from the City. The trial court granted the motion and allowed plaintiff 28 days to file an amended complaint.

¶ 5 In February 2018, plaintiff filed her amended complaint against the City in the small claims division of the trial court and alleged negligence. Her complaint alleged that on or about September 29, 2017, between 11 and 11:30 a.m. Plaintiff was exiting the CTA 63rd Street bus at 6301 South Western Avenue. She was

> "carefully getting off the 63rd Street bus walking left to cross S. Western Ave trip [*sic*] and fall on damage sidewalk that was lifted up from the ground, suffering a facture of her right knee and painful and serious injuries, all as a sole and proximate result of the hazardous conditions of the sidewalk cause by the negligence of the Defendant."

She claimed she sustained a "serious injury to her right knee and has incurred reasonable medical treatments as a result of the fall of the necessary treatment of said injury and reasonable future treatment." Plaintiff sought an award of $5,000.

¶ 6 Plaintiff attached several exhibits to her complaint. She included photocopied pictures of the sidewalk as well as a street view image of 6301 South Western Avenue in Chicago from Google Maps with a handwritten notation including an arrow stating, "Here is where the sidewalk was lifted from the ground." Plaintiff also attached her claim form for the City claims unit. Plaintiff further attached her medical records from Advocate Trinity Hospital in Chicago. The records were dated October 6, 2017. The first record related to an injury of plaintiff's right knee and the clinical indication was "contusion about one week ago. Pain." Multiple x-rays of plaintiff's right knee were taken and showed no fracture. The second record involved plaintiff's left shoulder and an indication of "left shoulder pain following injury." Multiple x-rays were taken and showed no fracture, dislocation or significant abnormality.

¶ 7 The case was set for mandatory arbitration. An arbitration hearing took place on June 25, 2018. Plaintiff was the only witness at the hearing. She testified that on September 29, 2017, she was on 63rd Street going towards Western Avenue while on a CTA bus. She exited the bus and was pulling her bag. She then "just, boom, *** fell down." Plaintiff tried to show the arbitrators a picture of the sidewalk she obtained from Google Maps. Plaintiff stated that the address where she fell was 6301 South Western Avenue. She estimated that she was two feet from the curb when she fell. She had exited the bus and "had turned to start walking, boom [she] just fell completely down." Plaintiff "was looking towards Western trying to cross the street and catch the next bus down to 95th." She was walking normally and not in a hurry. When asked if she was distracted, plaintiff answered, "No." Plaintiff had a small rolling bag in her right hand. No one was in front of her blocking her view of the sidewalk and it was daytime and a "nice day." She was wearing rubber-soled "sneakers."

¶ 8 Plaintiff testified that she was "not very familiar with that area," and estimated she had been to that location six times that year. Plaintiff admitted that she was aware of the City's 311 system. She did not report any defects at 63rd and Western before she fell and was not aware of anyone else contacting 311 prior to her fall. She did not see any construction.

¶ 9 Plaintiff stated that she was closer to Western. She estimated that she took two steps after she exited the bus before she fell. She did not realize there was a height differential in the sidewalk slab until she fell. She did not measure it, but estimated it was more than one inch and less than two inches lifted from the ground and it was approximately five feet long. There was nothing covering the sidewalk that would block her view. When she looked at the sidewalk after she fell, she stated that it looked like something she should avoid because "[n]o one should walk over that." Plaintiff admitted she was not looking down and thought "it was just a smooth sidewalk." When she fell, everything came "down." Two women standing nearby asked if she wanted them to call the paramedics and plaintiff said no. Plaintiff estimated she was at that location approximately 15 minutes. Plaintiff got up, crossed the street, and proceeded to take the Western bus southbound. Plaintiff went to her original planned destination, a bike shop to fix a tire. She then went home by bus.

¶ 10 After she got home, plaintiff started "feeling funny," and "things started to hurt." She called the doctor and she went to get x-rays a few days later. She has not sought any further treatment. She had not injured her right knee before or been involved in any other accident.

¶ 11 Following the hearing, the arbitrators entered an award in favor of the City. In July 2018, plaintiff filed a rejection of that arbitrators' award and requested trial. On July 24, 2018, the City filed a motion for summary judgment, arguing that the sidewalk condition was open and obvious and that the City did not have actual or constructive notice of the condition. In August 2018,

plaintiff filed a motion to strike the City's motion for summary judgment, and in September 2018, the City filed a response to plaintiff's motion. In October 2018, plaintiff filed another motion to strike the City's motion for summary judgment and also requested summary judgment in her favor. In her motion, plaintiff for the first time argued for a finding of willful and wanton conduct. She also asserted that the distraction exception applied to the open and obvious doctrine regarding the sidewalk where she fell. On October 1, 2018, the trial court granted the City's motion for summary judgment and found the sidewalk condition to be open and obvious.

¶ 12 This appeal followed in compliance with Illinois Supreme Court Rule 303 (eff. Jan. 1, 2015) with a timely notice of appeal filed on October 1, 2018. Accordingly, this court has jurisdiction of this appeal under Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994).

¶ 13 On appeal, plaintiff argues that the trial court erred in granting summary judgment because the distraction exception applied when she encountered the open and obvious condition of the sidewalk. Plaintiff also contends that the City improperly raised section 2-201 of the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/2-201 (West 2016)) in their summary judgment motion for the first time. However, the City did not raise any argument related to section 2-201 of the Tort Immunity Act in the trial court, nor has it raised such an argument on appeal. Accordingly, we disregard any argument by plaintiff related to this section of the Tort Immunity Act.

¶ 14 Summary judgment is appropriate where the pleadings, depositions, and admissions on file, together with any affidavits and exhibits, when viewed in the light most favorable to the nonmoving party, indicate that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2016). We review cases

involving summary judgment *de novo*. *Ragan v. Columbia Mutual Insurance Co.*, 183 Ill. 2d 342, 349 (1998).

¶ 15 "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). "The question of the existence of a duty is a question of law, and in determining whether a duty exists, the trial court considers whether a relationship existed between the parties that imposed a legal obligation upon one party for the benefit of the other party." *Sameer v. Butt*, 343 Ill. App. 3d 78, 85 (2003). In contrast, "whether a defendant breached the duty and whether the breach was the proximate cause of the plaintiff's injuries are factual matters for the jury to decide, provided there is a genuine issue of material fact regarding those issues." *Marshall*, 222 Ill. 2d at 430. " 'In the absence of a showing from which the court could infer the existence of a duty, no recovery by the plaintiff is possible as a matter of law and summary judgment in favor of the defendant is proper.' " *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 13 (quoting *Vesey v. Chicago Housing Authority*, 145 Ill. 2d 404, 411 (1991)).

¶ 16 Under section 3-102(a) of the Tort Immunity Act, a local public entity has "the duty to exercise ordinary care to maintain its property in a reasonably safe condition" for use by intended and permitted users. 745 ILCS 10/3-102(a) (West 2016). There are four factors to consider in a duty analysis: "(1) the reasonable foreseeability of the 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*, 2014 IL 116998, ¶ 14. "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.

¶ 17 Generally, under the open and obvious rule, " 'a party who owns or controls land is not required to foresee and protect against an injury if the potentially dangerous condition is open and obvious.' " *Bruns*, 2014 IL 116998, ¶ 16 (quoting *Rexroad v. City of Springfield*, 207 Ill. 2d 33, 44 (2003)). "The open and obvious rule is also reflected in section 343A of the Restatement (Second) of Torts, which this court has adopted." *Id.* "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, at 218 (1965)). " 'Obvious' means that 'both the condition and the risk are apparent to and would be recognized by a reasonable [person], in the position of the visitor, exercising ordinary perception, intelligence, and judgment.' " *Id.* (quoting Restatement (Second) of Torts § 343A cmt. b, at 219 (1965)). "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." *Id*. ¶ 18. However, "[t]he 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." *Id.* ¶ 19.

¶ 18 On the day of her fall, plaintiff had exited the 63rd Street bus and walked approximately two steps before she tripped over the raised sidewalk slab. She testified at the arbitration hearing that it was daytime and nothing was blocking her view of the sidewalk. Plaintiff does not dispute that the raised sidewalk slab was open and obvious. She submitted photographs of the slab and described it as being raised more than one inch, but less than two inches and approximately five feet long. However, she contends that she was distracted and did not see the open and obvious condition of the sidewalk.

¶ 19 The distraction exception to the open and obvious rule "applies ' "where the possessor of land 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." ' " *Bruns*, 2014 IL 116998, ¶ 20 (quoting *Sollami v. Eaton*, 201 Ill. 2d 1, 15 (2002), quoting Restatement (Second) of Torts § 343A cmt. f, at 220 (1965)). "[T]he distraction exception will only apply where evidence exists from which a court can infer that plaintiff was actually distracted." *Id.* ¶ 22.

¶ 20 In *Bruns*, the plaintiff was going to an appointment at an eye clinic when she stubbed her toe on a raised crack on a city-maintained sidewalk, causing her to fall. *Id.* ¶ 4. At the time of her fall, the plaintiff was not looking down at her feet, but was looking toward the clinic's steps and door. *Id.* The plaintiff admitted that she had seen the crack on prior visits and was certain that she saw it on the day of her fall. *Id.* The plaintiff filed a negligence action against the city. *Id.* The city filed its motion for summary judgment arguing that the sidewalk defect was open and obvious, and that it was therefore not required to foresee and protect against injuries resulting from the defect. *Id.* In answer to the motion, the plaintiff argued that she was distracted because she was looking at the clinic door, and that it was reasonable for the city to foresee that a person could become distracted in this manner. *Id.* ¶ 7. In granting summary judgment, the trial court concluded that the defect was open and obvious and that the distraction theory was inapplicable. *Id.* ¶ 8. The appellate court reversed the grant of summary judgment. *Id.* ¶ 13.

¶ 21 The supreme court reversed the appellate court, finding that that the distraction theory only applies when there is evidence from which the court can infer that the plaintiff was actually distracted, and that the "mere fact of looking elsewhere does not constitute a distraction." *Id.* ¶ 22. The supreme court also noted the circumstances in which the distraction exception had

been found applicable. *Id.* ¶¶ 24-27; see *Ward v. Kmart Corp.*, 136 Ill.2d 132, 153-54 (1990) (Kmart sold the plaintiff bulky merchandise that obscured his view and prevented him from walking into a five-foot concrete post outside the entrance of the store); *Deibert v. Bauer Brothers Construction Co.*, 141 Ill. 2d 430, 439-40 (1990) (plaintiff fell in a heavy equipment tire rut when exiting a bathroom because he was looking upward to ensure that workers were not throwing debris down from a balcony as the workers had historically done on this project); *American National Bank & Trust Co. of Chicago v. National Advertising Co.*, 149 Ill. 2d 14, 28-29 (1992) (billboard painter who came into contact with a high-voltage power line hanging above a walkrail that ran the length of the billboard was distracted by having to carefully watch where to place his feet on the walkrail); *Rexroad v. City of Springfield*, 207 Ill. 2d 33, 46 (2003) (student manager of a football team instructed by a coach to retrieve a helmet in the locker room, and forced to return using a different path because the original access gate was locked, was focused on returning the helmet to the coach and was distracted from a large hole in this alternate path to the field).

¶ 22 Here, plaintiff contends that she was distracted "while getting off a public bus pulling a bag." However, at the arbitration hearing, plaintiff admitted that she was looking toward Western because she planned to cross to catch a bus. She has not identified any hazard that prevented her from seeing the raised sidewalk slab. As the *Bruns* court held, the "mere fact of looking elsewhere does not constitute a distraction." *Bruns*, 2014 IL 116998, ¶ 22. This case is similar to the circumstances present in *Bruns* like the plaintiff there, plaintiff in this case was looking at Western rather than the sidewalk. In rejecting the plaintiff's distraction claim, the supreme court in *Bruns* observed:

> "In the absence of evidence of an actual distraction, we disagree with plaintiff that it was objectively reasonable for the City to expect that a pedestrian, generally exercising reasonable care for her own safety, would look elsewhere and fail to avoid the risk of injury from an open and obvious sidewalk defect. The plaintiff's position is contrary to the very essence of the open and obvious rule: because the risks are obvious, the defendant ' "could not reasonably be expected to anticipate that people will fail to protect themselves from any danger posed by the condition." ' *Bucheleres* [v. *Chicago Park District*], 171 Ill. 2d [435,] 448 [1996] (quoting *Ward*, 136 Ill. 2d at 148). Were we to conclude, as plaintiff does, that simply looking elsewhere constitutes a legal distraction, then the open and obvious rule would be upended and the distraction exception would swallow the rule."

¶ 23 We also find the circumstances in the present case analogous to the facts presented in *Negron v. City of Chicago*, 2016 IL App (1st) 143432. In that case, the plaintiff was walking on the south side of Division Street in Chicago. There was a crowd in the area. She heard someone yell behind her and she looked over her shoulder as she continued to walk. A few steps later, the plaintiff tripped over a section of sidewalk that had a two-inch height differential from the adjacent slabs. The weather was clear, it was still light out, and nothing obstructed her view of the sidewalk. She fell and fractured both elbows. *Id*. ¶¶ 1-5. The plaintiff then filed a negligence action against the City and alleged that she was injured because the City failed to maintain the sidewalk. *Id*. ¶ 6. The city moved for summary judgment. *Id*. After arguments, the trial court granted summary judgment, finding that the sidewalk defect was open and obvious and the plaintiff's claimed distraction exception was not reasonably foreseeable. *Id*. ¶ 10.

¶ 24 On appeal, the reviewing court concluded that the distraction exception was not applicable to the plaintiff's case. The court noted that the City "did not create or contribute to the distraction that caused" the plaintiff's accident. *Id*. ¶ 20. "A defendant that either creates or contributes to a distraction will typically have reason to know it exists." *Id*. "Conversely, where a defendant bears no responsibility for a distraction, courts frequently find that the defendant could not reasonably have foreseen it." *Id*. The court then rejected the plaintiff's contentions that a distraction was reasonable foreseeable. *Id*. ¶¶ 22-26. "None of [the plaintiff's] arguments persuades us that the city could reasonably have anticipated the distraction that caused [the plaintiff's] injury, and, therefore, the open-and-obvious doctrine applies." *Id*. ¶ 26.

¶ 25 The same reasoning from *Bruns* and *Negron* hold true here. Plaintiff's arbitration testimony that she was looking toward Western Avenue does not constitute a legal distraction from the open and obvious rule, nor does her argument on appeal that she was distracted because she was pulling her bag. We conclude that the distraction exception to the open and obvious rule does not apply in this case. However, application of the open and obvious doctrine does not end the inquiry as to whether the premises owner or occupier owes a duty of due care. *Bruns*, 2014 IL 116998, ¶ 35. Accordingly, we must consider the four factors referenced earlier in this order: "(1) the reasonable foreseeability of injury, (2) the reasonable likelihood of injury, (3) the magnitude of the burden that guarding against injury places on the defendant, and (4) the consequences of placing that burden on the defendant." *Id*.

¶ 26 "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." *Id.* "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." *Id.* The supreme court in *Bruns* found that the first

two factors carried little weight. "The first factor carries little weight because a defendant is ordinarily not required to foresee injury from a dangerous condition that is open and obvious." *Id*. ¶ 36. "The second factor also carries little weight because 'it is assumed that persons encountering the potentially dangerous condition of the land will appreciate and avoid the risks,' making the likelihood of injury slight." *Id*. (quoting *Sollami*, 201 Ill. 2d at 17). In reviewing the third and fourth factors, the supreme court observed that "the consequences of imposing that burden on the City would go well beyond the instant sidewalk defect. The City has miles of sidewalk to maintain. The imposition of this burden is not justified given the open and obvious nature of the risk involved." *Id*. ¶ 37.

¶ 27 Similarly, in considering where the City owed the plaintiff a duty of care, the *Negron* court concluded that the burden against the City was significant.

> "Because the distraction in this case was not reasonably foreseeable, the likelihood of injury from the open and obvious sidewalk defect was correspondingly low. Furthermore, the burden of guarding against such injury would be extremely high. The city has miles of sidewalk to maintain. Protecting pedestrians from random distracting noises on a city-wide basis would impose an unreasonable burden upon the city." *Negron*, 2016 IL App (1st) 143432, ¶ 26.

¶ 28 We agree with the conclusions in *Bruns* and *Negron* regarding the duty of care to plaintiff. As discussed in *Bruns*, the first two factors carry little weight where the condition is open and obvious as it is not reasonably foreseeable that one would fail to avoid encountering an open and obvious condition on the sidewalk. In regard to the third and fourth factors, we find the magnitude of the burden on the City to prevent any injury would be "extremely high" and nearly impossible to achieve. Accordingly, we hold that the City had no duty to protect plaintiff from

the open and obvious sidewalk defect. Therefore, the trial court properly granted summary judgment in favor of the City.

¶ 29 Based on the foregoing reasons, we affirm the decision of the circuit court of Cook County.

¶ 30 Affirmed.