2017 IL App (1st) 163110-U
Order filed: August 4, 2017

SIXTH DIVISION

No. 1-16-3110

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MARY BILEK,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 15 L 1944
	)	
WAL-MART STORES, INC.,	)	Honorable
	)	Janet Adams Brosnahan,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held*: Summary judgment entered in favor of defendant in this slip-and-fall case is affirmed, where there is no issue of genuine material fact that plaintiff slipped on anything but a natural accumulation of water.

¶ 2 In this slip-and-fall case, plaintiff appellant, Mary Bilek, appeals from the circuit court's order granting summary judgment in favor of defendant-appellee, Wal-Mart Stores, Inc. (Wal-Mart). For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 On February 25, 2015, plaintiff filed a complaint against Wal-Mart. In that complaint, plaintiff generally alleged that on March 5, 2013, she slipped and fell on a "quantity of liquid accumulated on the floor" of a retail store operated by Wal-Mart in Bridgeview, Illinois.

Plaintiff's complaint sought to recover for personal injuries she allegedly suffered as a result of the fall, contending that those injuries resulted from Wal-Mart's purported negligence (count I) and its violation of the Illinois Premises Liability Act (740 ILCS 103/1, *et seq*. (2014)) (count II). Wal-Mart filed an answer denying the material allegations of the complaint, as well as an affirmative defense contending—*inter alia*—it was not subject to liability because plaintiff slipped on "a natural accumulation of ice, snow or rainwater."

¶ 5 The parties thereafter engaged in discovery, including taking the depositions of plaintiff and a number of Wal-Mart's employees. We need not detail the evidence produced in discovery in any great detail for purposes of this appeal. It is sufficient to note that, according to plaintiff, the evidence produced below contained direct evidence and evidence supportive of reasonable inferences that: it was snowing outside on the day of her fall, snow and ice covered shopping carts were brought inside Wal-Mart's store by its employees, this snow and ice melted into a pool of water, plaintiff slipped on that pool of water, and, while Wal-Mart had instituted certain policies to warn customers of the hazard of melted water and to quickly remove that hazard, those policies were not followed on the day of her fall.

¶ 6 Wal-Mart filed a motion for summary judgment in which it contended: (1) it was not subject to liability, because the evidence established that plaintiff fell on nothing more than a natural accumulation of water, and (2) even if plaintiff slipped on something else, there was no evidence that Wal-Mart had actual or constructive knowledge of the hazard prior to plaintiff's fall. Plaintiff rejected these assertions in her response, and included in support thereof an affidavit containing factual averments that had not been included in her deposition testimony. Wal-Mart responded by asking the court to strike plaintiff's affidavit as being improper.

¶ 7 After concluding that it would neither strike nor consider plaintiff's affidavit, the circuit court entered an order granting Wal-Mart's motion for summary judgment. The circuit court specifically concluded that plaintiff had not presented any evidence showing that there was an issue of genuine material fact that she had slipped on anything but a natural accumulation of water. Plaintiff timely appealed.

¶ 8 II. ANALYSIS

¶ 9 On appeal, plaintiff contends that the circuit court improperly granted summary judgment in favor of Wal-Mart.

¶ 10 A. Standard of Review

¶ 11 Summary judgment is properly granted where the pleadings, depositions, and admissions on file, together with any affidavits, indicate 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 2014). The court must examine the evidence in the light most favorable to the nonmoving party (*Pavlik v. Wal-Mart Stores, Inc.*, 323 Ill. App. 3d 1060, 1063 (2001)), and must construe the material strictly against the movant and liberally in favor of the nonmovant (*Espinoza v. Elgin, Joliet and Eastern Ry. Co.*, 165 Ill. 2d 107, 113 (1995)). Although a drastic means of disposing of litigation, summary judgment is, nonetheless, an appropriate measure to expeditiously dispose of a suit when the moving party's right to the judgment is clear and free from doubt. *Gaston v. City of Danville*, 393 Ill. App. 3d 591, 601 (2009).

¶ 12 A plaintiff bringing a negligence claim must prove the defendant owed her a duty of care, the defendant breached that duty, and this breach was the proximate cause of her injury. *Krywin v. Chicago Transit Authority*, 238 Ill. 2d 215, 236 (2010). Summary judgment is properly entered for the defendant where plaintiff fails to establish one of these elements (*Pavlik*, 323 Ill. App. 3d

at 1063), with the issue of whether a duty exists being a question of law for the court to decide (*Espinoza*, 165 Ill. 2d at 113). A plaintiff is not required to prove her case in response to a motion for summary judgment, but must present evidentiary facts to support the elements of the cause of action. *Richardson v. Bond Drug Co. of Illinois*, 387 Ill. App. 3d 881, 885 (2009). When reviewing an order granting summary judgment, "we conduct a *de novo* review of the evidence in the record." *Espinoza*, 165 Ill. 2d at 113.

¶ 13 B. Discussion

¶ 14 As it was below, plaintiff's primary contention on appeal is that summary judgment in favor of Wal-Mart is improper because she slipped on a "substantial amount of liquid," and "there is considerable evidence that the liquid or water was not a natural accumulation, and was the result of WAL-MART employees pushing snowy and icy carts in from the outdoors to the store, causing an unnatural accumulation of melting snow and ice from the carts in an area where customers walked." We disagree. Even if—after viewing and construing the evidence in the light most favorable to plaintiff—we accepted plaintiff's characterization, that evidence would not be sufficient to establish an issue of fact as to whether plaintiff's fall was caused by anything other than a natural accumulation of water.

¶ 15 "Under the natural accumulation rule, a landowner or possessor of real property has no duty to remove natural accumulations of ice, snow, or water from its property." *Krywin*, 238 Ill. 2d at 227. This includes ice, snow, or water that is tracked inside the premises from the outside. *Id*. Thus, even if the landowner or possessor has knowledge that the accumulation caused a dangerous condition, there is no duty to remove if the accumulation is natural. *Choi v. Commonwealth Edison Co.*, 217 Ill. App. 3d 952, 956 (1991). It is also irrelevant whether a natural accumulation remains on the property for a purportedly "unreasonable" length of time,

and furthermore, because landowners and possessors of real property are not liable for failing to remove natural accumulations of water, owners and operators also have no duty to warn of such conditions. *Reed v. Galaxy Holdings, Inc.*, 394 Ill. App. 3d 39, 42 (2009). Nor will a voluntary undertaking to remove tracked-in water or minimize the hazard posed by it create any duty on the part of a landowner or possessor of real property. *Swartz v. Sears, Roebuck & Co.*, 264 Ill. App. 3d 254, 265 (1993).

¶ 16 Thus, "[t]o establish a duty, the plaintiff must make an *affirmative* showing of an *unnatural accumulation* or an *aggravation* of a natural condition before recovery will be allowed." (Emphasis added.) *Choi*, 217 Ill. App. 3d at 957. " 'In absence of such a showing, summary judgment for defendant is appropriate since the court owes no duty to reason some remote factual possibility.' " *Id.* (quoting *Shoemaker v. Rush-Presbyterian-St. Luke's Medical Center*, 187 Ill. App. 3d 1040, 1043 (1989)). Any assertion that the accumulation was unnatural or an aggravation of a natural condition based solely on speculation is not enough to raise a genuine issue of material fact. *Frederick v. Professional Truck Driver Training School, Inc.*, 328 Ill. App. 3d 472, 477 (2002).

¶ 17 Applying these principles in *Choi*, this court considered a case brought by an employee of an independent contractor engaged by the defendant landowner. The plaintiff was carrying pipes into the defendant's building, after the pipes had been stored outside and were covered in ice and snow. *Choi*, 217 Ill. App. 3d at 953. He was injured when he slipped on a puddle of water which had accumulated after the ice and snow on the pipes melted inside the building. *Id.* This court rejected the argument that, by storing the pipes outdoors and then requiring that they be brought directly indoors without de-icing them, the defendant's acts precluded the application of the general rule that a landowner is not liable for injuries resulting from "tracked-in" water. *Id.*

at 957. Rather, we found that the puddles which resulted from transporting the ice-covered pipes were a "continuation of a natural accumulation" and that the plaintiff failed to "make an affirmative showing of an unnatural accumulation or an aggravation of a natural condition" so as to establish a duty. *Id.*

¶ 18 Similarly in *Swartz*, this court considered a retail customer who slipped in an automotive service area. The defendant's employees had driven vehicles needing service into that area, and those vehicles were allegedly wet from being exposed to rainy weather outside. *Swartz*, 264 Ill. App. 3d at 267-68. In considering the application of the natural accumulation rule to that situation, and relying on the decision in *Choi*, this court concluded:

> "That defendant's employees may have driven the cars that tracked in the water is an insufficient basis to determine that an unnatural accumulation was present as a matter of law. The water in this case is more indicative of a 'continuation of a natural accumulation' rather than an unnatural accumulation. Regardless of who drove the cars into the service area, the result would have been the same: water would have dripped off the cars. While defendant's conduct could prevent it from seeking shelter under the rule of non-liability when that conduct results in a creation of an unnatural accumulation, this case does not present such an instance." *Id*. at 268.

¶ 19 Finally, we make note of two decisions from the United States District Court for the Northern District of Illinois. See *Bernard v. Supervalu, Inc*., 12-CV-1482, 2013 WL 6050616 (N.D. Ill. Nov. 14, 2013); and *Domkiene v. Menards, Inc*., 15 C 5732, 2016 WL 4607888 (N.D. Ill. Sept. 6, 2016). Applying Illinois law, specifically the natural accumulation rule, each case rejected the contention that a defendant retail store was improperly granted summary judgment because the defendant could be held liable when a customer slipped on water that was allegedly

introduced to the interior of a store when it dripped off of shopping carts, wet from rain, that were brought inside the store by the defendant's employees. *Bernard*, 2013 WL 6050616, at *3-4; *Domkiene*, 2016 WL 4607888, at *4. As the court in *Bernard*, stated:

> "Under the natural accumulation rule, Jewel–Osco's duty did not extend to taking precautions against water tracked in from a natural accumulation outside. To establish a duty, plaintiff must make an affirmative showing of an unnatural accumulation or an aggravation of a natural accumulation. Ms. Bernard made no such showing in this case. The water Ms. Bernard slipped on, if it originated on the carts as she argues, was a continuation of a natural accumulation. There is no evidence that Jewel–Osco aggravated this condition. Ms. Bernard has not shown that there is a genuine issue of material fact." *Bernard*, 2013 WL 6050616, at *4.

¶ 20 Again, viewing the evidence in this case in the light most favorable to her, plaintiff *herself* contends that the evidence produced below—*at best*—contained direct evidence and evidence supportive of reasonable inferences that the following facts are true: it was snowing outside on the day of her fall; snow and ice covered shopping carts were brought inside Wal-Mart's store by its employees; that snow and ice melted into a pool of water; plaintiff slipped on that water; and, while Wal-Mart and instituted certain policies to warn customers of the hazard of the melted water and to quickly remove that hazard, those policies were not followed on the day of her fall. However, under all the above authority, none of these facts—even taken as true—are sufficient to take this case out of the rule of non-liability for natural accumulations of water, and summary judgment was, therefore, properly entered in favor of Wal-Mart.[1]

[1] Although not addressed by the parties, the record also appears to support an alternative basis to affirm the circuit court's decision. Specifically, while Wal-Mart's affirmative defense made the specific contention that plaintiff slipped on "a natural accumulation of ice, snow or

¶ 21 We make three final, additional points. First, the parties' briefs on appeal spend considerable time discussing the evidence and significance of Wal-Mart's actual or constructive knowledge of the hazard presented by the water upon which plaintiff allegedly slipped. However, these issues are irrelevant in light of our conclusion that plaintiff presented no evidence that she slipped upon anything other than a natural accumulation of water. *Walker v. Chicago Transit Authority*, 92 Ill. App. 3d 120, 123 (1980).

¶ 22 Second, the parties have also addressed the propriety of the affidavit that plaintiff presented below in opposition to the motion for summary judgment. We need not further address this issue, as a review of the averments made in that affidavit—even if we did consider them—do nothing to alter the conclusions we have reached above.

¶ 23 Third, the parties' arguments appear to focus on the question of whether summary judgment was properly granted on the negligence claim pled as count I of plaintiff's complaint. However, plaintiff's complaint also contained a second count asserting a violation of the Premises Liability Act. We need not address the specifics of this count any further however, as our supreme court has recognized that a conclusion that a plaintiff's negligence claim fails under the natural accumulation rule is dispositive of any related claim under the Premises Liability Act. *Poke v. Illinois Power Co.*, 187 Ill. App. 3d 631, 635 (1989).

¶ 24 III. CONCLUSION

¶ 25 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 26 Affirmed.

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rainwater," the record does not contain any indication that plaintiff filed a reply to this assertion. It is well-recognized that the failure to reply to an affirmative defense constitutes an admission of the allegations contained therein. *Filliung v. Adams*, 387 Ill. App. 3d 40, 56 (2008).