2011 IL App (1st) 103114-U

FOURTH DIVISION
August 25, 2011

No. 1-10-3114

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

HAROLD PARKER,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 07 L1 0612
	)	
J.C. PENNEY CORPORATION, INC.,	)	
THE TAUBMAN COMPANY, LLC	)	
and SCHINDLER ELEVATOR	)	
CORPORATION,	)	Honorable
	)	Marcia Maras,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE SALONE delivered the judgment of the court.
Presiding Justice Lavin and Justice Sterba concurred in the judgment.

O R D E R

Held: The circuit court properly granted summary judgment in favor of defendants in a personal injury action brought by plaintiff who was injured while riding a store escalator, where plaintiff failed to establish a genuine issue of material fact as to the proximate cause of his injury.

¶ 1 Plaintiff Harold Parker appeals a circuit court order granting summary judgment in favor of defendants, J.C. Penney Corp., Inc. (Penney) and Schindler Elevator Corp. (Schindler), in a personal injury action. Plaintiff contends summary judgment was inappropriate where he had established a genuine issue of material fact. For the reasons that follow, we affirm.

¶ 2 Plaintiff sued defendants under a negligence theory for injuries allegedly received when, as an invitee of a store owned and operated by Penney, his jacket became caught on an escalator maintained and serviced by Schindler. The complaint also named Penney under a *res ipsa loquitur* theory of negligence.[1] The following facts were presented to the circuit court in pleadings, photographs, and depositions.

¶ 3 On October 8, 2005, plaintiff was injured while riding an ascending escalator in Penney's store in Woodfield Mall. Plaintiff's wife was two steps below him on the escalator. Plaintiff's right hand was on the escalator handrail. He was wearing a jacket, which was not bumping against the side panels of the escalator as he rode up. As plaintiff was almost to the top of the escalator, he heard and saw nothing different about the escalator "mechanically," but he felt the right side of his jacket snag and he was jerked backward. He felt severe pain in his neck. Plaintiff was pulled down one step on the escalator. His wife put up her hand to stop him from falling and he told her, "I'm caught." She could not see what was holding him. Plaintiff was able to get the jacket off quickly "before the stairs ran out." He believed he was able to free himself when a button may have come off his jacket. Neither plaintiff nor his wife could see what had snagged his jacket.

¶ 4 Plaintiff went to a store service desk and reported the incident. Two security guards were sent and one of them secured a camera. Plaintiff testified in his deposition that he never went back to look at the escalator and did not see the guards photographing the escalator. He was "just not sure" whether he heard security guards talking about a loose panel on the escalator. Plaintiff stated: "Something grabbed me that was part of the escalator system." However, he never saw what snagged his jacket.

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[1] A third defendant, The Taubman Company, L.L.C., owner of the premises leased to Penney, had been sued under theories of simple negligence and *res ipsa loquitur*, but was voluntarily dismissed before the summary judgment hearing.

¶ 5 Plaintiff's wife testified in her deposition that she learned where plaintiff's jacket may have snagged when a "supervisor or whoever it was came and they were looking at the escalator and they saw" that a strip that went down to hold the panels in place was "sticking out, bulged out, something like that." Neither plaintiff nor his wife had noticed a loose side panel or other part of the escalator either at the time of or prior to the incident.

¶ 6 Xer Sanchez, a loss prevention officer at the store, responded with a co-worker to plaintiff's report of the incident. Sanchez identified three photographs which either he or his co-worker took of the escalator after the incident. Although Parker had stated in his deposition that he did not return to the escalator after his jacket snagged, Sanchez expressed a different recollection in his discovery deposition:

> "Q. Now, did Mr. Parker actually point to this area for you to take the picture, or how did you know that this was the area that was involved in the incident?
>
> ***
>
> THE WITNESS: Well, from what I recall, he pointed -- he just pointed in the bottom of the escalator, and he pointed at the bar underneath -- near the bottom of the escalator. And that's where Mr. Parker located -- told me to locate it.
>
> BY MR. BISHOF [plaintiff's attorney]: Okay. I guess I want to be more specific on what he actually did. Was he on the escalator with you, or was he waiting for it to come down or waiting for the escalator, you know –
>
> A. It was on top of the escalator, I was talking to him. And he told me he just pointed down to the escalator where there is the only bar on the escalator down on the second -- first level.

Q. Now, where he pointed, was this a movable part of the escalator?

A. He just pointed in the bottom escalator, that's all. And, like, you know, where the silver -- where the silver is on the side rail.

Q. Did he point to where he believed his coat actually snagged?

A. Well, he -- it was in the second level. He just pointed down at the escalator, where he was pointing at the railing. That's all he was pointing at that I recall.

Q. Now, when you say at the bottom of the railing, you mean where he's holding on?

A. There is like -- there is a railing like that goes vertically, an escalator, and -- and there is like a metal on it. And that is, I believe, that connects vertically to the escalator. And he pointed at that, and that's what he told me that -- where he caught his jacket from is the metal sheet that goes vertically, which is located at the bottom, the first level of the escalator.

Q. Okay. Did he point to what side? Which side of the escalator did he get caught?

A. It was -- he said his right side got caught. Right side of his jacket got caught on the right side of the railing of the escalator.

Q. Do you know what these strips are that are depicted in photographs 5, 6, and 7, the vertical strips?

A. They are part of the escalator, as far as I know, that me or my - - or my coworker or I took a picture of, that's all I could remember."

¶ 7 Scott Bruns was an employee of defendant Schindler, which installed, maintained, and repaired the escalators. Bruns was assigned to service the escalators at the Penney store at the time of the 2005 incident. Sometime before April 2005, Bruns had recommended that skirt brushes be installed on all of the escalators on his route as a safety precaution to keep people's feet and shoes from getting caught where the steps met the sides of the escalators. That installation was not accomplished prior to the incident at the Penney store on October 8, 2005.

¶ 8 Donald Sanocki, another Schindler escalator service technician who serviced the Penney store escalators in October 2005, was unaware of any complaint about an escalator at the store on October 8, 2005.

¶ 9 Michael Chubeck, the loss prevention supervisor for the Penney store at the time of the incident, testified in his deposition that he could not recall whether Schindler was contacted about the incident.

¶ 10 After discovery was closed, defendants filed a motion for summary judgment, asserting plaintiff had failed to establish a material issue of fact as to whether the alleged escalator defect caused plaintiff's injury, whether the defect existed prior to plaintiff's alleged accident, how the defect came to be, and whether defendants had actual or constructive notice of the defect before the incident. Plaintiff's response asserted that actual or constructive notice was not required where plaintiff could show that defendants' negligent acts or omissions produced the condition causing plaintiff's injury, and that such an omission was the failure to install skirt brushes that would have kept plaintiff away from the side panels of the escalator. The response also contended that plaintiff had pointed out to Sanchez exactly where his jacket snagged on the escalator and that photographs were taken of that location.

¶ 11 The circuit court granted summary judgment in favor of defendants and against plaintiff. The court found that the failure to install the skirt brushes at the bottom of the escalator steps was a "red herring" because the brushes were intended only to keep people's feet from being trapped between the steps and sides of an escalator. The court ruled that there was no genuine issue of material fact as to the simple negligence counts against the defendants because there was no showing of proximate cause. The court also ruled plaintiff could not succeed against Penney on *res ipsa loquitur* without expert testimony to establish the accident could not have occurred without defendant's negligence.

¶ 12 On appeal, plaintiff first contends that summary judgment was inappropriate where there was a genuine issue of material fact sufficient to preclude summary judgment against him.

¶ 13 Our standard of review of the circuit court's decision to grant summary judgment is *de novo*. *Pritza v. Village of Lansing*, 405 Ill. App. 3d 634, 641 (2010). Summary judgment is proper where the pleadings, depositions, and admissions on file, together with any affidavits, indicate there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2008). A motion for summary judgment must be construed strictly against the movant and liberally in favor of the nonmoving party. *Jackson v. TLC Associates, Inc.*, 185 Ill. 2d 418, 423-24 (1998). Summary judgment is a drastic means of disposing of litigation, but it is nonetheless an appropriate measure to expeditiously dispose of a lawsuit when the moving party's right to a judgment in its favor is clear and free from doubt. *Madigan v. Yballe*, 397 Ill. App. 3d 481, 493 (2009).

¶ 14 The elements of a cause of action for negligence are: (1) a duty owed to the plaintiff by the defendant, (2) a breach of that duty, and (3) an injury proximately caused by the breach. *Alqadhi v. Standard Parking, Inc.*, 405 Ill. App. 3d 14, 16 (2010). Whether a duty of care exists is a question of law to be determined by the court. *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 391 (2006). However, the issues of breach of duty and proximate cause are factual

matters for a jury to decide, provided there is a genuine issue of material fact regarding those issues. *Espinoza v. Elgin, Joliet and Eastern Ry. Co.*, 165 Ill. 2d 107, 114 (1995). "A genuine issue of material fact exists where the facts are in dispute or where reasonable minds could draw different inferences from the undisputed facts." *Morrissey v. Arlington Park Racecourse, L.L.C.*, 404 Ill. App. 3d 711, 724 (2010).

¶ 15 At the summary judgment stage, plaintiff was required to introduce evidence of negligence on the part of defendants and evidence that defendants' negligence was a proximate cause of plaintiff's injuries. *Argueta v. Krivikas*, 2011 IL App (1st), 102166, ¶10, and cases cited therein. Moreover, for an act or omission of defendant to be regarded as negligent, plaintiff was required to show defendant had knowledge, or ought to have known from the circumstances, that the allegedly negligent act endangered another. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 48 (2004). Here, however, plaintiff failed to put forth sufficient evidence of breach of duty or proximate cause. Neither plaintiff nor his wife saw any separation or projection of the side panel, neither indicated that they had observed or noticed anything unusual about the operation of the escalator as they were riding it, and neither observed how plaintiff's jacket button came to be torn off. Plaintiff was not positive that the button coming off the jacket released the jacket, and the button was not produced. The deposition testimony of Sanchez, who examined the escalator after the incident, was confusing and inconclusive and his memory of the incident was poor. He did not testify to seeing any defect on the escalator. Sanchez did not inspect plaintiff's jacket and could not remember whether his co-worker did so. Two Schindler employees who serviced Penney's escalators during October of 2005 were also deposed, but there is no indication they knew of any report of the incident or that the escalator was taken out of service or that Schindler service technicians made any repairs to the escalator resulting from the incident. Sanchez or his co-worker took three photographs of a location on the escalator that Sanchez testified was

pointed out to him by plaintiff. However, plaintiff testified that he did not return to the escalator and did not see the Penney employees photograph the escalator.

¶ 16 Plaintiff asserts that the photographs portray a bent metal strip running along the border of the escalator's side panels. The record on appeal contains only poor-quality photocopies of the three photos which are inadequate to enable us to determine that a bent or protruding strip is depicted. Assuming the original photographs depict a defect in a side panel of the escalator, plaintiff has failed to demonstrate the alleged defect was the cause of his injury. Plaintiff has made an assumption that because a defect existed and an injury occurred, cause and effect were established. However, mere speculation, conclusions, or guess is not sufficient to withstand summary judgment. *Lewis* v. Chica Trucking, *Inc.,* 409 Ill. App. 3d 240, 251 (2011).

¶ 17 We find applicable our decision in *Householder v. Prudential Insurance Co.*, 130 Ill. App. 2d 184 (1970), where plaintiff, a 2½-year-old child, was riding a descending escalator with her mother. A moment before the two were to step off the escalator, the mother heard a "slight thump" and the child whimpered. At about the same time, the mother noticed "a little extra movement in the escalator, maybe a little jerk" along with the thump. After reaching the bottom, the mother leaned down to pick up the child and discovered a severe cut on the child's leg, which required about 40 sutures to close. Plaintiff's negligence suit alleged that a "sharp portion" of defendant's escalator came into contact with her leg as a result of the "jerk" of the escalator, causing her injury. The case went to a jury trial and the trial court granted the defendant's motion for a directed verdict at the close of the plaintiff's case. On appeal, plaintiff claimed there was sufficient evidence to submit the case to the jury on both simple negligence and *res ipsa loquitur*. This court affirmed the directed verdict in defendant's favor on the basis that the plaintiff had failed to show the escalator in fact caused her injury. *Id.* at 189. Here, as in *Householder*, where plaintiff failed to present sufficient evidence to establish proximate cause, summary judgment was appropriate. *Keating v. 68th and Paxton, L.L.C.*, 401 Ill. App. 3d 456, 471 (2010).

¶ 18 Plaintiff contends he was required to provide evidence sufficient to support only an inference that defendants' acts had produced the condition causing his injury and was not required to show defendants' knowledge or constructive notice of the condition. He bases his argument on *Mueller v. Phar-Mor, Inc.*, 336 Ill. App. 3d 659 (2000). There, this court found persuasive a line of cases holding that, to establish negligence, a store's customer need not show the store's knowledge or constructive notice of the condition causing his injury, but was required to offer only some slight additional evidence to raise an inference that it was more likely than not that the defendant or his employees, rather than a customer, created the condition. *Id.* at 667-68. The cases cited and relied on by *Mueller* were "fall down" negligence suits brought by invitees of business owners who slipped on a foreign substance on the floor, a factual situation different than ours. Even in those "fall down" cases, where "there is no way of showing how the substance became located on the floor, liability may be imposed if the defendant or its employees had constructive notice of its presence. *** Liability cannot be based on guess, speculation, or conjecture as to the cause of the injury. [Citation.] Proximate cause can only be established if it is reasonably certain the defendant's acts caused the plaintiff's injury. [Citation.]" *Newsom-Bogan v. Wendy's Old Fashioned Hamburgers of New York, Inc.*, No. 1-09-2860, slip op. at 6 (June 24, 2011).

¶ 19 Plaintiff contends, however, that he made a sufficient showing that Penney breached its duty to plaintiff and proximately caused his injury by failing prior to the accident to upgrade the escalator with skirt brushes that would have kept plaintiff away from the sides of the escalator. This argument has two flaws. First, according to Bruns, the purpose of the skirt brushes was to keep the feet or shoes of escalator riders away from between the side of the escalator and the steps, not to keep their entire bodies from the side panels. Second, this argument begs the question by assuming the accident happened because plaintiff was allowed to be too close to a defective side panel which caused his injury.

¶ 20 Plaintiff also asserts it was error to grant summary judgment for Penney on plaintiff's *res ipsa loquitur* theory. To establish the requisite elements of the *res ipsa* doctrine, a plaintiff must show that he was injured (1) in an occurrence that would not have occurred in the absence of negligence, (2) by an instrumentality or agency under the management or control of the defendant, and (3) under circumstances indicating the injury was not due to any voluntary act or neglect on the part of the one claiming the doctrine. *Daniels v. Standard Oil Realty Corp.*, 145 Ill. App. 3d 363, 367 (1986), citing *Lynch v. Precision Machine Shop, Ltd.*, 93 Ill. 2d 266, 272 (1982). Again, plaintiff was required to establish that some negligence on defendant's part with respect to maintenance of the escalator was the proximate cause of the injury. The *res ipsa* doctrine does not apply absent such a showing by plaintiff. See *Householder*, 130 Ill. App. 2d at 190.

¶ 21 Plaintiff contends the circuit court erred in ruling that expert testimony was mandatory in *res ipsa* cases. There is no requirement that expert testimony is a prerequisite to reliance on the *res ipsa* doctrine "in every case." *Heastie v. Roberts*, 226 Ill. 2d 515, 537 (2007). However, under the *res ipsa* doctrine, plaintiff was required to show that the accident would not have occurred in the absence of negligence. Plaintiff made no showing as to how the escalator was operating when plaintiff was injured, compared to how it should have been operating, to establish that the accident would not have occurred but for negligence. The circuit court correctly pointed out that to make that showing, expert testimony should have been presented.

¶ 22 For the reasons set forth above, where plaintiff failed to present sufficient evidence that defendants were liable for plaintiff's injury, the circuit court's grant of summary judgment in defendants' favor was appropriate.

¶ 23 Affirmed.