2012 IL App (1st) 110926-U

SIXTH DIVISION
June 22, 2012

No. 1-11-0926

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JOHN WITOWICZ, a minor, by his father and next friend MIKE WITOWICZ, and MIKE WITOWICZ, individually,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellants,	)	
v.	)	No. 08 L 9397
RMS PROPERTIES, INC., TOVAR SNOW PROFESSIONALS, INC., and RMS PROPERTIES, LLC,	)	Honorable James C. Murray, Jr.,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE GARCIA delivered the judgment of the court.
Justices Lampkin and Palmer concurred in the judgment.

O R D E R

¶ 1 *Held*: Summary judgment properly granted to defendants where plaintiffs' claim of liability rested on linking ice on the ground to a buildup of snow on a roof, yet no evidence was ever presented that the ice on which plaintiff slipped and fell, was the result of water runoff from melting snow on the roof resulting in the unnatural accumulation of the ice below.

¶ 2 Plaintiffs John Witowicz, a minor, by his father and next friend Mike Witowicz, and Mike Witowicz, individually, appeal the grant by the circuit court of Cook County of the

separate motions for summary judgment of defendants RMS Properties, Inc., RMS Properties LLC (collectively RMS), and defendant Tovar Snow Professionals, Inc. John and Mike sued for negligence arising out of a slip and fall by John on the property of RMS in which he broke his leg. John and Mike alleged that John's fall was caused by an unnatural accumulation of ice for which the defendants were responsible. The circuit court ruled that Mike's testimony that he observed a roof pitch that came to a corner point right above where John fell was insufficient to raise a fact question that John's fall was caused by an unnatural accumulation of snow and ice directly below the corner point of the roof so as to give rise to a duty of care on the part of RMS. The court also ruled that Mike's testimony, coupled with the terms of the "Snow and Ice Management Services" contract that "icy conditions" would be treated with "chemical applications" by Tovar likewise did not give rise to a duty of care owed by Tovar to the plaintiffs. We agree with each ruling and affirm the grants of summary judgment to the defendants.

¶ 3 Based on their briefs, the parties agree that the discovery depositions of John and Mike, upon which the circuit court issued its rulings, are dispositive of the issue before this court. We first summarize John's deposition.

¶ 4 On February 26, 2008, at about 2:30 p.m., John, who was then in middle school, accompanied his father, Mike, to a BoRics Hair Care store located in a Schaumburg strip mall near the intersection of Schaumburg and Springinsguth Roads. They parked and went into the BoRics. According to John, the walkway in front of BoRics had a thin layer of snow, with visible footprints. After entering BoRics, John returned to the car to get his backpack, which contained his homework. While walking back to the car he took a slightly different route than the one he took with his father, walking on the other side of a pillar. He was still on the walkway when both of his feet slipped and he landed on his right hip on the asphalt, breaking his leg. John recalled that he could see ice beneath a thin layer of snow where he fell. John estimated the snow

was about one and one-half inches deep and he believed there was ice below it because it looked shiny. He could not tell how thick the ice was. Nor did he look above where he fell to see if something there contributed to the ice that was on the ground. His father, Mike, came out and carried him into BoRics. His father then took John to their car and drove John to the hospital.

¶ 5 Mike testified in his deposition that on the date and time in question the temperature was around freezing and there was snow on the ground. In the parking lot near BoRics, there were piles of snow that looked like they had been left there by snow removal, but he could not see "melt" coming from them. The sidewalk in front of BoRics looked like it had been cleared of snow, with only a few snow granules remaining. He did not see any ice on the sidewalk. Mike observed salt spread, which he described as a "bluish-type granule," in front of the BoRics' door and the adjacent door, extending out about 4 feet along the sidewalk, which made the area wet where the snow had melted. When he was summoned outside to help his son, he noticed an accumulation of ice around a pillar on the sidewalk. The ice was shiny, with the pillar very close to the marks caused when John fell. He could not tell how thick the ice was. When he looked above where John had fallen he saw that the roof pitch came to a corner directly overhead where there was about a six-inch buildup of snow; it "looked like there was leaking or dripping from that area." He thought "that's what was causing the area to be so icy down below." However, when Mike was asked directly if he saw water coming from the snow buildup, he said no. Nor did he see any icicles hanging from the roof above where John fell and he saw no frozen streams of water on the side of the column. He explained that he thought water had come from the buildup of snow on the roof because it was right above the ice where John fell. He could not tell how thick the ice on the ground was; nor could he tell whether there was ice under the thin layer of snow that covered other parts of the walkway. Mike testified that the snow came up

about 1/4 inch on his shoes. Mike acknowledged that while he had been back to BoRics where John fell, he never observed how water traveled along the corner point of the roof.

¶ 6 The plaintiffs also presented the contract that Tovar had with RMS regarding remove snow and ice management of the strip mall property as evidence. The contract prohibited Tovar from engaging in snow and ice removal during business hours, between the hours of 7 a.m. and 9 p.m. In addition, according to the deposition testimony of Gilda Garza, property manager of RMS Properties, Inc., when snow fall did not surpass 3/4 inch, her own maintenance employees cleared the snow and applied the salt.

¶ 7 The plaintiffs' filed a three-count amended complaint. The first count alleged that RMS owned, managed or controlled the sidewalk outside of BoRics. The count alleged that RMS failed to take remedial measures to correct the dangerous condition of an unnatural accumulation of ice caused by drainage from the building housing BoRics, failed to warn plaintiffs and others of the dangers from the unnatural accumulation of ice, and allowed the dangerous accumulation to exist when they knew that patrons would have to traverse it to enter and exit BoRics. The second count alleged that the snow and ice management services agreement between Tovar and RMS obligated Tovar to treat icy conditions on the sidewalks of the premises, including the sidewalk immediately outside the entrance to BoRics. The count alleged that Tovar was negligent in the same ways as RMS with respect to the unnatural accumulation of ice outside of BoRics. The third count was directed specifically at RMS Properties, LLC, alleging that it failed to correct the roof of the building housing BoRics, which caused the unnatural accumulation of ice near the BoRics entrance. The count alleged that RMS Properties, LLC, failed to warn patrons of the unnatural accumulation of ice and permitted a dangerous accumulation of ice outside of BoRics. All three counts alleged that as the result of these actions or failures to act, John slipped and fell and was severely and permanently injured.

¶ 8 All three counts share the central premise of the complaint that John slipped and fell on an unnatural accumulation of ice linked to a presumably defective condition of the roof of the building housing BoRics. The circuit court ruled that the link between the purportedly defective roof condition and the ice on the ground where John fell was premised on nothing more than speculation. The court read the complaint as alleging no facts (as opposed to conclusions) that the ice that caused John to fall was the result of an unnatural accumulation coming from the roof; nor did the deposition testimony of Mike and John contain facts to that effect. The court ruled that Mike's deposition testimony that he believed a link existed between the six-inch pile of snow at the corner point of the roof and the ice directly below contained no facts to support the conclusion Mike reached. Mike testified that upon looking above from where John slipped and fell, he saw a buildup of snow on the roof. Mike, however, expressly admitted that he observed nothing to support that the ice on the ground was connected to water possibly dripping from that snow buildup on the roof; he saw no icicles on the roof or streams of frozen water along the column below the roof. He candidly testified that the link he made between the roof snow buildup and the ice upon which John slipped was based solely on the proximity of one to the other. Mike provided no testimony of any observations he made that confirmed the link he believed existed between the snow buildup on the roof and the ice directly below. In the absence of any evidence that might support a question of fact regarding an unnatural accumulation of snow and ice where John actually fell, the circuit court ruled he was compelled to grant summary judgment to all defendants.

¶ 9 Summary judgment is proper only where the pleadings, depositions and affidavits leave no genuine issue of material fact, entitling the moving party to summary judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2008). The standard of review is *de novo*. *Koziol v. Hayden*, 309 Ill. App. 3d 472, 476 (1999). The moving party's right to summary judgment must

be clear and free from doubt. *In re Estate of Hoover*, 155 Ill. 2d 402, 410 (1993). Regarding a negligence claim based on a slip and fall caused by an unnatural accumulation of snow and ice, the legal issue before the court is whether the defendant owes a duty of care to the injured plaintiff. *Krywin v. Chicago Transit Authority*, 238 Ill. 2d 215, 232 (2010) (the defendant was entitled to a directed verdict where "there was no evidence that the ice on the platform where the plaintiff fell was anything other than a natural accumulation").

¶ 10 Our supreme court has acknowledged that a natural accumulation of snow and ice does not mean that such a condition is considered "safe." *Id.* Rather, a natural accumulation of snow and ice triggers no duty of care because to impose "an obligation to remedy those conditions would be *** unreasonable and impractical ***." (Internal quotation marks omitted.) *Id*. Thus, in the instant case, before the defendants can be found to owe a duty of care as a matter of law, the plaintiffs must bring forth facts that the snow and ice upon which John fell and was injured was the result of an unnatural accumulation. *Branson v. R&L Investment, Inc.*, 196 Ill. App. 3d 1088, 1091 (1990).

¶ 11 In the instant case, the circuit court concluded that plaintiffs' case was premised on Mike's deposition testimony that a buildup of snow on the roof of the building that housed BoRics caused the ice upon which his son, John, slipped and fell, which the court characterized as speculation. The plaintiffs concede that the "crux of this appeal against the RMS defendants centers around the question of whether plaintiffs presented sufficient evidence at the summary judgment stage *** that John *** fell upon an unnatural accumulation of ice" and the plaintiffs' contention of error by the circuit court rests "primarily upon the observations of *** Mike Witowicz," John's father. The plaintiffs assert that Mike's testimony did not amount to speculation in the absence of expert testimony that the source of the ice on the ground was likely from the snow buildup on the roof. Rather, according to the plaintiffs, Mike's testimony was

proper lay-witness testimony, which "[j]urors who live in Chicago can clearly appreciate that snow trapped on a roof can melt, drip, and freeze on a sidewalk below." We cannot agree.

¶ 12 The record before us contains no observation made by Mike that the snow trapped on the roof did exactly as the plaintiffs contended: it melted, dripped below as water, and formed ice as it froze on the sidewalk below. Mike saw no water dripping from that buildup, saw no icicles hanging from the roof, and saw no stream of frozen water on the column adjacent to where John fell. We agree with the circuit court that to allow this claim to reach a jury would be to encourage the jury to engage in speculation, guess, or surmise. *Krywin*, 238 Ill. 2d at 232 (defendant is entitled to verdict as a matter of law when "no evidence [exists] that the ice on the platform where plaintiff fell was anything other than a natural accumulation"); *Mann v. Producer's Chemical Co.*, 356 Ill. App. 3d 967, 974 (2005) ("It is well settled that liability cannot be predicated upon surmise or conjecture as to the cause of an injury, but liability can be established where there is a reasonable certainty that defendant's actions caused the injury."). The plaintiffs' reliance on *Hornacek v. 5th Avenue Property Management*, 2011 IL App (1st) 103502, for their contention that the circuit court below erred is misplaced. There, several deposition witnesses testified that the snow piles created by the snow removal company caused "a 'big ice flow that kind of went from the ice pile that bisected the parking lot' " upon which the plaintiff allegedly fell. *Id.* at ¶11. This court concluded that in light of the undisputed nature of the snow piles as unnatural accumulations, the proximate cause issues regarding whether the snow removal company acted negligently and whether the landowner had actual or constructive notice of the dangerous icy conditions were factual issues for the trier of fact to resolve, precluding the entry of summary judgment. *Id.* at ¶¶31, 34-35. The threshold question in this case is whether *any* showing of unnatural accumulation was made, which we answer in the negative, as the court did in *Krywin*.

¶ 13 Based upon the record before us, we affirm the judgment of the circuit court of Cook County granting summary judgment to the defendants.

¶ 14 Affirmed.