2016 IL App (1st) 151708-U

SECOND DIVISION
September 30, 2016

No. 1-15-1708

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JACQUELINE MEDINA,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	
	)	No. 09 L 8734
RESURRECTION SERVICES, a corporation, and	)	
RESURRECTION HEALTH CARE CORPORATION,	)	
a corporation,	)	Honorable
	)	Daniel T. Gillespie,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Hyman and Justice Neville concurred in the judgment.

O R D E R

¶ 1 *Held*: Where the evidence presented a question of fact as to whether strip of material on edge of stair caused the plaintiff to fall in defendant's office building, the trial court's entry of summary judgment for defendant on the negligence count of complaint is reversed. However, we affirm the trial court's dismissal of the plaintiff's negligent spoliation of evidence claim.

¶ 2 Plaintiff Jacqueline Medina appeals from the trial court's grant of summary judgment in favor of defendant Resurrection Services (Resurrection) in Medina's action to recover damages for injuries sustained when she fell on a flight of stairs at an office building maintained by

Resurrection. On appeal, Medina contends the trial court erred in granting Resurrection's motion for summary judgment because the evidence presented a question of fact as to whether the condition of the stairs caused her injury. Medina also contends the trial court erred in granting Resurrection's motion to dismiss her spoliation of evidence claim, which alleged that employees of Resurrection removed a piece of material from the stairs after her fall and took photographs of the stairs that could not later be located.

¶ 3 On July 26, 2009, Medina filed a negligence complaint against Resurrection and Resurrection Health Care Corporation.[1] Medina's complaint alleged on August 1, 2007, she visited a relative at St. Joseph's Hospital at 2900 North Lake Shore Drive in Chicago. Medina walked from the hospital to a nearby office building managed by Resurrection after her relative asked that she obtain his medical records.

¶ 4 In her discovery deposition, Medina testified that she entered the Norman Stone Professional Office Building at 2800 North Sheridan Road, where several sets of stairs led from the building's entrance to a lower lobby area. She began walking down a flight of five or six stairs while holding a railing to her right. As Medina walked down the second set of stairs, she stepped on a strip of material with her right shoe. When Medina stepped down with her left foot, "[s]omething caught" her right foot. As she looked down, her feet slid forward and she fell forward onto her left side. Medina stated that something kept her right foot from moving and her foot was "stuck." She "saw something unfurled as I was falling down the stairs" and she thought it "could be weather stripping" and resembled an "anti-skid thing on the stair." When asked if she

[1] Although Medina has listed Resurrection Health Care Corporation as a party to this appeal, the record reflects that the trial court dismissed that entity from this action in 2010.

knew what her right foot was stuck on, she replied, "I'm imagining that it was the weather stripping that it got stuck on."

¶ 5 Medina further testified:

"A. I thought it could have been tack strips or a nail. I couldn't tell you for certain because I don't know what type of materials are used in that building. I saw the material unfurled as I was going down the stairs, and when I looked up after I stopped hitting the stairs, it was unfurled."

Q. Okay, but it's not your testimony that – when you're walking down the street and you trip on a raised curb, you can feel your foot catch on that curb and that will cause you to trip?

A. I didn't feel anything catch.

Q. So what you're saying is your right foot was kind of stuck on something that kind of kept it from going up?

A. Correct.

Q. And it's the opposite of you stepping on something with your right foot and your foot slipping?

A. Correct.

Q. And as I sit here today, you don't know what exactly what caused your foot to stick, correct?

A. Correct."

¶ 6 Medina testified that a security guard saw her fall and told her later that her left foot struck each of the five steps as she fell. Medina "felt each stair" with her foot as she fell. As the

security guard helped Medina up, she saw that her left foot was swollen. Medina's foot was broken in three places. In a written report, security guard Andray Ward stated he witnessed Medina's fall but did not see what caused it.

¶ 7 Resurrection employee John Bradley, a maintenance worker, testified that at the time of Medina's fall, "a strip of sandpaper-type material" made by 3M was attached to the edge of the step. Bradley said the material was about 3 inches wide and the "thickness of a piece of paper" and was attached to each step. When the step was examined after Medina's fall, the strip was flat against the step and was not curled. Bradley said he could put a portion of his finger under the strip and lift it off of the step. The portion of the strip closest to the edge of the step showed "as much as a half-inch of wear."

¶ 8 Bradley testified that in the month after Medina's fall, photographs were taken of the stairs where the fall occurred. He and Ellen Wiviott, his supervisor, took photos "for ourselves" because the situation "[w]ould be a maintenance incident." Bradley said he could not produce photographs of the steps.

¶ 9 The strip was removed within a week of the incident at the direction of Wiviott. When asked if the removed strip had been saved, Bradley responded: "That would have been difficult. It pulls up in a gummy mess. But no, we did not." At the time of his deposition, the stairs had been "completely carpeted."

¶ 10 Wiviott testified that she was the director of property management for Presence Health, formerly known as Resurrection. In 2007, safety strips were used on the lobby stairs and would be replaced by maintenance workers for "wear and tear when – if it started to get bad." Wiviott

did not know when or how often the strips were fixed, repaired or replaced; however, she later stated that the strips were replaced annually.

¶ 11 As to the step on which Medina fell, Wiviott did not know how long that strip had been there and said it had been replaced after the accident. Wiviott said the steps and the strip material were cleaned with a wet mop. She acknowledged that the strips wore down over time and began to "fade[]" and that they were designed for outdoor, not indoor, use.

¶ 12 In March 2014, Resurrection moved for summary judgment, asserting Medina did not allege that any acts or omissions of Resurrection caused her fall and that she "did not have an explanation about why she fell" in the moments after the incident. Medina's response argued the evidence showed the strip on the edge of the step caused her fall. This motion was initially granted, however, it was later vacated.

¶ 13 On June 4, 2014, the trial court granted summary judgment to Resurrection but allowed Medina leave to file an amended complaint alleging a count of spoliation of evidence. The trial court later vacated the summary judgment portion of its order.

¶ 14 On June 18, 2014, Medina was allowed to file an amended two-count complaint alleging negligence and spoliation of evidence. The negligence count alleged, *inter alia*, that the strip affixed to the step on which Median fell was a 3M "Outdoor Tread" strip that was not "properly fastened to the ceramic tile steps." The count alleged that Medina's shoe "became stuck or attached and/or held immovable" by the strip, causing her to fall down the stairs, and that Resurrection and its employees were negligent in failing to follow the product instructions by installing the strip across various grout lines, which allowed the material to come loose and create a "tacky" or "gummy" surface. The spoliation count alleged Resurrection and its

employees had a duty to retain the strip that was removed from the stair after Medina's fall and also Resurrection had a duty to retain the photographs referred to by Bradley.

¶ 15 On July 2, 2014, Resurrection filed a combined motion to strike the amended negligence count and a motion to dismiss the spoliation count. As to the spoliation count, Resurrection argued the count should be dismissed as time-barred pursuant to section 2-619(a)(5) of the Illinois Code of Civil Procedure (the Code) (735 ILCS 5/2-619(a)(5) (West 2012)). Resurrection argued that since Bradley's deposition in 2011, Medina made no effort to amend her complaint to allege spoliation, and that the statute of limitations on her spoliation claim expired in 2013, two years after she learned of the missing evidence. In addition, Resurrection asserted that Medina failed to state a spoliation claim because it was under no duty to preserve the evidence and, moreover, the absence of that evidence did not prevent Medina from proving her case. On August 12, 2014, the trial court denied the motion to dismiss and strike.

¶ 16 In its answer, Resurrection acknowledged that it used a traction strip on the step on which Medina fell but denied that the strip was not properly applied to the step or that Medina's shoe attached to the strip or immobilized her in any way. As to the spoliation count, Resurrection asserted that the allegations as to spoliation in Medina's amended complaint did not relate back to her original complaint filed in 2009 and were therefore untimely. Resurrection also asserted the affirmative defense that Medina was negligent in failing to keep a lookout and use caution in descending the stairs and that the hazard was open and obvious.

¶ 17 In October 2014, Medina submitted answers to Resurrection's interrogatories detailing the opinions of Christopher Perry, a licensed structural engineer and licensed architect. Perry described the stairs at issue as being partially covered by a 3-M Safety-Walk Slip-Resistant

material. Perry stated that he viewed photographs of the stairway. Perry stated that the tape was not properly installed and that the tape "became delaminated from the textured surface." He further stated that Medina's testimony was consistent with either of those conditions, or a combination of those conditions, that caused the tape to "fail."

¶ 18 In November 2014, Resurrection again moved for summary judgment, asserting that Medina had not established what caused her to fall. In response, Medina submitted the deposition testimony of Nava, Bradley and Wiviott, along with Medina's own deposition and affidavit and that of her husband.[2]

¶ 19 On May 15, 2015, the trial court entered summary judgment in favor of Resurrection on the negligence count because "the record does not contain any evidence which raises a question of fact. Neither plaintiff nor her expert knows why plaintiff fell." The court also granted Resurrection's motion to dismiss the spoliation count with prejudice, finding the claim was untimely and that Resurrection had no duty to preserve the evidence. On May 26, 2015, Medina filed a motion for rehearing, which the trial court denied. Medina now appeals those rulings.

¶ 20 We first address the trial court's grant of summary judgment to Resurrection on the negligence count. Summary judgment is a drastic measure that should be allowed only when the movant's right to that disposition is "clear and free from doubt." *Libolt v. Wiener Circle, Inc.*, 2016 IL App (1st) 150118, ¶ 25, quoting *Pyne v. Witmer*, 129 Ill. 2d 351, 358 (1989). Summary judgment is appropriate only where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2014);

[2] The affidavit of Medina's husband did not include any facts relevant to this appeal.

Bruns v. City of Centralia, 2014 IL 116998, ¶ 12. In making that determination, the court construes those matters strictly against the movant and liberally in favor of the party opposing summary judgment. *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 483 (1998). A trial court's grant of summary judgment is reviewed *de novo*. *Valfer v. Evanston Northwestern Healthcare*, 2016 IL 119220, ¶ 19.

¶ 21 The purpose of summary judgment is not to try a question of fact but to determine whether one exists. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). To survive a motion for summary judgment, a plaintiff need not prove her case but must present a factual basis that would arguably entitle her to a judgment. *Bruns*, 2014 IL 116998, ¶ 12. "A triable issue of fact exists where there is a dispute as to a material fact or where, although the facts are not in dispute, reasonable minds might differ in drawing inferences from those facts." *Danhauer v. Danhauer*, 2013 IL App (1st) 123537, ¶ 35, quoting *Petrovich v. Share Health Plan of Illinois, Inc.*, 188 Ill. 2d 17, 31 (1999). A court should not grant a motion for summary judgment unless the undisputed facts are susceptible to only one inference. *Bellerive v. Hilton Hotels Corp.*, 245 Ill. App. 3d 933, 936 (1993). Thus, a plaintiff can defeat summary judgment if she presents some evidence that arguably would entitle her to recover at trial. *Destiny Health, Inc. v. Connecticut General Life Insurance Co.*, 2015 IL App (1st) 142530, ¶ 24.

¶ 22 In a negligence action, the plaintiff must plead and prove the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately caused by that breach. *Bruns*, 2014 IL 116998, ¶ 12. Liability cannot be predicated upon surmise or conjecture as to the cause of an injury, and thus, proximate cause can be established only where there is a reasonable certainty that the defendant's act caused the injury. *Wiegman v. Hitch-Inn Post of*

Libertyville, Inc., 308 Ill. App. 3d 789, 795 (1999). Causation can be established by circumstantial evidence, that is, facts and circumstances that reasonably suggest, in the light of ordinary experience, that the defendant's negligence operated to produce the plaintiff's injury. *Rahic v. Satellite Air-Land Motor Service, Inc.*, 2014 IL App (1st) 132899, ¶ 21 (noting that it "is not necessary that only one conclusion follow from the evidence").

¶ 23 Medina contends that summary judgment was not warranted based on her inability to definitively state the cause of her injury. She asserts that her testimony that her foot made contact with the strip of material, the condition of that material and, coupled with the accounts of Nava, Bradley and Wiviott, creates a question of fact as to the cause of her injury to defeat summary judgment in favor of defendant.

¶ 24 In its motion for summary judgment and on appeal, Resurrection focuses on the following exchange in Medina's deposition:

> "Q. And as I sit here today, you don’t know what exactly what caused your foot to stick, correct?
>
> A. Correct."

¶ 25 Resurrection contends that despite Medina's testimony that the strip appeared to be unfurled, in order to defeat summary judgment, Medina was required to explain what caused her fall. Resurrection asserts that Medina did not "provide any evidence as to why she fell down the stairs" and, therefore, did not raise an issue of material fact as to the cause of her fall. We disagree and conclude that the record clearly presents a material issue of fact as to the cause of Medina’s fall and that the trier of fact could reasonably find the evidence presented supports a verdict in favor of Medina.

¶ 26 Stairs are not inherently or unreasonably dangerous; rather, they must have "some defect which caused the plaintiff injury." *Bellerive*, 245 Ill. App. 3d at 936. This court has declined to award summary judgment in several slip-and-fall cases where some identifiable fact or condition led to the plaintiff's fall, even where the plaintiff could not definitively state the fact or condition that was the cause.

¶ 27 In *Bellerive*, the plaintiff, a hotel guest, testified that she fell on stairs that were old and featured old rubber strips. The plaintiff stated that as she stepped onto one stair, her foot was not level and there "was like a wear in the steps, a little indentation or something from being worn." *Id*. at 935. When asked if that was what caused her fall, the plaintiff in *Bellerive* replied, "I don't know. It certainly had some part in it." *Id*. The plaintiff further stated she could not say "for certain" why she fell. *Id*. In reversing the trial court's grant of summary judgment, this court observed that we must construe the non-movant plaintiff's testimony in her favor, and that her testimony that the worn steps at least partially caused her fall precluded summary judgment. *Id*. at 937.

¶ 28 Similarly, in *Canzoneri v. Village of Franklin Park*, 161 Ill. App. 3d 33, 35 (1987), the plaintiff stated that she fell when a piece of broken sidewalk moved beneath her feet. Citing that testimony, we reversed the trial court's grant of summary judgment for the defendant village, rejecting the defendant's contention that the plaintiff did not know what caused her to fall. *Id*. at 39. Given that the plaintiff said she did not trip or slip and that no hole or raised section was present in the sidewalk, the *Canzoneri* court found that a reasonable certainty existed that the defect in the sidewalk caused the plaintiff's injury, thus precluding summary judgment. *Id*.

¶ 29 Likewise, in *Newsom-Bogan v. Wendy's Old Fashioned Hamburgers of New York, Inc.*, 2011 IL App (1st) 092860, ¶ 25, this court reversed the trial court's grant of summary judgment for the defendant restaurant chain, finding that the plaintiff's testimony that she slipped on grease created a triable issue of fact as to the cause of the plaintiff's fall. The plaintiff stated in her discovery deposition that after she fell, she could not get up off the floor because her hands were greasy and slippery. *Id*. ¶ 5.

¶ 30 Resurrection relies on *Kimbrough v. Jewel Companies, Inc.*, 92 Ill. App. 3d 813, 814 (1981), where the plaintiff slipped and fell on a ramp while leaving the defendant's grocery store. This court affirmed the trial court's entry of summary judgment for the defendant, noting that the plaintiff could not explain why she fell: she could not remember if her foot caught on something or if she stepped on something, she did not look down before she fell, she did not feel grease before she fell or feel any foreign substance on her shoe. *Id*. at 815-818.

¶ 31 In affirming summary judgment for the defendant, the *Kimbrough* court stated:

> "[I]t is not enough for a plaintiff to show that he or she fell on the defendant's flooring. The plaintiff must go further and prove that some condition caused the fall and that this condition was caused by the defendant. Since the plaintiff has admitted that she does not know what caused the fall, and she has at no time mentioned other known witnesses who could present evidence as to this question, it is clear that plaintiff cannot prove her case and at trial, a directed verdict for the defendant would be required. Accordingly, the trial court properly granted the defendant's motion for summary judgment." *Id*. at 818.

¶ 32 Here, the facts are similar to those in *Bellerive, Canzoneri* and *Newsom-Bogan* than those in *Kimbrough*. Indeed, *Canzoneri* specifically distinguished the facts of *Kimbrough*, noting that the "lack of an identifiable defect was the determinative factor" in allowing summary judgment in *Kimbrough*. See also *Rahic*, 2014 IL App (1st) 132899, ¶ 28 (summary judgment in defendant's favor affirmed where the plaintiff could not specify what caused his head injury); *Richardson v. Bond Drug Co. of Illinois*, 387 Ill. App. 3d 881, 886 (2009) (summary judgment for defendant affirmed where the plaintiff could not show that the floor was wet prior to his fall).

¶ 33 Here, Medina presented evidence of an identifiable condition on the stair, namely the strip of material that caused her to fall. Medina stated in her deposition that "something caught" on her right foot and that foot stuck to the stair. She "saw something unfurled" as she fell down the stairs and that she thought her foot had been stuck on the strip. Even though Medina agreed that she did not know "exactly what caused" her foot to stick to the stair, Medina's testimony identified the material on the stair as the cause of her fall. Therefore, this case is distinguishable from *Kimbrough* and other cases in which the plaintiff was not sure why he or she fell.

¶ 34 In addition, Resurrection’s employee, Bradley, testified that when he examined the strip, a portion of the material could be lifted up with his finger and removed from the step. Medina's account was supported by Perry's opinion that the tape had not been installed correctly and had come loose from the stair. This testimony, in addition to the testimonies of the other agents of defendant, Ward and Wiviott, clearly demonstrates that at the time of the fall a strip of tape was on the step and could be lifted and was worn. He further stated that Medina's testimony was consistent with either of those conditions, or a combination of those conditions, that caused the tape to "fail." See *Komater v. Kenton Court Associates*, 151 Ill. App. 3d 632, 637 (1986)

(answers to interrogatories pursuant to Rule 213(f) may be treated as an affidavit for purposes of a motion for summary judgment).

¶ 35 Whether the strip actually caused Medina to fall, or whether the fall occurred for some other reason, presents a question of material fact that precludes the entry of summary judgment. Accordingly, we reverse the trial court's entry of summary judgment for Resurrection on Medina's negligence claim as brought in the first count of Medina's amended complaint.

¶ 36 We next address the trial court's dismissal of Medina's spoliation of evidence claim raised in count II of her amended complaint. In that count, Medina asserts that after her fall, photographs were taken of the stairs by Bradley, Resurrection's maintenance worker, and a strip of material she caught her foot on was removed from the steps, but the removed material and the photos were not produced in discovery. Medina contends Resurrection had a duty to retain the removed material and the photographs. Resurrection argues the claim was not timely filed and, even if it was timely filed, the elements of negligent spoliation were not properly pled.

¶ 37 A defendant is entitled to an involuntary dismissal under section 2-619(a)(5) of the Code if the "action was not commenced within the time limited by law." 735 ILCS 5/2-619(a)(5) (West 2012). We review *de novo* a ruling on a motion to dismiss brought under section 2-619(a)(5). *Lee v. Naperville Community Unit School District 203*, 2015 IL App (2d) 150143, ¶ 3.

¶ 38 Medina's opening brief states "On June 4, 2014, Judge Gillespie held, Plaintiff's Argument 'Regarding Her Spoliation Count is Irrelevant.' However, Judge Gillespie did not rule on that motion. Because the Court decided that the Motion for Summary Judgment must be decided. Because plaintiff 'cannot establish the element of causation [sic]."

¶ 39 Resurrection replies that the question of whether the negligent spoliation claim was properly dismissed has been waived because the count was dismissed because it was filed outside the statute of limitations and Medina does not address "the timeliness of her claim on appeal" citing *Multiut Corporation v. Draiman*, 359 Ill. App. 3d 527, 534 (2005).

¶ 40 Our review of the record and the May 15, 2015 summary judgment order under review (not June 4, 2014) confirms the circuit court reasoned the injury occurred on August 1, 2007, the complaint was filed on July 24, 2009, plaintiff learned of the alleged destruction of the photographs of the scene and the removed tape during the October 11, 2011 deposition of defendant's agent, and the negligent spoliation claim was first filed on June 18, 2014.

¶ 41 We find the issue has been waived. *Housing Authority of Champaign County v. Lyles*, 395 Ill. App. 3d 1036, 1040 (2009) (an appellant's failure to properly develop an argument does "not merit consideration on appeal and may be rejected for that reason alone"). Medina has not presented any cogent argument addressing the timeliness of the filing of the negligent spoliation claim. Plaintiff does not advance any argument on when the limitations begins or whether the "discovery rule" applies to extend the limitations period or how the limitations period would not be implicated. In any event, plaintiff filed this claim more than two years after learning of the alleged destruction of the arguably material evidence. These failures are significant and the issue is sufficiently complex such that we will not attempt to make the argument for either party. See *In re Marriage of Petrik*, 2012 IL App (2d) 110495, ¶¶ 38-40. Because it is plaintiff's obligation to adequately brief this issue, and she has not, we find the issue waived.

¶ 42 In conclusion, we reverse the order of the trial court granting summary judgment in favor of Resurrection on Medina's negligence claim. The trial court's dismissal of Medina's spoliation

claim is affirmed. This matter is remanded for further proceedings.

¶ 43 Affirmed in part: reversed in part; remanded.