IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Deborah Bryson,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 20 L 7470
	)	
Navy Pier, Inc.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Summary judgment is proper only if there exist no questions of material fact and the defendant is deserving of a judgment as a matter of law. In this case, there remain questions of material fact as to whether: (1) the defendant failed to warn the plaintiff under the circumstances; (2) the plaintiff assumed the risk that led to her injury; and (3) the plaintiff's own conduct was the sole proximate cause of her injury. The existence of these questions means that the defendant's summary judgment motion must be denied.

Facts

On December 9, 2018, Deborah Bryson went with her family to the Winter Wonderfest at Navy Pier in Chicago. Bryson purchased a ticket to enter the event. At the bottom of the ticket was a notice stating, in part, that: "By entering the Navy Pier[ ] Complex you assume all risk of personal injury and loss or damage to property . . . [and] you agree to hold management harmless from any claims relating from personal injury loss or damage to property. . . ."

While at the event, Bryson's two-and-a-half-year-old grandson wanted to go down the Slippery Snowflake Slide. He climbed the stairs to the top, but was too scared to slide down. Bryson asked an attendant is she could go up the stairs to get to her grandson. Bryson climbed the stairs and then went down the slide with her grandson in front of her. After Bryson got to the bottom of the slide, she could not stand up because her foot had been injured. Bryson was wearing shoes when she went down the slide.

On July 15, 2020, Bryson filed a two-count complaint against Navy Pier. Count one is pleaded in negligence. Bryson alleges that she was not

told to remove her shoes before going down the slide and that her shoe got stuck in the slide as she came down. Bryson further alleges that Navy Pier owed her a duty of care for her safety, and claims that Navy Pier breached its duty by: (1) failing to maintain the slide in a safe condition; (2) permitting the slide to remain in an unreasonably dangerous condition; (3) failing to warn Bryson of the condition; (4) permitting Bryson to go down the slide without removing her shoes; (5) failing to supervise the slide; and (6) failing to have an instructor to monitor the slide's use as the manufacturer required. Count two is pleaded to the willful and wanton standard. Bryson makes the same allegations as in count one, but alleges that Navy Pier should have reasonably anticipated that slide users could become distracted while climbing the stairs and not appreciate the unsafe condition created by wearing shoes on the slide.

The case proceeded to discovery. Seth Kagy, Navy Pier's vice president of sales, was deposed. Kagy testified that to enter the event, Bryson had to purchase a ticket, a copy of which is contained in the record. The ticket contained an assumption of risk and waiver of rights. The record does not indicate the size of the ticket Bryson purchased. Kagy testified that the slide had no rips, tears, or defects as of December 8, 2018. He stated that rules were posted on the front of the slide, one of which required removing footwear. A photograph of the rules on the front of the slide is contained in the record. Navy Pier also posted a sign listing various rules where the line formed for the slide. The sign indicated that footwear had to be removed. A photograph of the sign is contained in the record. Kagy stated that attendants were at the slide to enforce the posted rules.

Bryson was also deposed. She testified that she did not recall reading the assumption of risk and waiver of rights language on the ticket. She also did not recall seeing any safety rules posted on the slide or on a sign at the entrance to the slide. Bryson indicated there was an attendant at the slide, and Bryson asked if she could go up the stairs to retrieve her grandson. The attendant agreed, but did not tell Bryson to take off her shoes or mention any other rules or risks associated with the slide. Bryson did not notice any defects with the slide, including cuts or tears. Bryson was unable to describe how she was injured, but she believes that her injury occurred near the bottom of the slide.

On April 25, 2022, Navy Pier filed a summary judgment motion. The parties fully briefed the motion and supplied various exhibits.

Analysis

Navy Pier brings its summary judgment motion pursuant to the Code of Civil Procedure. 735 ILCS 5/2-1005. Summary judgment is authorized "if 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 a judgment as a matter of law." *Id.* The purpose of summary judgment is not to try a question of fact, but to determine whether one exists that would preclude the entry of judgment as a matter of law. *See Land v. Board of Educ. of the City of Chicago*, 202 Ill. 2d 414, 421, 432 (2002).

A defendant moving for summary judgment may disprove a plaintiff's case by showing that the plaintiff lacks sufficient evidence to establish an element essential to a cause of action; this is the so-called "*Celotex* test." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), *followed Argueta v. Krivickas*, 2011 IL App (1st) 102166, ¶ 6. A court should grant summary judgment on a *Celotex*-style motion only when the record indicates the plaintiff had extensive opportunities to establish his or her case but failed in any way to demonstrate he or she could do so. *Colburn v. Mario Tricoci Hair Salons & Day Spas, Inc.*, 2012 IL App (2d) 110624, ¶ 33. If the defendant presents facts that, if not contradicted, are sufficient to support summary judgment as a matter of law, the nonmoving party cannot rest on the complaint and other pleadings to create a genuine issue of material fact. *See Harrison v. Hardin Cnty. Cmty. Unit Sch. Dist. No. 1*, 197 Ill. 2d 466, 470 (2001). Rather, a plaintiff creates a genuine issue of material fact only by presenting enough evidence to support each essential element of a cause of action that would arguably entitle the plaintiff to judgment. *Prostran v. City of Chicago*, 349 Ill. App. 3d 81, 85 (1st Dist. 2004). To determine whether a genuine issue as to any material fact exists, a court is to construe the pleadings, depositions, admissions, and affidavits strictly against the moving party and liberally in favor of the opponent. *See Adams v. Northern Ill. Gas Co.*, 211 Ill. 2d 32, 43 (2004). A triable issue precluding summary judgment exists if the material facts are disputed, or if the material facts are undisputed but a reasonable person might draw different inferences from the undisputed facts. *Destiny Health, Inc. v. Connecticut Gen'l Life Ins. Co.*, 2015 IL App (1st) 142530, ¶ 20. On the other hand, if no genuine issue of material fact exists, a court has no discretion and must grant summary judgment as a matter of law. *See First State Ins. Co. v. Montgomery Ward & Co.*, 267 Ill. App. 3d 851, 854-55 (1st Dist. 1994).

Navy Pier argues that it owed Bryson no duty of care for her safety because the risk of injury from the slide was open and obvious and Navy Pier had no duty to warn Bryson of dangers resulting from the slide's misuse.

Navy Pier bases its arguments, in part, on the Premises Liability Act, which imposes a duty on property owners only to maintain their property in a reasonably safe condition. 740 ILCS 130/1 – 5. "The duty owed to such entrants is that of reasonable care under the circumstances regarding the state of the premises or acts done or omitted on them." 740 ILCS 130/2. Under the statute, liability is not without limits. As provided:

> The duty of reasonable care under the circumstances . . . does not include any of the following: a duty to warn of or otherwise take reasonable steps to protect such entrants from conditions on the premises that are known to the entrant, are open and obvious, or can reasonably be expected to be discovered by the entrant; a duty to warn of latent defects or dangers or defects or dangers unknown to the owner or occupier of the premises; a duty to warn such entrants of any dangers resulting from misuse by the entrants of the premises or anything affixed to or located on the premises; or a duty to protect such entrants from their own misuse of the premises or anything affixed to or located on the premises.

Id. See also Ward v. K Mart Corp., 136 Ill. 2d 132, 148-151 (1990) (owner not liable for harm caused by open and obvious condition unless it is reasonably foreseeable that invitee might be injured).

Whether a duty exists is a question of law for the court to decide. *See Burns v. City of Centralia,* 2014 IL 116998, ¶ 13. To determine if a duty exists, a court is to analyze whether a relationship existed between the plaintiff and the defendant for which the law would impose a duty on the defendant for the plaintiff's benefit. *See Doe-3 v. McLean Cty. Unit Dist. No. 5 Bd. of Directors,* 2012 IL 112479, ¶ 22, *quoting Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 436 (2006). The "relationship" is "a shorthand description for the analysis of four factors: (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 the burden on the defendant." *Id.* (citing *Simpkins v. CSX Transp., Inc.*, 2012 IL 110662, ¶ 18). A court's analysis of the duty element focuses on the policy considerations inherent in these four factors and the weight accorded to each based on the case's particular circumstances. *Id.*

Navy Pier's first argument that it had no duty to warn of the slide's open and obvious conditions is spurious based on the uncontested record. The depositions confirm that there were no open and obvious conditions that presented an unreasonable risk of harm to Bryson. Kagy specifically testified that the slide had no rips, tears, or defects, and Bryson said she also did not

see any defects. Given the uncontested record, there was no open and obvious condition about which Bryson should have been placed on notice.

Navy Pier's argument that it had no duty to warn of dangers resulting from Bryson's misuse of the slide does not fare much better. Despite Bryson's statement that she did not see any warnings, it is plain her conduct violated those on the front of the slide and those posted where the line formed. The warnings required a guest to remove footwear before going down the slide. Although Bryon misused the slide, her misuse goes only to her comparative fault. The fact remains that the attendant permitted Bryson to go up the stairs in her shoes and did not tell her to take them off before sliding down. It is a fair inference that, absent an explicit warning from the attendant, Bryson would not remove her shoes and go down the slide with them on.

In sum, Navy Pier's arguments do nothing to alter the conclusion that it owed Bryson a duty. Bryson's injury was reasonably foreseeable and likely given that the attendant failed to tell Bryson to remove her shoes before going down the slide. The magnitude of the burden for the attendant to tell Bryson to remove her shoes was minimal; indeed, Kagy testified that was one of the attendant's duties. Imposing on Navy Pier a duty to warn Bryson verbally presented no additional burden since that was part of the attendant's job.

Navy Pier's second argument is that it owed Bryson no duty because she assumed the risk of injury through her conduct. This argument is properly seen as one based on the primary implied assumption of risk theory. "Primary implied assumption of risk is an affirmative defense that arises where the plaintiff's conduct indicates that he 'has implicitly consented to encounter an inherent and known risk, thereby excusing another from a legal duty which would otherwise exist.'" *Edwards v. Lombardi*, 2013 IL App (3d) 120518, ¶ 18 (quoting *Evans v. Lima Lima Flight Team, Inc.*, 373 Ill. App. 3d 407, 418 (1st Dist. 2007)). The essence of the affirmative defense is that a plaintiff cannot base a cause of action on a risk encountered voluntarily with full knowledge and appreciation of the danger. *Id.* "Assumption of the risk is particularly applicable when the parties are in a contractual relationship with each other." *Id.* More specifically, the assumption of the risk defense applies if a plaintiff voluntarily enters into a relationship with a defendant and consents to relieve the defendant of an obligation and risk the chance of injury from a known risk arising from a defendant's acts or omissions. See *Clark v. Rogers*, 137 Ill. App. 3d 591, 594-95 (1985).

Navy Pier's argument is based on the ticket Bryson purchased that included an explicit assumption of risk and waiver of rights language. This reliance is, however, problematic for two reasons. First, the copy of the ticket

attached as an exhibit to Navy Pier's motion is obviously an enlargement of the actual ticket. This concern is well founded considering that terms and conditions contained on tickets sold at places of amusement are invalid if they are inconspicuous, in small font, or incomplete. *Zuniga v. Major League Baseball*, 2021 IL App (1st) 201264, ¶ 22 (arbitration provision on baseball game ticket unenforceable). Second, Bryson did not voluntarily encounter the risk of going down the slide with her shoes on despite full knowledge and appreciation of the danger. Indeed, Bryson testified that she did not see the warnings on the front of the slide or the posting next to where the line started. Further, the attendant did not warn Bryson of the need to remove her shoes to avoid the danger they posed while going down the slide.

Navy Pier's final argument is that Bryson cannot establish proximate causation. Proximate cause contains two elements: (1) cause in fact; and (2) legal cause. *Krywin v. Chicago Transit Auth.*, 238 Ill. 2d 215, 225-26 (2010). Cause in fact requires that the defendant's conduct be a material and substantial factor in bringing about the plaintiff's injury, or that, in the absence of the defendant's conduct, the injury would not have occurred. *Id.* at 226. When considering cause in fact, courts generally employ either the traditional "but for" test or the "substantial factor" test. *See Nolan v. Weil-McLain*, 233 Ill. 2d 416, 431 (2009). Under the "but for" test, "'a defendant's conduct is not the cause of an event if the event would have occurred without it.'" *Id.* (quoting *Thacker v. UNR Industries, Inc.*, 151 Ill. 2d 343, 354 (1992)). Under the "substantial factor" test, "the defendant's conduct is said to be a cause of an event if it was a material element and a substantial factor in bringing the event about." (Internal quotation marks omitted.) *Id.*

Legal cause is present if the injury is the type a reasonable person would see as a likely result of his or her conduct. *First Springfield Bk. & Trust v. Galman*, 188 Ill. 2d 252, 257-58 (1999); *Simmons v. Garces*, 198 Ill. 2d 541, 558 (2002); *Abrams v. City of Chicago*, 211 Ill. 2d 251, 258 (2004). In other words, legal cause involves an assessment of foreseeability. *Lee v. Chicago Transit Auth.*, 152 Ill. 2d 432, 456 (1992). Courts ask whether the injury is the type that a reasonable person would see as a "likely result" of his or her conduct, or whether the injury is so "highly extraordinary" that imposing liability is not justified. *Id.*; *see also City of Chicago v. Beretta U.S.A., Corp.*, 213 Ill. 2d 351, 395 (2004) (legal cause "is established only if the defendant's conduct is so closely tied to the plaintiff's injury that he should be held legally responsible for it" (internal quotation marks omitted)). "The question is one of policy — How far should a defendant's legal responsibility extend for conduct that did, in fact, cause the harm?" *Id. See also Prodromos v. Everen Securities, Inc.*, 389 Ill. App. 3d 157, 171 (1st Dist. 2009) ("Because the consequences of every action stretch forward endlessly through time and the causes of every action stretch back to the dawn of

human history, the concept of proximate cause was developed to limit the liability of a wrongdoer to only those injuries reasonably related to the wrongdoer's actions.").

Given the facts contained in the record, both requirements of proximate cause are met in this instance. First, cause in fact exists because, but for the attendant's failure to warn Bryson not to go down the slide with her shoes on, it is possible to infer that she would not have been injured. Legal cause also does exists because Bryson's injury was a likely result absent a sufficient warning not to go down the slide with her shoes on. In other words, it is not "highly extraordinary" that Bryson suffered an injury. Finally, it should be emphasized that the existence of proximate cause does not mean that Bryson's own conduct is also not a proximate cause of her injury. Rather, whether Bryson's conduct contributed to her injury is ultimately a question a jury will have to decide.

Conclusion

For the reasons presented above, it is ordered that:

Navy Pier's summary judgment motion is denied.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

NOV 07 2022

Circuit Court 2075