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

Catarina Chavez,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 19 L 006626
	)	
The City of Des Plaines,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Section 3-102 of the Local Governmental and Governmental Employees Tort Immunity Act immunizes local public entities from liability arising from trip and falls on public sidewalks unless the municipality had actual or constructive notice of the alleged unsafe defect. Here, sufficient questions of material fact exist as to whether the defendant had constructive notice of the defect and whether the condition was *de minimis* or open and obvious. The defendant's summary judgment motion must, therefore, be denied.

Facts

On July 18, 2018, Catarina Chavez allegedly tripped on a sidewalk near 2156 Webster Lane in the City of Des Plaines. Chavez fell and suffered injuries. On February 13, 2020, Chavez filed her one-count first amended complaint against the City of Des Plaines ("the City"). Chavez alleges the City negligently: (1) maintained and controlled the sidewalk; (2) failed to post a warning sign to the public regarding defects in the sidewalk; and (3) failed to repair the defective sidewalk.

The case proceeded to discovery. Catarina testified at her deposition that she was walking and talking to her husband when her left foot caught on the height differential between two sidewalk slabs. Catarina explained that the height differential caused her to fall. She estimated the uneven sidewalk defect to be "[a]bout one inch and half or two." Catarina testified she and her husband were walking around 8:00 a.m. when she encountered the defect. In addition, there was a shadow was cast over the defect, yet Catarina also testified nothing obscured her view of the defect. She explained she did not see the defect because she was looking ahead, not down, while walking. Catarina admitted that she sometimes looks down when she walks to avoid tripping and that, had she looked down, she would have avoided the defect.

Humberto Chavez, Catarina's husband testified at his deposition that it was a sunny morning when Catarina tripped and fell. Humberto also testified that nothing obscured Catarina's view of the defect, and that both were looking ahead while walking. Humberto estimated the height differential "between an inch and a half to two inches."

Jon Duddles, the City's Assistant Director of Public Works and Engineering, averred the City first received notice of the defect on July 19, 2018. After receiving the notification, the City dispatched employees to inspect the area. According to Duddles, the employees ground down three height differentials at that location, including the one that allegedly caused Catarina's trip and fall. Duddles averred that, based on the City's policies for sidewalk maintenance and the limitations posed by the department's equipment, the grinding machine does not work for height differentials of two inches or more. Duddles explained that for a height differential of two inches or more, employees ramp the differential with asphalt as a temporary measure until the sidewalk squares can be replaced.

The City attached to its motion the "Service Request Details" demonstrating that on July 19, 2018, the work described was: "Grind 3 trip hazards at 2156 Webster." The documents also indicate the employees used the "12 Inch Sidewalk Grinder." The cost for the employees' services and use of equipment totaled $159.16.

On July 27, 2021, the City filed its motion for summary judgment. The parties fully briefed the motion.

Analysis

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." 735 ILCS 5/2-1005. 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 in one of two ways. First, the defendant may introduce affirmative evidence that, if uncontroverted, would entitle the defendant to judgment as a matter of law; this is the so-called "traditional test." *See Purtill v. Hess*, 111 Ill. 2d 229, 240-41 (1986). Second, the defendant may establish 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.

Regardless of the approach, 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). The inferences drawn in favor of the nonmovant must, however, be supported by the evidence. *Destiny Health, Inc. v. Connecticut Gen'l Life Ins. Co.*, 2015 IL App (1st) 142530, ¶ 20. 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. *Id.*

To prevail on an action for negligence, the plaintiff must prove the defendant owed the plaintiff a duty, the defendant breached that duty, and the defendant's breach proximately caused the plaintiff's injury. *Diebert v. Bauer Brothers Constr. Co.*, 141 Ill. 2d 430, 434 (1990). Catarina asserts the City breached its duty of care by failing to maintain and repair the sidewalk defect. In contrast, the City contends the defective condition was *de minimus*, the City had no notice of the defect, and, in the alternative, the danger associated with the defect was open and obvious.

Absent a duty owed to a plaintiff, there is no negligence and, therefore, no cause of action. *Dunn v. Baltimore & Ohio R.R. Co.*, 127 Ill. 2d 350, 365 (1989). Whether a duty exists is a question of law for the court to decide. *Ward v. K mart Corp.*, 136 Ill. 2d 132, 140 (1990). The Local Government and Governmental Employees Tort Immunity Act codifies the common-law duty of public entities to maintain their property in a reasonably safe condition under certain circumstances. *Lawson v. City of Chicago*, 278 Ill. App. 3d 628 (1st Dist. 1996). For example, municipalities are immune from liability if the plaintiff was not an intended or permitted user of public property or if the

municipality did not have actual or constructive notice of an unsafe condition in sufficient time to have taken measures to remedy or protect against the condition. *See Hough v. Kalousek*, 279 Ill. App. 3d 855, 860 (1st Dist. 1996); *Vaughn v. City of West Frankfort*, 166 Ill. 2d 155, 158 (1995).

It is undisputed that the City owned, maintained, and otherwise exercised exclusive control over the Webster Lane sidewalk. It is also undisputed that Catarina was an intended and permitted user of the sidewalk at the time of her trip and fall. The City argues, however, that it owed Catarina no duty to maintain and repair the sidewalk because the City had no notice of the defect.

Tort Immunity Act section 3-102(a) immunizes local public entities from liability unless: (1) the municipality had actual or constructive notice of the existence of the condition; (2) the condition was not reasonably safe; and (3) the municipality received notice in a reasonably sufficient time before an injury to remedy or protect against the condition. 745 ILCS 10/3-102(a); *Ramirez v. City of Chicago*, 318 Ill. App. 3d 18, 22 (1st Dist. 2000). The party charging notice also has the burden of proving it. *Zameer v. City of Chicago*, 2013 IL App (1st) 120198, ¶ 14. Although the issue of notice typically involves factual determinations, it becomes a question of law and may be decided by the trial court if all of the evidence, when viewed in the light most favorable to the party charging notice, "so overwhelmingly favors the defendant public entity that no contrary verdict could stand." *Perfetti v. Marion Cnty., Ill.*, 2015 IL App (5th) 110489, ¶ 19.

It is undisputed that the City did not have actual notice of the condition before July 18, 2018. Catarina argues, however, that the City had constructive notice because the condition existed for more than a year prior to her accident. Courts have held that constructive notice exists if the condition is so evident, plainly visible, or has existed for such duration of time that the public entity should have known of its existence by exercising reasonable care and diligence. *Ramirez*, 318 Ill. App. 3d at 22. There is no evidence in the record indicating when the City installed the sidewalk slabs. Catarina, however, submitted Google Maps photographs of the sidewalk dated 2007 showing the same defect.

The City argues the Google Maps photographs are inadmissible because they lack foundation. Courts have, however, taken judicial notice of Google Maps photographs and considered them for summary judgment purposes. *Wisnasky v. CSX Transp., Inc.*, 2020 IL App (5th) 170418, ¶ 6 (citing *People v. Clark*, 406 Ill. App. 3d 622, 633-34 (2d Dist. 2010) (holding maps from major online sites such as Google Maps are appropriate for judicial notice); see also *People v. Stiff*, 391 Ill. App. 3d 494, 503-04, 904

N.E.2d 1174, 328 Ill. Dec. 664 (5th Dist. 2009) (taking *sua sponte* judicial notice on appeal of distance from one house to another using Google Maps). Given that Catarina fell in 2018 and the Google Maps show a defect as early as 2007, there exists a question of material fact as to whether the City had constructive notice of the defect eleven years later.

The City next argues it is immune from liability because the defect was open and obvious. "In Illinois, the open and obvious doctrine is an exception to the general duty of care owed by a landowner." *Park v. Northeast Ill. Reg'l Commuter R.R.*, 2011 IL App (1st) 101283, ¶ 12. As a general rule, a landowner who "own[s], occup[ies], or control[s] and maintain[s] land [is] not ordinarily required to foresee and protect against injuries from potentially dangerous conditions that are open and obvious." *Bucheleres v. Chicago Park Dist.*, 171 Ill. 2d 435, 447-48 (1st Dist. 1996); *see* Restatement (Second) of Torts § 343A(1), at 218 (1965) ("possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them"). "The open and obvious nature of the condition itself gives caution" so "the law generally assumes that persons who encounter these conditions will take care to avoid any danger inherent in such condition." *Id.* at 448.

Illinois law permits limited exceptions for dangers that are open and obvious, making landowners liable for harms they can anticipate despite the condition being obvious. *Diebert*, 141 Ill. 2d at 434-35 (discussing adoption of Restatement (Second) of Torts § 343A (1965) in Illinois). "Obviousness requires that a reasonable person in the visitor's position, exercising ordinary intelligence, perception and judgment, would recognize both the condition and the risk." *Atchley v. University of Chicago Med. Cntr.*, 2016 IL App (1st) 152481, ¶ 34. "[W]here no dispute exists as to the physical nature of the condition, whether the dangerous condition is open and obvious is a question of law." *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 18.

Catarina is correct that the existence of an open-and-obvious condition does not automatically exclude a finding of a legal duty on the part of a defendant. *Jackson v. TLC Associates, Inc.*, 185 Ill. 2d 418, 425 (1998) ("In assessing whether a duty is owed, the court must still apply traditional duty analysis to the particular facts of the case."). An open-and-obvious condition affects the foreseeability of injury and the likelihood of injury, the first two factors of the duty analysis. *Bucheleres*, 171 Ill. 2d at 456. If the condition is open and obvious, there exists a slight foreseeability of harm and, therefore, the likelihood of injury weighs against imposing a duty. *Id.* at 456-57.
It is undisputed it was sunny on July 18, 2018, but there was a shadow cast over the defect. Catarina admitted that had she looked down, she would have seen the defect. Catarina did not, however, see the defect before she fell.

Such a purposeful field of vision has been previously addressed. *See Buchaklian v. Lake Cnty. Family YMCA*, 314 Ill. App. 3d 195, 202 (2d Dist. 2000) (overruling trial court's conclusion that, as a matter of law, mat defect was open and obvious and plaintiff could have avoided had she looked down in area where she was walking instead of looking straight ahead). Moreover, Catarina and Humberto both testified that they had not walked on that sidewalk before. *See id.* (court found persuasive that plaintiff had never previously observed or encountered defect). Further, courts have consistently held the law does not require plaintiffs to look constantly downward to avoid defects. *Id.* If the opposite were true, there would be a question as to whether it is reasonable for a person to walk in such a manner.

Determining that the open-and-obvious doctrine applies does not end the inquiry regarding duty in a negligence case. *Bruns*, 2014 IL 116998, ¶ 35. A court must still consider the four factors comprising a duty analysis: (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 that burden on the defendant. *Id.* Given the existing facts, it is reasonably foreseeable and likely that a pedestrian could trip on a sidewalk differential between one-and-one-half to two inches. The magnitude of the burden and the consequences of repairing the defect are low given that City workers addressed the defect the very next day at a cost of only $159.16. Based on this analysis, the City owed Catarina a duty of care.

The City's final argument is that it is immune from liability under section 3-102(a) because the defect was *de minimis*. The *de minimus* rule provides that, as a matter of law, defects found in frequently traversed areas are not actionable. *Gleason v. City of Chicago*, 190 Ill. App. 3d 1068, 1070 (1st Dist. 1989) (citing *Arvidson v. City of Elmhurst*, 11 Ill. 2d 601, 604 (2d Dist. 1957)). Thus, although a municipality has a duty to keep its property in reasonably safe condition, it has no duty to repair *de minimus* defects in its sidewalks. *Putman v. Village of Bensenville*, 337 Ill. App. 3d 197, 202 (1st Dist. 2003); *Hartung v. Maple Investment & Development Corp.*, 243 Ill. App. 3d 811, 814 (2d Dist. 1993).

The *de minimis* rule stems in large part from the recognition that municipalities would suffer an unreasonable economic burden were they required to keep sidewalks in perfect condition at all times. *Putman*, 337 Ill. App. 3d at 202. "It is common knowledge that sidewalks are constructed in slabs for the very reason that they must be allowed to expand and contract with changes in temperature." *Hartung*, 243 Ill. App. 3d at 816. Thus, "[m]unicipalities do not have a duty to keep all sidewalks in perfect condition at all times." *Gillock v. City of Springfield*, 268 Ill. App. 3d 455, 457 (1994).

A sidewalk defect is considered *de minimis* if a reasonably prudent person would not foresee some danger to persons walking on it. *Arvidson*, 11 Ill. 2d at 605. As there is a difference of opinion as to what constitutes a minor defect and there exists no bright-line test or mathematical formula to discern defects, each case turns on its own facts. *Siegel v. Village of Wilmette*, 324 Ill. App. 3d 903, 907 (1st Dist. 2001). Courts have looked at a variety of factors including: (1) the height difference between adjoining slabs; (2) the anticipated pedestrian traffic volume, and (3) the sidewalk's location in a commercial or residential area. *Monson v. City of Danville*, 2018 IL 122486, ¶ 43 (citing *Birck v. City of Quincy*, 241 Ill. App. 3d 119, 122 (4th Dist. 1993)). Injuries on *de minimis* sidewalk defects in well-travelled or busy commercial areas are more likely to result in liability than those in residential areas. *Warner v. City of Chicago*, 72 Ill. 2d 100, 104 (1st Dist. 1978); *Baker v. City of Granite City*, 75 Ill. App. 3d 157, 160 (5th Dist. 1979). A plaintiff has the burden to prove a defect was not *de minimis* and may do so by presenting evidence of the size of the defect and any aggravating circumstances. *Gillock*, 268 Ill. App. 3d at 458.

Our Supreme Court has held that unless the defect is so minimal that no danger to pedestrians could reasonably be foreseen, a court should remand the cause for consideration by the fact finder. *Monson*, 2018 IL 122486, ¶ 44; *see, e.g., Warner*, 72 Ill. 2d at 104-05 (conflicting testimony as to whether a height difference between sidewalk slabs in residential neighborhood was 1 or 2 inches presented jury question); *Baker*, 75 Ill. App. 3d at 160-61 (whether sidewalk crack between 1 1/4 inches and 2 inches in depth constituted unreasonably dangerous condition should be decided by jury).

Here, the City argues the sidewalk defect was *de minimis* based on the height difference between the slabs of concrete allegedly involved in Catarina's fall. Catarina disputes the City's characterization of the minimal nature of the defect. Photographs in the record show a person holding a ruler next to a concrete slab at a higher elevation than the adjoining slab. In this court's opinion, the photographs do not show a precise measurement of the height discrepancy. The City contends that because the grinding equipment could not grind a sidewalk differential more than two inches, the defect must have been below two inches. It is, however, just as probable the height differential was two inches tall and the grinding machine took care of the defect. There is no evidence of aggravating circumstances since the defect was not obscured and it was located in a residential district. Based on the totality of the circumstances in this case, there exist questions of material fact as to whether the defect was so minimal that no danger to pedestrians could reasonably be foreseen.

Conclusion

For the reasons presented above, it is ordered that:

The defendant's summary judgment motion is denied.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

JUN 27 2022

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