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

Mario Cisneros,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 20 L 2073
	)	
Leonard T. Musielak and Katherine Musielak,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Summary judgment is unwarranted if there exists a question of whether a defendant had constructive notice of a defective premises condition, but is warranted as to a claim based purely on speculation. Here, a defendant admits to knowing a stairway handrail was missing a component part, but the record does not support a claim of inadequate snow shoveling. For those reasons, the defendants' summary judgment motion is granted, in part, and denied, in part.

Facts

In mid-2015, Katherine and Leonard Musielak moved into a house located at 800 North Ridgeland Avenue in Oak Park. On February 1, 2019, Mario Cisneros was working as a FedEx courier and delivered a package to the Musielaks' house. Cisneros left the package by the front door, turned, and began walking down the front steps. While holding a handrail, Cisneros slipped on snow and began falling. He tried to regain his balance by grabbing tighter on the handrail, but it detached and pulled away. Cisneros fell on the stairs and injured his shoulder.

On October 13, 2020, Cisneros filed a second amended complaint against the Musielaks. The complaint alleges the Musielaks caused or permitted the handrail to be unsecured, thereby creating a dangerous condition. The complaint claims the Musielaks breached their duty of ordinary care for Cisneros's safety by negligently maintaining the handrail, failing to warn of its dangerous condition, failing to repair or replace the handrail, and improperly shoveling snow on the stairs so as to create an unnatural accumulation.

The case proceeded to discovery. The record establishes that the front stairway had two posts at the ground level with wooden handrails on each side rising to posts on the top step. In addition, a third, cylinder railing was attached to the posts on the north side of the stairway. The cylinder handrail rested on two metal brackets, one on each post and was connected with two, 90-degree elbow joints, again, one at the top and bottom. The bottom of the handrail sat on top of an anchor, but nothing, such as screws, held the handrail in place. After Cisneros fell, he took photographs of the handrail, called his supervisor, and then waited in his truck. While waiting in his truck, Cisneros saw Leonard Musielak come outside and reposition by hand the bottom of the handrail to the anchor.

The cylinder handrail had been in place when the Musielaks bought the house. Neither of them ever noticed any movement or looseness in the cylinder railing. Photographs show the bottom of the handrail did not have a 90-degree elbow joint to hold the handrail in place. Leonard testified that the elbow joint had always been missing but that, since it was nonstructural, he made no effort to replace it. The Musielaks knew the handrail's purpose was to provide safety for people walking up and down the stairway.

As to the claim of inadequate shoveling, photographs in the record show there was less snow at the top of the stairway than on the stairs and more snow on the sides of the stairs than in the center. The photographs also show snow packed down in the

center of the stairway, where Cisneros fell, but not on the sides. Neither Leonard nor Katherine testified they shoveled the stairway before Cisneros fell.

Analysis

The Musielaks bring their 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." 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 by showing 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. 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.*

The Musielaks argue they lacked notice of an alleged dangerous condition posed by the cylinder handrail. They base their argument on the Restatement (Second) of Torts that provides:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
> (c) fails to exercise reasonable care to protect them against the danger.

Restatement (Second) of Torts § 343 (1965). Under section 343, "there is no liability for landowners for dangerous or defective conditions on the premises in the absence of the landowner's actual or constructive knowledge." *Tomczak v. Planetsphere, Inc.*, 315 Ill. App. 3d 1033, 1038 (1st Dist. 2000); *Hanna v. Creative Designers, Inc.*, 2016 IL App (1st) 143727, ¶ 34.

As to actual notice, Illinois case law takes two slightly different positions as to the legal effect of an unsafe condition created by a defendant-property owner, neither of which is favorable for that party. If the defendant created the premises condition, notice of the condition is either irrelevant and need not be proven, *see Caburnay v. Norwegian Amer. Hosp.*, 2011 IL App (1st) 101740, ¶ 45, or is presumed, *see Bernal v. City of Hoopeston*,

307 Ill. App. 3d 766, 772 (4th Dist. 1999) (quoting *Harding v. Highland Park*, 228 Ill. App. 3d 561, 571 (2d Dist. 1992)). In contrast, constructive notice exists if a defective condition has existed for such a length of time or was so conspicuous that the defendant should have known of its existence through the exercise of reasonable care. *See Krivokuca v. City of Chicago*, 2017 IL App (1st) 152397, ¶ 50 (quoting *Burke v. Grillo*, 227 Ill. App. 3d 9, 18 (2d Dist. 1992)); *Siegel v. Village of Wilmette*, 324 Ill. App. 3d 903, 908 (1st Dist. 2001). Constructive notice is absent as a matter of law if there was no actual notice, the defect was small or not apparent, and the condition had not existed for a long period of time. *See Perfetti v. Marion County*, 2013 IL App (5th) 110489, ¶ 20 (no road defect apparent when inspected two days before accident); *Lewis v. Rutland Twnshp.*, 359 Ill. App. 3d 1076, 1080 (3d Dist. 2005) (dip in gravel road formed over weekend). Yet it is generally a jury question as to whether a defect existed for a sufficient period of time prior to a plaintiff's injury for the property owner to be deemed to have had constructive notice. *See Cook v. Village of Oak Park*, 2019 IL App (1st) 190010, ¶ 20 (citing *Baker v. City of Granite City*, 75 Ill. App. 3d 157, 161, (5th Dist. 1979)).

Photographs in the record show the bottom of the cylinder handrail missing a 90-degree elbow joint to attach it to the post. Leonard knew the joint was missing, and testified that it had broken off before Cisneros's fall. Leonard testified that the elbow joint was "nonstructural" and, therefore, did not replace the missing joint.

The central issue as to the cylinder handrail is not whether Leonard thought the elbow joint was "nonstructural," but whether he had constructive notice of the handrail's condition. He plainly did since he testified he knew the joint was missing. Even if Leonard believed the missing elbow joint was "nonstructural" and a jury agreed with him, a jury could still reasonably find the handrail's condition defective apart from it being "nonstructural" and, as a result, infer Leonard's constructive notice.

A different result is warranted as to the inadequate shoveling claim. It is true the photographs show less snow at the top of the stairway than on the stairs and more snow on the sides of the stairs than in the center. The photographs also show snow packed down in the center of the stairway, where Cisneros fell, but not on the sides. Neither Leonard nor Katherine testified they shoveled the stairway where Cisneros fell. In short, absent any affirmative testimony, Cisneros is merely speculating as to how the snow accumulated in the center of the stairway, and that is not enough to create a question of material fact.

Conclusion

Based on the foregoing, it is ordered that:

1. The defendants' summary judgment motion is denied as to paragraph 11(a)-(d) of the second amended complaint; and
2. The defendants' summary judgment motion is granted as to paragraph 11(e) of the second amended complaint.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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