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

Christine Crowley,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 19 L 13245
	)	
Kass Management Services, Inc. and 1910 West Sunnyside LLC,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

The open-and-obvious exception to a landlord's general duty of care owed to persons lawfully on the premises is inapplicable if the particular risk causing the plaintiff's injury was not apparent. Although the eroded stair at issue in this case was an apparent condition, the risk that more of the stair would crumble beneath the plaintiff's foot was not apparent. For that reason, there exists a question of material fact making summary judgment inappropriate.

Facts

On May 15, 2019, Christine Crowley went to visit her son and grandson at their apartment located at 1910 West Sunnyside Avenue in Chicago. Crowley later left the building through the front door and planned to descend three concrete stairs to the sidewalk. When Crowley stepped on the top stair, it crumbled beneath her foot, causing her to fall and sustain injuries.

On December 3, 2019, Crowley filed a four-count complaint against 1910 West Sunnyside LLC, the property owner, and Kass Management Services, Inc., the property manager. Counts one and three are directed against Kass under negligence and

premises theories, respectively, while counts two and four are mirror images directed against 1910 West Sunnyside. Crowley alleges the defendants owed her a duty of care for her safety as a person lawfully on the premises. Crowley claims the defendants breached their duties by failing to: (1) install a proper stair; (2) inspect for a defective and deteriorated stair; (3) discover the defect; (4) maintain the stair in a reasonably safe condition; (5) warn of the defective stair; (6) hire a competent contractor to build the stair; and (7) repair the stair in a timely fashion.

The defendants denied each of Crowley's material allegations and claims. The defendants further asserted various affirmative defenses of contributory negligence based on Crowley failing to: (1) keep a proper lookout; (2) prevent herself from slipping and falling; (3) be observant of conditions around her; (4) walk around an open and obvious condition; (5) see the open and obvious condition; and (6) use due care for her own safety.

The case proceeded to discovery. The record includes various photographs of the deteriorated step. In her deposition, Crowley testified that she did not see the deteriorated step when she entered the building. When Crowley left the building, she was carrying her grandson on her left hip. She admitted that, had she been looking, she could have seen the step's deterioration. Crowley also acknowledged that there was another staircase at the back of the building she could have used.

Crowley's son, Michael, was also deposed. He testified that the step had been repaired in the fall of 2018, but began to deteriorate that winter. Michael did not contact the building manager about the deteriorating steps, but he knew other tenants had. Michael did not think to warn his mother about the stairs' condition because he did not appreciate their danger.

The defendants filed a summary judgment motion arguing that the undisputed evidence establishes that the deteriorated step was an open and obvious condition that Crowley could have appreciated and avoided.

Analysis

The defendants filed for summary judgment, a motion authorized by the Code of Civil Procedure. 735 ILCS 5/2-1005. Summary judgment is proper "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 Ed. 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 introducing 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). 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.* 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).

The duty of care owed by a property owner to an invitee is explained in section 343 of the Restatement (Second) of Torts, which has been adopted into Illinois common law. *Genaust v. Illinois Power Co.*, 62 Ill. 2d 456, 468 (1976). Section 343 provides that:

> 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). The import of section 343 has been explained as follows:

> there is no liability for a landowner for dangerous or defective conditions on the premises in the absence of the landowner's actual or constructive knowledge. If the gist of a complaint is that the landowner did not create the condition, the plaintiff must be required to establish that the landowner knew or should have known of the defect.

Tomczak v. Planetsphere, Inc., 315 Ill. App. 3d 1033, 1038 (1st Dist. 2000).

Section 343 is not, however, without limits. The Illinois Supreme Court has also adopted into the common law section 343A of the Restatement (Second), recognizing the open-and-obvious exception to the general rule. *Ward v. K Mart Corp.*, 136 Ill. 2d 132, 150-51 (1990); *Deibert v. Bauer Bros. Constr. Co.*, 141 Ill. 2d 430, 434-36 (1990). As stated:

> (1) A 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, unless the possessor should anticipate the harm despite such knowledge or obviousness.

Restatement (Second) of Torts § 343A(1) (1965). As the court later explained, "a party who owns or controls land is not required to foresee and protect against an injury if the potentially dangerous condition is open and obvious." *Rexroad v. City of Springfield*, 207 Ill. 2d 33, 44 (2003). A condition is "obvious" if "both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising ordinary perception, intelligence, and judgment." Restatement (Second) of Torts § 343A cmt. *b*, at 219 (1965); *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 16. As further explained, "[t]he open and obvious nature of the condition itself gives caution and therefore the risk of harm is considered slight; people are expected to appreciate and avoid obvious risks." *Bucheleres v. Chicago Park Dist.*, 171 Ill. 2d 435, 448 (1996). Whether a dangerous condition is open and obvious may present a question of fact, but if the condition's physical nature is undisputed, it is a question of law. *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 18.

The defendants' central argument is that the step on which Crowley fell presented a condition subject to the open-and-obvious exception to the general duty of care. According to the defendants, the stair's condition was open and obvious because a reasonable person could see part of the stair had eroded. On this point, the defendants are correct: the photographs in the record make plain that the eroded stair was an open-and-obvious condition. That

conclusion is, however, unrelated to the condition that Crowley alleges caused her to fall.

Crowley did not testify that she fell by stepping where the stair was missing; rather, she testified she stepped on a portion of the stair that crumbled beneath her foot. Her testimony, therefore, goes to a result that would not have been evident even if she had looked down and seen the defect beforehand. It is equally true the eroded stair was a condition about which the record indicates one or both of the defendants had knowledge before May 15, 2019.

This factual distinction makes this case similar to *McGourty v. Chiapetti*, 38 Ill. App. 2d 165 (1st Dist. 1962). In *McGourty*, the plaintiff stepped on a concrete block used as a step to a loading dock. *Id.* at 170-71. The block slipped, and McGourty fell. *Id.* The jury found in favor of the plaintiff, and the defendant appealed. *Id.* at 169. On appeal, the defendant argued the dangerous condition causing the plaintiff's fall was latent, because snow that had fallen the previous evening covered the block. *Id.* at 174-75. The court rejected the argument because the condition was discoverable prior to the snowfall and was, therefore, a patent defect. *Id.* at 174-75. As the court concluded: "There is ample basis for the finding . . . [the] defendant could by reasonable inspection have discovered that during the winter the cement block would be a dangerous means of egress from the dock." *Id.* at 175.

Also relevant here is *Smith v. Morrow*, in which the plaintiff died after a porch railing gave way and she fell to the sidewalk below. 230 Ill. App. 382, 386 (2d Dist. 1923). The railing had been attached to decayed and rotting posts with rusted nails and then painted over. *Id.* at 387, 389. The court rejected the defendant's argument that there were observable defects prior to the occurrence. *Id.* at 389. As explained:

> It is apparent from the evidence that if this rail was in the condition which the evidence shows it was in, a

> reasonable inspection probably would have revealed it. It is hard to understand how a piece of railing in this condition could not have been discovered by a reasonable inspection. Merely looking at it might not have revealed the rusty nails which were concealed, but an inspection would have revealed the rotten ends of the rails, or there would have been some indication that the ends of the rails were rotten.

Id. at 390.

The photographic and testimonial record in this case confirms two conclusions: (1) the existence of an eroding stair was readily apparent; but (2) the specific cause of Crowley's fall—the crumbling of the stair beneath her foot—was not readily apparent. Given that distinction, it is necessary to evaluate whether the defendants owed Crowley a duty based on the four recognized factors: (1) the reasonable foreseeability of injury; (2) the reasonable likelihood of injury; (3) the magnitude of the burden that guarding against injury places on the defendant; and (4) the consequences of placing that burden on the defendant. *Bucheleres v. Chicago Park Dist.*, 171 Ill. 2d 435, 456 (1996). Here, an injury was reasonably foreseeable either because Crowley would step where the stair had already eroded or where it was in the process of eroding, wholly apart from whether the stair would crumble beneath her foot. Although the condition of what remained of the eroded stair may have been apparent had Crowley been looking, there remains a question as to whether a reasonable person could also expect that more of the stair would crumble beneath a foot. Such a defective condition on a stair makes it highly likely that a person such as Crowley could be injured as a result. The burden on the defendants to guard against Crowley's injury was not great. While replacing obviously defective concrete would have been the ultimate remedy, the defendants could also have temporarily warned of the condition either by placing a cone next to the stair or applying tape or paint next to the eroding stair. The consequences of placing the burden on the defendant would not be

any greater than the duty already imposed on a property owner for the safety of persons lawfully on the premises.

Conclusion

For the reasons presented above, it is ordered that:

The defendants' summary judgment motion is denied.

John H. Ehrlich

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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