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

| | | |
|---|---|---|
| Humberto Fernandez, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | No. 19 L 13818 |
| | ) | |
| Thorntons, LLC d/b/a Thorntons and Thorntons, Inc., d/b/a Thorntons, | ) | |
| | ) | |
| Defendants. | ) | |

## MEMORANDUM OPINION AND ORDER

A cause of action for premises liability requires a plaintiff to present some evidence about the condition proximately causing the plaintiff's injury. Although the plaintiff here did not see a floor mat's condition before he fell, the plaintiff felt his foot catch on the mat. Such circumstantial evidence raises a question of material fact as to the cause of the plaintiff's injury, making summary judgment inappropriate.

Facts

On January 31, 2017, Humberto Fernandez fell and injured himself when entering a Thorntons store at 2351 South Cicero Avenue in Cicero to pay for gas. On December 16, 2019, Fernandez filed a four-count complaint against Thorntons, Inc. and Thorntons, LLC.[1] Counts one and two are directed against Thorntons, LLC, and raise negligence and premises theories, respectively. Counts three and four are directed against Thorntons, Inc., based on the same theories. Fernandez alleges that Thorntons owed him a duty of care as a business invitee and

[1] In February 2019, Thorntons, LLC was formed and is the current owner of the store that had been owned by Thorntons, Inc.

breached that duty by placing a folded door mat on the floor. Fernandez claims Thorntons breached its duty by: (1) improperly operating, managing, maintaining, and controlling the premises; (2) failing to provide a safe premises; (3) allowing a folded door mat to remain on the floor; (4) failing to remedy the unsafe condition; (5) failing to inspect the premises; and (6) failing to warn of the dangerous condition.

The case proceeded in discovery. Fernandez acknowledged during his deposition that he did not see the floor mat because he was looking ahead and not at the floor in the moments before he fell. Fernandez assumed the mat was twisted because his right foot got caught in the mat. As a result of his foot getting caught in the mat, Fernandez could not move forward, causing him to fall and roll on the floor.

On March 4, 2021, Thorntons filed a summary judgment motion. Thorntons' central argument is that Fernandez cannot identify a defect in the floor mat that proximately caused his fall. Thorntons argues secondarily that it owed Fernandez no duty because the floor mat was an open-and-obvious condition. Fernandez filed a response brief, and Thorntons filed a reply.

Analysis

Thorntons 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 a business 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). 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*, 2014 IL 116998, ¶ 18. At the same time, a plaintiff is not expected to be constantly looking down to see dangerous conditions that are open and obvious. *Buchaklian v. Lake Cnty. Family YMCA*, 314 Ill. App. 3d 195, 202 (2d Dist. 2000).

Although Thorntons raises the open-and-obvious exception as a secondary argument, it should be addressed first because it concerns the elements of duty and breach. Thorntons argues it owed Fernandez no duty because he offered no explanation as to why he did not see the mat before falling. Thorntons' argument is, in fact, based on a selective reading of the record. Fernandez testified he was looking forward and not down before his fall. Based on *Buchaklian*, a plaintiff's failure to look down for premises defects does not as a matter of law trigger application of the open-and-obvious exception to the general duty of care. This argument cannot, therefore, be the basis for summary judgment.

Thornton's central argument is that liability may not be predicated on mere conjecture or surmise as to the cause of an injury. That legal principle is long established. *See Lee v. Chicago Transit Auth.*, 152 Ill. 2d 432, 455 (1992). Absent affirmative evidence that the defendant may have proximately caused a plaintiff's injury, the plaintiff has failed to establish a genuine issue of material fact, making summary judgment inappropriate. *Chmielewski v. Kahlfeldt*, 237 Ill. App. 3d 129, 137 (2d Dist. 1992). It is, therefore, not surprising that summary judgment has been granted in cases involving surface conditions in which plaintiffs failed to identify the cause of their falls. *See, e.g., Koukoulomatis v. Disco Wheels, Inc.*, 127 Ill. App. 3d 95, 101 (1984) (plaintiff did not see or feel anything wrong with carpet, no evidence existed as to carpet bulge, but plaintiff surmised carpet "[m]ust have gone up a little bit that I tripped over it"); *Kimbrough v. Jewel Companies*, 92 Ill. App. 3d 813, 817 (1st Dist. 1981) (plaintiff unable to identify anything causing her fall); *Brett v. F.W. Woolworth Co.*, 8 Ill. App. 3d 334, 336-37 (1st Dist. 1972) (plaintiff did not see or

feel what caused the fall, no witnesses were present, and no identifiable rug defect).

In contrast, courts have found a question of material fact may exist based on circumstantial evidence as opposed to direct evidence such as sight. *See, e.g., Donoho v. O'Connell's*, 13 Ill. 2d 113, 122 (1958) (no direct evidence as to how onion ring got onto floor, but evidence indicated staff cleaned table closest to onion ring shortly before plaintiff's fall). In those instances, "courts have generally allowed the negligence issue to go to the jury, without requiring defendant's knowledge or constructive notice." *Id.* Perhaps the most persuasive case is *Caburnay v. Norwegian American Hospital,* 2011 IL App (1st) 101740. In that case, Caburnay was waiting for an elevator and did not look at the mat on which he was standing. *Id.* at ¶ 5. After pressing the call button and stepping back, Caburnay fell on his neck and severed his spinal column. *Id.* at ¶ 4. Caburnay testified unequivocally the sole of his left shoe caught a fold in the mat and that he felt the fold with his left foot. *Id.* ¶¶ 12-13. He further testified the mechanism he described caused him to trip backwards. *Id.* Based on that testimony, the court determined Caburnay had raised a question of material fact to withstand summary judgment. *Id.* at ¶ 50.

As in *Caburnay,* Fernandez here admitted he did not see the mat or its condition before he fell. Also, similar to *Caburnay,* Fernandez assumed the mat was twisted because he felt his foot catch the mat. Importantly, Fernandez testified he knew his right foot got caught in the mat because he could not move forward. Not being able to more forward was, according to Fernandez, what caused him to fall and roll on the floor. Based on *Donoho* and *Caburnay*, the circumstantial evidence Fernandez presents in this case is sufficient to create a question of material fact for a jury, making summary judgment inappropriate.

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 22 2021

Circuit Court 2075