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

Bogdan Gajo,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 19 L 8522
	)	
City of Chicago,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Summary judgment is appropriate if the record shows there are no questions of material fact and the defendant is deserving of judgment as a matter of law. In this case, the evidentiary record establishes that the sidewalk condition on which the plaintiff tripped and fell was open and obvious and that the defendant owed the plaintiff no duty of care. As a result, the defendant's summary judgment motion is granted and this case is dismissed with prejudice.

Facts

On August 1, 2016, Bogdan Gajo was walking toward 5134 West Belmont Avenue in Chicago when he tripped and fell on an alleged sidewalk defect. Bogdan filed suit against the City of Chicago to recover for his injuries. Bogdan alleges that the City owed him a duty of care for his safety when walking on the sidewalk, and he claims the City breached its duty by failing to: (a) provide safe entry and exit to his premises; (b) clear hazards from the sidewalk; (c) prevent the sidewalk from remaining in an unsafe and hazardous condition; (d) maintain and repair the sidewalk; and (e) warn of the unsafe condition.

The case proceeded to discovery. Bogdan testified that he and his wife, Wieslawa Gajo, lived at 5134 West Belmont Avenue for more than 20 years. On August 1, 2016, the Gajos left their house around 6:00 p.m. to take a walk. At the time he fell, Bogdan and Wieslawa were talking and holding hands. Before he fell, Bogdan was looking ahead, toward the house. The Gajos were approximately two houses east of their house when Bogdan fell.

Bogdan testified that, at the time of his accident, he did not know what caused him to fall. Even after the fell, Bogdan did not look to see what had

caused his fall. He also stated that he did not see the hole before he fell because he was not paying attention. Bogdan claimed that he had never seen the hole before.

Wieslawa testified that Bogdan he fell on a hole in the sidewalk. She described the hole as being between two-and-a-half to three-feet wide and deep enough to trip on. She also testified there was nothing blocking their view of the sidewalk as they approached the hole. Wieslawa further testified that she had never seen the hole before because she and Bogdan had never walked that way before. Wieslawa further stated that she and Bogdan had never walked out the front door of their home for 12 years, from 2004 to 2016.

Bogdan and Wieslawa each testified that the holes shown in a photograph—exhibit 1A to their depositions—shows the sidewalk condition that caused Bogdan's fall. The photograph does not show holes in the sidewalk, rather two depressions that appear to have resulted from someone purposefully stepping in wet concrete perpendicular to the direction of the sidewalk. The record contains no measurements of how deep the depressions are in relation to the surrounding sidewalk, and neither Bogdan nor Wieslawa could say which hole caused Bogdan to trip and fall. Further, there is nothing in the record indicating that the City had notice of the sidewalk condition on which Bogdan tripped and fell at any time before August 1, 2016.

The City filed a summary judgment motion that the parties fully briefed. The parties rely on the same depositions and photographs in support of their unique positions.

Analysis

The City brings its summary judgment motion pursuant to the Code of Civil Procedure. The statute authorizes the issuance of summary judgment "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). If a 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.*

The City's central argument is that it owed Bogdan no duty because the sidewalk defect on which he tripped was open and obvious. The open and obvious rule provides that "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." *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 16 (quoting *Rexroad v. City of Springfield*, 207 Ill. 2d 33, 44 (2003)). The rule is reflected in section 343A of the Restatement (Second) of Torts, which has been adopted into Illinois common law. *Id.*; *see* Restatement (Second) of Torts § 343A. A condition is considered obvious if it and the risk are both "apparent to and would be recognized by a reasonable [person], in the position of the visitor, exercising ordinary perception, intelligence, and judgment." *Id.* (quoting Restatement (Second) of Torts § 343A cmt. *b*, at 219). Whether a condition is open and obvious is determined by a reasonable person's objective knowledge, not a plaintiff's subjective knowledge. *Buchaklian v. Lake Cnty. Family Young Men's Christian Ass'n*, 314 Ill. App. 3d 195, 203 (2d Dist. 2000). If there exists no dispute about the physical nature of the condition, the question of whether a condition is open and obvious is a question of law. *Id.* ¶ 18.

In this case, there is no dispute as to the physical nature of the condition either based on the available deposition testimony or the photographs contained in the record. Bogdan's response brief states that he did not appreciate the defect in contrast to the surrounding areas of sidewalk and that a reasonable person could see the defect as having been created by chalk or dirt. Bogdan cites to no deposition testimony supporting such statements and this court's review of the record found none. In sum, the sidewalk defect was open and obvious.

Bogdan argues that even if the sidewalk defect is open and obvious, the deliberate encounter exception applies to impose liability on the City. While it is true that the Supreme Court recognizes the deliberate encounter

exception, *see LaFever v. Kemlite Co.*, 185 Ill. 2d 380, 390-96 (1998), that exception applies only if there is some sort of economic compulsion, such as if the plaintiff's employment requires the employee to encounter a known hazard. *Sollami v. Eaton*, 201 Ill. 2d 1, 16 (2002); *Garcia v. Young*, 408 Ill. App. 3d 614 (4th Dist. 2011). As Bogdan admits he was simply out for a walk, there was no associated economic compulsion for encountering the sidewalk condition; consequently, the deliberate encounter exception does not apply.

A finding that a sidewalk defect is open and obvious does not end a court's inquiry because the existence of an open and obvious condition is not a *per se* bar to the existence of a legal duty. *Bucheleres v. Chicago Park Dist.*, 171 Ill. 2d 435, 449 (1996). To determine whether a duty exists, Illinois courts generally consider: (1) the foreseeability that the defendant's conduct will result in injury to another; (2) the likelihood of injury; (3) the magnitude of guarding against the injury; and (4) the consequences of placing that burden on the defendant. *Curatola v. Village of Niles*, 154 Ill. 2d 201, 214 (1993).

The existence of an open and obvious condition greatly influences the first two elements of this analysis. *See Sollami*, 201 Ill. 2d at 17. If a condition is open and obvious, a defendant is not typically required to foresee an injury, *Bruns*, 2014 IL 116998, ¶ 35, because it is not "objectively reasonable to expect" the occurrence. *Hills v. Bridgeview Little League Ass'n*, 195 Ill.2d 210, 238 (2000). Relatedly, if a condition is open and obvious, the reasonable likelihood of injury is slight because the law presumes that a pedestrian will appreciate and avoid the dangerous condition. *Bruns*, 2014 IL 116998, ¶ 35.

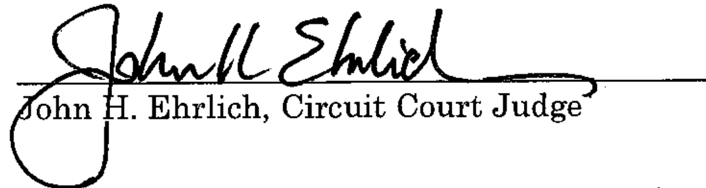
As to the third and fourth factors, this court finds *Foy v. Village of La Grange* to be highly pertinent. 2020 IL App (1st) 191340. In *Foy*, the court first found the defect on which the plaintiff tripped and fell was open and obvious. *Id.* at ¶ 25. As to the third and fourth factors of the duty analysis, the court relied on the fact that La Grange had miles of sidewalks to maintain and that "it is well recognized that sidewalks settle, erode, form cracks, and have other types of disruptions to the surface over time." *Id.* at ¶ 28. The court also focused on the fact that the record was devoid of any testimony indicating that La Grange had received notice of the particular sidewalk deviation at any time prior to Foy's trip and fall. *Id.* The court concluded that requiring La Grange to inspect its sidewalks for possible deviations would be a "huge burden," *id.*, and that the consequences of such a burden would apply to all the sidewalks in the village, thereby imposing an unjustifiable burden given the open and obvious risk the defect posed. *Id.*

In this case, the evidentiary record is very similar to that in *Foy*. There is no evidence in the record that the City had notice of the holes in the sidewalk before Bogdan's alleged trip and fall. And it is plainly obvious that, as in La Grange, Chicago sidewalks settle, erode, form cracks, and have other types of disruptions to the surface. Requiring the City to inspect and repair or replace sidewalks for similar defects would constitute an enormous burden, particularly since Chicago has thousands of miles of sidewalks more than La Grange. In sum, the four-part duty analysis establishes as a matter of law that the City owed Bogdan no duty.

Conclusion

For the reasons presented above, it is ordered that:

1. The City's summary judgment motion is granted; and
2. This case is dismissed with prejudice.



John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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