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

Lilian Crespo-Fregoso,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 19 L 179
	)	
City of Chicago,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Municipalities owe no duty to pedestrians who are not intended and permitted users of municipal property. The plaintiff was not an intended and permitted user of the street where she slipped and fell because she crossed at midblock outside of a marked crosswalk. The defendant's summary judgment motion must, therefore, be granted and the case dismissed with prejudice.

Facts

On January 7, 2018, Lilian Crespo-Fregoso returned to her home at 2158 North Central Avenue. After her husband parked the car in a designated parking space on the east side of the street, Lilian got out and took four plastic bags of groceries from the back seat. She proceeded to walk on the east sidewalk and then down a curb cut leading to the street. As she crossed the street to the west, she came to a pothole and a patch of ice. The pothole was approximately two feet in diameter and three to five inches deep. Lilian and her family had lived at that address for about a year, and she had seen the pothole before. Lilian always attempted to avoid the pothole, but this time she slipped on the snow covering the pothole and fell.

On April 11, 2019, Lilian filed an amended complaint against the City of Chicago seeking compensation for her injuries. The complaint alleges that the City had actual notice of the pothole based on a service request to the City's Department of Transportation that pre-dated Lilian's injury as well as constructive notice. The amended complaint further alleges that the City owed Lilian a duty of reasonable care to maintain its streets for pedestrians such as she. Lilian claims that the City breached its duty by failing to maintain the street and failing to repair the defective condition despite having actual and constructive notice of its existence.

The case proceeded to written and oral discovery. During her deposition, Lilian marked as exhibits aerial photographs of the area where she fell. The deposition exhibits also included street-view photographs depicting the street condition where Lilian fell. She admitted that there was no curb cut on the west side of the street corresponding to the curb cut on the east side of the street where her husband had parked the car. None of the photographs depict any crosswalk street markings in the mid-block area where Lilian slipped and fell. Lilian also admitted that she could have walked on the east sidewalk to the end of the block and crossed there, but she correctly pointed out there was no corresponding sidewalk on the west side of the street on which she could walk to her house.

According to the deposition of William Little, a City Department of Transportation public way inspector, the street condition on which Lilian slipped and fell may have existed as early as 2006. At that time, the City hired a contractor to access and repair water and sewer lines below the street. The contractor filled the cut channel with concrete, but never covered it with asphalt. The cut out section eventually wore down, creating a pothole. Another City Department of Transportation employee, Joaquin Lazo, an asphalt laborer, testified that the City installs safety ramps so that the handicapped can get off the curbs.

On February 21, 2020, the City filed a summary judgment motion based on the facts presented above. The City raises three arguments: (1) Lilian was not an intended and permitted user of the street; (2) the ice and pothole were open and obvious conditions; and (3) the ice and snow were natural accumulations. Attached to the motion are various exhibits, including some related to street markings that the City copied from the Manual of Uniform Traffic Control Devices, a publication that has been adopted into Illinois law. *See* 625 ILCS 5/11-301.

Lilian responds that she was an intended and permitted user of the street where she fell because, by statute, not all crosswalks must be marked. She further argues that the City intended for her to use the street at that location because there was no sidewalk on the west side of North Central Avenue on which she could walk except for the one running perpendicular to the street leading to her house. That sidewalk did not adjoin the street with a curb cut. In addition, the pothole was in the direct path leading from the curb cut on the east side of the street to the perpendicular sidewalk on the west side of the street.

Analysis

The Code of Civil Procedure 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 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 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). If a defendant presents

uncontradicted facts that are sufficient to support summary judgment as a matter of law, a plaintiff 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 must present enough evidence to support each essential element of a cause of action that would arguably entitle the plaintiff to judgment. *See 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. N. Ill. Gas Co.*, 211 Ill. 2d 32, 43 (2004). The inferences drawn in favor of the nonmovant must, however, be supported by the evidence. *See 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. *See 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 City argues that it owed Lilian no duty because she was not an intended and permitted user of North Central Avenue when she slipped, fell, and was injured. Duty is a question of law to be decided by the court. *See Doe v. Coe*, 2019 IL 123521, ¶ 36; *Choate v. Indiana Harbor Belt R.R.*, 2012 IL 112948, ¶ 22. Courts are to refer to the common law to identify and determine a local governmental entity's duties, if any. *See Bruns v. City of Centralia*, 2014 IL 116998, ¶ 15 (citing *Vesey v. Chicago Housing Auth.*, 145 Ill. 2d 404, 414 (1991)); *see also Village of Bloomingdale v. CDG Enterps., Inc.*, 196 Ill. 2d 484, 490 (2001). In other words, if there exists no common-law duty, there exists no cause of action.

By definition, an intended user of municipal property is also a permitted user, but a permitted user is not necessarily an intended user. *See Gutstein v. City of Evanston*, 402 Ill. App. 3d 610, 616-17 (1st Dist. 2010) (quoting *Boub v. Township of Wayne*, 183 Ill. 2d 520, 524 (1998)); *see also Wojdyla v. City of Park Ridge*, 148 Ill. 2d 417, 426 (1992). To evaluate whether a defendant owes a plaintiff a duty under this or any other circumstance, courts look to four 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. *See Simpkins v. CSX Transp., Inc.*, 2012 IL 110662, ¶ 18; *Bucheleres v. Chicago Pk. Dist.*, 171 Ill. 2d 435, 456. Whether a pedestrian's use of a particular piece of municipal property was intended and permitted is determined by the nature of the property itself. *See Vaughn v. City of West Frankfort*, 166 Ill. 2d 155, 162-63 (1995).

It is recognized as a general principle that, "since pedestrians are not intended users of streets, a municipality does not owe a duty of reasonable care to pedestrians who attempt to cross a street outside the crosswalks." *Id.* at 158. As the Supreme Court has recognized:

> [R]oads are paved, marked and regulated by traffic signs and signals for the benefit of automobiles. Parking lanes are set out according to painted blocks on the pavement, signs or meters on the sidewalk or parkway, or painted markings on the curb. Pedestrian walkways are designated by painted crosswalks by design, and by intersections by custom. These are the indications of intended use. That pedestrians may be permitted to cross the street mid-block does not mean they should have unfettered access to cross the street at whatever time and under whatever circumstances they should so choose. Marked or unmarked crosswalks are intended for the protection of pedestrians crossing streets, and municipalities are charged with liability for those areas.

> Those areas do not, however, include a highway in mid-block.

Wojdyla, 148 Ill. 2d 417, 426.

Lilian argues that she was an intended and permitted user of North Central Avenue where she fell because she was walking in an unmarked crosswalk. She reasons that since there was a curb cut on the east side of the street parallel to the perpendicular sidewalk on the west side of the street, the City "must have intended Lilian . . . to be an intended and permitted user." Resp. Br. at 5. She also points out that the only sidewalk was on the east side of the street. In other words, had Lilian walked the east sidewalk to the end of the block and crossed the street, there was no sidewalk on the west side on which she could walk to reach her house. Lilian correctly points out that there were no other marked crosswalks where pedestrians could cross the street. She also cites to Lazo's deposition in which he testified that the City installs safety ramps so that the handicapped can get off the curbs.

Since this controversy revolves around what constitutes a crosswalk, reference to the defining statute is essential. The Illinois Vehicle Code defines "crosswalk" as follows:

> (a) That part of a roadway at an intersection included within the connections of the lateral lines of the sidewalks on opposite sides of the highway measured from the curbs or, in the absence of curbs, from the edges of the traversable roadway, and in the absence of a sidewalk on one side of the highway, that part of the highway included within the extension of the lateral line of the existing sidewalk to the side of the highway without the sidewalk, with such extension forming a right angle to the centerline of the highway;
>
> (b) Any portion of a roadway at an intersection or elsewhere distinctly indicated for pedestrian crossing by

> lines or other markings on the surface placed in accordance with the provisions in the Manual adopted by the Department of Transportation as authorized in Section 11-301.

625 ILCS 5/1-113 (a) & (b). "[A] piece of property may constitute a 'crosswalk' if it meets the requirements of either, not both, section (a) or section (b)." *Kavales v. City of Berwyn*, 305 Ill. App. 3d 536, 542 (1st Dist. 1999). By its plain language, the definition supplied by subsection (a) applies only to crosswalks located at intersections. *See id.* In contrast, subsection (b) defines a crosswalk at any location as long as it is marked.

It is uncontested that the portion of North Central Avenue Lilian crossed was not at an intersection. That fact eliminates her argument based on subsection (a) that the curb cut on the east side of the street created an unmarked crosswalk to the west side of the street. It is also uncontested that the portion of North Central Avenue that Lilian crossed was not a marked crosswalk. That fact eliminates any possible argument based on subsection (b) since a crosswalk at any location other than an intersection must be marked. Since Lilian was not crossing at an intersection or in a marked crosswalk at midblock, she could not have been an intended and permitted user of North Central Avenue when she slipped and fell.

Lilian presents various other arguments that do not provide an exception to the statute's plain language. First, she argues that it is foreseeable that persons would cross the street at that location given the unique configuration of the street and sidewalks. On that point, Lilian may be entirely correct. "Foreseeability alone, however, is not the standard for determining whether a duty of care exists . . ." *Wojdyla*, 148 Ill. 2d at 428; *Vaughn*, 166 Ill. 2d at 161 (pedestrian not intended user of street when crossing midblock outside of crosswalk). *See also Tieman v. City of Princeton*, 251 Ill. App. 3d 766, 768 (3d Dist. 1993); *Ramirez v. City of Chicago*, 212 Ill. App. 3d 751, 755-56 (1st Dist. 1991). Similarly, custom or practice does not establish a

municipality's intended and permitted use of its property. *See Boub v. Township of Wayne*, 183 Ill. 2d 520, 531 (1998); *Deren v. City of Carbondale*, 13 Ill. App. 3d 473, 478 (5th Dist. 1973).

This court's conclusion if further supported by the four factors traditionally used to evaluate the existence of a duty. It is certainly foreseeable that a pedestrian would cross a street at midblock regardless of whether there exists a marked or unmarked crosswalk. Pedestrians do that all the time. It is also reasonably likely that someone would be injured from slipping and falling in a pothole located anywhere in a street. Those two factors, however, do not outweigh the other two. The magnitude of the burden on municipalities to eliminate all street potholes and the consequences of doing so would be incalculable. If Crespo-Fregoso's arguments prevailed, pedestrians would be intended and permitted users anywhere in the streets and municipalities would be required to keep streets in the same condition as sidewalks. That has never been the law in Illinois because such a standard would impose an unacceptable financial burden on municipalities. That is precisely the public policy adopted by the legislature and reflected in Vehicle Code section 5/1-113 (a) and (b).

Since Lilian was not an intended and permitted user of North Central Avenue when she slipped and fell, the City owed her no duty. Absent a duty, Lilian has failed to establish an essential element to the tort of negligence. That determination is dispositive of the entire case; consequently, this court need not address the parties' other arguments.

Conclusion

For the reasons stated 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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