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

Toni Kasper,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 18 L 4850
	)	
City of Chicago, a municipal corporation,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

A local governmental entity may be liable to a plaintiff for premises liability if the entity had actual or constructive notice of the defective condition causing the injury. The plaintiff here adduced no evidence of actual notice, but presented sufficient evidence to raise a question of material fact as to constructive notice. For that reason, the defendant's summary judgment motion is granted in part, with prejudice, and denied in part.

Facts

On June 6, 2017, Kasper was with a group of runners on the sidewalk just west of the northwest corner of West Roosevelt Road and South State Street. Kasper's foot tripped on an empty sign base, causing her to fall and suffer injuries. She subsequently filed suit against the City of Chicago and the Chicago Transit Authority.[1] Kasper's complaint alleges that the City owed her a duty of care based on the dangerous condition posed by the empty sign base. Kasper's relevant claims for purposes of the City's motion are that the City: (1) allowed the sign base to exist on the sidewalk where it constituted a dangerous condition; (2) failed to

[1] This court previously dismissed the CTA as a defendant.

maintain the sidewalk and empty sign base; and (3) failed to replace or remove the empty sign base.

During the written discovery phase, the City conducted a search for records as to whether it had received a complaint or request to repair the empty sign base. That search failed to turn up any relevant documents. During the oral discovery phase, a retired City employee, John Hulichy, testified at his deposition that on May 9, 2017, less than one month before Kasper's injury, he was working at the State Street-Roosevelt Road intersection. Hulichy testified that he was at the location for approximately 2½ hours to remove and replace several signs, including one located at 2 West Roosevelt Road. He also testified that he does not remember seeing an empty sign base while working at the intersection. He indicated that the City's Department of Streets and Sanitation employees would have emptied a garbage can immediately adjacent to the empty sign base.

In response to the City's motion, Kasper attached the affidavit of Michael Schaffner. Schaffner coached the running group to which Kasper belonged and was running with the group on June 6, 2017. He averred that he had been running at the same location approximately two times per week for at least six months before Kasper's injury. He further averred that the empty sign base existed for a least one month prior to the day of Kasper's injury.

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). 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. 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. *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 sole argument is that Kasper has failed to establish evidence that the City had actual or constructive notice of the empty sign base. Actual or constructive notice is a required element in any premises liability case against a local governmental entity. Absent notice, such an entity is immune from liability pursuant to the Local Governmental and Governmental Employees Tort Immunity Act. As provided:

> Except as otherwise provided in this Article, a local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition for the use in the exercise of ordinary care of people whom the entity intended and permitted to use the property in a manner in which and at such times as it was reasonably foreseeable that it would be used, and shall not be liable for injury unless it is proven that it has actual or constructive notice of the existence of such a

> condition that is not reasonably safe in reasonably adequate time prior to an injury to have taken measures to remedy or protect against such condition.

745 ILCS 10/3-102(a).

Kasper's response brief does not address the City's argument that there exists no evidence that the City had actual notice of the condition of the empty sign base. Since that argument is not rebutted, the City's summary judgment motion as to actual notice is granted, with prejudice. That leaves only the argument as to whether the City had constructive notice of the empty sign base on which Kasper tripped and fell.

"Constructive notice under section 3-102(a) of the Tort Immunity Act is established where the condition has existed for such a length of time or is so conspicuous or plainly visible that the public entity should have known of its existence by exercising reasonable care and diligence." *Perfetti v. Marion County*, 2013 IL App (5th) 110489, ¶ 19 (citing *Siegel v. Village of Wilmette*, 324 Ill. App. 3d 903, 908 (1st Dist. 2001); *Ramirez v. City of Chicago*, 318 Ill. App. 3d 18, 22 (1st Dist. 2000); *Burke v. Grillo*, 227 Ill. App. 3d 9, 18 (2d Dist. 1992)). Constructive notice is generally absent if there is no evidence as to how long the condition had existed. *See Finley v. Mercer Cty.*, 172 Ill. App. 3d 30, 33-34 (3d Dist. 1988) (no admissible evidence as to how long stop sign had been twisted); *Wilsey v. Schlawin*, 35 Ill. App. 3d 892, 896 (1st Dist. 1976) (no evidence of how long stop sign had been missing cannot establish constructive notice). In this case, Kasper has adduced some evidence as to constructive notice.

~~Schaffer's affidavit is, alone, sufficient to raise a question of~~ material fact as to whether the City had constructive notice of the empty sign base. Schaffer averred that he frequently ran on the same sidewalk in the six months prior to Kasper's fall and injury. He further averred that he noticed the empty sign base for at least one month before Kasper's accident. It may be that a one-month period of time is insufficient to establish constructive notice given

the number of similar unreported conditions that can be safely assumed to exist at any one time. On the other hand, one month might be considered sufficient given the fact that the sidewalk is subject to regular pedestrian traffic and Streets and Sanitation employees would potentially have noticed the empty sign base in the month prior to Kasper's injury.

Schaffer and his averments are, of course, subject to a determination of their credibility. It is, however, also true that it is not a court's function to weigh and appraise evidence or make determinations of credibility at the summary judgment stage. *See AYH Holdings, Inc. v. Avreco, Inc.*, 357 Ill. App. 3d 17, 31 (1st Dist. 2005). Rather, such a judgment of the evidence rests with a jury.

Conclusion

For the reasons presented above, it is ordered that:

1. The City's summary judgment motion as to the issue of actual notice is granted, with prejudice;
2. The City's summary judgment motion as to the issue of constructive notice is denied; and
3. This matter is scheduled for a case management conference on a date to be scheduled by notification to the parties.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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