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

Linda Timmons,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 18 L 3281
	)	
Chris Markos, Patty Markos, and Fox View Plaza, LLC,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

The Code of Civil Procedure authorizes a grant of summary judgment if there is no genuine issue of material fact. The plaintiff testified she did not know what caused her to fall, but also that her ankle rolled when she stepped onto what she later identified as an alleged defect. Since the plaintiff's testimony is inconsistent if not contradictory, a question of fact exists as to proximate causation and requires the defendant's summary judgment motion be denied.

Facts

On April 4, 2016, Linda Timmons fell in a parking lot owned by Fox View Plaza, LLC (Fox View) and leased to Chris Markos and Patty Markos (Markoses). An undetermined number of days after the fall, Timmons and her son returned to the lot to take pictures. They took pictures solely of the general area of the fall but did not take any measurements.

On April 6, 2018, Timmons filed a three-count complaint against Fox View and the Markoses. Each count is brought in negligence and alleges that there existed an uneven surface or depression in the parking lot. Timmons does not allege that the uneven surface caused her to trip or slip, but does allege that it caused her fall. Each count

claims that the defendants, among, other things, allowed the dangerous condition to exist, failed to repair it, and failed to warn pedestrians.

Timmons testified in her deposition that she did not slip or fall, but that the unevenness caused her fall. She identified the area where she fell as near the unevenness, but she did not notice it when she fell. She also did not feel any unevenness with her foot or with her hands when she got back up. Timmons testified that on the day of the fall she did not notice unevenness in any way. In response to the question of what made her lose her balance, Timmons said: "Well, as I transitioned from – because I was walking on asphalt, then I transitioned. And then at that point when I made the transition, that's when it occurred." Timmons Dep. at 36-37.

Although Timmons identified when her fall occurred, she could not identify what caused her fall, as this colloquy with her own attorney explains:

Q. Do you know what did cause the fall?
A. I really don't recall.
Q. And when you were making that transition, did you notice whether or not that area you were stepping onto was uneven?
A. No, I did not.
Q. Did you notice after the fact that that area was uneven?
A. No.
Q. As you sit here today, are you aware that that area was uneven?
A. I am now.
Q. And what made you become aware of that?
A. When I saw the pictures and parking lot.

Dep. at 72-73. Yet Timmons also testified based on a photograph of the scene that the asphalt and concrete were not the same height. Dep. at 71. Timmons also testified that when she stepped onto the transition area between the asphalt and the concrete, she felt her right ankle roll to the right. Dep. 76-77.

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). "In light of the standard, the trial court does not have any discretion in deciding the matter." *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 272 (1992).

A defendant moving for summary judgment may disprove a plaintiff's case in one of two ways. First, the defendant may introduce 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). This case fits the second way, in which the defendant may establish that the plaintiff lacks sufficient evidence to establish an element essential to a cause of action; this is the so-called "*Celotex* test." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), followed *Argueta v. Krivickas*, 2011 IL App (1st) 102166, ¶ 6. A court should grant summary judgment on a *Celotex*-style motion only if the record indicates the plaintiff had extensive opportunities to establish his or her case but failed in any way to demonstrate he or she could do so. *Colburn v. Mario Tricoci Hair Salons & Day Spas, Inc.*, 2012 IL App (2d) 110624, ¶ 33.

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).

Mere guesswork or speculation is insufficient to create a genuine issue of material fact to survive a summary judgment motion. *See Judge-Zeit v. General Pkg. Corp.*, 376 Ill. App. 3d 573, 584 (1st Dist. 2007) (citing *Tzakis v. Dominick's Finer Foods, Inc.*, 356 Ill. App. 3d 740, 747 (1st Dist. 2005)). In a property defect case, summary judgment is proper if the plaintiff has no evidence regarding the cause of her fall. As written: "[A]bsent positive and affirmative proof of causation, plaintiff cannot sustain the burden of establishing the existence of a genuine issue of material fact." *Stutz v. Vicere*, 389 Ill. App. 3d 676, 679 (1st Dist. 2009) (quoting *Kellman v. Twin Orchard County Club*, 202 Ill. App. 3d 968, 974 (1st Dist. 1990)). In *Stutz*, the plaintiff's husband fell down a stairway and died. The court granted summary judgment for the building owner because, although an expert witness provided evidence that the stairway failed to comply with the building code, that evidence was insufficient since the fall had been unwitnessed and, therefore, no evidence existed as to what caused the decedent's fall. *Id.* at 678 & 681.

The defendants' summary judgment motion alleges that Timmons is merely speculating that the unevenness proximately caused her fall. Proximate cause contains two elements: (1) cause in fact; and (2) legal cause. *Krywin v. Chicago Trans. Auth.*, 238 Ill. 2d 215, 225-26 (2010). Cause in fact requires that the defendant's conduct be a material and substantial factor in bringing about the plaintiff's injury, or that, in the absence of the defendant's conduct, the injury would not have occurred. *Id.* at 226. When considering cause in fact, courts generally employ either the traditional "but for" test or the "substantial factor" test. *See Nolan v. Weil-McLain*, 233 Ill. 2d 416, 431 (2009). Under the "but for" test, "'a defendant's conduct is not the cause of an event if the event would have occurred without it.'" *Id.* (quoting *Thacker v. UNR Industries, Inc.*, 151 Ill. 2d 343, 354 (1992)). Under the "substantial factor" test, "the defendant's conduct is said to be a cause of an event if

it was a material element and a substantial factor in bringing the event about." *Id.* (internal quotation marks omitted).

As to the second element, legal cause is present if the injury is of the type that a reasonable person would see as a likely result of his or her conduct. *First Springfield Bk. & Trust v. Galman*, 188 Ill. 2d 252, 257-58 (1999); *Simmons v. Garces*, 198 Ill. 2d 541, 558 (2002); *Abrams v. City of Chicago*, 211 Ill. 2d 251, 258 (2004). In other words, legal cause involves an assessment of foreseeability. *Lee v. Chicago Transit Auth.*, 152 Ill. 2d 432, 456 (1992). Courts ask whether the injury is the type that a reasonable person would see as a "likely result" of his or her conduct, or whether the injury is so "highly extraordinary" that imposing liability is not justified. *Id.*; *see also City of Chicago v. Beretta*, 213 Ill. 2d 351, 395 (2004) (legal cause "is established only if the defendant's conduct is so closely tied to the plaintiff's injury that he should be held legally responsible for it") (internal quotation marks omitted).

As to cause in fact, there exists a long line of Illinois cases addressing factual scenarios in which plaintiffs are unable to identify what caused their fall, most notably *Kimbrough v. Jewel Companies, Inc.*, 92 Ill. App. 3d 813 (1st Dist. 1981). In *Kimbrough*, the plaintiff fell on a ramp that had a grease spot. *Id.* at 817. The plaintiff stated she did not know what made her fall, there were no witnesses, and she could not say whether she had slipped on the grease. *Id.* The court wrote:

> it is not enough for a plaintiff to show that he or she fell on the defendant's flooring. The plaintiff must go further and prove that some condition caused the fall and that this condition was caused by the defendant. *Since the plaintiff has admitted that she does not know what caused the fall*, and she has at no time mentioned other known witnesses who could present evidence as to this question, it is clear that plaintiff cannot prove her case and at trial a directed verdict for the defendant would be required.

Id. at 818 (emphasis added).

Kimbrough requires a factual connection between the plaintiff and the defect. *Id.* at 817. Mere proximity is not enough; rather some additional fact is needed to bridge the proximity of the defect and the plaintiff's fall; otherwise the plaintiff has failed to establish proximate cause. *Id; cf. Wiegman v. Hitch-Inn Post of Libertyville, Inc.*, 308 Ill. App. 3d 789, 793 (2d Dist. 1999) (water all around plaintiff sufficient to create genuine issue of fact), and *Newsom-Bogan v. Wendy's Old Fashioned Hamburgers of New York, Inc.*, 2011 IL App (1st) 092860, ¶ 19 (plaintiff being unable to get back up because slippery grease around her created triable issue of fact), *with Vance v. Lucky Stores, Inc.*, 134 Ill. App. 3d 166, 167 (2d Dist. 1985) (undisturbed puddle in very close proximity to fall but no other evidence was insufficient to create issue of fact). In this case, as in *Kimbrough* and *Vance,* but unlike *Wiegman* and *Newsom-Bogan*, there is no externality to connect the unevenness of the parking lot with Timmons' fall.

Timmons argues her testimony of falling during the transition between the asphalt and the concrete and her later conclusion that the area between the asphalt and concrete was uneven based on the pictures she saw is enough to create a genuine issue of material fact. Such testimony and conclusion is nearly identical to that addressed by the court in *Brett v. F. W. Woolworth Co.* There, a plaintiff fell near a buttressing of two rugs and claimed the buttressing defect made her fall. 8 Ill. App. 3d 334, 337 (1st Dist. 1972). The court was unconvinced because proximity to the defect was insufficient. Rather, the plaintiff must show the defect "actually existed" and present evidence that the defect proximately caused the fall. *Id.* As the court explained:

> While the plaintiff in the instant case offers the depression theory as an explanation of the fall, this is merely a conclusion which is unsupported by any evidence. *By her own admission she did not see or feel what caused the fall.* The evidence that her body, after the fall, was in close proximity to the alleged depression is too ambiguous an inference upon which to predicate a causal connection.

Id. at 337 (1972) (emphasis added).

Timmons' cause-in-fact argument relies on two cases. The first is *Bellerive v. Hilton Hotels Corporation*, in which the court held that a plaintiff's internal expectation, belief, or sensation can create an issue of fact. 245 Ill. App. 3d 933, 935 (2d Dist. 1993). Although the plaintiff was not certain what made her fall, she believed it was the unevenness of the stair she felt with her foot. The court concluded the plaintiff's feeling, although internal to her alone, presented a fact issue for the jury. *Id.* Timmons' second case is *Allgauer v. Le Bastille, Inc.*, 101 Ill. App. 3d 978 (1st Dist. 1981). In that case, Allgauer fell because of an unexpected drop from the doorway into a stairwell and testified she did not know of anything on the stairs that caused her fall. *Id.* at 981. The court found her expectation connected the dangerous condition with her fall and created a triable issue of fact. *Id.*

Bellerive and *Allgauer* are both distinguishable. In each, the court concluded that the plaintiff's expectations or beliefs were sufficient to create questions of material fact. In this case, the facts are quite different, indeed, contradictory. On one hand, Timmons admits repeatedly she did not notice any unevenness before, during, or after the fall, and did not testify she believed or thought the unevenness caused her fall. She simply testified she "did not recall" what caused her to fall. Dep. at 72-73. Yet Timmons also testified that when she stepped on the transition area, she felt her right ankle roll to the right. Dep. at 76-77. Such testimony is not conjecture, but Timmons' recollection of what occurred at the time. Timmons' inability to testify consistently does not eliminate a question of fact, but raises questions of her credibility that a jury must decide. *See Russo v. Corey Steel Co.*, 2018 IL App (1st) 180467, ¶ 37 (internally inconsistent expert testimony) (citing *Sparling v. Peabody Coal Co.*, 59 Ill. 2d 491, 498-99 (1978) (credibility of witness whose own testimony is contradictory is for jury to decide)).

The second element of proximate causation is legal cause, which is equated with foreseeability. *See Lee*, 152 Ill. 2d at 456. Wholly apart from Timmons' inconsistent testimony, her injury is the type that a reasonable person would see as a likely result if it did, in fact, occur. In

other words, it is foreseeable that Timmons' right ankle rolling caused her fall, regardless of the cause of the ankle rolling.

Timmons' deposition testimony is inconsistent at best and contradictory at worst. Unsurprisingly, such testimony cannot eliminate questions of fact but raises substantial ones as to her credibility. Since credibility is for a jury to decide, this court cannot supply the relief sought by the defendants.

Conclusion

For the reasons presented above:

1. The defendants' summary judgment motion is denied; and
2. The parties are to comply with the Law Division's administrative order, meet and confer, and complete an agreed case management order for the remainder of this case.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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