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

Debra L. Annolino and Joe Annolino,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 13 L 120
	)	
City of Chicago, a municipal corporation,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

A landowner owes no duty of care to a person who fails to see and avoid an open-and-obvious property defect. Debra Annolino fell and injured herself after tripping on a 2½-inch differential between two sidewalk slabs that she admits she would have seen had she been looking. Debra's failure to use reasonable care for her own safety means that the City of Chicago owed her no duty, hence the City's summary judgment motion must be granted and the fourth-amended complaint dismissed with prejudice.

FACTS

In August 2013, the Annolinos flew from Arizona to Chicago to visit their daughter who had moved into a new apartment. On August 7, the Annolinos and their daughter left her 65 East Scott Street apartment and walked south on North Stone Street. Debra had never walked there before, and she proceeded to walk on the sidewalk closest to the street. The weather was clear and the pavement dry that morning. Debra was wearing glasses, did not have anything in her hands, and was not distracted. At approximately 1210 North Stone Street, Debra's left sandal caught on a raised sidewalk slab, causing her to fall to the sidewalk and strike it with her left knee, right hand, and the right side of her face.

The Annolinos filed suit against the City. The fourth-amended complaint raises two causes of action. The first is for negligence and alleges that the City failed to exercise ordinary care in maintaining the sidewalk in a reasonably safe condition, failed to inspect and repair the sidewalk, failed to warn of its dangerous condition, and ignored complaints about its condition. Joe Annolino brings the second cause of action for loss of consortium.

At her deposition, Debra described the sidewalk differential where she fell as 2½ inches in height. Photographs taken after the accident show a differential ranging from approximately 1¾ to 3 inches. Debra agreed that nothing obstructed her view of the defect just before she fell. Further, she admitted that, had she looked, she would have seen the defect.

Lawrence Ventresca, president of the property management company for 65 East Scott Street, testified that in 2009 he learned of the sidewalk defect on which Debra tripped and fell. Gloria Dougherty, the building's property manager, testified that she wrote one letter each in 2009, 2010, and 2011 to then Alderman Vi Daley complaining about the defect. In her 2009 and 2010 letters, Dougherty stated that several residents had tripped on the defect; in her 2011 letter, Dougherty stated that at least one resident of a nearby building had fallen on the sidewalk. The City did not, however, repair the condition.

ANALYSIS

The City brings its motion pursuant to the Code of Civil Procedure. That statute authorizes 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. 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 – the so-called "traditional test" – *Purtill v. Hess*, 111 Ill. 2d 229, 240-41 (1986) – or may establish that the plaintiff lacks sufficient evidence to establish an element essential to a cause of action – the so-called "*Celotex* test" – *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), *followed Argueta v. Krivickas*, 2011 IL App (1st) 102166, ¶ 6. To create a genuine issue of material fact and defeat a summary judgment motion, a plaintiff must present enough evidence in response to support each essential element of a cause of action. *Prostran v. City of Chicago*, 349 Ill. App. 3d 81, 85 (1st Dist. 2004).

A legally recognized cause of action in tort is one that alleges facts, not conclusions, which, if proven, would establish that: (1) the defendant owed the plaintiff a duty; (2) the defendant breached the duty; and (3) the breach proximately caused the plaintiff's injury. *Iseberg v. Gross*, 227 Ill. 2d 78, 86-87 (2007). Duty is a question of law to be decided by the court. *Choate v. Indiana Harbor Belt R.R.*, 2012 IL 112948, ¶ 22. To determine a local governmental entity's duties, if any, courts are to refer to the common law. *Village of Bloomingdale v. CDG Enterps., Inc.*, 196 Ill. 2d 484, 4990 (2001). In other words, if there exists no common-law duty, there is no cause of

action. To evaluate whether a defendant owed a plaintiff a duty, courts are to 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. *Bucheleres v. Chicago Pk. Dist.*, 171 Ill. 2d 435, 456 (1996).

The City encapsulates all four factors into a single argument that Illinois landowners are ordinarily not required to foresee and protect against injuries from potentially dangerous open-and-obvious conditions. *See id.* at 447-48. That legal principle is based on the understanding that a condition is open and obvious as a matter of law if "'both the condition and the risk are apparent to and would be recognized by a reasonable [person] . . . exercising ordinary perception, intelligence, and judgment.'" *Bonner v. City of Chicago*, 334 Ill. App. 3d 481, 484 (1st Dist. 2002), *quoting Deibert v. Bauer Brothers Constr. Co., Inc.*, 141 Ill. 2d 430, 435 (1990) (adopting the definition of "obvious" from the Restatement (Second) of Torts § 343A, comment b, at 219 (1965)). It follows that an open-and-obvious condition presents only a slight risk of injury because the condition can reasonably be avoided, *see Ward v. K mart*, 136 Ill. 2d 132, 148 (1990); consequently, the burden placed on the defendant to remedy such a defect plays a reduced role. The assessment of whether a particular condition is open and obvious is made based on a reasonable person's objective knowledge, not the plaintiff's subjective knowledge. *Bonner*, 334 Ill. App. 3d at 484.

In support of its argument, the City points nearly exclusively to Debra's deposition testimony. In her deposition, Debra stated that the lighting in the area on the morning of August 12 was not a factor leading to her trip and fall and that the pavement where she tripped and fell was dry. She indicated that she was wearing her glasses and that nothing covered the defect such as garbage or debris. Debra testified that she was looking ahead, not down, just before she tripped. Further, nothing distracted Debra just before she tripped. Debra testified that, based on subsequent measurements, she knew that the defect where she tripped and fell was 2½ inches in height. Significantly, Debra admitted that, had she looked at the condition, she would have seen it. The City emphasizes this statement throughout its motion and argues implicitly that the admission is one of an objective, reasonable person.

Debra makes several counter-arguments in her response brief. She argues first that the condition could not have been open and obvious because Dougherty averred that the sidewalk defect was a tripping hazard. Dougherty's conclusion creates problems for Debra but not a question of fact. Affidavits in summary judgment proceedings are a substitute for testimony

taken in open court and should include as much pertinent information as the affiant can testify to competently as if sworn as a trial witness. *See Fooden v. Board of Governors*, 48 Ill. 2d 580, 587 (1971). Affidavits cannot, therefore, consist of conclusions, but only of admissible facts. *See* Ill. S. Ct. R. 191(a). In the face of this standard, Dougherty's averment that the sidewalk condition was a tripping hazard constitutes a factual conclusion reserved for expert testimony. *See Robidoux v. Oliphant*, 201 Ill. 2d 324, 339 (2002) (expert witness affidavit is inadmissible to defeat summary judgment unless it meets Rule 191(a) standards). Yet there is nothing in the record indicating that Debra either identified Dougherty as an expert witness or disclosed her opinion. *See* Ill. S. Ct. R. 213(f)(3). The affidavit must, therefore, be stricken.

Even if Dougherty's three letters attached to her affidavit as exhibits could be considered independently, they would also be inadmissible because, at best, they constitute hearsay or, at worst, double if not triple hearsay. *See Radtke v. Murphy*, 312 Ill. App. 3d 657, 663-64 (1st Dist. 2000) (hearsay inadmissible under Rule 191(a)). Dougherty's letters do not indicate that she has any personal knowledge of the events described. Indeed, the only reasonable inference to be drawn from the letters is that Dougherty neither witnessed the events described nor spoke directly to the persons who had tripped or fallen on the defect. As such, the letters lack the reliability the law requires for this court to consider them as evidence; they are, therefore, inadmissible.

Yet even if the letters were admissible evidence, they would have been insufficient as a matter of law to put the City on notice of the defect. *See Sandoval v. City of Chicago*, 357 Ill. App. 3d 1023, 1032 (1st Dist. 2005) (notice of defect does not defeat its open-and-obvious nature). Debra argues that notice of a defect given to an alderman may be imputed to the mayor's office. If that were true, a complaint describing a defect on a state highway made to an elected state official – a senator, a representative, or even a circuit court judge – would put the governor's office on notice. The flaws with Debra's argument are that the executive, legislative, and judicial branches at any level of government are independent, United States Constitution, arts. I-III, § 1; Illinois Constitution, art. 2, § 1; Chicago Municipal Code, title II, chpts. 2-4, 2-8, and that the latter two do not repair defects in the public way. Missing here is evidence that Daley forwarded the three complaints to the mayor's office, which had the authority and the funds to correct the defect. That evidence would establish notice; without it, Dougherty's letters are inadmissible.

Debra next argues that the shade from a nearby tree distracted her from seeing the sidewalk defect. In other words, Debra believes that by planting the tree years before, the City created the distraction years later. If

Debra were correct, municipalities would have far less incentive to plant trees for fear of future liability from sidewalk trip and falls. Yet deforesting an *urbs in horto* into a treeless desert to eliminate distracting shade is a high price for the public to pay when Debra's reasonable care to see and respond to her immediate surroundings would have achieved the same result. Apart from Debra's argument being defeated by the lack of foreseeability presented by the risk, her deposition testimony belies her argument. Quite simply, Debra never testified that tree shade or anything else distracted her as she walked along North Stone Street. Further, she did not testify that she momentarily forgot about the defect, since she had never walked there before. That last point distinguishes this case from *Ward* as well as *Rexroad v. City of Springfield*, 207 Ill. 2d 33 (2003), on which Debra strongly relies. Rather, Debra's testimony puts her case under the same rubric as *Sandoval v. City of Chicago*, 357 Ill. App. 3d 1023 (1st Dist. 2005), which she unsuccessfully attempts to minimize.

Debra's last argument is an oblique request to create an exception to the open-and-obvious exception for strangers who encounter a defect in the public way. There is no support in the law for creating such an exception, and with good reason – it would swallow the rule. All pedestrians and motorists unfamiliar with their surroundings would be able to sue local governmental entities for encountering open-and-obvious defects that the law would otherwise assume a plaintiff would avoid through reasonable prudence and risk aversion. This court has no authority to create an exception and does not believe that a court with precedential authority would do so.

The court concludes that Debra has failed to establish any evidence from which it could even be inferred that the City owed her a duty of care. Since Debra cannot prove her case, the City is entitled to judgment as a matter of law. Further, since the City owed Debra no duty of care, Joe's derivative cause of action for lack of consortium must also fail as a matter of fact and law.

For the reasons presented above,

IT IS ORDERED THAT:

1. The City of Chicago's summary judgment motion is granted; and
2. The Annolinos' fourth-amended complaint is dismissed with prejudice.

Judge John H. Ehrlich

MAR 10 2014

Circuit Court 2075

John H. Ehrlich, Circuit Court Judge