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

Debra Crestoni,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	No. 14 L 1127
Midwest Gaming & Entertainment, LLC, d/b/a Rivers Casino,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

A property owner is not liable for a plaintiff's injuries attributed to an open-and-obvious condition on the property. In this case, the plaintiff knew the existence of the curb on which she tripped and fell, and her testimony that the area was dimly lighted is objectively untrue based on what is depicted on surveillance video. For those reasons, the defendant's summary judgment motion is granted and the case is dismissed with prejudice.

FACTS

On August 17, 2013, Debra Crestoni tripped, fell, and injured herself outside Rivers Casino, located at 3000 South River Road, Des Plaines, Illinois. On October 1, 2015, Crestoni filed a first-amended complaint seeking monetary damages for her injuries. The first-amended complaint alleges that at some point before Crestoni's injury, Rivers had installed a walkway connecting a driveway or parking lot on its property to the Courtyard by Marriott Hotel next door. Crestoni alleges that Rivers had failed to obtain a permit or to consult the Illinois Accessibility Code or the Americans with Disabilities Act before installing the walkway. According to Crestoni, these failures resulted in the walkway being installed without a curb

ramp, a violation of the Accessibility Code and the ADA since they apply to private land used by the general public.

Crestoni further alleges that on August 17, 2013 she stepped on the curb where the pathway intersects with the parking lot or driveway. Crestoni's foot slipped off the curbed, causing her to fall over the curb and onto the walkway, resulting in her injuries. Crestoni alleges that Rivers owed her a duty to install or construct the walkway and curb in compliance with all applicable building codes, the Accessibility Code, the ADA, and recognized construction-industry standards. She further alleges that Rivers owed her a duty to keep the driveway, walkway, and curb in a safe condition for use by the public. Based on these allegations, Crestoni claims that Rivers breached its duty to her by: (1) failing to install or construct the walkway, curb, and curb ramp in accordance with recognized construction standards, the Accessibility Code, and the ADA; (2) failing to maintain the walkway, curb, and curb ramp in compliance with the Accessibility Code and the ADA; (3) permitting the driveway, walkway, and curb to remain without a curb ramp in violation of the Accessibility Code and the ADA; (4) permitting the driveway, walkway, and curb to remain in a condition without a safe transition; (5) failing to warn of the existence of the curb separating the driveway from the walkway; and (6) failing to light the area surrounding the driveway, walkway, and curb.

Crestoni testified at her deposition that before August 17, 2013, she had been to Rivers more than 20 times. She also testified that she had arrived at Rivers that day at approximately 2:00 p.m. for a cash drawing she thought would be held at 4:00 p.m. Between 2:00 and 4:00 p.m., she played the slot machines. At that point, she discovered that the drawing was not scheduled until 8:00 p.m. In the interim, she went to the Ten Lounge to ask for a hotel room at the Courtyard by Marriott.

At some time after 4:00 p.m., Crestoni left Rivers for the hotel. She walked through Rivers' parking lot or roadway and stepped over the curb off of which she would later slip to reach the flagstone-like path connecting the Rivers and Marriott properties. Crestoni

checked in at the hotel and then returned to the casino following in reverse the same route that she had just taken. On both of these occasions, she had no problems walking from and to the casino. Crestoni admitted that she had, in fact, walked the same route between one and five times before August 17, 2013.

At approximately 7:00 or 7:30 p.m., Crestoni returned to the Ten Lounge, ate something, and drank a glass of wine. She left Rivers soon after the 8:00 p.m. drawing and started walking to the hotel following the same route she had taken in the afternoon and on prior occasions. She walked, once again, through what she believed was a parking lot on Rivers' property, heading to the path connecting Rivers' parking lot and the Marriott hotel. According to Crestoni, the sun had set. She does not recall any artificial lighting in the area, although she also testified that the area was dimly lighted.

Crestoni testified that she was trying to locate the path but that it was too dark and she had difficulty finding it. The pathway is higher than the parking lot and is separated by a curb. According to Crestoni, before she reached the pathway she stepped and tripped on the curb. She does not recall which of her feet tripped on the curb. After tripping on the curb, Crestoni fell and was injured.

Crestoni testified that she tripped over the curb because it was dark, there was a lack of an even surface, and she did not see the curb. She also testified that she fell in front of the curb. Crestoni does not know if there was a defect in the curb at the point where she fell. She testified as to various photographs of the area and said that exhibits 3, 7, and 11 show the curb the way it appeared on August 17, 2013. Exhibit 7 shows a row of light poles immediately adjacent to the roadway while Exhibit 9 shows the light pole nearest the path.

Scott Goin, Rivers' Director of Facilities, testified that the pathway existed by the winter of 2011 or 2012. He knows that because at that time Rivers replaced the pathway's broken pavers with new ones. Goin did not obtain any permits to repair the pathway and did not consult the Accessibility Code or the ADA. Goin testified that the area where Crestoni fell is artificially lighted.

Rivers attached to its motion a surveillance video as an exhibit. The clock on the video screen begins approximately at 8:45 p.m. The video shows Crestoni walking without any assistance on what appears to be a paved roadway, not a parking lot. A light pole is visible initially in the center of the video, which later is to the right of where Crestoni falls. During the first portion of the video, light from the adjacent parking garage casts Crestoni's shadow to her right (to the left of her in the video). After Crestoni walks past the end of the parking garage, her shadow disappears since parking garage wall cuts off the light. As she continues to walk toward the curb, her shadow reappears behind her (to the right of her in the video) and becomes darker as she gets closer to the curb and light pole to the left of where she falls.

While walking toward the curb and walkway, Crestoni's head is down. The curb and walkway are plainly visible in the video. As she reaches the edge of the roadway, Crestoni places the front part of her left foot on the top of the curb to the right of and outside the width of the pathway where it intersects the roadway. Crestoni's left foot slips back off the top of the curb onto the roadway toward her as the rest of her body continues to move forward. Her right foot clears the curb and lands to the right of the path. She takes two more steps as she falls to the ground.

The video shows no obstructions at or near the point where Crestoni's foot steps on and slips off the curb. The video shows that the area is artificially illuminated. Although the source of the lighting is not directly visible in the video, the curb is plainly visible, and the light pole illuminating the area is visible on the left side of the screen.

Crestoni viewed the video before her deposition. Based on the video, Crestoni's attorney and his client exchanged the following questions and answers at her deposition:

> Q. That video shows your foot attempting to be placed on the curb; is that correct?

A. That's correct.
Q. And then you tripped over that curb?
A. That's correct.
Q And then you fell on to and then over the path as a result of that?
A. That's correct.
Q. And what caused you to fall?
A. I didn't see the curb.
* * *
Q. And that was because it was dimly lit?
A. That's correct.

ANALYSIS

The Code of Civil Procedure 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. *See Prostran v. City of Chicago*, 349 Ill. App. 3d 81, 85 (1st Dist. 2004).

The purpose of a summary judgment proceeding 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). The nonmoving party is not expected to prove its case in response to a summary judgment motion, but is required to present a factual basis

as to each element that would arguably entitle the nonmoving party to judgment. *See id.* at 432. If the party seeking summary judgment 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).

To bring a common-law negligence claim, a plaintiff must establish, "the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately caused by that breach." *Ward v. K Mart Corp.*, 136 Ill. 2d 132, 140 (1990). Whether a defendant owes a plaintiff a duty is a question of law for a court to decide. *See Burns v. City of Centralia*, 2014 IL 116998, ¶ 13. "In the absence of a showing from which the court could infer the existence of a duty, no recovery by the plaintiff is possible as a matter of law and summary judgment in favor of the defendant is proper." *Vesey v. Chicago Housing Auth.*, 145 Ill. 2d 404, 411 (1991). To determine whether a duty exists, a court must determine whether a plaintiff and defendant, "stood in such a relationship to one another that the law imposed upon defendant an obligation of reasonable conduct for the benefit of plaintiff." *Ward*, 136 Ill. 2d at 140. To make that determination, a court is to consider four factors: "(1) the reasonable foreseeability of the injury, (2) the likelihood of the injury, (3) the magnitude of the burden of guarding against the injury, and (4) the consequences of placing that burden on the defendant." *Simpkins v. CSX Transp., Inc.*, 2012 IL 110662, ¶ 18. The weight to be given to any particular factor depends on the circumstances of the particular case. *See id.*

Rivers' singular argument seeks to establish that it owed Crestoni no duty under both the *Purtill* and *Celotex* tests. Rivers argues that Crestoni has failed to establish a duty Rivers owed to her because the curb's existence was open and obvious. Rivers also argues that the surveillance video objectively shows that the curb was plainly visible to Crestoni and, therefore, Rivers owed her no duty. Crestoni responds in two ways. First, Rivers made the curb a dangerous condition by constructing the path without a permit and in

violation of the Accessibility Code and the ADA. Second, the area was dimly lighted, making it difficult for Crestoni to see the curb.

The starting point for any duty analysis in a premises-liability action begins with the Restatement (Second) of Torts, which Illinois has adopted into its common law. *See Deibert v. Bauer Bros. Constr. Co.*, 141 Ill. 2d 430, 434 (1990). The Restatement provides generally that:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger.

Restatement (Second) of Torts, § 343, at 215-16 (1965); *see Ward*, 136 Ill. 2d at 145-46.

This general proposition forms the basis for Crestoni's first argument. According to her, the Accessibility Code and the ADA establish the standard of care against which Rivers' acts and omissions are to be judged. It is unquestionably true that standards of care may be established by a variety of evidence including statutes, *see, e.g., Jones v. Chicago HMO Ltd. of Ill.*, 191 Ill. 2d 278, 298 (2000) (expert testimony, hospital bylaws, statutes, accreditation standards, custom and community practice); *Putman v. Village of Bensenville*, 337 Ill. App. 3 197, 207 (2d Dist. 2003) (Accessibility Code), rules and regulations, *see, e.g., Advincula v. United Blood Srvcs.*, 176 Ill. 1, 46 (1996) (Illinois Blood Shield Act), and even private safety organizations, *see, e.g., Schultz v. Northeast Ill. Reg'l Commuter R.R.*, 201 Ill. 260, 297-99 (2002). "This principle is particularly applicable where the statute or regulation is designed for the protection of human life." *Putman*, 337 Ill. App. 3d at 207. Yet whether the Accessibility Code and the ADA establish the standard of care to be applied in this case is beside the point because, even if Crestoni is

correct, the ultimate issue to be resolved in this case is, as Rivers argues, whether the curb, which Crestoni claims caused her injury, was an open-and-obvious condition.

The reason the open-and-obvious condition is the analytical focus of this case is that the Restatement recognizes preexisting common-law exceptions to the general rule noted above. *See Putman*, 337 Ill. App. 3d at 204-05 (exception applied despite Illinois Accessibility Code violation). As the Restatement explicitly provides, "[a]n excused violation of a legislative enactment or an administrative regulation is not negligence." Restatement, § 288A(1); *see Putman*, 337 Ill. App. 3d at 204. For example, if,

> as in the case of the rules of the highway, the legislation is adopted in a field where the common law has already recognized a number of excuses for conduct which would otherwise be negligent, such excuses may continue to be recognized when the court adopts the statute as a standard.

Restatement, § 288A, cmt. *d*.

The open-and-obvious exception is recognized as part of Illinois common law. *See, e.g., Grillo v. Yeager Constr.*, 387 Ill. App. 3d 577, 595-96 (1st Dist. 2008); *Buerkett v. Illinois Power Co.*, 384 Ill. App. 3d 418, 422 (4th Dist. 2008). Under the open-and-obvious rule, "[a] possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." Restatement, § 343A, at 218; *see Ward*, 136 Ill. 2d at 149-51. The Restatement defines "known" as "not only knowledge of the existence of the condition or activity itself, but also appreciation of the danger it involves," *id.* at cmt. *b*, at 219, and "obvious" as denoting both, "the condition and the risk are apparent to and would be recognized by a reasonable [person], in the position of the visitor, exercising ordinary perception, intelligence, and judgment." *Id.*

The available evidence in the record indicates that Rivers could not have reasonably foreseen that the curb posed any danger to Crestoni. The reason is, quite simply, the curb from which Crestoni's foot slipped off was not defective. Indeed, Crestoni admitted in her deposition that she did not know of any defect in the curb where she fell. Crestoni Dep. at 83. Further, the photographs contained in the record corroborate that admission. Crestoni Dep. Exs. 2, 3, 7, 10, 11. Even if this court were to accept Crestoni's argument that the curb was defective because it did not contain a cut at the walkway intersection, such a "defect" would go only to causation and not duty since Goin testified and the video shows Crestoni stepping onto the curb outside the width of the walkway, Goin Dep. at 29, where a cut would otherwise have been located.

It is also relevant that Crestoni had prior knowledge of the curb's existence. "As to the reasonable likelihood of injury factor, we note that the law generally considers the likelihood of injury slight when the condition in issue is open and obvious, because it is assumed that persons encountering the potentially dangerous condition of the land will appreciate and avoid the risks." *Sollami v. Eaton*, 201 Ill. 2d 1, 17 (2002), *citing Bucheleres v. Chicago Pk. Dist.*, 171 Ill. 2d 435, 456 (1996). Crestoni testified that on the day she was injured, she had twice walked across the curb on her way to and from the Marriott hotel. In addition, Crestoni testified that before August 17, 2013, she had walked that same route one to five other times.

Crestoni's second argument is that the area where she slipped and fell was poorly lighted. This argument is misdirected because it cannot defeat the open-and-obvious exception to a property owner's duty. "Illumination is recognized as a form of warning. . . " *Swett v. Village of Algonquin*, 169, Ill. App. 3d 78, 89 (2d Dist. 1988). "[W]here there is no duty to protect against the condition which causes the harm, there is no duty to illuminate so as to warn of it." *Id., citing Newcomm v. Jul*, 133 Ill. App. 2d 918, 920-21 (3d Dist. 1971), *Greenwood v. Leu*, 14 Ill. App. 3d 11, 15-16 (5th Dist. 1973), and *Charpentier v. City of Chicago*, 150 Ill. App. 3d 988, 996 (1st Dist. 1986). Since this no-duty rule applies as an objective standard to defeat a visually impaired person's premises-liability claim, as in

Prostran v. City of Chicago, 349 Ill. App. 3d 81, 92 (1st Dist. 2004), the same must apply to Crestoni, who has no such disability. To find otherwise would illogically require property owners to "install lighting over every nonactionable [sic] defect," thereby, "substantially undercutting" the purpose of the open-and-obvious rule. *Putman*, 337 Ill. App. 3d at 205 (no-duty to illuminate *de minimis* defects). That legal principle means that both burden factors used to determine the existence of a duty weigh in Rivers' favor.

In addition to the open-and-obvious rule, the record, once again, defeats Crestoni's argument as a factual matter. The photographs to which Crestoni testified in her deposition, particularly exhibits 7 and 9, distinctly show a light pole near the walkway-parking-area intersection. The video shows light poles both to the right and left of where Crestoni falls. Most compelling is that the video shows Crestoni's shadow becoming darker the closer she walks to the light pole and curb, both of which are plainly visible in the video.

Given the apparent conflict between Crestoni's version of events and the surveillance video contained in the record, this court believes that it is necessary to address the use of the video as evidence in ruling on summary judgment motions. On this point, the United States Supreme Court has made clear that,

> When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.
>
> That was the case here with regard to the factual issue whether respondent was driving in such fashion as to endanger human life. Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape.

Scott v. Harris, 550 U.S. 372, 380 (2007). While the Illinois Supreme Court has not made such a definitive declaration, the Seventh Circuit Court of Appeals has applied the *Scott* rule in various unpublished opinions because video evidence discredited the plaintiff's version of events. *See, e.g., Barrett v. Wallace*, 570 F. App'x 598, 601 (7th Cir. 2014); *Rivera v. Jimenez*, 556 F. App'x 505, 506-07 (7th Cir. 2014) ([G]ranting summary judgment for the defendant is appropriate when a video discredits the plaintiff's version of events"); *Gillis v. Pollard*, 554 F. App'x 502, 506 (7th Cir. 2014) ("[W]here video evidence contradicts the plaintiff's version of events, the court should not accept the plaintiff's story for purposes of summary judgment").; *Johnson v. Moeller*, 269 F. App'x 593, 596 (7th Cir. 2008).

The *Scott* rule makes legal, factual, and practical sense. As a legal matter, if a court were to assume for purposes of summary judgment that only the plaintiff's recollection of an incident were true, summary judgment could never be granted despite contrary admissible evidence. *See Robidoux v. Oliphant*, 201 Ill. 2d 324, 333 (2002) (summary judgment must be based on "facts admissible in evidence"), *quoting* Ill. S. Ct. R. 191(a). The Code of Civil Procedure certainly does not contemplate such a result. *See* 735 ILCS 10/2-1005. Rather, the only issue is whether there remains a question of *material* fact, *see id.*, which a video may fully resolve. To find otherwise would make video inadmissible at the summary judgment stage, but admissible at trial. Such a dichotomy is unsupported by any statute or rule.

Scott also makes sense factually because it does not conflict with instances in which there exists no objective evidence. As has been recognized, "where there is a dispute about the condition's physical nature, such as its visibility, the question of whether a condition is open and obvious is factual." *Alqadhi v. Standard Parking, Inc.*, 405 Ill. App. 3d 14, 17-18 (1st Dist. 2010), *quoting Wilfong v. L.J. Dodd Constr.*, 301 Ill. App. 3d 1044, 1052 (2d Dist. 2010), *citing, in turn, Belluomini v. Stratford Green Condo. Ass'n*, 346 Ill. App. 3d 687, 692-93 (2d Dist. 2004). In *Alqadhi*, for example, there existed no video establishing independently whether the lighting conditions around the curb on which the plaintiff tripped

were "low" and "dark," consequently the court could not characterize the case as one in which there was "'no dispute about the physical nature of the condition.'" 405 Ill. App. 3d at 18, *quoting Belluomini*, 346 Ill. App. 3d at 694. That situation is the complete opposite of the situation in this case in which there exists objective video recording the events.

The *Scott* rule also makes sense as a practical matter. If the law were to make video inadmissible at the summary judgment stage, the result would be a severe diminishment in the value of video as a means of reducing litigation costs. If a court cannot rely on video to rule on a summary judgment motion, property owners have a substantial disincentive to record activities on their property since only the plaintiff's version of events will ever be considered true before trial.

The *Scott* rule is applicable in this case. The video discredits Crestoni's version of events to such an extent that no reasonable jury could believe her testimony that the area where she fell was dimly lighted. In the video, Crestoni's shadow is plainly visible and grows darker the closer she walks toward the curb and the nearby light pole. The video also plainly shows that the same artificial lighting illuminates the curb off of which Crestoni's foot slipped. Further, nothing in the record suggests that the camera that recorded the events employed an infrared or heat-seeking device that would make objects appear brighter than they actually appeared.

CONCLUSION

For the reasons presented above, it is ordered that:

1. Rivers' summary judgment motion is granted; and
2. this case is dismissed with prejudice.

Judge John H. Ehrlich

FEB 24 2016

Circuit Court 2075

John H. Ehrlich, Circuit Court Judge