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

Brenda Watkins, Plaintiff, v. 53rd Woodlawn Kimbark Shopping Center, Inc. and Aegis Properties, Corp., Defendants.	)	No. 14 L 13465
53rd Woodlawn Kimbark Shopping Center, Inc. and Aegis Properties, Corp., Third-Party Plaintiffs, v. City of Chicago, Third-Party Defendant.	)	

MEMORANDUM OPINION AND ORDER

Absent appropriation, a contract, or affirmative conduct, a landowner owes no duty to maintain adjoining property owned by another landowner. In this case, the third-party plaintiffs have failed to adduce any evidence that a condition on the third-party defendant's public sidewalk forced the plaintiff to walk on the defendants-third-party-plaintiffs' adjoining private sidewalk where she tripped and fell. Since the law and the facts favor the third-party defendant, its summary judgment motion must be granted with prejudice.

Facts

On September 12, 2014, Brenda Watkins was walking west on West 53rd Street in Chicago. At approximately 1228 West 53rd Street, Watkins stepped into a sidewalk hole and fell. Watkins subsequently filed suit against 53rd Woodlawn Kimbark Shopping Center, the alleged owner of the sidewalk where she fell, as well as Aegis Properties Corp., the property manager.

Watkins' complaint and her deposition provide the factual record related to her fall and injuries. According to Watkins, she had just left a Dunkin' Donuts shop and was walking home. The time was between 7:30 and 8:00 a.m., and the weather was sunny and cool. Watkins was wearing her glasses and clogs. At approximately 1228 West 53rd Street she walked between, on her left, a row of Divvy bikes and, on her right, the exterior wall of a CVS store. At this point her left foot went into a sidewalk hole causing her to fall and sustain injuries. Attached to Watkins' deposition are photographs that she marked with an "X" indicting the location of the sidewalk hole into which she stepped with her left foot. Watkins was not asked and gave no reason for walking at the particular location where she fell.

On December 31, 2014, Watkins filed her complaint. She claimed that 53rd Woodlawn and Aegis each owed her a duty of care to maintain the sidewalk where she fell and that each had breached its duty to her by permitting a unsafe sidewalk condition – the hole into which she stepped with her left foot – to exist. 53rd Woodlawn and Aegis later filed a first-amended, third-party complaint for contribution against the City of Chicago. *See* Joint Tortfeasor Contribution Act, 740 ILCS 100/0.01–5. The third-party complaint alleges that the general public uses the sidewalk where Watkins fell and that the City owed a duty to Watkins to maintain the sidewalk in reasonably safe condition. The third-party complaint claims that the City breached its duty to Watkins by permitting the sidewalk to fall into a state of disrepair. In their prayer for relief, 53rd Woodlawn and Aegis request that if they are found liable to Watkins, the City should pay a monetary judgment equal to its relative degree of fault.

In oral discovery, the City presented for deposition John Errera, a civil engineer with the City's Department of Transportation. Errera testified that he went to the location Watkins identified in her deposition and consulted the applicable 80-acre sheet, a plat demarking the City's right of way. Based on his observations and referrals, Errera testified that the City did not own the sidewalk where Watkins fell.

Analysis

The City's motion seeks summary judgment on the third-party complaint. 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. *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).

In this case, 53rd Woodlawn and Aegis seek contribution from the City in the event they are found liable for Watkins' damages. Such a remedy is authorized by the Contribution Act that, among other things, ensures the equitable apportionment of damages among tortfeasors. *See BHI Corp. v. Litgen Concrete Cutting & Coring Co.*, 214 Ill. 2d 356, 365 (2005). In other words, the trigger for the Contribution Act to apply is the existence of multiple tortfeasors. It follows that, "[i]f a defendant is not a tortfeasor *vis-a-vis* the original plaintiff, [that defendant] cannot be a joint tortfeasor *vis-a-vis* a codefendant and may not be held liable to that codefendant for contribution." *Vrough v. J&M Forklift*, 165 Ill. 2d 523, 529 (1995), *citing Esworthy v. Norfolk & Wstrn. Ry.*, 166 Ill. App. 3d 876, 880 (4th Dist. 1988).

To identify and determine a local governmental entity's duties, if any, courts are to refer to the common law. *See Village of Bloomingdale v. CDG Enterps., Inc.*, 196 Ill. 2d 484, 490 (2001); *Anthony v. City of Chicago*, 382 Ill. App. 3d 983, 988 (1st Dist. 2008). Parties, and even courts, frequently and mistakenly state that section 3-102 of the Local Governmental and Governmental Employees Tort Immunity Act establishes a local public entity's duty. *See* 745 ILCS 10/3-102(a) (a local public entity, "has the duty to exercise ordinary care to maintain its property in a reasonably safe condition"). Yet the Supreme Court has clarified that, "[t]he Tort Immunity Act did not create this duty; it merely codified the duty that existed at common law." *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 15, *citing Bubb v. Springfield School Dist.*, 186, 167 Ill. 2d 372, 377-78 (1995). "Thus, in determining whether the City's general duty of care set forth in section 3-102 extended to the risk at issue in this case — the defective sidewalk — we look to the common law." *Id.*, *citing Vesey v. Chicago Housing Auth.*, 145 Ill. 2d 404, 414 (1991).

Section 3-102(a) plainly states that the scope of a local public entity's duty of care extends only to "*its* property." 745 ILCS 3-102(a) (emphasis added). Neither section 3-102, nor any other Tort Immunity Act section, nor any common-law principle provides that a local public entity's duty extends to property owned by others. Indeed, absent evidence of appropriation, a contractual agreement, or some other affirmative conduct, a landowner owes no duty of care to maintain another landowner's property. *See Caracci v. Patel,* 2015 IL App (1st) 133897, ¶¶ 23-29; *Gilmore v. Powers,* 403 Ill. App. 3d 930, 933-34 (1st Dist. 2010), citing cases. The response brief filed by 53rd Woodlawn and Aegis does not cite to any case holding otherwise. As a matter of law, therefore, summary judgment is entirely appropriate.

As to matters of fact, the City relies on the deposition of John Errera, a civil engineer with the City's Department of Transportation. Errera testified that he went to the location Watkins identified in her deposition and consulted the applicable 80-acre sheet, a plat demarking the City's right of way. Based on his observations and referrals, Errera testified that the City did not own the sidewalk where Watkins fell.

53rd Woodlawn and Aegis quite simply have no evidence to contradict Errera's testimony. Instead, 53rd Woodlawn and Aegis attempt to create a question of fact by pointing to Errera's admission that the placement of the Divvy bikes could have narrowed the available public sidewalk space so that a pedestrian would have had to walk on the adjoining private sidewalk. A creative argument does not, however, make up for the lack of supporting facts. Watkins did not testify that the narrowness of the public sidewalk forced her to walk on the private sidewalk. Indeed, neither 53rd Woodlawn nor Aegis even asked Watkins that question. Absent that key fact, their supposition remains just that. In short, summary judgment is also warranted given the absence of a question of material fact.

Conclusion

For the reasons presented above, it is ordered that:

1. the City's summary judgment is granted; and
2. the amended third-party complaint for contribution filed by 53rd Woodlawn and Aegis is dismissed with prejudice;

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

JAN 12 2017

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