2017 IL App (2d) 160718-U
No. 2-16-0718
Order filed April 12, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

SUSAN GROHARING,	)	Appeal from the Circuit Court
	)	of Jo Daviess County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 14-L-13
	)	
THE VILLAGE OF HANOVER,	)	Honorable
	)	William A. Kelly,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Schostok and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly entered summary judgment for defendant on the ground that it was immune because plaintiff was not an intended and permitted user of the area of the street where she fell: although plaintiff argued that the Tort Immunity Act was inapplicable because the area was privately owned, she provided nothing to support that argument.

¶ 2 Plaintiff, Susan Groharing, sued defendant, the Village of Hanover, for injuries she sustained when she fell into a snow-covered storm drain. The trial court granted defendant's motion for summary judgment (735 ILCS 5/2-1005(c) (West 2014)), finding that defendant was immune from liability under section 3-102(a) of the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/3-102(a)(West 2014)) and,

further, that the condition of the storm drain was open and obvious. Plaintiff appeals. We affirm.

¶ 3 I. BACKGROUND

¶ 4 According to plaintiff's complaint, in December 2013, defendant was responsible for the maintenance of village storm drains. On December 10, 2013, plaintiff was leaving her job at Invensys during the early morning hours, in darkness, when she fell into a snow-covered storm drain. Plaintiff alleged that defendant was negligent in the following respects: "[f]ailing to maintain drains"; "[f]ailing to install storm drains with safely spaced grates"; "[f]ailing to protect pedestrians by installing a barricade around, or otherwise protect against, a broken or unsafe storm drain"; "[f]ailing to clear snow from drain and thereby increasing the potential danger to pedestrians"; "[f]ailing to safeguard a storm drain under repair properly from pedestrians"; and "[f]ail[ing] to warn of a hazardous condition created by [d]efendant."

¶ 5 Plaintiff testified at her deposition that she had worked at Invensys (a/k/a Robertshaw) for 23 years. On the day of the accident, she had worked from 10 p.m. to 6 a.m. She parked her car in the VFW parking lot, which was located across the street from the building in which she worked. It had snowed while she was working, and it was still snowing when she left at 6 a.m. The VFW lot had been plowed, but the snow was accumulating quickly. Plaintiff began to walk across Washington Street toward her car. She took about 12 steps and then felt her heel go out from underneath her. She tried to stop, but she slid into the drain up to her waist. One leg went into the drain; she did a split. The grate was slippery because of the wet snow on it. She testified: "The grate is where I hit first, and then I went in." Plaintiff testified that she had seen the storm drain before and had always known that it was there. She had never seen it in any condition other than the one depicted in a photograph that was taken after the incident. Before

the incident, she tried to avoid the storm drain. She had heard that it had been broken by a snowplow. She always parked her car so as to avoid it. She knew that there was a wide opening. On the day she fell, the storm drain was covered with freshly-fallen snow. She was looking down to walk in the path of the cars to avoid getting her shoes wet. She was not distracted by anything.

¶ 6 Defendant filed a motion for summary judgment, arguing, *inter alia*, that it was immune from liability under section 3-102(a) of the Tort Immunity Act because plaintiff was not an intended and permitted user of the area where plaintiff had fallen and because defendant did not have notice of any alleged defect.

¶ 7 In response, plaintiff argued, *inter alia*, that she was an intended and permitted user. Plaintiff also argued that defendant had actual and constructive notice of the broken grate. In support, plaintiff attached several affidavits from witnesses stating that the storm drain had been broken for three to five years prior to plaintiff's fall. One witness described it as being "in a state of disrepair." Another witness stated that "the cement was crumbling and there was a gaping hole in the grate with at least two bars missing from the grate." Another witness stated that "[t]he grate was broken badly enough that cars passing over it would bottom out." Another witness stated that she "personally observed the crumbling cement around the drain, 2 or possibly 2 or more missing bars which left a gaping hole, and the other bars were spaced far apart." Another witness stated that the "disrepair of the storm drain was widely known." Several witnesses stated that they "avoided the drain." Plaintiff also attached her own affidavit, stating that the storm drain had been broken for at least three years prior to her fall.

¶ 8 In reply, defendant continued to maintain that plaintiff was not an intended and permitted user. Defendant further argued, *inter alia*, that, given the affidavits, it owed plaintiff no duty, because the condition of the storm drain was open and obvious to the reasonable person.

¶ 9 At the hearing on the motion, defendant argued that plaintiff fell in an area where there was no crosswalk and thus she was not an intended user of the area where she fell. Defendant further argued that the affidavits submitted by plaintiff established that the condition of the storm drain was open and obvious. Defendant argued: "[Plaintiff's] own knowledge shows that she knew it was a condition there, she knew the exact location of the condition, she had presumably seen it many times over the three years working five days a week at this location, crossing in that same path and it would be pretty disingenuous, I believe to argue that it wasn't an open and obvious condition."

¶ 10 Plaintiff argued that, although she did not raise the issue in her response brief, section 3-102(a) of the Tort Immunity Act did not apply here because, according to plaintiff, defendant did not own Washington Street where the injury occurred. With respect to defendant's argument that the condition of the storm drain was open and obvious, plaintiff conceded that she knew about the presence of the condition. She argued, however, that an exception to the open-and-obvious rule applied, in that, because the condition had been there for so long, she had forgotten about it.

¶ 11 The trial court granted summary judgment for defendant. The court found that defendant was immune from liability under section 3-102(a) of the Tort Immunity Act, as it had a public right-of-way on the street and plaintiff was not an intended user. In addition, the court found that the condition was open and obvious, as plaintiff, by her own admission, had been aware of it for three years.

¶ 12 Plaintiff timely appealed.

¶ 13 II. ANALYSIS

¶ 14 Plaintiff argues that the trial court erred in granting summary judgment for defendant. First, plaintiff argues that, because defendant did not own the street where the storm drain was located, the immunities provided in section 3-102(a) of the Tort Immunity Act do not apply. Second, plaintiff argues that, even if the condition of the storm drain was open and obvious, the " 'forgotten' " exception applies.

¶ 15 Summary judgment is proper when the pleadings, depositions, and other matters on file establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2014). Our review is *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶ 16 Section 3-102(a) of the Tort Immunity Act, titled "Care in maintenance of property; constructive notice," states:

> "(a) 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) (West 2014).

"The immunity provided in section 3-102(a) applies where a public entity breaches its duty to exercise ordinary care to maintain its property in a reasonably safe condition but (1) the entity

did not have actual or constructive notice of the unsafe condition in reasonably adequate time prior to an injury to have taken measures to remedy or protect against the condition, or (2) the injured party failed to use ordinary care or was not an intended and permitted user of the property." *Pattullo-Banks v. City of Park Ridge*, 2014 IL App (1st) 132856, ¶ 15.

¶ 17 Here, the trial court found that defendant was immune from liability under section 3-102(a) of the Tort Immunity Act, because plaintiff was not an intended and permitted user of the area where she crossed the street. Plaintiff makes no argument challenging the court's conclusion that plaintiff was not an intended and permitted user; rather, plaintiff argues that section 3-102(a) does not apply because, according to plaintiff, the street on which the storm drain was located was not "public property" under the Act.

¶ 18 In support of her argument that the location of the storm drain was not public property, plaintiff directs our attention to section 3-101 of the Tort Immunity Act, which provides the following definition:

> "As used in this Article unless the context otherwise requires 'property of a local public entity' and 'public property' mean real or personal property owned or leased by a local public entity, but do not include easements, encroachments and other property that are located on its property but that it does not own, possess or lease." 745 ILCS 10/3-101 (West 2014).

According to plaintiff, because "Robertshaw retains ownership of the property," section 3-102(a) of the Tort Immunity Act does not apply.

¶ 19 To support this claim, plaintiff contends that she "entered into evidence a deed with a legal description indicating that the street is part of the property of Eaton Corporation. Eaton Corporation later sold the property to Robertshaw (f/k/a Invensys)." However, plaintiff fails to

point to specific language in the deed or to any authority that supports her interpretation. Indeed, she does not even provide a record citation to where the deed may be found. We note that, throughout her brief, plaintiff repeatedly refers to facts, documents, arguments made at the summary judgment hearing, and findings by the trial court, with no corresponding record citations. Illinois Supreme Court Rule 341(h)(6) (eff. Jan. 1, 2016) requires that a statement of facts must make "appropriate reference to the pages of the record on appeal." Rule 341(h)(7) (eff. Jan. 1, 2016) provides in relevant part that the appellant's brief shall include:

> "Argument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on. Evidence shall not be copied at length, but reference shall be made to the pages of the record on appeal or abstract, if any, where evidence may be found."

Plaintiff makes virtually no attempt to comply with these rules. Accordingly, we find that plaintiff has forfeited the issue. See *Vician v. Vician*, 2016 IL App (2d) 160022, ¶ 31 (finding an issue forfeited where the defendants failed to properly cite the record in support of their argument).

¶ 20 In any event, having located the deed in the record thanks to defendant's citation, we find that it is not sufficient to raise an issue of fact on this point. As defendant points out, the deed includes an exhibit, Exhibit A, which contains the legal description of a parcel conveyed to Robertshaw. However, the deed states that the conveyance specifically excludes 5,600 square feet of property that "has been previously set aside for public highway purposes." Although the land excepted is also described with only a legal description, the presence of defendant's storm drain strongly suggests that the street was within the land excepted from the conveyance and, as defendant maintains, is "entirely within the ownership and management of Village of Hanover."

Although plaintiff submits that the deed conveyed the entirety of the land to Robertshaw and that defendant had only an easement, she cites nothing to support this claim, from within the deed or elsewhere, and we reject it.

¶ 21 Further, the case relied on by plaintiff to support her claim that section 3-102(a) does not apply here is readily distinguishable. In *Steinbach v. CSX Transportation, Inc.*, 393 Ill. App. 3d 490 (2009), the father of a deceased dirt biker brought a wrongful death action against the city to recover for the dirt biker's death when he struck a steel cable that was stretched across a gravel roadway. *Id*. at 491. There was no dispute that the city owned the steel cable located on the gravel road. The trial court found that the city was immune from liability under section 3-102(a), because the decedent was neither intended nor permitted by the city to use the gravel roadway. *Id.* at 518. The reviewing court reversed on appeal, finding that, although the city owned the cable, the gravel road was owned and controlled by the railroad. In support of this conclusion, the court relied on the legal description of an easement granted to the city as a " 'non-exclusive easement along the former right-of-way of the Chicago, Rock Island & Pacific Railroad Company having a width of 100 feet.' " *Id*. at 512. The court stated:

> "The City had a limited right or privilege to use the gravel road for reasonable access to construct, maintain, operate, and repair the City's 34.5 KVA wireline. This privilege of reasonable access did not create a sufficient, possessory interest in the land such that the City could singularly designate decedent's status as a trespasser or claim the status of the location on the gravel road as public property." *Id.* at 520.

Here, unlike in *Steinbach*, plaintiff has not provided us with any evidence that defendant had a non-exclusive easement on private property, such that section 3-102(a) of the Tort Immunity Act would not apply. The evidence in *Steinbach* was undisputed that the property was owned and

controlled by the railroad, and it further established the existence and precise nature of the city's easement. The evidence presented here does not support plaintiff's position that defendant had an easement on private property.

¶ 22 III. CONCLUSION

¶ 23 For the reasons stated, we affirm the order of the circuit court of Jo Daviess County granting summary judgment for defendant.

¶ 24 Affirmed.