NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

JONATHAN PRATUS,

Appellant,

v.

MARZUCCO'S CONSTRUCTION & COATINGS, INC.,

Appellee.

Case No. 2D19-2807

Opinion filed January 15, 2021.

Appeal from the Circuit Court for Lee County; Alane C. Laboda, Judge.

Alexander Brockmeyer of Boyle, Leonard & Anderson, P.A., Fort Myers, for Appellant.

Robert Anderson of Yeslow & Koeppel, P.A., Fort Myers, for Appellee.

LABRIT, Judge.

Jonathan Pratus appeals a final summary judgment in favor of Marzucco's Construction & Coatings, Inc. Because genuine issues of material fact preclude summary judgment, we reverse.

BACKGROUND

Marzucco was the general contractor overseeing a parking garage construction project. Pratus—an employee of an electrical subcontractor on the project—was injured when he stepped into an uncovered drain on the construction site. The drain was outside a door that opened onto an exterior landing on the second floor of the garage. The interior lighting in the garage was twenty to thirty percent of the normal level, but it was bright outside on the day of the accident. As Pratus opened the door to access the landing and stairs leading to the third floor, sunlight and dust generated by Marzucco's concrete grinding work on the landing blinded him and he stepped into the drain.

There were about a hundred drains on the site, and whether Marzucco covered a particular drain depended on the phase of construction. Pratus had observed the subject drain covered and uncovered at various times during his work at the site. Pratus's work on the project was sporadic, and he had been off the site for about a week before the day of the accident. When he was last on the site, the door had been closed and marked with caution tape, but on the day of the accident, the tape had been removed. Pratus would not have opened the door if the caution tape remained, and he used the door because it was the most direct path for him to complete his work on the third floor.

Pratus sued Marzucco for negligence, alleging that Marzucco breached its duty to maintain the premises in a reasonably safe condition by leaving the drain uncovered and failing to warn of the danger of the uncovered drain. Marzucco moved for summary judgment, arguing that it had no duty to warn of the uncovered drain

because the danger was open and obvious. In opposition, Pratus argued that fact issues existed concerning whether the drain's dangerous condition was open and obvious; he also argued that even if the danger was open and obvious, fact issues remained as to whether Marzucco breached its duty to maintain the premises in a reasonably safe condition. The trial court concluded that Marzucco was entitled to judgment as a matter of law, reasoning that Marzucco had no duty to warn Pratus "of the open and obvious drain" because Pratus admittedly was aware of it and should have altered "his behavior in such a manner that the incident could have been avoided."

ANALYSIS

"We review summary judgments de novo." Greene v. Twistee Treat USA, LLC, 302 So. 3d 481, 482 (Fla. 2d DCA 2020) (citing Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000)). The movant for summary judgment is burdened to prove the nonexistence of any genuine issue of material fact and must establish entitlement to judgment as a matter of law. Id. at 482-83. All reasonable inferences are drawn in favor of the nonmoving party, and if the record reflects the possibility of any issue of fact or "raises even the slightest doubt that an issue might exist, summary judgment is improper." Id. at 483 (quoting Competelli v. City of Belleair Bluffs, 113 So. 3d 92, 92-93 (Fla. 2d DCA 2013)). "A party seeking summary judgment in a negligence action has a more onerous burden than that borne in other types of cases." Watts v. Goetz, No. 2D19-1002, 2020 WL 6153418, at *3 (Fla. 2d DCA Oct. 21, 2020) (quoting Pitcher v. Zappitell, 160 So. 3d 145, 147 (Fla. 4th DCA 2015)).

Pratus was a business invitee on the property, so Marzucco "owed him two duties: '(1) the duty to use reasonable care in maintaining the property in a

reasonably safe condition; and (2) the duty to warn of dangers of which the owner has or should have knowledge and which are unknown to the invitee and cannot be discovered by the invitee through the exercise of reasonable care.' " Tallent v. Pilot Travel Ctrs., LLC, 137 So. 3d 616, 617 (Fla. 2d DCA 2014) (quoting Wolford v. Ostenbridge, 861 So. 2d 455, 456 (Fla. 2d DCA 2003)); see also Skala v. Lyons Heritage Corp., 127 So. 3d 814, 815 n.2 (Fla. 2d DCA 2013).

The trial court concluded that Marzucco was not liable to Pratus as a matter of law because the drain was open and obvious. This was error. "The obvious danger doctrine provides that an owner or possessor of land is not liable for injuries to an invitee caused by a dangerous condition on the premises when the danger is known or obvious to the injured party, unless the owner or possessor should anticipate the harm despite the fact that the dangerous condition is open and obvious." De Cruz-Haymer v. Festival Food Mkt., Inc., 117 So. 3d 885, 888 (Fla. 4th DCA 2013) (quoting Aaron v. Palatka Mall, L.L.C., 908 So. 2d 574, 576–77 (Fla. 5th DCA 2005)). The test for application of the doctrine "is not whether the object is obvious, but whether the dangerous condition of the object is obvious." Id. (emphasis added) (citing Brady v. State Paving Corp., 693 So. 2d 612, 613 (Fla. 4th DCA 1997)). In determining whether the doctrine applies, a court must "consider all of the facts and circumstances surrounding the accident and the alleged dangerous condition." Id. (quoting Aaron, 908 So. 2d at 577); see also Greene, 302 So. 3d at 483-84 ("[T]he open-and-obvious-condition principle 'is certainly not a fixed rule, and all of the circumstances must be taken into account.' " (quoting Ashcroft v. Calder Race Course, Inc., 492 So. 2d 1309, 1311 (Fla. 1986))).

While the subject drain was undisputedly obvious, Marzucco failed to negate any triable factual issue as to whether its dangerous condition was obvious. The danger of the drain lay in the fact that it was uncovered. See Houk v. Monsanto Co., 609 So. 2d 757, 759 (Fla. 1st DCA 1992) (noting that it was not the "drain per se that created the dangerous condition, but rather its uncovered . . . state that caused the injury"). The only evidence before the trial court (Pratus's deposition testimony)[1] established that the drain was sometimes covered and sometimes uncovered. There is no evidence that Pratus knew the drain was uncovered on the day of the accident. And it would not have been unreasonable for Pratus to assume that the drain was covered since the caution tape had been removed from the door leading to the drain. Drawing all reasonable inferences favorably to Pratus, as we must, genuine issues of material fact precluded summary judgment for Marzucco on the theory that the uncovered drain presented an open and obvious danger.[2]

Furthermore, even if the danger was open and obvious, Marzucco "still had a duty to maintain the premises in a reasonably safe condition" if it could have

---

[1]Marzucco proffered no summary judgment evidence whatsoever, choosing to rely solely on Pratus's deposition testimony in support of its summary judgment motion.

[2]Marzucco and the trial court relied upon the majority opinion in Brookie v. Winn-Dixie Stores, Inc., 213 So. 3d 1129, 1133 (Fla. 1st DCA 2017), which held that a supermarket had no duty to warn a patron of a pallet whose "location was open and obvious and not inherently dangerous." Brookie is distinguishable because—as the First District recognized in Houk—an uncovered drain on a construction site can be inherently dangerous. Houk, 609 So. 2d at 761 (noting "potential for serious injury in the event a drain became uncovered"). Moreover, in Brookie, the plaintiff successfully navigated the pallet twice immediately before "walking right into" it. 213 So. 3d at 1134. Here, Pratus testified that he had not used the door for several days before the accident.

anticipated the harm to Pratus as a result of the uncovered drain. See Tallent, 137 So. 3d at 618 ("[T]he discharge of the duty to warn does not necessarily discharge the duty to maintain the premises in a reasonably safe condition." (quoting Knight v. Waltman, 774 So. 2d 731, 734 (Fla. 2d DCA 2000))). Put differently, to achieve summary judgment, Marzucco had to conclusively establish that it should not have anticipated the potential harm to Pratus as a result of the uncovered drain, "notwithstanding his knowledge of the danger." See Miller v. Slabaugh, 909 So. 2d 588, 589 (Fla. 2d DCA 2005).

Marzucco neither made nor attempted to make any such showing, and genuine issues of material fact remain as to whether Marzucco breached its duty to maintain the premises in a reasonably safe condition. Pratus used the door leading to the stairs because it was the most direct route to his work location on the third floor. And although Pratus knew the drain was located just outside the door, he testified that navigating alternate pathways through the construction site posed similar if not more dangerous obstacles.

On this record, triable factual issues exist as to whether Marzucco should have anticipated that Pratus "would choose to encounter the obvious perils of" using the door to access the stairwell landing "because the advantages of" doing so "to complete his job outweighed the risks associated with navigating the garage in that condition." See Skala, 127 So. 3d at 816-17; see also Ahl v. Stone Sw., Inc., 666 So. 2d 922, 924 (Fla. 1st DCA 1995) (holding that papermill owner "should have reasonably anticipated" that maintenance worker could be injured by slipping on oil and water on mill floor, despite worker's awareness of those conditions). Likewise, fact questions exist as to

whether Marzucco should have anticipated that upon opening the door to the stairwell landing, Pratus would be distracted by the dust Marzucco's concrete grinding work generated on the landing, rendering him unable to avoid stepping into the uncovered drain. See Greene, 302 So. 3d at 484 (stating that a jury question exists if there is a possibility that circumstances on premises would distract invitee's attention from known or obvious dangerous condition).

The trial court erroneously concluded that Marzucco's duty to maintain the premises in a reasonably safe condition was discharged because Pratus knew of the drain and failed to avoid it. To the contrary, Pratus's knowledge merely created a fact issue for "the jury as part of its comparative negligence determination." Skala, 127 So. 3d at 817; see also Miller, 909 So. 2d at 589 ("A plaintiff's knowledge of a dangerous condition does not negate a defendant's potential liability for negligently permitting the condition to exist; it simply raises the issue of comparative negligence and precludes summary judgment." (quoting Fenster v. Publix Supermarkets, Inc., 785 So. 2d 737, 739 (Fla. 4th DCA 2001))); De Cruz-Haymer, 117 So. 3d at 888 ("[T]he obvious nature of the danger creates an issue of fact regarding the plaintiff's own comparative negligence."); Ahl, 666 So. 2d at 924 (holding that plaintiff's knowledge of the dangerous condition goes "to the issue of his own comparative negligence" and "does not compel entry of summary judgment" for defendant).

For these reasons, we reverse the final judgment in favor of Marzucco and remand for further proceedings.

Reversed and remanded.

CASANUEVA and VILLANTI, JJ., Concur.