STATE OF MICHIGAN

COURT OF APPEALS

KATHRYN HADDEN, Plaintiff-Appellee, v McDERMITT APARTMENTS, LLC, Defendant-Appellant.	FOR PUBLICATION January 12, 2010 9:05 a.m. No. 286474 Genesee Circuit Court LC No. 07-087100-NO Advance Sheets Version

Before: MURPHY, P.J., and METER and BECKERING, JJ.

BECKERING, J.

Defendant appeals by leave granted the trial court's order denying its motion for summary disposition with regard to plaintiff's claim that defendant breached its statutory duty under MCL 554.139(1)(a). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was a tenant in an upstairs apartment of defendant's building. After twice calling defendant to complain about the presence of snow and ice on an outdoor stairway attached to the building, plaintiff slipped and fell on black ice when using the stairway. She fractured her left hip.

Plaintiff sued defendant for breach of common-law general liability for owners of premises and breach of defendant's statutory duty as a landlord to keep the premises and common areas fit for the use intended and the premises in reasonable repair under MCL 554.139(1)(a) and (b). Defendant moved for summary disposition under MCR 2.116(C)(10), arguing that there was no genuine issue of material fact that the hazard was open and obvious, so it could not be held liable under a common-law premises liability theory. Defendant also argued that it was not liable under MCL 554.139(1) because its statutory duty did not extend to snow and ice removal.

Initially, the trial court completely denied defendant's motion, but on the same day the trial court entered its order, our Supreme Court issued its decision in *Allison v AEW Capital Mgt, LLP*, 481 Mich 419; 751 NW2d 8 (2008). Defendant moved for reconsideration, arguing that applying *Allison* would change the outcome of the trial court's decision.

The trial court granted in part defendant's motion for reconsideration. It found, pursuant to the Court's holding in *Allison*, that defendant had no statutory duty to keep the stairway in

reasonable repair under MCL 554.139(1)(b). However, under MCL 554.139(1)(a), defendant had a duty to keep the stairway fit for its intended use. The trial court found the conclusion reached in *Allison*—that one to two inches of snow did not render a parking lot unfit for its intended use—distinguishable. The facts here included black ice, not just snow, and the intended use of easy ingress to and egress from the upstairs apartments was different from that of the parking lot in *Allison*. The trial court noted that, by its own terms, the statute is to be "liberally construed," quoting MCL 554.139(3). Finally, the trial court found that plaintiff waived her arguments against defendant's "open and obvious" danger defense because she cited no caselaw supporting her position.

In this Court, the only issue properly presented is whether the trial court's decision regarding MCL 554.139(1)(a) was erroneous given its finding that there is a material distinction between the facts here and those in *Allison*.

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although we view substantively admissible evidence submitted at the time of the motion in the light most favorable to the party opposing the motion, the nonmoving party must come forward with at least some evidentiary proof, some statement of specific fact upon which to base his or her case. *Maiden v Rozwood*, 461 Mich 109, 119-121; 597 NW2d 817 (1999); *Skinner v Square D Co*, 445 Mich 153, 161-162; 516 NW2d 475 (1994).

"MCL 554.139 provides a specific protection to lessees and licensees of residential property in *addition* to any protection provided by the common law." *Allison*, 481 Mich at 425 (emphasis in original). MCL 554.139 provides, in relevant part:

> (1) In every lease or license of residential premises, the lessor or licensor covenants:
>
> (a) That the premises and all common areas are fit for the use intended by the parties.
>
> * * *
>
> (3) The provisions of this section shall be liberally construed . . . .

For common areas, "the lessor effectively has a contractual duty to keep the [area] 'fit for the use intended by the parties.'" *Allison*, 481 Mich at 429, quoting MCL 554.139(1)(a).

Our Supreme Court in *Allison* made it clear that an accumulation of snow and ice could implicate a landlord's duty to keep the premises and all common areas fit for the use intended. *Allison*, 481 Mich at 438.[1] In *Allison*, at issue was whether "one to two inches of accumulated

[1] *Allison* also clarified that the "open and obvious" danger doctrine does not obviate a landlord's statutory duty under MCL 554.139. *Allison*, 481 Mich at 425.

snow" in an apartment complex parking lot made the parking lot unfit for its intended use. *Id*. at 423. While the majority of justices agreed that the presence of snow and ice could make a parking lot unfit for its intended use, the Supreme Court held that the facts in *Allison* did not establish that tenants were unable to use the parking lot for its intended purpose:

> A parking lot is constructed for the primary purpose of storing vehicles on the lot. "Fit" is defined as "adapted or suited; appropriate[.]" *Random House Webster's College Dictionary* (1997). Therefore, a lessor has a duty to keep a parking lot adapted or suited for the parking of vehicles. A parking lot is generally considered suitable for the parking of vehicles as long as the tenants are able to park their vehicles in the lot and have reasonable access to their vehicles. A lessor's obligation under MCL 554.139(1)(a) with regard to the accumulation of snow and ice concomitantly would commonly be to ensure that the entrance to, and the exit from, the lot is clear, that vehicles can access parking spaces, and that tenants have reasonable access to their parked vehicles. Fulfilling this obligation would allow the lot to be used as the parties intended it to be used.
>
> In this case, in construing the meaning of these terms in the contract, neither of the parties has indicated that the intended use of the parking lot was anything other than basic parking and reasonable access to such parking. Plaintiff's allegation of unfitness was supported only by two facts: that the lot was covered with one to two inches of snow and that plaintiff fell. Under the facts presented in this record, we believe that there could not be reasonable differences of opinion regarding the fact that tenants were able to enter and exit the parking lot, to park their vehicles therein, and to access those vehicles. Accordingly, plaintiff has not established that tenants were unable to use the parking lot for its intended purpose, and his claim fails as a matter of law.
>
> While a lessor may have some duty under MCL 554.139(1)(a) with regard to the accumulation of snow and ice in a parking lot, it would be triggered only under much more exigent circumstances than those obtaining in this case. The statute does not require a lessor to maintain a lot in an ideal condition or in the most accessible condition possible, but merely requires the lessor to maintain it in a condition that renders it fit for use as a parking lot. Mere inconvenience of access, or the need to remove snow and ice from parked cars, will not defeat the characterization of a lot as being fit for its intended purposes. [*Id*. at 429-430.]

While the *Allison* Court specifically referenced parking lots, the principles set forth apply to all common areas, including stairways. The primary purpose or intended use of a stairway is to provide pedestrian access to different levels of a building or structure. As with a parking lot, MCL 554.139(1)(a) does not require perfect maintenance of a stairway. The stairway need not be in an ideal condition, nor in the most accessible condition possible, but, rather, must provide tenants "reasonable access" to different building levels. See *Allison*, 481 Mich at 430. We must ascertain whether there could be reasonable differences of opinion regarding whether the stairway was fit for its intended use of providing tenants with reasonable access under the circumstances presented at the time of plaintiff's fall.

Plaintiff testified that she lived on the second floor of defendant's apartment building. In order to access her mailbox on the first floor, plaintiff used the stairway in question, which consisted of approximately 12 open steps located outside the building but covered by a roof. Plaintiff testified that the day before the fall, she left her apartment to check her mail and noted the presence of snow on all the stairs of the stairway. Although she was able to use the stairway without incident, plaintiff called defendant and complained to "Lori" about the presence of snow and ice on the stairway.[2] She was told that "Scott" would take care of it when he had the time.

Plaintiff testified that on the day of the fall, before she had left her apartment, she again called and notified defendant about the presence of snow and ice on the stairway. Plaintiff produced weather data indicating that preceding her fall, temperatures were at or below freezing, and the area experienced episodes of light freezing rain and at one point "ice pellets." At approximately 1:00 p.m. on December 1, 2006, plaintiff left her apartment to check her mail. She noticed "lots of snow," that was "fresh," and that there was "more than a couple of inches" on the second floor as she walked toward the stairway. Plaintiff descended the stairway and checked her mailbox. Plaintiff's testimony was conflicting on the issue whether she noticed snow or ice on the stairway before her fall. On her way back up the stairway, plaintiff used the right side of the stairway so that she could use the handrail. As she reached the second step, plaintiff slipped and fell on ice, fracturing her left hip. She testified that she did not see the ice before her fall because it was black ice and the stairway was too dark. As she fell, however, plaintiff noticed that the gutters overhead were overflowing with water and icicles had formed. Plaintiff testified that there was no salt on the stairway at the time of her fall.

Defendant concedes that for purposes of this appeal, plaintiff's testimony must be accepted as true and the evidence presented must be viewed in the light most favorable to plaintiff. We agree with the trial court that plaintiff has produced enough evidence to create a material question of fact whether the stairway was fit for its intended use at the time of plaintiff's fall. As stated earlier, the primary purpose of a stairway is to provide pedestrians reasonable access to different levels of a building or structure. Reasonable minds could conclude that the presence of black ice on a darkly lit, unsalted stairway—possibly caused or aggravated by overflowing ice water from overhead gutters in the presence of freezing rain—posed a hidden danger that denied tenants reasonable access to different levels of the apartment building and rendered the stairway unfit for its intended use.

This case is factually distinguishable from *Allison* because black ice on a stairway presents more than the "[m]ere inconvenience" posed by "one to two inches of snow" in a parking lot. See *Allison*, 481 Mich at 423, 430. Furthermore, as the Court stated in *Allison*, the primary use of a parking lot is to park cars. *Id*. at 429. Although the Court recognized that tenants must have reasonable access to their vehicles in a parking lot, i.e., they must be able to walk to the vehicles, *id*., tenants do not use a parking lot for its intended use by merely walking

[2] While it appears plaintiff contradicted herself at times throughout her deposition, neither party produced the entirety of plaintiff's deposition; therefore, the facts cited are gleaned from the available testimony presented to this Court.

in the lot. Walking in a parking lot is secondary to the parking lot's primary use. In contrast, a tenant uses a stairway for its intended use solely by walking up and down it. Thus, the primary purpose of a stairway is for walking. Indeed, the primary purposes and, therefore, intended uses of a parking lot and a stairway are two different things.

Therefore, under all the circumstances presented here, the snow- and ice-covered stairway may not have been fit for its intended use at the time of plaintiff's fall. We agree with the trial court that this issue presents a material question of fact for the jury.

Affirmed.
MURPHY, P.J., concurred.

/s/ Jane M. Beckering
/s/ William B. Murphy