STATE OF MICHIGAN

COURT OF APPEALS

RENEE MICKENS,

Plaintiff-Appellant,

v

DEXTER CHEVROLET COMPANY, a/k/a HARRY SLATKIN BUILDERS, d/b/a SHERWOOD HEIGHTS APARTMENTS, and HARTMAN AND TYNER, INC., d/b/a SHERWOOD HEIGHTS APARTMENTS,

Defendants-Appellees.

UNPUBLISHED
January 14, 2000

No. 208269
Wayne Circuit Court
LC No. 96-616853 NO

Before: Collins, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Plaintiff appeals the trial court order granting defendants' motion for summary disposition under MCR 2.116(C)(10) in this premises liability action. We affirm.

On appeal, an order granting or denying summary disposition is reviewed de novo. In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, admissions, and documentary evidence filed in the action or submitted by the parties in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the evidence shows that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).

The parties do not dispute that plaintiff, as a resident tenant utilizing a common area of the apartment complex, was an invitee. See *Bryant v Brannen*, 180 Mich App 87, 94; 446 NW2d 847 (1989). A land owner is subject to liability for physical harm caused to his invitees by a condition on the land only if the owner (1) knows of, or by the exercise of reasonable care would discover, the condition and should realize that it involves an unreasonable risk of harm to his invitees; (2) should expect that his invitees will not discover or realize the danger or will fail to protect themselves against it; and (3) fails to

exercise reasonable care to protect his invitees against the danger. *Lawrenchuk v Riverside Arena, Inc*, 214 Mich App 431, 432-433; 542 NW2d 612 (1995).

However, the land owner's duty is not absolute. *Douglas v Elba, Inc*, 184 Mich App 160, 163; 457 NW2d 117 (1990). Where the danger is known to the invitee or is so obvious that the invitee might reasonably be expected to discover it, the invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite the knowledge of it on behalf of the invitee. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992).

Plaintiff submitted the "affidavits" of herself, her mother, and two other tenants describing the poor condition of the rear hallway and stairway and their complaints to management regarding the flaws. However, these "affidavits" suffer from two fatal defects. First, they are not notarized to show that the statements contained therein were in fact made under oath. See MCR 2.113(A); *People, for use of Esper, v Burns*, 161 Mich 169, 173; 125 NW 740 (1910). In addition, each "affiant" stated that the statement was true to the best of his or her information, knowledge, and belief; there is no averment that he or she could provide testimony, based on personal knowledge, regarding the facts contained in the affidavits. See MCR 2.119(B); *Brooks v Reed*, 93 Mich App 166, 173-174; 286 NW2d 81 (1979). Accordingly, these affidavits cannot be considered in evaluating whether the trial court erred in granting defendants' motion for summary disposition.

In her complaint, plaintiff alleged that water accumulated on the metal edge of the steps; as a result, she slipped and fell, sustaining serious injuries. The trial court found that the condition of the stairs was open and obvious on the basis of two statements made by plaintiff. Approximately a month after the incident, an insurance adjuster questioned plaintiff regarding the accident, and the following exchange occurred:

> Q. Um, so prior to stepping onto the step do you know if it was actually wet or not?
>
> A. Yes it was.

In addition, during her deposition, plaintiff testified that both the hallway and the stairs were wet.

Plaintiff argues that the trial court erred in finding that the presence of water on the stairs was an open and obvious danger. Plaintiff contends, as she did below, that the above statements refer only to her after-the-fact knowledge that the stairs were wet. In deciding whether summary disposition was appropriate, the trial court was required to view the evidence in the light most favorable to plaintiff. See *Smith, supra*. A court may not weigh credibility in deciding a summary disposition motion, *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994), and a court must carefully avoid making findings of fact under the guise of determining that no issue of material fact exists, *Mahaffey v Attorney General*, 222 Mich App 325, 343; 564 NW2d 104 (1997). While this was perhaps not the most artfully crafted wording, we are satisfied that it was apparent that the question was designed to learn what plaintiff knew before ascending the steps. And plaintiff's answer is also clear: she knew, before ascending the steps, that the stairway was wet. Therefore, the danger was open and obvious.

Plaintiff also argues, relying on *Bertrand v Alan Ford, Inc*, 449 Mich 606; 537 NW2d 185 (1995), that, even assuming the danger was open and obvious, the doctrine does not apply because the danger presented an unreasonable risk of harm. However, the trial court rejected this argument because there was an alternative interior route that plaintiff could have taken, namely a front stairway joined to the back by a corridor. Plaintiff argues that whether it was reasonable for her to take the other stairway, which was approximately thirty-five feet away, presents a question of fact for the jury. However, plaintiff has made no showing whatsoever that the alternative route was dangerous beyond her unsubstantiated and unsworn statements that it was dangerous.

We read the Supreme Court's decision in *Bertrand*, *supra*, as standing for the proposition that the open and obvious danger doctrine does not apply where the plaintiff was obliged to encounter the danger even if aware of it. Because, in the case at bar, the plaintiff had an alternate route available, she was obliged to encounter the danger of the wet stairway only if the alternate route posed an equal or greater danger. Because plaintiff presented no evidence to support her proposition that the alternate route was also dangerous, the trial court did not err in concluding that there was no genuine issue of material fact in this case regarding the applicability of the open and obvious danger doctrine.

Affirmed. Defendants may tax costs.

/s/ Jeffrey G. Collins
/s/ David H. Sawyer