STATE OF MICHIGAN

COURT OF APPEALS

JAMES ELLIOTT and TERESA ELLIOTT,

Plaintiff-Appellants,

v

LEON J. PERRIN, COUNTRY VILLAGE APARTMENT COMPLEX, and LEE McCARTHY, d/b/a/ MIDNIGHT SNOW PLOWING,

Defendant-Appellees.

UNPUBLISHED
January 18, 2002

No. 222807
Shiawassee Circuit Court
LC No. 98-001639-NO

Before: K.F. Kelly, P.J., and White and Talbot, JJ.

PER CURIAM.

In this negligence action, plaintiff James Elliott[1] sought damages for injuries sustained as a result of a slip and fall. The trial court granted defendants' respective motions for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff appeals as of right. We affirm.

I. Basic Facts and Procedural History

Plaintiff is a tenant at Country Village Apartment Complex (hereinafter "Country Village,") which is owned by defendant Leon Perrin. The apartment complex had an agreement with defendant Lee McCarthy, d/b/a/ Midnight Snow Plowing (hereinafter "McCarthy" and "Midnight Snow Plowing" respectively) to remove snow and ice from its premises.

On February 4, 1997, plaintiff slipped and fell on a patch of ice that allegedly accumulated in the parking lot at Country Village and sustained serious injuries as a result. Deposition testimony revealed that because the weather reports for that day predicted a winter storm, McCarthy continuously examined the eight locations for which he provided snow and ice removal services. At approximately 3:30 a.m. he inspected Country Village. At this time, McCarthy did not apply any salt because the rain would merely wash it away. According to McCarthy, 7:30 a.m. was the earliest possible time where application of salt would have had some effect. Plaintiff slipped and fell at approximately 8:15-8:30 a.m. McCarthy arrived at

[1] Plaintiff Teresa Elliott has a derivative claim for loss of consortium. Accordingly, the term "plaintiff" refers to James Elliot.

Country Village about one hour after plaintiff's accident to apply salt. Plaintiff filed the instant action seeking damages for injuries sustained as a result of his slip and fall.

All defendants moved for summary disposition pursuant to MCR 2.116(C)(10). The trial court granted summary disposition to defendants McCarthy and Midnight Snow Plowing on the ground that they owed no duty to plaintiff in light of the language contained in the contract between the apartment complex and Midnight Snow Plowing. The trial court also granted summary disposition to defendants Leon Perrin and Country Village, finding that on the facts presented, the condition did not exist for a sufficient length of time such that defendants should have known of its existence and no reasonable juror could find otherwise. Plaintiffs appeal and we affirm.

II. Summary Disposition- Standard of Review

A motion brought pursuant to MCR 2.116(C)(10) tests the factual sufficiency of plaintiff's claim. This court reviews motions for summary disposition de novo. *Nationsbanc Mortgage Corporation v Luptak*, 243 Mich App 560, 563; 625 NW2d 385 (2000). The reviewing court must consider all of the evidence along with all reasonable inferences in a light most favorable to the nonmoving party and determine whether genuine factual issues exist to merit a trial. *Muskegon Rental Ass'n v Muskegon*, 244 Mich App 45, 50; 624 NW2d 496 (2000).

A. Discovery

First, plaintiff argues that the trial court improvidently granted summary disposition because discovery was ongoing. Although we appreciate the general rule that "summary disposition is premature if granted before discovery on a disputed issue is complete," *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000), we also recognize that summary disposition before discovery closes may be proper where "further discovery does not stand a fair chance of uncovering factual support for the position of the party opposing the motion." *Id*. (Citations omitted.)

A review of the transcript reveals a colloquy occurring between plaintiffs' counsel and the trial court relative to the discovery issue. In response to the court's query whether there were additional witnesses that could give testimony on disputed factual issues, plaintiffs' counsel conceded that indeed, all factual witnesses were deposed. Plaintiffs' counsel indicated that he wanted to consult with an expert but that the "strongest thing" would be the eyewitness testimony. Because plaintiff already deposed all witnesses having information on the disputed factual issues, the record reveals that further discovery would not provide additional factual support for plaintiffs in response to defendants' summary disposition motions. See *Village of Dimondale*, *supra* at 566. Accordingly, we do not find error in this regard.

B. Reasonable Measures

Plaintiff further contends that the trial court committed error requiring reversal because there was a genuine factual issue concerning whether defendants took reasonable measures within a reasonable amount of time to diminish the hazard posed by the accumulation of snow and ice. On the facts of this particular case, we do not agree.

Plaintiff allegedly slipped and fell on an accumulation of ice at the base of a ramp in the parking lot. Relative to defendant apartment complex, while in a common area such as a parking lot, plaintiff was a business invitee. *Stanley v Town Square Co-op*, 203 Mich App 143; 512 NW2d 51 (1993). It is axiomatic that owners and occupiers of land "have a special relationship to their invitees, giving rise to an affirmative duty to protect [them.]" *Holland v Liedel*, 197 Mich App 60, 62; 494 NW2d 772 (1992). The duty owed however, is not absolute. *Id*.

An owner or possessor of land is not an insurer of the invitee's safety. *Anderson v Wiegand*, 223 Mich App 549, 554; 567 NW2d 452 (1997). The proper test is one of reasonableness. As our Supreme Court recognized in *Quinlivan v Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244, 251; 235 NW2d 732 (1975) "[a]s invitor, the defendant [owes] the duty . . . of maintaining its premises in a *reasonably* safe condition and of exercising due care to prevent and to obviate the existence of a situation, known to it or that should have been known, that might result in injury." (Citations omitted.) (Emphasis added.)

Thus, the issue before us is whether a question of material fact exists as to whether McCarthy and Midnight Snow Plowing acting on behalf of Country Village, the possessor of land, took "reasonable measures within a reasonable period after accumulation of snow and ice to diminish the hazard of injury to [plaintiff] an invitee." *Anderson*, *supra* at 553-554. Plaintiff strenuously argues that inquiries as to reasonableness are factual issues, the resolution of which lies within the sound province of the trier of fact. However, on these particular facts, in this particular instance, we are constrained to find a genuine factual issue concerning the reasonableness of defendants' conduct upon which reasonable minds could possibly differ.

Country Village had an arrangement with Midnight Snow Plowing to remove the natural accumulation of snow and ice. McCarthy testified that he was aware of the weather reports predicting a winter storm for the early morning hours of February 4th. Accordingly, McCarthy testified that he continuously drove from site to site checking the conditions. At 3:30 a.m., while making his rounds, he drove through Country Village. At that particular time, it was merely raining. According to McCarthy, applying salt while its raining would have absolutely no effect. McCarthy indicated that this was especially true for Country Village because the complex itself is situated on a hill and any salt applied to the parking lot while it was raining would inevitably be washed down the hillside.

Shawn Haysn, an employee responsible for shoveling and salting the walks at Country Village, testified that he inspected the walks at 7:00 a.m. He indicated that at that time, he did not apply any salt because it was only raining and not freezing. Michelle Perrin, Country Village's manager, also testified that she went outside at 8:00 a.m. or 8:15 a.m. and according to her recollection, at that time it was still raining. Ms. Perrin testified that it was not until she was on her way to work sometime after 8:15 that the weather began to change and the rain began to freeze.

One witness, however, Russell Ward, had a somewhat different recollection. Ward testified that he was working on his computer at approximately 2:00 a.m. At that time, he indicated that the rain was coming down "at a pretty good clip." Ward further testified that he went out at about 5:15 a.m. to purchase a newspaper and that the parking lot was "extremely wet." Sometime between 5:15 a.m. and 5:30 a.m., Ward testified that he returned from the store

and when he alighted from his car and walked toward the apartment complex, he noticed that the water was beginning to freeze.

At first glance this appears to present questions of fact pertaining to when the ice began, when the "hazardous condition" developed and when salt should have been applied. However, upon further scrutiny, we note that the record contains uncontroverted testimony that the potential for run off is a significant factor relative to the overall efficacy of deicing agents. Similarly undisputed is testimony that salt prematurely applied, i.e. while it is raining, would simply wash away. Indeed, such an application of salt at Country Village was of particular concern considering that the complex is situated upon a hillside and thus increased the potential for run off. McCarthy testified that the water at Country Village did not flow naturally but rather flowed in accord with the man-made waterways constructed at that location. Consequently, the effect of the rain and the potential for runoff at Country Village was a consideration that significantly factored into *when* application of salt at that particular location would have some constructive effect.

According to McCarthy, the temperature dropped and the rain began to "lock onto the ground" at 7:30 a.m. Up until this point in time, applying salt would not have reduced any risk associated with the accumulation of ice and snow. At 7:30 a.m., when the rain began to freeze or "lock on," McCarthy stopped and serviced Royal Oak Apartments, the first of his eight clients. McCarthy testified that he salted a couple of the "main runs" at Royal Oak Apartments because they were flat surfaces and there was "no way for the water to run off."

Reviewing the evidence in a light most favorable to plaintiff, establishes that at the very earliest, the rain began to freeze was 5:30 a.m. Even assuming that the rain began to freeze as early as 5:30 a.m., that is not necessarily synonymous with when the "hazardous condition" for purposes of assessing liability materialized. McCarthy testified that it was not until 7:30 a.m, at the very earliest, that the rain began to "lock onto" the pavement. At this point, for purposes of assessing liability, the "hazardous condition" began to develop. In fact, uncontroverted testimony indicates that considering the rain, it would have been unreasonable to apply salt before 7:30 a.m. because of the run off.

The record indicates that plaintiff fell approximately one hour later at 8:15 – 8:30 a.m. At best, the "hazardous condition" existed for about one hour before plaintiff fell. Since liability for a hazardous condition attaches where the risk posed is "unreasonable," the issue becomes whether the hour and a half lapse between ice forming and McCarthy applying the salt to the parking lot posed an "unreasonable" risk to plaintiff for which defendants are legally responsible. See *Holland, supra* at 62. We find that it does not.

When ice began to form, McCarthy immediately began servicing the first of his eight clients and in due course, serviced plaintiff's apartment complex. Again, McCarthy acted reasonably. There is nothing in the record to suggest that McCarthy stopped or otherwise took a detour before reaching Country Village. Distilled to its essence, plaintiff argues that had Midnight Snow Plowing arrived *sooner* and applied salt to the parking lot, plaintiff would not have fallen and sustained injury. Thus, according to plaintiff, the "unreasonableness" was merely McCarthy's failure to salt the parking lot at *his* apartment complex *first*, thus creating the unreasonable risk to his safety and ultimate injury. Absolutely nothing in the record remotely intimates that McCarthy was under an obligation to service Country Village first.

The law requires an invitor to reduce or diminish the risk posed by a hazardous condition. The law does not require an invitor to completely eradicate the risk lest the invitor become an absolute insurer of the invitee's safety. See *Anderson*, *supra* at 553-554. To impose liability on the facts herein presented, would require snow removal services to anticipatorily apply salt to eliminate all possible risks posed by the natural accumulation of ice and snow. A careful review of the record does not reveal any material factual issue upon which reasonable minds could differ. Accordingly, the trial court did not commit error requiring reversal by granting defendants' motions for summary disposition.

III. The Contractual Issue

Although there was some dispute over whether a written contract existed between Midnight Snow Plowing and Country Village at the time that plaintiff fell, we note that not one of the defendants disavows the existence of a contractual relationship. In fact, McCarthy does not dispute that he undertook to provide plowing and snow removal services pursuant to an agreement with the apartment complex.[2]

In the case at bar, plaintiff argues that independent from any written contract, McCarthy owed plaintiff a common law duty to perform his contractual obligations with ordinary care. Even assuming, arguendo, that McCarthy owed plaintiff this common law duty, we are constrained to perceive how any reasonable juror could find that McCarthy breached his duty in light of our previous determination that McCarthy acted reasonably and within a reasonable amount of time to diminish the hazard posed by the natural accumulation of snow and ice on the facts herein presented. Accordingly, we do not find that the trial court committed error requiring reversal when it granted summary disposition in favor of defendants.

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[2] Since the defendants did not produce the actual contract in effect between the apartment complex and Midnight Snow Plowing, to circumvent the lack of privity, plaintiff asserts that McCarthy, as an agent for Midnight Snow Plowing, owed plaintiff a common law duty to perform the contractual obligations contained therein with ordinary care. In support of his position, plaintiff relies substantially on *Osman v Summer Green*, 209 Mich App 703; 532 NW2d 186 (1995) overruled on other grounds, *Smith v Global Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999). In *Osman*, plaintiff sustained injury when he slipped and fell in a K-Mart parking lot. The owner of the land had a contract with defendant for snow removal services. The contract in effect at the time that the plaintiff fell exempted the snow plowing service from any damages caused by slipping and falling on the pavement. The trial court limited the duty that the defendant owed to the plaintiff by applying a restrictive interpretation to that contractual language. On appeal, the trial court reversed holding that a duty materialized "out of defendant's undertaking to perform the task of snow plowing. The duty allegedly owing is that which accompanies every contract, *a common-law duty to perform with ordinary care the things agreed to be done*." *Osman, supra* at 707-708. (Emphasis added.) The *Osman* court recognized that "[t]hose forseeably injured by the negligent performance of a contractual undertaking are owed a duty of care." *Id.*

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Michael J. Talbot