STATE OF MICHIGAN

COURT OF APPEALS

LISA COHEN,

Plaintiff-Appellant,

v

GEORGE W. SMITH and BONNIE'S PATISSERIE,

Defendant-Appellee.

UNPUBLISHED
June 21, 2002

No. 231714
Oakland Circuit Court
LC No. 00-021889-NO

Before: Neff, P.J., and Griffin and Talbot, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals as of right from the trial court's order granting defendants' motions for summary disposition under MCR 2.116(C)(10). We affirm.

Plaintiff brought this action for injuries she allegedly sustained on property owned by defendant George W. Smith and occupied by defendant Bonnie's Patisserie. Plaintiff alleged that as she was leaving Bonnie's Patisserie, an "elevated portion" of the sidewalk in front of the store caused her to trip and fall. She later amended her complaint to add a claim for breach of statutory duty under Chapter 34, § 4.68 of the City Code of Southfield, which provides that "no person shall permit any sidewalk which adjoins property owned by him to fall into a state of disrepair or to be unsafe."

Defendants moved for summary disposition under MCR 2.116(C)(10). Defendants argued that they owed no duty to plaintiff because the condition of the sidewalk was open and obvious. They relied on plaintiff's deposition testimony in which she admitted that "it was very obvious how bad it was." With respect to count II of plaintiff's complaint, defendants argued that the cement walkway connecting Bonnie's Patisserie to the parking lot is not a "sidewalk" as defined in the city code, and therefore the ordinance is inapplicable, or, even if the ordinance does apply, it does not provide a basis for a private cause of action.

Plaintiff responded that a question of fact existed regarding whether the raised portion of the sidewalk was open and obvious, and relied on Smith's deposition testimony that he never noticed any such defect. Plaintiff also submitted an affidavit clarifying that her deposition testimony that "it was obvious how bad it was" referred to her injury, and not to the condition of the sidewalk. Plaintiff further argued that even if the defect in the sidewalk was open and obvious, defendants should have anticipated the harm, and therefore they are not relieved of

liability. In support of her count alleging breach of duty under the city ordinance, plaintiff relied on *Walker v City of Flint*, 213 Mich App 18; 539 NW2d 535 (1995), in which the plaintiff recovered for a slip and fall on a city sidewalk under the highway exception to governmental immunity, to which the open and obvious doctrine is not a defense.

We review a trial court's ruling on a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Id.* at 338. In ruling on the motion, the court must consider the pleadings, affidavits, depositions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion. *Quinto v Cross & Peters Co*, 451 Mich 358, 361-363; 547 NW2d 314 (1996). "Summary disposition is appropriate only where, viewing all documentary evidence in the light most favorable to the nonmoving party, no genuine issue of material fact exists." *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999).

"[T]he general rule is that a premises possessor is not required to protect an invitee from open and obvious dangers, but, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." *Lugo v Ameritech Corp*, 464 Mich 512, 517; 629 NW2d 384 (2001). "[O]nly those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine." *Id.* at 519.

We conclude that there is no question of fact that the condition of the sidewalk was open and obvious.[1] Plaintiff testified at deposition that she was carrying a box in front of her with both hands and she was not able to see over the box as she was walking out of the store. After she got up from the ground, she noticed chuckholes in the concrete and that part of the sidewalk was elevated. She admitted that she does not pay attention when she walks and that other than the box she was carrying, nothing interfered with her ability to see the sidewalk. See *Lugo, supra* at 521, 523. Accordingly, the evidence leaves no question of fact that the condition was discoverable upon casual inspection. *Corey v Davenport College (On Remand)*, ___ Mich App ___; ___ NW2d ___ (Docket No. 206185, rel'd 4/26/02), slip op p 2; *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). Smith's testimony that he never noticed a defect is insufficient to create a question of fact in light of plaintiff's admission that she failed to notice the condition of the sidewalk only because she was carrying the box in front of her. *Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd*, 466 Mich 11, 18; 643 NW2d 212 (2002), quoting *Lugo, supra* at 516-517 ("[I]f the particular activity or condition creates a risk of harm *only* because the invitee does not discover the condition or realize its danger, then the open and obvious doctrine will cut off liability if the invitee should have discovered the condition and realized its danger."). Further, plaintiff offers no evidence of any special aspect of the sidewalk that would create an unreasonable risk of harm despite the open and obvious nature of the condition. *Lugo, supra* at 523.

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[1] We note that our review of the photographic evidence further supports our conclusion that the condition of the sidewalk was open and obvious and without any special aspect giving rise to a uniquely high likelihood of harm. *Lugo, supra* at 519.

We also agree that the trial court properly granted summary disposition of plaintiff's claim based on a breach of duty under the city ordinance. The city ordinance creates a public duty and does not create a private cause of action against defendants.[2] *Levendoski v Geisenhaver*, 375 Mich 225, 227; 134 NW2d 228 (1965). See *Szkodzinski v Griffin*, 171 Mich App 711, 713; 431 NW2d 51 (1988); *Taylor v Saxton*, 133 Mich App 302, 306; 349 NW2d 165 (1984).

Affirmed.

/s/ Janet T. Neff
/s/ Richard Allen Griffin
/s/ Michael J. Talbot

[2] We note that the trial court correctly distinguished *Walker*, *supra*. That case involved a suit against a municipality and the applicability of the open and obvious doctrine to a case brought under the highway exception to governmental immunity. *Walker*, *supra* at 22.