

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ELEANOR ROBIN,

Plaintiff-Appellant,

V

ARBOR DRUGS, INC., d/b/a CVS PHARMACY,  
SIMSBURY PLAZA, and EDDY'S  
LANDSCAPING, L.L.C.,

Defendants-Appellees.

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UNPUBLISHED

October 25, 2002

No. 228134

Oakland Circuit Court

LC No. 99-016841-NO

Before: Meter, P.J., and Saad and R. B. Burns\*, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's opinion and order granting summary disposition to defendant Eddy's Landscaping, L.L.C., on plaintiff's negligence claim pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff slipped and fell on a walkway leading into an Arbor Drugs store, located in Simsbury Plaza. She filed a complaint against the store, the shopping center, and Eddy's Landscaping L.L.C. (hereafter defendant), which had contracted with the shopping center to provide snow removal and salting services. The contract required that the parking lots, entranceway, and sidewalks be salted in the event of any accumulation of ice or accumulations of snow at the property of more than one inch. Defendant assumed the responsibility of notifying the shopping center "in the event that additional salting is necessary to keep the property hazard free." The trial court found that plaintiff had failed to establish any genuine issue of material fact regarding a breach of any duty owed under the contract, which would give rise to a breach of the duty of care owed to plaintiff, and granted summary disposition to defendant.

This Court reviews decisions regarding motions for summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, 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 if the affidavits and other documentary evidence show that there is no genuine issue

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\* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

in respect to any material fact and the moving party is entitled to judgment as a matter of law. *Id.*

In *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 708; 644 NW2d 779 (2002), the defendant and Mariner's Point Associates Limited Partnership entered into a contract for the removal of snow and ice from the Mariner's Point Shopping Center. The contract provided that defendant would provide snow removal services in the parking areas, entrances, receiving areas and sidewalks for a flat fee, and that defendant would provide salting services for an extra charge, at the contractor's discretion. The plaintiff slipped and fell on ice and brought suit against the defendant. In examining whether the defendant breached a duty of care to the plaintiff, this Court noted the rule that a third party may not sue in tort for the negligent performance of a contract if the action is based solely on the nonperformance of a contractual duty. *Id.* At 708. This Court concluded that the defendant did not breach a duty of care to the plaintiff:

Here, defendant's negligence occurred, if at all, because defendant did not inspect and salt the Mariner's Point parking lot after it had rained. Therefore, the proper question to be resolved is whether plaintiff had an independent action in tort against defendant regardless of whether defendant breached the contract with Mariner's Point. Because defendant had no common-law duty to plow, inspect, or salt the parking lot in which plaintiff was injured, we find that defendant did not breach a duty of due care to plaintiff when it failed to inspect the parking lot on the day in question, and that plaintiff does not have an independent tort action against defendant. [*Id.* At 708-709 (citation omitted).]

Here, plaintiff's claim was that defendant was negligent in failing to reinspect the premises for accumulations of ice, given the existence of refreezing conditions. Since the essence of plaintiff's claim was the nonperformance of contractual obligations, the claim was not viable. Plaintiff failed to make any affirmative allegations of misfeasance or active negligence supportive of an independent tort action against defendant regardless of a contractual breach. Accordingly, the court properly entered summary disposition in defendant's favor.

Affirmed.

/s/ Patrick M. Meter

/s/ Robert B. Burns

I concur in result only.

/s/ Henry William Saad