STATE OF MICHIGAN

COURT OF APPEALS

HAROLD LAMBERT,

Plaintiff-Appellant,

v

LIVONIA APARTMENTS,

Defendant-Appellee.

UNPUBLISHED
November 26, 2002

No. 236807
Oakland Circuit Court
LC No. 01-030124-NO

Before: Markey, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff entered onto defendant's property to perform maintenance work. As he walked toward a building, he tripped on a raised portion of the sidewalk and fell to the ground, sustaining injuries. Plaintiff filed suit alleging that defendant negligently failed to maintain the premises in a safe condition and to warn of the unsafe condition. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that plaintiff could not establish a prima facie case of negligence, and that it had no duty to warn plaintiff of the condition of the sidewalk because the condition was open and obvious. The trial court granted the motion, holding that even assuming the sidewalk was defective, reasonable minds could not differ on the issue of whether the condition was open and obvious.

Plaintiff argues that the trial court erred as a matter of law in determining that the sidewalk condition was open and obvious. We disagree. A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim, and is reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence available, *Id*., and all inferences are drawn in favor of the nonmovant, *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994).

To establish a prima facie case of negligence, a plaintiff must prove: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached the duty; (3) that the defendant's breach of duty proximately caused the plaintiff's injuries; and (4) that the plaintiff suffered damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

The duty a possessor of land owes to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm does not generally encompass removal of open and obvious dangers. *Perkoviq v Delcore Homes-Lake Shore Pointe, Ltd*, 466 Mich 11, 16; 643 NW2d 212 (2002); *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). Only if special aspects of a condition make an open and obvious risk unreasonably dangerous, does the landowner have a duty to undertake reasonable precautions to protect invitees from that risk. *Lugo, supra* at 517. "[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. Typical open and obvious dangers, such as cracks in a driveway, do not give rise to these special aspects. *Id*. at 520 (ordinary pothole is a typical open and obvious danger); *Perkoviq, supra* at 19-20 (ice/snow build-up on a sloping rooftop is a typical open and obvious danger). Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger upon casual inspection. *Weakley v Dearborn Hgts*, 240 Mich App 382, 385; 612 NW2d 428 (2000).

In this case, a photograph submitted by defendant in support of its motion for summary disposition showed that the raised portion of the sidewalk is clearly visible. In his deposition, plaintiff acknowledged that his view of the sidewalk was not obstructed. Plaintiff claimed in a later affidavit that the grass around the sidewalk obstructed his view; however, a party cannot create an issue of fact by submitting an affidavit that contradicts that party's prior clear and unequivocal testimony. *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 155; 565 NW2d 868 (1997).

Moreover, the fact that plaintiff claims that he did not notice the defect is irrelevant. *Perkovq, supra* at 18. It is reasonable to conclude that plaintiff would not have been injured had he been watching the area in which he was walking. *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 497; 595 NW2d 152 (1999). Plaintiff did not come forward with sufficient evidence to create a question of fact as to whether there were "special aspects" of the sidewalk condition so as to create an unreasonable risk of harm. *Lugo, supra* at 517. Therefore, we hold that the trial court did not err in concluding that the condition on defendant's premises constituted an open and obvious danger, and summary disposition was proper.

Affirmed.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Michael R. Smolenski