STATE OF MICHIGAN

COURT OF APPEALS

MERLIN HITSMAN,

Plaintiff-Appellant,

v

BORMAN'S, INC., d/b/a FARMER JACK,[1]

Defendant,

and

GEORGE RAPANOS, d/b/a MIDLAND TOWNE CENTER, and PAT'S GRADALL SERVICE, INC.,

Defendants-Appellees.

UNPUBLISHED
April 20, 2004

No. 244526
LC No. 02-004505-NO

Before: Bandstra, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant, Pat's Gradall Service, Inc. (Gradall), a snow removal company, in this slip and fall case. Defendant George Rapanos, d/b/a Midland Towne Center (MTC), the owner of the parking lot where plaintiff fell, was granted summary disposition pursuant to MCR 2.116(C)(10) in an earlier order. We affirm.

Plaintiff filed suit against defendants to recover for personal injuries under a negligence theory. After exiting his vehicle in a Farmer Jack parking lot, plaintiff allegedly fell on a patch of black ice that had accumulated in the parking lot. Snow had fallen the day before the fall, but plaintiff did not see any accumulations of snow or ice. The parking lot was salted the day before the fall, and it is not disputed that no new snow fell on the day of plaintiff's fall. Plaintiff alleged that defendants failed to maintain the premises in a reasonably safe manner and failed to inspect

[1] Pursuant to a stipulation of counsel, an order dismissing Borman's, Inc., d/b/a Farmer Jack, with prejudice and without costs, was entered by the trial judge on May 9, 2002.

the premises to discover the icy condition of the parking lot that resulted from "refreezing." Dismissing plaintiff's claims, the trial court granted defendants' motion for summary disposition holding first that no evidence was presented that defendants had knowledge of the black ice and that the evidence did not establish a rational basis "to infer an obligation to inspect for any change of the condition of the parking lot," and second that any duty owed by Gradall was derivative of the claim against the premises owner.

On appeal, plaintiff first argues that the trial court erred in granting summary disposition pursuant to MCR 2.116(C)(10) because it is undisputed that MTC breached its duty to plaintiff. We disagree. Appellate review of the grant or denial of summary disposition is de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). This court must determine whether any genuine issue of material fact exists in order to prevent entering a judgment for the moving party as a matter of law. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998). We review the entire record in favor of the party opposing the motion, and grant the benefit of any reasonable doubt to the opposing party. *Id.*

"To establish a prima facie case of negligence, a plaintiff must introduce evidence sufficient to prove that (1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, (3) the defendant's breach of its duty was a proximate cause of the plaintiff's injuries, and (4) the plaintiff suffered damages." *Berryman v K Mart Corp*, 193 Mich App 88, 91-92; 483 NW2d 642 (1992).

Plaintiff and MTC agree that plaintiff was an invitee and that MTC owed plaintiff a duty of care. Generally, a premises possessor owes invitees a duty to exercise reasonable care to protect invitees from unreasonable risks of harm caused by dangerous conditions on the land. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). "[I]t is the duty of a possessor of land to take reasonable measures within a reasonable period after an accumulation of snow and ice to diminish the hazard of injury to an invitee. However, the possessor of land is not an absolute insurer of the safety of an invitee." *Anderson v Wiegand*, 223 Mich App 549, 553-554; 567 NW2d 452 (1997). See also *Orel v Uni-Rak Sales Co, Inc*, 454 Mich 564, 566; 563 NW2d 241 (1997), and *Quinlivan v Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244; 235 NW2d 732 (1975).

Viewed in a light most favorable to plaintiff, the evidence showed that some snow fell on the day before plaintiff's fall. However, plaintiff specified neither the time of the snowfall nor the amount of snow that fell. The evidence also established that Gradall, pursuant to its contract with MTC, salted the parking lot the day before the fall, and that no snow fell on the day of the fall. On the day of the fall, the weather was "nice and the sun was out." Under these circumstances, plaintiff failed to present a genuine issue of material fact regarding whether MTC's actions were reasonable or whether they occurred within a reasonable time after the accumulation. The mere allegation that there was precipitation and that plaintiff fell is not sufficient to establish a genuine issue of material fact. *Anderson, supra.*

Plaintiff also asserts that MTC breached its duty of care by failing to inspect the parking lot despite knowing that weather conditions can cause previously melted snow to refreeze, thereby creating a hazard. Plaintiff offered no evidence, other than his testimony that the sun was out on the day of the fall, to establish that the conditions were such that melting or refreezing could have occurred on either the day he fell, or the day before. Plaintiff has,

therefore, produced mere conjecture and speculation regarding whether refreezing occurred, and has consequently not met his burden in opposing a motion for summary disposition. *Karbel, supra* at 97-98.

Plaintiff also argues that the trial court erred when it ruled that any duty owed by Gradall was derivative of the claim against the premises owner. We agree with plaintiff on this point, but find that summary disposition in favor of Gradall was nonetheless appropriate.

Even when an invitor is found to owe an invitee no duty to remove ice and snow accumulations, a snow removal company can still owe an injured plaintiff a duty as one foreseeably injured by its failure to properly perform. See *Joyce v Rubin*, 249 Mich App 231; 642 NW2d 360 (2002). Assuming that Gradall owed plaintiff a duty to properly perform its functions under the contract, plaintiff failed to establish a genuine issue of material fact regarding whether Gradall performed negligently, and whether he was injured as a result of that negligence. Plaintiff asserts that Gradall salted the parking lot the day before plaintiff fell, and that the parking lot was still in an unreasonably dangerous condition when plaintiff fell. He then states: "From this set of circumstances, it is reasonable to infer that [Gradall] negligently maintained the premises when it provided snow removal services on January 16, 1999." He further states that because "[t]here is no dispute that there was not any additional precipitation on the date that [plaintiff] was injured[,] [t]he only reasonable inference is that the black ice that caused [plaintiff] to slip and fall arose out of the snow storm the day before." This inference constitutes plaintiff's sole evidence of negligence. However, the mere fact that plaintiff fell after Gradall had done some work on the premises is insufficient to establish negligence. See *Joyce, supra.*

Affirmed.

/s/ Richard A. Bandstra
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald