STATE OF MICHIGAN

COURT OF APPEALS

RENEE RUSSELL,

Plaintiff-Appellant,

v

NORTHFIELD PINES APARTMENTS and DTN MANAGEMENT COMPANY, INC.,

Defendants-Appellees.

UNPUBLISHED
May 8, 2008

No. 276773
Clinton Circuit Court
LC No. 05-009950-NO

Before: Donofrio, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court order granting summary disposition to defendant Northfield Pines Apartments[1] in this premises liability case. Because the trial court properly utilized common law premises liability principles in applying the open and obvious doctrine to a social guest, we affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

In general, this Court is liberal in finding the existence of a genuine issue of material fact. *Lash v Allstate Ins Co*, 210 Mich App 98, 101; 532 NW2d 869 (1995). However, "where the opposing party fails to come forward with evidence, beyond allegations or denials in the pleadings, to establish the existence of a material factual dispute, the motion is properly granted." *Id*. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue on which reasonable minds could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003).

First, plaintiff argues the open and obvious danger doctrine cannot be used to circumvent the statutory obligation imposed under MCL 554.139(1). MCL 554.139(1) governs what duties a lessor covenants to lessees. Plaintiff relies on *Allison v AEW Capital Mgt*, 274 Mich App 663;

[1] The issues on appeal deal exclusively with the trial court's order granting summary disposition in favor of defendant Northfield Pines Apartments, which is managed by DTN Management Company, Inc. Therefore, we refer to Northfield Pines Apartments as "defendant" for ease of reference.

736 NW2d 307 (2007), lv granted 480 Mich 894 (2007), which relied on *O'Donnell v Garasic*, 259 Mich App 569, 581; 676 NW2d 213 (2003), to support her position that MCL 554.139(1) governs this case. However, our Supreme Court recently stated in *Mullen v Zerfas*, 480 Mich 989; 742 NW2d 114 (2007), that "[t]he covenants created by the statute establish duties of a lessor or licensor of residential property to the lessee or licensee of the residential property, most typically of a landlord to a tenant." *Id*. The Court further explained that MCL 554.139(1) does not apply to "social guests" of a lessee and that *O'Donnell* does not establish a "duty on the part of owners of leased residential property to invitees or licensees generally." Therefore, because plaintiff was only a social guest of a lessee at the time of the incident, defendant did not owe a duty to her under MCL 554.139(1). Instead, common law premises liability principles apply.

"In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001), citing *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). "However, this duty does not generally encompass removal of open and obvious dangers." *Id*. But, if an invitor should anticipate the harm despite knowledge of it on behalf of the invitee, the invitor has a duty to warn. *Id*. Therefore, "the 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." *Id*. at 517. A danger is open and obvious and there is no duty to warn if an average person of ordinary intelligence on casual inspection would have realized the danger presented. *Novotney v Burger King Corp* (*On Remand*), 198 Mich App 470, 474-475; 499 NW2d 379 (1993).

There is nothing in the record that creates an issue of material fact concerning whether the snow and ice present on the sidewalk at defendant's apartment complex was open and obvious. Indeed, in reference to the argument presented about the snow and ice being an open and obvious danger by defendant at the motion for summary disposition, plaintiff's counsel seemed to concede the point by stating:

> Your Honor, everything that Defendant's counsel says would be true if this was just a case where there was snow and ice.

Also, plaintiff testified that there was an "inch to two inches" of snow on the ground when she arrived at her son's apartment and when asked whether she noticed the snow on the ground she testified that she did. Therefore, plaintiff seemed to acknowledge that the snow and ice on the ground was open and obvious. Regarding ice under the snow, the potential danger of slipperiness due to ice underlying a snow-covered surface is open and obvious. *Royce v Chatwell Club Apartments*, 276 Mich App 389, 392-393; 740 NW2d 547 (2007). Thus, the trial court properly granted summary disposition in favor of defendant because there was no genuine issue of material fact concerning whether the snow and ice was open and obvious.

Finally, the trial court did not commit an abuse of discretion in denying plaintiff's motion for reconsideration. A trial court's decision to grant a motion for reconsideration is an exercise of discretion. MCR 2.119(F)(3); *Kokx v Bylenga*, 241 Mich App 655, 658; 617 NW2d 368 (2000). "An abuse of discretion occurs when the decision results in an outcome falling outside

the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

In this regard, plaintiff brought its motion to reconsider because the trial court appeared to base its original holding on the open and obvious doctrine from *Allison*. However, as discussed above, our Supreme Court has held that the common law principles under the open and obvious danger doctrine should be applied when a social guest of a lessee, and not the lessee, is injured. Therefore, even though the trial court did not have the benefit of our Supreme Court's December 20, 2007 order in *Mullen* at the time of the motion for reconsideration on February 20, 2007, the trial court used the proper common law principles under the open and obvious danger doctrine. Further, because the same issues were presented on reconsideration, with no new case law at that time, no palpable error occurred which warranted a different disposition. Thus, the trial court did not abuse its discretion in denying plaintiff's motion for reconsideration.

Affirmed.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ William B. Murphy