STATE OF MICHIGAN

COURT OF APPEALS

DALLAS HODGINS,

Plaintiff-Appellant,

v

CROSSBOW INN, INC.,

Defendant-Appellee.

UNPUBLISHED
June 17, 2008

No. 278340
Genesee Circuit Court
LC No. 06-084064-NO

Before: Zahra, P.J., and Cavanagh and Jansen, JJ.

PER CURIAM.

Plaintiff appeals as of right the summary dismissal of his premises liability case on the ground that the "black ice" he purportedly slipped and fell on was open and obvious. We affirm.

Plaintiff's complaint averred that he slipped and fell in defendant's poorly lit parking lot on "black ice" that had accumulated in depressions on the parking surface as a consequence of the nature of the downspouts on the building. After a period of discovery, defendant moved for summary dismissal pursuant to MCR 2.116(C)(10). In his statement of the factual background, defendant questioned whether plaintiff's fall involved ice. No one saw ice and plaintiff had a physical condition involving his left leg that likely led to his fall. Further, the area in which plaintiff fell was not near a downspout or low lying surface and witnesses testified that the area was well-lit, as well as clean and dry. It had not snowed on the day of the fall and the parking lot had been salted a short time before plaintiff's fall. But, defendant argued, even if plaintiff did fall on ice, no duty of care was owed to him because it was an open and obvious condition, no special aspects rendered it unreasonably dangerous, and defendant did not have notice of any such condition.

Plaintiff responded to defendant's motion, arguing that he fell on "black ice" as he approached the northwest corner of the building, just as he was about to turn south. The ice could not be seen because the parking lot was poorly lit. The location of the downspout caused water to accumulate in a low spot of the pavement and, it was so cold that evening, the water froze. The danger was not open and obvious. There was no accumulation of snow in the parking lot under which ice could form so it could not have been anticipated and, it was so dark, the ice could not have been seen.

Oral arguments were held on the motion. Defense counsel agreed that defendant's kitchen employees were periodically salting the parking lot the evening of plaintiff's fall because

of light rain and below-freezing temperatures, although they did not see any ice. Counsel further argued that there was no evidence that anyone saw ice before or after the fall. Plaintiff only testified that after his fall, he felt ice underneath his body. The employees who assisted plaintiff immediately after his fall testified that plaintiff fell directly in front of the employee door to the kitchen, not in the area of the downspout that allegedly caused water to accumulate.

In response, plaintiff's counsel appeared to argue that plaintiff slipped in the area of the downspout, went airborne, and landed in front of the kitchen door. The court questioned this possibility in light of the seven or eight feet in distance between the downspout and the location where plaintiff landed, asking plaintiff's counsel if he agreed that the downspout could not have contributed to the pooling of the frozen water on which plaintiff allegedly slipped. Plaintiff's counsel responded "I don't need the down spout to succeed with this case . . . . I mean it may not have come from the down spout. It may have been - - there was a lot of water out there in depressions." Plaintiff's counsel claimed that he did not "need a special aspect in this case."

The trial court then focused on whether the allegedly dangerous condition was open and obvious. Defendant argued that, at least, plaintiff had constructive notice of the slippery conditions. He had lived in Michigan for years. The temperature was below freezing and it was lightly raining. Snow was piled on the edge of the lot. Thus, plaintiff is charged with knowledge of the naturally resulting slippery condition. The court agreed, concluding that "the substance that [plaintiff] fell on at the back door of the restaurant was a condition that was open and obvious." The matter was dismissed and this appeal followed.

Plaintiff first argues that "[t]he trial court's conclusion that ice is an open and obvious condition per se is based upon an erroneous interpretation of the case law." We disagree that the trial court held that "ice is an open and obvious condition per se." Rather the trial court held that it could "reach no other conclusion than [that] the cases cited by the defendant control the situation and that the substance that [plaintiff] fell on at the back door of the restaurant was a condition that was open and obvious." A primary case defendant focused its argument on was *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470; 499 NW2d 379 (1993). In that case, this Court held that a danger is open and obvious if "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection." *Id*. at 475. Consistent with that holding, defendant focused its argument on the facts that, taken together—the snow in the parking lot, the light rain falling, the below-freezing temperature, and his familiarity with Michigan winters—plaintiff should have been able to anticipate and discover the danger of slippery conditions upon casual inspection. Defendant cited cases in support of this position and the trial court agreed with defendant's claim that the condition, in light of the facts presented, was open and obvious. Thus, we reject this argument as a mischaracterization of the trial court's holding.

Next, plaintiff argues that "[s]ummary disposition was inappropriate because the evidence established genuine questions of fact regarding both the 'open and obvious' issue and the 'special aspects' issue." After review de novo, considering the evidence in a light most favorable to plaintiff to determine whether genuine questions of fact existed as to these issues, we disagree. See *Maiden v Rozwood*, 461 Mich 109, 118, 120-121; 597 NW2d 817 (1999).

Plaintiff claims that the "black ice" was not open and obvious primarily because the surface of the parking lot was clear of snow, and the ice was not visible. But this argument fails

to acknowledge other pertinent facts; namely, (1) it was raining, (2) the temperature was below freezing, (3) there was snow piled on the edges of the parking lot, and (4) plaintiff had lived in Michigan for many winters. In other words, that the ice was not visible and that no snow covered up the icy condition does not end the inquiry. The weather and parking lot conditions at the time of the slip and fall, coupled with knowledge gained by experience, would lead an average person of ordinary intelligence to anticipate that the parking lot would be icy and foresee the danger of slipping and falling on that ice. See *Ververis v Hartfield Lanes (On Remand)*, 271 Mich App 61, 65; 718 NW2d 382 (2006); *Teufel v Watkins*, 267 Mich App 425, 428; 705 NW2d 164 (2005); *Joyce v Rubin*, 249 Mich App 231, 238-239; 642 NW2d 360 (2002), quoting *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 11; 574 NW2d 691 (1997). Therefore, the trial court properly concluded that the alleged condition was open and obvious.

Finally plaintiff argues that, even if the ice was open and obvious, "the trial court erred in granting [defendant's] motion for summary disposition without considering whether there was a genuine question of fact with regard to the existence of 'special aspects.'" But the special aspect plaintiff pleaded and argued throughout this case was the nature of the downspout in that it caused water to pool. The trial court did address the existence of this purported special aspect and concluded that, because it was located almost eight feet from where plaintiff landed, it could not have contributed to plaintiff's fall. Plaintiff's counsel agreed, but argued that he did not need to rely on the existence of a special aspect to succeed in this case. Nevertheless, the trial court did conclude its holding with a finding that, under the facts presented, no special aspects existed that would render the open and obvious doctrine inapplicable.

Now, on appeal, plaintiff argues that the darkness of the parking lot, the lack of snow on the surface of the parking lot, and the invisible nature of the ice constituted special aspects. Because these conditions were argued in plaintiff's brief to some extent, we will consider this issue as if preserved. See *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). Nevertheless, darkness and the lack of snow covering the clear ice in this avoidable parking lot are not "special aspects" within the contemplation of *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001). These factors do not create an unreasonable risk of harm, i.e., they do not "give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided." *Id*. at 518-519.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen