

STATE OF MICHIGAN
COURT OF APPEALS

ETHEL KAMINSKI,

Plaintiff-Appellant,

v

JAMES HASKINS AND KATHLEEN HASKINS,

Defendants,

and

DILUSSO BUILDING CO., INC.,

Defendant-Appellee.

UNPUBLISHED

July 22, 2008

No. 275117

Macomb Circuit Court

LC No. 2004-004739-NO

Before: Gleicher, P.J., and O'Connell and Kelly, J.J.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition of plaintiff's negligence claim against defendant DiLusso Building Co., Inc. (DiLusso).¹ We affirm, albeit for reasons other than that relied upon by the trial court.²

Plaintiff tripped and fell on a step while visiting the home of defendant James Haskins, her son, and Kathleen Haskins, her daughter-in-law. DiLusso constructed the Haskinses' home, including the step. Plaintiff consulted an inspector who concluded that the step violated two provisions of the Michigan Building Code pertaining to riser height and nosing.

¹ The trial court also granted summary disposition of plaintiff's claims against defendants James Haskins and Kathleen Haskins, but plaintiff does not challenge that portion of the order in this appeal.

² Where a trial court reaches the correct result although using the wrong reasoning, it will be upheld on appeal. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Gleason v Dep't of Transportation*, 256 Mich App 1, 3; 662 NW2d 822 (2003).

Plaintiff argues that the trial court erred in granting summary disposition on her premises liability claim against DiLusso. We disagree. We review de novo a trial court's decision on a motion for summary disposition. *Zsigo v Hurley Medical Ctr*, 475 Mich 215, 220; 716 NW2d 220 (2006). When reviewing a decision on a motion for summary disposition pursuant to MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, and other evidence in the light most favorable to the party opposing the motion. *Id.* Summary disposition is appropriately granted if, except for the amount of damages, there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id.*

“It is well established . . . that premises liability is conditioned upon the presence of both possession and control over the land.” *Kubczak v Chem Bank & Trust Co*, 456 Mich 653, 660; 575 NW2d 745 (1998) (internal quotation marks and citation omitted). Plaintiff did not allege or produce any evidence that DiLusso was either in possession or control of the premises. The trial court did not err in granting summary disposition.

Plaintiff further contends that DiLusso's violation of the applicable building codes constitutes evidence of negligence.³ Plaintiff's argument is misplaced. Plaintiff does not have a direct cause of action against DiLusso; rather, her allegations are based on the contractual obligation DiLusso owed to the Haskinses. A duty of care “may and frequently does arise out of a contractual relationship, the theory being that accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done, and that a negligent performance constitutes a tort as well as a breach of contract.” *Fultz v Union-Commerce Assoc*, 470 Mich 460, 465; 683 NW2d 587 (2004), quoting *Clark v Dalman*, 379 Mich 251, 260-261; 150 NW2d 755 (1967). However, a defendant must owe a duty to the plaintiff that exists independent of the contract. *Id.* Here, there are no allegations that DiLusso breached any duty owed to her independent of the contract between DiLusso and the Haskinses. Accordingly, she “fails to satisfy the threshold requirement of establishing a duty that [DiLusso] owed to her under the ‘separate and distinct’ approach[.]” *Id.* at 468.

Affirmed.

/s/ Peter D. O'Connell

/s/ Kirsten Frank Kelly

³ To establish a negligence claim, plaintiff must prove that: (1) DiLusso owed plaintiff a duty of care; (2) DiLusso breached that duty; (3) plaintiff was injured; and (4) DiLusso's breach caused the injury. *Henry v Dow Chemical Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005). There can be no actionable negligence if no duty exists, and the threshold question of duty is determined by the court as a question of law. *Lelito v Monroe*, 273 Mich App 416, 419; 729 NW2d 564 (2006). “‘Duty’ is defined as the legal obligation to conform to a specific standard of conduct in order to protect others from unreasonable risks of injury.” *Id.*