STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM LENZ, Plaintiff-Appellant,	UNPUBLISHED April 21, 2009
v	No. 283312 Oakland Circuit Court
MICHIGAN MULTI-KING, INC. and VALLEY CITY LINEN COMPANY, Defendants-Appellees.	LC No. 07-081252-NO

Before: Beckering, P.J., and Talbot and Donofrio.

PER CURIAM.

Plaintiff, William Lenz, appeals as of right the grant of summary disposition in favor of defendants, Michigan Multi-King, Inc. and Valley City Linen Company, in this premises liability action. We affirm.

I. Factual History

At approximately noon on June 12, 2006, plaintiff went to the Baja Fresh restaurant owned by defendant Michigan Multi-King, Inc. ("Multi-King") with members of his family. While plaintiff's wife and adult son were in line to place their food order and plaintiff's daughter-in-law and grandchildren were securing a table for their party, plaintiff went to use the restroom. While en route to the restroom, plaintiff fell and injured his hip, necessitating his transport to a local hospital and subsequent medical treatment.

One-half hour earlier, at approximately 11:30 a.m., Otis Register, an employee of defendant Valley City Linen Company ("Valley City"), made his routine weekly delivery of clean linens and rugs to the restaurant pursuant to its contract with Multi-King. Upon arrival at the restaurant, Register picked up three dirty rugs and replaced them with clean rugs. Once these were placed in his truck, Register went into a back area of the restaurant, inaccessible to customers, and retrieved a bag of dirty linens and placed it in his vehicle. On his third trip into the restaurant, Register brought a bag of clean linens and placed them outside the door of the manager's office. Because the office was locked and the linens could not be placed inside, Register tied the bag's strings to the office handle to keep it upright. Finally, at approximately 11:40 a.m., Register secured the signature of the restaurant's manager, Jose Benabides, on the invoice documenting the linen delivery and left the restaurant. The Multi-King contract

specified the amount, types and costs of linens to be provided but did not indicate where, in the restaurant, these items were to be placed when delivered.

Plaintiff has no independent recollection regarding what caused him to fall. Plaintiff acknowledged that cataracts and other long-standing eye problems limited his visual acuity and that he had a "drop foot" condition resulting in limited flexibility in his right ankle. A patron at the restaurant, John Crawford Buchanan, indicated that he observed an individual carrying a large dark-colored bag into the restaurant while he was ordering his own lunch. Once seated, Buchanan saw plaintiff walk by his table and heard, but did not see plaintiff fall. Buchanan averred in an affidavit that he observed plaintiff lying on the floor on top of the same bag he had observed earlier being carried into the restaurant. Buchanan indicated that the dark-colored bag was on the black tile floor and blended to a degree that made the bag difficult to see or distinguish and that when he walked to his table he did not see the bag on the floor before plaintiff's accident occurred. The store manager, Benabides, completed an incident report on the same date at 12:20 p.m., indicating the accident occurred at 12:00 p.m. noting, "Customer trepped [sic]. Black bag on the floor, on the black tile."

II. Lower Court Proceedings

Plaintiff filed a complaint alleging a premises liability claim against Multi-King and a negligence claim against Valley City. Multi-King filed a motion for summary disposition pursuant to MCR 2.116(C)(10), asserting the open and obvious doctrine precluded imposition of liability. Multi-King also argued that plaintiff failed to establish it had actual or constructive notice of the alleged hazardous condition and that summary disposition was also precluded because plaintiff's theory regarding the cause of his injury was based solely on speculation and conjecture. Valley City filed a separate motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10) based on plaintiff's failure to establish the existence of a duty owed by this defendant. Valley City, consistent with co-defendant Multi-King, also asserted plaintiff's action was precluded because the alleged hazard was open and obvious and that plaintiff's theory of causation was based solely on speculation and conjecture. The trial court, determining that a genuine issue of material fact did not exist, granted summary disposition in favor of both defendants based on the open and obvious doctrine.

Plaintiff filed a motion for reconsideration and rehearing asserting the open and obvious doctrine was not a viable defense for Valley City because it was not the owner or possessor of the premises. Plaintiff also challenged the trial court's ruling in favor of Multi-King, asserting the proffered affidavit of Buchanan served to create a genuine issue of material fact and that the trial court's ruling, based on photographs taken after the incident, resulted in an improper determination of fact and witness credibility. The trial court, relying on unpublished cases applying the open and obvious doctrine to defendants who have created conditions on premises they do not own, denied reconsideration regarding its grant of summary disposition in favor of Valley City. In the alternative, the trial court opined that Valley City was also entitled to summary disposition based on the absence of a duty owed to plaintiff separate from its contract with Multi-King. The trial court did not specifically address plaintiff's assertion of error regarding the grant of summary disposition in favor of Multi-King in denying the motion for reconsideration.

III. Standard of Review

A trial court's decision to grant or deny summary disposition is reviewed de novo. *Dressel v Ameribank,* 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition pursuant to MCR 2.116(C)(8):

> [P]rovides for summary disposition where [t]he opposing party has failed to state a claim on which relief can be granted. A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a complaint. The trial court may only consider the pleadings in rendering its decision. All factual allegations in the pleadings must be accepted as true. The motion should be granted if no factual development could possibly justify recovery. [Gillie v Genesee Co Treasurer, 277 Mich App 333, 344; 745 NW2d 137 (2007) (internal citations and quotation marks omitted).]

A motion granted in accordance with MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed,* 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition may be granted pursuant to MCR 2.116(C)(10) when the documentary evidence demonstrates that there is no genuine issue pertaining to any material fact and the moving party is entitled to judgment in its favor as a matter of law. *Veenstra v Washtenaw Country Club,* 466 Mich 155, 163; 645 NW2d 643 (2002). A genuine issue of material fact is found to exist 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). Further, whether a defendant owes a duty to a plaintiff comprises a question of law, which this Court reviews de novo. *Fultz v Union-Commerce Assoc,* 470 Mich 460, 463; 683 NW2d 587 (2004). A trial court's decision to deny a motion for reconsideration is reviewed by this Court for an abuse of discretion. *Shawl v Spence Bros, Inc,* 280 Mich App 213, 218; 760 NW2d 674 (2008).

IV. Analysis

With regard to Valley City, plaintiff correctly asserts the trial court erred in granting summary disposition to this defendant based on the open and obvious doctrine. As recognized previously in case law, the open and obvious hazard doctrine is inapplicable to ordinary negligence claims. *Laier v Kitchen,* 266 Mich App 482, 484; 702 NW2d 199 (2005); *Hiner v Mojica,* 271 Mich App 604, 615-616; 722 NW2d 914 (2006). Despite this error, the trial court correctly recognized in ruling on the motion for reconsideration that a grant of summary disposition in favor of Valley City was justified based on the absence of a legal duty.

To establish a claim of negligence, a plaintiff must demonstrate (a) the existence of a duty, (2) breach of that duty, (3) causation, and (4) damages or injuries. *Henry v Dow Chemical Co,* 473 Mich 63, 71-72; 701 NW2d 684 (2005), lv granted 482 Mich 1043 (2008). "The threshold question in a negligence action is whether the defendant owed a duty to the plaintiff. It is axiomatic that there can be no tort liability unless defendants owed a duty to plaintiff." *Fultz, supra* at 463 (internal quotation marks and citation omitted). Specifically, when dealing with a tort action arising from a contractual duty:

> [T]he lower courts should analyze tort actions based on a contract and brought by a plaintiff who is not a party to that contract by using a "separate and distinct" mode of analysis. Specifically, the threshold question is whether the defendant

> owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations. If no independent duty exists, no tort action based on a contract will lie. [*Id.* at 467.]

Plaintiff contends that Valley City owed him a duty separate and distinct from its contract with Multi-King "to place the linen bag in an area where it would not pose a danger to customers." According to plaintiff's reasoning, the absence of instructions in the contract between Multi-King and Valley City regarding the placement of the clean linen bags upon delivery results in a duty that arises by operation of law. Contrary to plaintiff's assertions and convoluted reasoning, there existed no duty independent of the contract with Multi-King. Simply put, any obligations or duties that arise stem from the existence of the contract between defendants for the delivery of linen. Hence, plaintiff has failed to demonstrate or establish that any separate or distinct relationship existed between himself and Valley City that would impose a duty. Impliedly, plaintiff focuses on whether any danger regarding placement of the bag by Valley City's employee was foreseeable. Regardless, when a relationship does not exist between the parties, liability may not be imposed on a defendant. *In re Certified Question,* 479 Mich 498, 507; 740 NW2d 206 (2007).

Plaintiff also contends as error the trial court's grant of summary disposition in favor of Multi-King based on the open and obvious hazard doctrine, and its subsequent denial of plaintiff's motion for reconsideration. While we agree the trial court was not at liberty to disregard the Buchanan affidavit, which raised a genuine issue of material fact pertaining to the open and obvious character of the alleged hazard, an alternative basis to affirm the dismissal of plaintiff's premises liability exists based on the absence of actual or constructive notice for this defendant.

It is routinely recognized that a possessor of land is not an absolute insurer with regard to the safety of an invitee. *Anderson v Wiegand,* 223 Mich App 549, 554; 567 NW2d 452 (1997). However, an invitor is deemed to owe an invitee a duty to inspect its premises and make any necessary repairs or warn of hazards that are discovered. *James v Alberts,* 464 Mich 12, 19-20; 626 NW2d 158 (2001). In accordance with *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347(2001), after rem 249 Mich App 141 (2002):

> It is the duty of a storekeeper to provide reasonably safe aisles for customers and he is liable for injury resulting from an unsafe condition either caused by the active negligence of himself and his employees or, if otherwise caused, where known to the storekeeper or is of such a character or *has existed a sufficient length of time that he should have had knowledge of it.* [Internal citations and quotation marks omitted, emphasis in original.]

Hence, whether an invitee is owed a duty by an invitor hinges on whether the invitor had actual or constructive notice of the alleged hazardous condition. *Id.*

Opposing Multi-King's motion for summary disposition, plaintiff asserted that notice existed based on the restaurant manager's signature on the Valley City delivery invoice approximately 20 minutes before plaintiff's fall. In addition, plaintiff cites to testimony by the restaurant manager indicating that an employee was assigned to the customer area to clean and conduct inspections on 15-minute intervals, implying an opportunity existed for discovery of the

alleged hazard. However, contrary to plaintiff's assertions, the invoice merely provides notice of the delivery and not its location or the existence of a potential hazard. Notably, although the linen delivery occurred on a weekly basis, it was typically placed inside the manager's office and was only left outside this room when that door was locked. Although reasonable inferences may be drawn from the evidence to support the existence of constructive notice of a hazardous condition, such inferences must comprise more than mere speculation or conjecture. *Whitmore v Sears, Roebuck & Co*, 89 Mich App 3, 9; 279 NW2d 318 (1979). Plaintiff has failed to demonstrate that by signing the invoice that the manager was on notice that the linen bag was outside the office and presented a potential hazard.

Furthermore, there is no evidence of any complaints by customers regarding the alleged hazard that had occurred anytime previously or during the interval of time between the delivery of the bag of linens and plaintiff's fall. Based on the absence of evidence demonstrating that the condition existed for a sufficient or considerable length of time, the grant of summary disposition in favor of defendant is proper. *Whitmore, supra* at 8. In addition, defendant's assignment of an employee to do inspections of the customer area of the restaurant on 15-minute intervals, coupled with Buchanan's affidavit, suggests that the bag was not readily visible and, therefore, would not indicate defendant should have known about the condition. This Court should not reverse a trial court's order "when the right result was reached for the wrong reason." *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).

Affirmed.

/s/ Jane M. Beckering
/s/ Michael J. Talbot
/s/ Pat M. Donofrio