STATE OF MICHIGAN

COURT OF APPEALS

DON W. WRIGHT, SR.,

Plaintiff-Appellant,

v

MEADOWOOD JACKSON, L.L.C.,

Defendant-Appellee.

UNPUBLISHED
June 16, 2009

No. 285379
Jackson Circuit Court
LC No. 07-002345-NO

Before: Fort Hood, P.J., and Cavanagh and K.F. Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition. We affirm.

On January 14, 2007, plaintiff, a tenant of defendant's apartment complex, fell when he was exiting his apartment. Specifically, plaintiff was *backing out* of the apartment with two bags of garbage in his hands. He backed up with one foot and when he backed up again, he went off the side when stepping off the porch or stoop, falling onto the cement walk. When asked to describe the cause of the accident, plaintiff testified that he did not know how the fall occurred because "it happened so fast." It was freezing rain at the time of the fall. However, there was salt in the area of the fall, and plaintiff did not attribute his fall to the weather conditions or the salt placement. Plaintiff denied that he misplaced his foot when he stepped off the porch, but admitted that he did not know if he slipped or stepped off. A caregiver for a neighbor heard plaintiff call out for help and called an ambulance. Plaintiff was taken to the hospital where he underwent hip replacement surgery.

Plaintiff moved into the apartment complex in February 2005. He noticed that the cement slab in the area of the fall was sinking. However, he never notified anyone at the apartment complex of the sinking condition. Rather, he assumed that it was "not [his] place to tell them." However, when asked to describe the degree to which the slab had sunk, plaintiff could not estimate the degree of separation. Plaintiff offered expert testimony from Albert Marr, a retired builder, who examined the area of the fall. Marr opined that the doorway was defective because it had an "excessive rise." Specifically, Marr opined that the rise measured was "eight and seven eighths" and the maximum allowed was "eight and a quarter." Although Marr purportedly offered expert testimony, he could not identify, by name, the building code and could not identify the section of the code that was violated. He also opined that the change in the rise was probably due to "normal settlage." Marr did not know if the condition of the stoop

caused plaintiff's fall. Additionally, although Marr opined that a handrail should have been installed, he acknowledged that the building code did not require the placement of a handrail.

The treating physician, Dr. Robert Doane, testified that plaintiff's situation was "unusual" because he had avascular necrosis of the hip. Avascular necrosis was a condition where the bone died. Alcohol abuse, steroid use, and certain types of medical treatment could cause this type of necrosis. However, Dr. Doane opined that, in light of plaintiff's medical history that included alcoholic cirrhosis, alcohol may have been the cause. At the time of admission, plaintiff was in stage three of the condition where the femoral head collapses; the ball changes its shape from round and spherical to flat and compressed. Because of the advanced stage of the condition, it was unclear if the avascular necrosis caused plaintiff's fall or if the fall caused the collapse of the femoral head. Dr. Doane opined that hip replacement surgery was necessary to allow plaintiff to ambulate without pain.

Plaintiff filed a one-count complaint that did not identify the cause of action at issue. However, the assertions contained in the complaint allege that defendant had a duty to exercise ordinary care and caution, had a statutory duty to kept the premises fit for its intended use and in reasonable repair, and failed to act appropriately, but rather acted recklessly or negligently. Defendant moved for summary disposition, asserting that (1) the common law claims should be dismissed because the condition was open and obvious and no special aspects existed to make the condition unreasonably dangerous; (2) a duty to protect did not exist where defendant was unaware of the condition of the landing; and (3) plaintiff could not present evidence to demonstrate that the landing was not maintained in reasonable repair or fit for its intended use. The trial court agreed and granted defendant's motion for summary disposition.

Summary disposition decisions are reviewed de novo on appeal. *Joliet v Pitoniak*, 475 Mich 30, 35; 715 NW2d 60 (2006). The moving party has the initial burden to support its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate a genuine issue of disputed fact exists for trial. *Id*. The nonmoving party may not rely on mere allegations or denials in the pleadings. *Id*. Affidavits, depositions, and documentary evidence offered in support of, and in opposition to, a dispositive motion shall be considered only to the extent that the content or substance would be admissible as evidence. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999).

To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; (3) causation; and (4) damages as a result of the injury to the plaintiff. *Henry v Dow Chemical Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005). Whether a defendant owes a plaintiff a duty of care presents a question of law that is reviewed de novo. *Fultz v Union-Commerce Associates*, 470 Mich 460, 463; 683 NW2d 587 (2004). The duty to interpret and apply the law is allocated to the courts, not the parties' expert witnesses. *Hottmann v Hottmann*, 226 Mich App 171, 179-180; 572 NW2d 259 (1997).

"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). The duty generally does not include removing open and obvious dangers unless the premises owner should

anticipate that special aspects of the condition make even an open and obvious risk unreasonably dangerous. *Id*. at 517. Whether a hazardous condition is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger and risk presented upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). The determination depends on the characteristics of a reasonably prudent person, and not on the characteristics of a specific plaintiff. See *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 329 n 10; 683 NW2d 683 NW2d 573 (2004). An everchanging and uncorroborated account is nothing more than speculation and conjecture and does not demonstrate that a defendant knew or had reason to know of the existence of a dangerous condition. *D'Ambrosio v McCready*, 225 Mich App 90, 96; 570 NW2d 797 (1997). In Michigan, it is the overriding public policy to encourage people to take reasonable care for their own safety and watch where they are walking. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 616-617; 537 NW2d 185 (1995).

Plaintiff first contends that defendant had notice of the condition of the land because of the evidence of caulking. Because plaintiff failed to present documentary evidence regarding this issue, the trial court did not err in granting summary disposition. *Quinto, supra*. Plaintiff deposed the property manager and maintenance workers and did not raise the issue of when the caulking occurred, if they were on notice of the caulking, or whether the caulking occurred by a prior owner. Moreover, plaintiff failed to identify any defect in the stoop as a result of the caulking. According, this issue is without merit.

Plaintiff next argues that the open and obvious doctrine does not apply because the condition of the land would only be "noticeable from a close-up perspective, such as from someone who is applying caulk to conceal the separation." We disagree. Review of plaintiff's own deposition testimony reveals that he noticed that the step was separating and did not report it to management because it was not his "place to tell them." The photographs also indicate that the condition of the step was open and obvious to an ordinary user upon casual inspection. *Novotney, supra*. There were no special aspects that made the step unreasonably dangerous. *Mann, supra*; *Lugo, supra*. Therefore, this challenge is without merit.

Plaintiff further contends that defendant breached the statutory duty to maintain a landing that is fit for its intended use. We disagree. A landlord has a duty to maintain common areas, including sidewalks, to ensure that they are fit for their intended use. MCL 554.139; *Benton v Dart Properties, Inc*, 270 Mich App 437, 443-444; 715 NW2d 335 (2006). In the present case, plaintiff failed to present evidence that the stoop was unfit for its intended use. Although plaintiff's purported expert measured the step and concluded that it varied from the building code, the expert attributed the difference to "normal settlage" and did not opine that the step was unfit for its intended purpose. In fact, the expert would not provide any opinion regarding causation between the condition of the step and the injury. The photographs submitted indicate that a common step was involved, and the step was not cracked or damaged in any way. Plaintiff could not attribute the step to the cause of his fall; in fact, plaintiff did not know the cause of his fall. Accordingly, the trial court did not err in dismissing the statutory claim.

Lastly, plaintiff asserts that there are genuine issues of material fact regarding causation. We disagree. Plaintiff could only speculate regarding the cause of his fall. Although it was freezing rain at the time of the fall, plaintiff did not indicate that the weather conditions or the lack of precautions in light of the weather conditions caused his fall. In fact, plaintiff

acknowledged that there was salt in the area of his fall. Furthermore, plaintiff's doctor could not conclude that the step was the cause of the fall. Rather, in light of plaintiff's medical history, it was unclear if the existing stage three avascular necrosis caused the breakage when plaintiff stepped down. Speculation and conjecture does not create a factual issue. *D'Ambrosio, supra*.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly