STATE OF MICHIGAN

COURT OF APPEALS

SALEM A. ELBGAL,

Plaintiff-Appellant,

v

CITY OF DEARBORN,

Defendant-Appellee,

and

TOUFIC SAREINI, SAEED ALI, and NEHMA ALI,

Third Party Defendants.

UNPUBLISHED
September 3, 2009

No. 285292
Wayne Circuit Court
LC No. 07-705569-NO

Before: Saad, C.J., and Whitbeck and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's order granting summary disposition to defendant, apparently under MCR 2.110(C)(7) and (C)(10). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff alleged that, on December 22, 2005, he slipped on snow and ice and fell on a defective sidewalk in front of 10421 Dix, Dearborn. Plaintiff fractured a hip in the fall. Defendant answered and moved for summary disposition under MCR 2.116(C)(7) (governmental immunity) and (C)(10) (no genuine issue of material fact). The trial court granted defendant's motion under the "two inch sidewalk rule" and the "natural accumulation" doctrine.

We review the trial court's grant or denial of summary disposition de novo. *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 566-567; 702 NW2d 539 (2005); *Haliw v Sterling Heights*, 464 Mich 297, 301; 627 NW2d 581 (2000). Under MCR 2.116(C)(7), the court accepts the plaintiff's well-pleaded factual allegations as true. *Gadigian v City of Taylor*, 282 Mich App 179, 181; ___ NW2d ___ (2009). If no material facts are in dispute and reasonable minds could not differ concerning the effect of the facts, the court may decide the plaintiff's claim as one of law. The court considers pleadings and documentary evidence in the light most favorable to the

nonmoving party. *Gadigian, supra*; *Alcona Co v Wolverine Environmental Production, Inc*, 233 Mich App 238, 246; 590 NW2d 586 (1998).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a complaint and must be supported by affidavits, depositions, admissions, or documentary evidence. MCR 2.116(G)(3)(b); *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). The nonmoving party must then provide evidence of specific facts showing a genuine issue of material fact. *Slatterly v Madiol*, 257 Mich App 242, 249; 668 NW2d 154 (2003). Granting the nonmoving party the benefit of any reasonable doubt regarding material facts, the court must decide if a factual dispute exists to require a trial. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1985). The court may not make factual findings or weigh credibility, and must consider all documentary evidence in the light most favorable to the party opposing the motion. *Haliw, supra* at 302.

Plaintiff argues that a genuine issue of fact existed regarding the condition of the sidewalk. We disagree. As a governmental agency, defendant has the duty to maintain sidewalks in reasonable repair so they are reasonably safe and convenient for public travel. MCL 691.1402(1); MCL 691.1401(e). Exceptions to governmental immunity are narrowly construed. *Haliw, supra* at 303. One such exception is the highway exception, which under MCL 691.1401(e) includes sidewalks. The two inch rule of MCL 691.1402a(2) states, "A discontinuity defect of less than 2 inches creates a rebuttable inference that the municipal corporation maintained the sidewalk in reasonable repair." A "rebuttable inference" differs from a "rebuttable presumption" in that the inference lacks the force of compulsion. *Gadigian, supra* at 186.

In the case at bar, plaintiff offered no evidence of a discontinuity defect of two inches or more on the sidewalk where he fell. Plaintiff estimated the defect at "maybe half-inch," and plaintiff's son testified that it was less than two inches. Photos submitted by both parties show almost no difference in height between blocks of sidewalk. There is a thin crack in one of the blocks, but this may not be the block where plaintiff fell. In any case, plaintiff testified that the defects were covered up by snow, and photos taken soon after the accident show much ice and snow where plaintiff fell. There were no special conditions such as those noted by the plaintiff's engineering expert in *Gadigian, supra* at 188-189. We thus conclude that plaintiff failed to offer evidence to rebut the inference of MCL 691.1402a(2), and defendant was entitled to judgment as a matter of law.

We also find that the trial court did not err reversibly in granting summary disposition under the natural accumulation doctrine. This rule states that "a governmental agency's failure to remove natural accumulations of ice and snow on a public highway does not signal negligence." *Haliw, supra* at 297. Again, "highway" includes "sidewalk," MCL 691.1401(e). Plaintiff "must prove that there was an existing defect in the sidewalk rendering it not reasonably safe for public travel." *Haliw, supra* at 308. Further, "there must exist the combination of ice or snow and the defect that, in tandem, proximately causes the slip and fall." *Id*. at 311. In *Haliw*, the plaintiff slipped on a depression in the sidewalk where ice had formed. The Supreme Court found that the plaintiff did not prove that the depression rendered the sidewalk out of repair and not reasonably safe and convenient for public travel. *Id.*

In the present case, plaintiff simply failed to present evidence of a defect in the sidewalk. The color photos taken right after the accident show snow and ice covering most of the sidewalk in front of one storefront. In this location, which was where plaintiff fell, all that is visible is the snow and ice. There is no sidewalk defect apparent that combines with the snow and ice to cause an unsafe condition. Photos taken after the ice and snow were removed also show no defect. Therefore, under *Haliw*, plaintiff failed to demonstrate a genuine issue of material fact and summary disposition was properly granted under MCR 2.116(C)(7) and (C)(10).

Finally, defendant argues that, even if the court committed error in granting summary disposition under the two inch rule and natural accumulation doctrine, summary disposition would have been proper because plaintiff failed to send a proper pre-suit notice. Pursuant to MCL 691.1404(1), the plaintiff must notify the defendant municipality within 120 days of "the exact location and nature of the defect, the injury sustained and the names of witnesses known at the time by the claimant." See *Rowland v Washtenaw Co Rd Commission*, 477 Mich 197, 200, 219; 731 NW2d 41 (2007). Plaintiff counters that the court decided this issue in his favor.

We find the court's remarks ambiguous and not clearly indicating a decision on the notice issue. However, we need not reach this issue since summary disposition was appropriate under the two inch rule and natural accumulation doctrine.

Affirmed.

/s/ Henry William Saad
/s/ William C. Whitbeck
/s/ Brian K. Zahra