STATE OF MICHIGAN

COURT OF APPEALS

OLGA ELIZABETH HERRERA,

Plaintiff-Appellant,

v

ROMP ENTERTAINMENT, INC., a/k/a TONIC NIGHT CLUB, LLC,

Defendant/Cross-Defendant-Appellee,

and

27-29 SOUTH SAGINAW, LLC,

Defendant/Cross-Plaintiff,

and

FRANKLIN PROPERTIES I, LLC, and FRANKLIN PROPERTIES, INC.,

Defendants.

UNPUBLISHED
February 16, 2010

No. 285471
Oakland Circuit Court
LC No. 2007-082632-NO

Before: Owens, P. J., and Servitto, and Gleicher, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting defendant Romp Entertainment's motion for summary disposition. We reverse. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was visiting Tonic Night Club, operated by defendant Romp Entertainment ("Romp"), and located in a building owned by defendant 27-29 South Saginaw, LLC. Plaintiff was in a dance area with a wall made of corrugated metal. In front of the wall was a box on which patrons were permitted to climb and to dance. A person standing on the box could, without difficulty, reach the top of the corrugated metal wall. A bouncer helped plaintiff climb onto the box. As plaintiff turned around, she put her hand on the top edge of the wall; moments later she realized that her hand was badly cut, with her fingers nearly severed from her hand.

Plaintiff filed suit alleging that the wall presented an unreasonably dangerous condition of which defendants had notice, and that Romp should have warned her or should have corrected the condition or taken other precautions to protect her from injury. Romp moved for summary disposition under MCR 2.116(C)(10), arguing that the wall was not unreasonably dangerous and, while plaintiff contended that she cut her hand by merely placing it on the wall, no customer had ever been injured by the wall before, and Romp's employees frequently pressed on it with their hands without suffering an injury. Romp emphasized that it did not create the condition; the wall was installed in 1993, years before Romp began to operate the business. According to Romp, plaintiff could not establish that Romp knew or should have known of the allegedly dangerous condition. Furthermore, inspection and testing by Romp's expert and its employees did not reveal the wall edge to be sharp.

The trial court found that Romp had not created the condition. Romp presented evidence that the wall was installed long before it had control of the premises, and plaintiff had no evidence to the contrary. The court also found that Romp did not know, nor should it have known, about the condition because it was not foreseeable that someone would be injured by the wall's edge when no one had been injured prior to plaintiff, despite numerous people being exposed to the same condition.

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although substantively admissible evidence submitted at the time of the motion must be viewed in the light most favorable to the party opposing the motion, the non-moving party must come forward with at least some evidentiary proof, some statement of specific fact upon which to base his case. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999); *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

An owner or possessor of premises owes a duty to protect its invitees from an unreasonable risk of harm caused by a dangerous condition of the land. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). Liability arises when an injury results from an unsafe condition either caused by the active negligence of the owner or its agents or, if not so caused, if the owner knows of or should have known of the unsafe condition. *Hampton v Waste Mgt of Michigan, Inc*, 236 Mich App 598, 604; 601 NW2d 172 (1999). The mere existence of a danger is not enough to establish liability. *Kroll v Katz*, 374 Mich 364, 373; 132 NW2d 27 (1965).

Here, the deposition testimony of several Romp employees established that patrons regularly danced the boxes or speakers on the club's dance floor. Romp's president, Martin Coats, conceded his awareness that the wall next to one of the boxes was constructed using "corrugated metal material" that had an "open, bare" edge at the top lacking any "caulking" or "cushioning." Coats also acknowledged that it was foreseeable that a dancer would grab onto the wall.

Plaintiff's expert witness, a licensed builder, described in an affidavit that "corrugated sheet metal" covered the wall abutting the box on which plaintiff had danced, and that the "trim for the corrugated sheet metal was ripped off its top edge, exposing sharp metal edges." The expert opined:

> In my professional opinion, the corrugated sheet metal, especially in proximity to the wooden box where Herrera testified she was dancing upon when she cut her right hand on March 5, 2007 is not an appropriate material to expose to invitees because it involves an unreasonable risk of harm to the public in general. Thus, by placing the wooden box in direct proximity of the dangerous corrugated sheet metal, Tonic created an unreasonably dangerous condition for its invitees, such as Herrera.

While evidence was presented that no one had ever suffered an injury associated with the wall prior to Herrera, that fact neither negates Romp's notice of the dangerous condition nor eliminates its duty to abate it because "it would not be competent to prove an absence of accidents as tending to show an absence of negligence." *Larned v Vanderlinde*, 165 Mich 464, 468, 131 NW 165 (1911).

As indicated in *Sitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597; 614 NW2d 88 (2000):

> The landowner has a duty of care, not only to warn the invitee of any known dangers, but the additional obligation to also make the premises safe, which requires the landowner to inspect the premises and, depending upon the circumstances, make any necessary repairs or warn of any discovered hazards. Thus, an invitee is entitled to the highest level of protection under premises liability law.

As such, Romp owed plaintiff the duties to inspect the metal wall next to the box on which its customers regularly danced, to discover the wall's sharp edge, and to determine the wall's safety under the circumstances. Not only does sufficient record evidence reasonably support that the wall posed a danger, given the considerable length of time that the metal wall had been present next to the box on the dance floor, a jury could reasonably infer that Romp knew or, or should have discovered, the risk posed to dancers and taken some precaution to protect the wall's metal edge. Because there remains a dispute as to whether the edge was in fact sharp or dangerous and whether Romp knew or should have reasonably known of an unsafe condition presented by the wall next to the box, summary disposition was inappropriate.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Deborah A. Servitto