STATE OF MICHIGAN

COURT OF APPEALS

VIRGINIA LOWERY,

Plaintiff-Appellant,

v

BROOKLINE MANAGEMENT COMPANY, RHP PROPERTIES, INC., and HUNTERS RIDGE APARTMENTS ASSOCIATES, L.L.C.,

Defendants-Appellees.

UNPUBLISHED
July 29, 2010

No. 290875
Kent Circuit Court
LC No. 07-013576-NI

Before: SAWYER, P.J., and BANDSTRA and WHITBECK, JJ.

PER CURIAM.

Plaintiff Virginia Lowery appeals as of right the trial court's February 6, 2009 order granting defendants summary disposition in this premises liability case. We affirm.

On March 12, 2005, plaintiff went to her daughter's home for dinner. Plaintiff's son transported her to her daughter's home after assisting plaintiff to his car, via the back entrance to the apartment building in which plaintiff lived. Sometime after midnight, plaintiff's son drove her back to her apartment building; he helped plaintiff out of his car, but did not walk her to the door of the building. During her deposition, plaintiff testified that, as she was walking to the building, she observed snow and ice on the sidewalk. She testified further that she was attempting to avoid this ice and snow, by walking to an area that appeared clear, but once she reached this area, she fell, and that, after she fell, she could feel that there was ice on this portion of the sidewalk as well. Plaintiff acknowledged that the temperature had not gone above freezing and that it had "snowed quite a bit earlier" that day.

Plaintiff argues that the condition was not open and obvious because she slipped on black ice. Further, she contends that there were special aspects of the condition that remove it from the open and obvious doctrine, specifically that the condition was unavoidable. In addition, plaintiff argues that defendants owed her a statutory duty pursuant to MCL 554.139(1)(a) and (b).

We review de novo a trial court's decision to grant summary disposition. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). We review the record in the same manner as the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). In evaluating a motion for summary disposition brought under this

subsection, a reviewing court considers affidavits, pleadings, depositions, admissions and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. *Coblentz*, 475 Mich at 567-568; *Maiden*, 461 Mich at 120. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); MCR 2.116(G)(4); *Coblentz*, 475 Mich at 568; *Maiden*, 461 Mich at 120.

Premises liability law has been summarized by the Michigan Supreme Court as follows:

> Generally, a premises possessor owes a duty of care 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. This duty generally does not encompass a duty to protect an invitee from "open and obvious" dangers. However, if there are "special aspects" of a condition that make even an "open and obvious" danger "unreasonably dangerous," the premises possessor maintains a duty to undertake reasonable precautions to protect invitees from such danger. [*Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 328-329; 683 NW2d 573 (2004) (citations omitted).]

The test to determine if a danger is open and obvious is whether an average user of ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection. *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002). Conditions that would constitute special aspects include a condition where there is a substantial risk of death or severe injury or a condition that is unavoidable because no alternative route exists. *Lugo v Ameritech Corp*, 464 Mich 512, 518; 629 NW2d 384 (2001).

We conclude, after viewing the evidence in the light most favorable to plaintiff, that the condition was open and obvious and without special aspects. Although this claim involves black ice, which by its nature is invisible or nearly invisible, we find that "other indicia of a potentially hazardous condition" existed, which would alert a reasonable person of ordinary intelligence that a dangerous condition existed. *Janson v Sajewski Funeral Home, Inc*, 486 Mich 934; 782 NW2d 201 (2010); *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 483; 760 NW2d 287 (2008); *Joyce*, 249 Mich App at 238. As noted above, during her deposition plaintiff specifically testified that it "snowed quite a bit" earlier in the day, that when she walked to the parking lot earlier in the evening, the sidewalk was icy and snowy, that there was ice and snow on the sidewalk by the back door of her apartment building when she returned from her daughter's house and that it was this snow and ice that she was trying to walk around when she fell on the black ice. Further, even though she claims there "was not much" lighting, the testimony provides that there was sufficient lighting for plaintiff to recognize that there was ice and snow on the sidewalk. Hence, the facts viewed most favorably to plaintiff support the conclusion that the alleged black ice was open and obvious because there was sufficient indicia of a potentially hazardous condition, which would alert a reasonable person of ordinary intelligence that a dangerous condition existed. *Janson*, 486 Mich 934; *Slaughter*, 281 Mich App at 483; *Joyce*, 249 Mich App at 238.

Further, the record does not support the existence of special aspects removing the condition from the open and obvious doctrine. Plaintiff could have entered her apartment building using the front sidewalk. She had a reasonable alternative. *Lugo*, 464 Mich at 518. And, nothing in the record supports that the condition at issue posed a substantial risk of death or

severe injury. *Id*. Thus, the condition was avoidable and not unreasonably dangerous. *Janson*, 486 Mich 934. Hence, whether snow removal was engaged in over the weekend was not relevant because the condition was open and obvious with no special aspects. *Id.* Therefore, the trial court properly granted summary disposition for all defendants on plaintiff's common law claims.

In addition, no statutory duty existed in this case. MCL 554.139(1)(a) provides that premises and common areas must be fit for the use intended by the parties, and MCL 554.139(1)(b) provides that the lessor must keep the premises in reasonable repair during the term of the lease. We conclude that based on the language in *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419, 425-426; 751 NW2d 8 (2008), which requires the statutory protection of MCL 554.139(1) to be based on the existence of a lease, and the fact that the lease was between plaintiff and Hunters Ridge Apartments Associates, L.L.C., summary disposition for Brookline Management Company and RHP Properties, Inc., was proper on the statutory claims.

Hunters Ridge also did not owe plaintiff a statutory duty under MCL 554.139(1)(a). Here, the sidewalk was a common area because it was an area that was "accessed by two or more, or all, of the tenants" and over which the lessor retained general control. *Allison*, 481 Mich at 428. Further, the sidewalk in this case was fit for its intended purpose because it provided a reasonable means by which a tenant could traverse between the parking lot and the apartment building. *Id*. at 429. Plaintiff testified that every time she left and came back to her apartment, she was able to use the sidewalk without falling, except on this one occasion. In fact, earlier in the evening, plaintiff was able to traverse the sidewalk without falling. Moreover, it is reasonable to believe that if other people also traveled across the sidewalk that evening, they did so without incident, since no complaints about ice were reported that evening. Hence, the sidewalk was clearly fit for its intended purpose of allowing a reasonable means by which a tenant could traverse between the parking lot and the apartment building. Although a duty under MCL 554.139(1)(a) may exist regarding the accumulation of snow and ice on a sidewalk, that duty would only be triggered under more exigent circumstances than those shown in this case. *Allison*, 481 Mich at 430. "The statute does not require a lessor to maintain a [sidewalk] in an ideal condition or in the most accessible condition possible, but merely requires the lessor to maintain it in a condition that renders it fit for use as" a sidewalk. *Id*. The sidewalk was clearly fit for its intended purpose as a matter of law even though it was not in ideal condition because it contained ice and snow. Therefore, we conclude that Hunters Ridge did not have a statutory duty to plaintiff pursuant to MCL 554.139(1)(a).

Further, the *Allison* Court held that the lessor's duty, under MCL 554.139(1)(b), does not apply to common areas. *Allison*, 481 Mich at 432. And, as already stated, the sidewalk where plaintiff fell was a common area. Further, "[t]he accumulation of snow and ice does not constitute a defect in property, and, therefore, the lessor would have no duty under MCL 554.139(1)(b) with regard to snow and ice . . . ." *Allison*, 481 Mich at 434. Based on the foregoing, Hunters Ridge did not have a statutory duty to plaintiff pursuant to MCL 554.139(1)(b).

We affirm.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ William C. Whitbeck