STATE OF MICHIGAN

COURT OF APPEALS

FRANK THOMAS DEMAREE,

Plaintiff-Appellant,

v

A & K ENTERPRISES, INC., BRIAN L. EAVES, and BETH EAVES

Defendants-Appellees.

UNPUBLISHED
December 16, 2014

No. 318069
Roscommon Circuit Court
LC No. 11-729493-NI

Before: M. J. KELLY, P.J., and CAVANAGH and METER, JJ.

PER CURIAM.

In this slip-and-fall action, plaintiff appeals as of right from an order of the circuit court granting defendants' motion for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact). We affirm.

Plaintiff rented a cabin from defendants for approximately five years. The cabin was plaintiff's residence. He normally parked his pickup truck in a gravel area near his cabin. However, on March 3, 2011, he parked near a different cabin (cabin nine), next to the truck belonging to the resident of that cabin. Specifically, he parked in an area close to Kimberly Drive, next to the other vehicle, which was parked next to cabin nine. Freezing rain was forecast for that evening, and plaintiff awoke the next day to find ice covering the ground. Plaintiff left his cabin at 2:30 p.m. to go to his truck. He stated that at the time it was sunny and the sidewalk ice had melted. He walked to his truck, placed a few items in it from the passenger side, and then proceeded to try to walk around the truck to the driver's side, holding onto it for stability. When he came around the driver's side quarter panel he fell onto his left hip, sustaining an injury.

Defendants moved for summary disposition under MCR 2.116(C)(10), arguing that plaintiff's claim was barred by the open-and-obvious doctrine. Plaintiff responded that the open-and-obvious doctrine was obviated by MCL 554.139. The trial court agreed with plaintiff and denied defendants' motion. Defendants later filed a second (C)(10) motion, arguing that they had a land survey that showed plaintiff fell on county property and not the property of defendants. The trial court found the survey was admissible and determined that no reasonable trier of fact could find anything other than that the fall occurred on the county right-of-way. Defendants' second motion for summary disposition was granted. Plaintiff argues that the trial

court erred in relying on the survey because it was not self-authenticating, was not supported by an affidavit, and failed to conclusively establish that plaintiff was not on defendants' property.

A court's ruling on a motion for summary disposition is reviewed de novo. *Dunn v Bennett*, 303 Mich App 767, 770; 846 NW2d 75 (2014). MCR 2.116(C)(10) provides for summary disposition where, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." Such a motion tests the factual sufficiency of the complaint, and in considering the motion, the court considers the affidavits, pleadings, depositions, admissions, and other evidence in the light most favorable to the party opposing the motion. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). If the evidence "fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id*. at 120. Where the burden of proof at trial rests on the nonmoving party, as is the case here, the nonmoving party may not rely on mere allegations or denials in the pleadings, but must set forth specific facts showing that a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). If an issue upon which reasonable minds might differ is evident, a genuine issue of material fact exists. *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 475; 776 NW2d 398 (2009).

With their second motion for summary disposition, defendants submitted a "sketch of survey" and photographic evidence. Two photographs are alleged to show plaintiff's truck the day after the fall while the other photographs are alleged to show the location of the survey stakes and a demonstration truck "parked in basically the same exact position" as plaintiff's truck, thus showing a "comparison to the survey stakes."

The survey was admissible. Although defendants claimed the survey was admissible under the hearsay exceptions for interests in land, MRE 803(14) and (15), those exceptions relate to documents that establish or affect an interest in real property, not documents that describe real property. See also 16 Michigan Law & Practice, Evidence, § 147 ("Among the various types of documents affecting an interest in real or personal property that are admissible in evidence as relevant, competent, and material to the truth of the matters asserted are deeds, bills of sale, contracts for the purchase and sale of property, and mortgages."). However, a surveyor may testify regarding a survey conducted and the resulting boundary lines. See, generally, *Wilcox v Jenison*, 198 Mich 182, 193-196; 164 NW 484 (1917), *Hockmoth v Des Grands Champ*, 71 Mich 520, 521-522; 39 NW 737 (1888), and *Waisanen Family Trust v Superior Twp*, 305 Mich App 719, 722, 732; 854 NW2d 213 (2014). Significantly, to be considered by the court in conjunction with a motion for summary disposition, "evidence presented must include admissible content, but need not be in admissible form." *Maiden*, 461 Mich at 123 & 124 n 6. Therefore, the survey was properly considered by the trial court, and we note that plaintiff *did not specifically dispute* the location of the stakes and trucks in the photographs. In addition, in *Barnard Mfg Co, Inc* v *Gates Performance Engineering, Inc*, 285 Mich App 362, 373-374; 775 NW2d 618 (2009), this Court stated that documents submitted in support of a motion for summary disposition under MCR 2.116(C)(10) are properly considered if there exists a plausible basis for a foundation for admissibility, thus negating plaintiff's "lack of foundation" argument that he raises in his appellate brief.

Although plaintiff submitted an affidavit, as the party with the burden of proof, he was required to put forward *specific* facts to survive a motion for summary disposition. *Quinto*, 451 Mich at 362. Plaintiff averred that "I clearly recall that I fell on the Defendant's [sic] premises, not near a curbside adjoining Kimberly [Drive]." This was simply a general denial of defendants' specific survey evidence. Indeed, although plaintiff had seen the survey and his counsel made general allegations that the survey was not "clear enough," he did not *specifically* and adequately dispute the location of survey stakes or the demonstrative pickup truck. Under such circumstances, it was within the trial court's right to conclude that, in light of the documents presented by defendants, no genuine issue of material fact existed. Further, we note that plaintiff stated that his vehicle was parked closer to Kimberly Drive than the vehicle belonging to the resident of cabin nine, and that the two vehicles were about five feet apart. This is consistent with the finding that he fell within the county right-of-way.

At any rate, even assuming that plaintiff fell on property within defendants' control, plaintiff and the court below relied upon MCL 554.139, which provides:

> (1) In every lease or license of residential premises, the lessor or licensor covenants:
>
> (a) That the premises and all common areas are fit for the use intended by the parties.
>
> (b) To keep the premises in reasonable repair during the term of the lease or license, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located, except when the disrepair or violation of the applicable health or safety laws has been caused by the tenants wilful or irresponsible conduct or lack of conduct.
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> (2) The parties to the lease or license may modify the obligations imposed by this section where the lease or license has a current term of at least 1 year.
>
> (3) The provisions of this section shall be liberally construed, and the privilege of a prospective lessee or licensee to inspect the premises before concluding a lease or license shall not defeat his right to have the benefit of the covenants established herein.

In *Allison v AEW Capital Mgt LLP*, 481 Mich 419, 428-429; 751 NW2d 8 (2008), the Michigan Supreme Court held that a parking lot within a leased residential property is a common area subject to MCL 554.139(1)(a) and thus must be fit for the use intended by the parties. However, this duty only extends to the intended use; a lessor must "keep a parking lot adapted or suited for the parking of vehicles," an obligation which is met "as long as the tenants are able to park their vehicles in the lot and have reasonable access to their vehicles. *Id*. at 429. Here, plaintiff stated in his deposition that he was able to make his way to his truck before he fell. He stated that he walked between his cabin and cabin eight to an alley, which he traversed down to his truck. It was only when he was walking around the truck that the fall occurred. A landlord is only required to provide reasonable access. *Allison*, 481 Mich at 430. Even taking the facts in the

light most favorable to plaintiff, it is clear he had access to his vehicle because he was able to reach it safely. See, generally, *id.*

Affirmed.

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter