STATE OF MICHIGAN

COURT OF APPEALS

LASHANDA SNELL,

Plaintiff-Appellant,

v

AVALON PROPERTIES OF GRAND RAPIDS, L.L.C., and TURF PLUS LAWN CARE AND PLOWING, L.L.C.,

Defendants-Appellees.

UNPUBLISHED
May 24, 2016

No. 327658
Kent Circuit Court
LC No. 2014-003401-NO

Before: O'BRIEN, P.J., and K. F. KELLY and FORT HOOD, JJ.

Fort Hood, J. (*dissenting*).

I respectfully dissent from the majority opinion. I disagree with the majority's conclusion that plaintiff failed to establish a genuine issue of material fact in regard to her premises liability claim. Additionally, I believe that the trial court erred in denying plaintiff's motion to amend her complaint. Accordingly, I would reverse the trial court and remand for further proceedings.

Regarding the premises liability claim, I would hold that there was a genuine issue of material fact whether the danger at issue, the snow covered driveway, was effectively unavoidable. I agree with the majority that Michigan courts have determined that where a plaintiff has a choice whether to confront a dangerous condition, the condition is not effectively unavoidable. *Hoffner v Lanctoe*, 492 Mich 450, 468-269; 821 NW2d 88 (2012). Recently, our Court analyzed this issue in *Lymon v Freedland*, ____ Mich App ___, ___; ___ NW2d ___ (2016) (Docket No. 323926); slip op at 7-9. In *Lymon*, the plaintiff was a home health aide, who slipped on a snowy and icy driveway outside the home of an elderly patient. *Id*. at ___; slip op at 8. This Court determined that there was a question of fact whether the driveway was effectively unavoidable. *Id*. at ___; slip op at 8. The Court held that while the plaintiff alternatively could have "traversed the steep yard next to the driveway," the evidence showed that this route "also contained slippery hazardous conditions." *Id*. at ___; slip op at 8. The Court concluded that there was a question of fact whether the driveway was effectively unavoidable. *Id*. at ___; slip op at 9.

Here, there was an alternate route in that plaintiff had a garage in which she could park her car in lieu of parking in the driveway. However, I conclude that there was a question of whether the garage was available as an alternate route for plaintiff. Initially, I note that I am

unconvinced by plaintiff's claims that the garage was unavailable because she and her neighbor used the garage for storage. Plaintiff chose to occupy her garage with personal items instead of parking her vehicle there, and such a choice would not render the garage inaccessible. Moreover, plaintiff never asked her neighbors to move their belongings from her side of the garage. However, plaintiff also asserted that her garage door opener did not work, and claimed that her landlord knew of the malfunction but had not fixed the problem. The trial court stated that plaintiff's deposition testimony revealed that, even assuming plaintiff's garage door was not malfunctioning, it was clear that plaintiff had no intention of parking the car in her garage. However, that is a credibility determination not proper at summary disposition. The trial court is "not permitted to weigh the evidence or assess credibility on a motion for summary disposition." *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 705; 822 NW2d 254 (2012), citing *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). In addition, while the majority opines that plaintiff failed to prove that she could not cancel her doctor's appointment, I would hold that whether plaintiff should have reasonably been expected to cancel her doctor's appointment rather than encounter the snowy driveway also presented a question of fact for the jury.

I would also hold that plaintiff should be entitled to amend her complaint to include a violation of MCL 554.139. Ultimately, I conclude that there was a question of fact whether the driveway was fit for the use intended pursuant to MCL 554.139(1)(a). In *Allison v AEW Capital Management, LLP*, 481 Mich 419, 429-430; 751 NW2d 8 (2008), the Court held that one to two inches of snow in a parking lot would not render a parking lot unfit. However, here, while plaintiff testified that she was able to park her vehicle in the driveway, she also testified that there was as much as 10 inches of snow in the driveway. Whether plaintiff could reasonably access her vehicle with 10 inches of snow in the driveway presents a question of fact appropriate for the jury. Moreover, while it was true that discovery closed and deadlines for amendment had passed, the court rules support amendment of the complaint. MCR 2.118(A)(2) ("Leave shall be freely given when justice so requires."). Given my recommended disposition of the first issue, as well as the fact that much of the discovery already conducted pertains to this claim, I do not agree that defendants would be prejudiced by amendment of the complaint.

For the reasons stated, I would reverse and remand.

/s/ Karen M. Fort Hood