

STATE OF MICHIGAN
COURT OF APPEALS

GERALD GASS,

Plaintiff-Appellant,

v

CATTS REALTY COMPANY INC.,

Defendant,

and

SPARTAN STORES INC.,

Defendant-Appellee.

UNPUBLISHED

March 13, 2012

No. 302217

Roscommon Circuit Court

LC No. 10-728409-NO

Before: MURPHY, C.J., and HOEKSTRA and MURRAY, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant Spartan Store's motion for summary disposition pursuant to MCR 2.116(C)(10).¹ We affirm.

I. FACTS

On December 27, 2008, plaintiff drove to defendant's store, Glen's Market, in Houghton Lake. Plaintiff testified that rain had fallen overnight and that black ice had formed, but that when he travelled to the store the roads were clear and dry, and the store's parking lot appeared clear and dry as well. Plaintiff entered the store through the front entrance and exited through the same doors. On his way out of the store, plaintiff slipped and fell just outside the entrance. Plaintiff said he slipped on a patch of black ice that was three to five feet in diameter.

After falling, plaintiff reported the incident to Glen's store director, Bill Noeske. Noeske and plaintiff went outside to determine the location of his fall. Plaintiff first indicated the general area in which he fell, but eventually pointed out the specific spot at which the fall

¹ Defendant Cass Realty Company, Inc., was dismissed from the case through a stipulated order.

occurred. Noeske then scuffed his foot along the ground to test for the presence of ice or some other slippery substance, but found nothing. Noeske tested other spots in the general area, but found no ice or other slippery spots. However, plaintiff testified that the spot where he fell was in the same condition as when the fall occurred and that there was a dusting of snow and slip marks on the spot. Plaintiff testified that he did not know if the alleged ice was there when he entered the store, but that he paid attention to where he was walking and watched for ice as he entered the store.

Plaintiff filed suit alleging that defendant failed to maintain the premises in a reasonably safe condition. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that any icy condition was open and obvious, and that it had no notice of any ice that might have been present. The trial court granted defendant's motion, holding that there was no genuine issue of material fact that the black ice, if it existed at all, was open and obvious. As an alternative basis, the court held that there was no evidence that defendant had any notice of the alleged dangerous condition.

II. ANALYSIS

We review de novo a trial court's decision on a motion for summary disposition. *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 475; 776 NW2d 389 (2009). Summary disposition under MCR 2.116(C)(10) is appropriate when the moving party is able to demonstrate that there are no disputed material factual issues. *Coblentz v Novi*, 475 Mich 558, 568; 719 NW2d 73 (2006). The moving party can use affidavits, depositions, admissions, and other documentary evidence to support the position that no genuine issue of material fact exists. *Id.* at 567-568; MCR 2.116(G)(4). The non-moving party then has the burden of demonstrating through similar documentary evidence that there is a genuine issue of material fact. *Coblentz*, 475 Mich at 568-569. The trial court must examine the evidence provided by the parties in a light most favorable to the non-moving party when deciding whether to grant the motion. *Watts v Mich Multi-King, Inc*, 291 Mich App 98, 102; 804 NW2d 569 (2010). If genuine issues of material fact exist then summary disposition is inappropriate. *Id.* at 103.²

In general, a landowner owes a duty to an invitee to take reasonable steps to ensure that the premises are reasonably safe, and must warn an invitee of unreasonably dangerous conditions or dangers known to the landowner but unknown to the invitee. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). The landowner does not have a duty to warn an invitee of dangers that are open and obvious, because the invitee is reasonably expected to discover the danger. *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 478; 760 NW2d 287 (2008). A danger is open and obvious if it is discoverable to an average user of ordinary

² In his brief on appeal, plaintiff relies in part on outdated and overruled summary disposition standards. No longer must a court deny a motion for summary disposition unless it is "impossible" for the nonmoving party to support its claim at trial. Nor may a trial court deny summary disposition on the basis that a record "might be developed" that could cause reasonable minds to differ. *Smith v Globe Life Ins Co*, 460 Mich 446, 455 n 2; 597 NW2d 28 (1999); *Grand Trunk W R, Inc v Auto Warehousing Co*, 262 Mich App 345, 350; 686 NW2d 756 (2004).

intelligence upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). A landowner must warn of an open and obvious danger if special aspects make even the open and obvious danger unreasonably dangerous. *Lugo*, 464 Mich at 517.

Absent special circumstances, the hazards presented by visible ice and snow are open and obvious. *Slaughter*, 281 Mich App at 480-481. However, black ice is not an open and obvious danger absent indicia that it would have been visible upon casual inspection or other indicia that a potentially dangerous condition is present. *Id.* at 483. “As such, the circumstances and specific weather conditions present at the time of plaintiff’s fall are relevant” in determining whether the black ice was open and obvious. *Id.*

For two reasons we conclude that the trial court correctly granted summary disposition in favor of defendant. First, the trial court correctly held that there was no genuine issue of material fact that the condition of black ice, assuming it existed, was open and obvious. Plaintiff’s deposition testimony indicated that the roads and parking lot were dry even though freezing rain had fallen the previous night. Plaintiff saw snow on the ground surrounding the roads and parking lot, but the roads and lot themselves were clear. Plaintiff indicated that the temperature was below freezing, and that the wind had blown a dusting of snow in the area where he fell. This testimony, taken together, indicated that the weather conditions were such that a dangerous condition such as black ice could be present. *Slaughter*, 281 Mich App at 483. Additionally, plaintiff testified that a dusting of snow had accumulated on the walkway and that the mark he left when he slipped was evident because of that snow. Consequently, there was undisputed evidence that upon casual inspection the area could be slippery.

Second, the trial court’s alternative basis for dismissal was also sound. As defendant argues, the trial court also ruled that defendant did not have notice of the alleged condition, yet plaintiff has failed to address this issue on appeal. A landowner owes a duty to an invitee to take reasonable steps to ensure the premises are reasonable safe, and must warn an invitee of unreasonably dangerous conditions known to the landowner but unknown to the invitee. *Lugo*, 464 Mich at 516. This duty arises when the landowner has actual or constructive notice of the condition. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 188 (1995).

Noeske’s unrefuted deposition testimony was that defendant had no notice of the existence of any dangerous condition by the doors. Nothing in the record shows that defendant had actual notice of the black ice, nor is there any evidence to suggest that the condition existed for a period of time such that defendant had constructive notice of the condition. Consequently, even if there was a genuine issue of material fact on whether the condition was open and obvious, the trial court did not err in granting summary disposition on this alternative ground.

Affirmed.

/s/ William B. Murphy
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray