STATE OF MICHIGAN

COURT OF APPEALS

JOHN C. DOUGHERTY,

Plaintiff-Appellant,

v

NYKEL-SOMERSET MANAGEMENT, L.L.C. and SOMERSET APARTMENTS, L.L.C.,

Defendants-Appellees.

UNPUBLISHED
September 4, 2012

No. 303910
Oakland Circuit Court
LC No. 2010-111126-NO

Before: GLEICHER, P.J., and M. J. KELLY and BOONSTRA, JJ.

BOONSTRA, J (*dissenting*).

In this slip-and-fall case, the majority reverses the trial court's order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10). Because the record reflects a lack of notice to defendants of any dangerous condition, I respectfully dissent.

I. BASIC FACTS

Plaintiff's complaint arises out of injuries sustained by plaintiff when he slipped and fell on an icy sidewalk at an apartment complex owned and operated by defendants. On the day of the accident, plaintiff, a tenant of the apartment complex, left his apartment sometime around 2:00 or 3:00 p.m. to go to a shopping mall. Plaintiff testified that when he left the apartment, it was cold and overcast, but he did not remember it snowing, raining, or sleeting. There was no snow or ice on the sidewalk, although there was snow on the ground on both sides of the sidewalk. Evidence was presented that light snow fell on the morning of the incident and again later that evening (after plaintiff's fall), and that the temperature, which was above freezing for most of the day, became progressively colder. As plaintiff was walking back to his apartment in the evening, he fell on a patch of ice on the sidewalk and suffered injuries, including two broken ribs. At his deposition, plaintiff testified that he did not see the ice before he fell, that the ice completely covered the sidewalk (although he was unsure if it covered the sidewalk completely at the time of his fall or if the ice had started accumulating and had continued to accumulate following his fall), and that the area where he fell was not adequately lit because a nearby light was "located in the shade of" a large evergreen tree. Plaintiff did not produce any evidence that he or any other tenant had ever informed defendant of a problem with either ice or the lighting in the area. Nor was there any evidence that defendant discovered the alleged lighting condition during a "casual" inspection of the building. No evidence was set forth that any maintenance

person inspected the building and noticed a lighting issue prior to plaintiff's fall[1]. Plaintiff filed suit, alleging negligence on a premises liability theory, violation of MCL 554.139, nuisance in fact, and breach of implied contract.

II. LACK OF NOTICE

Plaintiff alleges that defendant owed him both a common-law and statutory duty of care. Plaintiff, as a tenant, was an invitee on defendant's premises. *Royce v Chatwell Club Apartments*, 276 Mich App 389, 392 n 2; 740 NW2d 547 (2007). In the context of premises liability claims, "[t]he invitor's legal duty is 'to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land' that the landowner knows or should know the invitees will not discover, realize, or protect themselves against." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995) (citations omitted). The premises possessor thus owes an invitee a duty to inform him of known dangers, as well as a duty to inspect the premises for reasonable defects. *Kroll v Katz*, 374 Mich 364, 373; 132 NW2d 27 (1965). The premises possessor does not, however, owe the invitee a duty to warn him of dangers of which the possessor is unaware and could not have discovered with reasonable care. *Id.* The mere existence of a danger does not establish liability, unless it is of "such a character or of such duration" that the premises possessor would have discovered it in the exercise of reasonable care. *Id.*, quoting Prosser on Torts (2d ed.), p. 459 (emphasis removed).

MCL 554.139 imposes a higher duty on residential landlords than on other invitors. *Benton v Dart Properties, Inc*, 270 Mich App 437, 443 n 2; 715 NW2d 335 (2006). "MCL 554.139 provides a specific protection to lessees and licensees of residential property in *addition* to any protection provided by the common law." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008) (emphasis in original). MCL 554.139(1) provides, in pertinent part, that:

> 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.

The effect of MCL 554.139(1)(a) is to impose a statutorily mandated contractual duty on a lessor of residential premises to keep common areas in a condition fit for their intended use. *Allison*, 481 Mich at 429. Our Supreme Court has adopted the approach of the Second Restatement of Torts in assessing a lessor's liability to a lessee for a breach the duty imposed by MCL 554.139. *Mobil Oil Corp v Thorn*, 401 Mich 306, 312; 258 NW2d 30 (1977), citing 2 Restatement Torts 2d, § 357. Thus, a lessor may be liable in tort for injuries caused to a lessee if the lessor fails to exercise reasonable care in performing his contractual obligation. *Id.*

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[1] The concurrence suggests that, by virtue of its use of this language, this dissent "misapprehends the constructive notice doctrine." *Ante* at 1, 3. I disagree. It is an undisputed and indisputable fact that there was no evidence of actual notice, which is what this language conveys. That there also was no constructive notice is demonstrated later in this dissent.

Importantly, § 357 is clear that a "a contract to keep the premises in safe condition subjects the lessor to liability only if he does not exercise reasonable care after he has had notice of the need for repairs." 2 Restatement Torts 2d, § 357, comment d. Further, statutes that impose new liabilities not found at common law must not be "extended by implication to abrogate established rules of common law." *Rusinek v Schultz, Snyder & Steele Lumber Co*., 411 Mich 502, 508; 309 NW2d 163 (1981) *(*citation omitted); *In re Black*, 83 Mich 513, 47 NW 342 (1890). At common law, a lessor is liable for injuries resulting from dangerous conditions on the land of which he knows or should have known. *Bertrand*, 449 Mich at 609; *Kroll*, 374 Mich at 373. A landlord is charged with the statutory duty to repair "all defects of which he knew or should have known." *Raatika v Jones*, 81 Mich App 428, 430; 265 NW2d 360 (1978). Thus, the common-law requirement of actual or constructive notice to a lessor is also a requirement for the establishment of liability under MCL 554.139(a). See also *Evans v Van Kleek*, 110 Mich App 798, 803; 314 NW2d 486 (1981).

The starting point for analyzing both plaintiff's premises liability claim and his claim under MCL 554.139 is therefore notice to the defendant. *Kroll*, 374 Mich at 373; *Hampton*, 236 Mich App at 604; *Evans*, 110 Mich App at 803. If defendant did not create the alleged condition, plaintiff must show that defendant knew about the condition, or should have known about it, and failed to take reasonable measures to prevent the injury. See *Clark*, 465 Mich at 419. Absent actual or constructive notice of the dangerous condition, a premises possessor cannot be shown to have breached his duty to the injured party, whether an invitee or a lessee, and summary disposition is appropriate. *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 706-707; 644 NW2d 779 (2002); *Whitmore v Sears, Roebuck & Co*, 89 Mich App 3, 8-10; 279 NW2d 318 (1979).

Constructive notice is notice imposed by law when, although a person did not have actual notice of a dangerous condition, the party should have known of the danger. *Siegel v Detroit City Ice & Fuel Co*, 324 Mich 205; 36 NW2d 719 (1949). Constructive notice can be inferred from evidence that the dangerous condition existed for a sufficient length of time or was of such a character that the landowner should have known of its existence. *Clark*, 465 Mich at 419; 634; *Hampton*, 236 Mich App at 603-604.

Plaintiff presents no evidence of defendant's actual notice of any icy condition, but rather argues that summary disposition was not appropriate because reasonable minds may differ regarding whether defendant had constructive notice of the icy condition of the sidewalk. I disagree. Viewed in a light most favorable to plaintiff, the evidence did not present a genuine issue of material fact regarding defendant's notice of the accumulation of ice.

No evidence was presented that plaintiff or anyone else had informed defendants of the icy condition before plaintiff's injury. There was also no evidence that anyone else had fallen on the ice before plaintiff's fall. In his deposition testimony, plaintiff admitted that he never complained to defendants about any problem with the sidewalk before his fall. Plaintiff presented no evidence that anyone else had ever complained about the condition of the sidewalk. Plaintiff also failed to present evidence that the icy condition was of such a nature or existed for a sufficient length of time such that defendants should have known of its presence. Plaintiff had walked on the same sidewalk only four to five hours before the incident and had observed no snow or ice on the sidewalk. Plaintiff conceded that he did not know where the ice came from or

how long it had been on the sidewalk at the time of his accident. No evidence established that precipitation fell between the time of plaintiff's walk on the sidewalk four to five hours before the incident and the fall. Although defendant owed plaintiff a duty of care both at common law and by statute, plaintiff failed to show that defendant had actual or constructive notice of the existence of the alleged accumulation of ice, and thus arguably breached that duty.

I disagree with plaintiff's contention that the weather conditions on the day of the incident put defendants on constructive notice of the icy condition of the sidewalk. The circumstantial evidence of local weather conditions favorable to the formation of ice, without more, does not create a reasonable inference that defendants had constructive notice of the specific patch of ice on which plaintiff fell. See *Altairi v Alhaj*, 235 Mich App 626, 640; 599 NW2d 537 (1999).

To its credit, the majority correctly notes a lack of any evidence that defendant had received notice of an icy condition, and that to impute notice of the icy condition to defendant, the jury would have to speculate as to exactly when the ice formed, which is impermissible. See also *Skinner v Square D Co*, 445 Mich 153, 164-65; 516 NW2d 475 (1994), overruled in part on other grounds in *Smith v Globe Life Ins Co*, 460 Mich 446, 455 n 2; 597 NW2d 28 (1999). However, the majority finds a fact question as to whether defendant should have noticed the allegedly defective lighting condition. I disagree that plaintiff has shown that a genuine issue of material fact exists. Plaintiff presented no evidence indicating that the allegedly obscured lighting condition was created by defendants, or that defendant had any actual notice of the condition. Moreover, a landlord does not have a duty to inspect the premises on a regular basis to determine if any defects exist, but only has a duty to repair any defects *brought to his attention* or found by *casual inspection* of the premises. *Raatika*, 81 Mich App at 430 (emphasis added). Plaintiff produced no evidence that he or anyone else had informed defendant of any lighting condition, or that defendant had discovered the lighting condition during casual inspection.

Additionally, I would not impute constructive notice to defendant of any lighting condition based on the evidence presented. Although trees do not sprout up overnight, I do not find compelling evidence that the "shade of a large evergreen tree" was here of "such a character or of such duration" that defendant would have discovered inadequate lighting in the exercise of reasonable care. *Kroll*, 374 Mich at 373, quoting Prosser on Torts (2d ed.), p. 459 (emphasis removed). Plaintiff argues only cursorily that the sidewalk was poorly lit; yet the majority has latched onto this bare assertion as a means of resurrecting plaintiff's claim. Plaintiff presented no evidence of *how long* the lighting was allegedly inadequate; thus I cannot find any basis for concluding that defendant should be charged with notice of such inadequacy. Given the dearth of evidence presented by plaintiff on this point, the concurrence posits, without any evidentiary basis whatsoever, that the alleged "poor lighting condition . . . *likely* existed for a considerable period of time before plaintiff fell." *Ante* at 3 (emphasis added).

In my view, this kind of judicial conjecture does not serve to create or support a finding of a genuine issue of material fact such as would justify the reversal of the trial court's grant of summary disposition. Although plaintiff's wife testified that the light was "weak," I believe that the chain of inferences that the majority makes from that statement—that defendant may have installed an inadequate bulb, and therefore had notice that as a nearby tree grew (over an unknown period of time) the lighting would be rendered inadequate, such that if ice formed on

the sidewalk tenants would be unable to see it, begins to resemble the same sort of impermissible "conjecture" the majority admits would be impermissible for a jury considering the icy patch in isolation. See *Skinner*, 445 Mich at 164-65.

III. CONCLUSION

Because plaintiff failed to establish a genuine issue of material fact as to defendants' actual or constructive notice of any allegedly dangerous condition, defendant was entitled to a judgment as a matter of law and the trial court's grant of summary disposition to defendant was proper. MCR 2.116(C)(10); see also *Derbabian*, 249 Mich App at 706-707.

I would therefore affirm the trial court's grant of summary disposition on both plaintiff's premises liability and statutory violation claims, due to the absence of a genuine issue of material fact regarding defendant's actual or constructive knowledge of the alleged condition.[2] For these reasons, I respectfully dissent.[3]

/s/ Mark T. Boonstra

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[2] Because I would find that plaintiff failed to establish a genuine issue of material fact as to defendants' notice of a dangerous condition, it is unnecessary to address, *e.g.*, whether any condition was "open and obvious" (for purposes of a premises liability claim) or whether the sidewalk was "unfit for its intended use" (for purposes of a statutory liability claim).

[3] I also would decline to disturb the trial court's dismissal of plaintiff's nuisance in fact claim because (a) plaintiff failed to properly present the issue for appeal by raising it in the statement of his questions presented in his appellate brief, MCR 7.212(C)(5); *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 221; 761 NW2d 293 (2008) (citation omitted), and (b) it was plainly without merit as a matter of law. A nuisance in fact results "where the natural tendency of an act is to create danger and inflict injury on person or property." *Radloff v State*, 116 Mich App 745, 756; 323 NW2d 541 (1982), remanded 417 Mich 894 (1983), on remand 136 Mich App 457 (1984). Plaintiff argues that defendants allowed a condition to exist that had a natural tendency to create danger. "It is well established that '[t]he gravamen of an action is determined by reading the claim as a whole' and looking 'beyond the procedural labels to determine the exact nature of the claim.'" *Tipton v William Beaumont Hosp*, 266 Mich App 27, 33; 697 NW2d 552 (2005) (internal citations omitted). Looking at plaintiff's claim as a whole, plaintiff's allegation is that defendant breached their duty to maintain the property in a safe condition. As a result, plaintiff's claim sounds in premises liability, not nuisance. See *James v Albert*, 464 Mich 12, 18-19; 626 NW2d 2001 (noting that when an injury arises out of a condition of the land, rather than the activity alleged to cause the condition, the resulting action is a premises liability action). I therefore would affirm the trial court's grant of summary disposition to defendant on plaintiff's nuisance claim. MCR 2.116(C)(10). For the same reason, I also would affirm the trial court's grant of summary disposition to defendant on plaintiff's breach of implied contract claim, which plaintiff in any event appears to have abandoned, see *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001). Neither of those claims should be revived based upon the majority's errant decision to reinstate plaintiff's premises liability and statutory claims.