STATE OF MICHIGAN

COURT OF APPEALS

GARY LOUKS,

Plaintiff-Appellant,

v

WIXOM VILLAGE COMMERCIAL, L.L.C., and RSM MANAGEMENT, L.L.C.,

Defendants-Appellees.

UNPUBLISHED
June 19, 2012

No. 304355
Oakland Circuit Court
LC No. 2010-111198-NO

Before: JANSEN, P.J., and CAVANAGH and HOEKSTRA, JJ.

PER CURIAM.

In this premises liability case, plaintiff appeals as of right the trial court's order granting defendants' motion for summary disposition. Because we conclude plaintiff failed to demonstrate a genuine issue of material fact in regard to whether defendants had notice of the dangerous condition, we affirm.

This case arises out of injuries sustained by plaintiff when he slipped and fell on a patch of black ice. On December 10, 2008, at about 6:00 p.m., plaintiff went to a shopping center managed by defendant RSM Management, L.L.C., and owned by defendant Wixom Village Commercial, L.L.C., located in Wixom, Michigan. According to plaintiff, it was a cold day and it was not snowing at the time of the incident, but there was standing snow on the ground. Plaintiff went to a pizzeria located in the shopping center and purchased a pizza. As he was rounding the corner of the building to return to his vehicle, plaintiff slipped and fell on his right knee and shoulder. Plaintiff stated that most of the sidewalk was dry, but after he slipped he noticed a patch of dark ice. Plaintiff also noticed a leaking overhead gutter, and came to believe that water dripping from the gutter onto the sidewalk led to the formation of the ice on which he slipped.

Co-owner of the pizzeria, Alex Grassi, was deposed and stated that the sidewalks in the shopping center were salted every morning, and that he spreads more salt on the sidewalk later in the day if he notices ice. Records indicated that the snow removal company employed by RSM Management salted the shopping center sidewalks using four bags of salt on the day of the incident. About once a week, the property manager also inspects the grounds for maintenance issues.

Plaintiff filed a complaint alleging negligence against RSM Management, and later filed an amended complaint adding Wixom Village Commercial. Defendants filed a joint motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). Defendants claimed that RSM Management owed no duty to plaintiff because it was the property manager and not an owner of the property, that the dangerous condition causing plaintiff's injury was open and obvious, and that defendants had no knowledge of the dangerous condition. A hearing regarding defendants' motion was held on May 11, 2011.

After hearing oral arguments, the trial court found that summary disposition was appropriate pursuant to MCR 2.116(C)(10). Specifically, the trial court found that while there were genuine issues of material fact in regard to whether RSM Management owed plaintiff a duty and whether the condition was open and obvious, summary disposition was appropriate because there were no genuine issues of material fact in regard to defendants' knowledge of the dangerous condition. Accordingly, the trial court granted summary disposition in favor of defendants and dismissed plaintiff's claims.

On appeal, plaintiff argues that the trial court erred in finding that there was no genuine issue of material fact regarding whether defendants knew, or should have known, of the dangerous condition that caused plaintiff's injuries.

We review a trial court's decision to grant summary disposition de novo. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). Summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim based on the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. *Id.* The evidence is viewed in the light most favorable to the nonmoving party. *Id.* at 567-568. "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to a judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Pursuant to MCR 2.116(G)(4), when a motion for summary disposition is supported by affidavits, depositions, admissions, or other documentary evidence, "an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." Appropriate judgment shall be entered against any party that fails to set forth specific facts showing a genuine issue of fact for trial. MCR 2.116(G)(4); *Maiden*, 461 Mich at 121.

"In a premises liability action, a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Benton v Dart Properties*, 270 Mich App 437, 440; 715 NW2d 335 (2006). The duty that a landowner owes to a visitor depends on the visitor's status at the time of the injury. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). It is undisputed that plaintiff was an invitee on December 10, 2008, when he went to a pizzeria in defendants' shopping center.

Generally, an invitor must "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). An invitor's liability must arise from a condition of which the invitor knew or a condition of such a character or duration that the

invitor should have known of it. *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001); *Hampton v Waste Mgt of Mich, Inc*, 236 Mich App 598, 604; 601 NW2d 172 (1999). The plaintiff has the burden of demonstrating that the defendant had actual knowledge of the dangerous condition or should have had knowledge of the dangerous condition due to the condition's character or duration. See *Benton*, 270 Mich App at 440; *Stitt*, 462 Mich at 597.

In this case, the trial court granted summary disposition in favor of defendants because it determined that there was no genuine issue of material fact in regard to whether defendants had actual knowledge of the black ice or should have reasonably discovered the black ice. On appeal, plaintiff argues that the trial court erred in determining that the undisputed facts demonstrated defendants lacked knowledge of the dangerous condition.[1] Specifically, plaintiff maintains that defendants should have reasonably discovered that water was dripping off the roof and gutters and forming ice on the sidewalk where plaintiff fell. Plaintiff argues that defendants should have known of this condition because plaintiff returned to the location of his fall in late January 2009, and again more than a year after his injury, and both times observed water dripping from the overhead gutter. On both occasions plaintiff took photographs depicting this condition. Plaintiff argues that the fact that the condition was not remedied after his fall creates a genuine issue of material fact in regard to whether defendants were reasonably maintaining the premises, and accordingly, demonstrates that defendants reasonably should have discovered the dangerous condition before he fell.

Plaintiff also argues that because defendants admit the area is regularly salted, salt is kept on the premises, and a property manager is employed to inspect the property for maintenance issues, defendants were aware that ice can form, and thus, knew or should have known about the dangerous condition. Finally, plaintiff points to the fact that Grassi admitted to observing water drip off the roof all over the building when snow was melting or it was raining as evidence that defendants had notice that a drip from the roof could cause a dangerous icy condition on the sidewalk.

We find plaintiff's arguments unavailing. RSM Management's property manager's deposition testimony was that she walked the property once per week to look for problems and did not see a leak in the gutter or the patch of ice. Plaintiff responded with the evidence that Grassi, who was a tenant in the shopping center owned and managed by defendants, noticed water dripping from the roof, but Grassi's observations do not demonstrate that defendants had actual knowledge of the condition. Grassi was not obligated to report the property's condition to defendants, and in fact did not report the condition to defendants. Thus, there is nothing to suggest that defendants had actual knowledge of the dangerous condition or that this condition existed for an amount of time sufficient to infer that defendants should have known that it could be dangerous.

[1] We note that on appeal defendants argue only that the trial court properly determined that defendants lacked knowledge of the dangerous condition. Defendants do not address the trial court's decision that there were genuine issues of material fact in regard to the issue of RSM Management's duty and the open and obvious nature of the condition.

Further, with regard to the evidence of plaintiff's follow up visits and photographs, we note that photographs taken of the condition after plaintiff was injured do not establish that defendants had knowledge of the dangerous condition at the time plaintiff was injured. More to the point, the fact that plaintiff observed ice and water dripping from the overhead gutter on two occasions after his fall does not demonstrate that defendants failed to reasonably maintain the premises. Plaintiff submitted no evidence regarding the condition of the roof and gutters. Plaintiff's photographs depict an icicle hanging from the gutter, and ice and water on the ground in the location where he fell. The fact that water drips from the gutter does not itself prove that the gutter or roof was in need of repair. Indeed, plaintiff did not submit any evidence of a defect present at the location where he observed water dripping from the gutter that established the need for repairs. Accordingly, plaintiff's subsequent visits and photographs do not create a genuine issue of material fact in regard to whether a defect existed that should have been discovered.

Next, plaintiff's arguments regarding the fact that the property is regularly salted, salt is kept on the premises, and a property manager regularly inspects for maintenance issues essentially amount to an argument that because defendants were aware that dangerous conditions could form in the winter, defendants were aware or should have been aware of the dangerous condition in this case. This Court has previously rejected similar reasoning. In *Altairi v Alhaj*, 235 Mich App 626, 640; 599 NW2d 537 (1999), this Court stated, "[i]nsofar as plaintiff seeks to use general knowledge of local weather conditions to show that defendant should have known [about the icy condition], the same knowledge can be imputed to plaintiff." This Court in *Altairi* suggested circumstantial evidence that ice may have formed due to weather conditions does not allow a reasonable inference that a defendant had constructive notice of the dangerous condition. *Id.* at 640 (finding that a meteorologist's affidavit regarding general weather conditions was not evidence of the defendant's knowledge of ice). Accordingly, plaintiff's argument that defendants should have known about the dangerous condition because defendants' use of salt proved defendants knew ice could form does not demonstrate that defendants knew or should have known about the specific dangerous condition that led to plaintiff's injury.

Accordingly, we conclude that when viewed in the light most favorable to plaintiff, the evidence does not demonstrate a genuine issue of material fact in regard to whether defendants knew or should have known about the dangerous condition. Therefore, the trial court properly granted summary disposition in favor of defendants.

Affirmed.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra