STATE OF MICHIGAN

COURT OF APPEALS

TERRI SINGLETON,

Plaintiff-Appellant,

v

MID MICHIGAN INVESTMENT COMPANY d/b/a OMARS OF LANSING,

Defendant-Appellee.

UNPUBLISHED
September 20, 2012

No. 306011
Ingham Circuit Court
LC No. 10-000713-NO

Before: SERVITTO, P.J., and FITZGERALD and TALBOT, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals as of right from an order granting summary disposition in favor of defendant. Because the trial court did not properly apply the standard applicable in proceedings brought pursuant to MCR 2.116(C)(10), and because questions of material fact exist which preclude summary disposition, we reverse and remand for further proceedings.

On October 1, 2008, plaintiff attended a fundraiser that was held on the second floor of a bar defendant owns in downtown Lansing. Plaintiff alleged that a wet substance caused her to fall as she was descending the wrought-iron spiral staircase inside the bar and testified to the same at her deposition. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), contending that there was no evidence of any material on the staircase and/or that any condition which resulted in plaintiff's fall was open and obvious. At oral argument on its motion, defendant further pointed out that plaintiff's medical records indicate that while being treated at the hospital after her fall, defendant told hospital staff that she had simply missed a step while descending the staircase. The trial court granted summary disposition in defendant's favor.

We review de novo a trial court's decision to grant summary disposition. *Greene v A P Prod, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006). When summary disposition is sought under MCR 2.116(C)(10), documentary evidence is viewed in the light most favorable to the nonmoving party. *Id*. Summary disposition is properly granted "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 461; 646 NW2d 455 (2002).

On appeal, plaintiff asserts that the trial court incorrectly applied the above standard and made a factual determination when assessing defendant's motion. We agree.

"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, Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006). Under common law, the duty a defendant owes will depend on the plaintiff's status on the land. *Id*. A plaintiff who is invited onto the defendant's land for commercial purposes is an invitee. *Id*. A premises owner owes an invitee the duty "to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). This duty does not, however, extend to "dangers that are so obvious and apparent that a person may reasonably be expected to discover them and protect himself or herself," i.e., those that are open and obvious. *Laier v Kitchen*, 266 Mich App 482, 487; 702 NW2d 199 (2005). An objective test is used when considering whether a condition is open and obvious. *Novotney v Burger King Corp* (*On Remand*), 198 Mich App 470, 475-476; 499 NW2d 379 (1993). Specifically, the test is whether "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection." *Id*.

As the moving party, defendant had the initial burden of supporting its position that it was entitled to judgment as a matter of law with documentary evidence. *Coblentz v Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). Its position was that the condition of the staircase was open and obvious, so it did not have a duty to protect plaintiff from the dangers it presented. Once the moving party has met its burden, the burden shifts to the nonmoving party to show that a genuine issue of material fact exists for trial. *AFSCME Council 25 v Detroit*, 267 Mich App 255, 261; 704 NW2d 712 (2005). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When the truth of a material factual assertion depends on credibility, a genuine factual issue exists and summary disposition may not be granted. *White v Taylor Distributing Co*, 275 Mich App 615, 625; 739 NW2d 132 (2007).

Here, the trial court found that evidence in plaintiff's medical record indicating that she had missed a step was more credible than her deposition testimony that she had slipped on a wet substance. The court went on to conclude that the dangers of missing a step are open and obvious. Again, however, the trial court may not make factual findings or weigh credibility when deciding a motion for summary disposition. *In re Handelsman*, 266 Mich App 433, 437; 702 NW2d 641 (2005). The motion should have been evaluated viewing the evidence in the light most favorable to plaintiff, i.e., she slipped on a wet substance while descending the spiral staircase in the dimly lit bar. It is irrelevant for purposes of summary disposition that defendant had evidence that calls this into question. The conflicting evidence, at most, simply presented a question of material of fact for resolution by the jury. The trial court thus did not apply the proper standard in reviewing, and ultimately granting defendant's motion for summary disposition.

Had the trial court applied the proper standard, summary disposition would have nevertheless been inappropriate. Defendant contends that the substance plaintiff asserts she

slipped on was visible upon casual inspection because plaintiff admitted that she was able to see the liquid from the waitress stand after she had fallen. However, this misconstrues plaintiff's testimony. Plaintiff stated that after she fell, she was able to look back up and from that vantage point, was able to see the wet substance on the spiral staircase. A reasonable jury could infer from her testimony that the substance would only have been visible once a customer was on the ground. It may not have been clearly visible from plaintiff's vantage point when she was descending the staircase.

The lighting and the staircase's shape could also have affected whether the condition was open and obvious. A copy of the bar's website entered into evidence shows that defendant describes the upstairs as having a "candlelight" atmosphere, which suggests that the area was dimly lit. In addition, the staircase was spiral. Thus, plaintiff may not have been able to see the entire staircase as she descended. The curvature of the staircase could also have distorted what lighting was available and could have substantially limited plaintiff's ability to see a wet substance on a stair. These are all factual issues that a jury must consider, so it was inappropriate for the trial court to conclude that the danger was open and obvious as a matter of law. Accordingly, we conclude that summary disposition was inappropriate.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald