NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION III
No. CA08-1245

ROBERT GLORIS and CHRISTINA JARBOE APPELLANTS V. BOBBY J. WHITFIELD and RPM MANAGEMENT COMPANY, INC. APPELLEES	**Opinion Delivered** May 6, 2009 APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, [NO. CV07-9781] HONORABLE ELLEN B. BRANTLEY, JUDGE AFFIRMED

JOSEPHINE LINKER HART, Judge

Robert Gloris and Christina Jarboe appeal from the grant of summary judgment in favor of appellees Bobby J. Whitfield and RPM Management Company, Inc. (RPM). Appellants sued appellees for injuries that they suffered when a deck, attached to a house owned by Whitfield and managed as rental property by RPM, collapsed. On appeal, appellants argue that the trial court erred in granting summary judgment because the language of the lease and lease addendum in which RPM has a duty to make "major repairs" is ambiguous so as to create a material issue of fact; and whether RPM reasonably fulfilled its duty and obligations under the lease and lease addendum was a fact question that should be decided by a jury. We affirm.

On August 6, 2005, appellants attended a party hosted by Larry Moorhead, Jeffrey Biever, and Jonathan Hall, the three tenants who leased Whitfield's house. They joined perhaps as many as twenty-eight other guests on a twelve-by-twelve foot deck that was

affixed to the second floor of the dwelling. In the early morning hours of August 7, the deck suddenly broke away from the house, causing everyone on it to fall to the ground. The appellants were among those people injured in the mishap. They brought suit against Whitfield and RPM.

On May 6, 2008, Whitfield moved for summary judgment. He asserted that because the appellants were social guests, they were licensees of the tenants under Arkansas law. As such he only owed the appellants a duty to refrain from injuring them through willful or wanton conduct or, alternatively, to warn them of known hidden dangers or defects. Further, he averred that he had no knowledge of any defect concerning the deck. Attached to his motion were the depositions of Jarboe, Gloris, and Tisouli Acosta, all of whom were guests at the party; the lease; and Whitfield's affidavit stating that prior to August 7, 2005, he had "no knowledge of any defect in the deck and had no knowledge that the deck needed to be repaired."

In Acosta's deposition, he stated that the deck "looked stable" and that he did not observe anything wrong with the deck. Likewise, in her deposition, Jarboe stated that in the numerous times she visited the house and partied on the deck prior to its collapse, there was nothing about the deck's condition or structural integrity that gave her concern. In Gloris's deposition, he also stated that he was a frequent visitor to the residence in question, and aside from observing that the deck appeared to have been built with the house, he did not suspect that there were any problems with the deck. According to Gloris, there was "a loud instant crack" and the deck "pulled away" from the house, spilling the guests onto the ground.

On May 13, 2008, RPM joined Whitfield's summary-judgment motion, but also placed before the court an affidavit by Pam Penor, the manager of RPM's rental property management unit. Penor stated that neither she nor anyone else at RPM had any knowledge of a defective condition of the deck, any deteriorated condition of the wood, or knowledge that the deck might collapse.

Appellants opposed the summary-judgment motion, asserting that the Lease created a contractual duty to repair and maintain the property,[1] and that Whitfield and RPM failed to perform the agreement in a reasonable manner. They asserted that appellees breached their duty because they "did not replace, treat the wood, or apparently even inspect a 33-year- old deck that was outside and exposed to the weather." Further, appellants claimed that the appellees breached their duty to warn because they did not inform them of the age of the deck and how it had been maintained. Attached to appellants' response was the management agreement between Whitfield and RPM; a copy of the Lease; pictures depicting where the

---

[1] Appellants find this duty in the Lease Addendum which states:

LESSOR will be responsible for all major repairs to the building structure and fixtures resulting from normal wear and tear, plus normal maintenance on appliances, heating and air conditioning equipment, repair of plumbing pipes (excluding interior stoppages), sewer lines and electrical wiring.

LESSEE will be responsible for normal operating expenses such as electrical fuses, air conditioning filters, window panes, toilet and sink stoppages, gutter cleaning, pest control, etc.

Appellants also rely on a provision in the Lease, to wit:

OTHER AGREEMENTS: Lessee shall make no alterations on the leased premises without the consent of lessor and that lessor, its officers, and agents, shall have the right to enter upon said premises at all reasonable times for the purpose of inspection and to make necessary replacements and repairs.

deck had been attached to the house; an affidavit from Clint Palmer stating that he was the photographer and that he had also collected a piece of wood from the deck; depositions from Gloris, Jarboe, Whitfield, and Penor; a copy of an October 20, 2000, inspection of the house; two letters from Penor to the tenants giving them notice of their scheduled "interior inspection" of the rental property; and a memo from RPM to all its tenants regarding its policy on its right to enter rental property for "inspection and to make necessary replacements and repairs."

In his deposition, Whitfield stated that he formerly lived in the house, but subsequently began to rent it in 1985 or 1986. He claimed that he periodically inspected the structure. Whitfield confirmed that the deck had been originally constructed with the house in 1972. He did not recall treating the deck with seals or preservatives. Penor stated that, in accordance with her duties at RPM, she inspected rental properties when they were vacant and periodically while they were occupied. In these inspections, she looked for "obvious signs of wear and tear, chipping paint, rotten boards, . . . just the obvious things that you can see." Penor claimed to have no knowledge about the maintenance history of the deck. She considered replacement of the deck to be a "major repair," noting that it cost $1600 for Whitfield to replace the structure. Penor stated that she viewed the deck shortly after it collapsed and noted that there was rotted wood "inside that was not visible from the outside."

At the hearing on the summary-judgment motions held on June 18, 2008, appellants essentially argued that their proof of a defect in the deck lay in the fact that it was dry rotted

and in the fact that the deck was thirty years old. Further, they asserted that the Lease Addendum imposed a duty to repair. At that time, they did not assert that there was any ambiguity in the Lease. Appellees argued that the duty to repair only arose after the deck collapsed and was "broken." The trial judge found that more proof was required beyond the age of the deck and its maintenance history for the appellants' case to survive summary judgment. The appellants timely filed a notice of appeal.

In reviewing summary-judgment cases, we need only decide if the trial court's grant of summary judgment was appropriate based on whether the evidence presented by the moving party left a material question of fact unanswered. *Bradley v. Welch*, 94 Ark. App. 171, 228 S.W.3d 559 (2006). Once the moving party makes a prima facie showing that it is entitled to summary judgment, the opponent must meet proof with proof by showing a material issue of fact. *Moses v. Bridgeman,* 355 Ark. 460, 139 S.W.3d 503 (2003).

Appellants first argue that the language of the Lease and Lease Addendum in which RPM has the duty to make major repairs is ambiguous so as to create a material issue of fact precluding summary judgment. Specifically, they assert that the definitions of "major repairs" and "normal wear and tear" are open to interpretation and therefore ambiguous and should be left to a jury to decide their meaning. Further, appellants assert that there was a disagreement as to when the duty to make repairs arose. Additionally, appellants contend that inspections were "contemplated" by the lease as evidenced by the memo and notice of inspection letters, and there was a question for the jury as to whether RPM acted unreasonably by apparently not making any inspections of the deck between October 2000

and August 2005, knowing that the deck had never been treated or replaced and that it was thirty years old.

We note first that our analysis of this issue is hampered by the fact that the complaint was not made a part of the record before us. This omission is significant because if a moving party fails to offer proof on a controverted issue, summary judgment is not appropriate, regardless of whether the nonmoving party presents the court with any countervailing evidence. *See Moses v. Bridgeman*, *supra*. However, we only have before us the summary-judgment motions filed by the appellees. As noted previously, appellees moved for summary judgment because they asserted that there was no material issue of fact regarding the appellants' status as licensees, that they had not willfully or wantonly engaged in conduct that would injure appellants, and that they did not know of any defect in the deck, so they had no duty to warn. Appellants failed to meet proof with proof as to any of these points. Regarding knowledge of the deck's defects, we believe that the trial judge did not err in finding that the appellants were required to present more than the mere age of the deck to prove that appellees should have been aware of some latent defect. There was, of course, no testimony concerning the useful life of wood decks. Moreover, the only testimony regarding the location of the "dry rot" was presented by Penor who affirmatively stated that it was in a place that could not be observed. Accordingly, appellants have failed to meet proof with proof.

We also find unavailing appellants' argument that summary judgment was inappropriate because the Lease and Lease Addendum were ambiguous and therefore the jury was entitled to decide the case. The appellants never argued to the trial court that the

definitions of "major repairs" and "normal wear and tear" are ambiguous. It is settled law in Arkansas that appellate courts will not address an argument raised for the first time on appeal. *Sykes v. Williams*, 373 Ark. 236, --- S.W.3d ---- (2008). We are mindful that there was a discussion before the trial court concerning the duty to make repairs on the part of appellees. However, the contractual provision in the Lease upon which appellants rely merely apportions responsibility between Lessor and Lessee when a repair is necessary. The plain wording of the Lease does not impose a contractual duty on the Lessor to "maintain" the premises in "reasonable state of repair as may be required to keep and maintain the same in good and tenable condition" as the plain wording of the lease at issue in *Denton v. Pennigton*, 82 Ark. App. 179, 119 S.W.3d 519 (2003), clearly did.

Finally, with regard to the appellants' argument concerning inspections, we do not believe that they created a duty on the part of the appellees that exceeded the common-law duties owed to licensees. In the first place, the plain wording of the documents presented to the trial court indicated that the purpose of the inspections was to insure that the tenants were not damaging the leasehold. Secondly, there was proof that Whitfield and Penor conducted inspections. There was no countervailing proof offered by the appellants that a more thorough inspection would have revealed the latent defects in the deck.

For their second point, the appellants argue that a jury should decide whether RPM reasonably fulfilled its duty and obligations under the Lease and Lease Addendum. They contend that RPM had a duty to warn licensees of any hidden defect that the licensee does not know about or has no reason to know exists. The appellants assert that the age and

maintenance history of the deck were essentially a defect that the appellees had a duty to warn about. They cite *Delt v. Bowers*, 97 Ark. App. 323, 249 S.W.3d 162 (2007) for the proposition that a lessor is liable when the lessor has superior knowledge of an unreasonable risk of harm. We disagree.

We decline appellant's invitation to hold that, as a matter of law, the mere age of the deck and arguable lack of maintenance give rise to a duty to warn licensees that it was defective. Again, as we noted previously, there was no proof about the useful life of a deck. Furthermore, we know from Gloris's deposition that the age of the deck was apparent to him. It is settled law that the duty to warn does not extend to obvious dangers or risks that the licensee should have been expected to recognize. *See Dorton v. Francisco*, 309 Ark. 472, 833 S.W.2d 362 (1992). The appellants' resort to *Delt v. Bowers*, *supra*, does not compel a different result. That case did not involve a lessor, but rather a union member who was injured by a motorist near her employer's manufacturing plant, and the issue was what duty of care her union owed to her.

Affirmed.

GLADWIN and KINARD, JJ., agree.