DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

CITY OF NAPLES, FLORIDA and
JILL GASS,

Appellants,

v.

CHOPS CITY GRILL, INC.,

Appellee.

No. 2D19-2836

December 29, 2021

Appeal from the Circuit Court for Collier County; Hugh D. Hayes, Judge.

Christopher D. Donovan, James D. Fox and Sara F. Hall of Roetzel & Andress, LPA, Naples, for Appellant City of Naples.

Brian J. Lee of Morgan & Morgan, Jacksonville, for Appellant Jill Gass.

Sharon C. Degnan of Kubicki Draper, Orlando, for Appellee.

SILBERMAN, Judge.

The City of Naples and Jill Gass challenge a partial final judgment that enters summary judgment in favor of Chops City Grill, Inc. (Chops), in Ms. Gass's negligence action against the City and Chops. Because Chops did not carry its burden to establish that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law, we reverse and remand for further proceedings. Based on our determination, we need not reach the second issue that the City raised. Additionally, we reject without discussion Chops' argument that we should dismiss this appeal.

In October 2015, Ms. Gass and her then boyfriend, George Quinn, were on their way to meet another couple at a restaurant in Naples. Mr. Quinn was driving and dropped Ms. Gass off in front of a different restaurant, Chops. Mr. Quinn then left to park the car elsewhere. After Ms. Gass exited the car, she stepped off the street and onto the sidewalk. Within a few steps she fell to the ground and was injured. She was unable to pinpoint exactly where she fell or what caused her to fall, but it was in an area with pavers in front of Chops. She acknowledged that she was walking towards the restaurants in that area "to see which one [she] was supposed to go into."

Ms. Gass initially filed suit against the City and later added Chops as a defendant. She alleged that the City was liable as it "was the owner and in possession and/or had custody and control of that certain walkway" on which she fell. She asserted that she was a business invitee/guest of the City of Naples and that the City "negligently maintained the premises by allowing a defective and/or dangerous and uneven walkway to exist." She claimed that the walkway was unsafe, that the City knew of the "negligent condition" of the sidewalk, and that the City's negligence was the proximate cause of her injury.

Ms. Gass made similar allegations against Chops. She added that Chops "negligently and/or incorrectly installed the walkway pavers, making them unsafe, defective and dangerous." She asserted that Chops failed to reasonably maintain the pavers and/or created a tripping hazard. Finally, she asserted that Chops knew of the danger and that its negligence was the proximate cause of her injury.

In their answers, the City and Chops denied liability and raised several affirmative defenses. Eventually, Chops moved for entry of a summary judgment against Ms. Gass. Chops asserted

that it owed no duty to Ms. Gass, that Ms. Gass fell on the City's property, and that Chops "had no control, ownership, and/or role in the construction or maintenance, of the" sidewalk. Chops attached to its motion an unauthenticated copy of its lease for the premises.

On June 26, 2019, the trial court conducted a hearing on the motion for summary judgment. Although no court reporter was present, the parties submitted to the trial court and the court approved a "Stipulated Order Settling and Approving the Statement of the Evidence/Proceedings." The order reflects that Chops was not the restaurant to which Ms. Gass and Mr. Quinn were headed: Ms. Gass "fell as she was walking down the sidewalk, intending to patronize another business." The order also summarizes the parties' respective arguments and sets forth the trial court's oral ruling at the conclusion of the hearing. As stated in the order: "The Court held that Plaintiff had alleged that she fell on the pavers. In doing so, the Court cited to Plaintiff's deposition. The Court also held that based on the Building Lease Agreement, Chops City was not responsible for the pavers."

On appeal, the City and Ms. Gass contend that Chops failed to carry its burden to establish that there are no genuine issues of

material fact and that it is entitled to judgment as a matter of law. Specifically, they assert that Chops failed to show that it had no duty to Ms. Gass concerning the paver area where Ms. Gass tripped and fell. In response, Chops argues that it has no duty to maintain the public sidewalk in front of its restaurant in a safe condition and that it is the City that owes this legal duty to Ms. Gass.

Appellate review of a summary judgment is de novo. *Lee Cnty. Dep't of Transp. v. Island Water Ass'n*, 218 So. 3d 974, 976 (Fla. 2d DCA 2017). Summary judgment is proper only when no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. *Id.* (citing *Cook v. Bay Area Renaissance Festival of Largo, Inc.*, 164 So. 3d 120, 122 (Fla. 2d DCA 2015)). The possibility of a genuine issue of material fact renders a summary judgment inappropriate. *Id.* The movant "carries the initial burden of establishing the absence of any genuine issue of material fact and entitlement to judgment as a matter of law, and" the party opposing summary judgment has no duty "to demonstrate the existence of such issue until after the movant has satisfied his initial burden." *Jones Constr. Co. of Cent. Fla. v. Fla. Workers' Comp. JUA, Inc.*, 793 So. 2d 978, 979 (Fla. 2d DCA 2001).

A movant has an "even more onerous" burden in a negligence action involving a slip and fall. *Tallent v. Pilot Travel Ctrs., LLC*, 137 So. 3d 616, 617 (Fla. 2d DCA 2014) (quoting *Hervey v. Alfonso*, 650 So. 2d 644, 646 (Fla. 2d DCA 1995)). To be entitled to summary judgment, a defendant must "establish unequivocally the absence of negligence, or that the plaintiff's negligence was the sole proximate cause of the injury." *Id.* (quoting *Hervey*, 650 So. 2d at 646).

The issue in a premises liability case of whether a defendant has a duty of care is not dependent upon ownership of the premises; rather, "the appropriate inquiry is whether the party has the ability to exercise control over the premises." *Metsker v. Carefree/Scott Fetzer Co.*, 90 So. 3d 973, 977 (Fla. 2d DCA 2012). "A party who has control over premises has a duty of care to keep the premises in repair." *Lee Cnty.*, 218 So. 3d at 977 (first citing *Cook*, 164 So. 3d at 122; and then citing *Metsker*, 90 So. 3d at 977). Two parties may have a duty of care when both share control of the premises. *Lee Cnty.*, 218 So. 3d at 977 (citing *Metsker*, 90 So. 3d at 977); *see also Craig v. Gate Mar. Props., Inc.*, 631 So. 2d 375, 378 (Fla. 1st DCA 1994) (stating that a party "who assumes control over the premises in question, no matter under what guise, assumes

also the duty to keep them in repair, and the fact that others are under a duty which they fail to perform is no defense to one who has assumed control, thereby bringing others within the sphere of danger" (quoting *Arias v. State Farm Fire & Cas. Co.*, 426 So. 2d 1136, 1138 (Fla. 1st DCA 1983))).

Although Chops argued the provisions of its lease to the trial court, that does not resolve the issue. As this court has stated, "[D]espite a contract, a party who exercises control over property may have a duty to maintain a premises in a reasonably safe condition." *Lee Cnty.*, 218 So. 3d at 977. Moreover, "[a] tenant's ability to manage and control an area is a question of fact for a jury to decide." *Burton v. MDC PGA Plaza Corp.*, 78 So. 3d 732, 736 (Fla. 4th DCA 2012).

Chops failed to meet its burden to establish the absence of negligence. *See Tallent*, 137 So. 3d at 617. Ms. Gass fell on the paver sidewalk in an area she claimed was owned, possessed, or controlled by Chops, although she could not state precisely where on that sidewalk she fell. Under the facts here, Chops was required to prove that it had no duty of care as to the paver sidewalk in front of its restaurant. Chops claims that the area where Ms. Gass fell

was the sidewalk owned by the City; however, ownership is not the test. And even if the lease did not require Chops to maintain the pavers, that does not mean that Chops had no duty of care if it exercised control over the area along with the City. *See Lee Cnty.*, 218 So. 3d at 977; *Metsker*, 90 So. 3d at 977.

Chops failed to provide summary judgment evidence that it did not have control over the paver area. We note that, among other things, Ms. Gass argued to the trial court that Chops had control over the area where she fell based on provisions of the Naples Municipal Code which allow a restaurant operator to use sidewalks for outdoor dining. The City also argued that the lease refuted Chops' argument that it had no control over the paver sidewalk. For example, the lease permitted Chops to place "sandwich board signage" on the sidewalks adjoining the premises and required Chops to keep the areas immediately adjoining the premises clean and free of obstructions.

The trial court granted summary judgment on the basis that under the lease Chops was not responsible for the pavers. But that does not account for the possibility that more than one party may have control over the area. *See Metsker*, 90 So. 3d at 977 ("Two or

more parties may share control over land or business premises."). Based on Chops' failure to provide evidence that it did not have control over the area where Ms. Gass fell and thus had no duty concerning the area, summary judgment on that basis was improper. *See Lee Cnty.*, 218 So. 3d at 977 ("[A]n agreement between two parties does not necessarily absolve a party from a duty to the public."). Therefore, we reverse the final summary judgment and remand for further proceedings.

Reversed and remanded.

BLACK and SLEET, JJ., Concur.

Opinion subject to revision prior to official publication.