Third District Court of Appeal

State of Florida

Opinion filed July 1, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-1422
Lower Tribunal No. 17-22589

Reina I. Echevarria and Jorge Echevarria,
Appellants,

vs.

Lennar Homes, LLC, etc.,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Mavel Ruiz, Judge.

Philip D. Parrish, P.A., and Philip D. Parrish; The Gutierrez Firm, and Jorge P. Gutierrez, Jr., for appellants.

Gordon Rees Scully Mansukhani LLP, and David M. Gersten and Ryan M. Wolis, for appellee.

Before EMAS, C.J., and SCALES and MILLER, JJ.

SCALES, J.

This is a premises liability action where appellant Reina I. Echevarria, the co-plaintiff below, sustained injuries from a fall while exiting a model home constructed by the defendant below, appellee Lennar Homes, LLC ("Lennar"). The trial court granted final summary judgment in favor of Lennar on Mrs. Echevarria's negligence claim,[1] holding that Lennar owed no duty to Mrs. Echevarria – either to warn of a dangerous condition or to maintain the premises in a reasonably safe condition – because the single-step transition that allegedly caused Mrs. Echevarria's fall was open and obvious and not inherently dangerous. Because we conclude there is an issue of material fact as to whether Lennar, through an uncommon design or mode of construction, created a hidden danger on its property that a prudent invitee would not anticipate, we reverse the final summary judgment and remand for further proceedings.

I. RELEVANT FACTS AND PROCEDURAL BACKGROUND

On February 14, 2016, Mrs. Echevarria fell and was injured while visiting the sales complex at Lennar's Isles of Oasis housing development in Homestead, Florida. On September 22, 2017, the Echevarrias filed a two-count complaint against Lennar, seeking damages for negligence (count I) and loss of consortium (count II).

[1] The trial court also granted final summary judgment in favor of Lennar on Mr. Echevarria's claim for loss of consortium.

The complaint alleged that when Mrs. Echevarria exited Lennar's model home for the first time, she could not see the step down from the raised, front porch onto the adjacent walkway. The Echevarrias asserted that Lennar created a dangerous condition – i.e., an optical illusion – because the walkway and porch were both "covered by the same colored brick pavers" and the porch "blended in perfectly with the adjacent walkway, making the step invisible to the naked eye as you exited the home." The Echevarrias alleged that Lennar had created a dangerous condition by maintaining this optical illusion, thus breaching both its duty to warn and its duty to maintain the premises in a reasonably safe condition.

Consistent with the complaint's allegations, Mrs. Echevarria testified in her deposition that she was "looking forward" when she exited the home, but that, from her vantage point, it "looked like . . . one level" and "there was no step there." Her response to an interrogatory similarly averred that the "step was not visible" and that the "difference in the elevation of the walkway . . . was hidden or unable to be perceived."

In October 2018, Lennar moved for summary judgment, arguing that the Echevarrias had presented "no competent evidence of circumstances which would support the existence of an optical illusion." In support of its motion, Lennar provided a verified expert report of a Florida registered architect, who opined, among other things, that "the subject configuration of a step off the porch was not

an uncommon design" and that the landing of the adjacent walkway "was in compliance with . . . the landing requirements of the applicable residential code."[2]

In opposing Lennar's motion for summary judgment, the Echevarrias provided two expert affidavits of the same Florida licensed building inspector. Their expert averred that "the curved landing [of the adjacent walkway] at the stair did not provide the minimum required landing" set forth in the Florida Building Code and that "[t]he failure to provide a compliant landing at the bottom of the step . . . helped to conceal the step's presence and location." The expert further opined that the adjacent walkway was "temporary in nature and would have required removal when the complex was finally converted for single family occupancy, with the installation of new roadways, driveways and sidewalks."

On April 15, 2019, the trial court conducted a hearing on Lennar's motion for summary judgment, following which the trial court entered an order granting

[2] Lennar's expert opined, consistent with the Echevarrias' expert, that section R311.7.5 of the 2010 version of the Florida Building Code, Residential applies in this case. Seeking to undercut its own expert's conclusion, Lennar's Answer Brief argues that the 2014 version of the Florida Building Code – which purportedly no longer provides for a minimum required landing in a residential setting – should, instead, apply here. "As a general rule, an appellate court cannot address claims raised for the first time on appeal." Manning v. Tunnell, 943 So. 2d 1018, 1020 (Fla. 1st DCA 2006). Moreover, unsworn legal argument of counsel is not evidence. See Chase Home Loans LLC v. Sosa, 104 So. 3d 1240, 1241 (Fla. 3d DCA 2012) ("[U]nsworn representations of counsel about factual matters do not have any evidentiary weight in the absence of a stipulation.").

summary judgment "for the reasons stated on the record." The hearing transcript reflects that, notwithstanding the clear conflict between the parties' experts over Lennar's compliance with the Florida Building Code[3] and, consequently, whether the layout of the subject premises created a hidden danger, the trial court granted summary judgment in favor of Lennar based on the court's determinations that: (i) pictures of the scene demonstrated unequivocally an open and obvious condition that was not inherently dangerous; and (ii) the alleged code violation did not contribute to Mrs. Echevarria's fall.

The trial court entered a final judgment in favor of Lennar on July 23, 2019. The Echevarrias timely appealed.

II. ANALYSIS[4]

"A property owner owes two duties to its business invitees: 1) to warn of concealed dangers which are or should be known to the owner and which are unknown to the invitee and cannot be discovered through the exercise of due care; and 2) to use ordinary care to maintain its premises in a reasonably safe condition."

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[3] The parties' experts also disagreed over the applicability of other codes and whether such codes were violated in this case.

[4] We review *de novo* the trial court's order granting final summary judgment. See Davis v. Baez, 208 So. 3d 747, 750 (Fla. 3d DCA 2016). In employing this standard of review, "we must view the record and reasonable inferences therefrom in a light most favorable to the nonmoving party, and any doubt concerning the existence of a disputed issue of material fact must be resolved against the moving party." Id. at 750-51.

Rocamonde v. Marshalls of Ma., Inc., 56 So. 3d 863, 865 (Fla. 3d DCA 2011).

A change in floor levels does not, by itself, generally constitute a dangerous condition. See Casby v. Flint, 520 So. 2d 281, 282 (Fla. 1988) (concluding a homeowner did not owe a duty of care to "warn of a change in floor levels obscured by an excessive number of people"); Schoen v. Gilbert, 436 So. 2d 75, 76 (Fla. 1983) (affirming summary judgment where the plaintiff fell without seeing a six-inch step separating the foyer and the living room, concluding "a difference in floor levels is not an inherently dangerous condition, even in dim lighting"); Gomez v. Plasencia, 522 So. 2d 423, 423 (Fla. 3d DCA 1988) (affirming summary judgment in favor of the premises owner because "the record affirmatively establish[ed] the plaintiff was injured and fell *solely* because she did not notice the difference in floor levels of a model home she was inspecting as an invitee") (emphasis added).

"However, an uncommon design or mode of construction creating a hidden danger that a prudent invitee would not anticipate may transform multiple floor levels into an inherently dangerous condition." Rice v. Whitehurst, 778 So. 2d 1027, 1028 (Fla. 4th DCA 2001); Glanzberg v. Kauffman, 788 So. 2d 252, 254 (Fla. 4th DCA 2000) ("A plaintiff . . . can prove a dangerous condition by showing an uncommon design or mode of construction creates a hidden danger that a prudent invitee would not anticipate."); see also Allen v. Young, 807 So. 2d 704, 705 (Fla. 4th DCA 2002) (affirming summary judgment in favor of the defendant for a slip

and fall at the defendant's residence where there was a change in elevation between the patio and pool areas of the yard, because there was "no testimony (expert or otherwise) to establish an uncommon design or mode of construction or that the layout created an 'optical illusion'").

In this case, viewing the record and the reasonable inferences therefrom in the light most favorable to the Echevarrias, we conclude there is an issue of material fact as to whether Lennar, through an uncommon design or mode of construction, created a hidden danger (i.e., an optical illusion) on its property that a prudent invitee would not anticipate. That is, the trier of fact must resolve whether the adjacent walkway Lennar constructed outside the model home failed to comply with the Florida Building Code and, if so, whether such failure concealed the step's presence and location from the vantage point of Mrs. Echevarria as she exited the model home for the first time.[5] See Slaats v. Sandy Lane Residential, LLC, 59 So. 3d 320, 321 (Fla. 3d DCA 2011) (reversing summary judgment in favor of a premises owner who successfully argued that a step down in a hotel pool area was an open and obvious condition because "the plaintiffs filed the affidavit of an expert stating that the step down presented a unique, special hazard" that was "hidden and unexpected");

[5] We express no opinion as to whether the alleged hidden danger, if established, caused Mrs. Echeverria's fall, or whether Mrs. Echevarria's own, alleged comparative negligence contributed to her injuries. Those issues are, of course, for the trier of fact to resolve.

Glanzberg, 788 So. 2d at 254 (finding an expert's testimony that the steps outside the defendant's home had "noncompliant code issues" and that the steps were "not readily apparent" and "not in a safe condition" was sufficient proof of an uncommon design or mode of construction that created an issue of material fact as to whether the steps were a dangerous condition); see also Bejarano v. City of Coral Gables, 44 Fla. L. Weekly D1769, 2019 WL 3046851, at *2 (Fla. 3d DCA July 10, 2019) (finding an expert's affidavit averring the city's placement of palm trees "violated applicable line-of-sight visibility standards and the conditions restricted [the plaintiff's] view" created an issue of fact as to whether the city had created a dangerous condition); Cruz v. Wal-Mart Stores E., LP, 268 So. 3d 796, 800 (Fla. 4th DCA 2019) (finding an expert's claim that a "manhole was raised and elevated higher than permitted by the Broward County Code" created an issue of material fact as to whether the manhole was a dangerous condition); Doering v. Villages Operating Co., 153 So. 3d 417, 418 (Fla. 5th DCA 2014) (determining evidence of a building code violation could be used to support a claim that property was not maintained in a reasonably safe condition).

III. CONCLUSION

Because there is a disputed issue of material fact as to whether Lennar, through an uncommon design or mode of construction, created a hidden danger on

its property that a prudent invitee would not anticipate, we reverse the final summary judgment and remand for further proceedings.

Reversed and remanded.