IN THE COURT OF APPEALS OF IOWA

No. 7-216 / 06-1543
Filed July 12, 2007

EVELYN KARNS,
Plaintiff-Appellant,

vs.

STEPHEN LIPOVAC, ROSEMARY LIPOVAC, and LAB INVESTMENT CO., INC.,
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge.

Plaintiff appeals the grant of summary judgment to defendants in her tort suit based on premises liability. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Channing L. Dutton of Lawyer, Lawyer, Dutton & Drake, L.L.P., West Des Moines, for appellant.

Clark I. Mitchell of Grefe & Sidney, P.L.C., Des Moines, for appellees.

Considered by Zimmer, P.J., and Miller J., and Beeghly, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

BEEGHLY, S.J.

I. Background Facts & Proceedings

On July 19, 2002, Evelyn Karns attended a garage sale at 3608 Mary Lynn Drive in Urbandale, Iowa. Karns tripped and fell in the driveway of the residence and suffered injuries.

Until July 2, 2002, the residence had been owned by Rodney and Karen Idso. The couple separated earlier that year, and Rodney moved out of the home. The home fell into foreclosure proceedings and was sold at a sheriff's sale to LAB Investment Co., Inc. on July 3, 2002. Karen, however, remained in the home.

Stephen Lipovac, an officer of LAB Investment, offered to give Karen some time to relocate. In a letter dated July 16, 2002, Lipovac gave the following conditions: (1) no charge for rent in July; (2) if Karen stayed through August, rent would be $1000; (3) Karen had to be out by August 31; (4) Karen would pay utility costs; (5) Karen would leave the house in "broom clean" condition; and (6) Karen was expected to mow the lawn. Lipovac also stated "workers may be at the house to do exterior repairs, but access to the inside was not necessary."

Karen moved out of the home at the end of August. On August 14, 2002, LAB Investment sold the home to Stephen and Rosemary Lipovac.

On May 21, 2004, Karns filed a tort suit against the Lipovacs, the Idsos, and LAB Investment, based on the injuries she suffered on July 19, 2002. The Lipovacs and LAB Investment filed a motion for summary judgment. They claimed that because they were not in possession of the land when Karns was

injured, they owed her no duty of care. The Lipovacs and LAB Investment asserted that Karen remained in possession of the residence.

The district court granted the motion for summary judgment. The court found, "Because these defendants were not in possession of the subject real estate, the Court concludes that as a matter of law they owed no duty to plaintiff." Karns filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2). The district court noted the Idsos had not been dismissed from the suit. The court otherwise denied the motion to reconsider.

Karns filed a petition for interlocutory appeal. That request was denied. The case against the Idsos was subsequently dismissed by Karns. She now appeals the district court's grant of summary judgment to the Lipovacs and LAB Investment.

II. Standard of Review

We review a ruling on a motion for summary judgment for a correction of errors at law. Iowa R. App. P. 6.4. Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Kistler v. City of Perry*, 719 N.W.2d 804, 805 (Iowa 2006). A court should view the record in the light most favorable to the nonmoving party. *Eggiman v. Self-Insured Servs. Co.*, 718 N.W.2d 754, 758 (Iowa 2006).

III. Merits

A possessor of land may be liable for physical harm caused to invitees that come on the land. *Benham v. King*, 700 N.W.2d 314, 318 (Iowa 2005)

(citing Restatement (Second) of Torts § 343, at 215-16 (1965)). The possessor of land is under a duty to use ordinary care to keep the premises in a reasonably safe condition for business invitees. *Konicek v. Loomis Bros., Inc.*, 457 N.W.2d 614, 618 (Iowa 1990). There is no dispute that Karns would be considered an invitee.

In Iowa, the term "possessor" is defined as follows:

> A possessor of land is
>
> (a) a person who is in occupation of the land with intent to control it, or
>
> (b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or
>
> (c) a person who is entitled to immediate occupation of the land, if no other person is in possession under clauses (a) and (b).

Weidmeyer v. Equitable Life Assurance Soc'y, 644 N.W.2d 31, 33 (Iowa 2002) (quoting Restatement (Second) of Torts § 328E, at 170 (1965)). The status of possessor of land depends upon occupation and control of the land, not on ownership. *Van Essen v. McCormick Enters. Co.*, 599 N.W.2d 716, 719 (Iowa 1999).

Ownership of land includes the rights of possession and control. *Galloway v. Bankers Trust Co.*, 420 N.W.2d 437, 441 (Iowa 1988). The owner of land, however, may loan possession of land to another, thereby making the other party the possessor of the land. *Weidmeyer*, 644 N.W.2d at 33. Through a lease agreement an owner may give possession and control of land to a tenant. *Van Essen*, 599 N.W.2d at 719.

"As a general rule, a landlord is not liable for injuries caused by the unsafe conditions of the property arising after it is leased, provided there is no

agreement to repair." *Allison by Fox v. Page*, 545 N.W.2d 281, 283 (Iowa 1996); *see also Fouts ex rel. Jensen v. Mason*, 592 N.W.2d 33, 38 (Iowa 1999) ("Provided there is no agreement to repair, landlords are generally not liable . . . ."). In the absence of an agreement to repair, the landlord has no obligation to keep the premises in repair, and is not responsible for the condition of the premises. *Byers v. Evans*, 436 N.W.2d 654, 655 (Iowa Ct. App. 1988). The reason for this rule is because once the landlord relinquishes control, the landlord may not enter the premises to cure any deficiencies. *Van Essen*, 599 N.W.2d at 721.

The terms of the agreement between Karen and LAB Investment are found in the letter from Stephen Lipovac dated July 16, 2002. The letter states, "The only other thing we discussed was that workers may be at the house to do exterior repairs, but access to the inside was not necessary." The letter shows LAB Investment intended to do repairs outside of the building. Therefore, LAB Investment retained control of the outside of the building and was not precluded from entering the premises to cure any deficiencies. *See Stupka v. Scheidel*, 244 Iowa 442, 448, N.W2d 874, 878 (1953) (noting a landlord may keep control of the outside of a building); *see also* Restatement (Second) of Torts § 360, at 250 (1977).

LAB Investment relies upon Karen's deposition testimony, where she states:

> Q. What was your understanding as to who would be responsible for maintenance of the property? A. Such as?
> Q. Well – A. You mean if something broke down or something?

Q. Yes. A. I assumed myself.

Karen's testimony does not specify whether she is discussing the interior or exterior of the house. We conclude the more specific terms found in the letter should determine who was in control of the driveway area at the time of the accident. We conclude the district court erred in granting summary judgment to LAB Investment.

The record also shows as undisputed fact that at all times material to the plaintiff Karns's claim the Lipovacs did not own 3608 Mary Lynn Drive. Further, under the undisputed facts shown by the record, the Lipovacs had no possession or control of any portion of the premises at times material to Karns's accident. We therefore affirm the district court's grant of summary judgment to the Lipovacs.

We reverse the decision of the district court in regard to LAB Investment. We affirm as to the Lipovacs. The case is remanded for further proceedings.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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