RENDERED: June 25, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000937-MR

CORDELIA PARKER — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHELIA R. ISAAC, JUDGE
ACTION NO. 96-CI-2124

JOE E. JOHNSON — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: DYCHE, GUIDUGLI AND MILLER, JUDGES.

GUIDUGLI, JUDGE. Cordelia Parker (Parker) appeals from an order of the Fayette Circuit Court entered March 20, 1998, granting summary judgment to the appellee, Joe E. Johnson (Johnson). We affirm.

The operative facts of this case are not in dispute. In June of 1995, Parker resided in an apartment complex maintained by Johnson Realty, which is owned and operated by Johnson. On June 23, 1995, Parker noticed water leaking from her kitchen ceiling and phoned Johnson Realty to report the leak. An agent of Johnson told her that maintenance would be notified of the leak. However, repairs were not effected that day. As the

leak worsened, Parker continually notified Johnson through Johnson Realty from June 23, 1995, to June 25, 1995. Each day promises of maintenance were made but no service or inspection followed.

On June 26, 1995, Parker again notified Johnson of the leak. By this time portions of the ceiling were bulging from a build-up of water and a small piece of plaster had fallen. Johnson's agent told Parker to stay out of the area where the leak occurred and to pack some items in preparation for temporary relocation to an upstairs apartment. As Parker was packing dishes in the kitchen, the ceiling collapsed on her causing injury.

On June 25, 1996, Parker filed a complaint in the Fayette Circuit Court against Johnson alleging negligence by Johnson for failure to maintain safe premises for residents of the property occupied by her; failure to properly maintain the ceiling; failure to exercise the standard of care owed to her; and failure to warn her of the hazardous conditions of the premises. On December 10, 1997, after limited discovery, Johnson filed a motion for summary judgment on the issue of liability. This motion was heard by the trial court on March 17, 1998. At the hearing the trial court denied Johnson's motion finding that several issues of material fact had yet to be determined. These issues of material fact included whether Johnson's failure to address the leak for three (3) days was reasonable; whether Parker's presence in the kitchen was reasonable; and the content and adequacy of Johnson's alleged warning to Parker. However, on

March 29, 1998, the trial court entered an order granting Johnson's motion for summary judgment. This appeal followed.

A moving party is entitled to summary judgment only where the "pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Kentucky Rules of Civil Procedure (CR) 56.03. In the oft cited case Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991), the Supreme Court of Kentucky stated:

> [T]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor.
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> [A] judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances....
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> ...
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> [T]he rule [CR 56.03] is to be cautiously applied. The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor. Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact.

Further, in discussing when summary judgment is proper in a negligence case, the Supreme Court of Kentucky in Adkins v. Greyhound Corp., Ky., 357 S.W.2d 860, 862 (1962), stated:

> CR 56.03 authorized summary judgment if it be shown "that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law."

> That the evidence is not in conflict does not, of course, preclude the existence of issues as to material facts. In a negligence case, such as this, whether a party conformed to the standard of care required of him and, if not, whether failure to do so had a proximate or contributing causal connection with the accident and injury are issues of material fact unless the answer is so clear that there is no room for difference of opinion among reasonable minds. [citations omitted]...A summary judgment is proper when it is manifest that the party against whom the judgment is sought could not strengthen his case at a trial and the moving party would be entitled ultimately and inevitably to a directed verdict. (emphasis added).

The present case is indicative of the situation described in Adkins. The operative facts of the case are not in dispute. Instead the issue of causation is before this Court, specifically, the narrow issue of "necessity." In this appeal, Parker argues that the standard for summary judgment was not met. She further argues that Johnson was negligent by failing to repair the ceiling. Finally, she argues that even is she was negligent, the trial court should have applied the doctrine of comparative negligence to apportion fault between her and Johnson. We disagree.

Under Kentucky tort law, each person has the duty to exercise ordinary care for his own safety and is not licensed to walk blindly into dangers which are obvious, are known to him, or would be anticipated by a person of ordinary prudence. Morton v. Allen Const. Co., Ky., 416 S.W.2d 733 (1967). "An individual who exposes himself to a known danger that is imminent and obvious to a person with ordinary prudence, has acted negligently as a matter of law." Smith v. Louis Berkman Co., 894 F.Supp. 1084,

1094 (W.D. Ky. 1995). Further, "when parties act with full knowledge of the prevailing conditions,...there is no duty to warn nor is there an actionable claim against a third party for injuries that involve the condition itself." Peak v. Barlow Homes, Inc., Ky. App., 765 S.W.2d 577, 579 (1988)(citations omitted).

Parker admits in her brief that she was aware of the hazardous condition present in the kitchen. She stated that she noticed "portions of the ceiling exhibited bulges from a build-up of water, and a small piece of plaster had fallen." In addition, Parker admits that Johnson's agent warned her to "stay out of the area where the leak occurred." Under these circumstances, we believe that the dangerous condition of the ceiling was open and obvious and that Parker was fully aware of that danger. However, Parker chose to expose herself to that danger and the pivotal question before the trial court was whether that exposure occurred out of necessity.

In granting Johnson's motion for summary judgment, the trial court stated:

> The question for the Court is whether as a matter of law Parker has failed to make a showing of "substantial necessity or urgency" to pack her dishes at the time she was injured. Davis v. Coleman Management Co., KY 765 S.W.2d 37, 40 (1989). Two older cases, Fuhs v. Ryan, Ky. App., 571 S.W.2d 627 (1978) and Houchin v. Willow Ave. Realty Co., Ky., 453 S.W.2d 560 (1970) are instructive on what constitutes a necessity. Although both were decided before Kentucky adopted comparative fault, their analyses [sic] of the doctrine of necessity remain helpful to the Court.
>
> The Fuhs court reversed the trial court's entry of summary judgment for the landlord.

> Id., 571 S.W.2d at 629. In that case, the tenant was injured while descending an icy staircase, which was the only way to access the ground from her third-floor apartment. She had been ordered to report to work. On these facts, the court was not prepared to hold her decision "per se unreasonable." Id. On the other hand, the Houchin plaintiff was injured while walking down an unlit stairway to wash her curtains. The light bulb in the stairway had burned out some two weeks prior to her injury.
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> In this case, the Court finds that the situation is more akin to that in Houchin than that in Fuhs. Although Parker had been warned about the fragile state of the ceiling and told to vacate the premises, she took the time to wash and then begin packing her dishes. This is not the sort of pressing circumstance which constitutes a necessity. As a matter of law the court therefore holds that it would be impossible at trial for Parker to prove a necessity existed.

We agree with the trial court's reasoning in this matter and believe that there is no room for difference of opinion among reasonable minds. Thus, because Parker exposed herself to an open and obvious danger, which was admittedly known to her, without necessity, she is liable for the injuries she sustained when the ceiling collapsed. Under these circumstances we do not reach the doctrine of comparative negligence. Had necessity justified Parker's presence in the kitchen when the ceiling collapsed, application of the doctrine of comparative negligence might be appropriate to apportion fault between Parker and Johnson if Johnson were found negligent. The issue of whether or not Johnson was negligent in failing to effectuate repairs in four days time was not decided by the trial court and is not properly before us at this time. However, Johnson's negligence is questionable under present authority in this state.

See Mahan-Jellico Coal Co. V. Dulling, Ky., 139 S.W.2d 749 (1940) (holding where contract exists for landlord to effect repairs, landlord liable for cost of repairs but generally not liable for damage to persons or goods resulting from unrepaired defects).

We believe summary judgment was proper in this case. For the foregoing reasons, the decision of the trial court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Shirley Allen Cunningham, Jr.
Rosanna L. Peace
W. Robert Farmer
Lexington, KY

BRIEF FOR APPELLEE:

Paul F. Guthrie
Errol Cooper
Lexington, KY