

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001668-MR

DAVID SMITH, JR.

APPELLANT

v.

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 96-CI-00363

DR. ROBERT BAKER

APPELLEE

OPINION
REVERSED
** **

BEFORE: BARBER, BUCKINGHAM, MILLER, JUDGES.

BARBER, JUDGE: David Smith, Jr. (Appellant) has appealed from summary judgment entered by the Greenup Circuit Court on June 20, 2001, which dismissed his negligence claim against Dr. Robert Baker (Appellee). Having concluded that there is a genuine issue of material fact, we reverse.

Appellant fell from a rafter or "tier" while hanging tobacco in a barn owned by Dr. Robert Baker (Appellee) in Greenup County, Kentucky. Appellant was standing on a tier when it suddenly snapped and he fell onto a truck parked below. At the time, Appellant was employed by his cousin, Eddie Smith, to help house tobacco in the barn owned by Appellee. Eddie Smith had a

rental arrangement with Appellee, whereby Appellee paid for fertilizer, seed and chemicals and provided the land and barn. In turn, Eddie Smith supplied the labor. Appellant filed suit against Appellee under a negligence theory of liability.

An affidavit by Roland Roper, the resident tenant, indicates that sometime prior to September the barn had been wind damaged and blown off its foundation and that Appellee was aware of this damage. Appellee denied any knowledge of the wind damage or foundation shift. Depositions of the workers indicate they checked the rafters the day of the accident for obvious defects and detected none. Appellant offered the statement of an engineer indicating that the wind damage, which moved poles from their foundation, would cause undue stress on the tier poles without necessarily causing them to appear affected.

On March 10, 1997, Appellee filed a motion for summary judgment, which was overruled on May 1, 1997, at which time the case proceeded to trial. On October 11, 1997, a mistrial was declared, with the trial date reset for July 23, 2001. On April 17, 2001, Appellee renewed his motion for summary judgment, arguing that new case law from this Court warranted reconsideration. Summary judgment was granted on June 21, 2001. On June 25, 2001, Appellant filed a Motion to Alter, Amend or Vacate the order granting summary judgment, which was denied on July 12, 2001. This appeal followed.

The issues on appeal are whether Appellant raised a genuine issue of material fact as to whether there was a latent defect in the barn; whether Appellee was aware of the defect; and

whether the defect was readily discoverable by Appellant on reasonable inspection.

Pursuant to CR 56.03, summary judgment is proper "if 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." For summary judgment to be proper the movant must show that the adverse party cannot prevail under any circumstances. Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985). "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." Steelvest, Inc. v. Scansteel Service Ctr., Inc., Ky., 807 S.W.2d 476, 480 (1991). The standard of review on appeal of a summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996). There is no requirement that the appellate court defer to the trial court since factual findings are not at issue. Goldsmith v. Allied Building Components, Inc., Ky., 833 S.W.2d 378, 381 (1992).

The trial court's rationale for granting summary judgment in favor of Appellee was (1) that Appellee was not aware of any latent defects and so had no duty to Appellant and (2) there was no evidence that a latent defect resulted from the barn being blown off its foundation.

The order of the trial court is confusing in its rationale finding that Appellee was not aware of any latent defect in the barn. It appears that the court attributed the deposition of Appellant to the Appellee and, based on this deposition, came to the conclusion that Appellee was not aware of any latent defect. In any event, Appellant argues that the affidavit of Roland Loper raised an issue of material fact as to Appellant's knowledge and we must agree. While Appellee stated in his deposition that he did not know of any wind damage to the barn, Mr. Loper's affidavit is to the contrary. This clearly raised a question of fact for the jury as to the knowledge of Appellee.

The trial court's second basis for granting summary judgment was that there was no evidence indicating that a latent defect resulted from the barn being blown off its foundation and that for a jury to so find would require mere speculation. Appellant points to the deposition of an engineer who inspected the barn, stating that he believed the positioning of the support poles due to the wind damage would cause undue stress on the tier poles even though they might not appear obviously affected. We believe this testimony was sufficient to raise a genuine issue of material fact as to whether there was a latent defect in the barn.

The trial court relied on Lambert v. Franklin Real Estate Company, Ky. App., 37 S.W.3d 770 (2000) in determining that Appellee owed no duty to Appellant. Appellee argued to the trial court that somehow Lambert changed the duty and liability

of a landlord to a tenant. However, Lambert merely affirmed the duty articulated in Milby v. Mears, Ky. App., 580 S.W.2d 724 (1979) that a landlord owes a duty to disclose a known defective condition which is unknown to the tenant and not discoverable through reasonable inspection. Milby, supra. All Lambert added to this analysis is that the duty and liability to persons on leased premises by the consent of tenant are the same as those owed to the tenant. Lambert, supra. We fail to see how that leads to the conclusion in this case that Appellee owed no duty to Appellant. If Appellee knew of a latent defect in the barn of which Appellant was not aware and could not discover by way of reasonable inspection, then Appellee owed Appellant a duty. In Lambert, power lines above where the men were working were alleged to be a latent defect. This Court found that because the power lines were open and obvious to the men working, they were as obvious to the tenant as to landlord, and therefore not a latent defect. Lambert, supra. Distinguishable in the instant case is that here the depositions indicate that there was not an open and obvious defect in the poles or tiers. While the workers all stated that they inspected the rafters, no one stated that they inspected the foundation of the barn for defects on the day Appellant fell or that they were aware of the wind damage to the barn. Appellee argues that because the engineer could see the foundation shift on inspection and because Mr. Loper was aware of the damage, that Appellant should have seen it on reasonable inspection, inferring that it was open and obvious. Appellee is free to argue this at trial. Whether Appellant conducted a

"reasonable inspection" is properly a question for the jury. However, we cannot say that a reasonable inspection would have included an inspection of the foundation, especially if the workers were not aware that there had been wind damage to the barn. It seems reasonable to this court that while the workers might be required to inspect the rafters for obvious defects, which it appears they did, that does not necessarily lead to the conclusion that they would be required to inspect the foundation. While this may go to the issue of comparative fault, as Appellant asserts, this is a question not properly disposed of by summary judgment.

In light of the above, we cannot conclude that summary judgment in favor of Appellee was proper. A question of fact has been raised as to whether there was a latent defect on the premises; whether Appellee knew of the defect; and whether the defect was discoverable by Appellant on reasonable inspection. For the foregoing reasons the judgment of the Greenup Circuit Court is reversed and remanded for additional proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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