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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-002083-MR

TODD CHRISTOPHER SEMTAK,
EXECUTOR OF THE ESTATE
OF DEANNA SEMTAK, DECEASED

APPELLANT

v.

APPEAL FROM LEE CIRCUIT COURT
HONORABLE THOMAS P. JONES, JUDGE
ACTION NO. 13-CI-00042

L.G.S. HOLDINGS, LLC.

APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, CLAYTON, AND J. LAMBERT, JUDGES.

ACREE, JUDGE: This is a premises liability case. Todd Christopher Semtak, Executor of the Estate of Deanna Semtak, appeals the Lee Circuit Court's November 21, 2014 order granting summary judgment in favor of appellee L.G.S. Holdings, LLC. We find genuine issues of material fact exist precluding summary

judgment. Accordingly, we reverse and remand for additional proceedings consistent with this Opinion.

FACTS AND PROCEDURE

Deanna Semtak worked as an administrative assistant for Experience Works, Inc. Experience Works leased office space at the Village Shopping Center in Beattyville, Kentucky, from LGS Holdings. LGS Holdings also leased space in the center to other tenants, and owned and operated two businesses located in the center.

In the afternoon on April 20, 2012, just after celebrating her 74th birthday, Deanna was waiting for her son to pick her up from work. While she waited, Deanna sat on a wooden picnic table situated in a grassy area behind Experience Work. As she sat down on the table, it collapsed. Deanna was severely injured.

Deanna filed a negligence action against LGS Holdings. LGS Holdings, in turn, filed a third-party complaint against Experience Works, alleging that an Experience Works' employee had placed the defective table on the premises prior to the incident and, therefore, Deanna's injuries were the result of Experience Works' negligence.

Deanna admitted in deposition that she often sat on the picnic table and that she never noticed anything wrong with it. Experience Works eventually admitted, in response to interrogatories, that "it was responsible for the table." (R. 176).

> The table was placed by Experience Works on the LGS Holdings property in 2009 or 2010, when the table was new, having been purchased from Lowe's Home Improvement by Experience Works. At the time of the incident the wooden table was very dilapidated.

(R. 174). Eddie Cundiff, an Experience Works' employee, submitted an affidavit wherein he confirmed the "wooden table was very dilapidated," and, "[p]ursuant to [the lease between Experience Works and LGS Holdings], Experience Works was responsible for any actions taken by any of its employees on the premises and in the area around the building, including where the picnic table was located." (R. 310).

The lease between LGS Holdings and Experience Works provided:

> [Experience Works] shall be liable to and shall indemnify, defend, and hold [LGS Holdings] harmless from any and all lawsuits, judgments, liabilities, damages, claims, costs and expenses . . . arising out of personal injury or death . . . on the ***Leased Premises*** resulting as a consequence of . . . any act or omission of [Experience Works], its agents, contractors or employees[.]

(R. 191) (emphasis added). It defined the "leased premises" as consisting of several different units "of space within a building owned by" LGS Holdings plus "an adjoining parking area." (R. 188-89). It was Experience Works' responsibility to maintain the "interior of the Leased Premises" and LGS Holdings' responsibility to "maintain in good condition and repair . . . the exterior of the Leased Premises" and "all improvements on the Property . . . including, without limitation, parking lots, drives, and landscaping." (R. 192). LGS Holdings agreed to indemnify and

hold Experience Works harmless for any personal injury or death that occurred "as a consequence of (i) any condition of the Leased Premises which is [LGS Holdings'] obligation to remedy, repair or restore[.]" (R. 190).

Rosemary Smith, a managing member of LGS Holdings, testified in deposition that the lease for Experience Works "only covered what was inside the four walls" and parking. (Smith Deposition, p. 17-18). Smith also testified, somewhat obscurely, that the picnic table at issue was located in a common area that LGS Holdings was responsible for maintaining. Smith stated: she and her husband were on the premises daily; they did not have a proper maintenance worker; they did not regularly inspect the property; and they had no knowledge of the picnic table until after the accident. Smith testified that if she had seen the dilapidated table she would have had it removed.

After limited discovery, LGS Holdings moved for summary judgment, arguing Experience Works leased the property and admitted responsibility for the table, and LGS Holdings could not have reasonably discovered any defect in the table. Deanna opposed the motion. Following oral argument, the circuit court granted LGS Holdings' motion. It reasoned:

> No one disputes that an employee of Experience Works placed the picnic table on the premises. If [Deanna] was sitting on the table and did not discover the defect, then LGS Holdings certainly could not have discovered the defect from afar. There was no opportunity for LGS Holdings to make the conditions safer, even if it would have done so had it known a defect existed. Therefore . . . LGS Holdings . . . did not fail to exercise ordinary care to keep the premises in a reasonably safe condition

> because it is undisputed that Experience Works placed the picnic table on the property and [Deanna] had the last clear chance to avoid the accident; however, if [Deanna] did not perceive any risk with her repeated contacts with the table, then this Court cannot place such a burden on L.G.S. Holdings.

(R. 317-18). Deanna appealed.[1]

STANDARD OF REVIEW

"The standard of review on appeal of summary judgment is whether the trial court correctly found there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Carter v. Smith*, 366 S.W.3d 414, 419 (Ky. 2012). We must "view the evidence in the light most favorable to the nonmoving party," and we will only sustain the circuit court's grant of summary judgment "if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001). "[S]ummary judgments involve no fact finding[.]" *Associated Ins. Serv., Inc. v. Garcia*, 307 S.W.3d 58, 61 (Ky. 2010). Our review is *de novo*. *Id.*

ANALYSIS

Deanna argues genuine issues of material fact exist precluding summary judgment and, therefore, the circuit court erred in granting judgment in LGS Holdings' favor. She faults the circuit court for narrowly focusing on the fact

[1] Deanna died while this appeal was pending. Todd Semtak was appointed executor of her estate, and properly revived this action. Kentucky Revised Statutes (KRS) 411.140; KRS 395.278; Kentucky Rules of Civil Procedure 25.01. For ease of reading and general comprehension, we will continue to refer to the appellant as "Deanna" throughout this Opinion.

that she had taken a seat on this particular picnic table before and that such act somehow relieved LGS Holdings of its duty to exercise ordinary care to keep common areas in a reasonably safe condition.

"Negligence, as used in law, may be defined as the failure to discharge a legal duty, whereby injury occurs." *Franklin v. Tracy*, 117 Ky. 267, 77 S.W. 1113, 1115 (1904). While general negligence law requires the existence of a duty, premises liability law supplies the nature and scope of that duty. *West v. KKI, LLC*, 300 S.W.3d 184, 190 (Ky. App. 2008). In the context of landlord-tenant relationships, Kentucky has adopted the rule as stated in the Restatement (Second) of Torts § 360 (1965). *Warren v. Winkle*, 400 S.W.3d 755, 759 (Ky. App. 2013). That rule provides:

> A possessor of land who leases a part thereof and retains in his own control any other part which the lessee is entitled to use as appurtenant to the part leased to him, is subject to liability to his lessee and others lawfully upon the land with the consent of the lessee or a sublessee for physical harm caused by a dangerous condition upon that part of the land retained in the lessor's control, if the lessor by the exercise of reasonable care could have discovered the condition and the unreasonable risk involved therein and could have made the condition safe.

Restatement (Second) of Torts § 360 (1965). We have interpreted this section to require that the landlord "exercise ordinary care to keep common areas in a reasonably safe condition." *Warren*, 400 S.W.3d at 759; *Carver v. Howard*, 280 S.W.2d 708, 711 (Ky. 1955) ("In determining the liability of a landlord to a tenant and his guests, invitees and others[,] . . . where the defective condition is located in

that portion" of the premises "retained by the lessor for the common use and benefit of a number of tenants . . . the landlord must exercise ordinary care to keep [the common area] in a reasonably safe condition[.]").

Deanna argues the picnic table was located in a common area, and LGS Holdings had a duty to exercise reasonable care to discover unsafe conditions, such as the picnic table, and to make those conditions safe. In response, LGS Holdings makes much of the fact that an Experience Works' employee placed the table on the premises, and that Experience Works admitted it was responsible of the table's condition and existence. LGS Holdings argues that this alone relieves it of any liability. We disagree.

The Restatement clearly states that § 360 "applies to subject the lessor to liability to third persons entering the land, irrespective of whether the lessee knows or does not know of the dangerous condition." Restatement (Second) of Torts § 360 (1965), cmt. a; *Warren*, 400 S.W.3d at 761 ("[A] tenant's knowledge of a dangerous condition will not absolve the landlord from liability."). The fact that Experience Works placed the table on the property does not relieve LGS Holdings of its duty, as the landlord, to reasonably maintain the property's common areas.

LGS Holdings also claims the picnic table was *not* located in a common area, and no genuine issue exists as to this fact. In support, LGS Holdings points to Cundiff's affidavit, quoted previously, wherein he stated that Experience Works, not LGS Holdings, was responsible for the area where the

picnic table was located. Because the picnic table was not situated in a common area, LGS Holdings argues, it owed no duty to Deanna under Restatement § 360. Again, we disagree.

Cundiff's affidavit is certainly affirmative evidence suggesting the area at issue was not a common area, but part of Experience Works' leased space. However, other evidence in the record conflicts with Cundiff's statement. Smith testified in deposition LGS Holdings was responsible for maintaining the area where the picnic table was located. She further testified that Experience Works' lease only included the area "within the four walls" of the building and a parking lot. This is in accord with the language of the lease itself describing the leased premises as only the "space ***within*** [the] building" and a parking lot. (R. 188-89)(emphasis added). From this one reasonably could find that the grassy area where the picnic table was located was *not* part of the "leased premises" subject to Experience Works' control, but a common area LGS Holdings was responsible for maintaining. The evidence is conflicting. And this fact is material to whether LGS Holdings owed a duty to Deanna. This genuine issue of material fact alone precludes summary judgment.

LGS Holdings next argues that, even if the picnic table was placed in a common area, it breached no duty to Deanna. It contends that Deanna is unable to demonstrate that LGS Holdings failed to exercise ordinary care to keep the premises in a reasonably safe condition. It points to the circuit court's decision wherein it stated that, if Deanna, who regularly sat on the table, was unable to

perceive any risk, then LGS Holdings likewise could not have known of the risk the table presented.

Again, the legal standard set forth in Restatement (Second) of Torts § 360 required LGS Holdings to exercise reasonable care to: (a) discover (i) the dangerous condition in the common area and (ii) the risk involved; and (b) make the condition safe. Restatement (Second) of Torts § 360. There is no dispute that the picnic table was located in plain sight in the grassy area behind the building leased by Experience Works. A reasonable juror could find that LGS Holdings, had it exercised reasonable care – such as regularly inspecting its property – could have discovered the table. Furthermore, testimony revealed the fact that the table's condition was also apparent and known. Cundiff described it as "dilapidated." Pictures contained in the record confirm his testimony. A reasonable person could have perceived the risk involved with allowing a table in that condition to remain on the premises. And, it was relatively simple to make the condition safe – remove the table. In fact, Smith testified that, had she known of the table in its condition, she would have had it removed.

Deanna's failure to appreciate the table's defects does not relieve *LGS Holdings* of its legal duty. And it does not preclude a reasonable juror from finding LGS Holdings breached that duty. A landlord is not relieved of liability "even though the person injured, whether he be the lessee himself or a third person, has knowledge of the existence of the dangerous condition." Restatement (Second) of Torts § 360, cmt. b.; *Davis v. Coleman Management Co.*, 765 S.W.2d

37, 39 (Ky. App. 1989) ("The [injured person's] knowledge of a dangerous condition does not in itself relieve the landlord of liability."). We think the circuit court was led astray when it focused on Deanna's knowledge and conduct instead of that of LGS Holdings.

We pause to clarify that nothing in this Opinion should be construed as dictating a finding of liability against LGS Holdings. We find merely that there is conflicting evidence in the record as to whether the table was located in a common area, thereby trigging LGS Holdings' duty, as a landlord, under the Restatement, and whether LGS Holdings breached that duty.

Simply put, genuine issues of material fact remain on Deanna's premises liability claim. LGS Holdings is not entitled to judgement as a matter of law. Accordingly, we reverse the Lee Circuit Court's November 21, 2014 order granting summary judgment in favor of LGS Holdings and remand for additional proceedings consistent with this Opinion.

ALL CONCUR

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