RENDERED: NOVEMBER 2, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000931-MR

EDWARD MCKEE APPELLANT

APPEAL FROM BOURBON CIRCUIT COURT
v. HONORABLE ROBERT G. JOHNSON, JUDGE
ACTION NO. 15-CI-00250

SANDERS RENTALS, LLC APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, D. LAMBERT AND SMALLWOOD, JUDGES.

SMALLWOOD, JUDGE: Edward McKee appeals from a summary judgment rendered by the Bourbon Circuit Court in favor of Sanders Rentals, LLC. He argues: that a landlord's duty to maintain common areas of an apartment complex is non-delegable; that an exculpatory provision in a lease is invalid; that the question of whether Sanders Rentals, LLC assumed a duty to remove snow remains for consideration; and that a lease provision is discriminatory. For the

reasons addressed below, we find no error and AFFIRM the summary judgment on appeal.

Sanders Rentals, LLC ("Sanders") owns and operates an apartment complex situated in Paris, Kentucky. On October 25, 2013, Edward McKee ("McKee") executed a residential lease for Apartment 3. The lease contained a provision stating that,

> LESSOR shall not be liable to LESSEE, LESSEE's household members or LESSEE's visitors for any personal injury, or for any damage to or loss of personal property, from fire, smoke, rain, flood, any appliance or any HVAV [sic], electrical, plumbing, and/or other equipment and systems, theft or vandalism, unless that injury is caused by LESSOR's negligence or a failure to perform a duty imposed by law. LESSOR has no duty to remove any ice, sleet or snow from any part of the apartment complex (house). It is the sole obligation of LESSEE, LESSEE's household members and LESSEE's visitors to exercise due care for their safety and to secure their own property in the event of any of the above-described events or conditions.

On March 4 and 5, 2015, Paris, Kentucky experienced several inches of snowfall.[1] On March 6, 2015, McKee – then age 65 – attempted to leave the apartment complex. He would later allege that while descending a set of stone stairs from his apartment, he slipped and fell over the stair railing and onto the

[1] McKee asserts, and Sanders does not dispute, that there was an observed snowfall total of "up to eighteen inches" and an accumulation of ice.

ground. As a result of the fall, McKee suffered a broken left hip requiring surgery, hospitalization and rehabilitation.

On November 19, 2015, McKee filed the instant action against Sanders in Bourbon Circuit Court seeking money damages resulting from the injury. In support of the claim, McKee alleged that Sanders was negligent in failing to keep the common areas under Sanders' control reasonably safe for egress, and that Sanders' negligence proximately resulted in McKee's injuries.

The matter proceeded with discovery and depositions, whereupon Sanders filed a motion for summary judgment on January 1, 2017. As a basis for the motion, Sanders argued that under the terms of the lease – specifically the above-cited and provision – it had no legal duty to clear snow and ice from the premises. To demonstrate McKee's knowledge and acceptance of this provision, Sanders noted that in addition to McKee's signature on the lease, McKee had engaged a third party to remove snow and ice who was in fact accomplishing this task at the time of McKee's fall.

McKee then tendered a response and cross-motion for partial summary judgment to declare contractual provision invalid. McKee argued therein that based on the Uniform Residential Landlord Tenant Act ("URLTA"), public policy precluded enforcement of the lease provision at issue.

After the motion and cross-motion were briefed and argued, the court rendered a summary judgment in favor of Sanders and denying McKee's cross-motion for partial summary judgment. McKee then filed motion to alter, amend or vacate, wherein he raised two new arguments not previously forwarded, that the lease violated federal and state anti-discrimination statutes, and that Sanders had assumed the duty to clear the snow because he had paid another tenant to do so the prior year. Sanders filed a responsive pleading noting that McKee may not raise new arguments after entry of the summary judgment. McKee replied with another new argument, to wit, that the possessor of land owes a non-delegable duty to invitees under *Kentucky River Medical Center v. McIntosh*, 319 S.W.3d 385, 389 (Ky. 2010).

On June 8, 2017, the circuit court rendered an order denying McKee's motion upon finding that McKee's Fair Housing Act argument was raised after the summary judgment, and that the case law relied upon by McKee was distinguishable from the facts at issue. This appeal followed.

McKee now argues that the Bourbon Circuit Court erred in sustaining Sanders' motion for summary judgment. In support of this argument, he asserts that Sanders possessed a duty to maintain the common areas of the apartment complex, and that this duty is non-delegable. After directing our attention to case law standing for the proposition that a landlord has a general duty to take

reasonable steps to make common areas reasonably safe, McKee argues that the lease's exculpatory provision is in conflict with the URLTA, *supra*. He contends that the exculpatory provision is invalid as it is against the public policy advanced by the Kentucky legislature via its adoption of the URLTA, and that the parties did not have equal bargaining power when the lease was signed. In sum, McKee asserts that Sanders cannot rely on the lease to avoid its non-delegable duty to make the common areas safe, and that the Bourbon Circuit Court erred in failing to so rule.

The focus of McKee's argument on this issue is that "the exculpatory provision at issue is in conflict with the Uniform Residential Landlord Tenant Act (URLTA)." In 1974, the Kentucky General Assembly adopted the URLTA with its passage of Kentucky Revised Statutes (KRS) Chapter 383. Specifically, the URLTA provides that "[a] landlord shall . . . [k]eep all common areas of the premises in a clean and safe condition[.]" KRS 383.595(1)(c). It goes on to place limitations on the landlord's ability to transfer maintenance tasks to tenants. McKee asserts that the URLTA evinces a strong public policy in favor of protecting tenants, that it recognized the dangers inherent in transferring the duty to keep common areas safe to tenants, that the lease provision at issue contains none of these procedural safeguards, and he was injured in precisely the way that the legislature sought to avoid.

Sanders responds, however, and McKee so acknowledges, that the General Assembly left to local governments the *option* of adopting the URLTA within their respective jurisdictions. Said the legislature, "The General Assembly hereby *authorizes* cities, counties, and urban-county governments to enact the provisions of the Uniform Residential Landlord and Tenant Act as set forth in KRS 383.505 to 383.705. *If adopted*, these provisions shall be adopted in their entirety and without amendment." KRS 383.500 (emphasis added). The plain language of the statute reveals that its adoption is voluntary.

It is uncontroverted that the Bourbon County government has not adopted the URLTA. The question for our consideration, then, is whether Kentucky's enactment of KRS 383.500, *et seq.*, which gives local governments the option of adopting its provisions, operates to bar Sanders from executing a lease stating that it does not have a duty to remove snow or ice. We must answer this question in the negative. While a landlord has a "general duty . . . to exercise reasonable care to keep common areas reasonably safe[,]" *Davis v. Coleman Management Company*, 765 S.W.2d 37, 39 (Ky. App. 1989), McKee has cited no case law or statutory law supportive of the proposition that a landlord must remove heavy snowfall from common areas, nor that the parties may not acknowledge in the lease that the landlord has no such duty. Further, while McKee characterizes the lease as transferring to the tenants the duty to keep common areas safe, the

terms of the lease merely provide that Sanders has no contractual duty to remove ice and snow. KRS 383.500 is a provision with optional implementation by local governments. It is the legislature and local governing bodies which have determined that its protections are not applicable to all landlords within the Commonwealth. The lease provision does not run afoul of the URLTA, KRS 383.500 nor the common law duty of landlords to exercise reasonable care to keep common areas reasonably safe.

McKee goes on to argue that Sanders assumed the duty to clear snow from the common area stairs, and that the lease unlawfully discriminates against persons with disabilities by operating in contravention to KRS 344.360.[2] Sanders contends that these arguments were raised for the first time in McKee's Kentucky Rules of Civil Procedure (CR) 59.05 Motion and subsequent pleadings, were not considered by the circuit court and are therefore not ripe for appellate review. In response, McKee maintains that these arguments were raised prior to the entry of summary judgment, and were merely given additional emphasis in the CR 59.05 motion and subsequent pleadings in response to the entry of summary judgment.

McKee has failed to comply with CR 76.12(4)(c)(iv) and (v), requiring a written argument with reference to the record showing whether the issue was properly preserved for review and in what manner. We may strike that

[2] KRS 344.360 is titled "Unlawful housing practices; design and construction requirements."

portion of the written argument not in compliance with CR 76.12. *Briggs v. Kreutztrager*, 433 S.W.3d 355, 361 (Ky. App. 2014). Nevertheless, we have closely reviewed these arguments and cannot conclude that they form a basis for reversing the summary judgment on appeal. The record does not demonstrate that Sanders assumed a duty to remove ice and snow, and it was McKee – not Sanders – who had engaged a third party to clear a path in the snow just prior to McKee's fall.

Similarly, we find as unpersuasive McKee's contention that the lease violates KRS 344.360, which states in relevant part that,

> It is an unlawful housing practice for a real estate operator . . .
> . . .
>
> (2) To discriminate against any person because of race, color, religion, sex, familial status, disability, or national origin in the terms, conditions, or privileges of the sale, exchange, rental, or lease of real property or in the furnishing of facilities or services in connection therewith[.]
> . . .
>
> (9) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a housing accommodation to any buyer or renter because of a disability of:
>
> (a) That buyer or renter[.]
> . . .
>
> (10) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such housing accommodation, because of a disability of:

(a) That person[.]

Because KRS 344.360 is substantially similar to the federal statutory scheme (42 United States Code 3604(b)), Kentucky courts routinely look to the federal provision in interpreting KRS 344.360. *Ammerman v. Board of Education of Nicholas County*, 30 S.W.3d 793, 797 (Ky. 2000). Under either scheme, a plaintiff must allege: 1) discriminatory treatment, 2) a discriminatory effect, or 3) a failure to make a reasonable accommodation. *Anderson v. City of Blue Ash*, 798 F.3d 338, 360 (6th Cir. 2015). Sanders argues, and we agree, that McKee cannot establish that the lease meets any of these elements. McKee never alleged nor offered proof of discriminatory treatment, discriminatory effect showing that he suffered disproportionately more than other individuals, nor that he requested or was denied a reasonable accommodation. As such, even if this matter were properly raised below, preserved and argued in conformity with CR 76.12 – which we do not find to be the case – we cannot conclude that McKee's KRS 344.360 argument forms a basis for reversing the summary judgment on appeal.

Summary judgment "shall be rendered forthwith 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." CR 56.03. "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 Center, Inc.,* 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. *Id*. "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." *Id.* Finally, "[t]he 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,* 916 S.W.2d 779, 781 (Ky. App. 1996).

While Sanders, like all residential landlords, had a general duty to take reasonable steps to make common areas reasonably safe, *Davis*, *supra*, McKee has not demonstrated that Sanders had an express duty to remove ice and snow from the common areas. Further, the public policy provisions of the URLTA do not apply to the facts before us because the URLTA was not adopted by the Bourbon County government. When viewing the record in a light most favorable to McKee and resolving all doubts in his favor, we conclude that the trial court correctly found that there were no genuine issues as to any material fact and that Sanders was entitled to a judgment as a matter of law.

For the foregoing reasons, we AFFIRM the summary judgment of the Bourbon Circuit Court.

ALL CONCUR.

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