NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 CA 0504

FERINANDO THOMAS

VERSUS

JENNIFER DO

Judgment Rendered: NOV 0 1 2013

* * * * *

On Appeal from
19th Judicial District Court,
In and for East Baton Rouge Parish,
State of Louisiana
Trial Court No. C570858

The Honorable William A. Morvant, Judge Presiding

* * * * *

A. Hannibal Joiner
Baton Rouge, Louisiana

Attorney for Plaintiff/Appellant,
Ferinando Thomas

Donald R. Smith
Baton Rouge, Louisiana

Attorney for Defendant/Appellee,
Jennifer Do

C. Shannon Hardy
John W. Penny, Jr.
Lafayette, Louisiana

Attorneys for Defendant/Appellee,
Allstate Insurance Company

* * * *

BEFORE: WHIPPLE, C.J., WELCH, AND CRAIN, JJ.

CRAIN, J.

Ferinando Thomas[1] appeals a summary judgment dismissing his premises liability claims against Jennifer Do and Allstate Insurance Company. We affirm.

FACTS AND PROCEDURAL HISTORY

Thomas instituted this suit for damages against Do and Allstate alleging that he suffered a broken ankle after stepping into a water-covered hole at the rental property owned by Do, which he was visiting as a guest of Do's lessee, Jacqueline Patterson. (R. 3, 58 60, 96) Thomas contends that Do failed to maintain the property in a safe manner, which rendered it unreasonably dangerous. (R. 61, 97). He claims that with Do's express consent, Patterson had planted flowers in the area in which he fell, which created loose soil that was wet due to recent rain. (R. 97)

The defendants maintain that under the terms of the lease, Patterson assumed responsibility for the condition of the leased premises thereby absolving them of any liability for Thomas's injuries. (R. 28, 78) The trial court granted the defendant's motion for summary judgment and dismissed Thomas' claims. Thomas now appeals.

DISCUSSION

A motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine issue of material fact. *All Crane Rental of Georgia, Inc. v. Vincent,* 10–0116 (La. App. 1 Cir. 9/10/10), 47 So. 3d 1024, 1027, *writ denied,* 10–2227 (La. 11/19/10), 49 So. 3d 387. Summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits, if any, show that there is no genuine issue of material fact and that the mover is entitled to judgment as a matter of law. La. Code Civ. Pro. art. 966B(2). Summary judgment is favored and designed to secure

---

[1] The plaintiff's first name is spelled both "Ferinando" and "Fernando" in the record.

the just, speedy, and inexpensive determination of every action. La. Code Civ. Pro. art. 966A(2).

Appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether a summary judgment is appropriate. *All Crane,* 47 So. 3d at 1027. On a motion for summary judgment, the burden of proof is on the mover. La. Code Civ. Pro. art. 966C(2). However, if the mover will not bear the burden of proof at trial on the matter that is before the court on the motion, the mover's burden does not require that all essential elements of the adverse party's claim, action, or defense be negated. Instead, the mover must point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, the adverse party must produce factual evidence sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial. If the adverse party fails to meet this burden, there is no genuine issue of material fact, and the mover is entitled to summary judgment as a matter of law. La. Code Civ. Pro. art. 966C(2); *All Crane,* 47 So. 3d at 1027.

A fact is material when its existence or nonexistence may be essential to the plaintiff's cause of action under the applicable theory of recovery, meaning that the fact potentially insures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of the legal dispute. *Smith v. Our Lady of the Lake Hosp., Inc.,* 93–2512 (La. 7/5/94), 639 So. 2d 730, 751. Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. *Richard v. Hall,* 03–1488 (La. 4/23/04), 874 So. 2d 131, 137.

Louisiana Revised Statute 9:3221 provides that:

> [T]he owner of premises leased under a contract whereby the lessee assumes responsibility for their condition is not liable for injury

> caused by any defect therein to the lessee or anyone on the premises who derives his right to be thereon from the lessee, unless the owner knew or should have known of the defect or had received notice thereof and failed to remedy it within a reasonable time.

Section 1332 is a statutory exception to the lessor's strict liability for premises defects set forth in Louisiana Civil Code article 2696.[2] Thus, when the lessee has assumed responsibility for the premises, the lessor may be held responsible only upon showing that the lessor knew of the defect, or should have known of the defect, or had received notice of the defect and failed to remedy it within a reasonable time. La. R.S. 9:3221.

In support of the motion for summary judgment, the defendants introduced affidavits by Do and Patterson establishing that Patterson leased the property in question from Do. Do attested that upon expiration of the original one-year term, the lease continued on a month-to-month basis "with the same terms in force," and was in effect at the time of Thomas's injury. Patterson likewise attested that the lease was in effect on the date in question.

The lease between Do and Patterson contains the following provisions:

> The Lessor shall not be liable to Lessee, or to the Lessee's employees, patrons and visitors, or to any other person for any damage to person or property caused by any act, omission or neglect of Lessee or any other tenant of said premises, and Lessee agrees to pay/hold Lessor harmless from all claims for any such damage, whether the injury occurs on or off the premises.
>
> * * * *
>
> Lessee shall be responsible for the upkeep of the yard and assumes responsibility for the condition of the premises.

Do's affidavit states that she had no knowledge of any defect on the property and that she had not been notified of any defect on the property. Patterson's affidavit supported Do's statements, denying that there were any holes or defects

---

[2] Louisiana Civil Code article 2696 provides that a lessor warrants the lessee that the thing leased is suitable for the purpose for which it was leased and that it is free of vices or defects that prevent its use for that purpose. That warranty extends to defects that are not known to the lessor. La. Civ. Code art. 2697.

on the premises and specifically stating that Patterson had not notified Do of any holes or other defects.

In opposition to the motion, Thomas offered his own affidavit, the affidavit of Andre Sterling, who witnessed Thomas fall, the lease agreement, Do's answers to interrogatories, photographs of the area in which he fell, as well as Do's deposition testimony. Thomas contended this evidence showed a genuine issue of material fact as to whether he was injured in an area of the property that was common ground and not covered by the lease. He further contended that he showed a genuine issue of material fact as to whether Do knew her tenant was planting flowers, which created loose soil, on property located in a flood zone.

The trial court concluded that Patterson assumed responsibility for the leased premises pursuant to the terms of the lease and that Do had no knowledge of any defect on the property. Finding no genuine issue of material fact reflected in the evidence offered by Thomas, the trial court granted the motion in the defendants' favor.

On appeal, Thomas does not dispute that the provisions of the lease transferred responsibility of the leased premises from Do to Patterson. Rather, Thomas argues that there are genuine issues of material fact as to whether the lease provisions were in effect at the time he was injured and whether Do knew or should have known of the defect since she knew that Patterson was planting flowers in a flood zone.

After thorough review, we find no merit in Thomas's contentions. First, both Do and Patterson attested that the lease provisions, including those that transferred responsibility for the premises to Patterson, were in effect at the time of Thomas's accident. Second, both Do and Patterson testified that Do had no notice of any defect on the premises. Thomas presented no evidence to the contrary

relative to either issue. Thomas also provided no support for his assertion that Do should be imputed with knowledge of a defect because she allowed her tenant to plant flowers in an alleged flood zone. No evidence of a flood was presented. We find the fact that the property was allegedly in a flood zone to be immaterial and irrelevant.

Lastly, Thomas argues that the area of the flowerbed is "common area" and outside the area covered by the lease and that the question of whether the flowerbed area is "common area" is, at least, a contested material fact. We find no support in the record for that contention.

The exception provided by Section 3221 does not extend to common areas on leased premises which remain under the lessor's control. *See Shubert v. Tonti Development Corp.*, 09-348 (La. App. 5 Cir. 12/29/09), 30 So. 3d 977, 986, *writ denied*, 10-0241 (La. 4/9/10), 31 So. 3d 393; *Dorion v. Eleven Eleven Bldg.*, 98-3018 (La. App. 4 Cir. 5/12/99), 737 So. 2d 878, 880. In *Ostrander v. Parkland Villa Apartments*, 511 So. 2d 1293, 1294-95 (La. App. 2 Cir. 1987), the court explained:

> [Section] 3221 does not apply to damages incurred by the lessee resulting from a defect in the property which is not part of the leased premises, and over which the lessee has no supervision or control.... When a common accessory is under the control of the lessor, the tenant can maintain an action for damages flowing from an injury caused by a defect in the accessory, notwithstanding his contractual assumption under [Section] 3221.

The reasoning for this "is that no single, individual tenant normally assumes exclusive responsibility for the care and maintenance of common areas." *Shubert*, 30 So. 3d at 986.

Do's August 3, 2012 affidavit sets forth that the leased property is one unit of a duplex apartment with a flowerbed next to its entryway. Photographs attached to Do's affidavit show a flowerbed directly in front of the unit's door. In her

affidavit, Do states that "[t]here is no common ground as maintained by plaintiff and [the] duplex is not a major apartment complex that would have common grounds and stairways for use by all tenants of the complex." Do maintains that the flowerbed is part of the leased property for which Patterson assumed responsibility, and is not "common ground" as alleged by Thomas. Do ~~stated~~ further attested and the photographs show that the flowerbed was immediately outside the front door of Patterson's rented unit, and was covered by the lease. Again, Thomas provided no support for his contention that the flowerbed was a "common area." The undisputed facts presented by Do and Patterson refute that contention. We find that the defendants established that Do is not liable for injuries Thomas sustained as a result of the alleged defect in the rental property.

The arguments and evidence presented by Thomas do not reveal any genuine issue of material fact that would preclude summary judgment. For these reasons, summary judgment was appropriately granted dismissing Thomas's claims against the defendants.

CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed. Costs of this appeal are assessed to Ferinando Thomas.

AFFIRMED.