STATE OF MICHIGAN

COURT OF APPEALS

RICK HATTLEY,

Plaintiff-Appellant,

v

STANLEY TARGOSZ, d/b/a COURT OF KINGS APARTMENTS,

Defendant-Appellee.

UNPUBLISHED
August 2, 2002

No. 232871
Wayne Circuit Court
LC No. 00-008610-NO

Before: Murray, P.J., and Sawyer and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was visiting his father, who resided in an apartment on defendant's premises. Plaintiff parked his car in the rear parking lot and attempted to walk to the front of the building through an area between the building and a fence. A large amount of snow was on the ground at the time, and snow from the parking lot had been plowed to the corner of the building. The snow formed a large mound that blocked clear access to the area between the building and the fence. Plaintiff, who was wearing tennis shoes, attempted to climb over the snow mound so that he could walk between the building and the fence. He slipped on the snow and sustained injuries when he hit his head on an electrical box attached to the building.

Plaintiff's complaint alleged that defendant negligently failed to maintain the premises in a reasonably safe condition, including the area between the building and the fence, which was used as a common walkway, and to warn of the unsafe condition. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that he had no duty to maintain the area where plaintiff fell because the area was not designed for pedestrian traffic and had never been maintained for that purpose. The trial court granted the motion, finding that because plaintiff did not present evidence to create an issue of fact as to whether the area was a common walkway, as a matter of law defendant did not owe plaintiff a duty to clear the area.

We review a trial court's decision on a motion for summary disposition de novo. *Harrison v Olde Financial Corp*, 225 Mich App 601, 605; 572 NW2d 679 (1997).

To establish a prima facie case of negligence, a plaintiff must prove: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached the duty; (3) that the defendant's breach of duty proximately caused the plaintiff's injuries; and (4) that the plaintiff suffered damages. *Berryman v K-Mart Corp*, 193 Mich App 88, 91-92; 483 NW2d 642 (1992).

A possessor of land has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. A possessor of land may be held liable for injuries resulting from negligent maintenance of the land. The duty to protect an invitee does not extend to a condition from which an unreasonable risk of harm cannot be anticipated, or from a condition that is so open and obvious that an invitee could be expected to discover it for himself. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). Generally, whether a duty exists is a question of law for the court. However, where the determination of duty depends on factual findings, those findings must be made by the jury. *Holland v Liedel*, 197 Mich App 60, 65; 494 NW2d 772 (1992).

Plaintiff argues that the trial court erred by granting defendant's motion for summary disposition. He contends that the trial court impermissibly made a finding of fact on the issue of whether the area between the building and the fence was a walkway in order to conclude that defendant did not have a duty to maintain the area.

We disagree and affirm. The area between the building and the fence was not a paved walkway, and was not designated as a walkway. On the day of the incident a large pile of snow blocked access to the area between the building and the fence. Plaintiff asserted that the area between the building and the fence was commonly used as a walkway; however, he presented only his opinion to support this assertion. Speculation and conjecture are insufficient to create a genuine issue of material fact. *Detroit v General Motors Corp*, 233 Mich App 132, 139; 592 NW2d 732 (1998).

Moreover, plaintiff's statements in his affidavit that he did not climb over a pile of snow and that he was walking on a smooth path when he fell directly contradicted his deposition testimony that he fell when he was climbing over a pile of snow. A party cannot create a factual dispute by submitting an affidavit that directly contradicts his own sworn testimony. *Dykes v William Beaumont Hosp*, 246 Mich App 471, 480; 633 NW2d 440 (2001).

Because it was undisputed that the area was not paved for use as a walkway, and given that plaintiff failed to present evidence that created an issue of fact as to whether the area was generally used as a walkway, the trial court did not err in finding that defendant did not have a duty to clear the area of snow so that it was accessible to pedestrians. *Holland*, *supra*. A possessor of land is not an absolute insurer of safety to an invitee. *Anderson v Wiegand*, 223 Mich App 549, 553-554; 567 NW2d 452 (1997).

Affirmed.

/s/ Christopher M. Murray
/s/ David H. Sawyer
/s/ Brian K. Zahra