STATE OF MICHIGAN

COURT OF APPEALS

VICTORIA L. GOTAUTAS,

Plaintiff-Appellant,

v

THE MARION APARTMENTS OF ST. CLAIR,

Defendant-Appellee.

UNPUBLISHED
November 16, 2006

No. 270785
St. Clair Circuit Court
LC No. 05-001479-NI

Before: Servitto, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant's motion for summary disposition and dismissing plaintiff's complaint with prejudice. We affirm.

Plaintiff slipped and fell on ice in the parking lot of her apartment building, owned and operated by defendant, sustaining injuries to her ankle. On appeal, plaintiff argues that genuine issues of material fact existed regarding whether defendant had constructive notice of the icy condition of the parking lot, and whether defendant breached its duty to inspect the premises and take reasonable measures to ensure that the common areas, including the parking lot, were fit for their ordinary use. We disagree.

On appeal, this Court reviews a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). This Court must review the record in the same manner as the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998); *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005). Review is limited to the evidence that had been presented to the trial court at the time the motion was decided. *Peña v Ingham County Road Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003).

The mere occurrence of a fall on defendant's premises is not enough to raise an inference of negligence on the part of defendant. *Andrews v K Mart Corp*, 181 Mich App 666, 669; 450 NW2d 27 (1989). In a premises liability case, the plaintiff must prove the elements of a negligence claim: (1) a duty owed by the defendant to the plaintiff, (2) the defendant breached that duty, (3) the breach proximately caused plaintiff's injury, and (4) the plaintiff suffered damages. *O'Donnell v Garasic*, 259 Mich App 569, 573; 676 NW2d 213 (2003); *Taylor v Laban*, 241 Mich App 449, 452-453; 616 NW2d 229 (2000). The duty owed by the landlord to

the plaintiff varies with the plaintiff's status on the land. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000). A tenant is an invitee of her landlord. *Stanley v Town Square Coop*, 203 Mich App 143, 149; 512 NW2d 51 (1993). A landlord, as an invitor, has a common law duty to exercise reasonable care to protect an invitee from unreasonable risk of harm caused by dangerous conditions on the land. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001).

Usually, an accumulation of ice and snow presents an open and obvious danger. An invitor has a duty to take reasonable measures within a reasonable time after an accumulation of ice and snow to diminish the hazard of injury to an invitee only if the accumulation is not open and obvious or there is some special aspect, which makes the accumulation unreasonably dangerous. *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 328-329, 332-333; 683 NW2d 573 (2004). However, MCL 554.139 imposes a higher duty on landlords than on other invitors. *Benton v Dart Properties Inc*, 270 Mich App 437, 443 n 2; 715 NW2d 335 (2006). MCL 554.139 provides, in relevant part:

> (1) In every lease or license of residential premises, the lessor or licensor covenants:
>
> > (a) That the *premises and all common areas* are *fit for the use intended* by the parties.
> >
> > (b) To keep the *premises* in *reasonable repair* during the term of the lease or license, and to *comply with the applicable health and safety laws* of the state and of the local unit of government where the premises are located, except when the disrepair or violation of the applicable health or safety laws has been caused by the tenants [sic] willful or irresponsible conduct or lack of conduct.
>
> * * *
>
> (3) The provisions of this section *shall be liberally construed* . . . . [Emphasis added.]

Thus, the open and obvious danger doctrine is not applicable when a tenant is injured because a landlord failed to maintain the premises and the common areas fit for the use intended and in reasonable repair. MCL 554.139(1)(a) and (b); *O'Donnell*, *supra* at 581. Rather, liability for injuries due to the accumulation of ice and snow may be imposed on a landlord only if the condition of the premises was caused by the landlord's active negligence, was known to the landlord, or the condition was of such a character or duration that it should have been known. *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 706; 644 NW2d 779 (2002); *Hampton v Waste Mgt of Michigan*, 236 Mich App 598, 604; 601 NW2d 172 (1999). Thus, if defendant did not create the icy condition, plaintiff must show that defendant should have known about the condition and failed to take reasonable measures to prevent injury. *Clark v K Mart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001); *Benton*, *supra* at 441.

Plaintiff argues on appeal that granting defendant's motion for summary disposition was not appropriate because reasonable minds may differ regarding whether defendant had

constructive notice of the ice in the parking lot, and whether defendant breached the duty owed to plaintiff. We disagree. Viewed in a light most favorable to plaintiff, the evidence did not present a genuine issue of material fact regarding defendant's notice of the ice.[1]

The day of plaintiff's accident was clear and cold, with no snow or rain. Plaintiff stated that it did not snow for a couple of days before the incident, and that she had no difficulty walking to her car when she left her apartment to go to work early that morning. According to plaintiff, there was no visible snow or ice in the parking lot. When she returned from work, on her way from the parking lot to her apartment, plaintiff slipped and fell on the concrete portion of the driveway, between the left wall of a garage and a sewer drain. Although nothing was obstructing the area where she fell and it was still daylight, plaintiff did not see ice or snow on the concrete before or after she fell. However, plaintiff claims she felt the ice when lying on the ground. Plaintiff did not notice any salt in the parking area. However, the snow removal bill indicates that snow was removed and salt was applied on the premises two days before the accident. Notably, plaintiff presented no evidence showing how the ice patch developed, the duration of time it had existed before plaintiff's accident, or that defendant had actual notice of the ice. There is also no indication that weather conditions were such that defendant would have suspected ice could form in the parking lot area or would have determined the need to take preventive measures. Although defendant owed plaintiff a duty of care, plaintiff failed to show that defendant had actual or constructive notice of the existence of the alleged ice. Thus, the trial court properly granted defendant's motion for summary disposition.

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot

---

[1] On appeal, plaintiff relies on documents that were not presented to the trial court in connection with defendant's motion for summary disposition, such as weather reports, transcripts of other depositions, and a copy of a contract for the snow and ice removal. This Court's review is limited to the evidence that had been presented to the trial court at the time the motion was decided. *Peña*, *supra* at 310. Accordingly, we will review, in a light most favorable to plaintiff, only the evidence presented in connection with defendant's motion for summary disposition. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004).