STATE OF MICHIGAN

COURT OF APPEALS

KATRINA HILTON,

Plaintiff-Appellant,

v

BARRINGTON GROUP, INCORPORATED and GINGER APARTMENTS, L.P.,

Defendants-Appellees.

UNPUBLISHED
November 17, 2009

No. 282312
Oakland Circuit Court
LC No. 07-080703-NS

Before: Markey, P.J., and Fitzgerald and Gleicher, JJ.

MARKEY, J., (dissenting).

I respectfully dissent. Plaintiff tripped and fell on a single riser step in the community laundry room of defendants' apartment building, sustaining injuries to her ankle. My deferential review of the trial court's decision to set aside entry of default against defendant Ginger Apartments convinces me that the trial court's decision was within the range of reasonably principled outcomes. Further, I concur with the trial court that the undisputed facts here do not create either a material question of fact that the step was not open and obvious, or an unreasonably dangerous condition despite being open and obvious. I would affirm.

This Court reviews a trial court's decision on a motion to set aside a default for a clear abuse of discretion. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 625; 750 NW2d 228 (2008). "[A]n abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). Although this standard of review is not as deferential as that enunciated in *Spalding v Spalding*, 355 Mich 382; 94 NW2d 810 (1959), it recognizes that "'there will be more than one reasonable and principled outcome.'" *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006), quoting *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). To find an abuse of discretion still requires that the appellate court have far more than a difference of judicial opinion with the lower court regarding the outcome the trial court selects. See *Saffian*, *supra*, quoting *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 761-762; 685 NW2d 391 (2004), quoting *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999) (noting appellate review of the trial court's decision to set aside a default is "sharply limited" to when there is a "clear abuse of discretion").

A motion to set aside an entry of default may be granted, unless on the basis of lack of jurisdiction over the defendant, only on a showing of good cause and an affidavit of facts

showing a meritorious defense is filed. MCR 2.603(D)(1); *Saffian, supra* at 14. As the majority notes, the moving party shows sufficient "good cause" to set aside a default by establishing either (1) a substantial irregularity or defect in the proceeding upon which the default is based, or (2) a reasonable excuse for failure to comply with the requirements that created the default. *Alken-Ziegler, Inc, supra* at 233. Although "good cause" and "meritorious defense" are separate inquiries, a lesser showing of "good cause" is required when a party states a meritorious defense that would be absolute if proven, to prevent a manifest injustice. *Id*. at 230-231, 233-234.

I conclude that the trial court's determination that defendant Ginger Apartments established both good cause to set aside the default in the form of a reasonable excuse for the failure to timely respond and also a meritorious defense was a reasonable and principled outcome. As Solove's attorney stated in an affidavit, the individual designated to receive and respond to legal notices was in the hospital for the entire period of time in question. He was unable to receive any mail, and there is no evidence that Solove was able to accomplish any work. The trial court could have properly discounted plaintiff's argument, accepted by the majority, that others in the business should have performed Solove's responsibilities. Ginger Apartments was not responsible for the day-to-day management of the apartment complex. This task was left to defendant, Barrington Group, Incorporated. There is nothing to suggest that Solove's medical condition was any less serious then stated, and there is no indication that anyone else from Ginger Apartments was aware of the lawsuit until counsel for Barrington Group contacted Solove's attorney, who then acted immediately. I find that the trial court's determination that defendant Ginger Apartments presented sufficient evidence to establish good cause was among the reasonable and principled outcomes, so not an abuse of discretion.

Moreover, the trial court did not abuse its discretion by determining that defendant Ginger Apartments presented an affidavit of meritorious defenses: that there was no notice of a hazardous condition and that the step on which plaintiff fell was an open and obvious condition. Indeed, these defenses are such that if proven would be absolute, thus lessening defendant Ginger Apartments' burden of showing "good cause" for its failure to timely respond to plaintiff's complaint. *Alken-Ziegler, supra* at 233-234. So, I would hold that the trial court did not abuse its discretion by setting aside the entry of default against Ginger Apartments.

I also respectfully disagree with the majority that the trial court erred in granting defendants' motion for summary disposition. A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support for a claim and should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Healing Place at North Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51, 55-56; 744 NW2d 174 (2007). "A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue on which reasonable minds could differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

In a premises liability action, the plaintiff must prove the four elements of negligence: (1) that the defendant had a duty to the plaintiff, (2) the defendant breached that duty, (3) the breach proximately caused an injury, and (4) the plaintiff suffered damages as a result. *Taylor v Laban*, 241 Mich App 449, 452; 616 NW2d 229 (2000). A premises possessor owes a common law duty to exercise reasonable care to warn or protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech*, 464 Mich 512, 516; 629 NW2d 384 (2001). Here, plaintiff was a social guest of Richardson, the tenant at the apartment

complex. Social guests of tenants are classified as invitees of the landlord. *Stanley v Town Square Co-op*, 203 Mich App 143, 147-148, 512 NW2d 51 (1993). But the basic duty to warn or protect an invitee does not generally include removal of open and obvious dangers. "[W]here the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee." *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992).

The open and obvious doctrine is not an exception to the duty owed to invitees, but instead is "an integral part of the definition of that duty." *Lugo*, *supra* at 516. A danger is open and obvious if "an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection[.]" *Novotney v Burger King (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993). This test is objective, meaning a court does not consider whether a particular plaintiff should have known that the condition was hazardous, but rather whether a reasonable person in that position would have foreseen the danger. *Joyce v Rubin*, 249 Mich App 231, 238-239; 642 NW2d 360 (2002). Only when a premises condition has special aspects that make it unreasonably dangerous despite its being open and obvious so that it presents a "uniquely high likelihood of harm or severity of harm if the risk is not avoided" does the duty to protect invitees from that risk still apply. *Lugo*, *supra* at 517-519.

The majority agrees with plaintiff that the trial court should have considered Charles Reynolds's affidavit as an expert opinion to create a question of fact. Reynolds opined that the step and its surrounding area because of its monotone gray color rendered it unreasonably hazardous and not open and obvious on casual inspection. Even without Reynolds's affidavit, the majority concludes the evidence, including photographs of the area, creates a genuine issue of material fact whether the step was open and obvious upon casual inspection. Further, the majority concludes that even if open and obvious, questions of fact existed whether special aspects of the step, including its being unavoidable and its monotone color scheme, rendered it unreasonably dangerous despite its being open and obvious. I conclude that even if Reynolds's affidavit is considered, the step at issue is an open and obvious hazard that is not rendered unreasonably dangerous by its monotone color scheme.

"[T]he danger of tripping and falling on a step is generally open and obvious." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614; 537 NW2d 185 (1995). Specifically, differing floor levels in buildings are so common that the landowner does not owe a duty to make ordinary steps foolproof or to protect invitees from any harm they present unless special aspects of the steps make the risk of harm unreasonable. *Id.* at 614-617. To find an unreasonable risk of harm, there must be something unusual about "the character, location, or surrounding conditions of the steps." *Id.* at 617. In my opinion, the ordinary steps in this case did not pose an unreasonable risk of harm despite the absence of warnings or the failure to mark the steps with a contrasting color. *Id.* at 618-621.

Plaintiff's deposition testimony is inconsistent regarding whether she was looking where she was going. At one point, she indicates that although she looked down just before she reached the step, she did not see it. But, she also testified that, hypothetically, if she had looked straight down, she probably would have seen it. Regardless, the mere fact that plaintiff did not see the step before she fell is irrelevant because the test is objective. *Novotney*, *supra* at 475. If an average person of ordinary intelligence would have been able to discover the step, then it is

still open and obvious. *Id.*; *Joyce*, *supra* at 238-239. If the condition creates a risk of harm solely because the plaintiff failed to notice it, the open and obvious doctrine eliminates liability if the plaintiff should have discovered it and realized its danger. *Bertrand*, *supra* at 611. Also, that contrasting paint or other visual clues might have rendered the step more visible does not equate to the step having special aspects rendering it an unreasonably dangerous. Ordinary steps do not pose an unreasonable risk of harm despite the absence of warnings or the failure to mark the steps with a contrasting color. *Id.* at 618-623.

While the step may not be readily apparent on first glance in the some of the photographs provided, there are sufficient visual cues to alert a casually observant person of the need to descend into the room. The upper level wraps to the left all the way along the room, and the step down from this level can be seen across the room to the door on the far side of the room. This would tip off the average person that he will need to descend into this room. Also, looking across the room, the door on the other side of the room appears lower. This provides another visual cue that a step down will be necessary. Additionally, the crumbling edge of the step shown in some of defendants' photographs is another visual cue that there is a step. Steps that are the same color as their surroundings are not unusual occurrences. See *Bertrand*, *supra* at 618-621. Considering the visual cues previously discussed and the relatively short height of the step, there is nothing about this step that presented a uniquely high likelihood of harm or severity of harm if it were not avoided. *Lugo*, *supra* at 517-519. Therefore, the step is an open and obvious condition not possessing any special aspects making it unreasonably dangerous.

For the foregoing reasons, I would affirm.

/s/ Jane E. Markey