STATE OF MICHIGAN

COURT OF APPEALS

SAMUEL SOLOMON,

Plaintiff-Appellant,

v

BLUE WATER VILLAGE EAST, LLC, BLUE WATER VILLAGE SOUTH, LLC, and FADY, INC,

Defendants-Appellees.

UNPUBLISHED
July 29, 2010

No. 291780
Eaton Circuit Court
LC No. 08-000797-CK

Before: O'CONNELL, P.J., and METER and OWENS, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On February 19, 2007, plaintiff slipped and fell on the sidewalk of his apartment complex. About five inches of snow had fallen on or about February 14, 2007. Defendants contracted for the snow removal and a salting of the premises on February 14, 2007. No further snow fell between February 14, 2007, and February 19, 2007.

On the day of the incident, plaintiff left his apartment early in the morning. He observed snow and ice on the stairs and sidewalk that morning, but did not inform defendant of the condition. Weather records indicate that the temperature rose as high as 41 degrees Fahrenheit during the day, which caused some snow to thaw and run onto the stairs and sidewalk. When plaintiff returned home at approximately 5:00 p.m., he did not use the stairs to travel from the parking lot to his apartment, but instead took a shortcut. That evening, plaintiff left his apartment between 6:00 p.m. and 7:00 p.m. He used the stairs located near his apartment. As he stepped from the last step onto the downward-sloping concrete pad leading to the parking lot, plaintiff slipped and fell on a patch of ice. As a result of his fall, plaintiff sustained an ankle injury that required surgical repair.

Plaintiff filed suit alleging that defendants negligently failed to maintain the property in a condition fit for its intended use pursuant to MCL 554.139, and that defendants negligently allowed an unnatural accumulation of ice to remain on the sidewalk. Defendants moved for

summary disposition pursuant to MCR 2.116(C)(10). The trial court granted the motion, finding that the condition about which plaintiff complained was open and obvious, and that the circumstances presented by the ice on which plaintiff fell were not such that defendants were required to remove the ice in order to keep the sidewalk fit for its intended use.

We review a trial court's decision to grant or deny a motion for summary disposition de novo. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). When reviewing a motion brought under MCR 2.116(C)(10), we consider "the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Id*. If there is no genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Id.*

"In a premises liability action, a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Benton v Dart Properties Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006). The duty owed to a plaintiff depends on the plaintiff's status on the property. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). Since a lessor receives a pecuniary benefit from tenants, while tenants are in the common areas of the premises, they are considered invitees of the lessor. *Stanley v Town Square Co-op*, 203 Mich App 143, 147; 512 NW2d 51 (1993).

A lessor "owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). This duty does not extend to a danger that is open and obvious, unless there is a special aspect of the danger that makes it unreasonably dangerous. *Id.* at 517. Although the open and obvious doctrine may cut off liability for common-law negligence, it does not bar a premises liability claim based on violation of a specific statutory duty, such as the one brought in this action. *Royce v Chatwell Club Apartments*, 276 Mich App 389, 397; 740 NW2d 547 (2007).

MCL 554.139(1)(a) states that in every lease of a residential premises, the lessor covenants to keep "the premises and all common areas . . . fit for the use intended by the parties." Plaintiff relies on *Benton* for his claim that defendant breached its duties under the statute. The trial court determined that *Allison v AWE Capital Mgt LLP*, 481 Mich 419; 751 NW2d 8 (2008), controlled, but after a review of those cases, we find that the trial court erred in so concluding.

In *Benton*, the plaintiff noticed the icy sidewalks when he left for work in the morning, and when he returned home later that evening. While leaving his apartment, he slipped and fell on the snow and ice covered sidewalk as he walked to the parking lot. *Benton*, 270 Mich App at 439. The plaintiff had taken a different path from the one taken when he returned home from work shortly before the incident, and therefore had not previously encountered the hazard. The plaintiff subsequently brought a premises liability action based on negligence and the defendant's breach of its statutory duty under MCL 554.139(1)(a). *Id.* The trial court granted the defendant's motion for summary disposition.

This Court reversed the trial court's decision. The *Benton* Court's review focused on the statutory claim. After concluding that a sidewalk that is within an apartment complex

constitutes a "common area" under the statute, this Court proceeded to determine the fitness of the sidewalk for its intended purpose. *Benton*, 270 Mich App at 442-443. The *Benton* Court held that "a landlord has a duty to take reasonable measures to ensure that the sidewalks are fit for their intended use. Because the intended use of a sidewalk is walking on it, a sidewalk covered with ice is not fit for this purpose." *Id.* at 444. Although the defendant salted the sidewalks once that morning, the *Benton* Court found that a genuine issue of material fact existed as to whether it was a sufficient preventive measure given the weather conditions on the day of the incident. *Id.* at 445.

In *Allison*, our Supreme Court considered MCL 554.139(1)(a) as it applied to a parking lot's fitness for its intended use. In that case, the plaintiff slipped and fell in his apartment complex parking lot, which was covered in approximately one to two inches of snow and ice. The *Allison* Court cited *Benton* when concluding that parking lots constitute "common areas" under the statute. *Allison*, 481 Mich at 428. In determining the intended use of a parking lot, the *Allison* Court noted that "neither of the parties . . . indicated that the intended use of the parking lot was anything other than basic parking and reasonable access to such parking." *Id.* at 429-430. The *Allison* Court held that, "[w]hile a lessor may have some duty under MCL 554.139(1)(a) with regard to the accumulation of snow and ice in a parking lot," the accumulation of one to two inches of snow and ice was not enough to trigger the defendant's duty under the statute, because it did not preclude tenants from parking or accessing their vehicles in the lot. *Id.* at 430.

We conclude that *Benton* comports with and survives *Allison*. Since different areas of an apartment complex may have different intended uses, whether there is a breach of the statute depends heavily on the primary intended use of the portion of the premises at issue. The intended use of a sidewalk is for walking, *Benton*, 270 Mich App at 444, while the intended of a parking lot is primarily for parking vehicles, *Allison*, 481 Mich at 430. Since the intended uses are different, a condition that renders a sidewalk unfit for use may not have the same effect on a parking lot. Therefore, the proper inquiry here is whether there is a genuine issue of material fact as to whether defendant breached its duty under MCL 554.139(1)(a) in light of *Benton*.

"A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When determining whether a genuine issue of material fact exists, all reasonable inferences are made in favor of the nonmoving party. *Bertrand v Allan Ford, Inc*, 449 Mich 606, 618; 537 NW2d 185 (1995).

In this case, weather records indicate that approximately five inches of snow remained on the ground at the time of the incident. On February 14, 2007, defendants had the snow removed from the sidewalks and parking lot, and applied salt to those areas. Defendants do not assert that any other measures were taken between February 14, 2007, and the date of the incident. According to weather records, on February 19, 2007, temperatures reached as high as 41 degrees Fahrenheit. Such a rise in temperature very likely caused some of the accumulated snow to melt. Plaintiff contends that the downward sloping design of the sidewalk and concrete pad produced a concentrated accumulation of melted snow, which turned into ice. Photographs of the subject area reveal the sloping nature of the sidewalk, and support the conclusion that snowmelt could accumulate in the area. Given the downward slope, if ice were to form in that area of the sidewalk, it could certainly present a dangerous condition.

In light of the existing accumulation on the day of the incident, the rising temperatures, and the downward slope of the area of the sidewalk at issue, we find that reasonable minds could differ as to whether reasonable measures were taken to keep the area free from ice. The *Benton* Court found that, given the weather conditions during the day, a genuine issue of material fact existed as whether salting only once during the day was a reasonable measure. *Benton*, 270 Mich App at 445. In this case, the last measure to keep the sidewalks free from ice and snow was taken five days prior to the incident. Accordingly, we find that a genuine issue of material fact exists as to whether such inaction was reasonable in light of the weather conditions between that last measure and the time of the incident. The trial court erred in granting summary disposition for defendants.

Reversed. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Donald S. Owens