STATE OF MICHIGAN

COURT OF APPEALS

DAVID MILLER,

Plaintiff-Appellant,

v

HOT ROD MOTORCYCLES, INC., d/b/a HOT ROD HARLEY-DAVIDSON,

Defendant-Appellee.

UNPUBLISHED
December 16, 2010

No. 295120
Muskegon Circuit Court
LC No. 2009-046511-NO

Before: MURRAY, P.J., and HOEKSTRA and SERVITTO, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in defendant's favor in this premises liability claim. Because the condition leading to plaintiff's injuries was open and obvious, with no special aspects present, we affirm.

Plaintiff initially visited defendant's business in February 2006. He made at least one more visit during the next few weeks, and, on March 2, 2006, plaintiff again visited defendant's business. On that date, as he exited the store, plaintiff stepped on a corner of the handicapped ramp leading to the store front and fell, incurring injuries. According to plaintiff, the edge of the ramp was concealed due to snow. Plaintiff thereafter initiated the instant lawsuit against defendant, asserting claims of negligence and nuisance.

Defendant moved for summary disposition, asserting that the condition alleged to have caused plaintiff's injuries was open and obvious and, as a result, plaintiff's claims were barred. The trial court agreed, entering an order dismissing plaintiff's claims based upon the open and obvious doctrine. Plaintiff now appeals that decision.

We review de novo a trial court's ruling on a motion for summary disposition. *Robertson v Blue Water Oil Co*, 268 Mich App 588, 592; 708 NW2d 749 (2005). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When reviewing a motion under this subrule, this Court considers the pleadings, admissions, affidavits, and other relevant record evidence in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

On appeal, plaintiff contends that the condition causing his injuries was not open and obvious and that even if it was, special aspects of the condition existed so as to remove the matter from the application of the open and obvious doctrine. Plaintiff asserts that summary disposition was thus inappropriate. We disagree.

Generally, a premises owner 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. *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002). Under the open and obvious doctrine, however, where the invitee knows of the danger or where it is so obvious that a reasonable invitee should discover it, a premises owner owes no duty to protect the invitee unless harm should be anticipated despite the invitee's awareness of the condition. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001); *Riddle v McLouth Steel Prods Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). To determine whether a danger is open and obvious, the courts consider "whether an average user with ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection." *Joyce*, 249 Mich App at 238.

In this matter, plaintiff testified that he had been to defendant's place of business on at least two prior occasions. He was thus familiar with the general layout of the store's entrance and exit. Plaintiff further testified that there had been a terrible storm the night before he fell at defendant's business, with sleet, freezing rain, and snowfall. According to plaintiff, the sidewalk in front of the building had been shoveled, as had the handicapped ramp. Plaintiff testified that, "[t]he rest of it was full, it was level, but you could see there was snow."

Plaintiff testified that only one of the double doors leading into the store was available for use on March 2, 2006, and that the available door opened outward only about 60 degrees. Despite the limited access through the door, however, plaintiff walked up the handicapped ramp to enter the store with no apparent problems. Plaintiff testified that as he left the store, he was carrying purchases in each hand, and that a store employee exited the store ahead of him, assisting him by carrying another of plaintiff's purchases. The store employee held the door open for plaintiff but, according to plaintiff, because the door only opened partway, it forced him to step onto the "deadfall" area of the handicapped ramp (the sloped side of the ramp leading to the pavement below) rather than directly on the ramp itself.

Plaintiff acknowledged that three to six inches of snow had fallen the evening before, and that snow had filled the space next to the ramp so that it was level with it. According to plaintiff, the specific cause of his fall was the snow-covered ramp sides. However, plaintiff was well aware that there was a ramp, and basic knowledge dictates that a ramp will have sides that are not even with the surrounding pavement. A ramp is, after all, constructed as an alternative to steps, to provide access to a higher area. Plaintiff readily admitted to knowing the ramp was there, and saw that the snow was even with the ramp. Notably, he did not testify that he thought the ramp continued beyond the area that was shoveled and visible.

Moreover, any surface covered with several inches of snow poses an obvious danger, as anything from ice to sharp objects could be under the snow. See, *Ververis v Hartfield Lanes*, 271 Mich App 61, 67; 718 NW2d 382 (2006)("[W]e hold as a matter of law that, by its very nature, a snow-covered surface presents an open and obvious danger because of the high probability that it may be slippery."). Given plaintiff's observations, as well as the fact that plaintiff easily walked

up the ramp and through the same door through which he exited, any danger posed by the snow-covered side slopes of the ramp was open and obvious.

The question becomes, then, whether there existed a special aspect that made the risk posed by the snow-covered side slopes unreasonably dangerous so as to give rise to a duty on behalf of defendant despite the open and obviousness of the condition. Generally, if "special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." *Lugo*, 464 Mich at 517. According to the *Lugo* court, special aspects exist where a condition, though open and obvious, is effectively unavoidable, such as where the only exit to a business is covered with standing water, or where a condition poses an unreasonably dangerous risk, such as an unguarded 30-foot-deep pit in the middle of parking lot. *Id*. at 518-519. Neither a common condition nor an avoidable condition is uniquely dangerous. *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 8-9; 649 NW2d 392 (2002).

Plaintiff contends that the condition at issue was effectively unavoidable in that there was only one door open for use at the business and, at the time of his fall, said door was not working properly. Plaintiff asserts that because the door opened outward only 60 degrees, he was forced to step not directly in the middle of the ramp, but off to the ramp side, where the snow-covered slope began. This may have been the only way out of the building, but, as previously indicated, plaintiff was confronted with the exact same situation in entering the store and managed to do so without incident. Plaintiff was therefore on notice of the situation before he entered the store. At that point, plaintiff could have elected to return to the store at a later time rather than face the conditions presented. There is no indication that plaintiff had to be at defendant's store on that precise date and at that precise time to deal with a crucial and urgent matter or that plaintiff somehow was trapped. The condition was thus not effectively unavoidable.

Plaintiff next asserts that the slope of the "deadfall" on the ramp exceeded the maximum percentage of slope allowed under the Michigan Building Code and that this violation presents a special aspect. We first note that the allegation of a violation is supported only by plaintiff's self-serving affidavit that he measured the slope and it violated the applicable code. Second, the violation of a building code serves as some evidence of negligence, but does not necessarily support a "special aspects" analysis. *O'Donnell v Garasic*, 259 Mich App 569, 578; 676 NW2d 213 (2003), abrogated on other grounds, *Mullen v Zerfas*, 480 Mich 989; 742 NW2d 114 (2007). Regardless of a code violation, the critical question remains whether there is something unusual about the alleged hazard that gives rise to an unreasonable risk of harm. *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 720; 737 NW2d 179 (2007). Here, there was nothing unusual about the areas around the ramp being full of snow that would create an *unreasonable* risk of harm.

Plaintiff's final argument on appeal is that the existence of a genuine issue of material fact precluded summary disposition on his nuisance claim. We disagree.

We first note that plaintiff has cited no binding authority to support his position. As such, we may view the claim as effectively abandoned and need not consider it. See, e.g., *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001). Nevertheless, we will briefly address this issue.

In a section of plaintiff's complaint entitled "nuisance," plaintiff alleged that defendant "improperly operated and maintained the premises" by maintaining a ramp that was not in conformance with applicable municipal building codes, and by having their door only partially operable, thereby directing pedestrian traffic toward the unmarked side slope of the ramp. Plaintiff alleges, then, that his fall occurred because the faulty door directed him toward the edge of the shoveled ramp, to a snow-covered and unmarked slope on the side of the ramp. These allegations necessarily find their basis in premises liability because the allegations focus on defendant's duties (and alleged breach thereof) as a premises owner. Plaintiff, in essence, contends that defendant failed to maintain his door in an operable manner, and that he failed to shovel the snow off the ramp slopes or warn of their existence. Plaintiff does not assert that defendant created the condition—i.e. the faulty door or the snow-covered ramp. Instead, he finds fault with defendant's actions in maintaining his premises in an unsafe manner. When an injury develops from a condition of the land, rather than from an activity or conduct that created the condition, the action sounds in premises liability. *James v Albert*, 464 Mich 12, 18-19; 626 NW2d 158 (2001).

The gravamen of an action is determined by reading the claim as a whole and looking beyond the procedural labels to determine the exact nature of the claim. *Tipton v William Beaumont Hosp*, 266 Mich App 27, 33; 697 NW2d 552 (2005). Looking at plaintiff's allegations as whole, his claims are born out of premises liability. Thus, plaintiff's nuisance claim is not sustainable as a cause of action separate and distinct from that of his premises liability claim.

Affirmed.

/s/ Christopher M. Murray
/s/ Joel P. Hoekstra
/s/ Deborah A. Servitto