S T A T E   O F   M I C H I G A N

C O U R T   O F   A P P E A L S

JEFFREY J. MUTUAL,

Plaintiff,

v

KOJAIAN MANAGEMENT CORPORATION, GRUBB & ELLIS MANAGEMENT SERVICES, INC., and TTERTT ASSOCIATES, L.L.C., d/b/a TOP OF TROY,

Defendants/Cross-Plaintiffs-Appellees,

and

BONDED MAINTENANCE COMPANY,

Defendant/Cross-Defendant-Appellant.

UNPUBLISHED
December 21, 2010

No. 293740
Oakland Circuit Court
LC No. 2007-086077-NO

JEFFREY J. MUTUAL,

Plaintiff-Appellant,

v

KOJAIAN MANAGEMENT CORPORATION, GRUBB & ELLIS MANAGEMENT SERVICES, INC., and TTERTT ASSOCIATES, L.L.C., d/b/a TOP OF TROY,

Defendants/Cross-Plaintiffs-Appellees,

and

No. 295842
Oakland Circuit Court
LC No. 2007-086077-NO

BONDED MAINTENANCE COMPANY,

Defendant/Cross-Defendant-
Appellee.

Before: DONOFRIO, P.J., and CAVANAGH and FITZGERALD, JJ.

PER CURIAM.

In Docket No. 293740, defendant/cross-defendant, Bonded Maintenance Company ("Bonded"), appeals as of right from the trial court's order granting summary disposition in favor of defendants, Kojaian Management Corporation ("Kojaian"), Grubb & Ellis Management Services, Inc. ("Grubb & Ellis"), and TTERTT Associates, L.L.C., d/b/a Top of Troy ("TTERTT"), and Bonded (referred to collectively as "defendants"). Bonded argues on appeal that the trial court erred when it granted partial summary disposition in favor of Grubb & Ellis and TTERTT[1] on their cross-complaint for indemnification from Bonded. We affirm.

In Docket No. 295842, plaintiff also appeals as of right from the trial court's order granting summary disposition in favor of defendants. On appeal, plaintiff argues that the trial court erred when it granted summary disposition in favor of defendants on his premises liability claim on the ground that defendants did not have notice of the allegedly hazardous condition. We affirm.

This case arises out of plaintiff's alleged slip and fall in the Top of Troy building, which is owned by TTERTT. TTERTT hired Grubb & Ellis to manage the building and Grubb & Ellis hired Bonded to provide janitorial services in the building. Plaintiff sued defendants in a premises liability action for negligently creating or permitting the creation of a wet hazard on the lobby floor of the building. Cross-plaintiffs sued Bonded for indemnification pursuant to their service contract. These appeals were consolidated on January 13, 2010. *Mutual v Kojaian Mgmt Co*, unpublished order of the Court of Appeals, entered January 13, 2010 (Docket Nos. 293740 & 295842).

I. DOCKET NO. 293740

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[1] The trial court also granted summary disposition in favor of Kojaian on different grounds that Bonded is not appealing. Nevertheless, Kojaian was a cross-plaintiff and has joined with Grubb & Ellis and TTERTT in all pleadings and briefs in the lower court and before this Court. We will refer to Grubb & Ellis, TTERTT, and Kojaian collectively as cross-plaintiffs where appropriate.

Bonded argues that the trial court erred when it granted summary disposition in favor of Grubb & Ellis and TTERTT[2] on their cross-complaint on the ground that there was no genuine issue of material fact regarding Bonded's contractual duty to indemnify. We disagree.

On appeal, a decision to grant a motion for summary disposition is reviewed de novo. *Hines v Volkswagen of Am, Inc*, 265 Mich App 432, 437; 695 NW2d 84 (2005). When reviewing a motion for summary disposition under MCR 2.116(C)(10), this Court must consider the record in the same manner as the trial court. *Id.* Any court considering such a motion must consider all the pleadings and the evidence in a light most favorable to the nonmoving party. *Id.* The motion tests whether there exists a genuine issue of material fact. *Id.* "Summary disposition is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Brown v Brown*, 478 Mich 545, 552; 739 NW2d 313 (2007). Additionally, construction of a contract is a question of law this Court reviews de novo. *Grand Trunk Western R, Inc v Auto Warehousing Co*, 262 Mich App 345, 350; 686 NW2d 756 (2004).

Our Supreme Court has recently reiterated, "An indemnity contract is to be construed in the same fashion as other contracts. The extent of the duty must be determined from the language of the contract, itself." *Zahn v Kroger*, 483 Mich 34, 40; 764 NW2d 207 (2009) (internal citations omitted). Further, as with all contracts, if the language of the contract is "clear and unambiguous, it is to be construed according to its plain sense and meaning." *Id*. at 41. Of paramount importance when interpreting the provisions of a contract is to "give effect to the intentions of the parties." *Id*. at 40-41.

The indemnification provision of the service contract provides:

> (a) To the extent permitted by law, Contractor, for itself its agents and its employees, shall indemnify and hold harmless (and, if requested by Agent, defend) the Indemnified Parties (as defined below) from and against any and all loss, costs, claims, damages, liabilities, suits, liens, and expenses (including reasonable attorney fees and costs of defense) insured by or asserted against any of the Indemnified Parties *directly or indirectly arising or alleged to arise out of or in connection with or due to the Contractor's performance or failure to perform any provisions of this Contract* and from and against any and all claims by workers, suppliers and subcontractors who are directly or indirectly involved in the performance of this Contract. [Emphasis added.]

Bonded's expected performance is detailed in an exhibit attached to the contract. Under "Public Areas" in the section on "Day Cleaning," the exhibit specifies that Bonded is obligated to "Check common area corridors, vacuum/mop, as necessary," and "Wet mop lobby flooring as necessary, particularly during inclement weather."

[2] Bonded does not dispute the ground on which the trial court granted summary disposition in favor of Kojaian.

Plaintiff alleged in his complaint that defendants, *inter alia*, "[failed] to properly cleanup [sic] the entrance floor within a reasonable period of time," "[created] a hazard by the unnatural presence of liquid to [sic] the entrance floor," "[n]egligently fail[ed] to properly remove liquid from the premises," "[n]egligently allow[ed] unnatural accumulation of liquid to remain on the areas of the floor, and "[n]egligently fail[ed] to keep said premises in all common areas therein fit for foreseeable use," leading to his injuries. Plaintiff expressly alleged these claims against each defendant, including Bonded.

Contrary to Bonded's argument, plaintiff's allegations squarely fall within the ambit of Bonded's contractual duties to Grubb & Ellis and TTERTT. Specifically, Bonded was required to mop the lobby floor, "as necessary." Plaintiff is explicitly alleging that it was, in fact, *necessary* for someone to mop the floor of the lobby and that either nobody did or somebody did so negligently. The contract identifies Bonded as the party responsible for doing this. We also note that the language of the indemnification provision is extremely broad. The provision covers claims that are *alleged* to arise, directly *or indirectly*, out of *or in connection with* Bonded's contractual performance or failure to perform. Parties are free, under their freedom of contract, to allocate risks and responsibilities however they wish. See *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005) (parties have freedom of contract).

Bonded also argues that the speculative nature of plaintiff's allegations render both its complaint and cross-plaintiffs' complaint *too* speculative to survive a summary disposition motion because there is no evidence that Bonded was *actually* required to clean the wet floor before plaintiff's alleged fall. We conclude, however, that Bonded relies too much on the perceived weakness of plaintiff's allegations rather than the substance of the allegations. Regardless of whether plaintiff has provided evidence in support his allegations, he has, nevertheless, alleged that the floor was negligently maintained. Similarly, cross-plaintiffs' claim is merely that plaintiff has *alleged* a claim arising out of the contract between Grubb & Ellis and Bonded, which is clearly not speculative. The trial court did not err when it granted summary disposition in favor of Grubb & Ellis and TTERTT.

II. DOCKET NO. 295842

Plaintiff first argues that the trial court erred when it granted summary disposition in defendants' favor on the ground that they had no notice of the alleged hazard, because there is evidence that defendants *created* the hazard. We disagree.

To review, a decision to grant a motion for summary disposition is reviewed de novo. *Hines*, 265 Mich App at 437. When reviewing a motion for summary disposition under MCR 2.116(C)(10), this Court must consider the record in the same manner as the trial court. *Id.* Any court considering such a motion must consider all the pleadings and the evidence in a light most favorable to the nonmoving party. *Id.* The motion tests whether there exists a genuine issue of material fact. *Id.* "Summary disposition is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Brown*, 478 Mich at 552.

In a premises liability action, the plaintiff must prove (1) the defendant owed the plaintiff a duty, (2) the defendant breached the duty, (3) the breach caused plaintiff injury, and (4) the plaintiff suffered damages. *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712; 737 NW2d 179 (2007). Further, in order to show a breach of duty, a plaintiff's injury resulting from a dangerous condition must be caused either by active negligence of the defendant or a dangerous condition that is known to the defendant or has existed for a sufficient length of time that the defendant should have known about it. *Hampton v Waste Mgt of Mich, Inc*, 236 Mich App 598, 603-604; 601 NW2d 172 (1999). Plaintiff argues that defendants created the hazardous condition by their active negligence in one of two possible ways.

First, plaintiff argues that he presented evidence raising a genuine issue of material fact regarding whether there was accumulated water in the lobby which was mopped up by one of defendants' employees who failed to leave a warning sign regarding the wet area. Plaintiff argues that because the testimony showed that it was the usual procedure for a day porter to patrol the common areas of the building and mop up excess water, as necessary, the wetness on the floor must have arisen from just such an event.

Plaintiff's theory is merely conjecture. "A conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference." *Karbel v Comerica Bank*, 247 Mich App 90, 97-98; 635 NW2d 69 (2001). Mere conjecture does not raise a genuine issue of material fact. *Id*. at 107. Plaintiff's theory that someone had previously mopped up the floor, leaving it wet but without a warning sign, is consistent with the (limited) evidence presented in this case. There is no actual evidence in support of this theory, however. No witness ever saw the wet area before the accident. No witness saw the accident. There was no evidence presented regarding the actual actions of the employees on the day in question. There was testimony that *if* the floor had been mopped, warning signs would have been placed around the area. But there is absolutely no evidence that it *was* mopped. Moreover, there was never any evidence that there was an accumulation of water, or even that it was common for there to be an accumulation of water on the lobby floor. Plaintiff has not presented evidence sufficient to raise a genuine factual question.

Plaintiff next argues that the mere fact that the floor was buffed or waxed to a high gloss "create[s] a genuine issue of material fact as to the necessity of notice in this case." The only evidence regarding the finish on the floor was plaintiff's testimony that it was always "very shiny." There has been no evidence presented that a shiny floor is a hazardous condition. This theory is also mere conjecture. It may be general knowledge that a wet floor could be a hazardous condition, but there is no reason to believe that a highly waxed floor is. See *Hulett v Great Atlantic & Pacific Tea Co*, 299 Mich 59, 66; 299 NW 807 (1941) ("The mere fact that one slips on an oiled floor and injures oneself does not establish actionable negligence. There must be evidence that the floor was improperly oiled so as to create a hazardous condition."); *Pollack v Oak Office Bldg*, 7 Mich App 173, 180; 151 NW2d 353 (1967) (requiring some evidence beyond slipperiness to raise a factual question regarding an excessively waxed floor).

Plaintiff also argues, in the alternative, that defendants *were* on notice about the wet floor. Plaintiff's argument is that the evidence raises an "inference" that "any pools of water" that had been tracked into the building the morning of his fall had been mopped by defendants' employees and, therefore, defendant had actual notice of the hazardous condition. As above, this argument is complete conjecture. Plaintiff has presented no evidence that there were ever any pools of water on the lobby floor, on the day of his fall or on any other rainy day. Further, there is no evidence that any employee mopped up any water near the medical entrance that day.

There is simply no evidence in support of plaintiff's theory, or regarding how the floor got wet or how long it was wet. Accordingly, there is no genuine issue of material fact regarding whether defendants had notice of the wet floor.

Plaintiff next argues that he would have been entitled to a jury instruction permitting the jury to construe the fact that defendants could not produce security videos of the day in question against them. Accordingly, he argues that this raises a genuine issue of material fact, sufficient to avoid summary disposition, because the trial court should have considered this adverse inference in its consideration of that motion.

Plaintiff did not raise this issue before the trial court and, therefore, it is unpreserved and we need not review it. *Heydon v MediaOne of Southeast Mich, Inc*, 275 Mich App 267, 278; 739 NW2d 373 (2007); *Polkton Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005).

Plaintiff finally argues that the trial court erred when it granted summary disposition in favor of Bonded on the ground that there was no genuine issue of material fact regarding whether Bonded owed plaintiff a duty separate from its contractual duties. We disagree.

The trial court held that *Fultz v Union-Commerce Assocs*, 470 Mich 460; 683 NW2d 587 (2004), required plaintiff to demonstrate that Bonded's actions created a duty to plaintiff separate and distinct from its contractual obligations. The court concluded that plaintiff's allegations that Bonded created the hazard by mopping the floor and failing to replace the rugs were unsupported by the facts. Thus, plaintiff had not alleged any action outside of Bonded's contractual obligations.

Our Supreme Court in *Fultz* stated that merely distinguishing between misfeasance and nonfeasance was an inadequate analytical framework for determining whether a contractual party owed a duty to a third party. *Fultz*, 470 Mich at 467. The Court concluded that courts should determine whether the contractual party owes a "separate and distinct" duty to the plaintiff. *Id*. The Court further noted that a contractual party may create a separate and distinct duty by the creation of a new hazard. *Id*.

Plaintiff is correct that if there is a genuine issue of material fact regarding whether Bonded created a new hazard, summary disposition is not proper. However, plaintiff's argument yet again rests on pure conjecture. Plaintiff has not presented any evidence that Bonded's employees created the alleged hazard that caused his fall by mopping the floor to create an invisible hazard and failing to adequately protect or warn against the hazard. There is no evidence that anyone knew of the wetness before plaintiff's fall. There is no evidence that there was a puddle of water or that anyone mopped it. Accordingly, there was no genuine issue of material fact regarding whether Bonded's employees created a separate duty to plaintiff by its creation of a hazardous condition.

Affirmed.

/s/ Pat M. Donofrio
/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald