STATE OF MICHIGAN

COURT OF APPEALS

JERRY MERETSKY, Plaintiff-Appellant,	UNPUBLISHED March 17, 2015
v	No. 319399 Oakland Circuit Court
CITY OF ROYAL OAK, Defendant-Appellee.	LC No. 2013-131947-NO

Before: MARKEY, P.J., and MURRAY and BORRELLO, JJ.

PER CURIAM.

In this trip-and-fall action, plaintiff appeals a November 13, 2013, trial court order granting summary disposition in favor of defendant City of Royal Oak pursuant to MCR 2.116(C)(7). For the reasons set forth in this opinion, we affirm.

On November 21, 2012, plaintiff was walking on a sidewalk maintained by defendant near 702 South Washington Avenue, when he tripped and fell, suffering facial, dental, and shoulder injuries. A witness saw plaintiff fall to the ground and called for emergency assistance. The responding police officer notified the Department of Public Works of the condition and city workers applied cold patch to the sidewalk shortly after the incident.

Shortly thereafter, plaintiff filed a two-count complaint alleging claims for negligence and nuisance. Plaintiff asserted that defendant breached its duties to repair and maintain the sidewalk to make it safe and convenient for public travel. Defendant moved for summary disposition pursuant to MCR 2.116(C)(7), contending that it was entitled to a statutory presumption that the sidewalk was maintained in reasonable repair and that plaintiff could not rebut that presumption by showing a vertical discontinuity of two inches or more. In support of its motion, defendant submitted photographs of the sidewalk with portions of the cold patch removed and showing measurements of the vertical discontinuity of less than two inches.

Plaintiff filed a response to defendant's motion in which he acknowledged that he did not engage in "independent testing" of the vertical discontinuity, but he argued that it appeared that portions of the sidewalk that defendant failed to measure exceeded two inches. Plaintiff did not file a motion to compel access to the sidewalk or request an opportunity to conduct his own examination of the discontinuity.

To counter plaintiff's assertion, defendant filed a reply brief and submitted an affidavit from its public service supervisor, Richard Ray, who averred that he measured the discontinuity across the entire length of the sidewalk, and that there was no discontinuity of two inches or more at any point. The trial court granted defendant's motion for summary disposition, holding that plaintiff failed to rebut the statutory presumption that the sidewalk was maintained in reasonable repair because he failed to present evidence of a vertical discontinuity defect of two inches or more, and failed to present evidence of a dangerous condition of the sidewalk itself other than a vertical discontinuity.[1]

Plaintiff contends that the trial court erred in granting defendant's motion for summary disposition.

We review a trial court's decision to grant or deny summary disposition de novo. *Ter Beek v City of Wyoming*, 495 Mich 1, 8; 846 NW2d 531 (2014). Summary disposition is warranted under MCR 2.116(C)(7) when it is barred by governmental immunity. *In re Bradley Estate*, 494 Mich 367, 376-377; 835 NW2d 545 (2013). "A party filing suit against a governmental agency bears the burden of pleading his or her claim in avoidance of governmental immunity." *Id*. at 377. The plaintiff must assert specific facts demonstrating the application of a governmental immunity exception to withstand the defendant's motion for summary disposition. *McLean v McElhaney*, 289 Mich App 592, 597; 798 NW2d 29 (2010). "When considering a motion brought under subrule (C)(7), the trial court must consider any affidavits, depositions, admissions, or other documentary evidence submitted by the parties to determine whether there is a genuine issue of material fact precluding summary disposition." *Dybata v Wayne Co*, 287 Mich App 635, 637; 791 NW2d 499 (2010).

Pursuant to MCL 691.1407(1), a governmental body is immune from tort liability unless a plaintiff can show that a statutory exception applies. MCL 691.1402 provides a "highway exception," that requires a governmental agency to "maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." A sidewalk is included within the statutory definition of a highway. MCL 691.1401(c). Municipalities have a duty to maintain sidewalks in reasonable repair. *Robinson v City of Lansing*, 486 Mich 1, 7; 782 NW2d 171 (2010). That duty is governed by MCL 691.1402a, which provides in relevant part as follows:

> (1) A municipal corporation in which a sidewalk is installed adjacent to a municipal, county, or state highway shall maintain the sidewalk in reasonable repair.
>
> (2) A municipal corporation is not liable for breach of a duty to maintain a sidewalk unless the plaintiff proves that at least 30 days before the occurrence of the relevant injury, death, or damage, the municipal corporation knew or, in the exercise of reasonable diligence, should have known of the existence of the defect in the sidewalk.

[1] The trial court also held that there was no nuisance exception to governmental immunity. Plaintiff does not challenge this aspect of the trial court's ruling on appeal.

(3) In a civil action, a municipal corporation that has a duty to maintain a sidewalk under subsection (1) is presumed to have maintained the sidewalk in reasonable repair. *This presumption may only be rebutted by evidence of facts showing that a proximate cause of the injury was 1 or both of the following*:

(a) A vertical discontinuity defect of 2 inches or more in the sidewalk.

(b) A dangerous condition in the sidewalk itself of a particular character other than solely a vertical discontinuity.

(4) Whether a presumption under subsection (3) has been rebutted is a question of law for the court. [Emphasis added.]

In the event that a plaintiff cannot overcome the presumption in MCL 691.1402a(3), the governmental entity is presumed to have maintained the sidewalk in reasonable repair and the highway exception to governmental immunity does not apply.

A presumption is not evidence, but a legal rule or a legal conclusion. *Gillett v Mich United Traction Co*, 205 Mich 410, 415; 171 NW 536 (1919). It relieves the party benefitting from the presumption from presenting argument or evidence, but acts as a prima facie case, until the other party presents its evidence. *Id*. When a presumption is raised, it will stand unless rebutted by evidence. See *McKinstry v Valley Obstetrics-Gynecology Clinic, PC*, 428 Mich 167, 181; 405 NW2d 88 (1987). The presumption ceases to operate if the opposing party introduces direct, positive, and credible evidence. *Gillette*, 205 Mich at 415-416.

In its motion, defendant argued that plaintiff failed to rebut the statutory presumption that it maintained the sidewalk in reasonable repair because plaintiff failed to present evidence of a vertical discontinuity defect of two inches or more. To support its position, defendant presented photographic evidence showing the site of the accident with portions of the cold patch removed and measurements indicating that the vertical discontinuity did not exceed two inches.

In opposition to defendant's motion, plaintiff acknowledged that he did not have measurements of the vertical discontinuity, but argued that it was apparent from the photographs that the discontinuity was higher in places not measured by defendant's employees. In addition, plaintiff did not produce any evidence to support that, other than the discontinuity, the sidewalk was unreasonably dangerous. Plaintiff's bald assertions were insufficient to overcome the rebuttable presumption that defendant maintained the sidewalk in reasonable repair. A party opposing summary disposition cannot rely on speculation and conjecture and instead must present admissible documentary evidence in response to the moving party's evidence. *Leonard C Carnaghi, Inc v Amwest Surety Ins Co*, 241 Mich App 686, 690; 617 NW2d 49 (2000). During discovery, plaintiff had the burden to produce documentary evidence to rebut the statutory presumption. MCL 691.1402a(3); *Gillett*, 205 Mich at 415-416. Plaintiff failed to do so and summary disposition was therefore appropriate.

Plaintiff contends that the trial court erred in relying on defendant's documentary evidence of the sidewalk measurements without providing plaintiff with notice or an opportunity to conduct his own evaluation. However, plaintiff does not contend that he submitted a formal discovery request to defendant to allow him to inspect and measure the sidewalk discontinuity.

Instead, in his brief on appeal, plaintiff contends that Jeff Glenn went to the location to take measurements and could not do so because it was covered with cold patch. Given that he was aware of the patch, during discovery, plaintiff could have requested access to the discontinuity to allow for inspection under MCR 2.310, which provides a means for a party to gain access to land for inspection. Plaintiff fails to identify any discovery materials that he submitted to defendant for purposes of accessing and inspecting the accident site. Alternatively, plaintiff could have moved the trial court to compel discovery if necessary. See MCR 2.313(A) (providing a means to obtain an order compelling discovery). Plaintiff failed to utilize any of these discovery techniques to obtain critical information to counter defendant's motion for summary disposition. He cannot now claim on appeal that, because of his failure, the trial court should not have considered the evidence that defendant produced during discovery. In short, plaintiff's argument that the trial court erred in considering defendant's photographs is devoid of legal merit.

Affirmed. No costs awarded. MCR 7.219(A).

/s/ Jane E. Markey
/s/ Christopher M. Murray
/s/ Stephen L. Borrello