STATE OF MICHIGAN

COURT OF APPEALS

PAMELA BRANCH,

Plaintiff-Appellant,

v

D & S PROPERTY MANAGEMENT, LLC,

Defendant-Appellee.

UNPUBLISHED
December 26, 2019

No. 345882
Macomb Circuit Court
LC No. 2017-001162-NO

Before: MURRAY, C.J., and SAWYER and GLEICHER, JJ.

PER CURIAM.

Plaintiff brought suit against defendant alleging several claims including a claim of common-law premises liability and violations of MCL 554.139. The circuit court granted summary disposition in favor of defendant and dismissed plaintiff's premises liability claim and plaintiff's statutory claims under MCR 2.116(C)(10). Plaintiff now appeals as of right. We affirm in part, and reverse and remand in part for further proceedings consistent with this opinion.

This premises liability action arises out of injuries sustained by plaintiff from two slip and falls that occurred at Pine Crest Apartments, an apartment complex owned by defendant. On the date of plaintiff's injuries, she was a resident at Pine Crest Apartments. Plaintiff left her apartment through the rear entryway to the building at approximately 6:00 a.m. and returned at approximately 9:00 a.m. Upon plaintiff's return, she was unable to see the sidewalk leading to the rear entryway to the building because it was covered in snow but knew where it was from prior experience. As plaintiff used the sidewalk to approach the rear entryway of the apartment building, she slipped and fell onto her back, twisting her ankle. After plaintiff fell, she stood up, entered the apartment building through the rear entryway, and called the management office at Pine Crest Apartments. Plaintiff reported that she had fallen and requested that management arrange for the snow to be cleared from the sidewalks. Despite plaintiff's request, management did not clear the snow from the sidewalks and did not use salt to abate the conditions.

Plaintiff remained in her apartment until approximately 9:00 p.m. on that same day. As plaintiff was preparing to leave for a second time, she looked outside and noticed that the snow

had not been cleared from the sidewalks. Plaintiff also noted that it was dark at that time, and the light above the stairs outside the rear entryway was broken. As plaintiff was descending the stairs to the rear entryway, she slipped and fell, injuring her back. Before plaintiff fell, she attempted to grab the handrail next to the stairs for support but was unable to do so because it was covered in ice. The ice accumulated as a result of a defective gutter above the rear entryway stairs that was leaking water. An expert meteorologist assessed the weather conditions on the date of plaintiff's injuries and opined that the ice plaintiff encountered had existed for 31 hours before her first slip and fall and for 42 hours before her second slip and fall. As a result of the two slip and falls, plaintiff sustained injuries, underwent multiple back surgeries, and incurred medical expenses.

On appeal, plaintiff argues that the circuit court erred in granting defendant's motion for summary disposition because there was a question of fact as to whether the sidewalk and rear entryway stairs at Pine Crest Apartments were fit for their intended uses under MCL 554.139(1)(a). Plaintiff also contends that the areas in which plaintiff fell were effectively unavoidable at the time of plaintiff's injuries. We agree that there is a question of fact as to whether the sidewalk and rear entryway stairs at Pine Crest Apartments were fit for their intended uses under MCL 554.139(1)(a) and disagree that there is a question of fact as to whether the areas in which plaintiff fell were effectively unavoidable at the time of plaintiff's injuries.

I. MCL 554.139(1)(a)

Defendant moved for summary disposition under both MCR 2.116(C)(8) and (C)(10), and the circuit court considered evidence outside the pleadings. Therefore, this Court considers the motion as having been decided under MCR 2.116(C)(10). *Candler v Farm Bureau Mut Ins Co of Mich*, 321 Mich App 772, 776; 910 NW2d 666 (2017). A trial court's decision on a motion for summary disposition is reviewed de novo. *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 5-6; 890 NW2d 344 (2016). A motion for summary disposition under MCR 2.116(C)(10) challenges the "factual adequacy of a complaint on the basis of the entire record, including affidavits, depositions, admissions, or other documentary evidence." *Gorman v American Honda Motor Co, Inc*, 302 Mich App 113, 115; 839 NW2d 223 (2013). A trial court's grant of summary disposition under MCR 2.116(C)(10) is proper when the evidence, "viewed in the light most favorable to the nonmoving party, show[s] that there is no genuine issue as to any material fact and the moving party is therefore entitled to judgment as a matter of law." *Lowrey*, 500 Mich at 5. "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." *Gorman*, 302 Mich App at 116 (citation omitted). " 'This Court is liberal in finding genuine issues of material fact.' " *Lewis v Farmers Ins Exch*, 315 Mich App 202, 209; 888 NW2d 916 (2016), quoting *Jimkoski v Shupe*, 282 Mich App 1, 5; 763 NW2d 1 (2008).[1]

[1] In her brief on appeal plaintiff relies in part on an outdated and overruled summary disposition standard, arguing that under MCR 2.116(C)(10) the trial court cannot summarily dismiss a case if a record "could be developed that would leave open an issue upon which reasonable minds

Plaintiff argues that there is a genuine issue of material fact as to whether the sidewalk and rear entryway stairs at Pine Crest Apartments were fit for their intended uses under MCL 554.139(1)(a). We agree.

MCL 554.139(1)(a) provides that in every lease or license of residential premises, the lessor or licensor covenants that the premises and all common areas are fit for their intended use by the parties. MCL 554.139(1)(a). "MCL 554.139 provides a specific protection to lessees and licensees of residential property *in addition to* any protection provided by the common law." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). The Michigan Supreme Court has addressed the analytical framework that is to be used when determining liability under MCL 554.139(1)(a). See *id*. at 428-431. First, the court is to determine whether the area in question is a common area. *Estate of Trueblood v P&G Apartments, LLC*, 327 Mich App 275, 289; ___ NW2d ___ (2019). Next, the court is to identify the intended use of the common area. *Id*. "Lastly, the court must determine if there could be reasonable differences of opinion regarding whether the conditions made the common area unfit for its intended use." *Id*. (quotation marks omitted). MCL 554.139(1)(a) does not require a lessor to maintain a premises in an ideal condition or in the most accessible condition possible, but merely requires the lessor to maintain it in a condition that renders it fit for its intended use. *Allison*, 481 Mich at 430. Mere inconvenience of access will not render a premises unfit for its intended use. *Id*.

In this case, plaintiff slipped and fell in two separate locations. Plaintiff first slipped on the sidewalk leading from her apartment building to the parking lot. Plaintiff then slipped while descending the stairs to the rear entranceway of her apartment building. This Court has held that sidewalks located within an apartment complex constitute common areas. *Benton v Dart Props, Inc*, 270 Mich App 437, 442; 715 NW2d 335 (2006). Furthermore, this Court has held that stairways located within an apartment complex constitute common areas. *Hadden v McDermitt Apartments, LLC*, 287 Mich App 124, 130; 782 NW2d 800 (2010). Accordingly, both locations in which plaintiff slipped and fell are common areas within the meaning of MCL 554.139(1)(a).

The intended use of a sidewalk is for pedestrians to walk on it. *Benton*, 270 Mich App at 444. Moreover, the intended use of a stairway is to provide pedestrian access to different levels of a building or structure. *Hadden*, 287 Mich App at 130. Accordingly, it must be ascertained whether there could be reasonable differences of opinion as to whether the sidewalk and stairs to the rear entranceway of plaintiff's apartment building were fit for their intended uses on the date of plaintiff's injuries. See *id*.

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could differ." Twenty years ago the Supreme Court explicitly rejected this approach. See *Smith v Globe Life Ins Co*, 460 Mich 446, 455 n 2; 597 NW2d 28 (1999). We recognized the correct standard under the 1985 Court Rules more than a decade ago in *Grand Trunk W R, Inc v Auto Warehousing Co*, 262 Mich App 345, 350; 686 NW2d 756 (2004). Nevertheless, this Court continues to receive briefs advocating our application of this outdated, overruled, and obviously inapplicable standard. We urge appellate counsel to update their brief banks or their legal research methods to avoid citing to summary judgment standards that were set aside by the 1985 Court Rules.

A. SIDEWALK LEADING TO PLAINTIFF'S APARTMENT BUILDING

A genuine issue of material fact exists as to whether the sidewalk leading from plaintiff's apartment building to the parking lot was fit for its intended use. In *Estate of Trueblood*,[2] this Court summarized the current state of Michigan law as it relates to the effect of ice accumulation on the intended use of a sidewalk in the context of MCL 554.139. "In *Benton*, this Court held that 'a sidewalk covered in ice is not fit' for its intended use." *Estate of Trueblood*, 327 Mich App at 290, quoting *Benton*, 270 Mich App at 444. "But in *Allison*, our Supreme Court explained that ice does not inherently render a common area unfit for its intended use if the ice is a '[m]ere inconvenience.' " *Id*., quoting *Allison*, 481 Mich at 430. In reconciling the holdings in *Benton* and *Allison*, this Court distinguished between sidewalks that are completely covered in ice and sidewalks that are partially covered in ice. *Id*. at 291. In doing so, this Court held that a sidewalk completely covered in ice is not fit for its intended use because it presents more than a mere inconvenience of access, but rather, forces anyone using the sidewalk to walk on ice. *Id*. Conversely, a sidewalk that is only partially covered in ice does not inherently render it unfit for its intended use because the ice is a mere inconvenience. *Id*. at 291-292. Thus, in considering a motion for summary disposition as to whether a sidewalk is fit for its intended use, the dispositive issue is whether there is a question of fact that a sidewalk is completely covered in ice, and therefore, presents more than a mere inconvenience. See *id*.

There is a question of fact as to whether the sidewalk leading from plaintiff's apartment building to the parking lot was fit for its intended use. Plaintiff's expert stated in his affidavit that ice would have existed on untreated surfaces at the location of Pine Crest Apartments on the date that plaintiff slipped and fell. Plaintiff's expert also opined that the ice that plaintiff encountered had existed for 31 hours before her first slip and fall, and for 42 hours before her second slip and fall. Moreover, plaintiff stated in her deposition that the snow had not been cleared from the sidewalks and there was a layer of ice under the snow at the time of her first slip and fall. Notably, plaintiff indicated that the entire sidewalk was covered in snow and ice by stating that she could not see the sidewalk under the snow as she was walking toward her apartment building, but knew where the sidewalk was from prior experience. Because the snow and ice had not been cleared, and because plaintiff could not see the sidewalk under the snow as she was walking to her apartment building, the evidence presented creates a question of fact as to whether the sidewalk was completely covered in snow and ice, thereby rendering the ice more than a mere inconvenience.

Defendant avers that there is no question of fact as to whether the sidewalk was fit for its intended use because plaintiff stated in her deposition that she used the sidewalk to her apartment building two times without falling on the date of her injuries. This evidence tends to suggest that the sidewalk was fit for its intended use and was not completely covered in ice because plaintiff was able to walk on it twice without slipping. However, this evidence also suggests that plaintiff walked on the sidewalk more carefully at some times than at others, or that plaintiff was simply

[2] Estate of Trueblood had not been issued prior to the trial court's decision on defendant's motion.

able to keep her balance some of the time. While this evidence is contrary to plaintiff's deposition testimony, it does not invalidate plaintiff's deposition testimony that the sidewalk was completely covered in snow and ice such that there is no question of fact regarding this issue. Thus, given the conflicting evidence on this matter, a genuine issue of material fact exists as to whether the sidewalk leading from plaintiff's apartment building to the parking lot was fit for its intended use.

B. STAIRS TO THE REAR ENTRANCEWAY OF PLAINTIFF'S APARTMENT BUILDING

A genuine issue of material fact exists as to whether the stairs to the rear entranceway to plaintiff's apartment building were fit for their intended use. The presence of ice in a common area does not inherently render that common area unfit for its intended use provided that the ice presents a mere inconvenience of access. *Allison*, 481 Mich at 430. The principles set forth in *Allison* apply to all common areas, including stairways. *Hadden*, 287 Mich App at 130. Thus, "MCL 554.139(1)(a) does not require perfect maintenance of a stairway. The stairway need not be in an ideal condition, nor in the most accessible condition possible, but, rather, must provide tenants 'reasonable access' to different building levels." *Id*. (citation omitted).

In *Hadden*, this Court considered whether there was a genuine issue of material fact as to whether the stairway leading to the plaintiff's apartment unit was fit for its intended use by providing tenants with reasonable access to the premises. *Id*. The plaintiff presented evidence that she lived on the second floor of an apartment building owned by the defendant. *Id*. The plaintiff also presented evidence that there was fresh snow and black ice on the stairway, the stairway was unlit, the gutters above the stairway were overflowing with water, and there was no salt on the stairway at the time of her fall. *Id*. at 131. Additionally, the plaintiff presented evidence that she was able to use the stairway without incident on the day before her injury, but called the defendant to complain about the presence of snow and ice on the stairway. *Id*. at 130-131. Based upon this evidence, this Court concluded:

> Reasonable minds could conclude that the presence of black ice on a darkly lit, unsalted stairway—possibly caused or aggravated by overflowing ice water from overhead gutters in the presence of freezing rain—posed a hidden danger that denied tenants reasonable access to different levels of the apartment building and rendered the stairway unfit for its intended use. [*Id*. at 132.]

Ultimately, this Court held that the evidence presented by the plaintiff was sufficient to establish a genuine issue of material fact as to whether the stairway was fit for its intended use on the date of the plaintiff's injuries. *Id*.

The facts presented by plaintiff in this case bear several similarities to the facts in *Hadden*. Thus, a genuine issue of material fact exists as to whether the rear entranceway to Pine Crest Apartments was fit for its intended use of providing tenants with reasonable access to the premises. Much like the plaintiff in *Hadden*, plaintiff presented evidence that she was aware of the wintry weather conditions and requested that management arrange for the snow to be cleared from the walkways before her second slip and fall. Additionally, plaintiff presented evidence that the stairs and the handrail leading to the rear entranceway were covered in ice, the light above the rear entranceway was broken, and the gutter above the rear entranceway was leaking

water at that time, causing ice to accumulate on the handrail and the stairs. Plaintiff also presented evidence that, on the date of her injuries, she used the stairs to the rear entranceway without issue approximately 12 hours prior to her slip and fall. However, unlike the plaintiff in *Hadden*, plaintiff did not slip on black ice in this case. Thus, plaintiff was not injured by a hidden danger like the plaintiff in *Hadden*.

Michigan law dictates that the stairs to the rear entranceway were not required to be in an ideal condition, nor were they required to be in the most accessible condition possible. *Allison*, 481 Mich at 430. However, reasonable minds could conclude that the presence of snow and ice on the darkly lit, unsalted stairway—possibly caused by overflowing water from overhead gutters—posed a danger that denied tenants reasonable access to different levels of the Pine Crest Apartment building and rendered the stairway unfit for its intended use.

It is true that plaintiff was aware of the presence of the ice at the time of her second slip and fall. Additionally, the open and obvious doctrine provides that a landlord does not owe a tenant a duty to safeguard from open and obvious dangers. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). An open and obvious danger is known to a tenant or is so obvious that a tenant might reasonably be expected to discover it. *Id*. However, whether plaintiff knew or should have known of the condition of the stairs leading to the rear entranceway does not affect the analysis at hand. Indeed, the open and obvious doctrine is not available to deny liability for a statutory violation under MCL 554.139(1). *Benton*, 270 Mich App at 441. Thus, plaintiff's knowledge of the ice on the stairs at the time of her second slip and fall does not negate the existence of a genuine issue of material fact as to whether the rear entranceway stairs to Pine Crest Apartments were fit for their intended use. In sum, the circuit court erred in determining that there was no genuine issue of material fact as to whether the stairs to the rear entranceway to Pine Crest Apartments were fit for their intended use.

II. PREMISES LIABILITY

Plaintiff argues that there is a question of fact as to whether the snow and ice at Pine Crest Apartments presented an open and obvious hazard that was effectively unavoidable. We disagree.

"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*, 270 Mich App at 440. "The duty that a landlord owes a plaintiff depends on the plaintiff's status on the land." *Id*. "A person invited on the land for the owner's commercial purposes or pecuniary gain is an invitee, and a tenant is an invitee of the landlord." *Id*.

A landlord "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*, 464 Mich at 516. "Absent special aspects, this duty does not extend to open and obvious dangers." *Estate of Trueblood*, 327 Mich App at 285. "Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection." *Hoffner v Lanctoe*, 492 Mich 450, 461; 821 NW2d 88 (2012). "Generally, the hazard presented by snow and ice is open and obvious, and the

landowner has no duty to warn of or remove the hazard." *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 694; 822 NW2d 254 (2012). Michigan courts "impute[] knowledge regarding the existence of a condition as should reasonably be gleaned from all of the senses as well as one's common knowledge of weather hazards that occur in Michigan during the winter months." *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 479; 760 NW2d 287 (2008). As a matter of law, "by its very nature, a snow-covered surface presents an open and obvious danger because of the high probability that it may be slippery." *Ververis v Hartfield Lanes*, 271 Mich App 61, 67; 718 NW2d 382 (2006).

The hazard presented by the snow and ice that plaintiff encountered on the date of her injuries was open and obvious. On the date of plaintiff's injuries, plaintiff observed that there was snow on the sidewalk from a prior snowfall and it had been snowing throughout the morning. At the time of plaintiff's first slip and fall, there was approximately 2 feet of snow on the ground. Before plaintiff's second slip and fall, she observed that the snow had not been cleared from the sidewalks and salt had not been used to abate the conditions. Furthermore, plaintiff's expert opined that the ice that plaintiff encountered had existed for 31 hours before her first fall, and for 42 hours before her second fall. As a result of plaintiff's prior observations and the duration that the snow and ice were present, a reasonable person in plaintiff's position would have gleaned from the circumstances, as well as common knowledge of weather hazards that occur in Michigan during the winter months, that the sidewalk and rear entryway stairs were slippery. See *Slaughter*, 281 Mich App at 479. Thus, the circuit court did not err in determining that there is no question of fact that the hazard presented by the snow and ice that plaintiff encountered on the date of her injuries was open and obvious.

Although there is no question of fact as to whether the snow and ice at Pine Crest Apartments presented an open and obvious hazard, liability may still arise if the hazard was effectively unavoidable. *Hoffner*, 492 Mich at 463. "[T]he standard for 'effective unavoidability' is that a person, for all practical purposes, must be *required* or *compelled* to confront a dangerous hazard. As a parallel conclusion, situations in which a person has a choice whether to confront a hazard cannot truly be unavoidable, or even effectively so." *Id*. at 469.

There is no question of fact as to whether the hazard in this case was effectively unavoidable. At the time of plaintiff's slip and falls, she had the option to enter and exit her apartment building through the front door, but chose to enter and exit through the back door because it was convenient to do so. Thus, plaintiff was not required or compelled to confront the hazardous stairway and sidewalk leading to the rear entryway of her apartment building.

"[P]arties opposing a motion for summary disposition must present more than conjecture and speculation to meet their burden of providing evidentiary proof establishing a genuine issue of material fact." *Detroit v Gen Motors Corp*, 233 Mich App 132, 139; 592 NW2d 732 (1998). It is true that plaintiff presented evidence that snow and ice may have also been present at the front door entryway to plaintiff's apartment building. For instance, plaintiff's expert opined that ice existed on untreated surfaces at the location of Pine Crest Apartments on the date of plaintiff's slip and falls. Additionally, plaintiff opined that management did not clear the snow from the sidewalks and did not use salt to abate the conditions. However, plaintiff failed to present specific evidence that the front door entryway presented a hazard similar to the back door entryway. Plaintiff testified that she did not remember whether the front entryway was well-lit

and she was not sure whether the railing leading to the front door entryway was icy. Thus, there is no question of fact as to whether plaintiff was required or compelled to encounter a hazard before entering or exiting her apartment building because the evidence presented by plaintiff only provides speculation that the front door entryway was hazardous and plaintiff could have used an alternate route to enter and exit her apartment building.

Based upon the record, and viewing the evidence in the light most favorable to plaintiff, we conclude that there is a question of fact as to whether the sidewalk and rear entryway stairs at Pine Crest Apartments were fit for their intended uses under MCL 554.139(1)(a), and there is no question of fact as to whether the snow and ice at Pine Crest Apartments presented an open and obvious hazard that was effectively unavoidable.

We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs, neither party having prevailed in full.

/s/ Christopher M. Murray
/s/ David H. Sawyer