

STATE OF MICHIGAN
COURT OF APPEALS

GAIL CROSKEY,

Plaintiff-Appellant,

v

FCA US, LLC, doing business as
CHRYSLER GROUP, LLC,

Defendant-Appellee.

UNPUBLISHED

January 14, 2021

No. 350936

Oakland County Circuit Court

LC No. 2018-167036-NO

Before: FORT HOOD, P.J., and CAVANAGH and TUKEL, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition in favor of defendant in this premises liability action arising from an allegedly defective stair step. We affirm.

On November 28, 2015, plaintiff was working as a janitor at defendant's Sterling Heights facility and was injured when she fell while descending a set of stairs. Plaintiff claimed that she and her coworker were walking side-by-side down the stairs and when her coworker stepped on the left side of the last step, the metal plate covering the concrete step flexed which caused plaintiff to lose her balance and fall. Plaintiff had never used the stairs previously. Plaintiff alleged that the step was defective because the metal plate came loose from the step. In July 2018, plaintiff filed her premises liability complaint.

In June 2019, defendant filed its motion for summary disposition under MCR 2.116(C)(10). Defendant argued that plaintiff could not establish that it knew or should have known about the allegedly defective step. In other words, there was no evidence that defendant had actual notice of the condition and there was no evidence that defendant had constructive notice of the condition considering its character and how long it had existed prior to plaintiff's fall; therefore, plaintiff's premises liability claim must be dismissed.

Plaintiff opposed defendant's motion, arguing that because the set of stairs were located in a high-traffic area defendant had reason to know of the defective condition of the step. In other words, even if plaintiff could not prove actual notice, the court should infer constructive notice of the dangerous condition because the stairs were located in a high-traffic area.

Defendant filed a reply to plaintiff's response, arguing that plaintiff conceded defendant did not have actual notice and failed to carry her burden to show that defendant had constructive notice of the allegedly dangerous condition. That is, plaintiff failed to provide any evidence that defendant should have known about the alleged defective step considering its purported character or duration of existence. Plaintiff relied on her claim that the stairs were in a high-traffic area but there was no evidence to establish that the stairs were in a high-traffic area. And even if they were, plaintiff admitted that the defect was not apparent and only arose when two people walked in tandem down the stairs and stepped on that step in precisely the same way as plaintiff and her coworker. Further, if the stairs were in a "high-traffic area" and the step had been defective as plaintiff claims, it would be more likely that defendant would have had actual notice of the condition—and plaintiff admitted that she could not establish that defendant had such actual notice. Accordingly, her claim must be dismissed.

After oral arguments, the trial court granted defendant's motion for summary disposition and dismissed this case. The trial court held that plaintiff failed to demonstrate that defendant had actual or constructive notice of the allegedly defective stair step, and thus, defendant was entitled to summary disposition under MCR 2.116(C)(10). This appeal followed.

We review de novo a trial court's decision on a motion for summary disposition. *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 5-6; 890 NW2d 344 (2016). A motion brought under MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim." *Spiek v Mich Dept of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). The moving party must identify the matters that have no disputed factual issues, and has the initial burden of either submitting affirmative evidence negating an essential element of the nonmoving party's claim or demonstrating that the nonmoving party's evidence is insufficient to establish an essential element of their claim. *Lowrey*, 500 Mich at 7, quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The party opposing the motion must then establish by evidentiary materials that a genuine issue of disputed fact exists. *Quinto*, 451 Mich at 362-363. After considering the documentary evidence submitted in the light most favorable to the nonmoving party, the court determines whether a genuine issue of material fact exists to warrant a trial. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

In this case, defendant does not dispute that plaintiff was an invitee. Plaintiff claims in this premises liability case that defendant breached its duty of care with regard to the allegedly defective step. "A premises owner breaches its duty of care when it 'knows or should know of a dangerous condition on the premises of which the invitee is unaware and fails to fix the defect, guard against the defect, or warn the invitee of the defect.'" *Lowrey*, 500 Mich at 8, quoting *Hoffner v Lanctoe*, 492 Mich 450, 460; 821 NW2d 88 (2012). Thus, a plaintiff must prove that the premises owner had actual or constructive notice of the claimed dangerous condition. *Lowrey*, 500 Mich at 10.

In this case, plaintiff wholly failed to establish that a genuine issue of fact existed on the issue whether defendant had actual or constructive notice regarding the allegedly defective step. Plaintiff did not even claim that defendant had actual notice of the allegedly defective step. Rather, in opposition to defendant's motion for summary disposition plaintiff simply argued that the stairs

were located in a high-traffic area so constructive notice of the defect should be inferred. We cannot agree. Despite plaintiff's claim that this stairway was located in a "high-traffic area," plaintiff provided no evidence of any accidents, incident reports, complaints, or maintenance records related to the allegedly defective step. And plaintiff provided no evidence from which it could be inferred that defendant should have known about the condition considering its character or how long it had existed. To the contrary, plaintiff admitted that the defect was not readily observable, that she had not seen it, that she did not know when it arose, and that the metal strip that caused her to lose her balance only flexed because her coworker stepped on it just as plaintiff was stepping on that same step. Accordingly, as the trial court held, plaintiff failed to proffer evidence sufficient to demonstrate a question of fact regarding defendant's actual or constructive notice of the allegedly dangerous condition, and thus, defendant was entitled to summary disposition of this premises liability action. See *id.* at 11-12.

Affirmed.

/s/ Karen M. Fort Hood

/s/ Mark J. Cavanagh

/s/ Jonathan Tukel