STATE OF MICHIGAN

COURT OF APPEALS

KENIA MERCEDES GUTIERREZ,

Plaintiff-Appellant,

v

HANNAWA HOLDINGS, GENESEE, LLC, DJ'S PROPERTY MAINTENANCE, LLC, and ALLENWEST GROUP, LLC,

Defendants-Appellees.

UNPUBLISHED
November 23, 2021

No. 354306
Wayne Circuit Court
LC No. 19-002733-NO

Before: M. J. KELLY, P.J., and STEPHENS and REDFORD, JJ.

PER CURIAM.

In this slip-and-fall action, plaintiff, Kenia Mercedes Gutierrez, appeals as of right the trial court's order granting summary disposition to defendants Allenwest Group, LLC (Allenwest), DJ's Property Maintenance, LLC (DPM), and Hannawa Holdings, Genesee, LLC (Hannawa), under MCR 2.116(C)(10) (no genuine question as to any material fact).[1] We reverse the trial court's order granting summary disposition to Hannawa, affirm the trial court's orders granting summary disposition to Allenwest and DPM, and remand for further proceedings.

I. BACKGROUND

Allenwest was the owner of a strip mall. Hannawa owned a building that was adjacent to the strip mall. Allenwest contracted with DPM to provide snow-removal services for its property and Hannawa's property, for which it later billed Hannawa. In 2019, Hannawa's building was occupied by tenant Concentra Urgent Care (Concentra). Plaintiff was an employee of Concentra. On the morning of January 29, 2019, plaintiff slipped on a patch of ice covered with snow and fell

[1] DPM moved for summary disposition under MCR 2.116(C)(8) and (10) and the trial court did not explicitly identify which subrule it decided the motion under. However, because the trial court referenced the entire record and not just the pleadings, we treat DPM's motion as having been decided under MCR 2.116(C)(10).

on the sidewalk a few feet from the employee entrance to Concentra. As a result, plaintiff fractured her lower left leg, requiring surgery and time off of work.

Plaintiff initially sued Hannawa and Allenwest but after notice of non-party fault, added DPM. Plaintiff filed an amended complaint on April 24, 2019. With respect to Hannawa, plaintiff alleged, in relevant part, that Hannawa possessed the relevant premises and owed her a duty to keep the premises free of dangerous conditions. Regarding Allenwest and DPM, plaintiff alleged that Hannawa contracted with them for the removal of snow and ice from the premises. She further pled that Allenwest and DPM breached that contract, and breached their separate and distinct duty to perform the contract in a reasonable manner so as to avoid endangering plaintiff. Discovery ensued.

The parties have no dispute as to the layout of the subject premises. The employee entrance was on the south side of the building; the entrances for physical therapy and urgent care patients were on the west side of the building. Plaintiff testified that she was instructed to use the employee entrance but had no reason to believe she was prohibited from using the other two entrances. Plaintiff was unaware whether the other two entrances had been cleared of snow and ice, although she could tell that the parking lot had not been cleared in front of any of the entrances. She testified that the snow was partially up the side of her tennis shoes when she exited her vehicle. There was also snow on the sidewalk that did not appear to have been shoveled or salted. Plaintiff noticed, after falling, that there was ice under her footprints. Plaintiff saw her manager shovel and salt the urgent care patient entrance the day before. After her fall, plaintiff's manager shoveled and salted the employee sidewalk. Plaintiff also knew that a snow-removal company generally cleared snow from the parking lot and sidewalks, and salted the sidewalks.

Each defendant moved the trial court for summary disposition. Hannawa argued the snow-covered ice upon which plaintiff slipped was open and obvious, was neither unreasonably dangerous nor effectively unavoidable. Therefore, no duty was owed to the plaintiff to protect her from danger posed by ice and snow. Allenwest and DPM both argued there were entitled to summary disposition because plaintiff was not a third-party beneficiary of the contract between them. Allenwest additionally argued that plaintiff's premises-liability claim against it was deficient since it was not the premises possessor and, even if it was, the nature of the ice and snow being open and obvious precluded liability. DPM also argued it owed plaintiff no legal duty separate and distinct from its contract with Allenwest, to which plaintiff was not a party.

Plaintiff submitted evidence in opposition to defendants' motions. Plaintiff submitted the contract between Allenwest and DPM, billing records from DPM for service at the subject property, meteorological reports from the 72 hours prior to her slip and fall, and an affidavit from Steven J. Ziemba. In his affidavit, Ziemba averred that he was a safety expert with "over 48 years of experience in the inspection and evaluation of paved surfaces". Ziemba reviewed DPM's invoices and the meteorological reports. Ziemba averred that DPM invoiced for plowing the parking lot and shoveling the sidewalks after midnight on January 29th, but did not salt the sidewalks despite freezing rain and additional snowfall.

The trial court granted summary disposition to Hannawa and Allenwest on the basis that the ice and snow was an open and obvious danger that plaintiff could have avoided by either not going into work or using an alternate entrance. The court granted summary disposition to DPM,

concluding that plaintiff was not a party to the contract between DPM and Allenwest and that DPM owed plaintiff no separate and distinct duty. Plaintiff now appeals.

II. STANDARD OF REVIEW

A trial court's decision on a motion for summary disposition is reviewed de novo. *Glasker-Davis v Auvenshine*, 333 Mich App 222, 229; 964 NW2d 809 (2020). Summary disposition under MCR 2.116(C)(10) is appropriate "when the affidavits or other documentary evidence, viewed in the light most favorable to the nonmoving party, show 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 v LMPS & LMPJ, Inc*, 500 Mich 1, 5; 890 NW2d 344 (2016). "Once the moving party meets its burden of supporting its motion under MCR 2.116(C)(10) with documentary evidence, the burden shifts to the nonmoving party to set forth specific facts showing that a genuine issue of disputed fact exists." *Jim's Body Shop, Inc v Dept of Treasury*, 328 Mich App 187, 206; 937 NW2d 123 (2019). "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." *Highfield Beach at Lake Mich v Sanderson*, 331 Mich App 636, 653; 954 NW2d 231 (2020) (quotation marks and citation omitted). "All reasonable inferences are to be drawn in favor of the nonmovant." *MemberSelect Ins Co v Flesher*, 332 Mich App 216, 221; 956 NW2d 535 (2020).

III. HANNAWA

Plaintiff argues the trial court erred by concluding there was no genuine issue of material fact as to whether the snow-covered ice upon which she slipped was effectively avoidable. We agree.

A premises possessor owes invitees the duty "to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). However, this duty only applies to dangers with risks of harm that are unlikely to be discovered by an invitee. *Id*. at 516-517. Accordingly, a possessor of land does not generally owe an invitee a duty to protect against dangers that a reasonable person under the circumstances would discover and avoid, i.e., open and obvious dangers. *Estate of Livings v Sage's Investment Group, LLC*, ___ Mich ___, ___; ___ NW2d ___ (2021) (Docket No. 159692); slip op at 6. Nevertheless, if a dangerous condition has special aspects that "give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided" despite being open and obvious, a possessor *does* owe invitees a duty to prevent such harm. *Lugo*, 464 Mich at 519. Our Supreme Court has recognized two ways in which a danger may qualify as having special aspects: when the danger is *unreasonably dangerous* or when the danger is *effectively unavoidable*. *Hoffner v Lanctoe*, 492 Mich 450, 463; 821 NW2d 88 (2012). A danger is "unreasonably dangerous" when it "present[s] an extremely high risk of severe harm to an invitee who fails to avoid the risk in circumstances where there is no sensible reason for such an inordinate risk of severe harm to be presented." *Lugo*, 464 Mich at 519, n 2. "[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." *Hoffner*, 492 Mich at 469-470. The issue in this case concerns the latter special aspect of "effective unavoidability".

The trial court held that the danger of ice and snow was effectively avoidable because plaintiff had the options of either using the patient entrance sidewalks or not going into work that day. The court's conclusion that plaintiff had the option of using other entrances was based on a lack of evidence showing that the patient entrances were in the same condition as the employee entrance. DPM's billings records showed the sidewalks were last shoveled at 3:00 a.m. on January 29th, and not salted at all that day before the accident. The snow removal contract did not impose different duties relative to the three building entrances. A reasonable jury could infer from this evidence that because all the sidewalks received the same treatment and were subject to the same weather conditions, they would have all been a similar condition at the time of plaintiff's fall. While plaintiff also testified that she had seen her manager shovel and salt the patient urgent care entrance the day before her accident, there was no evidence the same was done on the day of the accident. Thus, it would be speculation to assume that the patient entrances were in a different condition from the employee entrance due to the manager's actions on the day of the accident. Viewing the evidence in the light most favorable to the plaintiff, reasonable minds could disagree as to whether plaintiff could have avoided the danger of ice and snow at the employee entrance by choosing to use the patient entrances instead.

The trial court also concluded that plaintiff had the option of not going to work that day or insisting through a supervisor that the entrance be cleared, and that the fact that plaintiff was entering her place of employment when she was injured did not make the hazard unavoidable. The court cited *Bullard v Oakwood Annapolis Hosp*, 308 Mich App 403, 413; 864 NW2d 591 (2014) overruled by *Estate of Livings v Sage's Inv Group, LLC, No*, ___ Mich ___; ___ NW2d ___ (2021), for its holding. In *Bullard*, the plaintiff slipped and fell on ice while performing maintenance on the defendant's rooftop generator. The plaintiff sued the defendant and claimed that the ice was an unavoidable part of his work duties. The defendant moved for summary disposition and contended that the ice was an open and obvious danger. On appeal, a panel of this Court reversed the trial court's order denying the defendant summary disposition on the basis that the ice was either unreasonably dangerous or effectively unavoidable. As to whether the condition was effectively unavoidable, the Court held that the plaintiff made a series of choices to proceed with his work instead of postponing it to another time or day. *Bullard*, 308 Mich App at 412-413. Applying *Bullard* to the instant case, the trial court held that plaintiff made the choice to traverse the employee walkway instead of not going into work or waiting until the sidewalk was cleared.

Bullard has been overruled since the trial court's decision in this case by our Supreme Court's decision in *Estate of Livings v Sage's Inv Group, LLC, No*, *supra*. *Livings* involved a plaintiff who slipped on ice in her employer's parking lot while coming to work. The plaintiff sued her employer and the employer moved for summary disposition, arguing that the plaintiff could have avoided the conditions by parking elsewhere and using the front door. The trial court denied the motion and found a question of fact existed as to whether Livings would have been allowed to use the other entrance. A panel of this Court affirmed. Our Supreme Court held:

> an open and obvious condition can be deemed effectively unavoidable when a plaintiff must confront it to enter his or her place of employment for work purposes. However, in assessing this question, it is still necessary to consider whether any alternatives were available that a reasonable individual in the plaintiff's circumstances would have used to avoid the condition. [*Livings*, ___ Mich at ___; slip op at 2.]

Since our Supreme Court announced the special-aspects rule in *Lugo* until the Court's decision in *Livings*, the Supreme Court "had never identified a real-world condition that was effectively unavoidable or unreasonably dangerous such that liability attached." *Livings*, ___ Mich at ___ (MCCORMACK, C.J., concurring); slip op at 10. And this Court generally took a dim view of relying on employment as support for finding a danger effectively unavoidable. See, e.g., *Bullard*, *supra*. The trial court's determination that the hazard in this case was avoidable through the exercise of a decision to not go to work is no longer viable. *Livings*, ___ Mich at ___; slip op at 15 ("What a court cannot conclude, however, is that a hazard was avoidable simply because the employee could have elected to skip work or breach other requirements of his or her employment."). The trial court also suggested that plaintiff could have called her supervisor and insisted on the sidewalk being cleared before plaintiff entered her place of employment is similarly unpersuasive. This suggestion is "tantamount to skipping work and, under the analysis above, [is] therefore not [a] reasonable alternative[]." *Livings*, ___ Mich at ___; slip op at 17. Instead, a reasonable jury could infer that no "alternatives were available that a reasonable individual in the plaintiff's circumstances would have used to avoid the condition." *Livings*, ___ Mich at ___; slip op at 2.

For these reasons, we conclude that a question of fact exists as to whether the snow-covered ice was effectively unavoidable and we reverse the trial court's grant of summary disposition to Hannawa.

IV. ALLENWEST AND DPM

Plaintiff argues that the trial court erred by granting summary disposition to Allenwest on the basis of premises liability, because her claim against Allenwest sounded in ordinary negligence. We agree. However, plaintiff's ordinary negligence claim ultimately fails as discussed, below.

The trial court decided Allenwest's motion for summary disposition on the basis of the open and obvious doctrine. The trial court erred in doing so because plaintiff did plea a premises-liability claim against Allenwest. The open and obvious doctrine applies only to premises-liability actions; it does not apply to a claim of ordinary negligence. *Wilson v BRK, Inc*, 328 Mich App 505, 512; 938 NW2d 761 (2019). Accordingly, before applying that doctrine, a trial court must first determine whether a claim is one of premises liability or ordinary negligence. A premises-liability claim concerns "an injury arising from an allegedly dangerous condition on the land." *Id*. In addition, premises liability "arises solely from the defendant's duty as an owner, possessor, or occupier of land." *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 692; 822 NW2d 254 (2012).

In her amended complaint, plaintiff alleged that Allenwest "performed snow and ice removal services in an inadequate and negligent manner, making the parking lot more hazardous" and "had a duty to perform [its] contract with [Hannawa] in a reasonable manner so as not to endanger employees of [Hannawa]." Plaintiff then provided a list of "acts and omissions of negligence" she alleged Allenwest committed. Importantly, nowhere in her amended complaint did plaintiff assert that Allenwest was the possessor of the premises.

Plaintiff argues that she has a viable common law negligence claim against Allenwest and DPM arising from the Allenwest-DPM contract for snow removal. We disagree.

An ordinary negligence claim has four elements: duty, breach, causation, and damages. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004). "[A] separate and distinct duty to support a cause of action in tort can arise by statute, or by a number of preexisting tort principles, including duties imposed because of a special relationship between the parties, and the generally recognized common-law duty to use due care in undertakings." *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 170; 809 NW2d 553 (2011) (citations omitted). That a defendant's conduct implicates a contract to which a plaintiff is not a party does not necessarily mean the actor is immune from tort liability for his or her conduct. *Id*. at 168-170. The common law "imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others." *Id*. at 165 (quotation marks and citation omitted). The common-law duty to use due care in undertakings is premised on "the simple idea that is embedded deep within the American common law of torts . . . : if one *having assumed to act*, does so negligently, then liability exists as to a third party for failure of the defendant to exercise care and skill in the performance itself." *Id*. at 170-171 (quotation marks and citation omitted; emphasis added).

Plaintiff argues that because Allenwest and DPM undertook the responsibility of removing ice and snow from the sidewalks and parking lot, they were obligated to perform the task with due care. The trial court rejected this argument. The bases of the court's ruling were three: plaintiff was not in privity to the contract; plaintiff was not a third-party beneficiary of the contract; and there was no evidence that DPM acted negligently in its removal of the ice and snow the morning of plaintiff's fall or created a new hazard.

The parties to the Allenwest-DPM contract were Allenwest and DPM. The two-year contract provided that DPM would salt and plow the parking lot, and shovel and de-ice the sidewalks. There is no dispute that plaintiff was not a party to the contract. Therefore, plaintiff's contractual nexus can, at best, be as a third-party beneficiary. The third-party beneficiary statute, MCL 600.1405, "reflects that not every person incidentally benefitted by a contractual promise has a right to sue for breach of that promise, but rather only if the promisor has 'undertaken to give or to do or refrain from doing something directly to or for said person.' " *Brunsell v City of Zeeland*, 467 Mich 293, 296; 651 NW2d 388 (2002) quoting MCL 600.1405(1). An intended third-party beneficiary is one that is referred to in the contract. *Id*. at 297 (citation omitted). "[A] third-party beneficiary may be a member of a class, but the class must be sufficiently described." *Koenig v City of S Haven*, 460 Mich 667, 680; 597 NW2d 99 (1999) (quotation marks and citation omitted). "[T]he class must be something less than the entire universe, e.g., 'the public' ". *Id*. The trial court did not err in finding that Allenwest and DPM were not directly contractually obligated to the plaintiff and that plaintiff was not a third-party beneficiary under the contract where she was not a party to the contract, not referenced in the contract, and not a member of a sufficiently defined class in the contract. See *Brunsell*, 467 Mich 293 (The Supreme Court held that pedestrian was not an intended third-party beneficiary of lease agreement between city and property owner.)

Plaintiff's Statement of Questions Presented stated: "Did the Trial Court Err when it Concluded that There were No Grounds upon which Defendant DJ's Property Maintenance LLC

could be Liable for Plaintiff's Damages?" This was not a direct appeal of the trial court's third-party beneficiary ruling, but because the complaint asserted liability under that theory, we addressed it before looking to any other possible breach of duty. Because there is no contractual liability, the only possible claim against DPM would require a showing that DPM created or increased a hazard. No such proofs were presented to the trial court. Plaintiff abandoned any claim that the failure to salt the sidewalks created a new hazard. At the hearing on defendants' motions for summary disposition, plaintiff's counsel stated, "nobody is alleging that [they] made it worse. We have no evidence that [they] made it worse. [They] may have even made it a little better."

V. CONCLUSION

The trial court's order granting summary disposition to Hannawa is reversed. The trial court's orders granting summary disposition to Allenwest and DPM are affirmed. We remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Cynthia Diane Stephens
/s/ James Robert Redford