STATE OF MICHIGAN

COURT OF APPEALS

PETER JOLLIFFE and LAURA JOLLIFFE,

Plaintiffs/Counter-Defendants-Appellees,

v

LARRY STEVENSON and BEVERLY STEVENSON,

Defendants/Counter-Plaintiffs/Third-Party Plaintiffs-Appellants,

and

ANDERSON LAWN MAINTENANCE,

Third-Party Defendants.

UNPUBLISHED
June 23, 2011

No. 297630
Muskegon Circuit Court
LC No. 08-046211-CH

Before: TALBOT, P.J., and GLEICHER and M. J. KELLY, JJ.

PER CURIAM.

Larry and Beverly Stevenson ("Stevensons") contest the trial court's order dismissing their premises liability claim following the grant of summary disposition in favor of Peter and Laura Jolliffe ("Jolliffes") on the counter-claim for breach of contract. We affirm.

The Jolliffes moved to Indiana and the Stevensons contracted to lease their house for a two-year period. When the Stevensons stopped making their monthly payments, the Jolliffes brought suit for breach of contract. The Stevensons filed an answer and counter-complaint, alleging claims for premises liability and breach of contract based on a slip-and-fall accident on the property involving Beverly Stevenson. Beverly had returned home after work to find the driveway of the premises covered in snow. It had snowed all day resulting in approximately six-inches of snow having accumulated on the driveway. Because she was unable to traverse the full length of the driveway, she parked her vehicle, entered the house and phoned the Jolliffes. The Jolliffes instructed her to telephone the snow-removal company, Anderson Lawn Maintenance. Anderson advised her that a worker would be out in an hour to clear the driveway. Realizing her car would be in their way, Beverly returned to her vehicle with the intent of moving it out of the

way, but slipped in an icy rut and fell in the driveway incurring injury to her ankle. The Stevenson's counter-complaint alleged both negligence and the breach of a lease provision that required the Jolliffes to arrange and pay for snow removal.

The Jolliffes filed a motion for separate trials for the claim and counter-claim, and for summary disposition on the counter-claim, arguing that liability was precluded because the hazardous condition was open and obvious. The trial court granted the motion to sever and granted summary disposition in favor of the Jolliffes on the Stevensons' tort claim, finding the "icy ruts in a driveway which caused Beverly Stevenson to slip and fall were not 'effectively unavoidable.'" Case evaluation on the counter-claim was scheduled. Believing the counter-claim had been resolved, the Jolliffes failed to attend the case evaluation. The Jolliffes petitioned the trial court for clarification, but before the court ruled the deadline arrived for accepting or rejecting the case evaluation. The Jolliffes accepted the evaluation, but the Stevensons rejected it. The court clarified that only the Stevensons' negligence claim had been dismissed; their breach of contract claim remained pending. The order also indicated that the Jolliffes were not estopped from bringing a motion for summary disposition on the remaining count.

The Jolliffes again filed a motion for summary disposition arguing that there was no evidence the lease had been breached. Snow removal service was arranged, paid for, and performed. The Stevensons countered that because the driveway had not been cleared they suffered a loss that would not have occurred had the provision of the lease been properly performed. The trial court granted summary disposition finding that the claim encompassed personal injuries rather than contract damages and, thus, was identical to the negligence claim that had already been dismissed.

The Jolliffes moved for costs and fees based on the Stevensons' rejection of the case evaluation rejection.[1] They sought $1,928.63 as the expenses incurred in litigating their clarification and second summary disposition motions. The Stevensons objected arguing that the only reason that litigation was necessary was because of the Jolliffes' misunderstanding of the scope of the first summary disposition ruling. The trial court rejected the Stevensons' argument that the court should refuse to award the costs in the interests of justice. Ultimately, the parties reached an agreement regarding the original complaint and the lawsuit was dismissed by stipulation.

The Stevensons first argue that despite the condition comprising an open and obvious hazard, the facts fall squarely within the "effectively unavoidable" portion of the "special aspects" exception, giving rise to a duty by the Jolliffes under a theory of premises liability.[2] They contend that when there is a dispute regarding whether a condition is "effectively

---

[1] MCR 2.403(O).

[2] The Stevensons' argument is premised on this Court's ruling in *Robertson v Blue Water Oil Co*, 268 Mich App 588; 708 NW2d 749 (2005).

unavoidable," the matter is for the jury to consider. Because the car blocked the driveway from being plowed, there was no alternative but to move the vehicle. It was during the walk to move the car that Beverly Stevenson fell and was injured. In sum, the Stevensons argued that because a question of fact remained regarding the unavoidable nature of the circumstances it was inappropriate to grant summary disposition. The Jolliffes assert that they were unaware of the snow because they were living in Indiana. This is significant because the Jolliffes were not in physical possession of the premises at the time the injury occurred and could do nothing to protect from harm anyone present on the property.

We review de novo a trial court's decision to grant or deny a motion for summary disposition.[3] Although substantively admissible evidence submitted at the time of the motion must be viewed in the light most favorable to the party opposing the motion, the non-moving party must come forward with at least some evidentiary proof, some statement of specific fact upon which to base his case.[4]

The trial court did not err in granting summary disposition in favor of the Jolliffes because they did not have a duty to the Stevensons. A premises possessor owes a duty to use reasonable care to protect invitees from an unreasonable risk of harm caused by dangerous conditions on the premises unless the dangers are known to the invitee or are open and obvious.[5] "Under the principles of premises liability, the right to recover for a condition or defect of land requires that the defendant have legal possession and control of the premises."[6] Possession and control are required because "'[i]t is a general proposition that liability for an injury due to defective premises ordinarily *depends upon power to prevent the injury* and therefore rests primarily upon him who has control and possession.'"[7] In the circumstances presented, the Stevensons were in possession of the property because they had "actual exercise of dominion and control."[8]

A panel of this Court has determined that "'possession for purposes of premises liability does not turn on a theoretical or impending right of possession, but instead depends on the *actual exercise of dominion and control over the property*.'"[9] "It is the possessor or occupier of land,

---

[3] *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998).

[4] *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999); *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

[5] *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001).

[6] *Morrow v Boldt*, 203 Mich App 324, 328; 512 NW2d 83 (1994).

[7] *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 662; 575 NW2d 745 (1998), quoting *Nezworski v Mazanec*, 301 Mich 43, 56; 2 NW2d 912 (1942) (emphasis added).

[8] *Kubczak*, 456 Mich at 661.

[9] *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 704; 644 NW2d 779 (2002) (citation omitted, emphasis added).

not necessarily the titleholder, who owes a duty to invitees regarding the condition of the land."[10] Further, even if a defendant is in possession and control of the land, liability will only arise if the defendant knew or should have known of the condition.[11] Although the Jolliffes were made aware of the situation by Beverly Stevenson's telephone call, they lacked the power or opportunity to prevent the injury due to their physical absence from the area. Rather, Beverly Stevenson was in the better position to assess the condition and her own ability to navigate it.

The Stevensons primarily contend that liability is premised on the circumstances comprising an "effectively unavoidable" condition.[12] The Stevensons' reliance on this exception is misplaced as the situation confronted by Beverly Stevenson was not unavoidable. For a situation to be construed as comprising an unreasonably high risk of harm caused by an effectively unavoidable condition, "the risk must be more than merely imaginable or premised on a plaintiff's own idiosyncrasies."[13] Beverly was not effectively trapped and without options but rather the victim of her own choices. When she arrived at the home Beverly could observe that the driveway had not been plowed and was impassable. She could have elected to not attempt to enter the driveway given its condition or, after contacting the snow removal service, could have waited until the plow arrived to try to move her vehicle. Evidence also suggested that she could have taken an alternative path to her vehicle avoiding the ruts she had created in attempting to traverse the driveway. As such, the Stevensons' assertion that Beverly was confronted with an unavoidable condition is unavailing.

Next, the Stevensons argue that the trial court should not have imposed case evaluation sanctions, despite their rejection of the award and acceptance by the Jolliffes. Although a trial court's decision to grant or deny case evaluation sanctions is subject to review de novo, the award of attorney fees and costs is reviewed for an abuse of discretion.[14] A trial court has not abused its discretion if the outcome of its decision is within the range of principled outcomes.[15]

The Michigan Rules of Court provide for an exception in the award of case evaluation sanctions in the "interests of justice."[16] Contrary to the position taken by the Stevensons, there is no requirement that all dispositive motions be made before case evaluation is conducted. The Stevensons do not dispute that it was highly likely and anticipated that a second motion for summary disposition would be filed once the Jolliffes learned that the breach of contract claim

---

[10] *Little v Howard Johnson Co*, 183 Mich App 675, 678-679; 455 NW2d 390 (1990).

[11] *Hampton v Waste Mgmt of Mich, Inc*, 236 Mich App 598, 605-606; 601 NW2d 172 (1999).

[12] *Robinson*, 268 Mich App at 593.

[13] *Id.* at 593.

[14] *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008).

[15] *Taylor v Currie*, 277 Mich App 85, 99; 743 NW2d 571 (2007).

[16] MCR 2.403(O)(11).

remained viable. Further, given the lack of any evidence that the Jolliffes breached the lease, dismissal could be presumed. Despite their awareness of these circumstances, the Stevensons elected to reject the award, creating their liability for costs and fees.[17]

Charging the Stevensons under $2,000 in costs and fees does not fall outside the range of principled outcomes. Even if the Stevensons believed they had pled a legitimate tort action their breach of contract claim clearly comprised merely a different characterization of the same allegations underlying their premises liability action. The damages for all of their asserted claims were identical and involved only those incurred from Beverly Stevenson's personal injury, not contract damages. It is well-established law that the court may look behind the label that a litigant attaches to a cause of action and determine the substance of the claim asserted.[18] Where negligent breach of contractual duties results in personal injuries, those personal injuries are compensable in tort, not contract.[19] Because it is not outside the range of principled outcomes for the Jolliffes to be awarded their costs for litigating this duplicative count, the trial court did not err in granting case evaluation sanctions.

Affirmed.

/s/ Michael J. Talbot
/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly

---

[17] MCR 2.403.

[18] *Local 1064, RWDSU AFL-CIO v Ernst & Young*, 449 Mich 322, 327 n 10; 535 NW2d 187 (1995).

[19] See *Mobil Oil Corp v Thorn*, 401 Mich 306, 310; 258 NW2d 30 (1977).