STATE OF MICHIGAN

COURT OF APPEALS

THOMAS MAGYAR, Plaintiff-Appellant,	UNPUBLISHED March 22, 2012
v	No. 299118 Saginaw Circuit Court
MICHAEL BARNES and DIANE BARNES, Defendants-Appellees.	LC No. 09-005785-NO

Before: SHAPIRO, P.J., and SAAD and BECKERING, JJ.

PER CURIAM.

Plaintiff appeals the trial court's order that summarily dismissed his statutory nuisance claim. Plaintiff also appeals the trial court's earlier order that dismissed his claims of common law negligence, statutory negligence, breach of contract, and common law nuisance. For the reasons set forth below, we affirm.

I. DISCUSSION

A. ARGUMENTS AND STANDARD OF REVIEW

Plaintiff lived at a rental property that his mother leased from defendants. Plaintiff alleges that he sustained injuries when he slipped and fell on ice that formed on the steps leading to the front door. The lease agreement states that the tenants are "responsible for snow removal" and plaintiff testified at his deposition that he was responsible for removing ice and snow on the premises. Moreover, at oral argument before this Court, plaintiff's counsel acknowledged that, under the terms of the lease, plaintiff and his mother were responsible for snow and ice removal as tenants of the property.

Plaintiff argues that the trial court erred when it granted summary disposition to defendants pursuant to MCR 2.116(C)(10). We review the court's decision de novo, and assess the evidence in a light most favorable to the nonmoving party. *Greene v A P Prod, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006). Summary disposition is proper "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 461; 646 NW2d 455 (2002).

B. STATUTORY DUTY FOR LEASED RESIDENCES

Plaintiff contends that the trial court erred by failing to properly consider whether defendants violated MCL 554.139 by not installing eaves troughs on the residence. MCL 554.139 provides:

> (1) In every lease or license of residential premises, the lessor or licensor covenants:
>
> (a) That the premises and all common areas are fit for the use intended by the parties.
>
> (b) To keep the premises in reasonable repair during the term of the lease or license, and to comply with the applicable health and safety laws of the state and of the local unit government where the premises are located, except when disrepair or violation of the applicable health or safety laws has been caused by the tenants[’] willful or irresponsible conduct or lack of conduct.
>
> (2) The parties to the lease or license may modify the obligations imposed by this section where the lease or license has a current term of at least 1 year.
>
> (3) The provisions of this section shall be liberally construed, and the privilege of a prospective lessee or licensee to inspect the premises before concluding a lease or license shall not defeat his right to have the benefit of the covenants established herein.

Plaintiff specifically contends that defendants interfered with the tenants’ use of the steps. MCR 554.139(1)(a).

While it is true that ice may interfere with the intended use of a stairway, i.e., “walking up and down,” *Hadden v McDermitt Apartments, LLC*, 287 Mich App 124, 132; 782 NW2d 800 (2010), this assertion fails to recognize that the parties to this lease agreed that the tenants would be responsible for the removal of snow and ice.[1] Moreover, the parties were allowed to modify this obligation under MCL 554.139(2) because the lease was for one year. Accordingly, a reasonable jury could not find that defendants had violated any duty with regard to the steps under MCL 554.139(1)(a).

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[1] Plaintiff admitted this at his deposition, the lease so provides, and plaintiff’s counsel conceded this point at oral argument before this Court. While the dissent expressly acknowledges that plaintiff agreed to take responsibility for the removal of ice and snow, it fails to recognize that this duty is at the very foundation of plaintiff’s claim against the landlords, who are the parties who had the foresight to contract with plaintiff to make it plaintiff’s duty to take care of this condition. Again, duty is the first inquiry in a premises liability action and, when a party explicitly takes on the duty to remove ice and snow, he should not be heard to argue that this duty was breached by someone else.

C. OPEN AND OBVIOUS DANGER

Plaintiff also avers that his common law negligence claim is not barred by the open and obvious danger doctrine because the doctrine cannot be used to avoid statutory obligations, and because the ice on the steps was not open and obvious. As noted, any statutory obligation that may have been applicable under MCR 554.139(1)(a) was specifically reallocated under the terms of the lease. With regard to the open and obvious doctrine, a landlord owes a duty to an invitee, such as plaintiff, 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, a landlord has no duty to warn an invitee "of dangers that are so obvious and apparent that a person may reasonably be expected to discover them and protect himself or herself." *Id*.

Black ice "is either invisible or nearly invisible, transparent, or nearly transparent." *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 483; 760 NW2d 287 (2008). However, black ice may be an open and obvious danger if there is "evidence that the black ice in question would have been visible on casual inspection before the fall" or if there are "other indicia of a potentially hazardous condition." *Id*. Applying the "governing precedent established in" *Slaughter*, our Supreme Court held in *Janson v Sajewski Funeral Home, Inc*, 486 Mich 934, 935; 782 NW2d 201 (2010), that the black ice was open and obvious because "the slip and fall occurred in winter, with temperatures at all times below freezing, snow present around the defendant's premises, mist and light freezing rain falling earlier in the day, and light snow falling during the period prior to the plaintiff's fall in the evening." *Id*.

Here, the parties did not present evidence about whether the ice was visible on causal inspection, but evidence established that there were other indications of a potentially hazardous condition. The slip and fall occurred a few days after a significant snowstorm in early February and snow remained on the ground. Plaintiff testified that it was warm enough that day to melt some of the snow and that, as a lifelong resident of Michigan, he was aware of how snow and ice can refreeze after melting. Plaintiff testified that he was specifically aware that ice tended to form on the steps and, on previous occasions, he and his mother used salt to melt the ice. Plaintiff was also aware that ice could be present because the back entrance of the residence was blocked by ice. Pursuant to Michigan law, the trial court correctly ruled that the danger was open and obvious. And, again, because plaintiff and his mother assumed responsibility by lease and by their conduct to attend to the ice and snow removal, plaintiff ought not be heard to make a claim in tort for injuries that arose out of the very condition for which he took responsibility and for which the landlord contracted to relieve himself of liability.

D. NUISANCE

The trial court granted summary disposition to defendants on plaintiff's statutory nuisance claim because the township in which the incident occurred did not adopt the Michigan Housing Law (MHL), MCL 125.401 *et seq*. The scope of the MHL is limited to "every city and organized village" that meets a threshold population level, and does not apply to townships unless the township board has enacted an ordinance that adopts the provisions. MCL 125.401. It is undisputed that the residence was located in Carrollton Township, which has adopted the

International Property Code, not the MHL. Carrollton Township Code, § 14-45. Accordingly, the trial court did not err when it granted summary disposition to defendants on this claim.

We hold that the trial court also correctly dismissed plaintiff's common law nuisance claim. Plaintiff takes the position that defendants created a nuisance by failing to provide eaves troughs above the front porch, which resulted in the accumulation of ice on the front steps. "Because nuisance covers so many types of harm, it is difficult to articulate an encompassing definition." *Adkins v Thomas Solvent Co*, 440 Mich 293, 303; 487 NW2d 715 (1992). It is generally defined as an interference with land, and Michigan recognizes two distinct forms of common law nuisance: (1) public nuisance and (2) private nuisance. *Id*. at 302-303. A public nuisance action is appropriate when a common right enjoyed by the general public has been unreasonably interfered with. *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 190; 540 NW2d 297 (1995). A private nuisance action is appropriate when the defendant has interfered with the use and enjoyment of an individual plaintiff's property interest in the land. *Adkins*, 440 Mich at 302. Although plaintiff summarily asserts that he has a valid public nuisance claim, he cites no supporting case law and, because his claim does not involve a right enjoyed by the general public, there is no basis for this claim. *Cloverleaf*, 213 Mich App at 190.

In addition to the public and private classifications, nuisances are classified as either nuisance in fact or nuisance at law. *Bluemer v Saginaw Central Oil & Gas Serv, Inc*, 356 Mich 399, 411; 97 NW2d 90 (1959). "A nuisance at law . . . is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings." *Id*. The absence of eaves troughs is not always a nuisance in every situation, so it cannot be classified as a nuisance in law. We further observe that, to the extent plaintiff seeks to establish a private nuisance in fact claim, such claim is premised on defendants' alleged failure to act which sounds in negligence, not nuisance. *Fuga v Comerica Bank-Detroit*, 202 Mich App 380, 383; 509 NW2d 778 (1993). Indeed, plaintiff's assertions with regard to defendants' alleged failure to act to support his nuisance claim are the same as those he asserts to establish his negligence claim. Thus, despite his attempt to label this a nuisance action, plaintiff's allegations clearly sounds in negligence. *David v Sternberg*, 272 Mich App 377, 381; 726 NW2d 89 (2006).

We further note that, were we to consider plaintiff's nuisance claim, it would nonetheless fail because, when plaintiff and his mother took over the premises, there was no "hidden danger" in existence that would subject defendants to liability in nuisance. See *McCurtis v Detroit Hilton*, 68 Mich App 253, 256; 242 NW2d 541 (1976); *Bluemer*, 356 Mich at 410-416. And again, plaintiff and his counsel concede that plaintiff and his mother agreed to undertake the responsibility of removing ice and snow from the premises.[2] Plaintiff cannot maintain a

[2] The concurring opinion also ignores the parties' decision to contractually assign responsibility for ice and snow removal to plaintiff. As the concurrence acknowledges, the gist of a nuisance claim is an "interference" with the use of land, and because plaintiff contractually agreed to be responsible for the very condition which he claims constitutes a common law nuisance, the only common sense, common law conclusion is that the landlord did not "interfere" with the tenants' use of the land.

nuisance action against defendants for failing to ameliorate a condition for which they assumed responsibility. Further, because plaintiff's nuisance claim is not sustainable as a cause of action separate and distinct from that of his premises liability claim, the trial court correctly dismissed this claim.

Affirmed.

/s/ Henry William Saad