STATE OF MICHIGAN

COURT OF APPEALS

CHARLENE KLASNER, Plaintiff-Appellant,	UNPUBLISHED November 17, 2011
V	No. 300425 Oakland Circuit Court
HARMAN & TYNER INC., Defendant-Appellee.	LC No. 2009-105766-NI

Before: SERVITTO, P.J., and CAVANAGH and STEVENS, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order granting summary disposition in defendant's favor in this premises liability matter. Because the condition causing plaintiff's fall was open and obvious and subject to no exceptions, and because defendant breached no statutory duty owed plaintiff, we affirm.

Plaintiff resides in an apartment building owned and operated by defendant. On January 18, 2009, while descending a stairway and stepping into the tiled foyer of the apartment building, plaintiff slipped and fell, incurring injuries. According to plaintiff, her slip and fall was the direct result of defendant's negligence in, among other things, allowing water, slush, ice and snow to accumulate on the tile and failing to remove or warn of the hazard. Plaintiff also alleged that defendant breached its statutory obligations as a lessor and is thus liable for her injuries on that basis as well. Defendant moved for summary disposition contending that the condition leading to plaintiff's slip and fall was open and obvious such that defendant had no duty to protect plaintiff from the same, and that it breached no statutory duty owed plaintiff because the foyer was kept in a condition fit for its intended purpose. The trial court agreed, granting summary disposition in defendant's favor. Plaintiff now appeals that decision.

Defendant moved for summary disposition pursuant to both MCR 2.116(C)(8) and (10). However, the trial court looked beyond the pleadings in rendering its decision, clearly premising its ruling upon MCR 2.116(C)(10). We review a trial court's decision to grant or deny summary disposition de novo. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). Issues concerning the interpretation of a statute are questions of law that we also review de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

When reviewing a motion under subrule (C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant record evidence in the light most favorable to the

nonmoving party to determine whether any genuine issue of material fact exists warranting a trial. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). Summary disposition is appropriate under MCR 2.116(C)(10) when the moving party can demonstrate there are no genuine issues of material fact and it is entitled to judgment as a matter of law. *Rose v Nat'l Auction Group, Inc.*, 466 Mich 453, 461; 646 NW2d 455 (2002).

We first note that the trial court, in orally rendering its decision, stated, "In looking at the evidence in a light most favorable to the Defendant, the Court . . . ." As pointed out by plaintiff, this would be an incorrect standard of review, as the evidence is to be viewed on a (C)(10) motion in a light most favorable to the non-moving party—here, plaintiff. However, it does not appear that the trial court was actually applying such a standard rather than simply misspeaking, as the trial court also stated, in the very same sentence, that it "grants Plaintiff's motion as to count I, negligence." The summary disposition motion was brought by defendant, not plaintiff, such that the trial court was actually granting defendant's motion and misspoke when it stated that it was granting plaintiff's motion. It would appear, then, the trial court simply transposed the parties in the sentence and misstated in whose favor it was viewing the evidence when reviewing the motion. This is a particularly logical conclusion given that in addressing a different count in plaintiff's complaint, the trial court stated, "In looking at the evidence in a light most favorable to the Plaintiff, the Court concludes . . . ." The trial court was thus aware of the appropriate standard of review and there is no evidence in the record that it applied an inappropriate standard. That issue being resolved, we turn to the remaining arguments raised by plaintiff on appeal.

Plaintiff contends that a question of fact exists as to whether the hazardous condition causing her fall and the resulting injuries was open and obvious, thus precluding summary disposition in defendant's favor. 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. *Kennedy v Great Atlantic & Pacific Tea Co.*, 274 Mich App 710, 712; 737 NW2d 179 (2007). The duty that a landlord owes a plaintiff depends on the plaintiff's status on the land. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). 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. *Stanley v Town Square Coop*, 203 Mich App 143, 149; 512 NW2d 51 (1993). An owner "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 v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). This duty generally does not, however, require the owner to protect an invitee from open and obvious dangers. *Id.* at 517. An open and obvious danger is one that an average user with ordinary intelligence would have been able to discover upon casual inspection. *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002). This is an objective test, and the court considers whether a reasonable person in the plaintiff's position would have foreseen the danger. *Id.* at 238–239.

In this case, plaintiff was walking down a stairway directly behind another individual and, as she stepped from the first step onto the foyer floor, immediately fell. The person walking in front of plaintiff, Marv Shultz, had come to plaintiff's apartment to pick her up and had

traversed the foyer, without incident, minutes before. Shultz testified that when he first entered the apartment building interior foyer, he immediately noticed that the rug covering part of the foyer floor had snow all over it. Shultz further testified that slush on the foyer floor beyond the rug was present and obvious, but that he had no problem walking through the slushy area to access the stairs to plaintiff's apartment. According to Shultz, he went up the stairs, which were wet, to plaintiff's apartment and remained there for approximately five minutes. Shultz and plaintiff then both came down the stairs, with Shultz carrying a laundry basket and walking in front of plaintiff. Shultz stepped off the bottom step and into the foyer without incident. Plaintiff, who had nothing in her hands, stepped behind Shultz off the bottom stair and onto the foyer floor, immediately falling. Plaintiff admits that once she had fallen she was able to observe the slushy condition of the foyer floor. Plaintiff also admits that once she stood in the foyer after her fall, the condition was readily apparent. Based upon the testimony, the slushy condition of the floor that caused plaintiff's fall was open and obvious.

Plaintiff contends that there was no opportunity for her to observe the slushy, wet condition of the foyer floor as she descended the stairway because there was a person directly in front of her, blocking her view and that, as such; the condition was not open and obvious. According to plaintiff, the objective "reasonable person in plaintiff's position" means a person following closely behind another down the stairs, and that such a person would not be able to foresee the danger posed by the slushy foyer. A person following another closely down the stairs, however, is entirely subjective to the particular plaintiff in this matter. In *Lugo*, 464 Mich 523–524, the Court explained that "it is important for courts in deciding summary disposition motions by premises possessors in 'open and obvious' cases to focus on the objective nature of the condition of the premises at issue, not on the subjective degree of care used by the plaintiff." Whereas plaintiff would have us view the condition from his or her specific, limited perspective, the question is not, and has never been, what a particular plaintiff saw or did not see, but what an average user would have seen had she been looking. This Court has held, for example, that if a plaintiff did not see the condition because he or she is not looking where he or she is going or is somehow distracted has no bearing on the open or obviousness on the condition. See, e.g., *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 498; 595 NW2d 152 (1999); *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 719; 737 NW2d 179 (2007). The focus, then, is on the condition itself, not on the particular plaintiff. *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 329; 683 NW2d 573 (2004).

There has been no allegation that the layout of the foyer, the lighting, or any other extraneous factor worked to conceal the condition of the foyer. The only thing that prevented plaintiff from seeing the condition of the foyer was Shultz's body in front of her. True, in cases where a hazard has been blocked from view, there have been instances where it was determined to have not been open and obvious. For example, in *Price v Kroger Co of Michigan*, 284 Mich App 496; 773 NW2d 739 (2009), the plaintiff was injured when a broken one inch long wire protruding from the bottom of a waist-high candy bin caused her to fall. The placement and height of the candy bin concealed the wire from view. However, the hazard in *Price* was concealed by a stationary object, positioned by an affirmative act on the part of (or at least arguably within the control of) the premises owner. Under those circumstances, liability could logically attach to the premises owner.

Here, in contrast, plaintiff's view was blocked by a factor beyond defendant's reach. Moreover the concealing "object" was transitory in nature and arguably not a specific factor that could be specifically predicted in time or placement, nor controlled or prevented by the premises owner.

Plaintiff next contends that questions of fact exist concerning whether defendant breached its duty of exercising ordinary care to address the existence of the hazardous condition that caused plaintiff to slip and fall. The open and obvious danger doctrine, however, attacks the duty element that a plaintiff must establish in a negligence case. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 612; 537 NW2d 185 (1995). Having found that the danger posed was open and obvious, defendant owed no duty to protect plaintiff from the same unless special aspects of the condition made the open and obvious risk unreasonably dangerous. Only if special aspects exist, such as where a condition is effectively unavoidable or creates an unreasonably high risk of severe harm, must a possessor of land take reasonable precautions to protect an invitee from the risk. *Lugo v Ameritech Corp*, 464 Mich. 512, 517-519; 629 NW2d 384 (2001). Plaintiff has not alleged that a special aspect of the condition removed it from the realm of the open and obvious, nor has she otherwise asserted that the condition remained unreasonably dangerous despite the open and obvious nature of the condition.

Plaintiff also asserts that a question of fact exists as to whether defendant breached its statutory duty to maintain the common area in a manner fit for its intended purpose. We disagree.

MCL 554.139 provides, in relevant part:

> (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.

The statute does not require any level of fitness beyond what is necessary to allow tenants to use the premises and common areas as the parties intended. *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419, 431; 751 NW2d 8 (2008). The "open and obvious" doctrine is not available as a mechanism to avoid liability when a defendant has a statutory duty to maintain the premises in accordance with MCL 554.139. *Id*. at 426 n 2.

There is no question that the foyer of the apartment building where plaintiff slipped and fell is a common area. The issue presented for our resolution, then, is whether the existence of slush and snow in the foyer makes it unfit for its intended purpose, thus amounting to a breach of the defendant's statutory duty under MCL 554.139.

A foyer is a "lobby or anteroom; an entrance hall." *The American Heritage Dictionary of the English Language* (4th Ed.). The intended use is to serve as a passageway into which one enters the apartment building. "Fit" is defined as "suited, adapted, or acceptable for a given circumstance or purpose." *Id*. Thus, defendant's obligation as a lessor with respect to the foyer would be to ensure that the foyer is kept suitable to allow for access and entry into the apartment

building. So long as the foyer was acceptable for use as a passageway into the apartment building, it is fit for its intended purpose.

In this matter, plaintiff's allegation of unfitness is that there was snow and slush in the foyer, and that she fell. However, at least one person, Shultz, entered the foyer in the same condition that plaintiff found it, mere minutes before, and was able to traverse it without difficulty. Plaintiff also testified that the foyer was not dark and that "obviously" someone had tracked slush into the foyer before she fell. Plaintiff further testified that the elevator nearest her apartment was inoperable and that "there's a lot of traffic going through here [the foyer]." There is no indication that there were any complaints about the condition of the foyer or that any other falls had taken place. That there was slush in the foyer and that plaintiff fell does not necessarily render the foyer unfit for its intended purpose. This is particularly so where the area was admittedly well-lit and plaintiff's friend had used the foyer area for its intended purpose without incident.

Plaintiff cites to *Hadden v McDermitt Apartments, LLC*, 287 Mich App 124, 130; 782 NW2d 800; 782 NW2d 800 (2010) as support for her argument that at least questions of fact exist as to whether defendant breached its statutory duty to keep the foyer fit for its intended purpose. In that case, a lessee slipped and fell on ice that had accumulated on an outside stairway attached to her apartment building. The *Hadden* court noted that:

> [T]he primary purpose of a stairway is to provide pedestrians reasonable access to different levels of a building or structure. 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.

Here, in contrast, there was no assertion or evidence that the area was darkly lit, that the slush posed a hidden danger that denied tenants reasonable access to the apartment building, or, more importantly, that no attempts had been made to clear the area of slush. According to the snow removal and salting log concerning plaintiff's apartment building, two of defendant's maintenance employees performed shoveling and salting at plaintiff's apartment building on the date of her accident from 8:00 a.m. until 10:30 a.m. This included clearing the building entrances and sidewalks. John McNeil, defendant's property manager, testified that he prepared the snow removal and salting log and was present while the services were being performed. According to McNeil, "clearing the building entrances" included cleaning the building foyer areas, and he personally inspected the work of the maintenances employees to ensure that the work was done properly before they were allowed to leave for the day.

Again, the sole allegation pertaining to unfitness was that slush was present and that plaintiff fell. Given the evidence that at least one other person traversed the well-lit foyer without incident minutes before plaintiff's fall, and that efforts were made to clear the area prior to her fall, the presence of slush is simply not enough to render the foyer unfit for its intended purpose of providing a passageway into which one enters the apartment building. Plaintiff has failed to establish a breach of statutory duty under MCL 554.139.

Affirmed.

/s/ Deborah A. Servitto
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens