

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL DAVIES,

Plaintiff-Appellant,

v

SANDRA JOHNSON, and GREENRIDGE
REALTY, INC.,

Defendants-Appellees,

and

COLDWELL BANKER/SCHMIDT, STEPHEN
SCHELLING, GREGORY GRESIK, and
CANDICE GRESIK,

Defendants.

UNPUBLISHED

July 19, 2012

No. 304944

Barry Circuit Court

LC No. 09-000624-NO

Before: SHAPIRO, P.J., and HOEKSTRA and WHITBECK, JJ.

PER CURIAM.

In this premises liability action, plaintiff Michael Davies appeals as of right the trial court's order granting summary disposition in favor of defendants Sandra Johnson and Greenridge Realty, Inc. Because we conclude that defendants did not have a duty to inspect and warn, we affirm.

This lawsuit stems from personal injuries received by plaintiff on February 5, 2008. Johnson is a licensed realtor and was showing plaintiff and his wife a home. Before viewing the home, plaintiff entered into an exclusive buyer agency contract with Johnson's employer, Greenridge Realty, Inc. (hereafter "Greenridge"). The home that Johnson was showing plaintiff did not have heat or electricity, and Johnson informed plaintiff that there was no heat or power in the home before they entered it. Plaintiff's accident occurred in the lower level of the home in a room that was actually a garage. While Johnson visited the home once before showing it to plaintiff, she did not enter the room where plaintiff was injured. Unaccompanied by Johnson, plaintiff opened the door to the garage where he was injured, and noticed that it was very dark. Using only a cellular telephone and a cigarette lighter to illuminate the area, plaintiff entered the room. Unknown to plaintiff or Johnson, the garage floor was uneven and there was a four-foot

drop-off. Plaintiff stepped over the edge and fell onto what he believed were buckets or paint cans on the cement floor. Plaintiff sustained a fractured right ankle, fractured left wrist, and fractured left elbow as a result of the fall.

Plaintiff filed a complaint against defendants alleging that Johnson “owed plaintiff Davies the duty to know enough about the condition of the premises in order to warn plaintiff Davies of the drop-off which was part of the basement floor.”¹ The complaint further alleged that Johnson “should have informed herself of the conditions of the premises before showing Davies through the house.” Defendants answered plaintiff’s complaint, and then filed a joint motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). After hearing oral arguments from the parties, the trial court granted summary disposition in favor of Johnson and Greenridge on the record, and a conforming order was entered on the same day. The trial court specifically found that defendants did not breach any duty owed to plaintiff, and that there was no duty to pre-inspect the home or to warn about a condition of which defendants were not aware. Plaintiff now appeals the trial court’s decision as of right.

On appeal, plaintiff maintains that the trial court erred in granting summary disposition because it found that defendants did not owe plaintiff a duty to inspect and warn of discovered dangers. Specifically, plaintiff argues that this Court should find that defendants had a duty to pre-inspect the property before showing it to plaintiff and to discover any dangerous conditions present on the property and warn plaintiff of any possible dangerous conditions. Plaintiff argues that defendants’ failure to pre-inspect the property constituted a breach of duty, and that the breach was the actual and proximate cause of plaintiff’s injuries.

Defendants’ motion was based on MCR 2.116(C)(8) and (10); however, we analyze the motion under MCR 2.116(C)(10) because the record indicates the trial court considered matters outside the pleadings. *Spiek v Mich Dep’t of Transp*, 456 Mich 331, 338; 572 NW2d 201 (1998). We review a trial court’s decision to grant summary disposition de novo. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). Summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim based on the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. *Id.* The evidence is viewed in the light most favorable to the nonmoving party. *Id.* at 567-568. “Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to a judgment as a matter of law.” *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

Initially, we disagree with plaintiff’s claim that this case should not be analyzed as a premises liability action. This Court is not bound by a party’s choice of labels for a claim. *In re Wayne Co Treasurer*, 265 Mich App 285, 299; 698 NW2d 879 (2005). Michigan law distinguishes between claims sounding in ordinary negligence and claims based on premises liability. See *Kachudas v Invaders Self Auto Wash, Inc*, 486 Mich 913, 914; 781 NW2d 806 (2010). An action sounds in premises liability when the injury is the result of a condition of the

¹ While the complaint refers to the area as a “basement,” the rest of the record indicates that the area was a boat garage.

land rather than an activity that created the condition. *James v Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001).

In this case, plaintiff was injured when he fell over a drop-off in an unlit room. The concrete floor was uneven, and plaintiff fell a distance of about four feet onto the ground. Plaintiff complains that Johnson should have inspected the property for dangerous conditions and warned him of any such conditions before showing him the property. Plaintiff's complaint requests damages for the injuries he sustained as a result of falling on the uneven concrete floor, which is clearly a condition of the land. Plaintiff does not allege that defendants did anything to create the dangerous condition. Therefore, we conclude that plaintiff's claim sounds in premises liability.

In a premises liability case, like any negligence case, plaintiff must show duty, breach, causation, and damages. *Hampton v Waste Management of Mich, Inc*, 236 Mich App 598, 602; 601 NW2d 172 (1999). Owners and occupiers of property have a duty to maintain their premises in a reasonably safe condition and to exercise ordinary care in keeping the premises safe. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001).

In this case, it is not disputed that defendants did not own the property on which plaintiff was injured. Further, defendants cannot reasonably be considered occupants of the property because defendants, as the buyer's agents, were granted access to the property for the limited purpose of showing it to plaintiff, a potential buyer. There is no evidence in the record that suggests defendants had any control over the premises. Nevertheless, plaintiff argues that a duty arises from this relationship.

Plaintiff cites no Michigan or other authority to support his claim that a buyer's agent has a duty to pre-inspect property before showing it to a potential buyer and to warn of any discovered dangers. Michigan has not yet considered the question, and a search of other jurisdictions revealed no case where a court held that a buyer's agent had a duty to pre-inspect property before showing it in order to discover any potential danger. Some jurisdictions have found that a seller's agent has an affirmative duty to take reasonable care to inspect the premises and either make them safe or warn invitees of any dangerous condition. See, e.g., *Hopkins v Fox & Lazo Realtors*, 132 NJ 426, 444-445; 625 A2d 1110 (1993); *Jarr v Seeco Construction Co*, 35 Wash App 324, 328; 666 P2d 392 (1983); *Coughlin v Harland L Weaver, Inc*, 103 Cal App 2d 602, 605-606; 230 P2d 141 (1951). In those cases, the reason for imposing such a duty is based on the theory that the seller's agent is in possession of the property which she or he has undertaken to sell. *Jarr*, 666 P2d at 393-394. Other jurisdictions have declined to impose such a duty on seller's agents. See, e.g., *Kubinsky v Van Zandt Realtors*, 811 SW2d 711, 714-715 (Tex App 1991); *Masick v McColly Realtors, Inc*, 858 NE2d 682, 691 (Ind App 2006).

The instant case is distinguishable from the cases cited because defendants in this case were buyer's agents. Unlike seller's agents, buyer's agents have no control of the premises and have limited access. Accordingly, even if we were to accept the reasoning of the other jurisdictions imposing a duty to inspect and warn on seller's agents, that reasoning does not support the imposition of such a duty on a buyer's agent. A buyer's agent has no greater control over the property than a potential buyer, and buyer's agents and potential buyers are equally able to discover and avoid dangers. The instant case illustrates this point; neither Johnson nor

plaintiff had knowledge of the condition of the dark room, and plaintiff was responsible for his own safety when he decided to enter the room without proper lighting. Johnson did not urge plaintiff to enter the area, nor did she possess any special control over the area. See *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 498-499; 418 NW2d 381 (1988) (A duty to protect another person arises when a “person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself.”).

Therefore, based on the lack of any authority supporting the imposition of a duty on a buyer’s agent to inspect and warn of discovered dangers, we conclude that defendants owed no duty to plaintiff in regard to the premises because defendants were not the owners or occupiers of the land, and defendants did not have a special relationship with plaintiff. Accordingly, the trial court properly granted summary disposition in favor of defendants because defendants did not breach any duty.

Affirmed.

/s/ Joel P. Hoekstra

/s/ William C. Whitbeck