STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2125

Hussen W. Butta,
Appellant,

vs.

Mortgage Electronic Registration System, Inc.,
defendant and third party plaintiff,

vs.

Collopy & Saunders Real Estate, Inc.
d/b/a Re/Max Results,
third party defendants,

Ludmilla Eremeyeva,
third party defendant,
Respondent.

Filed May 28, 2013
Affirmed
Chutich, Judge

Hennepin County District Court
File No. 27-CV-11-12183

Daniel W. Schermer, Daniel W. Schermer, P.A., Minneapolis, Minnesota (for appellant)

Paul E. D. Darsow, Arthur, Chapman, Kettering, Smetak & Pikala, P.A., Minneapolis, Minnesota (for respondent Mortgage Electronic Registration System, Inc.)

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Considered and decided by Peterson, Presiding Judge; Chutich, Judge; and Smith, Judge.

U N P U B L I S H E D O P I N I O N

CHUTICH, Judge

Appellant Hussen Butta challenges the district court's grant of summary judgment for respondent Mortgage Electronic Registration System, Inc. (MERS). Butta contends that the district court erred in concluding that MERS did not have a duty to inspect, repair, or warn Butta of a hazardous condition on its property. Because MERS did not have actual or constructive knowledge of any unreasonably dangerous condition on the property and because, in the alternative, any danger was open and obvious, MERS did not owe a duty to Butta. We affirm the grant of summary judgment for MERS.

FACTS

In 2007, MERS foreclosed on and became the owner of a home located in Brooklyn Center. MERS entered into a listing agreement with third-party defendant Collopy & Saunders Real Estate Inc. doing business as Re/Max Results (Re/Max) under which Re/Max agreed to market and sell the property. The listing agreement provided that Re/Max was to notify MERS of any hazardous conditions on the property, inspect the property weekly, and report conditions affecting marketability. The house was to be sold "as is" and MERS made no warranties as to the condition of the property.

An inspection of the house occurred on June 5, 2008, and the inspector noted that the ceilings were in "average condition" but that a lower-level ceiling was "damaged by

water." The inspection report did not include any comments or concerns about the condition of the garage, the garage ceiling, or the attic. A damage report was also prepared after an inspection on June 9, 2008, and it noted water damage in a lower-level ceiling but did not list any damage in the garage.

On July 3, 2008, Butta's brother went to view the Brooklyn Center property as a prospective purchaser. Butta accompanied his brother to the house because, as his brother testified, Butta "owns a house, he knows what need[s] to be fixed, and what some of the things need to be inspected before you purchase the house." Besides being a homeowner himself, Butta did not have any specialized expertise or qualifications in home inspection. Also present at the inspection were Ludmilla Eremeyeva, the brother's real-estate agent who was associated with Re/Max, and Pedro Martinez, a contractor or inspector that Eremeyeva had invited to provide estimates for any necessary repairs.

While viewing the house, the group noticed water damage in a bathroom ceiling. Martinez and Butta decided to try to access the space above the bathroom to determine whether the water was coming through the roof or if the plumbing was leaking. Butta testified that Eremeyeva suggested that the men inspect the ceiling.

The only access point to the house's attic or crawl space that would lead to the area above the bathroom was in the ceiling of the garage. The attic floor consisted of wooden beams with spaces in between filled with insulation. Martinez, holding a bright flashlight, crawled first into the unfinished attic, followed by Butta. Butta took his first step onto a wooden beam and, upon taking his second step, fell through the ceiling to the garage floor below. Butta testified at his deposition that he did not remember whether his

second step was onto a wooden beam or whether it was onto the space between the beams, which consisted only of sheetrock and insulation. As a result of the accident, Butta injured his back. The City of Brooklyn Park inspected the house two weeks later and noted that the garage ceiling needed repair but did not specify the nature of the damage.

Butta filed a complaint against MERS only, asserting that MERS was negligent in its "maintenance, inspection, upkeep and repair" of the property. MERS filed a third-party complaint against Re/Max and Eremeyeva, asserting that if MERS was liable to Butta, MERS was entitled to contribution and indemnity from Re/Max and Eremeyeva. MERS and Re/Max moved for summary judgment, Butta moved for partial summary judgment against MERS on the issue of liability, and Eremeyeva brought a motion to dismiss MERS's third-party complaint against her.

The district court granted summary judgment in favor of MERS and Re/Max, denied Butta's motion for partial summary judgment, and granted Eremeyeva's motion to dismiss. The district court concluded that MERS did not owe any legal duty to Butta, and therefore Butta could not prevail on his negligence claim as a matter of law. Butta appealed.[1]

D E C I S I O N

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that

[1] Re/Max filed an informal brief joining the arguments of MERS on appeal. Eremeyeva did not file a brief.

there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. On appeal from a grant of summary judgment, "we review de novo the district court's application of the law and its determination that there are no genuine issues of material fact." *Johnson v. Paynesville Farmers Union Co-op. Oil Co.*, 817 N.W.2d 693, 706 (Minn. 2012).

If the party opposing summary judgment bears the burden of proof on an essential element of his or her claim, summary judgment is appropriate if that party "fails to make a showing sufficient to establish that essential element." *Eng'g & Constr. Innovations, Inc. v. L.H. Bolduc Co.*, 825 N.W.2d 695, 704 (Minn. 2013) (quotation omitted). "[W]e view the evidence in the light most favorable to the party against whom summary judgment was granted." *Id*. (quotation omitted).

To prevail on his negligence claim, Butta must show: "(1) the existence of a duty of care; (2) a breach of that duty; (3) an injury was sustained; and (4) breach of the duty was the proximate cause of the injury." *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995). Summary judgment is appropriate "if the record reflects a complete lack of proof" on any of the elements. *Foss v. Kincade*, 766 N.W.2d 317, 320 (Minn. 2009). The district court granted summary judgment to MERS based on its conclusion that Butta could not prove the first element, the existence of a duty. Because a negligence claim fails in the absence of a legal duty, whether MERS owed a duty to Butta is a threshold question and presents an issue of law that we review de novo. *Domagala v. Rolland*, 805 N.W.2d 14, 22 (Minn. 2011).

Property owners generally owe entrants on their land a duty to use reasonable care for the entrants' safety. *Olmanson v. LeSueur Cnty.*, 693 N.W.2d 876, 880 (Minn. 2005). This obligation includes the "ongoing duty to inspect and maintain [the] property to ensure entrants on the landowner's land are not exposed to unreasonable risks of harm." *Id*. at 881. If, after a reasonable inspection, the landowner has neither actual nor constructive knowledge of a dangerous condition, the landowner is not liable for injuries caused to entrants by the condition. *Id*. The scope of a landowner's duty "is defined by the probability or foreseeability of injury to the invitee." *Gilmore v. Walgreen Co.*, 759 N.W.2d 433, 435 (Minn. App. 2009), *review denied* (Minn. Mar. 31, 2009).

Applying these principles here, we conclude that MERS did not owe a duty to Butta. The record includes no evidence that any unreasonably dangerous condition existed on MERS's property or that the garage ceiling was damaged in any way that MERS could have discovered upon reasonable inspection. The house had been inspected twice in the month before the incident and no inspector reported any damage to the garage in general, or the ceiling and attic in particular.[2] No evidence suggests that MERS failed to inspect or maintain the property or that the attic posed an unreasonable risk of harm of which MERS had a duty to warn Butta.

[2] Butta argues that the ceiling itself was a dangerous condition and that MERS failed to inspect the attic "despite extensive evidence of water damage to the ceiling." This assertion distorts the record, however, because the inspection reports do not reflect that the *garage* ceiling had any water damage, but rather that the ceilings in a bedroom and the family room were damaged. Butta testified that he did not notice any potentially dangerous condition in the garage before he entered the attic.

Our conclusion is supported by the deposition testimony of Butta and his brother. Butta testified that before he entered the attic, nothing about the garage made him think it was dangerous and he did not notice anything dangerous when he entered the attic. His brother also testified that he did not notice any damage in the garage before the accident and that nothing about the garage "made [him] concerned that the garage was dangerous." Considering all of the evidence presented to the district court, and even taking that evidence in the light most favorable to Butta, he has presented no evidence suggesting that the garage ceiling or attic were defective or unreasonably dangerous. We therefore conclude that MERS had no duty to warn Butta about the attic.[3]

Moreover, even if we assume that such a duty existed, summary judgment was appropriately granted because a landowner's duty to warn is not absolute. "Despite the general rule requiring landowners to inspect, repair, and warn, there is an exception where the dangerous condition is 'known or obvious.'" *Presbrey v. James*, 781 N.W.2d 13, 18 (Minn. App. 2010) (quoting *Olmanson*, 693 N.W.2d at 881). If the condition is known or obvious, the landowner does not have a duty to warn unless "he should anticipate the harm." *Id*. A dangerous condition is obvious when the danger is objectively observable. *Id*.

Although the floor of the attic was not defective, we conclude as a matter of law that the attic floor posed an obvious danger. *See Louis v. Louis*, 636 N.W.2d 314, 322

[3] Butta points to the city's post-incident inspection report, which noted that the garage ceiling needed repair, as evidence that a dangerous condition existed. The report does not specify the nature of the damage, however, and nothing in the record supports an inference that the damage was other than that caused by Butta's fall through the ceiling.

(Minn. 2001) (explaining that a danger is obvious as a matter of law when "the danger associated with the condition at issue was found to be clearly visible, or in plain view, meaning the condition itself posed the obvious danger"). The unfinished condition of the attic was clearly visible to anyone who entered the attic; anyone in the attic could see that the floor was not finished but consisted of solid wooden beams with spaces in between. The danger associated with navigating an unfinished attic would be obvious to a reasonable person, and the record does not show that any hidden or unobservable conditions existed that made the attic any more dangerous than it appeared. *See Presbrey*, 781 N.W.2d at 19 ("Caselaw is clear that the duty to warn only pertains to latent or hidden dangers, and not to an inherent and known danger of the property." (quotations omitted)).

Further, no reasonable jury could find that MERS should have reasonably anticipated the particular harm that befell Butta as a result of this obvious danger. *See id.* at 18. We therefore conclude that because any danger posed by the garage ceiling was obvious and MERS had no reason to anticipate Butta's injury, MERS had no duty to warn him about the attic.

In sum, the district court properly concluded that MERS did not owe a legal duty to Butta. We affirm the grant of summary judgment for MERS and Re/Max.

Affirmed.