STATE OF MINNESOTA
IN COURT OF APPEALS
A09-84

Vernon Tangen,
Appellant,

vs.

Susan Elizabeth Ruth Cherne,
Respondent.

Filed October 20, 2009
Affirmed
Bjorkman, Judge

St. Louis County District Court
File No. CV-06-213

Richard C. Mollin, 118 North Johnson, Fosston, MN 56542 (for appellant)

Thomas S. McEachron, Votel, McEachron & Godfrey, 444 Cedar Street, Suite 1250, St. Paul, MN 55101 (for respondent)

Considered and decided by Bjorkman, Presiding Judge; Peterson, Judge; and Connolly, Judge.

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

BJORKMAN, Judge

On appeal from summary judgment, appellant challenges the district court's determination that respondent owed him no legal duty and that his spoliation-of-evidence claim was moot. Because we find that respondent owed appellant no duty, we affirm.

FACTS

On July 14, 2002, Julie Tangen (Julie) moved into a duplex owned by respondent Susan Cherne. The two-story duplex housed two apartments, one on the western half of the building, and one on the eastern half. A small wooden balcony, about four feet wide and seven feet long, hung from the second story of the south side. Each half of the duplex had access to the balcony.

Julie enlisted the help of Robert Springer, Paul Hedrick, and appellant Vernon Tangen (Tangen) in moving her furniture. During the moving process, the three men decided to hoist a box spring up onto the balcony and into the apartment through the bathroom door. Hedrick stood on the bed of his pickup truck holding the box spring, while Tangen and Springer stood on the balcony. As Tangen and Springer leaned over the balcony to grab a rope, the balcony fell to the ground. Tangen landed on the concrete, the balcony landed on top of him.

Before resuming work, Springer and Hedrick picked up the pieces of the balcony, dragged them to the back of the yard, and cleaned up the area. The next day, Cherne hired two men to dispose of the remains of the balcony.

A few hours after the accident, Tangen sought emergency room treatment for contusions and pain in his left leg. His injury slowly grew worse, he accumulated significant medical bills, and he alleges that he sustained a permanent injury as a result of this incident.

Tangen commenced this action in December 2005, later amending his complaint to add a spoliation-of-evidence claim. At the conclusion of discovery, the district court

granted summary judgment in favor of Cherne, finding that she owed no duty to Tangen with respect to the condition of the balcony. The district court rejected Tangen's argument that the balcony contained a hidden dangerous condition and held that his spoliation claim was moot. This appeal follows.

D E C I S I O N

On appeal from summary judgment, we review de novo whether a genuine issue of material fact exists and whether the district court erred in its application of the law. Minn. R. Civ. P. 56.03 (2008); *STAR Ctrs., Inc. v. Faegre & Benson, LLP*, 644 N.W.2d 72, 77 (Minn. 2002). In doing so, we "view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). Nevertheless, the party resisting summary judgment "must do more than rest on mere averments" and must present material facts that create a genuine issue for trial. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). A material fact, for purposes of summary judgment, is one that will affect the outcome of the case. *Laska v. Anoka County*, 696 N.W.2d 133, 140 (Minn. App. 2005).

I. The district court correctly determined that Cherne owed no duty to Tangen.

Although the question of negligence is normally a matter for the jury,

> the defendant is entitled to summary judgment when the record reflects a complete lack of proof on any of the four essential elements of the claim: (1) the existence of a duty of care, (2) a breach of that duty, (3) an injury, and (4) the breach of the duty being the proximate cause of the injury.

Gradjelick v. Hance, 646 N.W.2d 225, 230 (Minn. 2002). The threshold element, the existence of a legal duty, "is an issue for the [district] court to determine as a matter of

law." *Oakland v. Stenlund*, 420 N.W.2d 248, 250 (Minn. App. 1988), *review denied* (Minn. Apr. 20, 1988).

Cherne's duty to Tangen is governed by her relationship to him. The parties do not contest that Julie and Cherne had a landlord-tenant relationship. Nor do they dispute the fact that whatever duty Cherne owed Julie as a tenant extended to Tangen as Julie's guest. *Johnson v. O'Brien*, 258 Minn. 502, 505 n.1, 105 N.W.2d 244, 246 n.1 (1960) (stating that a landlord owes the same duty to the guest of a tenant that the landlord owes to the tenant herself); *Oakland*, 420 N.W.2d at 250 (same).

Minnesota follows the common-law rule that landlords are generally not liable to tenants for defective conditions existing at the time the premises were leased. *Gradjelick*, 646 N.W.2d at 231; *Broughton v. Maes*, 378 N.W.2d 134, 135 (Minn. App. 1986) (citing Restatement (Second) of Torts § 356 (1965)), *review denied* (Minn. Feb. 14, 1986). Exceptions to this rule apply where (1) there is a hidden dangerous condition on the premises of which the landlord is aware, but the tenant is not; (2) the land is leased for admission to the public; (3) the landlord retains control of the premises; (4) the landlord negligently repairs the premises. *Broughton*, 378 N.W.2d at 135.[1]

Tangen first asserts that Cherne owed him a duty because the balcony contained a "hidden dangerous condition." The hidden-dangerous-condition exception "creates a duty of care in the landlord such that the landlord may be liable to tenants for breach of that duty when there is a hidden dangerous condition on the premises of which the

[1] Neither party argues that the public-admission or negligent-repair exception applies here.

landlord is aware, but the tenant is not." *Gradjelick*, 646 N.W.2d at 231. Minnesota has expanded the exception to include conditions of which the landlord "s*hould have known*" when "the tenant, exercising due care, would not discover the danger." *Id.* This rule, however, does not impose a duty on the landlord to make an inspection of the premises to search for dangerous conditions. *See* Restatement (Second) of Torts § 358 cmt. b (1965) ("[I]t is not enough that the dangerous condition of the land is one which might be discovered by a reasonable inspection of the premises.").

In support of summary judgment, Cherne presented affidavits and deposition testimony indicating that the balcony was not in a defective condition of which she should have been aware. Anthony Metzger, the previous tenant, testified that the balcony was in good condition during his tenancy and that he made no complaints about it to Cherne. James Preblich, the commercial carpet cleaner, who cleaned the apartment before Julie moved in, stated that he inspected the balcony from beneath and by walking on it before routing his cleaning hoses over it. To him, the balcony appeared stable and without material defects. Springer testified that as he removed the balcony pieces from the accident scene, he did not notice any condition that would have indicated a need for repair. Finally, Cherne herself walked out onto the balcony between renters and did not notice anything unsafe. Cherne testified that she never received any complaints from tenants about the balcony and had never observed any defects.

Tangen acknowledges that he has no evidence that the balcony's condition was defective prior to its collapse, but argues that Cherne should have known the balcony was dangerous because she had owned the property for nearly seven years, she had never

performed any maintenance on the balcony, and the house itself was over 70 years old. But Tangen points to no legal authority for the proposition that a building's age or a landlord's term of ownership is sufficient information from which a reasonable person would infer that a dangerous condition exists. *See* Restatement (Second) of Torts § 358 cmt. b (requiring "information from which a person of reasonable intelligence . . . would infer that the condition exists . . . and in addition would realize that its existence will involve an unreasonable risk of physical harm to persons on the land"). And Tangen's suggestion that Cherne disposed of the balcony to hide a defective condition of which she was aware fares no better. None of these assertions is sufficient to create a fact issue as to whether Cherne had reasonable notice of a defect in the condition of the balcony. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 1356 (1986) (requiring more than "metaphysical doubt" to survive summary judgment); *Broughton*, 378 N.W.2d at 136-37 (finding that landlord's admission of having remodeled a room did not raise fact issue as to landlord's potential negligent repairs).

Tangen also argues that Cherne owed him a duty because the balcony was a common area over which Cherne retained control. Tangen did not raise the common-area exception before the district court. In fact, after discussing the hidden-dangerous-condition exception in its decision, the district court noted that "[t]here does not seem to [be] any assertion that any of the [other] exceptions to the general rule would be appropriate in the present case." Because Tangen did not raise the common-area exception in the district court, we will not consider it on appeal. *See Thiele v. Stich*, 425

N.W.2d 580, 582 (Minn. 1988) (limiting appellate review to those matters brought before the district court).

II. The district court did not abuse its discretion or otherwise err in rejecting Tangen's spoliation-of-evidence claim.

A district court has discretion in determining whether to impose sanctions for spoliation of evidence. *Patton v. Newmar Corp.*, 538 N.W.2d 116, 119 (Minn. 1995). The appropriateness of a sanction is measured by the prejudice to the opposing party. *Wajda v. Kingsbury*, 652 N.W.2d 856, 860 (Minn. App. 2002).

> One challenging the [district] court's choice of a sanction has the difficult burden of convincing an appellate court that the [district] court abused its discretion—a burden which is met only when it is clear that no reasonable person would agree [with] the [district] court's assessment of what sanctions are appropriate.

Patton, 538 N.W.2d at 119 (quotation omitted).

Tangen asserts that summary judgment should have been denied because Cherne's removal of the balcony from the premises and her failure to retain it for the purpose of this lawsuit constitute spoliation of evidence. Tangen argues that the condition of the balcony, and Cherne's intent in disposing of it, raise fact issues for trial.

The district court concluded that, if Cherne committed spoliation and Tangen were prejudiced, the proper sanction would be a jury instruction. Because Cherne was entitled to summary judgment, the district court determined that the issue of spoliation was moot. Implicit in this decision is a finding that, on the facts alleged, Tangen's requested sanction—denying summary judgment and holding Cherne to a duty of reasonable care—is not an appropriate response to Cherne's alleged spoliation.

We agree that the sanction issue is moot because there will be no trial during which a jury instruction would be given. *See In re Matter of Schmidt*, 443 N.W.2d 824, 826 (Minn. 1989) ("If the court is unable to grant effectual relief, the issue raised is deemed to be moot resulting in dismissal of the appeal."). But, more broadly, we note that the alleged spoliation of the balcony is irrelevant to the dispositive issue of whether Cherne owed a duty to Tangen. Even assuming that Cherne's disposal of the balcony the day after the accident amounted to spoliation, the relevant inquiry, for purposes of the duty analysis, is what Cherne reasonably knew about the condition of the balcony before its collapse, not what a detailed, post-accident assessment of the balcony might have revealed. And on this point, both parties had ample opportunity to present testimony and other evidence. *See Foss v. Kincade*, 766 N.W.2d 317, 323-24 (Minn. 2009) (finding no prejudice where condition of destroyed bookcase could be reasonably determined through testimony). Tangen did not submit competent evidence that the balcony was in a defective condition of which Cherne was reasonably aware prior to the accident. Accordingly, the district court did not abuse its discretion or err in rejecting Tangen's argument that the alleged spoliation precludes summary judgment.

Affirmed.