[Cite as *Holloway v. McDaniel*, 2009-Ohio-3733.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91599

DIANA HOLLOWAY

PLAINTIFF-APPELLANT

vs.

HOPE MCDANIEL, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-618249

BEFORE: Blackmon, P.J., Stewart, J., and Celebrezze, J.

RELEASED: July 30, 2009

JOURNALIZED:

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PATRICIA ANN BLACKMON, P.J.:

{¶ 1} Appellant Diana Holloway ("Holloway") appeals the trial court's decision granting summary judgment in favor of appellee Lilas Lynch and assigns the following error for our review:

> **"I. The trial court abused its discretion in granting summary judgment to the appellee Lilas Lynch."**

{¶ 2} Having reviewed the record and pertinent law, we affirm the trial court's decision. The apposite facts follow.

{¶ 3} On April 17, 2005, Holloway slipped and fell in the basement of the house she was renting, which is located at 2932 East 118th Street, Cleveland, Ohio. She had rented the property since 2003. Prior to Holloway's fall, on April 7, 2005, Lynch sold the property to Hope McDaniel ("McDaniel"). Ruffin Real Estate Company ("Ruffin") actively managed the property for Lynch until it was sold.

{¶ 4} Fifteen months after her fall, Holloway filed a personal injury complaint against McDaniel, Ruffin, and Lynch seeking damages resulting from the fall. In the complaint, Holloway alleged that shortly after moving into the property, she noticed that the drain for the washing machine occasionally became clogged and caused water to back up onto the basement floor.

{¶ 5} Holloway also alleged that she would periodically notify the owners about the problem with the drain. In addition, Holloway alleged that on February 26, 2005, when she learned that the property was being sold, she presented the owners

with a list of things that needed to be fixed, but they failed to fix the problem with the drain.

{¶ 6} Holloway further alleged that on April 17, 2005, while doing her laundry, the drain backed up, causing soapy water to accumulate on the basement floor. Finally, Holloway alleged that as a result of the accumulation of soapy water on the basement floor, she slipped and fell and suffered injuries to her neck, back, and shoulders.

{¶ 7} McDaniel, Ruffin, and Lynch filed motions for summary judgment. On January 17, 2008, the trial court granted Lynch's motion for summary judgment, but denied McDaniel's and Ruffin's motion. Holloway filed a motion for reconsideration, which the trial court denied. On May 13, 2008, Holloway voluntarily dismissed her claims against McDaniel and Ruffin.

Summary Judgment

{¶ 8} In her sole assigned error, Holloway argues the trial court erred in granting summary judgment in favor of Lynch.

{¶ 9} We review an appeal from summary judgment under a de novo standard of review.[1] Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary

[1]*Baiko v. Mays* (2000), 140 Ohio App.3d 1, citing *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35; *Northeast Ohio Apt. Assn. v. Cuyahoga Cty. Bd. of Commrs.* (1997), 121 Ohio App.3d 188.

judgment is appropriate.[2] Under Civ.R. 56, summary judgment is appropriate when: (1) no genuine issue as to any material fact exists, (2) the party moving for summary judgment is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can reach only one conclusion which is adverse to the non-moving party.[3]

{¶ 10} The moving party carries an initial burden of setting forth specific facts which demonstrate his or her entitlement to summary judgment.[4] If the movant fails to meet this burden, summary judgment is not appropriate; if the movant does meet this burden, summary judgment will be appropriate only if the non-movant fails to establish the existence of a genuine issue of material fact.[5]

{¶ 11} In the instant case, Holloway contends that Lynch breached a duty to disclose and discover a defect on her premises. Holloway rented the property from Lynch. However, when Holloway slipped and fell, Lynch was not the owner. The owner of the property was McDaniel. Holloway argues, nonetheless, that Lynch owed her a duty to discover and disclose the latent defect.

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[2]Id. at 192, citing *Brown v. Scioto Bd. of Commrs.* (1993), 87 Ohio App.3d 704.

[3]*Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

[4]*Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107.

[5]Id. at 293.

{¶ 12} In support of her argument, Holloway relies on the Restatement of Tort's 2d § 353, which states in pertinent part as follows:

> **"Undisclosed Dangerous Conditions Known to Vendor:**
>
> **"(1) A vendor of land who conceals or fails to disclose to his vendee any condition, whether natural or artificial, which involves unreasonable risk to persons on the land, is subject to liability to the vendee and others upon the land with the consent of the vendee or his subvendee for physical harm caused by the condition after the vendee has taken possession, if**
>
> **"(a) the vendee does not know or have reason to know of the condition or the risk involved, and**
>
> **"(b) the vendor knows or has reason to know of the condition, and realizes or should realize the risk involved, and has reason to believe that the vendee will not discover the condition or realize the risk.**
>
> **"(2) If the vendor actively conceals the condition, the liability stated in Subsection (1) continues until the vendee discovers it and has reasonable opportunity to take effective precautions against it. Otherwise the liability continues only until the vendee has had reasonable opportunity to discover the condition and to take such precautions."**

{¶ 13} Initially, we note that the above quoted section of the Restatement is not applicable to the facts of the instant case. Holloway also acknowledges in her brief that the Ohio Supreme Court has not applied the Restatement of Tort's 2d § 353 to the issue she raises in the instant appeal. In addition, we note that this section of

the Restatement applies specifically to the duty owed by a seller to a buyer. Further, even if this section were applicable to the facts of the instant case, it presupposes a condition or risk that is unknown to the buyer or third person, who happens upon the property.

{¶ 14} Here, Holloway was a tenant of the property and was aware of the condition, which she alleges gave rise to her fall. In her deposition, Holloway testified that the she did laundry approximately twice a week and each time the basement flooded. Holloway testified in pertinent part as follows:

"Q. (By Mr. Koeth) So if you discovered this in November and complained to Ms. Lynch, and then the accident happens the next April we're talking about November, December, January, February, March part of April, so say five months, and you washed twice a week. So we're talking about eight times a month, times five months. So forty times it's backed up on you, is that correct, before your accident?

"A. Yes.

" ***

"Q. (By Mr. Koeth) During those 40 times that you would wash and the soap would back up, and the basement would flood did you find that the basement floor was slippery?

"A. I took a chance.

"Q. You took a chance?

"A. Yes. I had no where else to go. Where am I going to go to wash clothes?

"Q. Each and every time you took a chance, correct?

"A. Yes. When I go down there. When I first started it would be dry, then you wash the water would come out. I would put the clothes in the dryer and put another load in.
'Q. But by that time the floor is flooded, correct?

"A. Of course.

"Q. And each and every time you took a chance knowing you might slip and fall, correct?

"A. Yes.

"Q. You knew it was dangerous when soapy water was on the floor and it was slippery?

"A. Yes.

"Q. You knew that.

"A. Yes."[6]

{¶ 15} It is evident from the above testimony that the alleged condition, which Holloway claims gave rise to her fall, was not a latent defect. A latent defect is one that could not have been detected by inspection.[7] Holloway did laundry in excess of 40 times over a period of five months, thus she was well aware of the alleged condition in the basement.

{¶ 16} In addition, based on Holloway's own testimony, there is no indication that she notified Lynch of the alleged problem with the basement. R.C. 5321.04(A)

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[6]Holloway Depo. at 30-32.

[7]*Rogers v. Hill* (1998), 124 Ohio App.3d 468, citing *Layman v. Binns* (1988), 35 Ohio St.3d 176.

states that a landlord must "[c]omply with the requirements of all applicable building, housing, health, and safety codes that materially affect health and safety" and "[m]ake all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition."[8]

{¶ 17} A landlord is liable for injuries sustained on the demised residential premises, which are proximately caused by the landlord's failure to fulfill the duties imposed by R.C. 5321.04.[9] A landlord's violation of the duties imposed by R.C. 5321.04(A)(1) or 5321.04(A)(2) constitutes negligence per se, but a landlord will be excused from liability under either section if he neither knew nor should have known of the factual circumstances that caused the violation.[10]

{¶ 18} Holloway testified that Lynch was responsive to any complaints about the unit. Holloway stated that Lynch generally sent someone to address the situation immediately.[11] When asked specifically about whether she notified Lynch about the alleged flooding problem, Holloway testified as follows:

> **"Q. (By Mr. Canestraro) During those 40 times did you ever notify Ms. Lynch about the problem?**

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[8]R.C. 5321.04(A)(1) and (2).

[9]*Shroades v. Rental Homes, Inc.* (1981), 68 Ohio St.2d 20.

[10]*Avila v. Gerdenich Realty Co.,* 6th Dist. No. L-07-1098, 2007-Ohio-6356, citing *Sikora v. Wenzel*, 88 Ohio St.3d 493, 2000-Ohio-406.

[11]Holloway Depo. at 26-27.

“A. I probably called her like --

“Q. I don’t want to know what you probably did, what did you do?

“A. Yes, I called her.

“Q. When did you call her?

“A. When it first started.

“Q. When would that have been?

“A. I don’t know.

“Q. You don’t remember?

“A. I can’t recall what month, but I know I called.

“Q. What did she tell you?

“A. She always sent somebody out there. The guy probably came out there or whatever, but then that’s when Mr. Ruffin came in the picture.

“Q. Let’s back up a little. You talked to Ms. Lynch and explained that there was a problem with the water. You don’t remember when you first notified her of the problem?

“A. Right.

“Q. But each time she received a call from you she sent somebody out?

“A. Yes.

“Q. Was it always the same person?

“A. Yes.

“ *

"Q. Other than telling Ms. Lynch over the phone that you had a problem with the water did you ever send her a letter or other communication --

"A. No.

"Q. Did you make any direct complaints to Hope McDaniel regarding the water problem in the basement?

"A. No."[12]

{¶ 19} Further, our review of the Residential Property Disclosure Form relative to the transfer of the property from Lynch to McDaniels indicated that there were no leaks, backups, or other material problems with the water supply system. The disclosure form is signed by both Lynch and McDaniel.

{¶ 20} McDaniel, a safety inspector with the U.S. Postal Services, testified in her deposition that she inspected the basement before she bought the property. McDaniel stated that she did not see any signs of dampness or water stains in the basement. McDaniel stated that in addition to inspecting the property herself, she had a colleague, who is also a safety inspector, inspect the property before she agreed to the purchase. Like McDaniel, this individual did not see any signs of dampness or water stains.

{¶ 21} Moreover, the record indicates that immediately prior to the fall, Holloway was in the process of being evicted from the property for nonpayment of

[12]Holloway Depo. at 75-78.

rent. McDaniels stated that she accompanied the bailiffs to the property, but discovered that Holloway had vacated the unit. However, a foul odor emanated from the unit. McDaniels stated that they discovered the toilet stuffed with rags and filled with feces.

{¶ 22} McDaniel stated that she returned to the property the following day and found the second floor tenant doing laundry in the basement. McDaniel stated that the water was backing up, and she immediately called Roto-Rooter plumbing company. When Roto-Rooter arrived to address the issue, the plumber removed the grate covering the drain, and discovered children's clothing along with debris stuffed in the drain.[13] McDaniels stated that after the plumber removed the clothing and debris, the water drained out immediately.

{¶ 23} We conclude on the record before us that no genuine issues of material fact exist and that reasonable minds can only conclude that Lynch did not have actual or constructive knowledge of the alleged defect in this case. According to Holloway's own testimony, when the alleged flooding first began, she notified Lynch, who sent a repairman to address the problem, and in fact sent the same repairman to address any and all issues with the residence. Holloway also admitted that she never sent Lynch any written notice of the alleged flooding problem in the basement. Consequently, without notice of the alleged defect, Lynch breached no duty to

[13]McDaniel Depo. at 32.

Holloway and, therefore, is not liable for Holloway's injuries. Accordingly, we overrule the sole assigned error.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., CONCUR;
MELODY J. STEWART, J., CONCURS
IN JUDGMENT ONLY