STATE OF MICHIGAN

COURT OF APPEALS

JAMES SPITZ,

Plaintiff-Appellant,

v

OCCIDENTAL DEVELOPMENT, LLC,

Defendant-Appellee.

UNPUBLISHED
November 24, 2020

No. 351082
Eaton Circuit Court
LC No. 2019-000119-NO

Before: MARKEY, P.J., and METER and GADOLA, JJ.

PER CURIAM.

In this premises liability action, plaintiff leased an apartment in a complex defendant owned and operated. Plaintiff left his apartment one evening, descending the stairs to the sidewalk below, which led to the parking lot. Plaintiff stepped in a depression in the sidewalk, fracturing his right foot. Plaintiff filed this action, asserting defendant violated its duty under MCL 554.139 to keep the sidewalk in reasonable repair and fit for its intended use, breach of the lease agreement, and negligence. The trial court granted defendant's motion for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact) and dismissed all claims. Plaintiff now appeals as of right, and we affirm.

I. STANDARD OF REVIEW

We review a trial court's ruling on a motion for summary disposition de novo. *Pugno v Blue Harvest Farms LLC*, 326 Mich App 1, 11; 930 NW2d 393 (2018). Summary disposition under MCR 2.116(C)(10) is appropriate when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

II. MCL 554.139

Plaintiff first argues that there was a genuine issue of material fact as to whether defendant was potentially liable based on the sidewalk being unfit for its intended use under MCL 554.139(1)(a). We disagree.

MCL 554.139(1)(a) provides that in every lease or license of residential premises, the lessor or licensor covenants that "the premises and all common areas are fit for the use intended by the parties." "MCL 554.139 provides a specific protection to lessees and licensees of residential property *in addition* to any protection provided by the common law." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). The following analytical framework applies when determining liability under MCL 554.139(1)(a):

> First, the court is to determine whether the area in question is a "common area." Then, the court is to identify the intended use of the common area. Lastly, the court must determine if there could be "reasonable differences of opinion regarding" whether the conditions made the common area unfit for its intended use. [*Estate of Trueblood v P&G Apartments, LLC*, 327 Mich App 275, 285; 933 NW2d 732 (2019).]

In this case, it is undisputed that the sidewalk within the apartment complex was a common area and that "the intended use of a sidewalk is walking on it . . . ." *Benton v Dart Props, Inc*, 270 Mich App 437, 442-444; 715 NW2d 335 (2006). However, plaintiff argues that there could be a reasonable difference of opinion regarding whether the depression made the sidewalk unfit for its intended use. We disagree.

First, contrary to plaintiff's assertion, the trial court did not apply the open and obvious danger doctrine when analyzing whether defendant violated MCL 554.139. "MCL 554.139 provides a specific protection to lessees and licensees of residential property *in addition* to any protection provided by the common law." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). In a premises liability action, the plaintiff must establish the elements of negligence: duty, breach, proximate cause, and damages. *Benton v Dart Props, Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006). "In general, a premises possessor 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). "Absent special aspects, this duty does not extend to open and obvious dangers." *Estate of Trueblood*, 327 Mich App at 285 (quotation marks, citations, and alteration omitted).

In this case, the trial court separated its analysis of the open and obvious danger doctrine from its analysis of MCL 554.139. The trial court first analyzed Count III of plaintiff's complaint, the negligence count, and concluded that the open and obvious danger doctrine applied. It then applied the analytical framework for determining liability under MCR 554.139(1)(a) as outlined above without explicitly or implicitly referring to the open and obvious danger doctrine. Therefore, there is no indication that the trial court applied the open and obvious danger doctrine when analyzing MCR 554.139(1)(a).

In addition, the trial court did not err by concluding that defendant did not violate MCL 554.139(1)(a). The trial court properly concluded that the sidewalk was a common area, that the intended use of the sidewalk was to walk on it, and that the sidewalk was fit for its intended use. Therefore, as the trial court concluded, "defendant did not breach any duty owed to . . . plaintiff pursuant to statute."

In this case, plaintiff argues that the depression was not a mere inconvenience because it was large enough to break his foot. The dimensions of the depression are unclear based on the record. According to defendant's incident report, the depression was approximately four inches wide and approximately one inch deep. According to a photograph that was referenced during depositions taken in the case, the depression was less than one inch wide and was approximately two inches deep. Plaintiff's counsel asserted that the depression was "five inches by about four and about two inches deep." Plaintiff's counsel also stated that the parties agreed that 10 percent of the concrete square was unfit for its intended use and the other 90 percent was fit for its intended use. Finally, although the trial court believed that plaintiff had testified that the depression was "two inches deep to five feet (sic) wide," plaintiff actually testified that he did not know how deep the depression was and that he never measured it. Thus, viewing the evidence in the light most favorable to plaintiff, the depression was up to four inches wide and up to two inches deep and, contrary to plaintiff's assertion, the trial court did not err by concluding that the depression was not "big enough to be called a pothole."

Regardless of the size of the depression, plaintiff testified that there was nothing preventing him from walking around the depression at the time of the incident. Additionally, during the four to five months before the concrete was repaired, plaintiff walked around the depression. Because plaintiff was able to walk around the depression, the depression was a mere inconvenience. See *Estate of Trueblood*, 327 Mich App at 291. Contrary to plaintiff's assertion, the size and presence of the depression did not render the sidewalk unfit for its intended use. See *Allison*, 481 Mich at 430. Therefore, the trial court did not err by concluding that the sidewalk was fit for its intended use, i.e., walking on it, under MCL 554.139(1)(a). Accordingly, the trial court did not err by granting defendant's motion for summary disposition with respect to Count I of plaintiff's complaint.[1]

III. NEGLIGENCE/PREMISES LIABILITY

Next, plaintiff argues that the trial court erred by failing to consider a photograph of a downspout as evidence of defendant's active negligence. Plaintiff also argues that defendant breached its duty of care because it had actual or constructive notice of the dangerous condition and therefore should have repaired the depression. We disagree.

In this case, the community manager of the apartment complex testified that when snow melts, it can get into the cracks of the concrete and that when it refreezes, it can cause the sidewalk

[1] Plaintiff also argues that the trial court erred by granting defendant's motion for summary disposition on his breach of lease claim. We decline to address this argument because plaintiff did not present this issue in the statement of questions presented. *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 404; 628 NW2d 86 (2001); MCR 7.212(C)(5).

to crack or "heave." At the hearing on defendant's motion for summary disposition, plaintiff's counsel argued that defendant created the hazardous condition because it placed a downspout close to the apartment building, which contributed to the freezing and refreezing problem. The trial court declined to consider the photograph on foundational grounds.

We conclude that the trial court did not err by not considering the photograph of the downspout. "Michigan law distinguishes between claims arising from ordinary negligence and claims premised on a condition of the land." *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 692; 822 NW2d 254 (2012). Claims of ordinary negligence are based on the defendant's duty to conform conduct to a particular standard of care. See *Laier v Kitchen*, 266 Mich App 482, 493; 702 NW2d 199 (2005). In contrast, claims of premises liability are based on "the defendant's duty as an owner, possessor, or occupier of land." *Buhalis*, 296 Mich App at 692. "If the plaintiff's injury arose from an allegedly dangerous condition on the land, the action sounds in premises liability rather than ordinary negligence; this is true even when the plaintiff alleges that the premises possessor created the condition giving rise to the plaintiff's injury." *Id.*

Plaintiff's amended complaint alleges "negligence." However, "[c]ourts are not bound by the labels that parties attach to their claims." *Buhalis*, 296 Mich App at 691. "It is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim." *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007).

In this case, as the trial court stated, plaintiff's claim sounds in premises liability, not ordinary negligence. Specifically, plaintiff alleged that a condition on the land, i.e., the depression in the sidewalk, constituted a dangerous condition on the property that gave rise to his injuries. Further, plaintiff alleged that based on defendant's status as a premises possessor, it had the duty to protect him from unreasonably dangerous conditions. Because plaintiff's claim is based on defendant's duty as the premises possessor and not defendant's ability to conform to a particular standard of care, plaintiff's claim sounds in premises liability. Alleging that defendant created the condition giving rise to his injury did not transform the claim into one for ordinary negligence. See *Buhalis*, 296 Mich App at 692. Plaintiff has failed to show that the photograph of the downspout was relevant and would be admissible with respect to his claim of premises liability. Therefore, the trial court did not err by failing to consider the photograph of the downspout.

We also find no merit in plaintiff's argument that defendant breached the applicable duty of care. "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." *Benton*, 270 Mich App at 440.

It is undisputed that plaintiff was an invitee. "In general, a premises possessor 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). A premises possessor breaches this duty if it "knows or should know of a dangerous condition on the premises of which the invitee is unaware and fails to fix the defect, guard against the defect, or warn the invitee of the defect." *Hoffner v Lanctoe*, 492 Mich 450, 460; 821 NW2d 88 (2012). "Absent special aspects, this duty does not extend to open and obvious

dangers." *Estate of Trueblood*, 327 Mich App at 285. A condition is "open and obvious" if "it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection." *Hoffner*, 492 Mich at 461. A premises possessor does not have the duty to protect or warn of open and obvious dangers because "such dangers, by their nature, apprise an invitee of the potential hazard, which the invitee may then take reasonable measures to avoid." *Id*.

In this case, the trial court did not err by concluding that the condition was open and obvious. Plaintiff testified in his deposition that the depression was visible and admitted that if he had looked where he was walking, he could have avoided the area. Therefore, as in *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 714; 737 NW2d 179 (2007), there is no genuine issue of material fact that plaintiff "would have noticed the potentially hazardous condition had he been paying attention." Because an average person with ordinary intelligence would have reasonably discovered the depression upon casual inspection, see *Hoffner*, 492 Mich at 461, the trial court did not err by concluding that the open and obvious danger doctrine applied in this case. Thus, absent special aspects, *Estate of Trueblood*, 327 Mich App at 285, defendant did not have the duty to "fix the defect, guard against the defect, or warn [plaintiff] of the defect," *Hoffner*, 492 Mich at 460.

The trial court also did not err by concluding that no special aspects existed. "Special aspects" make the open and obvious condition "unreasonable." *Hoffner*, 492 Mich at 461. Our Supreme Court has recognized that special aspects exist in two situations—"when the danger is *unreasonably dangerous* or when the danger is *effectively unavoidable*." *Id*. at 463.

In this case, because plaintiff was able to walk around the area in question, the danger of the depression was not effectively unavoidable. Further, as the trial court stated, the depression in the sidewalk did not present a substantial risk of severe harm or death. Because the condition was open and obvious and no special aspects existed, defendant did not have the duty to exercise reasonable care to protect plaintiff from the depression. Therefore, contrary to plaintiff's assertion, defendant did not breach its duty of care by failing to identify and repair the depression. Accordingly, the trial court did not err by granting defendant's motion for summary disposition on plaintiff's negligence claim.

Affirmed.

/s/ Jane E. Markey
/s/ Patrick M. Meter
/s/ Michael F. Gadola