STATE OF MICHIGAN

COURT OF APPEALS

SALLY NAAB,

Plaintiff-Appellant,

v

FIRST CENTRUM CORPORATION, d/b/a VILLAGE COMMON APARTMENTS and CENTRUM MANAGEMENT CORPORATION,

Defendants-Appellees.

UNPUBLISHED
November 12, 1996

No. 184773
LC No. 93-038080-NO

SALLY NAAB,

Plaintiff-Appellant,

v

LAWTON APARTMENTS COMPANY, a/k/a LAWTON APARTMENTS COMPANY, LTD., THOMAS W. REINQUIST, RURAL HOUSING CORPORATION, and BF-LANSING LTD. PARTNERS, a/k/a BF-COLORADO, INC.,

Defendants-Appellees.

No. 184774
LC No. 93-038735-NO

Before: Gribbs, P.J., and Markey and T.G. Kavanagh,* JJ.

PER CURIAM.

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* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

Plaintiff Sally Naab appeals as of right from an order of the circuit court granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). We reverse and remand for further proceedings.

Plaintiff alleged that she slipped and fell in the vestibule of her apartment complex, owned and operated by defendants, due to water which had accumulated on the floor from snow being tracked into the lobby area. On December 31, 1990, plaintiff returned from an afternoon of shopping to her apartment at the Village Common Apartments in Lawton. Plaintiff's apartment had a lobby area between the outside door and doors to other apartments. The floor in this area was tile. There was no mat or carpet. Plaintiff alleged that the floor was wet from snow which had been tracked into the lobby during the course of the day. Plaintiff, noticing that the floor was wet, tried to walk carefully. Still, she slipped and fell, injuring herself.

Plaintiff brought suit against defendants claiming that they were negligent in failing to keep the walkways clear and the lobby area free from liquid accumulation. Specifically, plaintiff alleged that defendants knew or should have known that water was likely to accumulate on the tile floor of the vestibule and cause a dangerous condition. In her deposition, plaintiff claimed that on the day of her accident, the sidewalks at the apartment complex had not been shoveled "in a while." Plaintiff testified that during the two months she had lived at the Village Common Apartments, she sometimes saw water accumulate in the same area where she fell and that she never saw a mat on the floor. Karen Ostrander, a regional manager for the apartments, was deposed and testified that she was advised that the sidewalks were shoveled and salted late in the morning that same day.

The trial court granted defendants' motion for summary disposition, ruling that plaintiff was a licensee and that because the danger was open and obvious, defendants owed no duty to warn of the danger. Plaintiff moved for rehearing and argued that as a tenant she was an invitee. The court affirmed its earlier decision but ruled that plaintiff's classification as a licensee or invitee was not dispositive. In its second opinion, the court held that even if plaintiff were an invitee, defendants owed plaintiff no duty under the open and obvious rule. We review a grant of summary disposition de novo as a question of law. See *Vargo v Sauer*, 215 Mich App 389, 398; 547 NW2d 40 (1996).

Plaintiff first argues that as a resident tenant in an apartment complex, she should be considered an invitee rather than a licensee. The duty a possessor of land owes to those who come upon the land turns on the status of the visitor. *Stanley v Town Square Coop*, 203 Mich App 143, 146; 512 NW2d 51 (1993). Because the landlord exercises exclusive control over the common areas of the premises, the landlord is the only one who can take the necessary precautions to ensure that the common areas are safe for those who use them. *Id.* at 146-147. The landlord grants tenants a license to use the common areas of the property and tenants pay for this license as part of their rent. *Id*. at 147. Common areas of an apartment complex include hallways, lobbies, stairs and elevators. *Bryant v Brannen*, 180 Mich App 87, 94-95; 446 NW2d 847 (1989). "Therefore, tenants are invitees of the landlord while in the common areas, because the landlord has received a pecuniary benefit for licensing their presence." *Id*. Thus, we find that plaintiff was an invitee when she fell in the lobby area of her apartment building.

The next issue is what duty does the landlord owe to a tenant who is an invitee? Plaintiff claims that the trial court erred when it decided that defendants owed no duty to its tenants with respect to an open and obvious danger. Specifically, plaintiff argues that the "open and obvious doctrine" applies only to duty to warn cases and not to duty to maintain cases. In *Perry v Hazel Park Raceway*, 123 Mich App 542, 549-550; 332 NW2d 601 (1983), this Court held that a "defendant is not relieved from liability as a matter of law merely because an invitee has discovered the danger and attempted to protect himself against it. Rather, the question is whether he can reasonably expect invitees to protect themselves against the hazard." *Id.* (citations omitted.) Quoting Prosser, Torts (4th ed), §61, pp 394-395, this Court in *Perry, supra* at 550, adopted the following standard:

> "[W]here the condition is one such as icy steps, which cannot be negotiated with reasonable safety even though the invitee is fully aware of it, and, because the premises are held open to him for his use, it is to be expected that he will nevertheless proceed to encounter it. In all such cases, the jury may be permitted to find that obviousness, warning or even knowledge is not enough." [Footnote omitted.]

Further, in *Bertrand v Alan Ford, Inc*, 449 Mich 606, 610-611; 537 NW2d 185 (1995), the Michigan Supreme Court held that while a possessor of land may have no obligation to warn an invitee of fully obvious conditions, the invitor may still have a duty to protect an invitee against foreseeably dangerous conditions. The Court relied upon 2 Restatement Torts, 2d, § 343A(1), p 218, which states:

> A possessor of land is not liable to his invitees for physical harm caused to them by an activity or condition on the land whose danger is known or obvious to them, *unless the possessor should anticipate the harm despite such knowledge or obviousness.*[1] [Emphasis added.]

Accord *Riddle v McLouth Steel Co*, 440 Mich 85, 96; 485 NW2d 676 (1992), cited in *Bertrand, supra* at 612-613. "Thus, the open and obvious doctrine does not relieve the invitor of his general duty of reasonable care" because "if the risk of harm remains unreasonable, despite its obviousness or despite knowledge of it by the invitee, then the circumstances may be such that the invitor is required to undertake reasonable precautions. The issue then becomes the standard of care and is for the jury to decide." *Bertrand, supra* at 611.

In light of *Bertrand, supra*, we believe reasonable minds could conclude that a landlord should foresee that a tenant would slip on a tile floor that is covered with water from snow tracked in from the outdoors, especially in snowy conditions. See *id.* at 617-618. In this case, the issue is not whether proper precautions were taken to maintain the outside sidewalks, but rather the foreseeability of conditions indoors from snow being tracked into the lobby of the apartment building. *Id.* at 610-611. Defendants were aware of the snowy conditions that day because Ostrander testified in her deposition that the sidewalks had been shoveled earlier the same day. In addition, plaintiff testified that water had accumulated in the lobby on prior occasions and that there was no mat. These are all facts which lead this Court to conclude that a dangerous condition could be anticipated.

Plaintiff further argues that there was a genuine issue of material fact as to three issues: whether defendants shoveled and salted the sidewalks, whether defendants inspected the premises properly, and whether defendants had a duty to place a mat in the lobby where plaintiff fell. The courts are liberal in finding a genuine issue of material fact. *Meretta v Peach*, 195 Mich App 695, 697; 491 NW2d 278 (1992). Giving the benefit of the doubt to the nonmovant, the trial court must determine whether a record might be developed that would leave open an issue upon which reasonable minds might differ. *Michigan Mutual Ins Co v Dowell*, 204 Mich App 81, 85-86; 514 NW2d 185 (1994).

Plaintiff testified in her deposition that the sidewalks were not shoveled, while defendants claimed that they were shoveled. In the alternative, even if the sidewalks were shoveled, the real issue is whether defendant took precautionary measures to make sure the hallways inside the apartment building were safe. Plaintiff alleged that she slipped and fell in the lobby, not outside on the sidewalk. Defendants did not produce any testimony, affidavits or other evidence in discovery which showed that they attempted to protect plaintiff from the water accumulated in the vestibule where plaintiff fell. We find that a record might be developed that would leave open an issue upon which reasonable minds might differ. *Michigan Mutual, supra* at 85-86. Moreover, we have addressed above plaintiff's last claim concerning defendant's duty to place a mat on the lobby floor.

In conclusion, we find that plaintiff was an invitee and that defendants could anticipate that a person would slip and fall on the wet tile floor if there were no mat in the apartment's lobby. Further, conflicting testimony existed as to whether defendants properly shoveled and salted the sidewalks and whether defendants properly inspected the premises. Summary disposition was therefore improperly granted.

Reversed and remanded for further proceedings. Plaintiff is entitled to recover her costs pursuant to MCR 7.219.

/s/ Jane E. Markey
/s/ Roman S. Gribbs
/s/ Thomas Giles Kavanagh

[1] See also 2 Restatement Torts, 2d, §343, which requires the invitor to "'exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land' that the landowner knows or should know the invitees will not discover, realize, or protect themselves against." *Bertrand, supra* at 609, citing *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988).