STATE OF MICHIGAN

COURT OF APPEALS

ANTHONY PANOZZO,

Plaintiff-Appellant,

v

ALLEN C. BULMER,

Defendant/Third Party Plaintiff-Appellee,

and

RANDY SCHUBERG,

Third Party Defendant.

UNPUBLISHED
May 16, 1997

No. 188770
Mecosta Circuit Court
LC No. 94-010452-NO

Before: Young, P.J., and Doctoroff and Cavanagh, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

On April 27, 1992, plaintiff went to visit friends at a residence which was owned by defendant and leased to college students. The house was constructed by third-party defendant Randy Schuberg. As plaintiff reached the top-most step of the exterior stairway that was connected to a deck, the entire stairway collapsed beneath him, severely injuring him in the resultant fall. Third-party defendant Schuberg,[1] who is not a licensed builder, built the home with an attached deck and stairway in 1990, initially for his own occupancy, but sold it to defendant after living in it for about one year. When the house, with the attached deck and staircase, was completed and ready for occupancy, the county building inspector inspected the home and approved it for occupancy. Defendant bought the house from Schuberg on August 9, 1991. Although defendant did not have the house inspected before purchasing it, he walked through the house with a real estate agent to examine the general construction. Neither defendant nor the agent observed any defect in the staircase or deck at the time. Defendant

never contacted Schuberg before buying the house, and was not advised by Schuberg about any defect in the stairs.

In his complaint, plaintiff alleged that defendant was negligent in failing to properly inspect, maintain and repair the premises to insure its safety to lessees and invitees and by "[a]llowing a dangerous latent condition, which defendant knew of, or should have known of, in the exercise of reasonable care, that being a defective stairway, to exist on the premises, unknown to lessees and invitees." In the course of discovery, defendant admitted that plaintiff was an invitee when he entered upon the premises.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), supporting his motion with a copy of the building inspection certificate showing that the stairs had passed inspection, the affidavits of two experts, various photographs of the staircase and deck, and Schuberg's deposition testimony. Defendant also produced for inspection the two portions of a board called a "header" which had been attached to the deck and which had sheared in two upon the collapse of the stairs. In his affidavit, one of defendant's experts asserted that after inspecting the header and the deck, and "assuming that there were three appropriately-sized nails or screws in the attachment of the stringers to the header, it is my opinion that the attachment of the stringers to the header did not violate any building codes, standards or ordinances, and that a person purchasing a home with completed deck and stair construction could not reasonably be expected to have inspected the porch and stair attachment for construction code deficiencies."

By affidavit, another expert asserted that his inspection of the header revealed "a spike knot perpendicular to the grain that weakened the wood, that the board appeared to have sheared lengthwise parallel to the grain in the weakened area" and that "the wood stain had penetrated the wood board along the site of the shear or split." According to the expert, this evidence indicated that "the shear or split in the wood was present before the stain was applied." Schuberg testified that he stained the deck and stairs prior to selling the house to defendant.

Eight days before the hearing on defendant's motion for summary disposition, plaintiff filed a responsive brief, attaching the affidavits of Donald Van't Hof, a licensed realtor, Sam Bing, a "provider of residential home inspection," and Dave Rue, a general contractor. All three affiants claimed that defendant, as a reasonable and prudent buyer, should have obtained a professional inspection of the premises before the purchase or rental of the property. In addition, both Bing and Rue stated that they had examined photographs of the stairway taken before the stairway collapsed, and also stated that in their opinion the stairway was improperly constructed and connected to the premises. They further opined that the improper construction and connection of the stairway could have been detected by a professional or experienced inspector.

At the motion hearing, defendant moved the trial court to strike plaintiff's proposed experts and exclude consideration of their affidavits. Defendant argued that plaintiff's failure to previously disclose the experts violated the court's pretrial order. Defendant further contended that the affidavits set forth a new theory of liability, namely that defendant had a duty to obtain a professional inspection of the house

before the purchase or rental because such an inspection might have revealed the latent defect in the staircase. In granting defendant's motion for summary disposition, the trial court agreed with defendant to strike the affidavits of plaintiff's experts because they were not disclosed in accordance with the pretrial order. The trial court also found that plaintiff failed to carry "its burden of proof of establishing that . . . a reasonable inspection would have disclosed some defect, most likely the crack in the header, that caused the stairway to collapse." Subsequently, defendant voluntarily dismissed third-party defendant Schuberg without prejudice to facilitate plaintiff's appeal.

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence available to it. *Id.* The moving party must specifically identify the matters which have no disputed factual issues, and has the initial burden of supporting his position by affidavits, depositions, admissions, or other documentary evidence. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). The party opposing the motion then has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists. *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994). When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The existence of a disputed fact must be established by admissible evidence; a mere promise to offer factual support at trial is insufficient. *Cox v Dearborn Hts*, 210 Mich App 389, 398; 534 NW2d 135 (1995). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is property granted. *Quinto*, *supra*, at 362-363. Giving the benefit of reasonable doubt to the nonmovant, the court must determine whether a record might be developed which will leave open an issue upon which reasonable minds could differ. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995). On appeal, a trial court's grant or denial of summary disposition will be reviewed de novo. *Michigan Mutual Ins Co v Dowell*, 204 Mich App 81, 85-86; 514 NW2d 185 (1995).

In this case, the trial court properly granted defendant's motion for summary disposition because plaintiff failed to set forth specific facts showing that there was a genuine issue for trial. Plaintiff acknowledged that his burden of proof was to establish that defendant breached his duty to invitees to maintain the property in a reasonably safe condition and exercise due care to protect them from conditions that might result in injury. However, the possessor of land is subject to liability only if he knows of, or by the exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk to the invitees. *Riddle v McLouth Steel Products*, 440 Mich 85, 92-93; 485 NW2d 676 (1992), quoting from Restatement of Torts, 2d, § 343. In this case, defendant introduced expert opinion that the construction and method of attachment of the header did not violate any building codes, standards or ordinances, and that "a person purchasing a home with completed deck and stair construction could not reasonably be expected to have inspected the porch and stair attachment for construction code deficiencies." Although plaintiff claimed that a reasonable and prudent buyer of the premises for the purpose of leasing to tenants would have obtained a

professional inspection of the premises before the purchase or rental, plaintiff has not offered any documentary evidence to show that defendant's failure to have a professional inspection constituted a breach of his duty to plaintiff. Because plaintiff did not contest the trial court's ruling striking from consideration the affidavits proffered by plaintiff to support his position that there was a genuine issue of material fact, plaintiff was left with no documentary evidence to support his claim.

Although plaintiff argues that the grant of summary disposition was premature because defendant failed to present any evidence at the motion hearing that an inspection could not have discovered the defect in the staircase, defendant did not have the burden of proving that an inspection would not have revealed the defect in the staircase. Rather, once defendant supported his motion with evidence that his actions were reasonable and that the deck and stair construction did not violate any building codes, standards or ordinances, the burden shifted to plaintiff, the non-moving party, to show that there was a genuine issue of material fact. Plaintiff's promise to offer the necessary factual support at trial was insufficient. *Quinto, supra*; *Cox, supra*. Accordingly, the trial court properly granted defendant's motion for summary disposition.

Affirmed. Defendant being the prevailing party, he may tax costs pursuant to MCR 7.219.

/s/ Robert P. Young, Jr.
/s/ Martin M. Doctoroff
/s/ Mark J. Cavanagh

[1] Third-party defendant Schuberg was dismissed by stipulation.