

STATE OF MICHIGAN
COURT OF APPEALS

HEIDI LYNN BEARDSLEY,

Plaintiff-Appellant,

v

PAINT CREEK VILLAGE APARTMENTS,

Defendant-Appellee.

UNPUBLISHED
September 5, 1997

No. 197292
Oakland Circuit Court
LC No. 95-501374

Before: Hood, P.J., and McDonald and Young, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff was raped by an intruder who entered her boyfriend's apartment through an open window. Plaintiff filed a complaint against defendant, Paint Creek Village Apartments, alleging that defendant owed plaintiff a duty to protect her from intruders and that defendant had breached its duty. The trial court granted defendant's motion for summary disposition, finding that plaintiff's rape was not a foreseeable criminal act.

A motion for summary disposition is reviewed de novo. *Babula v Robertson*, 212 Mich App 45; 536 NW2d 834 (1995). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Amorello v Monsanto Corp*, 186 Mich App 324; 463 NW2d 487 (1990). Such motion may be granted when "there is no genuine issue of material fact and the moving party is entitled to judgment or partial judgment as a matter of law." *Id.* A party opposing a motion for summary disposition must show that material facts are genuinely disputed. *Id.*

The existence of a duty is normally an issue for the court to decide. *Aisner v Lafayette Towers*, 129 Mich App 642; 341 NW2d 852 (1983). However, where the duty depends on disputed factual circumstances, the jury determines the existence of those circumstances. *Id.* No duty is owed to an unforeseeable plaintiff. *Moning v Alfonso*, 400 Mich 425; 254 NW2d 759 (1977).

Landlords have a duty to protect invitees from the foreseeable criminal acts of third parties in the common areas under the landlord's control. *Stanley v Town Square Cooperative*, 203 Mich App 143; 512 NW2d 51 (1993). This duty imposes liability on the landlord "to the extent that foreseeable criminal acts are facilitated by his failure to keep the physical premises under his control reasonably safe (e.g., poor locks) or in good repair (e.g. broken locks)." *Bryant v Brannen*, 180 Mich App 87; 446 NW2d 847 (1989). In *Johnston v Harris*, 387 Mich 569; 198 NW2d 409 (1972), for example, the Court concluded that the landlord may have breached his duty to the plaintiff because he failed to provide adequate lighting and doorlocks in the vestibule outside the plaintiff's apartment. The apartment building was located in a high crime area. *Id.* Normally, the jury determines whether the risk of harm is foreseeable. *Holland v Liedel*, 197 Mich App 60; 494 NW2d 772 (1992). However, when the facts are not disputed, it is proper for the court to make the legal conclusion. *Moll v Abbott Laboratories*, 444 Mich 1; 506 NW2d 816 (1993).

This duty is not an absolute duty which requires the landlord to insure the safety of invitees. *Stanley*, *supra* at 150. Rather, the duty requires the landlord to take reasonable measures to protect invitees. *Id.* In the present case, the facts are not disputed. The apartment complex was in a low crime area, the only reported incident being a murder which occurred two weeks earlier and showed no signs of involving a forcible entry. Each apartment building was equipped with a buzzer intercom system, and each apartment had deadbolt locks. Lighting was provided in the parking lot, as well as at the entrance to the building.

Further, this duty does not extend to those portions of the premises over which tenant maintains exclusive possession and control. *Shoulders v Record Realty Co*, 185 Mich App 606; 62 NW2d 803 (1990); see also *Williams v City of Detroit*, 127 Mich App 464; 339 NW2d 215 (1983). In this case, plaintiff's rape did not occur in a common area of the premises, but rather inside a tenant's apartment. We reject plaintiff's allegations the conditions outside the window of the apartment contributed to the intruder's ability to enter the apartment, and that the conditions were part of the common area in which defendant has a duty to protect invitees from the foreseeable criminal acts of third parties. The connection between the rape of plaintiff and the conditions outside the window of the apartment is tenuous at best. Moreover while the conditions may have allowed the intruder to hide, the intruder's entry into the apartment was the result of plaintiff's failure to close the bedroom window. Defendant did not have a duty to protect plaintiff from the criminal assault.

Plaintiff also argues that defendant had a duty to repair the defective window lock, so that the window could be locked in a partially open position. We disagree. In an Oklahoma case, the tenant of an apartment was raped when an intruder entered her apartment through a sliding glass door with a defective lock. *Lay v Dworman*, 732 P2d 455, 457 (Okla, 1986). The tenant complained about the defective lock. *Id.* The Oklahoma Supreme Court concluded,

Where the premises provided are inadequately secured due to ineffective or defective materials, a duty on the part of the landlord to provide repairs or modifications would arise upon notification of the defect by the tenant. [*Id.* at 458.]

Because the tenant complained about the lock, the landlord had a duty to repair it. In the present case, however, plaintiff's boyfriend did not complain about the lock. Absent notice of the defective lock we conclude defendant did not have a duty to repair it.

Because the rape did not occur in a common area under defendant's control and because the facts do not demonstrate defendant created a dangerous condition outside the apartment favorable to criminal activity, defendant is not liable for the criminal assault. Moreover, defendant had no duty to repair the window lock because the tenant failed to inform defendant of the defect. Summary disposition was appropriate.

Affirmed.

/s/ Harold Hood

/s/ Gary R. McDonald

/s/ Robert P. Young, Jr.