

STATE OF MICHIGAN
COURT OF APPEALS

DOUGLAS MADDIX,

Plaintiff-Appellant,

v

PRIME PROPERTY ASSOCIATES, INC.,
MARCO SANTI and RONALD RUSSELL, d/b/a
AMERICAN OAKS PROFESSIONAL CENTER,

Defendants-Appellees.

UNPUBLISHED

July 28, 2005

No. 251223

Macomb Circuit Court

LC No. 02-003762-NO

ON RECONSIDERATION

Before: Gage, P.J., and Cavanagh and Griffin, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order granting defendants summary disposition. We affirm.

Plaintiff worked in an office building managed by defendant Prime Property Associates, Inc., and owned by defendants, Marco Santi and Ronald Russell, d/b/a American Oaks Professional Center, in Utica. On January 16, 2002, snow had been falling for three to four hours when plaintiff left work at 8:00 p.m. He noticed the accumulation of snow on the ground, but he did not see any ice. As plaintiff began walking down a handicapped ramp leading to the adjacent parking lot, he slipped and fell, sustaining injuries to his left arm and shoulder. Plaintiff claims that although he did not see any ice before his fall, he felt “black ice” beneath his feet as he stepped down.

Plaintiff argues that the trial court erred in granting defendants summary disposition because there is a genuine issue of material fact about whether the ice was open and obvious. We review de novo a trial court’s decision on a motion for summary disposition. *Rose v Nat’l Auction Group, Inc*, 466 Mich 453, 461; 646 NW2d 455 (2002). When reviewing a decision on a motion for summary disposition pursuant to MCR 2.116(C)(10), “we consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion.” *Id.* Summary disposition is appropriately granted, “if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.” *Id.*

Generally, a premises possessor has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v*

Ameritech Corp, 464 Mich 512, 516; 629 NW2d 384 (2001). This duty does not, however, extend to hazardous conditions that are open and obvious. “Where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee.” *Id.* The test for an open and obvious danger is whether an average user with ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection. *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 5; 649 NW2d 392 (2002).

When an accumulation of snow and ice is open and obvious, the premises possessor must take reasonable measures within a reasonable period of time after the accumulation to diminish the hazard only if there is some aspect of the accumulation that makes the accumulation unreasonably dangerous. *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 332; 683 NW2d 573 (2004). In determining whether accumulation is open and obvious, we consider whether the plaintiff had actual knowledge of ice or snow-covered ice. *Corey, supra* at 5; 649 NW2d 392 (2002); *Joyce v Rubin*, 249 Mich App 231, 239-240; 642 NW2d 360 (2002).

Recently, the Michigan Supreme Court reversed the Court of Appeals decision in *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99; 689 NW2d 737 (2004) (*Kenny I*), “for the reasons stated in the dissenting opinion.” *Kenny v Kaatz Funeral Home, Inc*, 472 Mich 929; 697 NW2d 526 (2005) (*Kenny II*). In *Kenny*, the plaintiff argued that the black ice at issue was virtually undetectable because it took on the color of the pavement and was covered by a layer of snow. The dissenting judge, however, found that the slippery condition of the parking lot was open and obvious. *Kenny I, supra* at 3-4 (Griffin, J, dissenting). Because plaintiff’s argument is essentially the same as the one advanced by the *Kenny* plaintiff, we conclude that the trial court correctly granted defendants summary disposition.

Plaintiff also argues that, even if the snow-covered ice is open and obvious, defendant should be subject to liability because there were special circumstances that made the condition unreasonably dangerous. When an accumulation of snow and ice is open and obvious, the premises possessor must take reasonable measures within a reasonable period of time after the accumulation to diminish the hazard only if there is some aspect of the accumulation that makes the accumulation unreasonably dangerous. *Mann, supra* at 332. We focus on the degree of potential harm presented, and there must be special aspects that create a uniquely high likelihood of harm or severity of harm if the risk is not avoided. *Lugo, supra* at 518 n 2, 519.

Plaintiff maintains that he would have encountered similarly icy and snowy conditions regardless of which exit he used. When plaintiff exited the building, he had the choice between using a staircase and a handicapped ramp to reach the parking lot. Plaintiff has not offered any evidence to suggest that he would have encountered snow-covered ice if he had used the staircase at this particular exit or one of the other six available exits. We cannot say that the snow-covered ice present on the handicapped ramp was unavoidable. We therefore conclude that the trial court properly determined that no special circumstances existed that made the risk of harm unreasonable.

Defendants argue, as an alternative ground for affirmance, that they owed no legal duty to plaintiff. *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994). Because

we have concluded that the snowy and icy condition was open and obvious and that the trial court did not err in granting summary disposition, we need not address this issue.

Affirmed.

/s/ Hilda R. Gage

/s/ Mark J. Cavanagh

Judge Griffin not participating.