

STATE OF MICHIGAN
COURT OF APPEALS

JEFFREY BATEN,

Plaintiff-Appellee,

v

231 MAC, LLC and 3TM GROUP, INC.,

Defendants,

and

RIVIERA CAFÉ, INC. d/b/a RIVIERA CAFÉ,

Defendant-Appellant.

UNPUBLISHED

July 15, 2008

No. 276755

Ingham Circuit Court

LC No. 05-000627-NO

JEFFREY BATEN,

Plaintiff-Appellee,

v

231 MAC, LLC and RIVIERA CAFÉ, INC. d/b/a
RIVIERA CAFE,

Defendants,

and

3TM GROUP, INC. d/b/a PINBALL PETE'S,

Defendant-Appellant.

No. 280035

Ingham Circuit Court

LC No. 05-000627-NO

JEFFREY BATEN,

Plaintiff-Appellee,

v

No. 280109

231 MAC, LLC,

Ingham Circuit Court
LC No. 05-000627-NO

Defendant-Appellant,

and

RIVIERA CAFÉ, INC d/b/a RIVIERA CAFÉ, and
3TM GROUP, INC. d/b/a PINBALL PETE'S,

Defendants.

Before: Fitzgerald, P.J., and Talbot and Donofrio, JJ.

PER CURIAM.

This case involves questions of defendants' duty owed to plaintiff who slipped and fell on an alleged patch of black ice located on defendants' premises. Defendants appeal by leave granted an order denying their motions for summary disposition under MCR 2.116(C)(10). Because the condition presented is open and obvious, we reverse.

On the morning of February 6, 2006, plaintiff drove to church and parked his car in a parking lot adjacent to defendants' premises. After exiting his car and traversing the parking lot, plaintiff slipped and fell on a patch of ice on the sidewalk adjacent to the premises suffering various injuries. The trial court denied defendants' motions for summary disposition finding a question of fact existed regarding how long the ice existed on the premises and which defendant had possession and control over the location of plaintiff's fall.

Defendants first argue on appeal that the trial court erred by not granting it summary disposition given that the condition was open and obvious.¹ On appeal, we review a grant or denial of summary disposition de novo. *West v Gen Motors Corp*, 469 Mich 177, 182; 665 NW2d 468 (2003). A motion premised on MCR 2.116(C)(10) should only be granted "when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Campbell v Kovich*, 273 Mich App 227, 229; 731 NW2d 112 (2006). A genuine issue of material fact exists when the record, all reasonable inferences drawn in the nonmoving party's favor, reveals an issue upon which reasonable minds could differ. *Cowles v Bank West*, 476 Mich 1, 32; 719 NW2d 94 (2006).

¹ Both Pinball Pete's and 231 MAC, LLC argued that the ice was open and obvious in the trial court proceedings. Though the Riviera Café did not make a similar argument, judgment in the Riviera Café's favor is appropriate because the factual record supports the conclusion that the ice was open and obvious as a matter of law. See *Laurel Woods Apartments v Roumayah*, 274 Mich App 631, 640; 734 NW2d 217 (2007).

In this case, the parties do not dispute that plaintiff is a licensee. In a premises liability action, the premises possessor “owes a licensee a duty only to warn the licensee of any hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved.” *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). Accordingly, a landowner has no duty to warn a licensee of conditions that are open and obvious, which by definition are not “hidden.” “Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger on casual inspection.” *Teufel v Watkins*, 267 Mich App 425, 427; 705 NW2d 164 (2005). In making this determination, this Court “looks not to whether a plaintiff should have known that the condition was hazardous, but to whether a reasonable person in his position would foresee the danger.” *Joyce v Rubin*, 249 Mich App 231, 238-239; 642 NW2d 360 (2002), quoting *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 11; 574 NW2d 691 (1997).

After our review of the evidence, we conclude the icy condition of the sidewalk was open and obvious. Plaintiff admitted that he saw the ice after he fell. Plaintiff’s mother testified that she observed the ice when she arrived at the scene. A passerby testified that although he traversed the area without incident and did not initially notice the ice, he observed the icy patch when he returned to assist plaintiff. The photographic evidence also shows that the ice was readily apparent on observation. Plaintiff’s testimony that the temperature was above freezing conflicts with other testimony asserting the opposite. In any event, a reasonably prudent person would have been aware of the hazardous conditions that fluctuating weather patterns can produce in Michigan during February, including the formation of ice on sidewalks. In sum, a reasonable person in plaintiff’s position would have discovered the ice upon a casual inspection. Plaintiff, however, admitted that he was not looking down at the ground as he walked, but was “looking around.” For all these reasons, plaintiff’s contention that the ice was not open and obvious because it was “black ice” must fail. See *Kenny v Kaatz Funeral Home, Inc*, 472 Mich 929; 697 NW2d 526 (2005).² We conclude that reasonable minds could not differ that the icy condition of the sidewalk was open and obvious. Accordingly, the trial court erred when it declined to grant all defendants summary disposition on this basis.

In some circumstances, even an “open and obvious” condition may be so “unreasonably dangerous so as to give rise to a duty upon a premises possessor to . . . remove or otherwise appropriately protect invitees against the danger.” *Lugo v Ameritech Corp*, 464 Mich 512, 524; 629 NW2d 384 (2001). In order to make an open and obvious condition unreasonably dangerous, some special aspect, or something out of the ordinary, must exist that makes the condition unavoidable or creates a uniquely high likelihood of harm or severity of harm. *Id.* at 525; *Royce v Chatwell Club Apartments*, 276 Mich App 389, 392; 740 NW2d 547 (2007), lv held in abeyance 743 NW2d 213 (2008). Plaintiff has failed to provide any evidence alleging any special aspect of the sidewalk that would create a “uniquely high likelihood of harm or

² Accord *Kaseta v Binkowski*, 480 Mich 939; 741 NW2d 15 (2007) (reversing for reasons stated in Court of Appeals dissent); *Mitchell v Premium Prop Investments Ltd Partnership*, 477 Mich 1060; 728 NW2d 460 (2007) (same).

severity of harm.” *Lugo, supra* at 519. Ice on a sidewalk is an ordinary occurrence in Michigan during February. It cannot be said that the ice in this case presented “a uniquely high likelihood of harm or severity of harm” as opposed to any other typical patch of ice. *Joyce, supra* at 241-243. Moreover, testimony established that plaintiff could have avoided the ice altogether by walking around it.

Because we reverse the trial court’s order on the bases above, it is unnecessary to consider the remainder of defendants’ arguments.

Reversed and remanded for entry of order of summary disposition in favor of defendants. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot
/s/ Pat M. Donofrio