STATE OF MICHIGAN

COURT OF APPEALS

TERRENCE LOUDE,

Plaintiff-Appellant,

v

IRON STREET PROPERTIES, LLC,

Defendant-Appellee.

UNPUBLISHED
December 22, 2020

No. 351009
Wayne Circuit Court
LC No. 18-006426-NO

Before: SWARTZLE, P.J., and BECKERING and GLEICHER, JJ.

PER CURIAM.

Terrence Loude slipped and fell on ice in a common area in an apartment complex. Loude presented evidence that water frequently flowed through the area and that ice commonly formed, despite the application of salt. This evidence sufficed to create a fact question regarding whether the defendant landlord failed to keep the area fit for its intended use. Accordingly, the circuit court improperly dismissed Loude's claim under MCL 554.139(1)(a). As Loude does not challenge the dismissal of his common-law premises liability claim, we affirm the circuit court's order in that regard. However, we vacate the summary dismissal of Loude's statutory claim and remand for further proceedings consistent with this opinion.

I. BACKGROUND

On a December morning, Terrence Loude left his apartment at the River Park Lofts complex, owned by defendant. Clad in tennis shoes and with garbage bag in hand, Loude set out toward the communal dumpsters that all residents were required to use. Loude traversed a walkway between two buildings and turned left to cross the parking lot where the dumpsters were located. The temperature was in the 30s and a "light dusting" of snow covered the ground. Loude safely reached the dumpsters but when he raised his arm to place the garbage bag inside, he slipped and fell, breaking his leg.

The parties dispute the condition of the ground around the dumpsters. Loude testified that he did not see any ice before his fall but recounted that his fall displaced the snow, revealing ice underneath. Defendant disclaimed that any ice existed in the area. After Loude's fall, other tenants, the building manager, and the building maintenance worker came to his aid.

Loude filed suit. Although conflated within the complaint, Loude actually raised two counts: a common-law premises liability action and a statutory claim under MCL 554.139(1)(a), asserting that defendant failed in its duty to maintain the premises in reasonable repair and fit for its intended purpose. Loude alleged that defendant was negligent in failing to shovel, salt, or properly maintain the common areas in the complex, specifically the area in front of the communal dumpsters.

Following discovery, defendant sought summary disposition under MCR 2.116(C)(10). Defendant contended that the ground condition in front of the dumpsters was open and obvious, barring Loude's premises liability claim. And Loude's statutory claim failed, defendant urged, because he fell in the parking lot, which was fit for its intended purpose of parking vehicles. The circuit court dismissed Loude's complaint in its entirety. The court ruled that Loude's premises liability claim failed because snow and ice in the winter are open and obvious conditions. Loude does not challenge that conclusion.

The court also dismissed Loude's statutory claim. The court determined that the parking lot in which Loude fell was a common area. The parking lot was not only used for parking cars; it also served as the pathway to the dumpsters used by the tenants. Accordingly, the circuit court found that the area had to provide reasonable access to the dumpsters to be fit for its intended purpose. Nevertheless, the court determined that summary disposition was warranted:

> [A]s I look at the deposition testimony of [Loude], [Loude] acknowledges that there were - - that he had access to the parking, that he had - - he observed ice in the parking lot in the past, that he had never slipped, nor was he aware of any other tenants slipping in the parking lot. It also indicated that [Michael Lacy], the building manager, took steps to maintain the parking lot. Now, [Loude] raises that there is a question of fact, as to the inconsistencies with regards to [Lacy's] testimony, however, [Lacy] testified that he - - he put salt out. In addition, the property manager, [Elizabeth Telegadas], she also testified that the day before, which was a Sunday, she normally doesn't work but she was out and that she salted and I believe cleaned the area. But, also, based on [Loude's] deposition, once he fell, there were a number of tenants that came over to his aid. There was [Lacy] that came over and that there were EMS workers that came over to - - to assist him. There is no allegations that any of those people were unable to access or walk across the same area in which [Loude] alleges that he fell and slipped on ice. So, there is no evidence that - - that any tenant complained or notified the defendants that they could not use the parking lot or they didn't have access to the garbage cans. So, for those reasons, the Court finds there is no genuine issue of material fact[.]

II. ANALYSIS

Loude appealed the dismissal of his statutory claim. We review de novo a circuit court's decision regarding a motion for summary disposition. *Zaher v Miotke*, 300 Mich App 132, 139; 832 NW2d 266 (2013).

> A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. Summary disposition is appropriate under MCR 2.116(C)(10) if there is no

> genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. [*Zaher*, 300 Mich App 139-140 (quotation marks and citation omitted).]

We also review de novo a lower court's determination regarding the interpretation and applicability of an underlying statute. *Mich Ass'n of Home Builders v City of Troy*, 504 Mich 204, 212; 934 NW2d 713 (2019).

Every lease of residential property includes a covenant from the landlord "[t]hat the premises and all common areas are fit for the use intended by the parties." MCL 554.139(1)(a). "The open and obvious danger doctrine cannot be used to avoid [that] statutory duty." *Wilson v BRK, Inc*, 328 Mich App 505, 517; 938 NW2d 761 (2019). "The statute does not require a lessor to maintain a [common area] in an ideal condition or in the most accessible condition possible, but merely requires the lessor to maintain it in a condition that renders it fit for use as a [common area]." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 430; 751 NW2d 8 (2008). " 'Fit' is defined as 'adapted or suited; appropriate[.]' " *Id*. at 429 (citation omitted). Perfection is not required, only reasonable access. *Hadden v McDermitt Apartments, LLC*, 287 Mich App 124, 130; 782 NW2d 800 (2010).

Although Loude slipped and fell in a parking lot, the intended use of the area was not simply for parking cars. By placing the communal dumpsters in the parking lot and requiring tenants to carry their trash to those receptacles, defendants created an area more akin to a sidewalk, a common area for the use of pedestrians to access a critical feature of the leasehold. See *Benton v Dart Props*, 270 Mich App 437, 443-444; 715 NW2d 335 (2006). And the tenants could expect the landlord to keep the immediate area of the dumpsters safe for them to place their garbage bags inside.

Considering the evidence in the light most favorable to Loude, factual questions precluded summary disposition. Loude did not see any ice before he fell, but afterwards he noticed that "[t]he snow was pushed," the ice "kind of came up" into view and Michael Lacy, defendant's maintenance man, "came out throwing salt."

Lacy testified that defendant employs an outside company to plow the parking lots at the complex. As there was minimal snow on December 11, 2017, however, Lacy personally "shovel[ed] the snow, the walkways, and where the dumpster is at." Lacy asserted that he began his workday at 9:00 a.m. by shoveling and salting where necessary. Lacy described that the area by the dumpsters tends to get slippery and that he had fallen there "multiple times" in the past. He specifically referred to it as "[a] problem area." As a result, Lacy asserted that he checks that area more often. He explained that the dumpster was in a slanted area of the parking lot, in the path of water that runs off a neighboring building and flows across the parking lot to a drain.

Lacy asserted that he salted the area in question at approximately 4:45 p.m. on the Friday before Loude's fall. Lacy's testimony regarding the day in question, a Monday, was far less definitive. He stated:

> Oh, at that dumpster there, I shoveled some snow there. Yeah, I shoveled some snow - - no, I didn't shovel, I threw some salt there. Wasn't no need to shovel. Snow was about to go away. So the wind was blowing at that time and blew the snow right on it. Then ice.

Lacy continued that he inspected the area that morning, and cleared it. When Lacy went inside to conduct his interior rounds, he looked out a window and observed Loude laying on the ground in front of the dumpsters. Lacy's testimony again became confused and inconsistent:

> *Q.* . . . [W]hat time would it have been that you were by the dumpsters on December 11, 2017?
>
> *A.* I can't give you an exact time, but it was in the morning time.
>
> *Q.* Okay. Do you believe that this would have been prior to the time that Mr. Loude fell?
>
> *A.* That's probably what the time, yes, ma'am.
>
> *Q.* Now, when you arrived at the area by the dumpsters that morning, what did you see?
>
> *A.* Nothing. I threw salt down in that area. He was a little way from the dumpster.
>
> *Q.* What made you throw salt down in the area, I guess is what I'm trying to get at?
>
> *A.* That's what I do anyway. I throw salt down anyway. It's natural. I have to throw salt down.
>
> *Q.* So, is it your testimony that you throw salt down regardless if you see anything in the area?
>
> *A.* Anything, I'm gonna throw salt down anyway, what area might be, I'm still throwing salt down. All the areas where people travel at, that's where I'm throwing salt down at.

* * *

Q. . . . Did you see any ice anywhere on the ground when you were in the area that morning?

A. That morning, it was snow - - it was covering the ice up. You wouldn't think that was ice. You would walk right on it.

Q. Okay. So there was snow in the area by the dumpsters.

A. No, it wasn't no snow by the dumpsters, because it was all salt right there. It was all salt right there. I threw salt right there, because I know peoples going there.

When counsel attempted to clarify, Lacy asserted that on the morning in question he both saw and did not see ice around the dumpsters:

Q. So, where you saw the snow covering ice was not near the dumpsters depicted in Exhibits 3A or 3B?

A. It wasn't near the dumpster. It was just regular salt right there.

* * *

Q. Is it depicted in any of the photographs that are in front of you, the area?

A. No, wasn't no snow - - I salt here, salt here. It was a long way from the dumpsters.

* * *

Q. Where was it that you saw that initial snow covering ice?

A. Around by the dumpster in this area, by the dumpster.

Lacy's testimony was allegedly clarified with a photograph showing an unidentified man standing near an area that had been covered by ice on the day in question. That photograph is not part of the lower court record and has not been presented on appeal. Lacy then allegedly marked with an X another photograph depicting where the snow-covered ice had been located. The only image in the record bearing an X, however, purportedly depicts where Loude fell.[1]

When Lacy first approached Loude after his fall, Lacy noted that a light dusty snow was on the ground and blew with the wind. There was "[t]hin - - thin - - thin snow covered - - covered

[1] We note that both Lacy and the building manager, Elizabeth Telegadas, claimed to have taken pictures of the area on the day in question but were later unable to retrieve those images from their cellular phones.

with a thin ice" in the area. There was salt on the ground, but "ice was forming up already." When the medical personnel moved Loude, Lacy noted the pattern left by Loude's body in the snow. The ground underneath Loude was wet. Lacy then changed his description again, claiming that salt in the area had already caused the ice to "crumbl[e] up" and "[w]as about to turn into water."

Elizabeth Telegadas testified that she is the manager at the apartment complex. She came outside after learning of Loude's fall. Loude was laying on the ground about 10 feet from the dumpsters. Telegadas initially testified that she could not see underneath Loude, but that the ground around him appeared dry with only some blowing snow and she saw no ice. As her deposition progressed, however, Telegadas indicated that she saw ice at the corner of the neighboring building near a downspout. She then asserted that "I didn't see [Loude] sitting on the ice because he was sitting on the ice." "[I]t was a really weird thing because we didn't see ice anywhere else, just" by the corner of the building and "wherever [Loude] was right by the dumpster."

This conflicting evidence creates a genuine issue of material fact regarding whether there was snow and ice on the ground where Loude fell. Loude saw the ice after he fell. And reading the deposition testimony of Telegadas and Lacy in the light most favorable to Loude, defendant's own agents also observed the ice.

The evidence also creates a genuine issue of material fact regarding the area's fitness for its intended use. Lacy testified that the dumpsters represented a "problem area" in the complex. Lacy had fallen there several times in the past and therefore paid special attention to the area when conducting his rounds. He blamed the problem on water running off the roof of a neighboring building. Telegadas claimed that she had never observed ice in front of the dumpsters. But she described that water appeared to have pooled in the area after running from a downspout on the neighboring building. A reasonable jury could readily find a high-traffic walkway frequently covered in ice unfit for its intended use. And although Lacy claimed to have salted the area on the day in question and Telegadas implied that she did so the night before, ice remained on the ground. Whether the area was reasonably maintained must be decided by a jury.

The circuit court emphasized that various people came to assist Loude and did not slip. This did not necessarily establish that the area was fit for its intended use at the time of Loude's fall.

> That others had been able to walk on the sidewalk without incident might have suggested that the sidewalk was not completely covered in ice, but it might also have suggested that the others had been walking more carefully on the sidewalk because given that plaintiff had slipped, they were aware that the sidewalk was slippery. [*Estate of Trueblood v P & G Apartments, LLC*, 327 Mich App 275, 292; 933 NW2d 732 (2019).]

Ultimately, record evidence created a fact question for trial. Summary disposition was not appropriate in this case.

We affirm the summary dismissal of Loude's premises liability action, but vacate the summary dismissal of his statutory claim. We remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brock A. Swartzle
/s/ Jane M. Beckering
/s/ Elizabeth L. Gleicher