STATE OF MICHIGAN

COURT OF APPEALS

ANGELA OLSHANSKY,

Plaintiff-Appellant,

v

FAMILY FARM & HOME, INC.,

Defendant-Appellee.

UNPUBLISHED
February 18, 2021

No. 350836
Genesee Circuit Court
LC No. 18-110819-NO

Before: BOONSTRA, P.J., and BORRELLO and RICK, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting summary disposition in favor of defendant under MCR 2.116(C)(8) (failure to state a claim upon which relief can be granted) and MCR 2.116(C)(10) (no genuine issue of material fact). We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

At about 7:00 p.m. on April 28, 2018, several employees at defendant's Family Farm & Home store in Fenton noticed an unusual odor, and some employees and customers began to cough. There was no "manager on duty" that evening, so the situation was reported to the store's designated "key employee," Sharon Matkovitch (Matkovitch).[1] Matkovitch testified at her deposition that she in turn contacted assistant store manager Tiffany Ashbrook (Ashbrook) at approximately 7:30 p.m.; Ashbrook advised Matkovitch to close the store. Ashbrook then contacted the store's general manager, Scott Webb (Webb), as well as the police and fire departments. According to plaintiff, she and her husband entered the store at approximately 7:30 p.m. At approximately 7:45 p.m., Matkovitch announced over the store's loudspeaker that the store was closing and told customers to immediately evacuate.

[1] The record indicates that Matkovitch also referred to herself as "acting manager" when addressing customers that night.

Firefighters who searched the store for contaminants initially believed that the airborne irritant may have been the result of a spill of fertilizer and lime that employees had cleaned up using chemical products. However, when Webb arrived and inspected the store, he eventually discovered that bags of fertilizer stacked on a pallet had apparently been cut open, and a bottle of Drano Max Gel (Drano) drain cleaner had been poured onto the fertilizer. The spill was located in a void of the pallet that was not readily observable. Webb believed that the Drano was the source of the irritant, but no chemical testing was ever done to identify what chemicals had been released. Police were not able to find any fingerprints on the bottle of Drano, and there was no surveillance footage at the store.

Plaintiff filed a complaint against defendant, alleging that she had suffered numerous injuries as a result of exposure to airborne irritants. The complaint alleged negligence or premises liability, gross negligence, negligent training or supervision, and negligent infliction of emotional distress (NIED). After discovery, defendant filed a motion for summary disposition under MCR 2.116(C)(8) and MCR 2.116(C)(10). The trial court granted the motion in full.[2] This appeal followed. On appeal, plaintiff only challenges the trial court's grant of summary disposition on her premises liability and negligent training and supervision claims.

II. STANDARD OF REVIEW

We review de novo a trial court's decision to grant or deny a motion for summary disposition, and the evidence is viewed in a light most favorable to the nonmoving party. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Summary disposition should be granted under MCR 2.116(C)(10) when the evidence reveals no genuine issue of material fact. *Id*. "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." *Id*.

III. ANALYSIS

Although plaintiff raised separate claims for premises liability and negligent training and supervision, plaintiff's argument on appeal is solely that defendant's employees were negligent in not closing the store and evacuating customers immediately upon first noticing the odor and coughing. We conclude that plaintiff has not established that the trial court erred by granting defendant's motion for summary disposition with regard to plaintiff's premises liability and negligent training and supervision claims.

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[2] The trial court did not identify the court rule under which it granted defendant's motion. However, it appears from the record that the trial court granted the motion with respect to the gross negligence and NIED counts under MCR 2.116(C)(8). With respect to the premises liability and negligent training or supervision counts, the court's reasoning relied on documentary evidence. When a trial court reviews evidence beyond the pleadings in making its determination, we generally treat a summary disposition motion as having been granted under MCR 2.116(C)(10). *Krass v Tri-Co Sec, Inc*, 233 Mich App 661, 664-665; 593 NW2d 578 (1999).

To establish premises liability, plaintiff must establish the elements of a negligence claim. *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 693; 822 NW2d 254 (2012). Negligence requires proof of the following elements: "(1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Id*.

Whether defendant owed plaintiff a legal duty is a question of law. *Id*. "Generally, an owner of land owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Id*. (quotation marks and citation omitted).[3] A defendant is liable "for a breach of this duty of ordinary care when the premises possessor knows or should know of a dangerous condition on the premises of which the invitee is unaware and fails to fix the defect, guard against the defect, or warn the invitee of the defect." *Hoffner v Lanctoe*, 492 Mich 450, 460; 821 NW2d 88 (2012).

"[A] storekeeper . . . is liable for injury resulting from an unsafe condition . . . [if it is] known to the storekeeper or [it] is of such a character or has existed a sufficient length of time that he should have had knowledge of it." *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001) (quotation marks and citation omitted; emphasis removed). Liability has been imposed in cases in which storekeepers failed to timely respond to a safety hazard. *Id*. at 421. However, a defendant storekeeper is entitled to summary disposition if the plaintiff fails to provide sufficient evidence for a trier of fact to conclude that the defendant had notice of the dangerous condition. *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 10; 890 NW2d 344 (2016).

Plaintiff has failed to provide sufficient evidence for a reasonable trier of fact to conclude that defendant had notice of the hazard[4] in this case, and therefore has failed to demonstrate a genuine issue of material fact regarding whether defendant owed a duty to plaintiff. Plaintiff argues that defendant's employees should have immediately known that there was an airborne irritant when employees noticed that there was an unusual odor and that people began coughing. However, the record contains no evidence that the odor and coughing were sufficient to *immediately* put an employee on notice of the fact that the store's air had been contaminated by dangerous chemicals. On the contrary, there was evidence that this hazard was particularly difficult to detect and that no incident of this nature had occurred in the store's prior 17 years of existence. Moreover, the fire department was unable to discover the source of the odor, and Webb indicated that he had to perform a thorough sweep of the store before eventually being able to find it. Webb also stated that there was nothing suspicious about the area outside of the pallet where the spilled fertilizer was ultimately discovered. The record shows that the employees of the store did act to close the store and evacuate customers when they became aware of a potential hazard. We conclude that the trial court did not err by granting summary disposition in favor of defendant with regard to the premises liability claim. *Lowrey*, 500 Mich at 10.

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[3] The parties agree that plaintiff was a business invitee of defendant.

[4] For the purposes of this analysis, we will assume that plaintiff's injuries, as well as the odor and coughing noticed by defendant's employees, were caused by the apparent mixing, by some unknown person, of the Drano and fertilizer.

Plaintiff also failed to produce sufficient evidence to survive a motion for summary disposition on her negligently training or supervision claim. A defendant may be directly liable for the negligent supervision or training of employees, see *Zsigo v Hurley Med Ctr*, 475 Mich 215, 227; 716 NW2d 220 (2006), as well as held vicariously liable for the negligence of its employees acting in the scope of their employment, *Hekman Biscuit Co v Comm Credit Co*, 291 Mich 156, 160; 289 NW 113 (1939). Here, the only evidence plaintiff produced to support the conclusion that defendant negligently trained its employees consists of statements from two employees that they had not been trained in responding to "an airborne contamination." Plaintiff did not, however, provide evidence that it was unreasonable for a store of this type to fail to provide this training. The record contains nothing to support a conclusion that defendant was required to specifically train its employees for this particular safety hazard.[5]

Further, the only evidence plaintiff produced to support the conclusion that defendant negligently supervised its employees was that there was not an employee with the title of "manager" on duty. As discussed, there was evidence in the record that Matkovitch was the employee in charge in some capacity, whether she was referred to as a "key employee" or "acting manager." Plaintiff did not produce any evidence that Matkovitch could not offer sufficient supervision or that defendant's response to the incident would have been different had a manager been at the store. Overall, plaintiff failed to produce any evidence even establishing defendant's duty to plaintiff regarding its training and supervision of its employees, much less a breach of that duty. *Buhalis*, 296 Mich App at 693.

Plaintiff failed to demonstrate a genuine dispute of material fact regarding defendant's duty to her in the context of either her premises liability or negligent training and supervision claim, and the trial court therefore did not err by granting defendant's motion for summary disposition. *West*, 469 Mich at 183.[6]

Affirmed. As the prevailing party, defendant may tax costs. MCR 7.219(A).

/s/ Mark T. Boonstra
/s/ Stephen L. Borrello
/s/ Michelle M. Rick

[5] The record shows Webb, who was contacted relatively quickly by phone on the night in question, did possess significant training as a firefighter, emergency medical technician, and hazardous material technician, although it is not clear from the record whether such training was a requirement for his position with defendant.

[6] Because we affirm the trial court on this basis, we need not address defendant's argument that it was not liable for the criminal acts of third parties. Although this argument was raised before the trial court, it does not appear that the trial court granted defendant's motion on this ground.