

STATE OF MICHIGAN
COURT OF APPEALS

CHRISTOPHER L. LEMON,

Plaintiff-Appellant,

v

RONALD L. WHITTAKER,

Defendant-Appellee.

UNPUBLISHED

August 17, 2010

No. 289653

Ingham Circuit Court

LC No. 08-000229-NO

Before: BANDSTRA, P.J., and FORT HOOD and DAVIS, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals as of right the grant of summary disposition to defendant. We reverse and remand.

During the 2005-2006 school year at Michigan State University, plaintiff was one of many tenants living in a home near the campus that was owned by defendant. Plaintiff was injured on December 23, 2005 while walking across an asphalt area between the home and the residence's parking lot. Plaintiff testified that the area was covered with snow and ice on the day he fell. The area was used by tenants for various outdoor recreational activities, as well as accessing city-issued trashcans that were either in or next to the area in issue. Plaintiff was injured as he was returning to the home from the trashcans.

We review a trial court's decision on a motion for summary disposition de novo. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition should be granted under MCR 2.116(C)(10) if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

Plaintiff contends that defendant violated MCL 554.139, which provides as follows:

(1) In every lease or license of residential premises, the lessor or licensor covenants:

(a) That the premises and all common areas are fit for the use intended by the parties.

(b) To keep the premises in reasonable repair during the term of the lease or license, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located, except when the disrepair or violation of the applicable health or safety laws has been caused by the tenants wilful or irresponsible conduct or lack of conduct.

(2) The parties to the lease or license may modify the obligations imposed by this section where the lease or license has a current term of at least 1 year.

(3) The provisions of this section shall be liberally construed, and the privilege of a prospective lessee or licensee to inspect the premises before concluding a lease or license shall not defeat his right to have the benefit of the covenants established herein.

Allison v AEW Capital Mgt, LLP, 481 Mich 419, 425; 751 NW2d 8 (2008) provides that the covenants between a landlord and a tenant set forth in § 39(1) “arise[] from the existence of a residential lease,” and “consequently become[] a statutorily mandated term of such a lease.” Although the covenants can be modified, MCL 554.139(2); *Kircher v City of Ypsilanti*, 269 Mich App 224, 230; 712 NW2d 738 (2005), because the duration lease at issue here was 356 days, the allocation of the responsibility of snow removal with the tenants in a lease addendum does not relieve defendant of the contractual duty to keep “all common areas . . . fit for the use intended by the parties.” MCL 554.139(2).

We first turn to the question of whether the area in which plaintiff fell constitutes a part of the “premises” or a “common area” within the meaning established by the statute. *Allison* drew the following distinction between “premises” and “common areas”:

In this statute, the Legislature specifically set the term “common areas” apart from the term “premises” by applying the first covenant to both terms and the second covenant only to “premises.” If we conclude that “premises” includes “common areas,” then the phrase “and all common areas” would be entirely superfluous. The only way to give meaning to the phrase “and all common areas” in this context is to conclude that “premises” does not encompass “common areas” [*Allison*, 481 Mich at 432.]

Section 39 does not define “common areas,” but our Supreme Court has held that “in the context of leased residential property, ‘common areas’ describes those areas of the property over which the lessor retains control that are shared by two or more, or all, of the tenants. A lessor’s duties regarding these areas arise from the control the lessor retains over them.” *Id.* at 427. In *Benton v Dart Props*, 270 Mich App 437, 439; 715 NW2d 335 (2006), the plaintiff was injured when he slipped and fell on an apartment complex sidewalk while walking from his apartment building to the parking lot. *Benson* concluded that “the sidewalks located within an apartment complex constitute ‘common areas’” under MCL 554.139(1)(a). *Id.* at 442. In reaching this decision, *Benton* noted that

sidewalks leading from an apartment building to adjoining parking lots are common areas for tenants because all tenants who . . . park their vehicles in the spaces allotted . . . rely on these sidewalks to access their vehicles and apartment buildings. Additionally, any person residing in an apartment complex must utilize the sidewalk provided by the landlord . . . to enter or exit his or her dwelling. [*Id.* at 443.]

In other words, sidewalks within an apartment complex are “property over which the lessor retains control that are shared by two or more, or all, of the tenants.” *Allison*, 481 Mich at 427.

In the case at hand, the area in which plaintiff fell is also “property over which the lessor retains control that are shared by two or more, or all, of the tenants.” *Id.* Defendant identified the area as “a common area” that is used for outdoor activities by residents. Trashcans for the residence are located in or near the area, and plaintiff indicated that he used the door leading to the area on a regular basis. Moreover, according to plaintiff, the area “goes to the back parking lot.” See *Benton*, 270 Mich App at 443. Accordingly, the area is a common area within the meaning of the statute.

The issue then becomes whether the area was fit for the use intended by the parties.¹ When considering the defendant’s duty under § 39(1)(a), *Allison* prefaced its analysis by considering this Court’s conclusion that the intended uses of a parking lot are parking vehicles and walking. *Allison*, 481 Mich at 429, citing *Allison v AEW Capital Mgt, LLP (On Reconsideration)*, 274 Mich App 663, 670-671; 736 NW2d 307 (2007), rev’d 481 Mich 419. The Supreme Court then stated, “We agree that the intended use of a parking lot includes the parking of vehicles.” *Id.* It did not, however, categorically state that walking was also an intended use.

Rather, the Supreme Court drew a careful distinction between parking as an intended use and reasonable access to parked vehicles. *Allison*, 481 Mich at 429-431. As this Court recently observed, “tenants do not use a parking lot for its intended use by merely walking in the lot. Walking in a parking lot is secondary to the parking lot’s primary use.” *Hadden v McDermitt Apartments, LLC*, 287 Mich App 124, 132; 782 NW2d 800 (2010). In keeping with this distinction, the Supreme Court in *Allison* rejected this Court’s conclusion that “the parking lot . . . was unfit simply because it was covered in snow and ice.” *Allison*, 481 Mich at 430. This Court’s conclusion that the parking lot was unfit was based solely on the intended use of walking on the lot. *Allison*, 274 Mich App at 670-671. Because this is not the primary purpose of the lot, as recognized by *Allison*, and because the “plaintiff did not show that the condition of the parking lot . . . precluded access to his vehicle” (a secondary purpose), *Allison*, 481 Mich at 430, our Supreme Court concluded that this Court erred in finding that the parking lot was unfit for its intended use, *id.* at 431.

¹ Because the area is not part of the “premises,” the duty of “reasonable repair” does not apply. *Allison*, 481 Mich at 432-433.

In the case at hand, a single primary purpose for the area was not identified. Rather, the primary purposes for the area were recognized as being to use the space for outdoor social activities and for taking trash to the common trashcans. In *Benton*, this Court stated that “[b]ecause the intended use of a sidewalk is walking on it, a sidewalk covered with ice is not fit for this purpose.” *Id.* at 444. Similarly, we conclude that a genuine issue of material fact exists on whether an outdoor common area used for social gatherings and accessing the tenants trashcans is fit for its intended uses when it is covered in ice and snow.

We reverse and remand to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra

/s/ Karen M. Fort Hood

/s/ Alton T. Davis