

STATE OF MICHIGAN
COURT OF APPEALS

STELLA MACK,

Plaintiff-Appellant,

v

TROY CITY SCHOOLS BOARD OF
EDUCATION,

Defendant/Cross-Plaintiff-Appellee,

and

TROY DANCE CONNECTION, INC.,

Defendant/Cross-Defendant-
Appellee.

UNPUBLISHED

August 14, 2008

No. 278406

Oakland Circuit Court

LC No. 2005-071090-NO

Before: Whitbeck, P.J., and O'Connell and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order dismissing the cross-claim of defendant/cross-plaintiff Troy City Schools Board of Education (TCSBE) against defendant/cross-defendant Troy Dance Connection, Inc. (TDC). On appeal, plaintiff challenges the trial court's orders granting defendants summary disposition. We affirm.

I. Basic Facts and Proceedings

TDC completed an application for a permit to use the Troy High School auditorium for a dance recital, as it had done on three previous occasions. In completing the application, TDC agreed to comply with the Troy School District's rules and regulations, and the permit was granted. TDC's owner, who signed the application, understood that the application constituted a contract. Plaintiff attended the recital to watch her granddaughters perform. Plaintiff left the auditorium twice to use the restroom during intermissions. During these breaks, the auditorium lights were turned on, but they were dimmed or completely turned off when the performances began again. While plaintiff was returning to the auditorium after her second trip to the restroom, she noticed that the auditorium lights were beginning to dim. She decided to sit in a row of seats near the rear of the auditorium because she did not want to navigate the aisleway steps on the way back to her assigned seat in diminished lighting, and she did not believe that she

had enough time to reach her assigned seat before the lights went down. As plaintiff stepped from the aisle into the chosen row of seats, she did not notice a nine-inch step down from the aisle to the floor of that row, and she fell, sustaining injuries. This row was the only row of the auditorium that had such a step.

Plaintiff alleged that TCSBE was liable for her injuries pursuant to the proprietary function and defective public building exceptions to the governmental tort liability act, MCL 691.1401, *et seq.* Plaintiff asserted a premises liability claim against TDC, arguing that it had possession and control over the auditorium. The trial court granted TCSBE's motion for summary disposition based on its determination that plaintiff had failed to establish a genuine issue of material fact regarding whether the proprietary function and public building exceptions applied to defeat governmental immunity. With respect to the public building exception, the trial court found that plaintiff had failed to establish a factual issue regarding whether 1) there was a dangerous or defective condition; and 2) whether TCSBE had actual or constructive knowledge of the alleged defect or whether it failed to remedy the alleged defect. The trial court also granted TDC's motion for summary disposition, finding that plaintiff had failed to establish factual issues regarding whether TDC had possession and control over the auditorium when plaintiff was injured and whether TDC had actual or constructive knowledge of the alleged dangerous condition.

II. Public Building Exception To Governmental Immunity

Plaintiff argues that the trial court erroneously granted TCSBE summary disposition on the basis that the public building exception to governmental immunity does not apply. We disagree. Plaintiff does not challenge the trial court's ruling regarding the proprietary function exception to governmental immunity in this appeal.

Governmental immunity is a question of law that we review *de novo*. *Pierce v City of Lansing*, 265 Mich App 174, 176; 694 NW2d 65 (2005). We also review the trial court's grant of summary disposition *de novo*. *Haliw v Sterling Heights*, 464 Mich 297, 301; 627 NW2d 581 (2001). We must consider all documentary evidence filed or submitted by the parties when a motion is brought pursuant to MCR 2.116(C)(7). *Id.* at 301-302. When a party moves pursuant to MCR 2.116(C)(10), "we must consider the affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties in the light most favorable to the party opposing the motion." *Id.* at 302. Summary disposition is appropriately granted if the evidence shows that there is no genuine issue of material fact, "and the moving party is entitled to judgment as a matter of law." *Id.*

Governmental immunity is broadly conferred, and exceptions must be narrowly construed. *Pohutski v Allen Park*, 465 Mich 675, 689; 641 NW2d 219 (2002). The public building exception to governmental immunity, MCL 691.1406, provides that "[g]overnmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public." Our Supreme Court has discussed the public building exception as follows:

[I]n order for a plaintiff to avoid governmental immunity under the public building exception, the plaintiff must prove that (1) a governmental agency is involved, (2) the public building in question is open for use by members of the

public, (3) a dangerous or defective condition of the public building itself exists, (4) the governmental agency had actual or constructive knowledge of the alleged defect, and (5) the governmental agency failed to remedy the alleged defective condition after a reasonable amount of time. [*Renny v Dep't of Transportation*, 478 Mich 490, 495-496; 734 NW2d 518 (2007).]

TCSBE is a governmental agency, MCL 691.1401(b), (d), and it is undisputed that the auditorium was open to members of the public. Plaintiff contends that there is a genuine issue of material fact regarding whether the step constitutes a dangerous or defective condition.

At oral arguments, plaintiff conceded that her design defect claim was not viable under the public building exception to governmental immunity pursuant to *Renny*, *supra* at 492, 507, which was decided while this appeal was pending.¹

In asserting that there was a dangerous or defective condition, plaintiff contends that TCSBE failed to repair or maintain aisle lighting or other warnings. Plaintiff testified in her deposition that there were no lights illuminating the stairs, and her expert opined that the aisle lights were either not installed or had burnt out. TCSBE's expert averred, however, that "the aisle step in question [was] illuminated with a chair aisle light that would make the step down readily apparent." Therefore, there is a genuine issue of material fact with respect to whether TCSBE failed to repair and maintain the aisle lighting.

There is no evidence that TCSBE had actual notice of the alleged lighting defect. MCL 691.1406 provides, "[k]nowledge of the dangerous and defective condition of the public building and time to repair the same shall be conclusively presumed when such defect existed so as to be readily apparent to an ordinary observant person for a period of 90 days or longer before the injury took place." Given that plaintiff presented no evidence that the lighting was defective for 90 days or more before the incident, there is no presumption that TCSBE had knowledge that the aisle lighting was allegedly malfunctioning or missing. One may show constructive notice by demonstrating that "the agency should have discovered the defect in the exercise of reasonable diligence." *Ali v Detroit*, 218 Mich App 581; 554 NW2d 384 (1996). TCSBE received no reports or complaints of injuries regarding the step in the 14 years between the time the auditorium was built and the time of plaintiff's injury. Although plaintiff's expert averred that the auditorium did not meet the building and fire codes that were enacted after the building was constructed, TCSBE presented evidence that the auditorium complied with the building code that was in effect when the auditorium was constructed. Therefore, plaintiff has presented no evidence that TCSBE should have discovered, through the exercise of reasonable diligence, that the chair aisle lights failed to illuminate the step. Therefore, the trial court properly granted TCSBE summary disposition on plaintiff's defective public building exception claim.

¹ The Troy High School auditorium was built in 1992, and it is undisputed that the condition of the step in question has been in existence since that time. Plaintiff did not assert that the step was in a state of disrepair, broken, or in any way not maintained from its prior condition; rather, she argued that its configuration, the nine-inch step and its placement, was a structural defect.

III. Premises Liability

Plaintiff contends that the trial court erred in granting summary disposition on her claim against TDC on the basis that she failed to establish a genuine issue of material fact regarding whether TDC has possession and control over the auditorium. We disagree.

“In a premises liability action, a plaintiff must prove (1) that the defendant owed a duty to the plaintiff, (2) that the defendant breached the duty, (3) that the defendant’s breach of the duty caused the plaintiff’s injuries, and (4) that the plaintiff suffered damages.” *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712; 737 NW2d 179 (2007). Where an invitor does not have possession and control over the premises, it does not owe an invitee a duty. *Orel v Uni-Rak Sales Co*, 454 Mich 564, 565; 563 NW2d 241 (1997); *Hampton v Waste Mgt of Michigan, Inc*, 236 Mich App 598, 603; 601 NW2d 172 (1999). Premises liability requires that TDC was a “possessor” of the auditorium when plaintiff was injured. See *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 702; 644 NW2d 779 (2002). A possessor is:

- (a) a person who is in occupation of the land with intent to control it or
- (b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or
- (c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b). [*Id.*, quoting *Merritt v Nickelson*, 407 Mich 544, 552; 287 NW2d 178 (1980) (internal quotation marks and additional citation omitted).]

The term “possession” has been defined as “[t]he right under which one may exercise control over something to the *exclusion of all others*.” *Id.* at 703, quoting Black’s Law Dictionary (7th ed) (emphasis and change in original). This Court has defined “control” as “exercis[ing] restraint or direction over; dominate, regulate, or command[.]” *id.*, quoting *Random House Webster’s College Dictionary* (1995) (change in original), or “the power to . . . manage, direct, or oversee[.]” *id.*, quoting Black’s Law Dictionary (7th ed) (deletion in original). Premises liability requires “both possession and control over the land” because the one with possession and control is usually in the best position to prevent harm to others. *Kubczak v Chem Bank & Trust Co*, 456 Mich 653, 661-662; 575 NW2d 745 (1998); *Derbabian, supra* at 705. Possession and control can be loaned to another, *Orel, supra* at 568, applying *Merritt, supra* at 552-553, and parties may share possession and control, *Rockwell v Hillcrest Country Club, Inc*, 25 Mich App 276, 289-290; 181 NW2d 290 (1970).

When TDC submitted its application for a permit to use the auditorium, it agreed to the rules and regulations established by the Troy School District. These regulations required that at least one custodian would be on duty and provided that TDC was not permitted to use other school equipment or other areas of the school. Additionally, TDC was required to obtain additional approval to hang special decorations, in order to ensure that the decorations conformed to applicable fire regulations. When the permit was issued, it provided that a custodian, a theater manager, at least one student lighting technician, and at least one student audio technician were required. TDC provided volunteer ushers to escort its guests to their seats. However, guests were not required to utilize their services, and the ushers did not remain at their

stations for the entire recital. To the extent that the provision of ushers constitutes an exercise of control, it is an exercise of control over the guests, not the premises. There is no evidence that TDC was allowed to exercise restraint or direction over the auditorium or dominate the auditorium. See *Derbajian, supra* at 703. Similarly, there is no evidence that TDC had the power to manage, direct, or oversee the auditorium. See *id.* Although TDC conducted performances and impliedly directed or managed the performers, there is no indication that it directed or managed the premises. The contract merely provided TDC permission to use the auditorium for approximately 12 hours for a dress rehearsal and recital performances. There is no evidence that TDC assumed any responsibility for building maintenance or had the authority to repair any allegedly broken aisle lighting. TDC did not have the right to exercise control over the auditorium to the exclusion of others, and it was not in the best position to prevent plaintiff's injury. Therefore, TDC lacked possession and did not owe plaintiff a duty. *Hampton, supra* at 603.

In addition, the inclusion of a waiver of liability provision in the permit application does not necessarily lead to a conclusion that TDC had possession and control of the premises. The provision merely indicates that TDC agreed to accept full responsibility for any injuries or damages occurring to TDC or its guests and to release and discharge the school district from claims arising out of the use of the facilities and equipment. It does not indicate that the school district gave possession and control of the auditorium to TDC, or that TDC assumed any duty to maintain or repair the premises. Thus, viewing the facts in the light most favorable to plaintiff, no genuine factual issue was presented with respect to whether TDC exercised possession and control over the premises. The trial court properly granted TDC summary disposition.

Plaintiff also argues that TDC had constructive notice of the step and that the step was not an open and obvious condition. However, given our resolution of plaintiff's argument regarding possession and control, it is unnecessary to address these arguments.

Affirmed.

/s/ William C. Whitbeck
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly