STATE OF MICHIGAN

COURT OF APPEALS

DEBORA HONAKER,

Plaintiff-Appellant,

v

ROCHESTER LUDLOW APARTMENTS,

Defendant-Appellee.

UNPUBLISHED
February 26, 2019

No. 341629
Oakland Circuit Court
LC No. 2017-156635-NO

Before: JANSEN, P.J., and BECKERING and O'BRIEN, JJ.

PER CURIAM.

Plaintiff, Debora Honaker, appeals as of right from the trial court's order granting summary disposition to defendant, Rochester Ludlow Apartments, pursuant to MCR 2.116(C)(10) (no genuine issue of material fact, movant entitled to summary disposition as a matter of law). We affirm.

I. RELEVANT FACTS AND PROCEDURAL HISTORY

In January 2014, plaintiff was leaving her apartment on the way to the post office when she slipped and fell on an outside landing leading to a set of exterior steps. Plaintiff claimed that she slipped because of an accumulation of ice and snow. In January 2017, plaintiff filed a three-count complaint alleging premises liability under common-law and statutory theories, one count of ordinary negligence, and one count of nuisance. With regard to each count, plaintiff alleged in essence that defendant's failure to clear the ice and snow accumulated on the landing created and maintained a dangerous condition, in violation of its common-law and statutory duties owed plaintiff, and that this breach of duty resulted in plaintiff's injury. Defendant filed an answer the following month, and the month after that, the trial court entered a scheduling order, pursuant to which the parties had until July 24, 2017, to complete discovery, and August 23, 2017, to file dispositive motions. The court later entered a stipulated order rescheduling the dates to October 23, 2017, and November 21, 2017, respectively.

On August 4, 2017, defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(8) (failure to state a claim) and (C)(10). Defendant attached to its motion plaintiff's photograph of the landing showing that there was considerable snow on the ground and bushes,

but that the landing and steps had obviously been cleared and salted. Defendant also attached a transcript of plaintiff's deposition, in which she testified that the photograph depicted the condition of the landing on the morning she had slipped and that she was not sure she had slipped on ice and snow; she might simply have fallen. Finally, defendant attached a report from an independent medical examiner taking issue with the proximate cause of several of plaintiff's stated injuries.

On August 7, 2017, the trial court entered an order scheduling defendant's summary disposition motion to be heard on October 11, 2017. The order gave plaintiff until September 13, 2017, to file a response brief and it gave defendant until September 20, 2017, to file an optional reply brief. On September 7, 2017, the trial court entered an order amending and extending the deadlines due to the unavailability of plaintiff's counsel on the scheduled hearing date. The trial court ordered that plaintiff's response brief was due by October 18, 2017, and defendant's optional reply brief was due by October 25, 2017. The court moved the summary disposition hearing date to November 8, 2017. Plaintiff did not file a response by October 18, 2017. On October 25, 2017, plaintiff still not having filed a response, defendant filed a supplemental brief reserving the right to file a reply brief should plaintiff file an untimely response.

If the court had not provided otherwise in its scheduling order, the court rules would have allowed plaintiff until November 1, 2017, to file a response to defendant's motion for summary disposition, given that the hearing date was set for November 8, 2017. MCR 2.116(G)(1)(ii) ("any response to the motion (including brief and any affidavits) must be filed and served at least 7 days before the hearing"). As of November 1, 2017, plaintiff had still not filed a brief or provided any affidavits, depositions, admissions, or other documentary evidence in opposition to defendant's motion for summary disposition.

On November 2, 2017, the trial court dispensed with oral argument pursuant to MCR 2.119(E)(3)[1] and issued an opinion and order granting defendant's motion for summary disposition. The court reviewed defendant's motion and the attached exhibits, acknowledged the fact that plaintiff failed to file a response opposing defendant's motion, and held:

> Plaintiff failed to meet her burden of evidencing any genuine issue of material fact as to whether Defendant violated its statutory or common law duties to Plaintiff. Having failed to meet her burden of proof in this regard, summary disposition is warranted as to Plaintiff's entire Complaint, pursuant to MCR 2.116(C)(10) and *Smith* [*v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999) . . . .

Subsequently, plaintiff filed a timely motion for reconsideration, arguing that the trial court had provided little or no legal analysis of her allegations of ordinary negligence and

[1] MCR 2.119(E)(3) provides: "A court may, in its discretion, dispense with or limit oral arguments on motions, and may require the parties to file briefs in support of and in opposition to a motion."

nuisance, and that summary disposition was inappropriate because discovery was ongoing and because dismissal was an excessively harsh sanction for plaintiff's single, unintentional violation of the court's scheduling order. Among the attachments to plaintiff's motion was the transcript of the deposition of defendant's property manager, including notices showing that the deposition had been rescheduled three times and was finally taken on the date the trial court granted defendant's motion for summary disposition.

The trial court entered an opinion and order on December 5, 2017, denying plaintiff's motion for reconsideration, reasoning as follows:

> Upon thorough review of the record, the Court finds that Plaintiff's Motion for Reconsideration merely presents the same issues ruled upon by the Court either expressly or by reasonable implication. The Court notes that Plaintiff's motion seeks reconsideration of the Court's Opinion and Order by presenting arguments in opposition to Defendant's dispositive [sic], which Plaintiff failed to provide previously to this Court. Indeed, Plaintiff provided *no opposition* to Defendant's dispositive motion. Moreover, Plaintiff's Motion for Reconsideration failed to provide this Court with *any* explanation for her failure to respond to the underlying dispositive motion and/or her failure to seek leave from the Court to file an untimely Response to same.
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> Consequently, it is this Court's opinion that Plaintiff failed to demonstrate a palpable error by which the Court and the parties have been misled, and furthermore, show that a different disposition of the underlying motion must result from correction of the alleged error as set forth in MCR 2.119(F)(3).

II. ANALYSIS

A. SUMMARY DISPOSITION AS A SANCTION

Plaintiff raises two issues on appeal. First, she argues that the trial court erred in granting defendant's motion for summary disposition because dismissing her case was an excessively harsh sanction for violating the trial court's scheduling order by not filing a timely response to defendant's motion for summary disposition. We disagree with plaintiff's characterization of the trial court's summary disposition decision as a "sanction," and affirm the order of the trial court granting defendant's motion for summary disposition on the merits. We review de novo a trial court's decision on a motion for summary disposition. *Allison v AEW Capital Management, LLP*, 481 Mich 419, 424; 751 NW2d 8 (2008). The Court reviews the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law. See *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998). Review is limited to the evidence the parties had presented to the trial court at the time the trial court decided the motion. *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 476; 776 NW2d 398 (2009).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). The moving party must specifically identify the matters that have no disputed factual issues, and

has the initial burden of supporting his position by affidavits, depositions, admissions, or other documentary evidence. *Bronson Methodist Hosp v Auto-Owners Ins Co*, 295 Mich App 431, 440; 814 NW2d 670 (2012). The party opposing the motion then has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists. MCR 2.116(G)(4); *Bronson Methodist Hosp*, 295 Mich App at 441. A court must consider the evidence submitted in the light most favorable to the nonmoving party. *Joseph*, 491 Mich at 206. 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 could differ. *Debano-Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013).

As the trial court made clear in its November 2, 2017 opinion and order, the effect of plaintiff's failing to file a response was that she did not oppose defendant's evidence with any contradictory or other evidence in support of her claim and create a genuine issue of material fact that would preclude summary disposition pursuant to MCR 2.116(C)(10). After defendant moved for summary disposition under (C)(10) and provided proper evidentiary support for its motion, plaintiff could not merely rest upon the allegations in her complaint, but had to, "by affidavits or as otherwise provided in [MCR 2.116], set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4). If the court found that defendant was entitled to summary disposition, the court rules obligated the court to enter judgment immediately for defendant. MCR 2.116(G)(4) ("If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her."); MCR 2.116(I)(1) ("If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay."). As we read the record, this is precisely what the trial court did.

B. MOTION FOR RECONSIDERATION

Plaintiff's second argument on appeal is that the trial court erred in granting summary disposition on all counts of plaintiff's complaint without reviewing the facts in the light most favorable to plaintiff. This is a two-pronged argument. Plaintiff first contends that the trial court inadequately analyzed plaintiff's negligence and nuisance claims in its opinion and order granting defendant's motion for summary disposition. We disagree.

"Courts are not bound by the labels that parties attach to their claims." *Buhalis v Trinity Continuing Care Services*, 296 Mich App 685, 691; 822 NW2d 254 (2012) "[T]he gravamen of an action is determined by reading [a plaintiff's] complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim." *Id*. at 691-692 (quotation marks and citation omitted). "Michigan law distinguishes between claims arising from ordinary negligence and claims premised on a condition of the land." *Id*. at 692. "If the plaintiff's injury arose from an allegedly dangerous condition on the land, the action sounds in premises liability rather than ordinary negligence; this is true even when the plaintiff alleges that the premises possessor created the condition giving rise to the plaintiff's injury." *Id*.

In the case at bar, plaintiff's allegations of negligence sound in premises liability, not ordinary negligence, because her injuries stem from an allegedly dangerous condition (the accumulation of snow and ice) on defendant's land. *Buhalis*, 296 Mich App at 692. Plaintiff's allegations of nuisance simply incorporate the factual allegations upon which she relies to state

her complaint for premises liability and ordinary negligence. Thus, to the extent that plaintiff implies defendant interfered with her rightful use or enjoyment of the property by creating and maintaining accumulations of ice and snow through its failure to act, her allegations of nuisance also sound in premises liability. *Id*.; see also *Fuga v Comerica Bank – Detroit*, 202 Mich App 380, 383; 509 NW2d 778 (1993), abrogated on other grounds in *Xu v Gay*, 257 Mich App 263, 267-268; 668 NW2d (2003). Thus, because plaintiff's counts for ordinary negligence and for nuisance sound in premises liability, dismissal of these counts was proper. See *Buhalis*, 296 Mich App at 692.

Moreover, it does not appear to us that the trial court erred in granting defendant's motion for summary disposition on the merits. Plaintiff alleged premises liability claims based on both the common law and MCL 554.139(1).[2] To prevail on her common-law claim, plaintiff had to prove the elements of negligence: duty, breach, causation, and damages. See *Loweke*, 489 Mich at 162; *Benton v Dart Props, Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006). Under the common law, a property owner owes its tenant-invitee "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." *Benton*, 270 Mich App at 440 (citation and quotation marks omitted). "Absent special aspects, this duty generally does not require the owner to protect an invitee from open and obvious dangers." *Id*. at 440-441. "Where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee." *Buhalis*, 296 Mich App at 693 (citation and quotation marks omitted). "Generally, the hazard presented by snow and ice is open and obvious, and the landowner has no duty to warn of or remove the hazard." *Id*. at 694.

To prevail on her statutory claim, plaintiff had to prove that the landing upon which she slipped was not fit for the use intended by the parties to plaintiff's residential lease. MCL 554.139(1)(a). "MCL 554.139 provides a specific protection to lessees and licensees of residential property in *addition* to any protection provided by the common law." *Allison*, 481 Mich at 425. "The statutory protection under MCL 554.139(1) arises from the existence of a residential lease and consequently becomes a statutorily mandated term of such lease." *Id*. "Therefore, a breach of the duty to maintain the premises under MCL 554.139(1)(a) . . . would be construed as a breach of the terms of the lease between the parties and any remedy under the statute would consist exclusively of a contract remedy." *Id*. at 425-426. Furthermore, "a defendant cannot use the open and obvious danger doctrine to avoid lability when the defendant has a statutory duty to maintain the premises in accordance with MCL 554.139(1)(a) or (b)." *Id*. at 425 & n 2. Under MCL 554.139, a lessor must keep common areas – like stairways, hallways,

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[2] MCL 554.139(1) provides in relevant part:

> (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.

sidewalks, and parking lots—fit for their intended use, but need not keep such areas in perfect condition. See *Allison*, 481 Mich at 429-430 (holding that a parking lot covered with one to two inches of snow, under which lay ice, was nevertheless fit for its intended use as a parking lot).

Viewing the evidence attached to defendant's motion for summary disposition in the light most favorable to plaintiff, we cannot say that the trial court erred in concluding that defendant properly supported its position and that plaintiff failed to present evidence of a genuine issue of material fact as to whether defendant breached its common law or statutory duties. As already indicated, both the photographic and deposition evidence indicated that any risk of slipping and falling on the landing was open and obvious, given the wintry conditions on the ground and landscaping, and that defendant had sufficiently cleared the landing and steps of accumulations of snow and ice to render them fit for their intended use.

The second prong of plaintiff's argument is that the trial court should have considered the factual evidence she submitted with her motion for reconsideration in the light most favorable to plaintiff and reversed its dismissal of plaintiff's premises liability claim. Plaintiff refers here to factual evidence she attached to her motion for reconsideration. Essentially, then, plaintiff is arguing that the trial court erred in denying her motion for reconsideration. Again, we disagree.

MCR 2.119(F) provides in relevant part:

> Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

"As a general matter, courts are permitted to revisit issues they previously decided, even if presented with a motion for reconsideration that offers nothing new to the court." *Hill v City of Warren*, 276 Mich App 299, 307; 740 NW2d 706 (2007). MCR 2.119(F) grants trial courts "considerable discretion in granting reconsideration to correct mistakes, to preserve judicial economy, and to minimize costs to the parties." *Al-Maliki v LaGrant*, 286 Mich App 483, 486; 781 NW2d 853 (2009), citing *Kokx v Bylenga*, 241 Mich App 655, 659; 617 NW2d 368 (2000). "The trial court may even give a party a second chance on a previously decided motion." *Al-Maliki*, 286 Mich App at 486.

Plaintiff argues on appeal that, upon filing a motion for reconsideration, "the Trial Court was on notice that there in fact was a set of facts which presented the matter in a light more favorable to the Plaintiff than that submitted previously by Defendant. At that point, something very different than that which the Trial Court had previously considered was now before it." Not only does plaintiff overestimate the persuasiveness of the evidence she submitted with her motion for reconsideration, but she errs in assuming that the trial court was required to view such facts in a light more favorable to plaintiff. That is the standard for reviewing a motion for summary disposition. See *BC Tile & Marble Co, Inc*, 288 Mich App at 582-583. Instead, the trial court had the discretion to revisit plaintiff's newly raised arguments. See MCR 2.119(F)(3);

Hill, 276 Mich App at 307. The trial court determined plaintiff failed to demonstrate palpable error and merely presented the same issues that the trial court already decided.

The only exhibit previously unavailable and potentially relevant to the question of whether defendant breached its duty was the deposition transcript of defendant's property manager, Karen Ellenberger. We see nothing in Ellenberger's testimony that raises a genuine issue of material fact that defendant breached its common-law or statutory duty to plaintiff. Ellenberger agreed with plaintiff's attorney that ice makes a landing unfit for its intended use and that one cannot safely stand on a landing covered with ice. However, she testified that, upon physical inspection shortly after plaintiff notified her of the slip-and-fall incident, the landing at issue appeared clear of snow and ice. This was consistent with plaintiff's testimony as well as with plaintiff's photograph of the area. Thus, read as a whole, Ellenberger's deposition testimony did not create a genuine issue of material fact that defendant breached its duty to plaintiff. In light of the record before us, we conclude that the trial court did not abuse its discretion in denying plaintiff's motion for reconsideration.

Affirmed.

/s/ Kathleen Jansen
/s/ Jane M. Beckering
/s/ Colleen A. O'Brien