STATE OF MICHIGAN

COURT OF APPEALS

KATRINA HILTON,

Plaintiff-Appellant,

v

BARRINGTON GROUP, INC. and GINGER APARTMENTS, L.P.,

Defendants-Appellees.

UNPUBLISHED
November 17, 2009

No. 282312
Oakland Circuit Court
LC No. 2007-080703-NS

Before: Markey, P.J., and Fitzgerald and Gleicher, JJ.

PER CURIAM.

In this premises liability action, plaintiff appeals as of right from a circuit court order granting summary disposition to defendants Barrington Group, Inc. and Ginger Apartments, L.P., pursuant to MCR 2.116(C)(10). We reverse and remand.

I. Entry of Default Judgment

Plaintiff initially challenges on appeal the circuit court's decision to set aside a default entered against Ginger Apartments. Plaintiff filed her initial complaint on February 7, 2008, alleging that the Barrington Group owned the apartment complex where she fell. Barrington answered the complaint on April 2, 2007 and identified Ginger Apartments as the owner of the complex and a nonparty at fault pursuant to MCL 600.6304 and MCR 2.112(K)(3). On May 21, 2007, plaintiff filed a "First Amended Complaint as of Right," adding Ginger Apartments as a party defendant and asserting the same claims contained in her initial complaint. On May 28, 2007, plaintiff served the Corporation Company, Ginger Apartments's registered agent, with the summons and complaint. Barrington answered the first amended complaint on June 12, 2007.

On July 24, 2007, approximately 56 days after the Corporation Company received service of the first amended complaint, plaintiff sought and obtained entry of Ginger Apartments's default. A week later, Ginger Apartments moved to set aside the default, averring that Larry Solove, "one of" Ginger Apartments's "designated General Partners" and the person to whom the Corporation Company forwarded the summons and complaint, "had been hospitalized and, as a result, was unable to receive mail or otherwise timely act upon the First Amended Complaint." Ginger Apartments attached an affidavit signed by Richard S. Rivitz, who described himself as a "friend, personal advisor and attorney" for Solove, and Ginger Apartments's corporate counsel. Rivitz asserted in the affidavit,

> Larry was hospitalized for well over a month and a half beginning sometime in mid May of this year and has only been transferred from the hospital to a stepped-down recovery and rehabilitation unit on July 19 or July 20, where Larry continues to recover as of the date of this affidavit from serious inflictions, complications and treatments for various health related matters. Due to his hospitalization and rehabilitation unit confinement, Larry was at the time of service of the Complaint and continues to be, unable to receive mail or otherwise timely act upon the Complaint.

Ginger Apartments further argued that plaintiff had improperly filed her first amended complaint without leave of the court in violation of MCR 2.118(A), and that it possessed a meritorious defense.

On August 8, 2007, the circuit court heard argument regarding Ginger Apartments's motion. The transcript of the motion hearing reflects that after counsel concluded their arguments, the court requested that counsel "approach for a minute, please?" After a one-minute bench conference, the circuit court announced, "The Court's going to set it aside upon the paying of a thousand dollars within 14 days to the plaintiff." The court offered no further reasoning or explanation for its decision to set aside the default.

Plaintiff contends that the circuit court lacked any basis to set aside the default. This Court reviews for an abuse of discretion a circuit court's decision whether to set aside a default. *Shawl v Spence Bros, Inc*, 280 Mich App 213, 220; 760 NW2d 674 (2008). An abuse of discretion occurs when the circuit court's ruling falls "outside the range of reasonable and principled outcomes." *Id*. at 221 (internal quotation omitted).

The Michigan Court Rules govern the setting aside of a default or default judgment. MCR 2.603(D). To warrant the setting aside of a default, the defaulting party bears the burden of demonstrating both good cause and a meritorious defense, pursuant to MCR 2.603(D)(1). *Alken-Ziegler, Inc v Waterbury Headers, Corp*, 461 Mich 219, 229; 600 NW2d 638 (1999). "Good cause" encompasses either (1) a substantial procedural defect or irregularity, or (2) "a reasonable excuse for failure to comply with the requirements that created the default." *Id*. at 233. "[I]f a party states a meritorious defense that would be absolute if proven, a lesser showing of 'good cause' will be required than if the defense were weaker, in order to prevent a manifest injustice." *Id*. at 233-234.

Although we feel sympathy for Solove's suffering of "serious inflictions, complications and treatments for various health related matters," as described by Rivitz, we reject that in the context of a lawsuit against a general partnership, one partner's illness automatically supplies good cause to set aside a default entered against the partnership. According to Rivitz's affidavit, Solove is but one of Ginger Apartments's general partners. The affidavit omits any mention of when Rivitz, Solove's friend and "personal advisor," first learned of Solove's illness and incapacity. The affidavit also fails to mention when the other general partners realized that Solove was ill, and is entirely silent regarding the efforts Rivitz and Ginger Apartments's other partners made to substitute for Solove during his illness. Although the affidavit avers that Solove lacked the ability "to receive mail or otherwise timely act upon the Complaint," it says nothing about the actions or capacities of the other general partners during the period of Solove's incapacity.

These telling omissions substantially undercut Ginger Apartments's claim that it lacked culpability for failing to timely respond to plaintiff's complaint. Furthermore, Rivitz's statements that "Larry had no prior knowledge of the pending action" and "was unable to receive mail" embody hearsay. MRE 801(c). The affidavit simply provides insufficient support for a conclusion that *Ginger Apartments* could not respond to plaintiff's complaint within the requisite time frame. Given the demonstrably inadequate record establishing good cause and the circuit court's silence regarding the reasons it set aside the default of Ginger Apartments, we conclude that the circuit court's order setting aside the default falls beyond the range of principled rulings under the circumstances of this case, and reverse the order.

II. Plaintiff's Premises Liability Claim

Plaintiff tripped and fell on a step on her way into the apartment building's laundry room. The single step at issue is gray in color, as is the surrounding floor. Photographs submitted to the circuit court reveal that because the colors of the step and the surrounding floor are uniformly gray, the step appears virtually invisible from the doorway of the laundry room. We find that the photographs and other evidence produced in response to the motion for summary disposition establish genuine issues of material fact with regard to whether the step was open and obvious and detectable on casual inspection.

We review de novo the circuit court's summary disposition ruling. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). In reviewing a motion premised on MCR 2.116(C)(10), which tests a claim's factual support, we "consider[] 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." *Id.*

The circuit court reasoned as follows in granting defendants summary disposition:

> The Court has considered the argument . . . and evidence presented in a light most favorable to the plaintiff; however, the Court finds there's no question of fact. The step at issue was open and obvious and did not present an unreasonable risk of harm. . . .
>
> Stairs are a common everyday occurrence, including stairs painted the same color as the connected floor. The evidence in this case is there's never been a problem with the step at issue, plus . . . defendant's [sic] had no actual or constructive notice of any defect in the premises. In addition, plaintiff admitted had she looked where she was walking, she probably would've seen the step . . . .
>
> In short, there's no evidence in this case that the condition of steps or stairs had special aspects that differentiate them from typical open and obvious risks. . . . Similarly, because the steps are open and obvious, there's no support for plaintiff's claim that defendant created a dangerous condition.

The circuit court did not consider an affidavit that plaintiff proffered from licensed professional engineer Charles Reynolds, explaining that "the affidavit does not set forth any qualifications

with regard to the building industry," "the affidavit sets forth only conclusions," and "the testimony set forth in the affidavit would not be admissible under MRE 702."

We first consider the propriety of the circuit court's rejection of Reynolds's affidavit. Reynolds opined, in relevant part,

> . . . [T]he single step-down, or single riser step created a hazard to safe pedestrian traffic, due to the fact that both the upper level and lower level of the floor were painted the same monotone gray color. It is extremely difficult to recognize a change in elevation when the surfaces are of the same monotone color and texture, and the sight angle makes recognition of the change in elevation of the walking surfaces nearly impossible.
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> * * *
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> My examination of the photographs (Deposition Exhibits) show [sic] that the single step-down was located approximately three feet inside of the door to the laundry room, and that there were no contrasting colors of floor between the two levels, and that a person entering has no warning or visual cue that there is a step-down. This is unreasonably hazardous and is not open and obvious on casual inspection.

No legal foundation supports the circuit court's striking of the Reynolds affidavit, which contrary to the circuit court's characterization, did not contain "only conclusions." Pursuant to MCR 2.116(G)(6), "[a]ffidavits . . . offered in support of or in opposition to a motion based on subrule (C)(1)–(7) or (10) shall only be considered to the extent *that the content or substance would be admissible as evidence* to establish or deny the grounds stated in the motion." (Emphasis added). In addressing this requirement, our Supreme Court in *Maiden v Rozwood*, 461 Mich 109, 124 n 6; 597 NW2d 817 (1999), approvingly quoted *Winskunas v Birnbaum*, 23 F3d 1264, 1267-1268 (CA 7, 1994), which explained,

> The evidence need not be in admissible form; affidavits are ordinarily not admissible evidence at a trial. But it must be admissible in content. . . . Occasional statements in cases that the party opposing summary judgment must present admissible evidence . . . should be understood in this light, as referring to the content or substance, rather than the form, of the submission.

Our Supreme Court thus has directed that evidence submitted in support of or opposition to a motion for summary disposition must be admissible in *substance*, not form. *Maiden*, *supra* at 124 n 6.

Furthermore, the circuit court erroneously opined that Reynolds's affidavit must meet the same reliability standards as expert trial testimony under MRE 702. According to MCR 2.119(B)(1),

> If an affidavit is filed in support of or in opposition to a motion, it must:
>
> (a) be made on personal knowledge;

(b) state with particularity facts admissible as evidence establishing or denying the grounds stated in the motion; and

(c) show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated in the affidavit.

This court rule does not require that an expert incorporate his specific qualifications and methods into an affidavit. Moreover, the requirements of MRE 702 are foundational, and relate to testimony. Defendants cite no authority in support of the proposition that the reliability requirements of MRE 702 apply to affidavits submitted in connection with a motion for summary disposition.

In summary, Reynolds's affidavit sets forth facts and opinions that qualify as admissible in content and substance. Whether Reynolds's engineering training and background supply an adequate foundation for his testimony may be subjects of a gatekeeping hearing conducted pursuant to *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 782; 685 NW2d 391 (2004). But under the governing standards contained in MCR 2.119(B)(1), concerns about the depth of Reynolds's engineering knowledge do not warrant the striking of his affidavit.

However, even without consideration of Reynolds's affidavit, the record evidence gives rise to genuine issues of material fact whether the step qualified as open and obvious. In *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992), our Supreme Court defined open and obvious hazards as dangers known to the invitee or "so obvious that the invitee might reasonably be expected to discover them." When a potentially dangerous condition "is wholly revealed by casual observation," the premises owner owes its invitees no duty to warn of the danger's existence. *Novotney v Burger King Corp* (*On Remand*), 198 Mich App 470, 474-475; 499 NW2d 379 (1993). The test for an open and obvious danger focuses on the inquiry: Would an average person of ordinary intelligence discover the danger and the risk it presented on casual inspection? *Id*. at 475. Our Supreme Court has explicitly cautioned that when applying this test, "it is important for courts … to focus on the objective nature of the condition of the premises at issue, not the subjective degree of care used by the plaintiff." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 523-524; 629 NW2d 384 (2001).

In light of the photographs depicting a step that is indistinguishable from the surrounding floor, genuine issues of fact exist concerning two separate legal questions: whether the step amounts to an open and obvious condition, and if so, whether it presented an unreasonable risk of harm. If a condition is open and obvious as a matter of law, a court still must consider whether a genuine issue of fact exists that the open and obvious condition qualifies as unreasonably dangerous. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 618; 537 NW2d 185 (1995).

Reasonable minds viewing the photographs could differ with respect to whether the existence of the step qualified as obvious to a reasonable invitee on *casual inspection*. M CIF JI 19.03. The circuit court failed to focus its analysis on the objective consideration of how the entire scene presented to an average laundry-room user. The task of interpreting the photographic cues and whether they adequately warned of the step's presence belongs to the jury.

Moreover, even accepting the circuit court's opinion that the step was open and obvious, a question of fact exists regarding whether it presented an unreasonably dangerous condition. A person wishing to make use of the apartment building's laundry facilities had no choice but to traverse the gray step to enter the laundry room, making it effectively unavoidable. And the step's visibility depended on distinguishing its contours within a uniformly gray field of view. The monotone color scheme in the laundry room and the step's unavoidability, when viewed in the light most favorable to plaintiff, give rise to a genuine issue of material fact whether these special aspects of the laundry room step "differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm[.]" *Lugo*, *supra* at 517; *Bertrand*, *supra* at 614.

We lastly reject defendants' contention that they lacked "notice" of the step's dangerous character. The notice doctrine does not apply where the premises owner itself unreasonably creates, tolerates or causes a dangerous condition. *Hampton v Waste Mgt of Michigan, Inc*, 236 Mich App 598, 604-605; 601 NW2d 172 (1999). Moreover, "[g]enerally, the question of whether a defect has existed a sufficient length of time and under circumstances that the defendant is deemed to have notice is a question of fact, and not a question of law." *Banks v Exxon Mobil Corp*, 477 Mich 983, 984; 725 NW2d 455 (2007).

In conclusion, because material questions of fact exist regarding both the open and obvious nature of the step and its inherent dangerousness, we reverse the circuit court's order granting defendants summary disposition and remand for trial.

Reversed and remanded. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Elizabeth L. Gleicher