STATE OF MICHIGAN

COURT OF APPEALS

JAMES R. WEBB, SR. and TINA M. WEBB,

Plaintiffs-Appellants,

v

MECA ASSOCIATES,

Defendant-Appellee.

UNPUBLISHED
September 18, 2003

No. 240067
Jackson Circuit Court
LC No. 00-002320-NO

Before: Smolenski, P.J., and Murphy and Wilder, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting defendant's motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

In October 1978 defendant, a Michigan partnership whose partners include Jeff Jacobs, leased a manufacturing facility to Michigan Extruded Aluminum, a corporation owned by the Jacobs family. Pursuant to the terms of the lease, defendant was responsible for repairs to the roof and the outer walls of the building. Effective January 1, 1991, defendant and Michigan Extruded agreed to continue the lease on a month-to-month basis. Michigan Extruded retained exclusive possession of the premises at all times. In 1995, Michigan Extruded replaced the concrete floor in the facility.

On October 28, 1999, Tina Webb, an employee of Michigan Extruded, sustained injuries when a piece of equipment she was moving became caught in a crack in the floor and fell on her. Plaintiffs filed the instant suit alleging that defendant knew or had reason to know of the dangerous condition of the floor in the facility, and negligently failed to maintain the premises in a reasonably safe condition and to warn of the unsafe condition. James Webb sought damages for loss of consortium.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), arguing that it did not owe a duty to Tina Webb because it did not have possession and control of the premises on which she was injured. Pursuant to the lease, Michigan Extruded assumed all responsibility for maintenance of the floor in the facility. Defendant also argued that it did not owe a duty to Tina Webb because the cracks in the floor were open and obvious. In response,

plaintiffs argued that if at the time it entered into the month-to-month lease agreement defendant knew or had reason to know of the dangerous condition of the floor in the facility, it had a continuing duty to exercise reasonable care to protect Tina Webb, a business invitee, from the dangerous condition. Plaintiffs further argued that under the terms of the month-to-month lease agreement defendant had a duty to determine the condition of the premises at the beginning of each month and to take reasonable steps to protect invitees from any dangerous conditions on the premises. Plaintiffs requested leave to amend their complaint to allege nuisance in fact in the event the trial court granted summary disposition in favor of defendant.

The trial court granted defendant's motion for summary disposition, concluding that defendant did not owe a duty to Tina Webb to maintain the floor. The trial court found that pursuant to the terms of the original lease, Michigan Extruded was responsible for maintaining and repairing the floor.[1] The trial court rejected plaintiffs' assertion that defendant had a duty to inspect the premises at the beginning of every month in order to ascertain whether any dangerous conditions existed thereon. The trial court did not address defendant's argument that the condition was open and obvious. The trial court rejected plaintiffs' request for leave to amend their complaint, noting that all proceedings had been completed.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2002).

To establish a prima facie case of negligence, 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 duty proximately caused the plaintiff's injuries; and (4) that the plaintiff suffered damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

A possessor of land has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). A possessor of land may be held liable for injuries resulting from negligent maintenance of the land. *Id.* at 610. The duty to protect an invitee does not extend to a condition from which an unreasonable risk of harm cannot be anticipated, or from a condition that is so open and obvious that an invitee could be expected to discover it for himself. *Id.* at 610-611.

Premises liability is conditioned upon the presence of both possession of and control over the premises. *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 660; 575 NW2d 745 (1998). Title to the property is not necessary. *Merritt v Nickelson*, 407 Mich 544, 552-553; 287

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[1] The trial court acknowledged that plaintiffs relied on the deposition testimony of a marketing employee who maintained that defendant reimbursed Michigan Extruded for the cost of replacing the floor. However, the trial court noted that the employee submitted an affidavit in which he stated that he was mistaken, and that defendant did not assume the cost of replacing the floor.

NW2d 178 (1980). Liability depends upon actual possession of and control over the premises. *Kubczak, supra* at 661. For purposes of premises liability, possession does not turn on a theoretical or impending right, but instead depends on the actual exercise of dominion and control over the property. *Id.*

Pursuant to MCR 2.116(I)(5), if a trial court grants summary disposition pursuant to MCR 2.116(C)(8), (9), or (10), the parties must be afforded an opportunity to amend their pleadings unless the evidence shows that an amendment would be futile. *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997). We review a trial court's decision to grant or deny leave to amend the complaint for an abuse of discretion. *Id.* at 654.

Plaintiffs argue that the trial court erred by granting defendant's motion for summary disposition and by denying their request to amend their complaint to allege a nuisance in fact. They assert that if at the time of entering into a lease a landlord knows or should know of a dangerous condition on the premises, the landlord has a continuing duty to protect business invitees from the condition. *Bluemer v Saginaw Central Oil & Gas Service, Inc*, 356 Mich 399, 414-416; 97 NW2d 90 (1959).

We affirm the trial court's decision. Beginning in 1991, defendant and Michigan Extruded had a month-to-month lease agreement for the premises. That agreement extended the terms of the original lease. Those terms made defendant responsible for maintaining only the roof and outer walls of the building. Michigan Extruded was responsible for maintaining the floor, and the company paid to replace the floor. Defendant did not reimburse Michigan Extruded for the cost of the replacement project. Although defendant owned the premises on which Tina Webb was injured, Michigan Extruded had possession and control over the premises and was obligated by the terms of the lease to maintain the floor. The trial court correctly held that under the circumstances defendant did not owe a duty to Tina Webb to repair or maintain the floor. Plaintiffs cite no authority to support their assertion that if premises are rented on a month-to-month-basis, the owner must inspect the premises at the beginning of every month in order to determine if any dangerous conditions exist. A party may not simply assert a position and then leave it to this Court to search for authority to sustain or reject that position. *Leitch v Switchenko*, 169 Mich App 761, 764; 426 NW2d 804 (1988). Possession of property for purposes of premises liability depends not on a theoretical right of possession, but rather on the actual exercise of dominion and control over the property. *Kubczak, supra* at 661. Defendant did not regain possession of the premises at the end of each month. Michigan Extruded remained in constant possession and control of the premises. There was no evidence that defendant knew of a floor defect in 1978, or even in 1991, and the floor itself was replaced in 1995 by Michigan Extruded, which continually made repairs to maintain the floor. The trial court correctly held that under the circumstances defendant had no duty to Tina Webb to repair or maintain the floor. Summary disposition was proper.

The trial court did not abuse its discretion by denying plaintiffs leave to amend their complaint to allege a nuisance in fact. As noted above, no evidence showed that at the time defendant leased the premises to Michigan Extruded in 1978 it was aware of any defect in the floor. *Bluemer, supra* at 415. After the lease became a month-to-month agreement, Michigan Extruded retained continuous possession and control over the premises. Defendant had no duty

to repair or maintain the floor under the circumstances. Amendment of the complaint would have been futile. *Weymers*, *supra* at 658. The trial court correctly denied plaintiffs' request to amend their complaint, albeit for the wrong reason. *Portice v Otsego County Sheriff's Dep't*, 169 Mich App 563, 566; 426 NW2d 706 (1988).

Affirmed.

/s/ Michael R. Smolenski
/s/ William B. Murphy
/s/ Kurtis T. Wilder