

STATE OF MICHIGAN
COURT OF APPEALS

JURGEN MATJA,

Plaintiff-Appellant,

V

ESTATE OF TIMOTHY BOCK,

Defendant-Appellee.

UNPUBLISHED
September 9, 2021

No. 353407
Washtenaw Circuit Court
LC No. 19-000778-NO

Before: FORT HOOD, P.J., and MARKEY and GLEICHER, JJ.

PER CURIAM.

Plaintiff Jurgen Matja fell through a hole in the second floor of a home owned by defendant, the Estate of Timothy Bock. Matja worked for Avenue Estate Sales, which was conducting an estate sale at the home on the day of the fall. The sale was held on the home’s first floor. Matja was on the second floor to retrieve a sale item for display downstairs when he fell. The sale had not yet started when the fall occurred.

The circuit court granted the estate’s motion for summary disposition, ruling that the estate had relinquished possession and control of the home to Avenue during the sale and therefore bore no liability for Matja’s injuries. No evidence supports this ruling. To the contrary, evidence demonstrates that the estate retained possession and control of the home while Avenue was present only to provide a limited service; therefore, the estate can be held liable for Matja’s injuries if liability is supported by the evidence. We vacate the court’s judgment and remand for continued proceedings.

I. BACKGROUND

When Timothy Bock passed away, the personal representative for his estate hired Avenue Estate Sales to conduct a sale inside Bock’s home. Avenue was tasked with staging the first floor of the home for the sale and selecting prices for the items. Jurgen Matja was injured before the sale even began. Matja worked for Avenue and was upstairs collecting items to bring downstairs for the sale. Matja fell through a hole in the floor of an upstairs bedroom. That hole had been hidden with a piece of carpeting. No one employed by Avenue was aware of the hidden hole before Matja’s fall.

Matja filed suit against the estate under theories of premises liability and negligence. The estate moved for summary disposition, shifting blame for Matja's injuries onto Avenue. The estate contended that it could not be held liable because Avenue had exclusive possession and control over the home at the time of Matja's injury. The circuit court agreed and dismissed Matja's complaint against the estate. Matja appeals.

II. ANALYSIS

We review de novo a lower court's resolution of a summary disposition motion. *Hoffner v Lanctoe*, 492 Mich 450, 459; 821 NW2d 88 (2012). The estate sought summary disposition under both MCR 2.116(C)(8) and (C)(10). As the court considered evidence beyond the pleadings, summary disposition was granted pursuant to MCR 2.116(C)(10). See *Cuddington v United Health Servs, Inc*, 298 Mich App 264, 270; 826 NW2d 519 (2012). Summary disposition is warranted under MCR 2.116(C)(10) when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." The court must review the evidence presented in the light most favorable to the nonmoving party and determine whether there remain any factual issues upon which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003); *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013).

The moving party bears the initial burden to demonstrate an entitlement to summary disposition. *Barnard Mfg v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). It meets this burden by "specifically identifying the issues as to which the moving party believes there is no genuine issue as to any material fact," and by supporting "its motion with affidavits, depositions, admissions, or other documentary evidence" that, if unrebutted, would establish a right to summary disposition. *Id.* 369-370, quoting MCR 2.116(G)(4). The estate did not support its summary disposition motion with facts establishing that Avenue had possession and control of the home at the time Matja was injured. Because the estate presented no evidence supporting a joint-possession theory, reasonable minds could differ in this regard, either.

"In a premises liability action, a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Benton v Dart Props Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006). With respect to a claim pertaining to the condition of land, "liability arises solely from the defendant's duty as an owner, possessor, or occupier of land." *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 692; 822 NW2d 254 (2012). "Premises liability is conditioned upon the presence of both possession and control over the land." *Merritt v Nickelson*, 407 Mich 544, 552; 287 NW2d 178, 180 (1980). See also *Morelli v City of Madison Hts*, 315 Mich App 699, 702; 890 NW2d 878 (2016). Avenue had neither.

"[P]ossession for purposes of premises liability does not turn on a theoretical or impending right of possession, but instead depends on the actual exercise of dominion and control over the property." *Kubczak v Chem Bank & Trust Co*, 456 Mich 653, 661; 575 NW2d 745 (1998). The reason for this rule is directly relevant to this case: "It is a general proposition that liability for an injury due to defective premises ordinarily depends upon power to prevent the injury and therefore

rests primarily upon him who has control and possession.” *Nezworski v Mazanec*, 301 Mich 43, 56; 2 NW2d 912 (1942) (quotation marks and citations omitted). Avenue was not in the best position to prevent Matja’s injury—the estate was.

In *Merritt*, 407 Mich at 552, our Supreme Court adopted the Restatement’s definition of a “possessor” of land:

- (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). [Quoting 2 Restatement Torts, 2d § 328, p 170 (emphasis added).]

To determine whether a party was the “possessor” of land, this Court has applied the *Black’s Law Dictionary* (7th ed) definition of the term “possession”: “[t]he right under which one may exercise control over something to the *exclusion of all others*.” *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 703; 644 NW2d 779 (2002) (emphasis added). “Control,” this Court continued, is defined as “exercis[ing] restraint or direction over; dominate, regulate, or command,” or “the power to . . . manage, direct, or oversee.” *Id.* at 703-704 (alteration in original). The evidence supports that Avenue had the power to control the estate sale, but no evidence suggests that Avenue controlled, dominated, regulated, or commanded the premises.

The facts cited by the estate in support of its claim that Avenue was in possession and control of the premises when Matja fell are as follows:

- Avenue instructed the personal representative and the family “to stay off the premises”;
- Avenue’s owner, Jonathan Tomlanovich, admitted that “he was in control of the defendant’s home, where he was organizing, staging and running a show”;
- Tomlanovich admitted that the estate “did not instruct him on how to run this sale,” of which he was “solely in control”;
- Tomlanovich admitted that he and Matja were the only people present when Matja was injured, and that he was instructing Matja where to move items when Matja fell through the hole;
- Matja admitted that Tomlanovich instructed the family members not to be present during the sale;
- Matja admitted that Tomlanovich directed Matja’s activities at the home, “taking full control of the premises”;

- Matja admitted that he understood that Avenue was “responsible for keeping the general public from going upstairs,” because that area was under construction.

Even if the estate had accurately described the testimony—which it has not—none of these “facts,” collectively or separately, amount to possession and control of the home.

At no time, even during the sale, does any evidence support that Avenue had a right to control the home “to the exclusion of all others.” Rather, Avenue occupied one part of the premises during the sale, and involved itself solely with selling furniture and other household items. It used a small portion of the property to complete a job it was hired to perform.

It defies common sense and experience to accept as a *legal* proposition that hiring a contractor to perform a limited job in a home automatically equates to relinquishing possession and control *of the property* to the contractor. Homeowners simply do not surrender control of their homes to people who enter the home to perform a job. As this Court observed in *Derbadian*, 249 Mich App at 703-704, a contractor’s entry onto land to perform work for the owner does not establish a transfer of possession and control absent some evidence of an intent to transfer control, such as a contractual provision to that effect. The estate has not produced its contract with Avenue. Nor has the estate brought forward any actual evidence of intended shared control, such as the provision of a key to the front door of the home, or the granting of a right to Avenue to bar people from entering the land.

Aside from logic and common sense, the evidentiary record refutes the estate’s claim that Avenue had possession and control of the home during the sale. First, according to Tomlanovich’s un rebutted testimony, Matja fell through the hole before the sale even started:

Q. Did this incident happen before any of the sale began?

A. Yes, it occurred during the setup of the sale.

Second, family members were present during the sale, and Tomlanovich did not ask them to leave. Third, Tomlanovich testified that he had no responsibility during the sale to “repair, maintain or inspect the premises.” If this is not enough to put to rest the notion that Avenue had possession and control of the home at the time of Matja’s injury, the testimony of the current owner of the home, Timothy Bock, Jr., seals the issue. Bock testified that on the day of the sale, the personal representative “was in charge of the estate,” which he clarified included “the house.”

Furthermore, the estate’s attempt to avoid this evidence with the claimed indicia of possession and control cited above is disingenuous at best. We reiterate here the estate’s arguments in support of possession and control, and following each include the actual testimony cited in support of each argument. The testimony does not support the estate’s characterization of the facts.

- Avenue instructed the personal representative and the family “to stay off the premises.”

Here is the testimony that allegedly supports that statement:

Q. What were the rules of the game, were you - - did you tell her [the personal representative] that she needed to be present or could not be present during the course of the sale?

A. Usually we ask that the clients are not present during the sale.

Q. Why?

A. Because it makes the customers uncomfortable.

As stated above, the accident occurred before the sale had started, and there were family members present during the sale—so much for Avenue’s “control.” But even assuming we take this testimony at face value, Tomlanovich’s preference that the family members absent themselves during the sale is not evidence that the estate relinquished to Avenue the ability to control the entire premises. Could Tomlanovich have called the utility companies servicing the home and turned off the power, water, and gas service? Did his request to run the sale with no family members present mean that he could paint the ceilings purple, or take the wallpaper off the walls?

As a good salesman, Tomlanovich recognized that having family members around while their possessions were being looked over, commented on, and sold is not conducive to big profits. This fact hardly licensed Tomlanovich to take control of the house.

- Avenue’s owner, Jonathan Tomlanovich, admitted that “he was in control of the defendant’s home, where he was organizing, staging and running a show.”

Here is the testimony that the estate cites in support of the statement that Tomlanovich “was in charge of the home”:

Q. Are you always at the sales?

A. Yes.

Q. There may be other workers present as well, but you’re there to supervise what’s going on?

A. Yes.

Q. Is that part of your agreement with your clients that you will run the show?

A. No. Says that Avenue Estate Sales will run the show, doesn’t say me specifically.

“Running the show” clearly refers to running the sale. This excerpt does not state or support that Tomlanovich was “in control of the defendant’s home.”

- Tomlanovich admitted that the estate “did not instruct him on how to run this sale,” of which he was “solely in control.”

This statement, accurately quoted, says absolutely nothing about possession and control of the home. A plumber repairing a sink is in charge of the sink. That does not mean that the plumber is in charge of the kitchen or the rest of the house.

- Tomlanovich admitted that he and Matja were the only people present when Matja was injured, and that he was instructing Matja where to move items when Matja fell through the hole.

Tomlanovich testified that he was the only person *in the room* when Matja fell. But again, this fact has nothing to do with possession and control of the premises.

- Matja admitted that Tomlanovich instructed the family members not to be present during the sale.

Here is the testimony cited by the estate in support of this claim:

Q. Are the homeowners or are the persons who are selling the items, are they present during the sales?

A. No.

Q. Why not?

A. It’s just the way Jonathan run[s] his sales.

This testimony says nothing about the sale in question, but more importantly, it says nothing about any “instruction” by Tomlanovich that the homeowners for whom he works relinquish possession and control of the premises to him during the sales. Obviously, Tomlanovich expresses a preference that the owners absent themselves, and likely he encourages that by telling them that the profits will be larger if they do so. But this is not evidence that Tomlanovich demanded possession and control of the premises, or that the estate relinquished control of the premises.

- Matja admitted that Tomlanovich directed Matja’s activities at the home, “taking full control of the premises.”

In support of this statement the estate relied upon the following testimony:

Q. You were mostly doing stuff alongside Jonathan?

A. Yes.

Q. He would direct you where to put things?

A. Yes.

Q. What to move?

A. Yes.

* * *

Q. Did Jonathan give you any direction that morning as to what your scope of work was going to be that day?

A. What do you mean?

Q. Well, did he say, okay, we are going to start by going, you know, out to the barn, you're going to move this or that, did he give you a detail or any specifics as to what he wanted you to do?

A. Not that I recall, no, I was just following his lead.

Simply put, nothing in this excerpt comes even remotely close to a statement that Tomlanovich took "full control of the premises."

- Matja admitted that he understood that Avenue was "responsible for keeping the general public from going upstairs," because that area was under construction.

The misrepresentation regarding this transcript excerpt is especially troubling. A review of the testimony reveals that the person who instructed that customers of the sale were not permitted upstairs was the personal representative (Sally), and not Tomlanovich:

Q. Did the woman, we'll call her Sally, did she give you any instructions as to whether or not people were going to be permitted to go into the areas that were under construction?

A. Well, like the general public?

Q. Yes?

A. No, the general public was not going to go upstairs.

Q. How come?

A. I believe it was because it was under construction or it just - - yeah.

The testimony flatly refutes the estate's contention that Avenue decided not to allow customers upstairs; that decision was made by the personal representative, further cementing that the actual possession and control of the premises never shifted to Avenue, even in part.

Ultimately, as a matter of law, the estate presented no evidence that Avenue had, or shared, possession and control of the premises at the time of Matja's fall. Avenue was a service provider

present on the property for a limited person. The estate retained full control and possession of the home while Avenue fulfilled the duties it was hired for.

We vacate the circuit court's judgment and remand for a trial focused solely on whether the estate breached its duties to Matja as the possessor of the land on which Matja sustained injury. We do not retain jurisdiction.

/s/ Jane E. Markey

/s/ Elizabeth L. Gleicher

Fort-Hood, P.J., did not participate.