

STATE OF MICHIGAN
COURT OF APPEALS

CORTEZ EPPS,

Plaintiff-Appellant,

v

NPT-313 COMPANY, doing business as SAPPHIRE
APARTMENTS,

Defendant-Appellant.

UNPUBLISHED

May 30, 2024

No. 362127

Oakland Circuit Court

LC No. 2020-182954-NO

Before: BORRELLO, P.J., and SWARTZLE and YOUNG, JJ.

PER CURIAM.

In this action arising out of an injury plaintiff suffered when a light fixture fell from the ceiling and struck him on the head, plaintiff appeals as of right the trial court’s order granting summary disposition in favor of defendant under MCR 2.116(C)(10) (no genuine issue of material fact). For the reasons set forth in this opinion, we reverse and remand for further proceedings.

I. BACKGROUND

Plaintiff is a hairstylist who rented a booth at the Hair Art Gallery, a hairstyling salon that was located in the basement level of the Sapphire Apartments in Southfield. Rashon Gaines, Angela Malone, and Tiffany Engelman were co-owners of the salon. The salon originally leased the premises from North Park Towers, the former owner of the Sapphire Apartments. When North Park Towers sold the complex to defendant in October 2015, the lease agreement was assigned to defendant. On October 26, 2019, a light fixture in the ceiling of the salon fell and hit plaintiff on the head while he was cutting a client’s hair. Plaintiff alleged that he suffered a concussion. Plaintiff contends that water leaked into the ceiling of the premises, damaging the ceiling drywall and causing the light fixture to fall.

The lease agreement at issue was executed on March 31, 2015, between Gaines, Malone, and Engelman, as owners of the salon, and North Park Towers Master Tenant, LLC. The lease provides that “[t]he Leased Premises shall be used as and occupied by Tenant as a facility for hair styling, manicures and pedicures and for no other purposes without the written consent of the Landlord.” Paragraph 6.3, titled Maintenance and Repairs, required the tenant to “keep and

maintain in good order, condition and repair, including replacement of parts and equipment, if necessary, the Leased Premises and every part thereof, including without limitation, the exterior and interior portion of all doors, windows, interior walls, floors and ceilings, all mechanical services, including without limitation, plumbing and sewerage facilities” That paragraph further stated, “If Tenant shall refuse or neglect to commence or to complete repairs properly and adequately to Landlord’s sole discretion, Landlord may, at its option, make and complete said repairs,” to be compensated by tenant.

Paragraph 8.1 of the lease contains an indemnification clause that provides, in pertinent part:

Tenant does hereby indemnify Landlord and save it harmless from and against any and all claims, actions, suits, damages, liabilities, losses, orders, decrees, or judgments and expenses of any kind or nature whatsoever, including, without limitation, reasonable attorney fees, costs and expenses in connection with loss of life, personal injury and/or damage to property or the environment . . . arising from or out of the condition or the Use, occupancy, possession or management of the Leased Premises or arising from or out of any occurrence in, upon or at the Leased Premises. . . . Landlord shall not be responsible or liable for any personal injuries or damage to Tenant or its officers, agents, employees, guests, assignees, sub-tenants, invitees or legal representatives or any other persons or any occupant of any part of the Leased Premises, or for injury or damage to any goods, wares, merchandise, freight or property of Tenant or any occupant of any part of the Leased Premises, irrespective of how the same may be caused, whether from action of the elements or any actions, omissions or negligence of any person whatsoever, and Tenant does hereby indemnify Landlord from and against any such injuries or damages and shall pay all costs, expenses and attorneys fees incurred or paid by Landlord in connection therewith.

Additionally, ¶ 15.1, titled “Non-Liability of Landlord,” states:

Landlord shall not be responsible or liable to Tenant for any loss or damage that may be occasioned by or through the acts or omissions of persons occupying any part of the premises adjacent to or connected with the Leased Premises. Tenant shall be solely responsible for all injuries to persons and property resulting from any accident, explosion, leak or other cause arising in or about the Use of the Leased Premises or its appurtenances, as hereinbefore stated, and it will not hold Landlord responsible for any loss or damage caused through accidental injury of any kind resulting from leaks, explosions or other cause emanating from the premises adjoining or above or beneath the Leased Premises, if any. Landlord shall not be responsible for any loss or damage resulting to Tenant or its property or any other person or entity or its property which may be caused by the bursting, stoppage or leaking of water, gas, sewer, steam pipes, heating, cooling or plumbing fixtures and systems, or from an overflow or backing up of any sewer or water main or other causes.

Plaintiff brought this action against defendant, alleging in relevant part, that plaintiff was an invitee on the premises when he was injured by the falling light fixture. Plaintiff additionally argued that the falling light fixture constituted a dangerous condition on the premises owned or controlled by defendant. Plaintiff further alleged that defendant was negligent in failing to correct the dangerous condition even though it was aware of the condition. Defendant filed a notice of nonparty fault against the salon.

Defendant moved for summary disposition under MCR 2.116(C)(10), arguing that it had relinquished control of the leased premises to the salon and that plaintiff therefore could not recover from defendant in premises liability. Defendant cited provisions in the lease agreement granting the lessee full control over the premises and allocating liability for personal injury and property damage to the lessee. Defendant also argued that plaintiff was either a trespasser or a licensee, not an invitee, because the salon violated the lease by allowing plaintiff to work on the premises as an independent contractor without authorization from defendant. Therefore, if defendant owed plaintiff a duty, that duty was limited to avoiding deliberate harm to him or warning him of concealed defects of which defendant was aware or had reason to be aware if plaintiff was not aware or did not have reason to be aware of the defect.

Plaintiff opposed the motion and argued that defendant implicitly consented to plaintiff's activities on the property by issuing him a key fob to enter the building and that plaintiff was an invitee on the premises. Plaintiff maintained that his employment arrangement with the salon was of the standard type in the industry and consistent with the manner in which the salon had been operating and hiring stylists under the lease for more than a decade. Plaintiff further argued that a landlord has a nondelegable duty to perform repairs in a nonnegligent manner, which extends to a tenant's invitee. Plaintiff provided evidence that defendant had performed repairs on the light and leaky ceiling before the accident at issue in this case. However, the evidence reflected that the repairs were essentially cosmetic repairs to the drywall and light fixture that did not address the source of the water leak. Plaintiff argued that these repairs were performed by defendant in a negligent manner that caused the light to fall.

At the motion hearing, the parties argued consistently with their written briefs. In response to defendant's arguments, plaintiff additionally argued that the landlord's nondelegable duty to perform repairs in a nonnegligent manner when the landlord decides to undertake such repairs provided a public policy reason for not permitting defendant to rely on the lease provisions to escape liability.

The trial court granted defendant's motion on the ground that the lease agreement granted the salon full control of the leased premises, which precluded a premises liability claim against defendant. The trial court stated:

The landlord's duty here didn't extend to areas that the tenants control. The lease specifically states that the Hair Art Gallery is liable for injuries that arise out of the leak. Michigan does encourage in favor of enforcing contracts and I believe that the public policy argument fails.

The trial court subsequently denied plaintiff's motion for reconsideration. Plaintiff now appeals.

II. STANDARD OF REVIEW

A trial court's decision on a motion for summary disposition is reviewed de novo. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). The trial court granted defendant's motion under MCR 2.116(C)(10), which allows a court to grant summary disposition "when the affidavits or other documentary evidence, viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and the moving party is therefore entitled to judgment as a matter of law." *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 5; 890 NW2d 344 (2016).

The reviewing Court must "review the pleadings, affidavits, and other documentary evidence submitted, make all reasonable inferences therefrom, and determine whether a genuine issue of material fact exists, giving the nonmoving party the benefit of reasonable doubt." *Wheeler v Shelby Charter Twp*, 265 Mich App 657, 663; 697 NW2d 180 (2005). "If the moving party properly supports his or her motion, the burden shifts to the nonmoving party to establish that a genuine issue of material fact exists." *Redmond v Heller*, 332 Mich App 415, 438; 957 NW2d 357 (2020). "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." *Johnson v VanderKooi*, 502 Mich 751, 761; 918 NW2d 785 (2018) (quotation marks, citation, and brackets omitted). "If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted." *Lowrey*, 500 Mich at 7 (quotation marks and citation omitted).

III. ANALYSIS

The trial court granted summary disposition in favor of defendant on the ground that defendant's duty as the landlord did not extend to the area leased by the salon, where the injury occurred, because that area was within the exclusive control of the salon and the salon had contractually agreed in the lease to be responsible for injuries arising out of a leak. On appeal, plaintiff argues that the trial court's decision was legally erroneous because a landlord is liable for injuries caused by repairs to the leased premises negligently performed by the landlord if the landlord, although not legally obligated to perform the repairs, nonetheless gratuitously undertakes to make those repairs. The issue presented to this Court is thus whether the trial court was correct that defendant, as a matter of law, had no duty in this premises liability action with respect to the hazardous condition of the leaky ceiling and light fixture. Resolution of this issue depends on a determination whether defendant had the requisite possession and control for purposes of a premises liability action.

A claim based on an injury allegedly caused by a dangerous condition on land "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." *Finazzo v Fire Equip Co*, 323 Mich App 620, 626; 918 NW2d 200 (2018) (quotation marks and citation omitted). Nonetheless, in "a premises-liability action, a plaintiff must prove the elements of negligence which are: (1) that the defendant owed the plaintiff a duty, (2) that the defendant breached that duty, (3) causation, and (4) damages." *Gabrielson v Woods Condo Ass'n, Inc*, ___ Mich App ___, ___; ___ NW3d ___ (2024) (Docket Nos. 364809 and 364813); slip op at 8.

“It is well established . . . that [p]remises liability is conditioned upon the presence of both possession and control over the land.” *Kubczak v Chem Bank & Trust Co*, 456 Mich 653, 660; 575 NW2d 745 (1998) (quotation marks and citations omitted; alteration in original). “[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.” *Id.* at 661. Our Supreme Court explained in *Kubczak*:

The purpose behind the principle requiring actual possession and control was best expressed in *Nezworski v Mazanec*, 301 Mich 43, 56; 2 NW2d 912 (1942):

“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.”

* * *

“Liability for negligence does not depend upon title; a person is liable for an injury resulting from his negligence in respect of a place or instrumentality which is in his control or possession, even though he is not the owner thereof.” [*Kubczak*, 456 Mich at 661-662 (omission in original).]

Here, defendant argues that the salon was solely liable under the lease agreement for any injuries arising out of conditions within the leased premises, such as the light that allegedly injured plaintiff in this case. Essentially, defendant disclaims any duty regarding the condition at issue on the ground that the condition was solely within the salon’s control. There are provisions in the lease, including the previously quoted paragraphs 8.1 and 15.1, that support the contention that the salon as tenant had generally agreed to be responsible for maintaining the leased premises and bearing liability for injuries that could arise from conditions on the leased premises, including water leaks.

This contractual apportionment of liability between tenant and landlord is consistent with the general rule that a landlord does not have a duty of reasonable care regarding the maintenance and repair of areas “within a tenant’s leasehold, because the landlord has relinquished its control over that area to the tenant.” *Bailey v Schaaf*, 494 Mich 595, 609 n 36; 835 NW2d 413 (2013). Hence, our Supreme Court has stated: “[i]n the absence of a contract duty on the part of the owner or landlord, the tenant, as between himself and the landlord, is bound to keep the leased premises in repair [and] the owner is not liable for damages to third persons for injuries arising from the neglect of the tenant to repair.” *Sholberg v Truman*, 496 Mich 1, 10; 852 NW2d 89 (2014) (quotation marks and citation omitted; second alteration in original).

“The underlying reason for the general rule . . . is that after leasing and surrendering the premises to the tenant the landlord loses all control over them.” “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.”

A tenant or occupant of premises having the entire control thereof is, so far as third persons are concerned, the owner. He is, therefore, as already stated, usually deemed to be prima facie liable for all injuries to third persons occasioned by the condition of the demised premises. [*Id.* at 10-11 (citations omitted; ellipsis in original).]

However, this does not end the inquiry. That the tenant is generally “prima facie liable” for injuries to third persons from conditions within the leased premises does not mean that the tenant is *always* or *solely* liable. “At common law, a landlord’s duty depends upon the facts and circumstances of each case,” and the “element of control is of prime importance.” *Lipsitz v Schechter*, 377 Mich 685, 687; 142 NW2d 1 (1966). Moreover, “[t]wo people or entities can have coextensive duties to entrants on land when they share possession and control of the property.” *Gabrielson*, ___ Mich App at ___; slip op at 9-10.

In *Ginsberg v Wineman*, 314 Mich 1, 6; 22 NW2d 49 (1946), on which plaintiff relies, the Court addressed the question whether a landlord could be liable for injuries sustained by a tenant’s employee on an improperly repaired step within the leased premises if the landlord’s agent had gratuitously repaired the step, although “not legally obligated to do so,” and “that repair was made in a negligent manner.” In that case, the tenant leased a store with a basement from the defendant landlord pursuant to a written lease that included a provision making the tenant responsible for keeping the premises in good repair. *Id.* at 3. The tenant claimed that shortly after moving into the leased premises, he told the landlord’s property manager that the basement stairway needed to be repaired and an employee of the landlord’s property management company arrived to inspect the stairway. *Id.* at 3-4. The tenant further claimed that this employee subsequently returned with a hammer, worked on the stairway, and then told the tenant “in effect, that everything was all right.” *Id.* The plaintiff was the tenant’s father and was also employed in the business conducted on the premises. *Id.* One day, while working on the premises, the plaintiff “started down the basement stairs of his son’s place of business . . . and just as he stepped on the second tread it ‘tipped right off’ and he fell the entire length of the stairway to the basement floor.” *Id.* at 4-5.

The tenant testified that before initially reporting the stairway problem to the property manager, “the plank of the second step was loose so that the end protruding away from the wall could be lifted up and the nails would come up with the plank.” *Id.* at 5. According to the tenant, he examined the step after the plaintiff’s accident and it appeared that the old nails had simply been hammered back down into the old holes and that no new nails had been driven into the step. *Id.* The defendant landlord, his property manager, and the employee who allegedly made the repair to the stairway, all denied having authorized or made the claimed repair on the premises. *Id.* at 3-4.

The jury returned a verdict for the plaintiff, and the defendant landlord’s motion for judgment notwithstanding the verdict was denied. *Id.* at 5. On appeal, our Supreme Court held:

Under the facts of this case . . . , [the landlord], having gratuitously undertaken, through his agents, . . . to make repairs on the premises, although not legally obligated to do so, and those repairs having been made in a negligent manner, . . . the landlord, must be held liable for the injuries sustained by his tenant’s employee, by reason of such negligent repairs. [*Id.* at 8.]

Similarly, in *Lipsitz*, 377 Mich at 687, 692, our Supreme Court affirmed the trial court's denial of the defendant landlords' motions for directed verdict and judgment notwithstanding the verdict, where the plaintiff was injured by a window screen that fell on her as she was leaving the defendant landlords' 4-story apartment building through a common exit. The screen fell from the window of an apartment while the tenants of that apartment were not home. *Id.* at 692. There was evidence that the defendant landlords and their agents exercised control over the area where the screen fell and the screen by generally securing screens to the building and removing them to wash the windows. *Id.* at 688. Our Supreme Court held that "the landlords had a duty to exercise reasonable care to remedy defects that might constitute a hazard in those areas of the building under their control which had, or should have, come to their attention." *Id.* at 689.

Here, plaintiff provided evidence that before the accident at issue, the salon reported problems to defendant regarding water leaking from the ceiling and light fixture in the salon and that defendant had performed repairs on the light and leaky ceiling on two separate occasions before plaintiff's alleged injury. On both of those previous occasions, the drywall ceiling to which the light fixture was attached became so wet that the drywall failed and caused the light fixture to fall. Furthermore, there was evidence that on both occasions, defendant or its subcontractors repaired the drywall and light fixture. However, water continued to leak through the ceiling and light fixture. Gaines testified that the leak was reported to defendant, but nothing was done to fix the leak.

Accordingly, even if defendant did not have any legal obligation under the terms of the lease to perform such repairs, there was evidence creating a question of fact whether defendant nonetheless undertook such repairs gratuitously and thereby exercised control over the condition of the leaky ceiling and affixed light fixture that allegedly caused plaintiff's injuries such that defendant had a duty to exercise reasonable care in performing those repairs. *Lipsitz*, 377 Mich at 689; *Ginsberg*, 314 Mich at 8. The trial court therefore erred by finding as a matter of law that defendant did not have a duty to keep this condition in reasonable repair. The question of possession and control over property at a given time for purposes of asserting a premises liability claim "presents a question for the jury to decide unless there is no dispute of material fact." *Gabrielson*, ___ Mich App at ___; slip op at 9.

Defendant has advanced several alternative grounds on appeal for affirming the trial court's order granting summary disposition in favor of defendant. However, the trial court's ruling was based solely on its erroneous conclusion that there was no genuine issue of material fact that defendant did not have the requisite possession and control to justify imposing a duty in premises liability regarding the hazardous condition at issue. The trial court did not rule on any of the other issues raised by defendant on appeal, and we therefore decline to rule on these issues in the first instance. Typically, "[a]ppellate review is limited to issues actually decided by the trial court." *Allen v Keating*, 205 Mich App 560, 564; 517 NW2d 830 (1994). Most importantly, we note that the issue of whether the repair was performed negligently is a separate issue from the question whether the landlord exercised the requisite control regarding the hazardous condition. *Lipsitz*, 377 Mich at 690-692.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff having prevailed is entitled to costs. MCR 7.219.

/s/ Stephen L. Borrello
/s/ Brock A. Swartzle
/s/ Adrienne N. Young