STATE OF MICHIGAN

COURT OF APPEALS

CHARLES F. SPADAFORE,

Plaintiff-Appellant,

v

APPLIED CLEANING TECHNOLOGY, INC., STEPHEN ERPS, and JOHANNA ERPS,

Defendants,

and

MICHIGAN DOG TRAINING, INC.,

Defendant-Appellee.

UNPUBLISHED
May 13, 2021

No. 353639
Wayne Circuit Court
LC No. 18-013989-NO

Before: BOONSTRA, P.J., and CAVANAGH and GADOLA, JJ.

PER CURIAM.

Plaintiff, Charles F. Spadafore, appeals as of right the final order of the trial court in this matter dismissing defendants, Applied Cleaning Technology, Inc., Stephen Erps, and Johanna Erps. On appeal, plaintiff challenges the order of the trial court granting defendant, Michigan Dog Training, Inc. (MDT), summary disposition under MCR 2.116(C)(10). We affirm.

I. FACTS

In this premises liability action the facts are largely undisputed. On July 26, 2017, plaintiff received an electric shock while attempting to repair an HVAC unit inside a commercial building in Plymouth, Michigan. Plaintiff was employed as an HVAC technician by D & G Heating and

Cooling. The building was owned by defendants, Stephen Erps and Johanna Erps.[1] At the time relevant to these events, defendant MDT had leased the building from the Erps for purposes of operating a dog training business.

Michael Burkey, the President of MDT, testified that on the morning of July 26, 2017, he noticed that the air conditioning was not working in the building. Burkey testified that under the terms of the lease, the Erps were responsible for maintaining the heating and cooling system. Stephen Erps similarly testified that MDT was not expected to repair the HVAC in the building, but instead was to notify the Erps of any HVAC problems, and the Erps would arrange for repairs. Burkey testified that on that morning he asked his office manager to call the Erps to report that the HVAC unit needed servicing. Shortly thereafter, plaintiff arrived from D & G Heating and Cooling to repair the HVAC unit. The parties do not dispute that the Erps contacted D & G Heating and Cooling and that the Erps paid for the service call.

The HVAC unit is located on top of an interior office in the building in an area that the parties agree is referred to as the "mezzanine." When plaintiff arrived at the building, an MDT employee led him to the mezzanine area and provided him with a ladder to access the area. Plaintiff climbed to the area above the office space where he used a flashlight to see, and he worked on his hands and knees because of the low clearance. Plaintiff testified that he removed a metal access door from the HVAC unit, then tried to catch the access door as it slipped from his hand. As he did so, he felt the sensation of electricity in his right hand and arm. Plaintiff testified that his next recollection was waking up in the hospital, and that he had no idea what caused the electric shock. Plaintiff allegedly sustained thermal burns and neurological injuries to his right hand and arm.

Burkey testified that after plaintiff began working on the HVAC unit, two of his employees told him that they thought plaintiff was sleeping on the job instead of repairing the HVAC. Burkey checked on plaintiff, and found plaintiff on his hands and knees, looking unwell, and attempting to climb down the ladder. Plaintiff told Burkey that after he removed the access panel to the HVAC unit, he was hit by a hot wire. Burkey told plaintiff to lie down, then called 911. EMTs from the Plymouth Fire Department arrived and transported plaintiff to the hospital.

That same day, Plymouth Building Department Official Brent Strong investigated the premises where plaintiff had been injured. While inspecting the mezzanine, Strong observed that a 14-guage wire ran about eight feet from a junction box to a point near the HVAC unit access panel. Strong later stated in an affidavit that the wire was not terminated in a safe fashion because "the copper wire was exposed and could have easily electrocuted someone." After speaking with Strong, Stephen Erps inspected the mezzanine area and found the wire Strong had identified, then addressed the hazard by putting wire nuts and electrical tape around the exposed wire.

Plaintiff initiated this personal injury premises liability action against MDT, the Erps, and Applied Cleaning Technology, Inc., alleging that defendants had joint control and possession of

[1] Stephen Erps testified that he and his wife, Johanna Erps, own the building, and that the building has never been owned by their corporation, Applied Cleaning Technology, Inc. The Commercial Lease Agreement states that the lease was between Stephen and Johanna Erps as the Landlord and MDT as the Tenant.

the premises where plaintiff's injury occurred. Although plaintiff's amended complaint alleged negligence and gross negligence by defendants, the trial court determined that because plaintiff's complaint alleged an injury arising from a condition on land, the claim actually was one of premises liability.

On May 17, 2019, MDT's expert, Michael C. Mathews, an investigator with Mathews Electric, Inc., examined the area where plaintiff had been injured. Mathews determined that the NM-B cable depicted in plaintiff's 2018 photos of the area was not connected to any power source and was not capable of being connected to a power source given its location. In addition, the sheathing on the wire was not stripped sufficiently to have permitted the wire to have been connected to a power source in the past. In a report of his findings, Mathews concluded that the cable "was not a viable source of energy for the reported electrocution."

MDT moved for summary disposition under MCR 2.116(C)(10), asserting that there was no genuine issue of material fact that plaintiff's injury was caused by the HVAC unit and that the HVAC unit was not in the possession and control of MDT under the terms of MDT's lease with the Erps. The trial court granted MDT's motion, holding that the mezzanine and the HVAC unit were not under the possession and control of MDT. The trial court thereafter denied plaintiff's motion for reconsideration. Plaintiff subsequently settled his claims against the Erps and their corporation, and the trial court entered a final order dismissing those defendants. Plaintiff now appeals from the final order, challenging the earlier order of the trial court granting MDT summary disposition.

II. DISCUSSION

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision to grant or deny a motion for summary disposition. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Id*. at 160. When reviewing a motion for summary disposition granted under MCR 2.116(C)(10), we consider the documentary evidence submitted by the parties in the light most favorable to the nonmoving party. *Id*. Summary disposition under MCR 2.116(C)(10) is warranted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id*. "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 and citations omitted). We also review de novo the trial court's determination whether a duty exists, which is a question of law to be decided by the court. *Hill v Sears, Roebuck & Co*, 492 Mich 651, 659; 822 NW2d 190 (2012).

B. SUMMARY DISPOSITION

Plaintiff contends that the trial court erred by granting MDT summary disposition under MCR 2.116(C)(10). Plaintiff argues that there was a genuine issue of material fact regarding the exact cause of his injury, and further contends that the evidence established that MDT had possession and control of the location where plaintiff was injured and of the HVAC unit, resulting in a valid claim of premises liability against MDT. We disagree.

Michigan law distinguishes between a claim of ordinary negligence and a claim premised on a condition of the land. *Lymon v Freedland*, 314 Mich App 746, 756; 887 NW2d 456 (2016). Whether the gravamen of an action sounds in negligence or in premises liability is determined by considering the plaintiff's complaint as a whole, regardless of the labels attached to the allegations by the plaintiff. *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 691-692; 822 NW2d 254 (2012). When a plaintiff alleges injuries arising from a dangerous condition on the land, the claim is one of premises liability rather than one of ordinary negligence. *Id*. at 692.

In a premises liability action, as in any negligence action, the plaintiff must establish the elements of negligence, being (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach proximately caused the plaintiff's injuries, and (4) the plaintiff suffered damages. *Goodwin v Northwest Michigan Fair Ass'n*, 325 Mich App 129, 157; 923 NW2d 894 (2018). The initial inquiry when analyzing a claim of premises liability is to establish the duty owed by the possessor of the premises to a person entering the premises, *Hoffner v Lanctoe*, 492 Mich 450, 460; 821 NW2d 88 (2012), which depends upon whether the visitor is classified as an invitee, a licensee, or a trespasser. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000). In this case, the parties agree that plaintiff was an invitee, being a person who enters upon the land of another by invitation. See *id*. The possessor of land owes the greatest duty to an invitee, being the duty to use reasonable care to protect the invitee from an unreasonable risk of harm posed by a dangerous condition on the premises. *Hoffner*, 492 Mich at 460. The possessor of the premises breaches that duty of care when he or she knows or should know of a dangerous condition on the premises of which the invitee is unaware, and fails to fix, guard against, or warn the invitee of the defect. *Lowrey v LMPS & LMPJ*, 500 Mich 1, 8; 890 NW2d 344 (2016).

Although the parties agree that plaintiff was an invitee, the parties do not agree regarding who was in possession and control of the premises in this case. A claim of premises liability arises from a defendant's duty as an owner, possessor, or occupier of land. *Lymon*, 314 Mich App at 756. Premises liability is based upon the presence of both possession and control over the premises, for the reason that the person in possession of the premises generally is in a position of control over the premises, and thus is the person best able to prevent harm to others. *Merritt v Nickelson*, 407 Mich 544, 552; 287 NW2d 178 (1980). Liability for an injury arising from defective premises thus generally "*depends upon power to prevent the injury* and therefore rests primarily upon him who has control and possession. . . . [A] person is liable for an injury resulting from his negligence in respect of a place or instrumentality which is in his control and possession." *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 662; 575 NW2d 745 (1998), quoting *Nezworski v Mazanec*, 301 Mich 43, 56; 2 NW2d 912 (1942).

In this case, the trial court held that MDT was not a possessor of the premises because MDT did not have possession or control over the HVAC unit or the area where defendant was injured. The trial court's decision is supported by the record. The parties' lease provides, in relevant part:

> [T]he Parties to this Lease (the "Parties") agree as follows:
>
> * * *

3. The Landlord agrees to rent to the Tenant the Premises for only the permitted use . . .

* * *

7. The Landlord reserves the right for itself and for all persons authorized by it, to erect, use and **maintain wiring**, mains, pipes and conduits and other means of distributing services in and through the Premises, and at all reasonable times to enter upon the Premises for the purpose of installation, maintenance or repair, and such entry will not be an interference with the Tenant's possession under this Lease.

8. **The Landlord reserves the right, when necessary by reason of accident or in order to make repairs**, alterations or improvements relating to the Premises or to other portions of the Building to cause temporary obstruction to the Common Areas and Facilities as reasonably necessary **and to interrupt or suspend the supply of electricity, water and other services** to the Premises until the repairs, alterations or improvement have been completed. . . .

9. Subject to this Lease, the Tenant . . . will have the non-exclusive right to use for their proper and intended purpose, during business hours, in common with all others entitled thereto those parts of the Common Areas and Facilities from time to time permitted by the Landlord. **The Common Areas and Facilities and the Building will at all times be subject to the exclusive control and management of the Landlord. The Landlord will operate and maintain the Common Areas and Facilities and the Building in such manner as the Landlord determines from time to time.**

* * *

17. The Landlord will be responsible for paying the following operating costs:

* * *

c. **provision, repair, replacement and maintenance of heating, cooling, ventilation and air conditioning equipment throughout the Building**. [Emphasis added.]

The lease defines the relevant terms used in the lease as follows:

[2.] b. "Building" means all buildings, improvements, equipment, fixtures, property and facilities from time to time located at 1031 Cherry, Plymouth, MI 48170, as from time to time altered, expanded or reduced by the Landlord in its sole discretion.

c. "Common Areas and Facilities" mean:

> i. those portions of the Building areas, buildings, improvements, facilities, **utilities**, **equipment and installations in or forming part of the Building which from time to time are not designated or intended by the Landlord to be leased to tenants of the Building including**, without limitation, exterior weather walls, roofs, entrances and exits, parking areas, driveways, loading docks and area, storage, **mechanical and electrical rooms, areas above and below leasable premises and not included within leasable premises**, . . . ; and
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> ii those lands, areas, buildings, improvements, facilities, **utilities, equipment and installations which serve or are for the useful benefit of the Building, the tenants of the Building or the Landlord and those having business with them,** whether or not located within, adjacent to or near the Building and which are designated from time to time by the Landlord as part of the Common Areas and Facilities.
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> e. "Premises" means the building at 1031-1051 Cherry, Plymouth, MI 48170. [Emphasis added.]

To summarize, the lease provides that MDT leased "the Premises" from the Erps, which is defined as the building at 1031-1051 Cherry, Plymouth, MI. Building is defined in the lease to include the "improvements, equipment, fixtures, property and facilities from time to time located at 1031 Cherry, Plymouth, MI 48170, as from time to time altered, expanded or reduced by the Landlord in its sole discretion." Plaintiff contends that this concludes the inquiry regarding possession and control and proves that MDT leased the entire building and therefore had possession and control of the entire building.

However, the lease also specifically provides that the Common Areas and Facilities of the building were "at all times subject to the exclusive control and management of the Landlord." The Common Areas and Facilities are defined by the lease as including "utilities, equipment and installations in or forming part of the Buildings," "utilities, equipment and installations which serve or are for the useful benefit of the Building," and "mechanical and electrical rooms." The Erps also specifically retained the right to maintain and use the wiring, and the right to suspend electricity and other services in the Building to make repairs or improvements. In addition, the Erps were responsible under the lease for paying the costs of "provision, repair, replacement and maintenance of heating, cooling, ventilation and air conditioning equipment throughout the Building."

Plaintiff argues, however, that the area of the building where plaintiff was injured was under the control and possession of MDT because under the Lease the mezzanine was part of the "leasable area," as defined in the lease as follows:

> d. "Leasable Area" means with respect to any rentable premises, the area expressed in square feet of all floor space **including floor space of mezzanines, if any**, determined calculated and certified by the Landlord. . . . [Emphasis added.]

But although the definition of "leasable area" is included in the definition section of the lease, plaintiff does not identify where in the lease, MDT leased the "leasable area." Rather, the

lease states that MDT leased "the Premises." In addition, the term Common Areas and Facilities is defined in the lease to include areas above and below "leasable premises," but does not refer to "leasable area." A definition, without more, does not identify any obligation of the parties to the lease regarding the thing defined.

Moreover, assuming MDT leased the "leasable area," the "utilities, equipment and installations in or forming part of the Buildings," and the "utilities, equipment and installations which serve or are for the useful benefit of the Building" and "mechanical and electrical rooms" were explicitly defined in the lease as included in the term Common Areas and Facilities, over which the Erps retained exclusive control and possession. Where a contract contains both specific and general terms, the specific terms generally are deemed to control over the general terms. *Village of Edmore v Crystal Automation Systems Inc*, 322 Mich App 244, 263; 911 NW2d 241 (2017). In addition, a contract must be read as a whole, giving effect to all the provisions. *Id*. Here, reading the terms of the lease together, there is no contractual language by which MDT agreed to lease the HVAC unit or the area where the HVAC unit was located. Rather, reading the lease as a whole indicates the opposite, that the parties agreed that the Erps had sole possession and control of the HVAC unit, as well as any electrical and wiring, and the mechanical and electrical rooms, and that the Erps had sole responsibility for maintenance of the HVAC unit and the electrical service in the building. Regardless of whether the mezzanine floor was included in the premises leased by MDT, the HVAC and the electrical wiring in the building was under the exclusive control of the Erps, as was the "room" where the mechanical and electrical equipment was housed.

In the context of premises liability, possession is defined as "the right under which one may exercise control over something to the exclusion of all others," while control is defined in part as "exercise[ing] restraint or direction over." *Derbabian v S & C Snow Plowing, Inc*, 249 Mich App 695, 703-704; 644 NW2d 779 (2002) (quotation marks and citation omitted). For purposes of premises liability, possession "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 704, quoting *Kubczak*, 456 Mich at 661. This Court has held that even when a contract grants one party possession and control over property for purposes of maintenance the relevant question is which party actually exercised control over maintenance, stating that "even if the franchise agreement could be construed as granting [the tenant] the right to control the restaurant's maintenance, there is no evidence that [it] exercised that right" on the day that the plaintiff was injured. *Little v Howard Johnson Co*, 183 Mich App 675, 679; 455 NW2d 390 (1990).

In this case, in addition to not having control over the HVAC unit, the electrical service, and the area where there HVAC unit was housed under the terms of the lease, MDT also did not actually exercise control over the HVAC unit, the electrical wiring, or the mezzanine area. Michael Burkey and Stephen Erps both testified that MDT was not expected to repair the HVAC in the building, but instead was to notify the Erps of any HVAC problems and the Erps would arrange for repairs. Burkey testified that on the morning plaintiff was injured he had notified the Erps that the air conditioning unit was not working, and shortly thereafter plaintiff arrived to repair the HVAC unit. Thus, the Erps not only had the contractual right to exercise control over the HVAC unit and the area where plaintiff was injured, but also actually exercised dominion and control over these aspects of the building. As a result, the Erps and not MDT had "possession" of the HVAC

unit, the electrical service in the building, and the area housing the HVAC unit where plaintiff was injured. See *Kubczak*, 456 Mich at 661; *Derbabian*, 249 Mich App at 703-704.

Plaintiff also contends that there was a question of fact as to what caused plaintiff to receive an electrical shock. The trial court agreed that there were questions of fact, and on that basis denied the Erps' and ACT's motion for summary disposition. With regard to MDT, however, whether plaintiff's injury was caused by the HVAC unit or by the exposed wire near the HVAC unit, the terms of the parties' lease and the actual practice of the parties demonstrated that the Erps exercised sole control over the HVAC unit, the electrical wiring of the building, and the area where the HVAC unit was housed despite MDT having leased the premises. Any question of fact regarding the potential sources of plaintiff's injury was not relevant as to MDT. The trial court therefore did not err in granting MDT summary disposition under MCR 2.116(C)(10).

Affirmed.

/s/ Mark T. Boonstra
/s/ Mark J. Cavanagh
/s/ Michael F. Gadola