RENDERED: JANUARY 16, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001637-MR

VICKIE LANDEL — APPELLANT

v.

APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE VERNON MINIARD, JR., JUDGE
ACTION NO. 11-CI-00579

THE KROGER COMPANY; AND NORTHRIDGE PARTNERS, LTD a/k/a NORTHRIDGE SHOPPING CENTER, LTD. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, MAZE, AND TAYLOR, JUDGES.

CLAYTON, JUDGE: Vickie Landel appeals the September 12, 2013 Russell Circuit Court order that granted the Kroger Company's (hereinafter "Kroger") motion to set aside the trial court's July 16, 2013 order, and also, granted Kroger summary judgment.

Further, Landel appeals from the September 13, 2013 order of the Russell Circuit Court denying her motion to alter, amend, or vacate the trial court's November 13, 2012 order, and also, designating the original order as "final and appealable." In the November 13th order, the trial court granted the motion of Northridge Partners, Ltd., also know as Northridge Shopping Center, (hereinafter "Northridge") to dismiss with prejudice Landel's first amended complaint. The trial court granted the motion because the addition of Northridge and XYZ Unknown Defendants to the Complaint was barred by the statute of limitations.

After careful consideration, we affirm.

BACKGROUND

Landel, who was a customer at a Kroger store, fell and was injured in the parking lot at the Northbridge Shopping Center in Russell Springs, Kentucky, on March 10, 2011. In her complaint, Landel alleges that the fall occurred because of a defective and dangerous condition in the parking lot.

On November 21, 2011, Kroger notified Landel through written correspondence that Northridge was the landlord and owner of the property and responsible for the upkeep of the parking lot where Landel claimed that she fell. Further, Kroger provided Landel the lease agreement that identified Northbridge as the landlord responsible for the common area, which includes the parking lot, of the shopping center.

On March 21, 2012, eleven days after the one-year anniversary of the incident, Landel moved the trial court to permit her to file an amended complaint

naming Northbridge and XYZ Unknown Defendants as additional defendants. Subsequently, Northbridge and XYZ Unknown Defendants filed a motion to dismiss the filing of the amended complaint because Landel failed to name them as defendants within one year of the alleged fall, and hence, missed the one-year statute of limitations. Landel responded that the one-year statute of limitations had not run because she did not obtain the name of the owner of the shopping center until after filing her initial complaint. Yet, Landel did not address that Kroger had supplied her, in November 2011, the name of the shopping center's owner and a copy of the lease agreement between Kroger and Northridge.

On November 13, 2012, the trial court dismissed with prejudice Northbridge and XYZ Defendants because Landel had failed to timely sue them. Kroger then filed a motion for summary judgment since it was not the title-owner of the property where Landel fell, and under Kroger's lease, it did not have any responsibility to maintain the common areas, which included the parking lot. The trial court, however, denied the motion for summary judgment.

Kroger then filed a motion to vacate the trial court's denial of its motion for summary judgment. After reconsidering, on September 12, 2013, the trial court granted both Kroger's motion to vacate its November 2012 order and also Kroger's summary judgment motion. In addition, the trial court denied Landel's motion to vacate the trial court's earlier order dismissing Northridge and XYZ Defendants. Landel now appeals from these decisions.

On appeal, Landel argues that the motion to amend the complaint and add Northbridge as a defendant was timely filed; that because Kroger retained an agent to clean the parking lot, it had established control over the space, and therefore, was liable for any injuries occurring on the lot; that Kroger's motion for summary judgment was properly denied; and, that the trial court's grant of Kroger's motion to vacate that order and thereafter grant summary judgment was in error.

In contrast, Kroger claims that the trial court's dismissal of Northbridge and XYZ Defendants was correct since Landel failed to name them as parties until after the expiration of the one-year statute of limitations set forth in Kentucky Revised Statutes (KRS) 413.140; that the trial court's grant of the summary judgment in favor of Kroger was proper since Kroger did not own the parking lot where Landel was injured; under Kroger's lease agreement, it had no responsibility to maintain the parking lot; and finally, *Smith v. Grubb*, 2012 WL 2160192 (KY. App. 2012)(2011-CA-000223-MR) was improperly cited as authority by Landel; and, the grant of summary judgment in Kroger's favor was without error.

STANDARD OF REVIEW

Initially, we observe that summary judgment is to be "cautiously applied and should not be used as a substitute for trial." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 483 (Ky. 1991). Further, granting a motion for summary judgment is an extraordinary remedy and should only be used "to

terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." *Id*. (quoting *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky.1985)).

Furthermore, the review by the trial court is performed not to resolve any issue of fact but to discover whether a real issue exists. *Steelvest* at 480. Furthermore, the review requires the facts be viewed in the light most favorable to the party opposing summary judgment. *Id.* Here, the facts must be viewed in a light most favorable to Landel.

Appellate review of a summary judgment involves only legal questions and a determination of whether a disputed material issue of fact exists. *Id*. Thus, we operate under a *de novo* standard of review with no need to defer to the trial court's decision. *Davis v. Scott*, 320 S.W.3d 87, 90 (Ky. 2010) (citation omitted).

ANALYSIS

In the matter before us, we will address the propriety of the trial court's dismissal of Landel's motion to amend her complaint and the efficacy of the trial court's ultimate decision to grant the summary judgment motion proffered by Kroger.

Statute of Limitations

Landel's fall occurred on March 10, 2011, and she filed her first complaint on November 2, 2011. On March 21, 2012, more than one year after the fall, she filed a motion to amend the original complaint and add as defendants both Northridge and XYZ Unknown Defendants to the complaint. However, the trial court determined that Landel was barred from adding additional parties because of the one-year statute of limitations.

The applicable statute of limitations is found in KRS 413.140(1), which states, "[t]he following actions shall be commenced within one (1) year after the cause of action accrued: (a) [a]n action for an injury to the person of the plaintiff. . . ." Further, Kentucky courts have held that the one-year statute of limitations applies to slip and fall actions. *See Everman v. Miller*, 597 S.W.2d 153 (Ky. App. 1979). Consequently, under these facts, the one-year statute of limitations ran until March 10, 2012, and the motion to amend the complaint and add defendants was outside the valid time period. We agree.

Landel contends that Kentucky case law allows the tolling of the statute of limitations in personal injury cases when through discovery it becomes apparent that another party must be added. *Louisville Trust Co. v. Johns-Manville Products Corp.*, 580 S.W.2d 497 (Ky. 1979). But the discovery rule does not toll the statute of limitations in order for an injured plaintiff to discover the identity of the wrongdoer unless there is fraudulent concealment or a misrepresentation by the defendant of his role in causing the plaintiff's injuries. *Fluke Corp. v. LeMaster*, 306 S.W.3d 55, 60 (Ky. 2010). Moreover, a person who has knowledge of an

injury is on notice to investigate and discover, within the statutory time constraints, the identity of the tortfeasor. *Id*.

Additionally, Landel was notified on November 21, 2011, that Northridge owned the shopping center and had agreed contractually, through its lease agreement with Kroger, to maintain the parking lot. The attorney for Kroger sent a letter to Landel's counsel providing both the name of the shopping center's owner and a copy of the lease. Hence, this information was known to Landel roughly four months prior to the expiration of the statute of limitations. Accordingly, the trial court did not err in dismissing Landel's motion to amend the complaint.

Summary Judgment

Negligence actions in Kentucky require that a plaintiff prove the existence of the following elements: duty, breach, causation, and damages. *Mullins v. Commonwealth Life Ins. Co.*, 839 S.W.2d 245, 247 (Ky. 1992). Moreover, the absence of proof on any one of the required elements is fatal to a negligence claim. *M & T Chemicals, Inc. v. Westrick*, 525 S.W.2d 740, 741 (Ky.1974). The existence of duty is a question of law for the courts. *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 89 (Ky. 2003). In the case at hand, Kroger moved for summary judgment under Kentucky Rules of Civil Procedure (CR) 56.03 because, according to it, there were no genuine issues of material fact, and

thus, Kroger was entitled to summary judgment as a matter of law. In particular, Kroger argues that it had no duty to Landel.

In Landel's complaint, she alleges that she fell in the parking lot of the Northridge shopping center on March 10, 2011. More than a year after the fall, she made a motion to amend the complaint and add Northridge and XYZ Unknown Defendants. The amended complaint acknowledges that Northridge and XYZ Defendants own the property known as Northridge Shopping Center, while interestingly, she claims an inability to determine the owner of the shopping center. However, as discussed above, the motion to amend the complaint was appropriately denied by the trial court because the one-year statute of limitations had expired barring the addition of new defendants.

Originally, the trial court denied Kroger's summary judgment motion because it opined, based on *Jaimes v. Thompson*, 318 S.W.3d 118 (Ky. App. 2010), that regardless of ownership of the premises, one who maintains control of a premise may be found liable for injuries sustained by an invitee of that premise. But a closer look at the reasoning in *Jaimes* illustrates instead that it supports Kroger's position. Therein, our Court stated:

> When determining whether a residential landlord is liable for injuries sustained on leased property, there is a critical distinction between properties leased wholly by one tenant and properties leased by numerous tenants. When a tenant maintains complete control and possession over the premises and the landlord has no contractual or statutory obligation to repair, the landlord is only liable for "the failure to disclose known latent defects at the time the tenant leases the premises." *Carver v. Howard*,

> 280 S.W.2d 708, 711 (Ky. App. 1955). However, when a portion of the premises is retained by the landlord for the common use and benefit of numerous tenants, the landlord must exercise ordinary care to keep common areas in a reasonably safe condition. *Id*.

Id. at 119-120.

Here, the landlord had a contractual obligation to maintain the common area, that is, the parking lot. In addition, as explained by our Court, the law supports the proposition that legally the landlord must exercise ordinary care to keep the common area safe.

In its order denying Kroger's summary judgment motion, the trial court also relied on an unpublished and now unreported opinion, *Smith v. Grubb*, 2014 WL 4782937 (Ky. App. 2014)(2011-CA-000223-MR), for the proposition that regardless of a contract between a lessor and a lessee, the lessee may be found liable for injuries sustained by an invitee if it is established that the lessee had "control and supervision" over the subject premises. Even though Landel suggests that this case is suitably cited, Kroger vociferously and accurately argues that the trial court's use of this case was improper given that it was an unpublished opinion. This case is now pending before the Kentucky Supreme Court on a motion for discretionary review. Notwithstanding the trial court's unacceptable use of *Grubb*, ultimately the trial court granted Kroger summary judgment, and thus, its use was harmless error.

Subsequently, after Kroger proffered its motion to alter the trial court's denial of its summary judgment, the trial court, without comment, vacated

the original order and ordered summary judgment in Kroger's favor. We concur with this action by the trial court.

Simply put, the crux of the issue is whether Kroger had a duty to Landel. We conclude that Landel has not presented genuine issues of material fact establishing that Kroger had a duty towards her. First, Kroger did not own the parking lot. And the lease agreement specifically states in paragraph eight of the lease that Kroger has no responsibility to keep the parking lot or the common area in good repair:

> Landlord shall keep and maintain the Common Area in good repair, including without limitation, keeping the same free of trash, debris, snow or ice as well as properly lighted, striped and surfaced. Landlord shall indemnify and save Tenant from all claims, losses, damages and expenses, including without limitation attorneys' fees arising out of the Common Area.

Thus, since Kroger had no ownership or contractual obligation to maintain the parking lot, it did not have a duty toward Landel. Accordingly, the trial court's grant of Kroger's summary judgment motion was not in error.

Landel maintains that Kroger had a duty to her because she was an invitee of Kroger who was injured on premises controlled and maintained by Kroger. But as noted, Kroger is not the owner of the parking lot and has no obligation to maintain the parking lot since the leaseholder, Northridge, is required by its lease to do so. Hence, Landel is incorrect in her supposition that Kroger is required to keep up the parking lot.

Landel is the party opposing the summary judgment motion, and therefore, to prevail must present some affirmative evidence that there is a genuine issue of material fact that necessitates a trial. *Steelvest*, 807 S.W.2d 476. But she did not establish that Kroger owed her a duty.

Further, Landel's arguments that Kroger failed to identify the third-party owner of the lot and that it hired an agent to maintain the lot are specious. Clearly, Kroger's attorney informed Landel's counsel of the lease owner, Northridge, and a copy of the lease. Numerous copies of the letter and the lease are found in the record. Nor has Landel rejected or argued that her counsel did not receive this information. And regarding the claim that Kroger hired an agent to maintain the parking lot, other than an unsupported innuendo, no evidence appears in the record to support this claim. In response, Kroger vehemently denies this averment.

Consequently, Landel failed to provide any sworn testimony or affirmative evidence to oppose Kroger's motion for summary judgment. Plus, evidence was placed in the record contradicting Northridge's obligation to keep the parking lot safe. The trial court's grant of summary judgment is affirmed.

CONCLUSION

We affirm the decision of the Russell Circuit Court.

MAZE, JUDGE, CONCURS.

TAYLOR, JUDGE, DISSENTS AND WILL NOT FILE SEPARATE OPINION.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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