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Coble v. Greencastle Elite Fitness & Dentury, Inc.

Sherry Coble, Plaintiff v.
Greencastle Elite Fitness & Century, Inc., Defendants
Court of Common Pleas of the 39th Judicial District of Pennsylvania, Franklin County Branch, Civil Action No. 2009 - 1331

HEADNOTES

Summary judgment; landlord out of possession; nuisance per se; leasing property for a purpose involving admission of the public

1. Generally, a landlord out of possession is not liable for injuries suffered by third parties on leased property.
2. A landlord out of possession may be liable for injuries suffered by a third party when the leased premises constitutes a nuisance per se.
3. As a matter of law, the women's shower area was not a nuisance per se.
4. A landlord out of possession may be liable for the injuries suffered by a third party if the landlord leases the property for a purpose involving the admission of the public and he neglects to inspect for or repair dangerous conditions existing on the property before possession is transferred to the lessee.
5. There is an issue of material fact as to whether Century, Inc. neglected to inspect for or repair dangerous conditions before transferring the premises to Greencastle Elite Fitness.

Appearances:
Stephen G. Held, Esq., Attorney for Plaintiff
Charles E. Haddick, Jr., Esq. and
Christine L. Line, Esq., Attorneys for Defendant Century, Inc.
Ann Margaret Grab, Esq., Attorney for Defendant
Greencastle Elite Fitness

OPINION

Before Krom, J.

Presently before the Court is Century, Inc.'s Motion for Summary Judgment. For the reasons the follow, the Court denies Century, Inc.'s Motion for Summary Judgment.

Background/ Procedural History

Sherry Coble ("Plaintiff") initiated a lawsuit against Greencastle Elite Fitness ("Elite Fitness") and Century, Inc. ("Century") by filing a Writ of Summons on March 25, 2009. Thereafter, Plaintiff filed a Complaint on July 1, 2009. The Complaint contained two counts of negligence, one against each Defendant. Plaintiff brought suit based on an accident that occurred in the ladies locker room, specifically the shower area, at Elite Fitness. Plaintiff alleges that as she stepped backward in the shower area after her work out on April 5, 2007, she fell down a step leading to and from the shower and suffered personal injuries as a result. *Complaint* ¶ 10. Specifically, Plaintiff alleges that as a result of the negligence of Defendants she "sustained injuries including, but not limited to, a posterior tibia tendon dysfunction right foot with partial tear and longitudinal tear of peroneas brevis tendon. *Complaint* ¶¶ 15, 25. Plaintiff alleges that Defendants knew or should have known that the step was poorly designed and posed an unreasonable risk of injury to people entering the shower area. *Complaint* ¶¶ 13, 23.

At the time the alleged incident took place, Elite Fitness was the operator of a fitness center located at 114 South Antrim Way, Greencastle, Pennsylvania 17225 ("the Premises"). *Complaint* ¶ 2; *Elite Fitness Answer* ¶ 2. Elite Fitness was in possession, management, and control of the Premises when the alleged incident took place.

Complaint ¶ 5; *Elite Fitness Answer* ¶ 5. At all relevant times, Century was the owner of the Premises. *Complaint* ¶ 6; *Century Answer* ¶ 6.

Century bought the building where the Premises is located in 2002. *Deposition of Jason S. Kinzer*[1] 9:14. At the time that Century bought the building, the Premises was leased to Rich and Marty Pine who were operating a gym/hair salon.[2] *Deposition of J.S.K*. 13:5-7. It is believed that the shower at the center of this dispute was already installed in the Premises when Century purchased the building. *Deposition of J.S.K*. 16:19-19:1. At some point after Century acquired the Premises, the Pines sold their gym business to Pete and Ginger Edwards who continued to run a gym known as Greencastle Elite Fitness on the Premises. On October 31, 2005, Century leased the Premises to Pete S. & Ginger R. Edwards T/A Greencastle Elite Fitness, Inc. Prior to signing the lease with the Edwards, Century did have a conversation with the Edwards; however, Century did not do a formal inspection of the Premises. *Deposition J.S.K*. of 14:17-15:2. Generally, Century would "go through the property" before leasing the property to a new tenant, but in this case the Premises was not being vacated so no inspection was done. *Deposition J.S.K*. 15:22-16:9. Since the Edwards have been running the gym and leasing the Premises, they have not made any changes to the ladies shower room other than adding a shower curtain and a rug. *Deposition of G.R.E*. 17:5, 48:7-50:13, 57:20-61:4.

Discovery has been ongoing between the parties and on June 17, 2013, Century filed a Motion for Summary Judgment, along with a Brief in Support. Plaintiff filed a Response to Century's Motion for Summary Judgment on July 12, 2013, and a Brief in Opposition on September 4, 2013. Century filed a Reply Brief on September 12, 2013. No response to Century's Motion for Summary Judgment was filed by Elite Fitness.[3] Oral argument in this matter was scheduled for October 2, 2013. By Order of Court dated September 19, 2013, Century's Motion for Summary Judgment will be decided on the briefs, the record, and the law without need for oral argument. Therefore, Century's Motion for Summary Judgment is now properly before the Court and ripe for decision.

Discussion

Summary Judgment Standard

"A motion for summary judgment may be granted only when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law." *Strine v. Commonwealth*, 894 A.2d 733, 737 (Pa. 2006). Only when the facts are so clear that reasonable minds cannot differ may the trial court properly enter summary judgment. *Basile v. H&R Block*, 761 A.2d 1115 (Pa. 2000). In deciding the motion, the Court reviews the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact are resolved in the nonmoving party's favor. *Belden & Blake v. Dep't of Conservation & Natural Res.*, 969 A.2d 528, 531 (Pa. 2009).

Summary judgment is appropriate when "an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury." Pa. R.C.P. 1035.2(2). In responding to a motion for summary judgment, the adverse party may not rest upon the allegations or denials of the pleadings. Pa R.C.P. 1035.3 Rather, the party must point to evidence in the record that controverts the motion. *Id*. Failure of the adverse party to do so entitles the moving party to judgment as a matter of law. *Gresik v. Pa P'ners, L.P.*, 989 A.2d 344, 352 (Pa. Super. 2009), *aff'd on other grounds*, 33 A.3d 594 (Pa. 2011).

Liability of an out of possession landlord

Pennsylvania treats leases as sales of the land for the duration of the lease. *Deeter v. Dull Corp., Inc.*, 617 A.2d 336, 339 (Pa. Super. 1992). Accordingly, landlords out of possession are generally not liable for injuries suffered by third parties on leased property. *Dinio v. Goshorn*, 270 A.2d 203, 206 (Pa. 1969). However, despite this general rule, a landlord out of possession may be liable:

> (1) if he has reserved control over a defective portion of the demised premises, (2) if the demised premises are so dangerously constructed that the premises are a nuisance per se, (3) if the lessor has

1 Jason S. Kinzer is the Vice-President of Century, Inc.

2 According to Ginger Edwards, Richard Pine and Ed Clark owned the gym. *Deposition of G.R.E*. 11:8. When the Edwards initially signed the lease there was a hair salon next to the gym being operated by Richard Pine rented. *Deposition of G.R.E*. 15:20-22. At some point Elite Fitness expanded into what had previously been the hair salon. *Id.*

3 Elite Fitness filed a Motion for Summary Judgment on August 25, 2011 alleging that Elite Fitness was immune from suit based on the Release of Liability that Plaintiff signed. *Elite Fitness MSJ* ¶ 12. The Court granted partial summary judgment on the issue of the Release of Liability in favor of Elite Fitness signed by Plaintiff.

> knowledge of a dangerous condition existing on the demised premises at the time of transferring possession and fails to disclose the condition to the lessee, (4) if the landlord leases the property for a purpose involving the admission of the public and he neglects to inspect for or repair dangerous conditions existing on the property before possession is transferred to the lessee, (5) if the lessor undertakes to repair the demised premises and negligently makes the repairs, or (6) if the lessor fails to make repairs after having been given notice of and a reasonable opportunity to remedy a dangerous condition existing on the leased premises.

Henze v. Texaco, Inc., 508 A.2d 1200, 1202 (Pa. Super. 1986) (citations omitted).

Century filed a Motion for Summary Judgment alleging that they are a landlord out of possession and that none of the exceptions to the general rule of non-liability for a landlord out of possession are applicable in this case and therefore they are entitled to summary judgment. *Century MSJ* ¶¶ 28, 30, 32-45. Plaintiff responds that summary judgment is inappropriate because there are genuine issues of material fact as to the applicability of the exceptions to the general rule of non-liability for a landlord out of possession.[4] *Brief in Opposition* p. 5. The Court will now address the two exceptions to the general rule of non-liability which Plaintiff asserts are applicable in this case.

The Premises do not constitute a nuisance per se

Century brings a Motion for Summary Judgment alleging that as a landlord out of possession they are not liable for injuries that occurred on the Premises while Elite Fitness was in possession and further that there is no issue of material fact that none of the exceptions to non-liability are applicable. Specifically, Century alleges that there is no issue of material fact that the shower did not constitute a nuisance per se[5] based on the testimony of Ginger Edwards during her deposition. *Century MSJ* ¶¶ 36, 37. Ginger Edwards testified that other than Plaintiff no one had ever complained of the shower construction or had sustained a fall in the ladies' shower area. *Deposition of G.R.E.* 58:3-6, 18-19.

Plaintiff argues that summary judgment is not proper because construction of the ladies' shower was a nuisance per se. *Brief in Opposition* p. 5. Plaintiff specifically asserts that as a result of the single step at the shower stall opening and the placement of the shower head, along with the lack of handrails or grab bars, the shower was so negligently constructed as to constitute a nuisance per se. *Brief in Opposition* p. 5-6. Plaintiff's expert,[6] Len McCuen, PE, AIA, stated that the step leading to the ladies' shower

> violated numerous applicable codes and standards including: the BOCA and ICC Building Codes, BOCA and ICC Property Maintenance Codes, Title 34 Labor and Industry of the Pennsylvania Code, the FRPA 101 Life Safety Code, NBS 120, ASTM F 1637, and ANSI A117.1/ADAAG.

Response, Exhibit 1 p. 14.

For an out of possession landlord to be liable because the premises are a nuisance per se "the premises must be so constructed or be in such condition that in and of itself it amounts to a nuisance [7]." *Brown v. White*, 51 A. 962 (Pa. 1902). "A nuisance per se is a nuisance at all times and under any circumstances…A nuisance in fact, on the other hand, is one which becomes such by reason of its location, surrounding circumstances, and the manner in which the acts complained of are done." 1 P.L.E. Nuisance § 1. In *Harte v. Jones*, the Pennsylvania Supreme Court held that a drop of several feet between two buildings (with a door to guard against entrance) was not a nuisance per se and that the landlord was not liable for injuries sustained by a third party who fell. 134 A. 467 (1926). Similarly, a landlord was not held liable for the injuries sustained by a third party when he fell from the first floor to the basement when he stepped through the basement door and there were no stairs, as this was not considered a nuisance per se. *Bornman v. Improvement Co.*, 107 A. 682 (Pa. 1919). Additionally, a violation of an ordinance is not conclusive of a nuisance or a nuisance per se. *Dressell Assocs. v. Beaver Builders Supply, Inc.*, 778 A.2d 800, 802 (Pa. Commw. Ct. 2000).

There is no material factual dispute as to the condition of the ladies' shower, rather the parties dispute whether the ladies' shower is a nuisance per se such that that Century, as an out of possession landlord, could be responsible for the alleged injuries that Plaintiff sustained in the Premises. Whether the shower is a nuisance per se, is a question

4 The Court does not believe that Plaintiff suggests that there is a question of material fact that Century is an out of possession landlord. Plaintiff repeatedly refers to Century as "an out of possession landlord."

5 Initially, Century argues that Plaintiff failed to plead in her Complaint that the shower step was a nuisance per se. *Reply Brief* p.5. While the Court finds that Plaintiff did not allege that the shower constituted a nuisance per se in her Complaint, the Court will analyze the applicability of the nuisance per se exception to the general rule of non-liability for a landlord out of possession.

6 The Court has not considered any of the legal conclusions of Mr. McCuen, a civil engineer and architect, in making a decision.

7 Black's Law dictionary defines nuisance as: "That which annoys or disturbs one in possession of his property, rendering its ordinary use or occupation physically uncomfortable to him." Black's Law Dictionary (Rev. Fourth Ed. 1968) 1214.

of law to be determined by the Court. Considering the description of the shower contained in Mr. McCuen's report and the testimony of Ginger Edwards in her deposition, the Court determines that the ladies' shower is not a nuisance per se.

There is an issue of material fact as to whether Century neglected to inspect for or repair dangerous conditions before transferring the Premises to Elite Fitness

Century asserts that summary judgment is proper as there is no evidence that Century neglected to inspect the property for dangerous conditions. *Century MSJ* ¶ 41. According to Mr. Kinzer's testimony when he acquired the building where the Premises is located in 2002 he performed a walk-through and that when Century entered into a lease with Pete and Ginger Edwards he did not formally inspect the Premises because the "gym kept going, just under new ownership." *Century MSJ* ¶¶ 39-40 (citing *Deposition of J.S.K*. 11:9-21 and 14-16).

Plaintiff alleges that Defendant had a responsibility to formally inspect the Premises to ensure the safety of the public. *Response* ¶ 40. Plaintiff also asserts that "[u]pon reasonable inspection, Defendant Century would have noticed that the shower was negligently constructed and posed a dangerous condition to business invitees." *Brief in Opposition* p.7.

Henze provides an exception to the general rule of non-liability for a landlord out of possession "if the landlord leases the property for a purpose involving the admission of the public and he neglects to inspect for or repair dangerous conditions existing on the property before possession is transferred to the lessee…" 538 A.2d at 1202.

Pete and Ginger Edwards operated their gym business, known as Greencastle Elite Fitness out of the Premises. When Century leased the Premises they knew that a gym which would be open to the public would be operated on the Premises. Whether Century neglected to inspect for or repair dangerous conditions existing on the Premises before possession was transferred to Pete and Ginger Edwards T/A Greencastle Elite Fitness, such that an exception to the general rule of non-liability for an out of possession landlord would be applicable, is a question of material fact to be answered by the jury. Specifically, there are issues of fact regarding whether an inspection was performed prior to a transfer of possession and whether the shower stall constituted a dangerous condition. As there is a material question of fact that must be answered by the jury, summary judgment is improper. Therefore, Century's Motion for Summary Judgment is DENIED. An appropriate Order of Court follows.

ORDER OF COURT

NOW THIS 4th day of October, 2013, upon review and consideration of Defendant Century, Inc.'s Motion for Summary Judgment, Plaintiff's Response, and the briefs submitted by both parties,

IT IS HEREBY ORDERED that Defendant Century Inc.'s Motion for Summary Judgment is DENIED for the reasons outlined in the above Opinion.

Pursuant to the requirements of Pa. R. Civ. P. 236 (a)(2),(b) and (d), the Prothonotary shall give written notice of the entry of this Order of Court, including a copy of this Order of Court, to each party's attorney of record and shall note in the docket the giving of such notice and the time and manner thereof.