STATE OF MICHIGAN

COURT OF APPEALS

STEVEN KLENOW, Plaintiff-Appellant,	UNPUBLISHED December 11, 2012
v	No. 309742 Saginaw Circuit Court
NEHCO COMPANY, Defendant-Appellee.	LC No. 10-010999-NO

Before: O'CONNELL, P.J., and CAVANAGH and DONOFRIO, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting summary disposition in favor of defendant under MCR 2.116(C)(10). Plaintiff also appeals the trial court's order denying his motion for reconsideration. We affirm both orders.

Plaintiff's action arose after he slipped on the icy floor of a walk-in freezer unit of the grocery business where he was employed as the meat manager. The freezer unit was a prefabricated structure; a prior owner had connected the freezer unit to the grocery building. Plaintiff alleged that the icy floor was the result of a dangerously defective roof that had been added to the freezer unit. Plaintiff sued defendant, who owned the grocery building and leased the building to plaintiff's employer. Plaintiff alleged that defendant breached a duty to maintain the freezer unit and the unit roof in a safe condition. The trial court entered summary disposition in favor of defendant upon finding (1) defendant did not possess or control the freezer unit for purposes of premises liability; (2) defendant had no duty to plaintiff that was separate and distinct from defendant's contractual obligations under the building lease; and (3) defendant neither knew nor should have known of the alleged dangerous condition of the freezer unit.

On appeal, plaintiff first argues that the trial court erred when it found that defendant neither possessed nor controlled the freezer unit. We review de novo the trial court's ruling on defendant's summary disposition motion. *Dancey v Travelers Prop Cas Co*, 288 Mich App 1, 7; 792 NW2d 372 (2010). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). We consider the pleadings and the other relevant record evidence in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. *Dancey*, 288 Mich App at 7.

In this case, the parties agree that plaintiff was at the grocery store as an invitee. To recover on a premises liability claim, an invitee must establish that the named defendant had possession and control of the premises at issue. *Kubczak v Chem Bank & Trust Co*, 456 Mich 653, 660; 575 NW2d 745 (1998). A defendant has possession of the premises if the defendant exercises actual dominion and control over the premises. *Id*. at 661. If the defendant had no dominion or control over the property, the defendant lacked reasonable power to prevent the alleged injury and cannot be held liable for the alleged damages. *Id*. at 661-662, citing *Nezworski v Mazanec*, 301 Mich 43, 56; 2 NW2d 912 (1942). A court may look to the contract between an owner of the premises and a possessor of the premises to determine whether the named defendant had authority to exercise dominion and control over the premises. See, e.g., *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 704; 644 NW2d 779 (2002).

The record in this case demonstrates that defendant neither possessed nor controlled the freezer unit. The prior owners of the grocery business testified that the grocery business owner possessed and controlled the freezer unit. Similarly, defendant's principal attested that the freezer unit and the roof were not defendant's property, but were instead the property of the grocery business owners. Moreover, the freezer unit was listed as business equipment on the inventory of items the prior grocery business owners sold to plaintiff's employer. Plaintiff presented no evidence to suggest that defendant had possession, dominion, or control over the freezer unit.

Plaintiff argues, however, that the cause of his injuries was the condition of the freezer unit roof and that defendant had control over the roof. Plaintiff further argues that the trial court orally ruled at the first summary disposition hearing that the freezer unit and its roof were appurtenances. The trial court's oral statement at that hearing was not a definitive ruling on the possession and control issue, for two reasons. First, the court made no written ruling on the issue until after the second summary disposition hearing. A court speaks only through its written orders. *Brausch v Brausch*, 283 Mich App 339, 353; 770 NW2d 77 (2009). Second, even if the court's statement could be deemed a finding that the freezer unit was an appurtenance to the building, the finding would not resolve the possession and control issue. In its written opinion after the second summary disposition hearing ,the trial court expressly found that "the evidence indicates that plaintiff's employer . . . had possession and control of the premises during the relevant time period." The trial court's finding is consistent with the record. Plaintiff provided no evidence to indicate that defendant was responsible for preserving, maintaining, or controlling the freezer unit or the freezer unit roof.

Plaintiff next argues that the building lease creates a question of fact regarding possession and control of the freezer unit roof. We disagree. The lease indicated that trade fixtures and equipment, including "built-in freezers and walk-in refrigerators," were property of the lessee, i.e., the grocery business owner. Regarding maintenance, the lease required the lessor (defendant) to maintain "the exterior walls of the Improvements (except the painting thereof), and the roof, except that portion of the building described as the canopied entrance." By its terms, this provision rendered defendant responsible for maintaining the roof over the "improvements," but not the roof over any appurtenances. Plaintiff maintains that the freezer unit is an appurtenance, not an improvement. Accordingly, plaintiff cannot prevail on his argument that the lease required defendant to maintain the freezer unit roof.

Plaintiff next argues that defendant failed to preserve the freezer unit and the roof as evidence, and that defendant should therefore be precluded from introducing evidence concerning possession and control of the unit and the roof. Plaintiff's argument has two flaws. First, although a party does have a responsibility to preserve evidence that it knows or should know is relevant to litigation, the responsibility exists only when a party has some degree of control over the evidence at issue. See *Brenner v Kolk*, 226 Mich App 149, 160-162, and 162 n 8; 573 NW2d 65 (1997). In this case, plaintiff has failed to produce evidence to establish that defendant had control over the freezer unit roof.

Second, plaintiff has not produced evidence to indicate that defendant was involved in any destruction of the freezer unit roof. The record indicates that the freezer unit roof was replaced after plaintiff's accident. Defendant produced evidence to indicate that a separate entity paid for and managed the reroofing of the freezer unit. Absent any evidence that defendant was involved in reroofing the unit, plaintiff's argument fails.

In sum, we conclude that the record contains nothing to indicate that defendant had possession or control over the freezer unit or the unit roof. Accordingly, the trial court correctly determined that plaintiff's premises liability claim must fail for lack of evidence on the essential element of possession and control. See *Kubczak*, 456 Mich at 660. Given that defendant cannot be liable to plaintiff for premises liability, we need not address plaintiff's separate argument that defendant had notice of the alleged condition of the freezer unit roof. Plaintiff asserted the notice argument both in his summary disposition briefs and in his motion for reconsideration. We note that the record supports the trial court's conclusion that defendant neither created the allegedly dangerous condition nor had notice of the condition. The trial court therefore correctly entered summary disposition in favor of defendant and correctly denied plaintiff's motion for reconsideration.

Affirmed.

/s/ Peter D. O'Connell
/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio