STATE OF MICHIGAN

COURT OF APPEALS

ELIZA McCOY, Plaintiff-Appellant,	UNPUBLISHED June 25, 2013
v	No. 309834 309834
DOROTHY GUTTON, a/k/a DOROTHY GUITON, Defendant-Appellee.	LC No. 11-011059-NO

Before: WHITBECK, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Plaintiff, defendant's former tenant, appeals as of right from an order granting defendant's motion for summary disposition in this case involving a fall on a set of stairs. We affirm.

On September 27, 2011, plaintiff filed a first amended complaint alleging, in part, the following:

> 10. On or about April 1, 2011, at approximately 10:00 p.m.[,] Plaintiff while carefully walking down the basement steps from her apartment in order to re-stock the boiler which provided heat to her apartment and which was located in the basement of the building . . . did fall as a result of the defective basement stairs, lose her balance and fall violently to the floor of the basement with great force and violence as a result of the dangerous conditions then and there existing.
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> 11. It was the duty of the Defendant herein to provide a safe place for tenants and/or invitees such as Plaintiff and others similarly situated, and to live [sic] and to perform the tasks necessary to provide heat to the apartments in the operation and maintenance of said premises so as to prevent injuries to its invitees.
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> 12. Further, Defendant had the duty toward Plaintiff and other patrons of said premises[,] as tenants and/or invitees, to inspect for dangerous conditions and to warn Plaintiff and other patrons of dangerous conditions . . . which Defendant knew or should have known existed[,] i.e. defective, worn and/or deteriorated

> basement steps which were poorly lit[,] and to remove any dangerous conditions then and there existing.

Plaintiff alleged that defendant failed to protect plaintiff from or warn plaintiff about "the hazards arising in the existence of poorly lit and detached, defective, worn and/or deteriorated basement steps[.]" Plaintiff alleged that defendant knew or should have known about the dangerous condition. She set forth a count of negligence and, in the course of raising this count, alleged violations of eight different statutes. She contended that she suffered numerous injuries in the fall, such as a closed-head injury and back injuries.

On December 7, 2011, defendant filed for summary disposition under MCR 2.116(C)(8) and (10). Defendant alleged, in part:

> Plaintiff was in the sole possession of the rental property at the time of the alleged injuries. As part of the agreement between Plaintiff and Defendant, Plaintiff was to re-stock the boiler regularly to keep it in working order. Plaintiff regularly would need to re-stock the boiler and therefore would have to use the steps often. Plaintiff contacted Defendant on March 31, 2011 with a request to pay her April rent in two parts. During that same conversation, and any previous conversations between the parties, no mention was ever made of any issue regarding the basement steps. Defendant was never notified of any defective nature of the steps until over a month after Plaintiff alleges that she fell.
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> Further, and also peculiar, is that the letter of representation from Plaintiff's counsel [received on or about May 19, 2011] indicated that Plaintiff "tripped and fell" down the basement stairs. At this time, as well as during any and all other communications between the parties, there was no allegation of any defect. Defendant was never put on notice of any defect within the rental property. It was not until this lawsuit was filed that allegations of defects on the stairs were made.

Defendant alleged that plaintiff took possession of the home in 2009 and the alleged fall occurred almost two years later. Defendant contended that, according to case law, a landlord does not have a duty to inspect premises on a regular basis to search for defects.

Defendant attached to its motion the letter of representation in which plaintiff's attorney stated that he had been retained to represent plaintiff "with reference to serious and permanent injuries she suffered on your premises on April 11 [sic], 2011, when she tripped and fell down the basement stairs."

Plaintiff filed a response on January 20, 2012. Plaintiff contended that defendant had not properly supported her motion with documentary evidence. Plaintiff also alleged, in part:

> On several occasions between the time she moved into the apartment in July, 2009, and the time of the aforementioned fall on April 1, 2011, [plaintiff] personally reported to Defendant's son and maintenance man, Cecil Gutton, that the basement[] steps need[ed] to be repaired. . . . [Plaintiff] specifically told Mr. Gutton, on several occasions prior to her fall, that the basement steps were too

> narrow and were falling apart. . . . [Plaintiff's] conversations with Mr. Gutton about the basement steps occurred while he was physically at the premises. Mr. Gutton further walked down the steps and into the basement on several occasions, after [plaintiff] complained about the steps and before her fall, in order to fix the boiler.

Plaintiff attached to her response brief her affidavit, dated January 18, 2012, in support of the above allegations. Plaintiff also attached to her response brief photographs of the stairs in question.

Defendant filed a response on February 15, 2012. Defendant made four main allegations. First, defendant alleged that Cecil was never informed about any problems with the stairs and never knew of any defects in the stairs, including after he used the stairs himself. Defendant attached to her brief an affidavit by Cecil, dated January 26, 2012, in support of this allegation. Cecil also alleged in the affidavit that "[a]fter [p]laintiff moved out, I painted the stairs but did not perform repairs to the stairs, steps or railings." Second, defendant alleged that defendant herself "never had any verbal or written communication with Plaintiff indicating that the basement steps were in any sort of disrepair." Defendant attached her affidavit, dated January 26, 2012, in support of this allegation. Third, defendant alleged that the photographic evidence demonstrated that "there were in fact no visual or actual defects to the basement stairs." Fourth, defendant contended that the alleged fall was plaintiff's own fault; defendant emphasized that plaintiff sent a letter, by way of her attorney, indicating that she had *tripped*, "presumably due to her own negligence." In connection with the argument concerning plaintiff's fault, defendant alleged that "[e]ven had there been a defect, [plaintiff] would have had knowledge of the same and failed to inform her landlord of any defects."

A motion hearing took place on February 17, 2012. Defendant's attorney argued that there was no defect and no notice of a defect. He stated that plaintiff "moved up and down those stairs on a regular basis." Plaintiff's attorney responded that summary disposition would be premature because no depositions had yet been taken and plaintiff's affidavit raised questions concerning the defect and the notice. The court ruled for defendant, stating merely that it had "reviewed the materials that have been submitted as well as listened to the presentations by . . . the attorneys" and that "there are no genuine issues of material fact . . . ."

On March 5, 2012, the trial court entered an order granting defendant's motion "for the reasons stated by the [c]ourt on the record . . . ."

On March 26, 2012, plaintiff filed a motion for reconsideration, raising arguments similar to those she raises on appeal. The trial court denied the motion for reconsideration, without elaboration, on April 3, 2012.

We review de novo a trial court's grant or denial of summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other

> evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Maiden*, 461 Mich at 120.][1]

We find no basis for reversal of the trial court's decision because plaintiff set forth no genuine issue of material fact concerning whether the steps were defective. While plaintiff provided a conclusory affidavit alleging that the stairs were "falling apart," she did not elaborate on *how* the steps were falling apart and the photographs do not substantiate that they were falling apart. Moreover, while plaintiff contends in her affidavit that the stairs were "too narrow," she provides no frame of reference for this allegation. She does not provide measurements or comparables or even indicate which part of or in what respect the stairs were "too narrow." Conclusory statements such as those on which plaintiff relies are insufficient to raise a genuine issue of material fact. See *Rose v National Auction Grp, Inc*, 466 Mich 453, 470; 646 NW2d 455 (2002). Plaintiff simply did not raise a genuine issue of material fact concerning whether the stairs were defective.

Plaintiff contends that we should not rely on the non-defective nature of the stairs because, according to plaintiff, defendant did not raise this issue until she filed her February 15, 2012, reply to plaintiff's response brief. Plaintiff, citing MCR 2.116(G)(3)(b), argues that defendant failed to attach "supportive documents" to its *initial motion* and that, therefore, the trial court should have denied summary disposition for that reason alone. However, defendant did attach documentary evidence to its initial motion—specifically, a letter from plaintiff's attorney that indicated that plaintiff "tripped and fell" on the stairs and that *failed* to mention any defect in the stairs.

Moreover, defendant argued in its initial motion that "[d]uring . . . any . . . conversations between the parties, no mention was ever made of any issue regarding the basement steps." While it is true that the main focus of defendant's initial motion was the lack of notice of any defect, we find that the lack of a defect itself was sufficiently alluded to in this pleading, and defendant thereafter expanded upon (and further supported) this latter argument in its February 15, 2012, brief. Plaintiff, citing MCR 2.116(G)(1), argues that the court should not have considered the February 15 brief because "[d]efendant failed to first seek leave of the [c]ourt to file a [r]eply . . . ."[2] However, even though defendant did not seek a separate motion for leave to file its reply brief, the brief clearly *was* accepted for filing by the court, and, significantly, plaintiff did not object below to the filing of this brief until her motion for reconsideration—after the court had granted summary disposition to defendant. Under these circumstances, we find no basis on which to deem improper the consideration of the February 15, 2012, brief.

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[1] The court also relied on MCR 2.116(C)(8) in granting the summary-disposition motion, but we find that decision moot, as noted *infra*.

[2] Plaintiff argues that the pertinent court rules "do not automatically allow for the opportunity to file a reply to a response."

Plaintiff contends that the trial court's ruling was premature because discovery had not yet occurred. However, "[i]f a party opposes a motion for summary disposition on the ground that discovery is incomplete, the party must at least assert that a dispute does indeed exist and support that allegation by some independent evidence. Mere conjecture does not entitle a party to discovery, because such discovery would be no more than a fishing expedition." *Davis v Detroit*, 269 Mich App 376, 379-380; 711 NW2d 462 (2005) (internal citation and quotation marks omitted). Plaintiff's conclusory statement about the stairs falling apart—in the face of contradictory photographic evidence—and her conclusory statement about "narrowness" were insufficient to trigger the need for additional discovery.

In light of our decision, we need not address the additional arguments that plaintiff raises on appeal, because they are now rendered moot.

Affirmed.

/s/ William C. Whitbeck
/s/ Patrick M. Meter
/s/ Pat M. Donofrio