# STATE OF MICHIGAN

# COURT OF APPEALS

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| JOHN KRISEL, DARLENE KRISEL, JOHN KRISEL III, and JULIA KRISEL,<br><br>Plaintiffs-Appellants,<br><br>v<br><br>SILVERBROOKE VILLA APARTMENTS,<br><br>Defendant-Appellee. | UNPUBLISHED<br>June 24, 2014<br><br><br><br>No. 314382<br>Oakland Circuit Court<br>LC No. 2011-120572-NO |

Before: WILDER, P.J., and SAAD and K. F. KELLY, JJ.

PER CURIAM.

Plaintiffs appeal the trial court's grant of summary disposition to defendant, and argue that it erred when it denied their motion for reconsideration and refused to allow them to amend their complaint. For the reasons stated below, we affirm.

## I. FACTS AND PROCEDURAL HISTORY

This case springs from a low-grade bedbug infestation in plaintiffs' former apartment, which is located in defendant's complex. When plaintiffs moved in on May 1, 2011, they complained of ants and other insects in the apartment, but did not mention bedbugs. Defendant promptly hired a pest-control company to address the issue. An exterminator inspected plaintiffs' apartment on May 4, found that plaintiffs' apartment had a bedbug infestation, and treated the apartment less than a week later. The pest-control company returned to complete follow-up treatments on plaintiffs' apartment in the following weeks, and also treated and the surrounding apartments, though plaintiffs' neighbors had not reported any bedbug infestation. On May 25, roughly two weeks after the exterminator treated plaintiffs' apartment, defendant also offered to allow plaintiffs to move out and break their lease with no penalties, provided that plaintiffs informed defendant of their intentions by June 1, 2011 and moved out by June 30, 2011.

Plaintiffs did not respond to defendant's offer and remained in the apartment, yet ceased to pay their rent. In June 2011, defendant sought to evict plaintiffs from the apartment for unpaid rent. In July 2011, plaintiffs brought their own suit, and alleged that defendant: (1) behaved negligently by renting them an apartment it should have known was infested with bedbugs; (2) violated the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.*, by

misrepresenting that the apartment was fit for habitation; and (3) breached the implied warranty of habitability by renting an apartment infested with bedbugs.

Defendant responded with a motion for summary disposition under MCR 2.116(C)(8) or (C)(10). It noted that it did not breach the implied warranty of habitability because it promptly addressed the bedbug problem, and plaintiffs did not present any evidence that there was a serious defect with the apartment. Further, defendant stated that the apartment was never inhabitable. In addition, it argued that plaintiffs' MCPA and negligence claims failed as a matter of law because they presented no evidence that defendant knew or should have known about the bedbug infestation, or caused the bedbug infestation.

After a hearing in October 2012, the trail court granted defendant's request for summary disposition, and held that all of plaintiffs' claims failed because they provided no evidence that defendant was aware of the bedbug infestation before they moved into the apartment. It also observed that: (1) plaintiffs inspected the unit before moving in; (2) there were no prior complaints of bedbugs in plaintiffs' apartment; and (3) defendant moved quickly to resolve the problem and permitted plaintiffs to leave with no penalties—yet plaintiffs remained in the apartment without paying rent. Plaintiffs' made a motion for reconsideration in October 2012, and attempted to amend their complaint in November 2012 to encompass new claims and theories of recovery. The trial court rejected both motions in January 2013, and plaintiffs appealed to our Court.

On appeal, plaintiffs argue that the trial court: (1) erred when it granted defendant's request for summary disposition; and (2) abused its discretion when it denied their motion for reconsideration and amended complaint.

## III. ANALYSIS

### A. MOTION FOR SUMMARY DISPOSITION[1]

#### 1. NEGLIGENCE

A cause of action based on negligence requires proof that "(1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the legal duty, (3) the plaintiff suffered damages, and (4) the defendant's breach was a proximate cause of the plaintiff's damages." *Hill*

[1] A trial court's decision on a motion for summary disposition is reviewed de novo. *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280; 807 NW2d 407 (2011). "A summary disposition motion under MCR 2.116(C)(10) tests the factual support for a claim and should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.* "When deciding a summary disposition motion, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence in the light most favorable to the opposing party." *Id*. Because the trial court considered evidence beyond the complaint, we review defendant's motion for summary disposition under MCR 2.116(C)(10). See *MEEMIC*, 292 Mich App at 280.

*v Sears, Roebuck and Co*, 492 Mich 651, 660; 822 NW2d 190 (2012). Generally, an individual has no legal duty to aid or protect another. *Bailey v Schaaf*, 494 Mich 595, 604; 835 NW2d 413 (2013). However, "when a person actively engages in certain conduct," a duty may arise from "a statute, a contractual relationship, or by operation of the common law." *Hill*, 492 Mich at 660-661. The determination whether a defendant has a legal duty is a question of law. *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 693; 822 NW2d 254 (2012).

In a premises liability case, "liability arises solely from the defendant's duty as an owner, possessor, or occupier of land." *Buhalis*, 296 Mich App at 692. The type and extent of the duty a landowner owes to a visitor "depends on whether the visitor was a trespasser, licensee, or invitee at the time of the injury." *Sanders v Perfecting Church*, 303 Mich App 1, 4; 840 NW2d 401 (2013). A tenant is considered a landlord's invitee. *Benton v Dart Props, Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006).

A landowner owes an invitee a duty to "exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Buhalis*, 296 Mich App at 693. This duty does not normally apply to dangers that are open and obvious. *Id.* A landowner breaches its duty to an invitee, and is thus liable for resulting injuries, when he "*knows or should know of a dangerous condition* on the premises of which the invitee is unaware and fails to fix the defect, guard against the defect, or warn the invitee of the defect." *Hoffner v Lanctoe*, 492 Mich 450, 460; 821 NW2d 88 (2012) (emphasis added). Accordingly, a plaintiff must offer evidence that the defendant knew or should have known about the underlying subject matter of the complaint. See *id*.

Here, plaintiffs unconvincingly assert that defendants knew or should have known about the bedbug infestation because: (1) plaintiffs did not have bedbugs in their prior apartment; (2) the bedbugs found in defendant's apartment were mature; and (3) the apartment had holes in its walls similar to holes used to treat a bedbug infestation.

Evidence that plaintiffs did not have bed bugs in their prior residence is not relevant to this case, because it has no impact on defendant's knowledge of a bedbug problem in the apartment. The fact that the bedbugs were mature is equally irrelevant—again, it does not demonstrate defendant had notice of a bedbug infestation in the apartment. As plaintiffs noted, bedbugs do not stay in one location throughout their lives. And it is possible the bedbugs moved from another apartment or arrived with plaintiffs' belongings. Moreover, the apartment's former tenant said that he never had problems with bedbugs during his occupancy, which indicates that the bedbugs had not been in the apartment for a long period of time.

Nor does the existence of patched and painted-over holes in the wall indicate that defendant had notice of a bedbug infestation when plaintiffs moved in. It is not clear that the holes were caused by a bedbug treatment—plaintiffs did not present any evidence that the apartment had been treated previously. And even if the holes were from a previous treatment,

they do not show that defendant had notice of a current bedbug problem. As plaintiffs admit, the holes were filled and painted over, which indicates that they had been there for some time.[2]

In any event, even if defendant was aware of the bedbug infestation, plaintiffs cannot claim premises liability because defendant moved quickly to fix the problem. Again, a landowner breaches its duty to an invitee when he knows or should know of a dangerous condition and fails to fix the condition, guard against it, or warn the invitee about it. *Hoffner*, 492 Mich at 460. Defendant promptly sent a pest-control company to exterminate the insects in plaintiffs apartment, and the company conducted follow-up treatments on two occasions. Defendant therefore fixed the condition and cannot be held liable for premises liability.

2. MCPA

The MCPA prohibits "[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce." MCL 445.903(1). Plaintiffs do not specify which subsections of the MCPA apply to their claim—instead, their complaint merely alleges that defendant violated the statute by "misleading the tenant-plaintiffs and permitting them to move into a bed bug parasite infested apartment and misrepresenting their premises as fit for habitable use when it was not fit for habitable use."

Again, to mislead plaintiffs or misrepresent the condition of the apartment, defendant had to have knowledge of the bedbug infestation. As the trial court properly concluded, plaintiffs failed to provide any evidence that defendants had notice of the bedbug problem. In fact, defendant offered evidence to the contrary: the apartment's prior tenant never had issues with bedbugs, and none of his maintenance requests and work orders included complaints of bedbugs. For these reasons, plaintiffs have not provided any evidence that defendant misled them or misrepresented the apartment's condition under the MCPA.

3. IMPLIED WARRANTY OF HABITABILITY

The implied warranty of habitability was codified, in part, by MCL 554.139:

> (1) In every lease or license of residential premises, the lessor or licensor covenants:

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[2] By the same token, plaintiff Darlene Krisel's statement on the presence of "a bunch of dead things" on the carpet when plaintiffs moved in does nothing to show that defendant was aware of a bedbug infestation. Darlene admitted that she did not know what the "dead things" were, nor did plaintiffs show that defendant had knowledge of the "dead things" on the carpet.

In any event, this allegation is not part of the lower court file and we are thus not allowed to consider it. "When reviewing a decision on a motion for summary disposition, this Court will not consider evidence that had not been submitted to the lower court at the time the motion was decided." *In re Rudell Estate*, 286 Mich App 391, 405; 780 NW2d 884 (2009).

> (a) That the premises and all common areas are fit for the use intended by the parties.
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> (b) To keep the premises in reasonable repair during the term of the lease or license, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located, except when the disrepair or violation of the applicable health or safety laws has been caused by the tenant[']s wilful [sic] or irresponsible conduct or lack of conduct.
>
> (2) The parties to the lease or license may modify the obligations imposed by this section where the lease or license has a current term of at least 1 year.
>
> (3) The provisions of this section shall be liberally construed, and the privilege of a prospective lessee or licensee to inspect the premises before concluding a lease or license shall not defeat his right to have the benefit of the covenants established herein.

"The statutory protection under MCL 554.139(1) arises from the existence of a residential lease and consequently becomes a statutorily mandated term of such lease." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425-426; 751 NW2d 8 (2008). Though the protections of MCL 554.139 supplement those provided by the common law,[3] plaintiffs limit their argument to statute.

A lessor's duty under MCL 554.139 does not require him to keep the premises in ideal condition. *Allison*, 481 Mich at 430. Rather, the lessor must keep the area fit for the use intended by the parties. *Id.* at 429-430; *Hadden*, 287 Mich App at 128. A landowner has a statutory obligation under MCL 554.139 to repair defects about which he knows or should have known, but does not have a duty to regularly inspect the premises to search for defects. *Evans v Van Kleek*, 110 Mich App 798, 803; 314 NW2d 486 (1981). The duty to repair a defect "equates to keeping the premises in a good condition as a result of restoring and mending damage to the property." *Allison*, 481 Mich at 434.

As noted, plaintiffs' provided no evidence that defendant knew about the bedbug problem in the apartment. In fact, plaintiffs failed to show that there were bedbugs in the apartment before they moved in. Furthermore, defendant took immediate steps to fix the problem when it became aware of it. The pest-control company treated plaintiffs' apartment within a week of discovering the bedbugs. Additional treatments were completed within a month, and a visual inspection on June 8 found no evidence of bedbugs.

And, oddly for a supposedly uninhabitable apartment, plaintiffs continued to live there, despite defendant's offer to let them leave without penalty. While it is not clear when plaintiffs moved out of the apartment, they had not done so by June 17, when defendant sought to evict

[3] *Hadden v McDermitt Apartments, LLC*, 287 Mich App 124, 128; 782 NW2d 800 (2010).

them for failure to pay rent. In sum, plaintiffs have failed to demonstrate that defendant's breached their duty under MCL 554.139 to provide habitable premises.

## B. MOTION FOR RECONSIDERATION[4]

MCR 2.119(F)(3) provides that a party who files a motion for reconsideration "must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." Generally, "a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted." MCR 2.119(F)(3).

Here, plaintiffs' assertions either lack merit or do not contain the specific allegations that must be stated in any complaint. See MCR 2.111(B)(1) (requiring "the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend"). And though there was a discrepancy in the testimony of defendant's building manager and the pest-control company's records on the past incidence of bedbug infestation at the apartment complex, this discrepancy did nothing to advance plaintiffs' case because it did not show that defendants had notice of a bedbug problem as to plaintiffs' apartment. Therefore, "a different disposition of the motion [for summary disposition]" is not required. See MCR 2.119(F)(3).

## C. AMENDED COMPLAINT

"A trial court's denial of leave to amend pleadings is reviewed for an abuse of discretion." *Lewandowski v Nuclear Mgt Co, LLC*, 272 Mich App 120, 126; 724 NW2d 718 (2006). "Leave to amend the pleadings should be freely granted to the nonprevailing party upon a grant of summary disposition unless the amendment would be futile or otherwise unjustified." *Id.* at 126-127. A court may deny a motion to amend a complaint "for particularized reasons, such as undue delay, bad faith, or dilatory motive on the part of the movant, a repeated failure to cure deficiencies in the pleadings, undue prejudice to the opposing party by virtue of allowing the amendment, or the futility of the amendment." *Boylan v Fifty Eight LLC*, 289 Mich App 709, 728; 808 NW2d 277 (2010).

Here, plaintiffs attempted to amend their complaint to add a slip-and-fall claim, purportedly because one of them tripped on a carpet that had been rolled up as part of the bedbug treatment. But plaintiffs did not seek to add the claim until after the trial court granted defendant's motion for summary disposition. They had no reason to delay the amendment to this late date, as the new claim did not rest on newly discovered information. And, in any event, the addition of the slip-and-fall action would be futile because the plaintiff who slipped knew that the carpets in the apartment had been pulled up, and a landowner only breaches its duty to an

[4] We review a trial court's decision on a motion for reconsideration for an abuse of discretion. *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). A court abuses its discretion when its decision "results in an outcome falling outside the range of principled outcomes." *Id.* at 605-606.

invitee when he knows of a dangerous condition "*of which the invitee is unaware*," and fails to fix or warn the invitee about it. See *Hoffner*, 492 Mich at 460 (emphasis added). The other additions sought by plaintiff, including breach of contract and the addition of a new defendant, have no merit. Plaintiffs fail to specify how their lease was breached, and they were aware of the new defendant's relationship with Silverbrooke during discovery. Again, a trial court may deny a plaintiff's motion to amend the complaint based on undue delay or a repeated failure to cure deficiencies in the pleadings. *Boylan*, 289 Mich App at 728.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Henry William Saad
/s/ Kirsten Frank Kelly