STATE OF MICHIGAN

COURT OF APPEALS

DIANE JAMES,

Plaintiff-Appellant,

v

JOSHUA LEE GUTHERIE,

Defendant-Appellee.

UNPUBLISHED
August 26, 2014

No. 316636
Manistee Circuit Court
LC No. 12-014507-NI

Before: Ronayne KRAUSE, P.J., and WILDER and STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals by right an order granting defendant West Shore Rental Management, Inc. summary disposition under MCR 2.116(C)(8) and (C)(10). We affirm.

I. BACKGROUND

Defendant West Shore Rental Management, Inc., (West Shore) contracted with Defendant Ryan Beddes to find tenants for his home while he lived out of state. On Beddes' behalf, West Shore entered into a rental agreement with defendant Joshua Lee Gutherie. At the time of the signing of the lease Gutherie owned only one dog that was recognized on the lease. Some months later Gutherie obtained a second dog whose existence was never acknowledged in any rental agreements.

According to plaintiff's first amended complaint, she was attacked by one of Gutherie's dogs on her own property. Plaintiff filed suit against West Shore, Beddes and Gutherie. The suit against Beddes was dismissed on motion and not appealed. Plaintiff obtained a default judgment against Gutherie. This appeal only involves claims against West Shore. Plaintiff complained West Shore was negligent as the owner or manager of the property where the dog was kept; for being in control of the property where the dog was kept; and for knowing the dog was present on the property and that it had vicious propensities. Plaintiff offered her own affidavit in support of her contention that West Shore knew of Gutherie's dog's vicious propensities.

West Shore filed a motion for summary judgment under MCR 2.116(C)(8) and (10). West Shore argued it was not liable for general negligence or as a premises owner. West Shore contended it was entitled to summary disposition as a matter of law, pointing directly to the case of *Feister v Bosack*, 198 Mich App 19, 26; 497 NW2d 522 (1993). It denied knowledge of the

dog's vicious propensities, control over the premises where the injury occurred, the premises where the animal was housed or over the animal.

The trial court granted West Shore summary disposition. It acknowledged the general rule that a (C)(10) motion should generally not be granted when discovery was still open, but found plaintiff's case to fit an exception under which the motion could be granted because there was no reasonable likelihood that further discovery would bring forth admissible evidence that would create a genuine issue of material fact. The court found the affidavit of plaintiff, which purported to impute knowledge of the offending dog's existence at the demised premises and its dangerous propensities, to be inadmissible because it was fraught with inadmissible hearsay statements attributed to Ryan Beddes' wife, Jennifer Beddes. In granting the motion the court relied on *Feister* criteria for landlord agent liability for injuries to third parties for dog bites. The court noted that a "landlord is not liable for attacks by animals kept by the tenant on those premises where the landlord had no knowledge of the animal or its dangerous proclivities at the time of the initial letting of the premises," 198 Mich App at 23 (citations omitted) and also "has no duty to inspect the premises to discover the existence of a tenant's dangerous animal." *Id*. at 26. The parties agreed that West Shore did not own the dog and that the attack did not take place on the premises leased to Gutherie. There was also no evidence that West Shore had possession of the premises leased to Gutherie.

II. MCR 2.116(C)(10)

Plaintiff argues the trial court erred in granting summary disposition before she had the opportunity to factually develop her claim of negligence against West Shore. She claims the court's order was premature when further discovery could have revealed a genuine issue of material fact. Also, that as a matter of law, it was improper for the court to grant a (C)(10) motion before discovery was completed. For the reasons stated below, we disagree.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Hoffner v Lanctoe*, 492 Mich 450, 459; 821 NW2d 88 (2012).

West Shore's motion for summary disposition was granted partly pursuant to MCR 2.116(C)(10). A motion under MCR 2.116(C)(10) "tests the factual sufficiency of a complaint." *Urbain v Beierling*, 301 Mich App 114, 122; 835 NW2d 455 (2013) (citation omitted). This Court may consider the pleadings, affidavits, depositions, admissions, and documentary evidence in its review. MCR 2.116(G)(5). Those documents submitted will only be considered to the extent that their "content or substance would be admissible as evidence to establish or deny the grounds stated in the motion." MCR 2.116(G)(6). The evidence submitted is viewed in a light most favorable to the nonmoving party. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition under MCR 2.116(C)(10) is proper when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The grounds listed in (C)(10) "may be raised at any time" in the trial court. MCR 2.116(D)(4). A genuine issue of material fact exists "when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Management, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008) (citation omitted).

The trial court did not err in granting West Shore's motion for summary disposition. The hearsay statements in the affidavit were not admissible nor did they support a finding that further discovery would have yielded evidence that would create a material question of fact.

"A motion under MCR 2.116(C)(10) is generally premature if discovery has not been completed unless there is no fair likelihood that further discovery will yield support for the nonmoving party's position." *Liparoto Const, Inc v General Shale Brick, Inc*, 284 Mich App 25, 33-34; 772 NW2d 801 (2009). The further discovery that plaintiff wanted to conduct involved deposing the homeowner's wife, Jennifer Beddes, and obtaining a document that would have recorded the details of a re-inspection of the premises. There is no record to support that either of these avenues of discovery, if followed, would have yielded support for plaintiff's position that West Shore was aware of the dangerous proclivities of the dog that allegedly attacked plaintiff.

Plaintiff's affidavit was composed of conclusory statements and hearsay statements. Plaintiff offered the conclusions that West Shore knew of vicious tendencies of the attacking dog and failed to exercise reasonable care to prevent the attack. She offers no competent evidence however, to support those conclusions. Instead she relies on double hearsay. Plaintiff declared that Jennifer Beddes told her that West Shore told Ms. Beddes that it was aware that there were two dogs at the leased premises, one named Mieko and one named Shia. Secondly, that according to Jennifer Beddes, West Shore had inspected the premises in May 2011 in anticipation of renewing its lease with Gutherie. Plaintiff also stated that Jennifer Beddes told her West Shore knew, from its inspection, "the dangerous and destructive nature of the dogs and that the dogs had escaped the residence through the windows." At the summary disposition motion hearing, the trial court pressed plaintiff for examples or details of how or why the dogs were dangerous and destructive. Plaintiff responded that they had destroyed furniture in the leased premises and had escaped out a window, once again according to Jennifer Beddes who herself had no first-hand knowledge of these occurrences.

The record reflects that the trial court correctly considered the affidavit in determining whether the motion for summary disposition was premature. While a party opposing summary disposition bears the burden of presenting admissible evidence that supports the existence of a material question of fact, a party asserting that summary disposition is premature is not required to present admissible evidence. Discovery, after all, is designed to garner information that "appears calculated to lead to admissible evidence." MCR 2.302 (B) (1). Plainitiff implicitly wanted to take a deposition of Jenifer Beddes. At best, had discovery continued and had Jennifer Beddes been deposed, she could only testify to West Shore making a party admission that it was aware that the dogs had destroyed furniture and had escaped through a window. Such an admission would not have aided the plaintiff's case. Chewing on furniture is a natural activity of dogs and not in and of itself dangerous. The same can be said about dogs trying to escape the confinement of their homes. Common canine behavior is usually "insufficient to show that a dog is abnormally dangerous or usually vicious." *Hiner v Mojica*, 271 Mich App 604, 612; 722 NW2d 914 (2006). Of additional import is that the statements of Jennifer Beddes, as related through plaintiff's affidavit, failed to identify which of the two dogs engaged in which behavior. Jennifer Beddes' testimony, even if it followed the affidavit could establish neither notice nor duty. Thus, it was not error for the court to deny continued discovery for plaintiff to take Ms. Beddes' deposition.

Plaintiff also wanted further time for discovery in order to obtain a document from West Shore's re-inspection of the premises in May 2011 which would establish that West Shore knew of the existence, of two dogs, their breed and the previously discussed typical canine behavior. Plaintiff was uncertain whether the document existed and West Shore claimed at the motion hearing that it had no inspection report. Even if such a report existed, the only additional fact that would have been presented was that West Shore knew that the dogs were akitas. Plaintiff asserts that that breed is known to be dangerous. No support was offered either as to the breed's "known" propensities for dangerous behavior or West Shore's knowledge of such propensities. It was not error for the trial court to deny plaintiff the opportunity for further discovery in this regard either.

West Shore was entitled to judgment as a matter of law where plaintiff failed to establish the genuine issue of whether West Shore was knowledgeable of the dog's dangerous propensities. West Shore filed its (C)(10) motion challenging plaintiff's claim that it had a duty to exercise reasonable care, either under a general negligence theory or common law premises liability theory, for a dog attack as the landlord of the premises where the dog was kept.

In Michigan, "the only possible way that [a landowner] could be held liable [for injuries to a third party sustained by his tenant's dog] on a common law theory would be if he knew of the dog's vicious nature." *Szkodzinski v Griffin*, 171 Mich App 711, 714; 431 NW2d 51 (1988). Accountability under a premises liability theory requires a similar finding:

> The general rule is that, in conventional settings in which premises are rented by a tenant who acquires exclusive possession and control, the landlord is not liable for attacks by animals kept by the tenant on those premises where the landlord had no knowledge of the animal or its dangerous proclivities at the time of the initial letting of the premises . . . .
>
> The principle with respect to the liability of a landlord whose tenant comes into possession of the animal after the premises have been leased [is] (that to establish liability it must be shown that the landlord had knowledge of the vicious propensities of the dog and had control of the premises or other capability to remove or confine the animal) .... [*Feister v Bosack*, 198 Mich App 19, 23; 497 NW2d 522 (1993) (citations omitted and emphasis in the original).]

The trial court considered the plaintiff's affidavit the only document offered addressing the dangerous nature of the dog, but properly rejected it as inadmissible hearsay. As this Court held in *SSC Assoc Ltd Partnership v Gen Retirement Sys of the City of Detroit*, 192 Mich App 360, 364; 480 NW2d 275 (1991), when opposing a motion for summary disposition, "[o]pinions, conclusionary denials, unsworn averments, and inadmissible hearsay do not satisfy the court rule; disputed fact (or lack of it) must be established by admissible evidence." Plaintiff failed to meet the evidentiary requirement of the court rule. MCR 2.116(G).

Plaintiff was unable to offer any evidence of vicious behavior on the part of the dog that allegedly attacked her. West Shore, on the other hand, provided the affidavit of its manager Rose Marie Smith, the affidavit of the premises owner Ryan Beddes and the lease agreement as evidence of its lack of knowledge. Smith declared that West Shore was only aware of one dog

on the premises, that a background check did not reveal a history of the tenant keeping dogs with a dangerous propensity, that West Shore was not made aware of any problems with the tenant, rental or dog in question, and that it did not have possession or control over the premises at the time of the alleged attack. The lease agreement between West Shore and Gutherie only noted one dog on the premises, which was not the dog allegedly involved in the incident with plaintiff. The affidavit of Ryan Beddes said that he relied on West Shore to screen and interview tenants. Beddes claimed that Gutherie entered the lease agreement with one dog and that West Shore said the dog was well trained and well behaved. Beddes had no occasion to see a second dog or learn of is proclivities or nature.

Summary disposition was appropriate as a matter of law.

III. MCR 2.116(C)(8)

Plaintiff also argues that her first amended complaint was sufficiently pled to state a claim of negligence against West Shore. We disagree.

West Shore's motion for summary disposition was also granted pursuant to MCR 2.116(C)(8) for failure to state a claim. A motion under "MCR 2.116(C)(8) tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted." *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). "The motion must be granted if no factual development could justify the plaintiffs' claim for relief." *Id*. "The trial court reviewing the motion must accept as true all factual allegations supporting the claim, and any reasonable inferences or conclusions that might be drawn from those facts." *Hoffner*, 492 Mich at 450.

To establish a prima facie case of negligence, a plaintiff must prove four elements: 1) duty, 2) breach of that duty, 3) causation, and 4) damages. *Brown v Brown*, 478 Mich 545, 552; 739 NW2d 313 (2007). An action for premises liability is conditioned upon the presence of both possession and control over the land. *Merritt v Nickelson*, 407 Mich 544, 544; 287 NW2d 178 (1980). Plaintiff's first amended complaint alleged West Shore's duty of reasonable care arose from its control over the premises where the dog was kept through its landlord/tenant relationship with the dog's owner and its knowledge of the dog's presence on the property.

West Shore did not have possession and control over the land where the dog was kept. A review of the record shows that West Shore was commissioned by the property owner to lease the premises to a prospective applicant after he or she filled out an application and passed background and credit checks. Further, once the property was leased, the tenant obtained possession and control over the premises and West Shore was unable to enter the premises without first contacting the tenant. These record facts are in line with the well understood principle that "[a] tenant has exclusive legal possession and control of the premises against the owner for the term of his leasehold[.]" *Ann Arbor Tenants Union v Ann Arbor YMCA*, 229 Mich App 431, 443; 581 NW2d 794 (1998). Once West Shore leased the premises to Gutherie, it no longer had possession and control over it. Liability cannot be extended to West Shore when it did not own or possess the dog.

Even if this Court were to find that West Shore had control over the premises where the dog was kept, it would not help plaintiff's claim when the alleged attack did not take place on the leased premises. The broad rule from *Feister* is that "a landlord has no duty to protect third parties from injuries inflicted by a tenant's pet that occur away from the leased premises." 198 Mich App at 21. Here, plaintiff was allegedly attacked on her own property. Nevertheless, plaintiff cites *Klimek v Drzewiecki*, 135 Mich App 115; 352 NW2d 361 (1984), for the proposition that this Court can find liability even when the attack did not occur on the leased premises, as long as it occurred "in close proximity" to it. Although a map was not provided to this Court, plaintiff claims she was attacked "in close proximity" when the leased premises were located at 917 Vine Street and plaintiff resided at 913 Vine Street.

Plaintiff has taken the *Klimek* holding regarding close proximity out of context. While *Klimek* did involve a dog attack, it did not involve a landlord/tenant relationship. In *Klimek*, a child was bit by a neighbor's dog while visiting her uncle. *Id*. at 117-118. The owner of the dog was also the occupier of the land, he was the neighbor who lived next door. *Id*. at 118. In *Klimek*, the court analyzed the scope of duty owed to a social guest and took into special consideration the child social guest. 135 Mich App at 119-120. In the instant case plaintiff argues that because her attack took place "in close proximity" to the leased premises, West Shore should be held liable. *Klimek* does not support plaintiff's logic. West Shore, unlike the neighbor in *Klimek*, did not control the dog nor have knowledge that the dog was dangerous.

Plaintiff contends that West Shore had an opportunity to not renew the lease and prevent the injury incurred by plaintiff. West Shore's answers to interrogatories did establish that despite the failure to note the second animal on the lease, it was aware that another dog was added to the household after the initial lease. However, there is no evidence that West Shore had information that either dog was vicious or dangerous as noted before.

Barring notice of the dog's dangerous propensities, there is no duty. "Where there is no legal duty, there can be no actionable negligence." *Klimek*, 135 Mich App at 118.

Affirmed. Defendant, as the prevailing party, may tax costs. MCR 7.219.

/s/ Amy Ronayne Krause
/s/ Kurtis T. Wilder
/s/ Cynthia Diane Stephens