SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2309-21

SHNEEQUA EASTERLING,

Plaintiff-Appellant,

v.

GEORGE JOHNSON,

Defendant-Respondent.

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Submitted June 1, 2023 – Decided June 9, 2023

Before Judges Enright and Fisher.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-2332-19.

John J. Pisano, attorney for appellant.

Gregory P. Helfrich & Associates, attorneys for respondent (Angela Lavelle, on the brief).

PER CURIAM

In this residential sidewalk slip-and-fall case, plaintiff Shneequa Easterling appeals from the Law Division's February 22, 2022 order granting

defendant George Johnson's motion for summary judgment and dismissing her complaint with prejudice. We affirm.

I.

Defendant owns a two-family home in Irvington and has occupied it for over forty years. Throughout this litigation, he claimed he never "rented or leased any portion of the property and . . . otherwise derived no economic day-to-day benefit from the property."

According to plaintiff, while she was walking on the sidewalk abutting defendant's home on March 5, 2019, she slipped and fell on ice, injuring her neck and back, as well as her right ankle. Approximately three weeks later, she instituted suit against defendant, alleging he owned and operated a "multi-unit rental property" and "was negligent in failing to warn" pedestrians about the ice that existed on the sidewalk next to his property. She also claimed he failed to "keep the aforesaid premises in a safe condition" and due to his negligence, she "sustain[ed] severe and permanent injuries." Defendant answered the complaint in December 2020.

On defendant's motion to extend discovery, the trial court entered an order on November 19, 2021, fixing the new discovery end date as January 27, 2022. Under that order, the parties' depositions were to be completed by November 30,

2021.

On January 21, 2022, defendant moved for summary judgment, arguing that as a residential homeowner, he had no duty to clear snow and ice from the sidewalk abutting his property. Three days later, without seeking to extend the discovery end date, plaintiff served a deposition notice on defendant and scheduled his deposition for February 8, 2022. Defendant did not appear for the deposition.

On February 18, 2022, the trial court heard defendant's summary judgment motion. Following argument, the judge found defendant's property was residential in nature and thus, defendant had no duty to remove snow or ice on the sidewalk abutting his property. Accordingly, the judge orally granted defendant's summary judgment motion. On February 22, 2022, the judge entered a conforming order and dismissed plaintiff's complaint with prejudice.

II.

On appeal, plaintiff argues "the order granting summary judgment . . . should be reversed because . . . defendant could be held liable for the icy condition of the sidewalk abutting his property even if it were residential." She also contends defendant could "be held liable if, in clearing the ice and snow" from the sidewalk next to the property, he "increase[d] the hazard by introducing

some new element of danger." These arguments are unavailing.

We "review a grant of summary judgment de novo, applying the same standard as the trial court." Norman Int'l, Inc. v. Admiral Ins. Co., 251 N.J. 538, 549 (2022) (quoting Woytas v. Greenwood Tree Experts, Inc., 237 N.J. 501, 511 (2019)). Accordingly, we consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995); see also Angland v. Mountain Creek Resort, Inc., 213 N.J. 573, 577 (2013).

Summary judgment must be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). "[A] non-moving party cannot defeat a motion for summary judgment merely by pointing to any fact in dispute." Brill, 142 N.J. at 529. In reviewing a decision on a summary judgment motion, we owe no deference to the trial court's legal analysis or interpretation of a statute. The Palisades v. 100 Old

Palisade, 230 N.J. 427, 442 (2017) (citing Zabilowicz v. Kelsey, 200 N.J. 507, 512 (2009)).

It is well settled that "absent negligent construction or repair," a residential property owner "does not owe a duty of care to a pedestrian injured as a result of the condition of the sidewalk abutting the landowner's property." Mohamed v. Iglesia Evangelica Oasis De Salvacion, 424 N.J. Super. 489, 492 (App. Div. 2012) (citing Stewart v. 104 Wallace St., Inc., 87 N.J. 146, 153 (1981)). Conversely, commercial property owners have a duty to maintain sidewalks that abut their property and are liable for injuries suffered because of their negligent failure to do so. See Stewart, 87 N.J. at 150.

Here, there was no evidence in the motion record that defendant made any repairs or otherwise created a dangerous condition on the sidewalk next to his home prior to plaintiff's fall. See Luchejko v. City of Hoboken, 207 N.J. 191, 210 (2011) (stating that absent competent evidence establishing they "create[d] or exacerbate[d] a dangerous sidewalk condition[,]" residential landowners do not owe a duty to pedestrians to maintain the sidewalks abutting their property). Accordingly, absent proof defendant's property was primarily commercial in nature, he enjoyed "blanket immunity" from sidewalk liability. Lodato v. Evesham Twp., 388 N.J. Super. 501, 507 (App. Div. 2006).

In that regard, we reject plaintiff's unsupported contention that defendant's use of his home as a "multi-family" dwelling qualified the property as commercial under Stewart. In Grijalba v. Floro, 431 N.J. Super. 57, 73 (App. Div. 2013), we listed the following factors as relevant in determining whether property was primarily residential or commercial:

> (1) the nature of the ownership of the property, including whether the property is owned for investment or business purposes; (2) the predominant use of the property, including the amount of space occupied by the owner on a steady or temporary basis to determine whether the property is utilized in whole or in substantial part as a place of residence; (3) whether the property has the capacity to generate income, including a comparison between the carrying costs with the amount of rent charged to determine if the owner is realizing a profit; and (4) any other relevant factor when applying "commonly accepted definitions of 'commercial' and 'residential' property."

Here, the motion record is devoid of evidence defendant utilized his property for any purpose in the past forty years as other than his own residence. In fact, there is no evidence he rented or generated a profit from any portion of the property. Thus, the record fairly established the nature and purpose of defendant's owner-occupied property was primarily residential and not commercial. See Smith v. Young, 300 N.J. Super. 82, 97 (App. Div. 1997) (holding that a two-family home, one unit of which was owner-occupied and the

other rented to a tenant, was "unquestionably residential in use"); Avallone v. Mortimer, 252 N.J. Super. 434, 438 (App. Div. 1991) (holding that where residential property is partially owner-occupied and partially rented, the issue is its predominant use); Borges v. Hamed, 247 N.J. Super. 295, 296 (App. Div. 1991) (holding a three-unit home in which defendants lived in one unit, rented the other two units to family members, and where there was no evidence defendants generated a profit from rent, was not a commercial property under Stewart).[1] Accordingly, we have no reason to disturb the February 18 order.

Finally, we address plaintiff's contention that summary judgment was improper because discovery was incomplete. Rule 4:46-1 permits a party to file a summary judgment motion before the close of discovery. When such a motion is filed, claims of incomplete discovery will not defeat summary judgment if further discovery will not patently alter the outcome. Wellington v. Est. of

[1] We recognize in certain instances following the court's decision in Stewart, our courts have characterized residential rental properties as commercial properties if they are not owner-occupied. See Wilson v. Jacobs, 334 N.J. Super. 640, 644-45 (App. Div. 2000) (holding that a house entirely rented to tenant was commercial); Hambright v. Yglesias, 200 N.J. Super. 392, 394-95 (App. Div. 1985) (holding that a two-family house entirely rented out for profit was commercial). But these cases are distinguishable from the facts present in this case, given defendant lives in his two-family property and there is no evidence he rents it out.

Wellington, 359 N.J. Super. 484, 496 (App. Div. 2003).

A party opposing a motion for summary judgment on the grounds that discovery is incomplete must "demonstrate with some degree of particularity the likelihood that further discovery will supply the missing elements of the cause of action." Badiali v. N.J. Mfrs. Ins. Grp., 220 N.J. 544, 555 (2015) (quoting Wellington, 359 N.J. Super. at 496). And in opposing summary judgment, a party must identify the specific discovery needed. See Trinity Church v. Lawson-Bell, 394 N.J. Super. 159, 166 (App. Div. 2007) ("A party opposing summary judgment on the ground that more discovery is needed must specify what further discovery is required, rather than simply asserting a generic contention that discovery is incomplete.").

Importantly, "discovery must proceed in a timely fashion." J. Josephson, Inc. v. Crum & Forster Ins. Co., 293 N.J. Super. 170, 204 (App. Div. 1996). "[A] claim of incomplete discovery will not defeat a summary judgment motion when the party opposing the motion has not sought discovery within the time prescribed by [Rule] 4:24-1[.]" Pressler & Verniero, Current N.J. Court Rules, cmt. 2.3.3 on R. 4:46-2 (2023) (citing Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 450-51 (2007)).

Here, despite having adequate opportunity to do so, plaintiff did not move

to compel or extend discovery beyond the previously extended discovery end date. Thus, any prejudice to plaintiff resulting from a lack of discovery would not have served as a basis to defeat defendant's summary judgment motion.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION