SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2974-21

DANIEL TORRES,

Plaintiff-Appellant,

v.

MICHAEL OSPINA and
SUSAN OSPINA,

Defendants-Respondents.

———————————————————

Submitted September 26, 2023 – Decided October 17, 2023

Before Judges DeAlmeida and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law Division, Gloucester County, Docket No. L-0970-20.

Amanda J. Davidson (Adams Kearny Law), attorney for appellant.

Kent & McBride, PC, attorneys for respondents (Lori S. Klinger, on the brief).

PER CURIAM

Daniel Torres appeals from the Law Division's April 29, 2022, summary disposition of his premises-liability complaint against Michael and Susan Ospina for personal injuries he sustained after he fell off a ladder while using a power washer on defendants' property. Plaintiff argues (1) the trial court misapplied relevant caselaw because the case it relied upon involved duties owed a social guest and the court deemed him a business invitee; (2) his claim of comparative negligence barred the court from awarding summary judgment to defendants; and (3) plaintiff was not required to proffer expert testimony to survive summary judgment in this matter. Because we find defendants breached no duty to plaintiff, regardless of his status as a business invitee or as a social guest, and because plaintiff failed to demonstrate a genuine issue of material fact, we affirm the trial court's order granting summary judgment to defendants.

I.

We glean the following facts from the record: defendants own and reside in a home in Williamstown, New Jersey. Plaintiff was Mr. Ospina's long-time friend of twenty years. In Spring 2018, plaintiff was asked to leave his sister's home where he had been residing and defendants allowed plaintiff to reside in their home until he could find an alternative residence. As part of this arrangement, plaintiff performed chores and maintenance work for defendants,

including power washing defendants' cars, the side of their house, their deck, and other household maintenance work. Because plaintiff was unemployed, plaintiff asked to be paid to perform these chores and defendants paid plaintiff for the work he performed, although he was not paying rent to them.

On September 20, 2018, Michael Ospina asked plaintiff to power wash the outside of defendants' barn: the walls, the roof, and the skylight. Michael Ospina connected the power washer to the house's well and provided plaintiff a ladder to reach the higher portions of the barn. Plaintiff obliged and attempted to power wash the outside of defendants' barn. Defendants did not supervise plaintiff while he power washed the outside of the barn, nor did anyone else help him.

Plaintiff started by power washing the bottom of the barn and did so for approximately twenty-five minutes. At this stage, plaintiff testified he had to use two hands to operate the power washer because of its "torque" and "power." Plaintiff did not experience any problems with the power washer while cleaning the barn's lower portions.

Once the bottom of the barn was finished, plaintiff utilized the ladder provided by defendants to power wash the higher portions of the barn. Plaintiff testified he had prior experience using a ladder. Plaintiff explained he placed

the ladder against the barn, ensured the ground was flat, and ascended the ladder. Plaintiff also testified neither the power washer nor the ladder was defective in any way. To use the power washer while on the ladder, plaintiff held the ladder with one hand and operated the power washer with his other hand. Plaintiff used the same amount of pressure to pull the power washer's trigger while he was on the ladder as on the ground. The force of the power washer pushed plaintiff back and caused the ladder to shift. As a result of the ladder's shift, plaintiff fell off the ladder and broke his left heel. Plaintiff continued to reside in defendants' home following the accident until he was able to ambulate.

On September 4, 2020, plaintiff filed a complaint in the Law Division against defendants asserting one count of premises liability. After discovery concluded, defendants moved for summary judgment. On April 29, 2022, the trial court granted defendants' motion for summary judgment and dismissed plaintiff's claim with prejudice.

The trial court found plaintiff was a business invitee, not a social guest, of defendants, noting:

> although he was living there, that doesn't mean that he's less of a business invitee because he was asked to perform this for money. He wasn't doing it out of generosity of his heart or because he's helping a friend, Mr. Torres and Mr. Ospina were friends, that's why he ended up [sleeping] on the couch to begin with, but he

> expected that Mr. Ospina would pay him and Mr. Ospina did pay him for the work that he was doing beforehand, and he expected remuneration for performing the power washing on the date in question.

The court further found there was no evidence of a dangerous condition on the property, much less defendants' knowledge of a dangerous condition, which would create a duty on the part of defendants.

II.

Plaintiff now appeals from the summary judgment order. We review de novo orders granting summary judgment, applying the same standard that governed the trial court's ruling. Lee v. Brown, 232 N.J. 114, 126, (2018); see also Bhagat v. Bhagat, 217 N.J. 22, 38 (2014). Summary judgment will be granted if, viewing the competent evidential materials in the light most favorable to the non-moving party, "there is no genuine issue of material fact and 'the moving party is entitled to a judgment or order as a matter of law.'" Conley v. Guerrero, 228 N.J. 339, 346 (2017) (quoting Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016)).

We are mindful "an issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." R. 4:46-2(c); see also

Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). "The practical effect of this rule is that neither the motion court nor an appellate court can ignore the elements of the cause of action or the evidential standard governing the cause of action." Bhagat, 217 N.J. at 38. "When no issue of fact exists, and only a question of law remains, this [c]ourt affords no special deference to the legal determinations of the trial court." Templo Fuente, 224 N.J. at 199.

A landowner's duty to third parties coming onto his land derives from the common law. Rowe v. Mazel Thirty, LLC, 209 N.J. 35, 43-44 (2012); Parks v. Rogers, 176 N.J. 491, 497 (2003). The landowner has a duty to provide invitees with due care under all circumstances. Jeter v. Sam's Club, 250 N.J. 240, 251 (2022) (quoting Prioleau v. Ky. Fried Chicken, Inc., 223 N.J. 245, 257 (2015)). Stated differently, the landowner must provide invitees with a reasonably safe place within the scope of the invitation. D'Alessandro v. Hartezl, 422 N.J. Super. 575, 579 (App. Div. 2011) (quoting Butler v. Acme Mkts., Inc., 89 N.J. 270, 275 (1982)). This includes the duty to conduct a reasonable inspection to find and rectify dangerous conditions on the property. D'Alessandro, 422 N.J. Super. at 579 (quoting Daggett v. Di Trani, 194 N.J. Super. 185, 189 (App. Div. 1984)); Longo v. Aprile, 374 N.J. Super. 469, 474 (App. Div. 2004).

In contrast, a "landowner is not required to provide greater safety on his premises for a social guest than he would for himself." Parks, 176 N.J. at 497-98. Social guests are not owed a duty to protect against hidden or latent defects, but the landowner must warn social guests of known dangerous conditions on the property of which the guest is reasonably unaware. Rowe, 209 N.J. at 44 (quoting Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 434 (1993)). A landowner has no duty to inspect his property for social guests. Rowe, 209 N.J. at 44, 48.

III.

Plaintiff argues the court erred in relying on Longo v. Aprile, 374 N.J. Super. at 474, where the plaintiff was a social guest, because the trial court found he was a business invitee. Plaintiff posits this difference in status precludes any reliance on Longo in deciding this matter. He claims, as a business invitee, defendants owed him a duty to act reasonably towards him and instead created a dangerous condition when they asked him to climb a ladder and power wash the barn. Plaintiff maintains his use of the ladder and power washer constituted a "dangerous activity" for purposes of premises liability, claiming "it is imperative to focus on who created the dangerous activity."

Plaintiff contends "it is well accepted in New Jersey that landowners will be held liable for their negligence in the course of things done on the land as well as failure to use reasonable care to prevent injury from dangers they created," and it is the jury's duty, not the trial court, to determine whether the defendants exercised reasonable care, which precludes summary judgment. Plaintiff's arguments are belied by the applicable law and the record.

New Jersey applies common-law principles to premises liability claims involving owners of non-commercial property. Rowe, 209 N.J. at 43-44; Park, 176 N.J. at 497. The scope of a defendant's duty varies depending upon the plaintiff's status as a business invitee or a social guest. Rowe, 209 N.J. at 43-44. New Jersey courts determine a plaintiff's status by considering the reasons for the plaintiff's presence on the property. Ibid. Although a social guest "is permitted to come upon the property, and does so for his own purposes," ibid., an invitee benefits the owner in a way beyond the purely social. D'Alessandro, 422 N.J. Super. at 579 (quoting Filipowicz v. Diletto, 350 N.J. Super. 552, 558 (App. Div. 2002)). Consequently, a landowner owes a business invitee a higher duty of care than a social guest. Rowe, 209 N.J. at 44 (quoting Hopkins, 132 N.J. at 434); Parks, 176 N.J. at 497.

The landowner has a duty to provide business invitees with due care under all circumstances. Jeter, 250 N.J. at 251 (quoting Prioleau, 223 N.J. at 257). This includes the duty to conduct a reasonable inspection to find and rectify dangerous conditions on the property. D'Alessandro, 422 N.J. Super. at 579 (quoting Daggett, 194 N.J. Super. at 189); Longo, 374 N.J. Super. at 474. A dangerous condition generally exists on the property itself, Roe by M.J. v. N.J. Transit Rail Operations, Inc., 317 N.J. Super. 72, 79 (App. Div. 1998), but may also exist through a combination of a defect in the property and actions by third parties. Longo, 374 N.J. Super. at 474.

Without a dangerous condition—and actual or constructive notice of it—there can be no duty. See Jeter, 250 N.J. at 251 (stating that an owner is liable when an invitee is injured by a dangerous condition on the owner's premises). A residential landowner generally does not owe social guests or business invitees a duty of supervision. A landowner does not owe a general duty to safeguard social guests' well-being against open and obvious dangers. Delvalle v. Trino, 474 N.J. Super. 124, 137-38 (App. Div. 2022).

Importantly, a landowner's duty to invitees does not require the elimination of hazards which are open and obvious to the invitee or part of the very work the invitee performed. Dawson v. Bunker Hill Plaza Assocs., 289

N.J. Super. 309, 317-18 (App. Div. 1996) (quoting Sanna v. Nat'l Sponge Co., 209 N.J. Super. 60, 67 (App. Div. 1986)). "The possessor of the land may reasonably assume that [invitees] will protect [themselves] by the exercise of ordinary care, or [they] will voluntarily assume the risk of harm if [they fail to do so.]" Restatement (Second) of Torts § 343A cmt. e (Am. L. Inst. 1965). "Generally, where the focus is not on a physical condition of the property but on activities conducted thereupon, the duty to use reasonable care falls upon 'the person conducting the activity.'" Delvalle, 474 N.J. Super. at 136 (quoting Hanna v. Stone, 329 N.J. Super. 385, 389 (App. Div. 2000)).

Plaintiff is correct in stating the duty owed to social guests is less than that owed to business invitees. Because he was not at the defendants' residence for purely social reasons, the trial court correctly found plaintiff was a business invitee. As an invitee, defendants owed plaintiff a higher duty of care. See Parks, 176 N.J. at 497.

However, plaintiff presents no evidence of a dangerous condition. Plaintiff testified the ground he placed defendants' ladder upon was flat. Plaintiff also testified defendants' ladder was not defective in any way and had the required bottom grips to keep the ladder steady. There is nothing to indicate

there was a dangerous condition on the premises outside of the ordinary use of a ladder and power washer.

Defendants did not have a duty to safeguard plaintiff against the known risk associated with using a ladder and power washer. Plaintiff had prior experience with the power washer and was familiar with using ladders. Before he ascended the ladder, plaintiff had used the power washer before and knew its force; on that day he had used it to clean the bottom half of the barn for approximately twenty-five minutes. The amount of pressure he used to pull the power washer's trigger was the same on the ground as on the ladder.

Plaintiff cannot identify anything defendants could have discovered through reasonable inspection, and there is nothing to indicate defendants failed to make their property, the power washer, or the ladder reasonably safe for use. The risk associated with using a power washer while on a ladder is obvious and was known to plaintiff. Plaintiff assumed that risk when he agreed to perform the work and defendants owed plaintiff no duty to safeguard against such a risk.

Although plaintiff is correct in noting breach of a duty is ordinarily a question of fact, Jerkins ex rel. Jerkins v. Anderson, 191 N.J. 285, 305 (2007), the absence of any evidence of a duty warrants an award of summary judgment, see D'Alessandro, 422 N.J. Super. at 583 (affirming an award of summary

judgment to landowner when there was "no competent proof" defendants breached a legal duty); Longo, 374 N.J. Super. at 475.

Plaintiff's remaining arguments lack merit. Plaintiff, citing the Comparative Negligence Act, N.J.S.A. 2A:15-5.1 to -5.8, contends because comparative negligence is a question for the jury, the award of summary judgment was improper. A defendant must first be liable for a plaintiff's injuries before comparative negligence is assessed. Because plaintiff cannot establish defendants owed him a duty or any breach of a duty, there are no circumstances under which defendants may be found liable for even one percent of plaintiff's injuries. The Comparative Negligence Act does not apply.

Plaintiff also contends because the accident falls within a layperson's understanding, he should be permitted to make a res ipsa loquitor argument to a jury without the aid of an expert. The ladder and power washer were in the control of the plaintiff at the time the accident occurred. In general, "res ipsa loquitur" cannot be invoked unless it is shown the instrumentality causing the injury was within the control of the defendant at the time of the mishap. Jerista v. Murray, 185 N.J. 175, 199 (2005) (quoting Jakubowski v. Minn. Mining & Mfg., 42 N.J. 177, 183 (1964)). Affording the most generous view of the evidence in a light most favorable to plaintiff, there is no evidence to indicate

defendants owed plaintiff any duty or breached any duty. Moreover, plaintiff's lack of an expert did not factor into the trial court's ruling.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION