2013 IL App (3d) 120717-U

Order filed April 26, 2013

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

GLEN FALK, JEANETTE FALK, and DENISE FLANERY,	) Appeal from the Circuit Court) of the 13th Judicial Circuit,) La Salle County, Illinois,
Plaintiffs-Appellants,	)
	) Appeal No. 3-12-0717
v.	) Circuit No. 11-M-310
	)
STATHMOS, LLC, an Illinois Limited Liability Corporation,	)
	) Honorable) Eugene P. Daugherity,
Defendant-Appellee.	) Judge, Presiding.
	)

JUSTICE LYTTON delivered the judgment of the court.
Justices Holdridge and McDade concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court properly granted summary judgment in favor of property owner who leased his property where plaintiffs' damages were caused by alterations to property made by lessee.

¶ 2 Plaintiffs Glen Falk, Jeanette Falk and Denise Flanery own property adjacent to property owned by defendant Stathmos, LLC. Plaintiffs filed a complaint alleging that defendant made changes to its property, including re-grading and paving, that resulted in flooding and damage to

their properties. Defendant filed a motion for summary judgment, arguing that it owed no duty to plaintiffs because defendant relinquished control of its property to its lessee, Illinois Central School Bus, which altered the property. The trial court granted defendant's motion for summary judgment. On appeal, plaintiffs argue that the trial court erred in granting summary judgment to defendant because (1) defendant filed an improper "hybrid" motion for summary judgment/motion to dismiss; (2) the lease between defendant and Illinois Central School Bus did not establish that defendant relinquished control of its property; (3) defendant did not record the lease; and (4) the improvements to the property that caused plaintiffs' damage were "structural," making defendant responsible for them. We affirm.

¶ 3 In 2010, plaintiffs Glen and Jeanette Falk owned and resided at 212 South Illinois Street in Streator.[1] Plaintiff Denise Flanery leased and resided at 215 South Illinois Street in Streator. In April 2010, defendant Stathmos, LLC purchased a building located at 205 South Illinois Street in Streator, which is adjacent to plaintiffs' properties.

¶ 4 In July 2011, plaintiffs filed a complaint against defendant, alleging that defendant had made certain improvements to its property, including re-grading and paving, which caused flooding and damage to plaintiffs' properties. Defendant filed a motion for summary judgment "brought pursuant to 735 ILCS 5/2-619." Defendant's motion set forth the law applicable to motions for summary judgment and then asserted that defendant was not responsible for plaintiffs' damages because it had leased the property to Illinois Central School Bus, which had altered the property. Attached to defendant's motion was an affidavit from Scott Cheshareck, one of the members of defendant, as

[1] Plaintiff Glen Falk died on January 31, 2012. His wife, Jeanette Falk, then became the sole owner of the property.

well as the lease agreement between defendant and Illinois Central School Bus, effective May 1, 2010, to June 30, 2015.

¶ 5 Cheshareck's affidavit stated that all of the alterations to the property located at 205 South Illinois Street in Streator were made by Illinois Central School Bus after it signed a lease with defendant. The affidavit further stated that "Stathmos LLC did not direct, control or supervise any of the alterations of the property located at 205 South Illinois Street in Streator." The lease agreement provided in pertinent part:

> "7. (A) Lessee shall maintain and keep the Premises and appurtenances thereto all according to applicable statutes and ordinances and the directions of public officers thereunto duly authorized to the extent relating to Lessee's particular use of the Premises, all at its own expense, and shall yield the same back to Lessor upon the termination of this Lease in its then current condition, loss by fire, other casualty, condemnation and ordinary wear and tear excepted. ***
>
> (B) If Lessee shall not keep the Premises in the condition as aforesaid and the condition remains for thirty (30) days following Lessee's receipt of written notice from the Lessor of the deficiencies, Lessor, its agents, contractors or employees may enter the Premises to perform any reasonably necessary maintenance or repair *** so that the Premises is in substantially the same condition of repair, sightlines and cleanliness as existed as of the date of this Lease."

¶ 6 Plaintiffs filed a "Response to Defendant's Motion for Summary Judgment," asking the court to "[d]ismiss the Defendants [sic] Motion for Summary Judgment" and "[g]rant Summary Judgment *** in favor of the Plaintiffs." Thereafter, the trial court held a hearing on defendant's motion for

summary judgment. At the conclusion of the hearing, the court orally granted "summary judgment for the defendant" and then issued a written order stating: "Defendant's Motion for Summary Judgment is granted." Plaintiffs appealed the trial court's order that "[g]ranted the Motion of the Defendant Stathmos, LLC and entered Summary Judgment."

¶ 7 I

¶ 8 Before addressing the substance of the motion ruled on by the trial court, we will address an alleged procedural defect raised by plaintiffs for the first time on appeal. Plaintiffs argue that defendant's motion to dismiss was actually a "hybrid" motion to dismiss/motion for summary judgment, which the trial court should have dismissed as improper.

¶ 9 First, we disagree with plaintiffs' characterization of defendant's motion. The motion was labeled "Motion for Summary Judgment," and the parties and the court treated it as a motion for summary judgment. While the motion referred to "735 ILCS 5/619," which governs motions to dismiss, we believe that defendant's inclusion of that citation in its motion was merely an error. The body of the motion made clear that defendant was seeking summary judgment in its favor.

¶ 10 Furthermore, even if defendant had filed a hybrid motion that combined a request for summary judgment and a request to dismiss plaintiffs' complaint, the proper remedy would not be reversal. Appellate courts generally treat hybrid motions as they were fundamentally decided by the trial court, absent any showing of prejudice to the nonmovant. *Grobe v. Hollywood Casino-Aurora, Inc.*, 325 Ill. App. 3d 710, 715 (2001). No prejudice will be found where a plaintiff fails to object to the form of the defendant's motion in the trial court and seeks resolution of the motion. See *id.*

¶ 11 In this case, the parties and the trial court treated defendant's motion as a motion for summary judgment. Defendant's initial pleading was a "Motion for Summary Judgment," which sought "an

order granting summary judgment in its favor." Plaintiffs responded with a pleading entitled, "Response to Defendant's Motion for Summary Judgment," which asked the trial court to "[d]ismiss the Defendants [sic] Motion for Summary Judgment" and "[g]rant Summary Judgment pursuant to 735 ILCS 5/2-1005 in favor of the Plaintiffs." Thereafter, defendant filed its "Reply in Support of its Motion for Summary Judgment," again seeking "an order granting summary judgment in its favor." At the hearing on the motion, the trial court stated that the hearing was "on the defendant's Motion for Summary Judgment." At the hearing, defendant argued in favor of the trial court granting summary judgment, and plaintiffs argued against the trial court entering summary judgment for defendant. At the conclusion of the hearing, the trial court orally, and then in writing, granted defendant's motion for summary judgment.

¶ 12 Since the parties and trial court treated the motion as one for summary judgment, this court will also do so, absent a showing of prejudice to plaintiffs. *Grobe*, 325 Ill. App. 3d at 715. Plaintiffs will not be prejudiced by treating defendant's motion as a motion for summary judgment. They did not object to the form of defendant's motion in the trial court, responded to it as a motion for summary judgment and requested summary judgment in response to defendant's motion. Because there is no prejudice, we will treat defendant's motion as one for summary judgment.

¶ 13 II

¶ 14 Plaintiffs argue that summary judgment should not have been granted to defendant because there were questions of fact with respect to defendant's control of the building.

¶ 15 Summary judgment is appropriate where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2010).

When determining whether a genuine issue of material fact exists, the court must construe all pleadings and attachments strictly against the movant and liberally in favor of the nonmovant. *Hilgart v. 210 Mittel Drive Partnership*, 2012 IL App (2d) 110943, ¶ 19. We review *de novo* the trial court's grant of summary judgment. *Id*.

¶ 16 To state a claim for negligence, a plaintiff must establish that (1) the defendant owed the plaintiff a duty of care, (2) the defendant breached that duty, and (3) the plaintiff was injured as a proximate result of such breach. *Gilley v. Kiddel*, 372 Ill. App. 3d 271, 274-75 (2007). "Whether a duty exists is a question of law to be determined by the court, and depends on whether the parties stood in such a relationship to one another that the law imposes an obligation on the defendant to act reasonably for the protection of the plaintiff." *Gouge v. Central Illinois Public Service Co.*, 144 Ill. 2d 535, 542 (1991). In the absence of a duty, no recovery by the plaintiff is possible as a matter of law. *Rowe v. State Bank of Lombard*, 125 Ill. 2d 203, 215 (1988).

¶ 17 A lessor is not liable for injures caused by a condition on premises leased to a tenant and under the tenant's control. *Gilley*, 372 Ill. App. 3d at 275. The rationale for lessor immunity is that the lease is a conveyance of property that ends the lessor's control over premises, a prerequisite of tort liability. *Wright v. Mr. Quick, Inc.*, 109 Ill. 2d 236, 238 (1985). Only the party in control of the premises can be held liable for defective or dangerous conditions on the premises. *Hilgart*, 2012 IL App (2d) 110943, ¶ 38.

¶ 18 Under the general rule, a lessor who relinquishes control of property to a lessee owes no duty to a third party who is injured by the leased property. *Gilley*, 372 Ill. App. 3d at 275. There are, however, several exceptions to the rule. *Id*. A landlord may be liable where (1) a latent defect exists at the time of leasing that the landlord should know about; (2) the landlord fraudulently conceals a

dangerous condition; (3) the defect causing harm amounts to a nuisance; (4) the landlord has contracted by a covenant in the lease to keep the premises in repair; (5) the landlord violates a statutory requirement and the tenant is in the class designated to be protected by such requirement; and (6) the landlord voluntarily undertakes to render a service. *Id*.

¶ 19 When a lease agreement expressly provides that the tenant is responsible for maintaining and keeping the property in good repair, the lessee is responsible for any injuries to third persons caused by the property. *Id*. at 276. A lease agreement that gives the landlord the right to enter the property to make repairs does not, without more, impose a duty on the landlord to repair the premises nor make the landlord responsible for conditions on the premises. *Id*. at 276-77.

¶ 20 In this case, the lease agreement provided that Illinois Central School Bus, as lessee, "shall maintain and keep the Premises and appurtenances thereto all according to applicable statutes and ordinances and the directions of public officers thereunto duly authorized to the extent relating to Lessee's particular use of the Premises, all at its own expense." This provision makes clear that defendant relinquished its control of the premises to Illinois Central School Bus to repair and improve the property. See *Hilgart*, 2012 IL App (2d) 110943, ¶ 40; *Gilley*, 372 Ill. App. 3d at 275. The language of the lease is supported by Cheshareck's affidavit, which stated that all of the alterations to the property were made by Illinois Central School Bus and that "Stathmos LLC did not direct, control or supervise any of the alterations of the property."

¶ 21 Nevertheless, defendant contends that another provision of the lease, section 7(B), which allows defendant to make repairs if Illinois Central School Bus fails to do so, evinces the parties' intent that defendant retain control of the property. We disagree.

¶ 22 A lease provision that allows a landlord to enter the premises and make repairs it deems

necessary does not impose a duty on the landlord to make repairs. *Gilley*, 372 Ill. App. 3d at 276-77; *St. May's Hospital v. Auburn*, 128 Ill. App. 3d 747, 749 (1984). Virtually every landlord retains the right to enter the premises in order to make improvements. *Id*. "These reservations in the lease do not, however, change the rule that it is the lessee, as the party in possession and control of the premises who owes a duty to third parties and can be liable for injuries from defective conditions on the premises." *Yacoub v. Chicago* Park District, 248 Ill. App. 3d 958, 961 (1993).

¶ 23 Here, where defendant made Illinois Central School Bus responsible for repairing and maintaining the leased premises, the general rule of lessor immunity applies. The trial court properly granted summary judgment to defendant.

¶ 24 III

¶ 25 Plaintiffs next argue that the lease between defendant and Illinois Central School Bus could not absolve defendant of liability because the lease was not recorded.

¶ 26 A lease conveys an interest in property which becomes binding when it is delivered and accepted. *Sinclair v. Sinclair*, 224 Ill. App. 130, 136-38 (1922). A lease need not be recorded to be valid and effective. *Lake v. Campbell*, 18 Ill. 106, 113-14 (1856); *Seim v. Hale*, 67 Ill. App. 364, 365 (1896).

¶ 27 Here, the lease agreement between defendant and Illinois Central School Bus became valid when it was signed by the parties. That the lease was not recorded does not affect its validity. Pursuant to the terms of the lease, Illinois Central Bus Service, as lessee, was responsible for making improvements to the property, which it did.

¶ 28 IV

¶ 29 Finally, plaintiffs argue that the improvements Illinois Central School Bus made to

defendant's property constituted "structural" changes to the property, thereby making defendant responsible for them. Plaintiffs cite *Quincy Mall v. Kerasotes Showplace Theatres, LLC*, 388 Ill. App. 3d 820 (2009), in support of this argument. The court in *Quincy Mall* was asked to determine whether a landlord or tenant should be responsible for paying for replacement of the roof on the leased property. *Id*. at 824. In determining which party was obligated to pay, the court examined whether the roof replacement was a "structural" change. *Id*. at 824-25. The court held that any change in the premises that was permanent would be deemed a "structural" change for which the landlord would be responsible. *Id*. at 825-26. *Quincy Mall* addressed which party was liable in a dispute between a landlord and tenant. This case involves third-party liability for damages caused by improvements to real property that were made by a tenant. Courts apply the general rule that a property owner is not liable for injures caused by a condition on premises leased to a tenant and under the tenant's control. See *Wright*, 109 Ill. 2d at 238; *Gilley*, 372 Ill. App. 3d at 275. Applying the general rule to this case establishes that defendant, as the lessor, was not liable for damages caused by changes its lessee made to the leased property. Thus, the trial court properly granted summary judgment in favor of defendant.

¶ 30 CONCLUSION

¶ 31 The judgment of the circuit court of La Salle County is affirmed.

¶ 32 Affirmed.