[Cite as *Mandelbaum v. Smith*, 2015-Ohio-1035.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101888

MICHELLE G. MANDELBAUM

PLAINTIFF-APPELLANT

vs.

GEMMA CASADESUS SMITH

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-808973

BEFORE: Jones, P.J., S. Gallagher, J., and Laster Mays, J.

RELEASED AND JOURNALIZED: March 19, 2015

ATTORNEY FOR APPELLANT

Ilan Wexler
Anzellotti Sperling Pazol & Small Co. L.P.A.
21 N. Wickliffe Circle
Youngstown, Ohio 44515

ATTORNEYS FOR APPELLEE

Roert J. Koeth
Ann E. Leo
Koeth Rice & Leo Co. L.P.A.
1280 West Third Street
Cleveland, Ohio 44113

LARRY A. JONES, SR., P.J.:

{¶1} Plaintiff-appellant Michelle Mandelbaum appeals from the trial court's August 11, 2014 judgment granting the motion for summary judgment of defendant-appellee Gemma Casadesus Smith. We affirm.

I. Procedural History

{¶2} In September 2013, Mandelbaum initiated this negligence action against Smith for injuries she allegedly sustained while she was a guest on premises owned and managed by Smith. Mandelbaum named Smith as a defendant both individually and as administrator of the estate of her deceased husband, Mark Smith.

{¶3} Smith answered the complaint, and thereafter the parties engaged in discovery. After discovery was completed, Smith filed a motion for summary judgment, which Mandelbaum opposed. In opposing Smith's summary judgment motion, Mandelbaum presented the court with an expert's affidavit. Smith moved to have the affidavit stricken on the ground that it consisted of improper opinion testimony.

{¶4} In its August 11, 2014 judgment, the trial court granted Smith's motion for summary judgment, and dismissed Mandelbaum's claims. Mandelbaum now appeals and for her sole assigned error contends that the trial court erred in granting Smith's motion for summary judgment.

II. Facts

{¶5} The record contains three deposition testimonies: Smith's, Mandelbaum's, and Daniel Artis-May, the tenant at whose house Mandelbaum was visiting when the incident occurred on the front porch on June 18, 2011.

{¶6} The property where the incident occurred, which was located on Jay Avenue in Cleveland, had been owned by Smith's late husband, Mark Smith. After his passing, Smith

became the administrator of his estate. Smith had no involvement with the rental property prior to her husband's passing; she took over managing it after he passed away. The incident happened after the husband's death.

{¶7} When Smith began managing the property, she went to the property to introduce herself to the tenants. Although she did not formally inspect the property, she testified that, in regard to the front porch, she only noticed that it needed to be painted. Further, she requested from the tenants a list of any needed repairs. One tenant informed her of needed repairs to the back porch and she had the repairs done. The first time she became aware of a problem with the front porch was in August 2011, when she was contacted by Mandelbaum's attorney.

{¶8} Artis-May confirmed that when Smith first took over managing the property, she asked him to "go through everything and if there's anything wrong," to let her know. He notified her of some "small, random things," but had no issues with the front porch. Artis-May testified that he was "very good about maintaining the house" because, at the time, it was his intention to remain there for awhile.

{¶9} On June 17, 2011, the day before the incident, in the morning, Artis-May noticed that two of the floorboards on the front porch were loose. Later that day, in the evening, Artis-May had guests at his home, including Mandelbaum, and warned them of the loose floorboards. The record establishes that the only means of ingress and egress to Artis-May's portion of the home was through the front porch. Artis-May testified that he and his guests were in and out of the house because those who smoked would go outside to do so. The guests were on the porch without incident.

{¶10} The following day, June 18, 2011, after having had spent the night at Artis-May's home, Mandelbaum and Artis-May were outside; Mandelbaum was on the front porch and

Artis-May was gardening in the yard. Artis-May asked Mandelbaum to hand him a bag of potting soil that was on the porch. As she walked on the porch to give the bag to him, some of the floorboards gave way and Mandelbaum fell through the porch. Artis-May helped Mandelbaum get up and cleaned up the scrapes she had. She also had bruising. Mandelbaum initially self-treated with ice packs and over-the-counter pain reliever.

{¶11} After the incident, Artis-May saw that the porch's floorboards were rotted underneath, but admitted that that could not be seen until they were broken apart as a result of Mandelbaum's fall.

{¶12} Mandelbaum first sought medical treatment on June 26, 2011 because the area where she was injured became infected. She eventually was hospitalized because of the infection and had to have surgery. Mandelbaum admitted that she did not have any evidence that Smith knew about the condition of the porch.

III. Law and Analysis

{¶13} Summary judgment is appropriate when

> (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party.

Marusa v. Erie Ins. Co., 136 Ohio St.3d 118, 2013-Ohio-1957, 991 N.E.2d 232, ¶ 7. Our review of summary judgment is de novo. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8.

{¶14} R.C. 5321.04(A) imposes certain obligations upon a landlord who is a party to a rental agreement. Among other duties, a landlord must do the following:

> (1) Comply with the requirements of all applicable building, housing, health, and safety codes that materially affect health and safety;

(2) Make all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition;

(3) Keep all common areas of the premises in a safe and sanitary condition[.]

R.C. 5321.04(A)(1)-(3).

{¶15} The landlord's obligations extend to a tenant's guests. *Mann v. Northgate Investors, L.L.C.*, 138 Ohio St.3d 175, 2014-Ohio-455, 5 N.E.3d 594, ¶ 33. Mandelbaum contends that Smith breached her duties under R.C. 5321.04(A)(3) and, therefore, was negligent per se.

{¶16} Although it is true that a landlord's violation of the duties set forth in R.C. 5321.04 constitute negligence per se, *Mann* at *id.*, a landlord will be excused from liability if she "neither knew nor should have known of the factual circumstances that caused the violation." *Sikora v. Wenzel*, 88 Ohio St.3d 493, 498, 727 N.E.2d 1277 (2000).

{¶17} Upon review, there is no evidence in this case that Smith had knowledge of the condition of the porch. While Mandelbaum seems to concede lack of actual knowledge, she contends that Smith had constructive knowledge and that Smith "cannot legitimately argue lack of constructive notice when she failed to inspect the premises to determine compliance with her statutory duties." But "R.C. 5321.04 does not impose an affirmative duty on a landlord to inspect the premises to find prospective dangers or code violations." *Hollowell v. Aplis*, 8th Dist. Cuyahoga No. 100275, 2014-Ohio-1084, ¶ 11, citing *Butler v. Wyndtree Hous. Ltd. Partnership*, 12th Dist. Butler No. CA2011-03-056, 2012-Ohio-49, ¶ 42; *Avila v. Gerdenich Realty Co.*, 6th Dist. Lucas No. L-07-1098, 2007-Ohio-6356, ¶ 10.

{¶18} Upon assuming management of the property, Mandelbaum went to the property and asked the tenants to let her know of needed repairs. She saw the front porch and only observed that it needed painting. Artis-May, who took pride in the property, did not inform Smith at that

time of any problems with the porch. In fact, even after a problem arose the day before the incident, Artis- May did not inform Smith because, as he testified, his "thought [was], oh, you know, they're just a little loose. You know, I assessed the situation and I thought, nah, they're just a little loose. We'll continue with [the plans for] tonight * * *." Artis-May also did not mention the incident to Smith immediately after it happened.

{¶19} Mandelbaum's expert does not create an issue of fact.[1] After reviewing pictures taken *after the incident*, the expert opined that the wood was rotted and that the "condition of the deck would have put the landlord on notice of a dangerous condition that needed to be addressed immediately." That opinion, however, does not demonstrate that Smith should have known the condition of the deck prior to its collapse. The view of the wood prior to the incident was different from the view after the incident, when the inside and under portion of the floorboards could be seen. The record here simply does not demonstrate that Smith was put on notice, actual or constructive, that there was a defect in the boards.

{¶20} In light of the above, the trial court properly granted Smith's motion for summary judgment. Mandelbaum's assignment of error is, therefore, overruled.

{¶21} Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

---

[1]The trial court never ruled on Smith's request to strike the affidavit of Mandelbaum's expert and, therefore, the request is deemed denied. *See Savage v. Cody-Zeigler, Inc.*, 4th Dist. Athens No. 06CA5, 2006-Ohio-2760, ¶ 25.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, SR., PRESIDING JUDGE

SEAN C. GALLAGHER, J., and
ANITA LASTER MAYS, J., CONCUR