[Cite as *Nader v. Carlyle Condominiums*, 2010-Ohio-4359.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94445

ELIAS J. NADER, ADMINISTRATOR OF THE ESTATE OF LAILA NADER, DECEASED

PLAINTIFF-APPELLANT

vs.

CARLYLE CONDOMINIUMS, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-652820

BEFORE: Kilbane, P.J., Blackmon, J., and Boyle, J.

RELEASED AND JOURNALIZED: September 16, 2010

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MARY EILEEN KILBANE, P.J.:

{¶ 1} Appellant, Elias Nader, the Administrator of the Estate of Laila Nader ("the estate"), appeals the trial court's judgment granting summary judgment in favor of The Carlyle Condominiums, 12900 Lake Avenue Condominium Association, Carlyle Condominium Association (collectively "the Carlyle"),[1] and First Realty Property Management ("First Realty") or (collectively "the appellees"), which concluded that appellees were not liable

[1]Counsel for the Carlyle Condominiums, 12900 Lake Avenue Condominium Association, and Carlyle Condominium Association stated in the Defendants' motion for summary judgment (filed Feb. 27, 2009) that the defendants were improperly named. Counsel stated that the proper party is 12900 Lake Avenue Condominium Association dba The Carlyle Condominiums.

for the drowning death of Laila Nader ("Nader"). After a review of the record and pertinent law, we affirm.

{¶ 2} The following facts gave rise to the instant appeal.

{¶ 3} In 1988, Nader purchased a condominium at the Carlyle. The Carlyle Condominiums is a 533 unit high-rise building with approximately 800 residents. The Carlyle has both an indoor and outdoor pool for use by its residents. Nader swam daily in the Carlyle's indoor pool, which ranged in depth from three to five feet.

{¶ 4} On July 20, 2007, at approximately 10:24 a.m., Nader, who was 73 years old at the time, entered the pool area. She stepped into the shallow end of the pool and began moving in a circular pattern.[2] When Nader was approximately at the mid-point of the pool, she began to struggle, bobbing up and down. At approximately 10:38 a.m., Nader went completely underwater and drowned. At 12:01 p.m., another resident discovered Nader's body in the pool and contacted the front desk, who called 911. Nader was transported to Lakewood Hospital where she was pronounced dead.

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[2]The record provides the precise times of the events, as the incident was documented on the Carlyle's surveillance camera footage.

{¶ 5} On March 4, 2008, the estate filed suit against appellees alleging wrongful death. On June 10, 2008, appellees answered the complaint denying all allegations and raising numerous affirmative defenses.

{¶ 6} On February 27, 2009, the Carlyle filed a motion for summary judgment, arguing that Nader was an experienced swimmer who used the pool everyday for 20 years, and that the pool had multiple warning signs posted stating, "No lifeguard on duty — Swim at your own risk."

{¶ 7} On April 1, 2009, the estate filed its brief in opposition to the motion for summary judgment, arguing that the Carlyle was liable because it informed residents that the entire complex, including the pool area, was being monitored by the front desk via surveillance cameras and closed-circuit television monitors. The estate argued that Nader relied on the presence and monitoring of these cameras when she swam alone in pool. The estate argued that while ordinarily the condominium association may not be liable for such an incident, in this case, the Carlyle was liable because it had assumed the duty to protect its residents.

{¶ 8} On April 30, 2009, the trial court issued an opinion granting the motion for summary judgment. The trial court reasoned that the main purpose of the surveillance cameras was for security from theft and vandalism, not to ensure swimmers' safety in the two swimming pools.

{¶ 9} The estate appealed this decision in App. No. 93370. On October 10, 2009, this court sua sponte dismissed the appeal for lack of a final appealable order because the claims against First Realty remained pending in the trial court.

{¶ 10} On October 27, 2009, First Realty filed its motion for summary judgment and a motion for leave to file the motion for summary judgment instanter, which incorporated all of the arguments made by the Carlyle in its motion for summary judgment.

{¶ 11} On November 4, 2009, the trial court granted First Realty's motion for leave to file its motion instanter. On December 7, 2009, the estate filed its brief in opposition. That same day, the trial court granted First Realty's motion for summary judgment, incorporating by reference its April 30, 2009 opinion.

{¶ 12} The estate filed the instant appeal, asserting three assignments of error. As each assignment of error addresses the summary judgment decisions, we will review them together.

ASSIGNMENT OF ERROR NUMBER ONE

"THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AS IT FAILED TO RECOGNIZE THAT APPELLEE CARLYLE ASSUMED A DUTY TO PROTECT DECEDENT LAILA NADER WHILE SHE SWAM AND SUBSEQUENTLY BREACHED THAT DUTY."

ASSIGNMENT OF ERROR NUMBER TWO

"GENUINE ISSUES OF MATERIAL FACT REMAIN AS TO WHETHER APPELLEE CARLYLE ACTUALLY EMPLOYED LIFEGUARDS."

ASSIGNMENT OF ERROR NUMBER THREE

"APPELLEE CARLYLE FAILED TO PRESENT EVIDENCE ON ALL THE MATERIAL DETERMINATIVE ISSUES SET FORTH IN PLAINTIFF'S COMPLAINT AND, THUS, SUMMARY JUDGMENT WAS IMPROPER AS GENUINE ISSUES OF MATERIAL FACT REMAIN."

Standard of Review

{¶ 13} In Ohio, appellate review of summary judgment is de novo. *Comer v. Risko* 106 Ohio St.3d 185, 186, 2005-Ohio-4559, 833 N.E.2d 712. "Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate." *Mosby v. Sanders*, Cuyahoga App. No. 92605, 2009-Ohio-6459, at ¶11, citing *Hollins v. Schaffer*, 182 Ohio App.3d 282, 286, 2009-Ohio-2136, 912 N.E.2d 637.

{¶ 14} The Ohio Supreme Court stated the appropriate test in *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 1998-Ohio-389, 696 N.E.2d 201, as follows: "Pursuant to Civ.R. 56, 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) reasonable minds can come to but one

conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor." *State ex rel. Duncan v. Mentor City Council*, 105 Ohio St.3d 372, 374, 2005-Ohio-2163, 826 N.E.2d 832, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

{¶ 15} "The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law." *Zivich* at 370, quoting *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-293, 1996-Ohio-107, 662 N.E.2d 264. Once the moving party satisfies its burden, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E); see *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385, 1996-Ohio-389, 667 N.E.2d 1197. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359, 1992-Ohio-95, 604 N.E.2d 138.

Analysis

{¶ 16} The estate argues that while swimming pools have generally been held to be an open-and-obvious danger negating any duty on the part of the landowner, the Carlyle assumed that duty when it informed residents that

the pool was monitored by surveillance cameras on closed-circuit television monitors. Appellees argue that they were entitled to summary judgment because the danger of drowning in the swimming pool was open and obvious, and further, that appellees warned residents of the Carlyle that no lifeguards were on duty.

{¶ 17} In its motion for summary judgment, the Carlyle argued that because the dangers associated with the swimming pool were open and obvious, it was under no legal duty to protect Nader. In support of the motion, the Carlyle attached the deposition testimony of Elias Nader, Nader's son, who stated that his mother was aware of the dangers associated with swimming, and also attached photographs of several signs posted at the pool that warned swimmers to swim at their own risk because no lifeguard was on duty.

{¶ 18} It has long been established that an owner or occupier of land owes no duty to warn invitees of open-and-obvious dangers on the property. *LeJeune v. Crocker Shell Food Mart & Car Wash* (Oct. 22, 1998), Cuyahoga App. No. 74262. "The rationale behind the doctrine is that the open and obvious nature of the hazard itself serves as a warning. Thus, the owner or occupier may reasonably expect that persons entering the premises will discover those dangers and take appropriate measures to protect themselves."

Id. In Ohio, the danger of drowning associated with swimming pools has been found to be open and obvious. *Bae v. Dragoo & Assoc., Inc.*, Franklin App. No. 03AP-254, 2004-Ohio-544, 804 N.E.2d 1007, at ¶14, citing *Mullens v. Binsky* (1998), 130 Ohio App.3d 64, 719 N.E.2d 599.

{¶ 19} The estate argues that the Carlyle owed a duty to Nader pursuant to the assumption of duty doctrine, under which an individual who would normally have no legal duty, creates such a duty when they undertake an action, and another reasonablely relies on that action. *Hoffecker v. Great Lakes Mall, Inc.* (Oct. 13, 1989), Lake App. No. 88-L-13-132. The estate contends that even if the Carlyle would have normally had no duty to protect its residents from the dangers associated with the swimming pool, it created such a duty when it assumed the role of monitoring the surveillance cameras because Nader relied on the monitoring of the cameras while she swam in case of an emergency.

{¶ 20} The evidence does not support that the Carlyle assumed the duty of protecting Nader by installing the surveillance cameras, nor does it support that Nader reasonablely relied on the cameras. The estate cites to no Ohio case in support of the proposition that a landowner can be held liable for the protection of individuals on the property simply by installing and monitoring cameras for security purposes. Rather, the estate relies heavily on

Kerr-Morris v. Equitable Real Estate Invest. Mgt., Inc. (1999), 136 Ohio App.3d 331, 736 N.E.2d 552.

{¶ 21} In *Kerr-Morris,* the plaintiff sued a hotel when she injured herself after slipping in a shower. While the hotel argued that the danger of slipping in a wet shower was open and obvious, the plaintiff argued that the hotel had assumed the duty of guarding against this hazard when it installed nonslip strips on the shower floor and failed to properly replace them after they had worn away.

{¶ 22} The plaintiff contended that if the hotel had properly maintained the nonslip strips she would not have fallen. The trial court granted summary judgment in favor of the hotel, but the First District Court of Appeals reversed, concluding that there were yellow marks on the shower floor that made it appear as if the nonslip strips were still present. Consequently, the court determined that a genuine issue of material fact still existed as to whether the danger was open and obvious.

{¶ 23} In the instant case, if Nader had any belief that the surveillance cameras were present to protect her from the dangers of swimming in the pool, this belief would have been negated by the several signs posted near the pool that stated no lifeguards were present and that swimmers swim at their own risk. Nader swam daily at this pool for nearly 20 years. While the

estate argues that it was in the job description of the front desk receptionist to monitor the surveillance cameras, it would not be reasonable for an individual to rely on this as a quasi-lifeguard. The closed-circuit television monitors displayed at the front desk show images from 16 separate cameras. It would be unreasonable for an individual to rely on the front desk receptionist, who also had numerous other listed duties, to actively monitor all 16 cameras.

{¶ 24} Lastly, the estate argues that there remains a genuine issue of material fact as to whether there were lifeguards employed at the Carlyle. The only evidence to support the estate's contention that the Carlyle may have employed lifeguards at some time is a 1988 version of the Carlyle's Rules and Regulations, which makes reference to lifeguards. However, there is no evidence that the Carlyle ever actually hired lifeguards, nor is there evidence that lifeguards were employed at the time of this incident.

{¶ 25} Further, Ohio law does not require lifeguards to be employed at condominium units such as the Carlyle. By the estate's own admission, the indoor pool at the Carlyle measures 55 feet long by 25 feet wide. Pursuant to Ohio Adm. Code 3701-31-05(B), a swimming pool that is smaller than 2000 square feet is not required to have a lifeguard on duty. *Kemp v. Chu Bros.*

(Jan. 13, 2000), Cuyahoga App. No. 74956. Therefore, there was no requirement that the Carlyle employ lifeguards at its indoor pool.

{¶ 26} The Carlyle also attached the affidavit of Mark Seifert ("Seifert"), a sanitarian employed at the Cuyahoga County Board of Health. Seifert stated that after reviewing all inspection reviews from 2005 through 2008, he found no safety violations, and concluded that no provision of the Ohio Rev. Code required the Carlyle to staff lifeguards.

{¶ 27} Consequently, the estate's assignments of error are overruled.

Judgment affirmed.

It is ordered that appellees recover from 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 common pleas court to carry this judgment into execution.

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

MARY EILEEN KILBANE, PRESIDING JUDGE

PATRICIA A. BLACKMON, J. and
MARY J. BOYLE, J., CONCUR