COURT OF APPEALS
DECISION
DATED AND FILED

March 20, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP117 **Cir. Ct. No. 2011CV291**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

TY BABBITTS,

PLAINTIFF-APPELLANT,

KATHLEEN SEBELIUS, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES AND STATE OF WISCONSIN DEPARTMENT OF HEALTH SERVICES,

INVOLUNTARY-PLAINTIFFS,

V.

STEVEN PETERSEN D/B/A S&J DEVELOPMENT CO., HASTINGS MUTUAL INSURANCE COMPANY AND JEFFREY M. PETERSEN,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Waupaca County: JOHN P. HOFFMANN, Judge. *Affirmed*.

Before Blanchard, P.J., Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Ty Babbitts appeals a circuit court order dismissing Babbitts' negligence and safe place statute claims on summary judgment. Babbitts argues that: (1) disputed issues of material fact precluded summary judgment; (2) the circuit court erred by denying Babbitts' motion for reconsideration, dismissing Babbitts' claims with prejudice, and denying Babbitts leave to file a second amended complaint; and (3) Babbitts is entitled to reversal in the interest of justice. We conclude that the circuit court properly granted summary judgment because the undisputed evidence defeated Babbitts' safe place and negligence claims.[1] We further conclude that the circuit court did not erroneously exercise its discretion by denying Babbitts' motions, that the order was properly entered, and that Babbitts is not entitled to reversal in the interest of justice. We affirm.

Background

¶2 Babbitts filed a complaint and amended complaint asserting he was injured in April 2009 when a balcony on which he was standing collapsed and fell to the ground. Babbitts named Steven Petersen and Jeffrey Petersen as defendants, and asserted that the Petersens owned and operated the building at which the accident occurred. Babbitts asserted that his injuries were caused by the Petersens' negligence in failing to properly maintain the premises.

[1] Because we conclude that there are no disputed issues of material fact precluding summary judgment, we do not reach the parties' dispute over whether Babbitts properly joined all necessary defendants.

¶3 The Petersens answered the amended complaint, denying liability. The Petersens denied Babbitts' claim of negligence, and raised the affirmative defense that Babbitts' claims were barred by the statute of repose.

¶4 The Petersens then moved for summary judgment. In support, the Petersens submitted two affidavits by Steven Petersen. Steven Petersen asserted in his affidavits that he was familiar with the building in which Babbitts was injured, and that construction of the property in which Babbitts was injured was substantially completed in the early 1990s. Steven Petersen also asserted that he inspected the balcony in September 2008, about a month before the subject apartment was leased to Babbitts, and that Steven Petersen did not observe any problems with the balcony. Steven Petersen also stated he periodically inspected the building for maintenance issues in the months before the accident and observed no maintenance issues with the balcony, and that he received no complaints or reports of concern about the balcony during that time.

¶5 The Petersens also submitted an affidavit by an individual who had painted the balcony sometime in 2008, averring that there were no observable problems or maintenance issues with the balcony at the time it was painted. Additionally, the Petersens submitted an affidavit by the Petersens' counsel stating that Babbitts was deposed in connection with this action, and that certain pages of the transcript of the deposition were attached. In the deposition, Babbitts indicated he never requested maintenance for the balcony or complained about its condition prior to the accident. The Petersens argued that, under these facts, Babbitts' claims were barred by the ten-year statute of repose for personal injury claims resulting from improvements to real property. *See* WIS. STAT. § 893.89 (2011-

12).[2] Additionally, the Petersens asserted that Babbitts' Safe Place claim failed because Babbitts had not properly named the actual owner and operator of the building, S&J Development Co., a general partnership.

¶6 Babbitts opposed summary judgment. He argued that his complaint alleged that the Petersens were negligent by failing to properly *maintain* the balcony, which would take Babbitts' claim out of the statute of repose. *See* WIS. STAT. § 893.89(4)(c). Babbitts submitted an affidavit by Babbitts' counsel stating that a report by Babbitts' expert was attached. Babbitts argued that his expert report supported a finding that the Petersens were negligent by failing to properly maintain the balcony, creating an issue of material fact. Additionally, while Babbitts disputed that it was necessary to name S&J Development Co. as a defendant, Babbitts moved for leave to file a second amended complaint naming the partnership.

¶7 The circuit court held a hearing and then granted summary judgment to the Petersens. The court determined, first, that the expert report Babbitts had submitted—in the form of a letter attached to an affidavit by Babbitts' counsel—was inadmissible hearsay. The court then explained that, on the material properly submitted to the court, there was no issue of material fact as to whether the Petersens were negligent in the maintenance of the balcony. The court denied Babbitts' motion to file a second amended complaint, noting that a second amended complaint would not cure the defect of the lack of material factual issues.

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶8 Following the summary judgment hearing, Babbitts objected to a proposed order by the Petersens that provided Babbitts' claims would be dismissed with prejudice. Babbitts also moved for reconsideration, this time submitting an affidavit by his proposed expert along with an attached curriculum vitae and the letter report previously submitted. The circuit court denied the motion for reconsideration and entered the proposed order. Babbitts appeals.

Standard of Review

¶9 "We review de novo the grant of summary judgment, employing the same methodology as the circuit court." ***Palisades Collection LLC v. Kalal***, 2010 WI App 38, ¶9, 324 Wis. 2d 180, 781 N.W.2d 503. A circuit court's determination as to the admissibility of evidence is generally discretionary, although we review de novo the construction of evidentiary rules and their application to a set of facts. ***Id.***, ¶¶13-14. We review a circuit court's decision on motions for reconsideration and leave to file a second amended complaint for an erroneous exercise of discretion. *See* ***Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.***, 2004 WI App 129, ¶6, 275 Wis. 2d 397, 685 N.W.2d 853; ***Grothe v. Valley Coatings, Inc.***, 2000 WI App 240, ¶12, 239 Wis. 2d 406, 620 N.W.2d 463.

Discussion

¶10 "A party is entitled to summary judgment when there are no genuine issues of material fact and that party is entitled to judgment as a matter of law." ***Palisades***, 324 Wis. 2d 180, ¶9. Under our summary judgment methodology, we must examine the moving party's submissions to determine whether they establish a prima facie case for summary judgment. ***Id.*** If the moving party has made a prima facie case for summary judgment, we then examine the opposing party's

submissions to determine whether there are material facts in dispute to preclude summary judgment. ***Id.***

¶11 Babbitts contends that, as an initial matter, the Petersens' summary judgment submissions did not establish a prima facie case for summary judgment. He contends that, to defeat Babbitts' safe place and negligence claims, the Petersens were required to submit expert opinions ruling out negligence by the Petersens. Babbitts argues that the Petersens' summary judgment submissions were insufficient because they offered only the opinions of Steven Petersen and a painter to support the Petersens' denial of negligence. Thus, according to Babbitts, the Petersens did not make a prima facie case to defeat Babbitts' claim that the Petersens were negligent in the maintenance of the balcony, taking Babbitts' safe place and negligence claims out of the ten-year limit under the statute of repose. *See* WIS. STAT. § 893.89(4)(c).

¶12 Wisconsin's Safe Place Statute imposes a duty on the owner of a public building to "construct, repair or maintain" the building so as to render the building safe. WIS. STAT. § 101.11(1). Thus, the owner of a building is liable for both structural defects and unsafe conditions associated with the structure of the building. ***Barry v. Employers Mut. Cas. Co.***, 2001 WI 101, ¶¶20-21, 245 Wis. 2d 560, 630 N.W.2d 517. A claim based on an unsafe condition requires actual or constructive notice to the owner to impose liability. ***Id.***, ¶23.

¶13 Additionally, under common law negligence principles, "everyone has a duty to everyone else to act with reasonable care," and a common law negligence action may survive even when a safe place claim fails. ***Megal v. Green Bay Area Visitor & Convention Bureau, Inc.***, 2004 WI 98, ¶¶21-25, 274 Wis. 2d 162, 682 N.W.2d 857. A claim of common law negligence requires a showing

that the defendant "either acts affirmatively or fails to act in a way that a reasonable person would recognize as creating an unreasonable risk of injury." ***Id.***, ¶25.

¶14 Any action for injury resulting from improvements to real property is subject to the builder's statute of repose under WIS. STAT. § 893.89. *See* ***Mair v. Trollhaugen Ski Resort***, 2006 WI 61, ¶¶16-35, 291 Wis. 2d 132, 715 N.W.2d 598. The statute of repose bars claims based on structural defects, but does not apply to claims of "negligence in the maintenance, operation or inspection of an improvement to real property." ***Id.***, ¶29 (emphasis omitted); WIS. STAT. §§ 893.89(2) and (4)(c).

¶15 Here, at summary judgment, the Petersens submitted affidavits asserting that, about seven months prior to the accident, Steven Petersen inspected the balcony and did not observe any problems; that Steven Petersen periodically inspected the premises in the months leading up to the accident and did not observe any problems; that the balcony had been painted within a year and a half before the accident, and the painter did not observe any problems with the balcony; and that Babbitts had not requested any maintenance or reported any problems with the balcony during the months he rented the apartment prior to the accident. The only reasonable inference from this evidence is that the Petersens had no notice of an unsafe condition of the balcony, defeating Babbitts' safe place claim based on an unsafe condition of the property. ***Barry***, 245 Wis. 2d 560, ¶23. Additionally, the only reasonable inference is that the Petersens did not act or fail to act in any way that would create an unreasonable risk of injury, defeating Babbitts' common law negligence claim. ***Megal***, 274 Wis. 2d 162, ¶25. Moreover, as Babbitts concedes, a claim based on a structural defect rather than failure to maintain is barred by the statute of repose. *See* WIS. STAT. § 893.89.

Accordingly, we conclude that the Petersens made a prima facie case for summary judgment on Babbitts' safe place and negligence claims.

¶16 Next, Babbitts contends that the circuit court erred by failing to consider the expert report Babbitts submitted along with his counsel's affidavit to oppose summary judgment. He contends that the expert report created an issue of material fact as to whether the Petersens negligently failed to maintain the balcony.

¶17 An affidavit opposing summary judgment "shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence." WIS. STAT. § 802.08(3). Here, Babbitts submitted an affidavit by his attorney stating that an expert report was attached. However, Babbitts did not provide an affidavit by the expert. The circuit court properly determined the statements in the expert report were inadmissible hearsay. *See* WIS. STAT. § 908.01. Because the Petersens made a prima facie case for summary judgment and Babbitts did not submit any admissible evidentiary facts to rebut that prima facie case, summary judgment was properly granted.[3]

[3] To the extent Babbitts contends that summary judgment was inappropriate because the facts of the case could have supported a res ipsa loquitur instruction, we disagree. Because Babbitts did not submit any admissible evidentiary facts as to why the balcony collapsed, there was nothing to support that instruction. "Res ipsa loquitur is a rule of circumstantial evidence which permits, but does not require, a permissible inference of negligence to be drawn by the jury." ***McGuire v. Stein's Gift & Garden Ctr., Inc.***, 178 Wis. 2d 379, 389, 504 N.W.2d 385 (Ct. App. 1993). A plaintiff is entitled to a res ipsa loquitur instruction if the evidence establishes that: "(1) the event causing the plaintiff's injuries was of the kind which ordinarily does not occur in the absence of negligence, and (2) the agency or instrumentality causing the harm was within the exclusive control or right to control of the defendant." ***Id.*** at 390. Babbitts did not present any facts to show that the Petersens had exclusive right to control the balcony, to support a res ipsa loquitur instruction.

¶18 Babbitts also contends that the circuit court erred by denying Babbitts' motion for reconsideration. Babbitts points out that he submitted an affidavit by his expert with the attached expert report in support of his motion for reconsideration. Babbitts asserts that the circuit court should have granted his motion for reconsideration once he submitted material opposing summary judgment in the proper form. However, a motion for reconsideration must establish that reconsideration is necessary based on newly discovered facts or to correct a manifest error of law or fact. *See* ***Koepsell's Olde Popcorn Wagons, Inc.***, 275 Wis. 2d 397, ¶44. "A 'manifest error' is not demonstrated by the disappointment of the losing party. It is the 'wholesale disregard, misapplication, or failure to recognize controlling precedent.'" ***Id.*** (quoted source and internal citation omitted). Additionally, "[a] party may not use a motion for reconsideration to introduce new evidence that could have been introduced at the original summary judgment phase." ***Id.***, ¶46. Because Babbitts' motion for reconsideration asserted the arguments he made at summary judgment, and presented new material that would have been available to submit on summary judgment, we conclude the circuit court properly exercised its discretion by denying the motion.

¶19 Babbitts also contends that the circuit court erred by dismissing his case with prejudice and by denying him leave to file a second amended complaint. So far as we can tell, Babbitts' argument on these issues is that it was unfair for Babbitts to be denied a trial on the merits. However, as explained above, the circuit court properly granted summary judgment to the Petersens based on the evidence properly submitted to the court. We are not persuaded that the circuit court erred by dismissing Babbitts' claims with prejudice or by denying Babbitts leave to file a second amended complaint.

¶20 Finally, Babbitts contends that he is entitled to reversal in the interests of justice. We decline to exercise our power to reverse under WIS. STAT. § 752.35. We affirm.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.