THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee. Lee, Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2013-001102
Case No. 2011-CP-40-04883R

Raymond Armstrong .... Appellant,

v.

Jacqueline Berry and Samuel J. Thompson. .... Respondent.

INITIAL BRIEF OF RESPONDENT SAMUEL J. THOMPSON

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

FACTS 3

STANDARD OF REVIEW 6

ARGUMENTS

I. THE TRIAL CORRECTLY GRANTED SUMMARY JUDGMENT TO LANDLORD THOMPSON BECAUSE LANDLORD OWED NO DUTY TO TENANT ARMSTRONG TO REPAIR AND A REASONABLE INSPECTION WOULD NOT HAVE REVEALED THE ALLEGED DEFECT AND LANDLORD DID NOT UNDERTAKE ANY ACTION TO REPAIR THE ALLEGED DEFECT. 7

II. THE CIRCUIT COURT CORRECTLY GRANTED SUMMARY JUDGMENT ALTHOUGH AFFIANT MOORE HAD NOT BEEN DEPOSED BECAUSE ADEQUATE TIME FOR DISCOVERY HAD PASSED 12

CONCLUSION 14

TABLE OF AUTHORITIES

CASES

CEL Products, LLC v. Rozelle, 357 SC. 125, 591 S.E.2d 643 (Ct.App. 2004)............7, 12

Conner v. Farmers and Merchants Bank, 243 S.C. 132, 132 S.E.2d 385 (1963)..........9, 10

Creighton v. Coligny Plaza Ltd. Pshp., 334 S.C. 96, 116, 512 S.E2d 510, 520 (Ct. App. 1998)..10

Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003)..6

Durkin v. Hansen, 313 S.C. 343, 346-47, 437 S.E.2d 550, 552 (Ct. App. 1993)................9

Ellis v. Davidson, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004)......................6

Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002)....................................6

Garvin v. Bi-Lo, Inc., 343 S.C. 625, 629, 541 S.E.2d 831, 833......................................10

Gauld v. O'Shaugnessy Realty Co., 380 S.C. 548, 671 S.E.2d 79 (Ct. App. 2008)...........6

Guinan v. Tenet Healthsystems of Hilton Head, Inc., 383 S.C. 48, 54-55, 677 S.E.2d 32, 36 (Ct.App. 2009)..12, 13

Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).........6

Harris v. Rose's Stores, Inc., 315 S.C. 344, 433 S.E.2d 905 (Ct. App. 1993)....................6

Huggler v. State, 360 S.C. 627, 634, 602 S.E.2d 753, 757 (2004)....................................9

Main v. Corley, 281 S.C. 525, 316 S.E.2d 406 (1984)..6

Moore v. Weinberg, 373 S.C. 209, 644 S.E.2d 740 (Ct. App. 2007)................................6

Timmons v. Williams Wood Products Corp., 164 S.C. 361, 162 S.E. 329, 330 (1932)..7, 10

Watson v. Sellers, 299 S.C. 426, 433, 385 S.E.2d 369, 372-73 (Ct. App. 1989)..........9, 10

Wintersteen v. Food Lion, Inc., 344 S.C. 32, 35, 542 S.E.2d 728, 729 (2001)................11

RULES

Rule 56(c), SCRCP 6, 12

Rule 801, SCRE 8

Rule 802, SCRE 8

OTHER

30 S.C. Juris. Evidence §157 9

STATEMENT OF ISSUES ON APPEAL

The Respondent would respectfully restate the Issues on Appeal as follows:

I. DID THE TRIAL COURT PROPERLY GRANT SUMMARY JUDGMENT IN FAVOR OF LANDLORD THOMPSON BECAUSE LANDLORD OWED NO DUTY TO REPAIR AND NO DUTY WAS CREATED BECAUSE A REASONABLE INSPECTION WOULD NOT HAVE REVEALED THE ALLEGED DEFECT AND LANDLORD DID NOT UNDERTAKE ANY ACTION TO REPAIR THE ALLEGED DEFECT?

II. DID THE CIRCUIT COURT CORRECTLY GRANT SUMMARY JUDGMENT ALTHOUGH AFFIANT MOORE HAD NOT BEEN DEPOSED BECAUSE ADEQUATE TIME FOR DISCOVERY HAD PASSED?

STATEMENT OF THE CASE

Appellant, Raymond Armstrong ("Armstrong"), commenced this action by filing a Summons and Complaint on May 14, 2009. Respondent, Samuel Thompson ("Thompson"), served his Answer upon Armstrong on October 5, 2009. Armstrong dismissed the case pursuant to Rule 40(j), SCRCP in May 2010. In May of 2011, the parties entered into a consent order to restore the action to the docket.

Thompson filed a Motion for Summary Judgment on January 11, 2012 and a Memorandum in Support of the Motion for Summary Judgment along with exhibits on May 8, 2012. The Honorable Alison Renee Lee heard oral arguments on the motion on May 8, 2012. By Order filed May 30, 2012, Judge Lee granted Thompson's Motion for Summary Judgment. Armstrong filed a Motion for Reconsideration on June 13, 2012, but did not supply a copy of the Motion to Judge Lee. Judge Lee filed an Order denying the Motion for Reconsideration on April 17, 2013. Armstrong filed and served his Notice of Appeal on May 14, 2013.

FACTS

This is a premises liability case. In the plaintiff's complaint, he alleges that he fell in a house he rented from Thompson. Armstrong and his sister, Beverly Armstrong Washington, began renting Thompson's home located at 212 Hickory Ridge, Columbia, South Carolina in November of 2005.

Armstrong testified that on October 1, 2006, he fell between the living room and kitchen in the rental home. (Depo. of Armstrong, p. 129-130, Photos of Area, Exhibits 1 and 2). The living room, which is adjacent to the kitchen, had hardwood flooring. (Depo. of Thompson, p. 33, ll. 17-24). The kitchen had linoleum flooring. (Depo. of Armstrong, p. 130, ll. 2-7). Before Armstrong moved into the house, Thompson installed a piece of transitional wood that spanned the doorway between the kitchen and living room. (Depo. of Thompson, p. 34, l. 4 – p. 35, l. 25). Thompson used approximately six screws to secure the wooden threshold. (Depo. of Thompson, p. 36, ll. 4-15).

Armstrong did not request any repairs be completed before he moved into the house. (Depo. of Armstrong, p.63, ll. 6-8). Armstrong and his sister had been living in the house approximately eleven (11) months when Armstrong fell. (Depo. of Armstrong, p. 137, ll. 1-6; Depo. of Washington, p. 33, ll. 11-12). Armstrong described that when he fell, "the floor went down" and a "board came up." (Depo. of Armstrong, p.70, l. 20 – p. 71, l. 3). Armstrong's sister testified that a piece of the molding popped up. (Depo. of Washington, p. 44).

Before Armstrong's fall, Armstrong had no complaints about the house. (Depo. of Armstrong, p. 64, ll. 7-10). Armstrong testified that during the time he lived in the house, he walked from the living room into the kitchen a couple of times each day and never felt the floor give way or had the board pop up as he walked over it. (Depo. of Armstrong, p.74). Armstrong further testified that during the eleven months he lived in the house that he never noticed that the

threshold between the kitchen and the living room was loose. (Depo. of Armstrong, p. 137, ll.1-6). He testified that he had never had boards pop up before the incident. (Depo. of Armstrong, p. 72, ll. 6-10). Armstrong stated that he never reported to anybody that there was something wrong with the board. (Depo. of Armstrong, p. 72, ll. 13-15).

Furthermore, Armstrong's sister described that she walked through the area where Armstrong fell the day before the incident and did not notice anything about the ¼ round wood. (Depo. of Washington, p. 52). She agreed that she never reported the condition of the wood to the landlord, Thompson. (Depo. of Washington, p. 72). She testified:

> Q: But is it your testimony that you never told him [Thompson] that there was anything wrong with this piece of wood?
>
> A: There was nothing to see that there was [anything] wrong with that piece of wood. How would I know that?
>
> Q: So because there was nothing to see there's nothing you ever asked him [Thompson] to fix; is that right?
>
> A: The wood?
>
> Q: Right.
>
> A: No. It dislodged when Raymond walked into the kitchen. No. I never asked him to fix that piece of wood. We had no conversations about that piece of wood. Had I known that the piece of wood was going to come dislodged I probably would have had it repaired. But, there's nothing you could see or predict. I'm not a prophet....

(Depo. of Washington, p. 72, ll. 7-21).

Thompson filed a motion for summary judgment on the basis that there existed no genuine issue of material fact regarding any of his acts or omissions because there was no evidence that he had a duty to repair the condition or that he knew or should have known of any defect which existed in the residence he leased to Armstrong. Thompson further contended that the tenants failed to give him notice of the condition of the wood. In the hearing on the motion

for summary judgment, counsel for Armstrong conceded that Armstrong did not allege any cause of action under the South Carolina Residential Tenant Act. (Transcript of Hearing, p.13). The plaintiff's counsel further conceded that no written notice was given to landlord Thompson. (Transcript of Hearing, p.14). Judge Alison Renee Lee granted Thompson's Motion for Summary Judgment on the basis that no duty was created because 1) a reasonable inspection would not have revealed the alleged defect; 2) there was no evidence that Thompson undertook any action to make a repair in the leased premises; and 3) there was no evidence that Armstrong provided written or oral notice of the alleged defect or needed repairs.

STANDARD OF REVIEW

The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003). A trial court may properly grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, 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." Rule 56(c), SCRCP. When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Ellis v. Davidson, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004). The burden is on the moving party to establish an absence of a genuine issue of material fact. Gauld v. O'Shaugnessy Realty Co., 380 S.C. 548, 671 S.E.2d 79 (Ct. App. 2008). Once the moving party meets the initial burden of showing an absence of evidentiary support for the non-moving party's case, the non-moving party is required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). In meeting its burden, the non-moving party cannot simply rest on mere allegations or denials contained in the pleadings. Moore v. Weinberg, 373 S.C. 209, 644 S.E.2d 740 (Ct. App. 2007). It is not sufficient that a party create an inference which is not reasonable or an issue of fact that is not genuine. Main v. Corley, 281 S.C. 525, 316 S.E.2d 406 (1984). A trial court properly grants summary judgment against a party who has failed to make a showing sufficient to establish the existence of an essential element of that party's case. Harris v. Rose's Stores, Inc., 315 S.C. 344, 433 S.E.2d 905 (Ct. App. 1993). On appeal, when reviewing the grant of summary judgment, the court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002).

ARGUMENTS

I. THE TRIAL CORRECTLY GRANTED SUMMARY JUDGMENT TO LANDLORD THOMPSON BECAUSE LANDLORD OWED NO DUTY TO TENANT ARMSTRONG TO REPAIR AND A REASONABLE INSPECTION WOULD NOT HAVE REVEALED THE ALLEGED DEFECT AND LANDLORD DID NOT UNDERTAKE ANY ACTION TO REPAIR THE ALLEGED DEFECT.

A. There is no common law duty for landlord to repair the leased premises.

Under South Carolina law, it is well recognized that "the relationship of landlord and tenant, of itself alone, imposes no duty upon the former to repair" unless such duty arises by virtue of a contract. Timmons v. Williams Wood Products Corp., 164 S.C. 361, 162 S.E. 329, 330 (1932); *see also,* Conner v. Farmers and Merchants Bank, 243 S.C. 132, 132 S.E.2d 385 (1963)(restating the rule that "the relationship of landlord and tenant imposes no legal duty on the part of the former to keep the leased premises in repair, in the absence of a valid contract on the part of the lessor to do so."). Since there is no lease between the parties, then there is no duty for Landlord Thompson to repair, and the trial court properly granted summary judgment.

B. There is no evidence that Landlord Thompson could have discovered the alleged defect on reasonable inspection.

The South Carolina Supreme Court has recognized exceptions to the common law rule regarding the duty to repair which is referenced above. *See,* Timmons, 164 S.C. 361, 163 S.E. at 333. A duty may arise where injury to the tenant is caused by a defective condition known to the landlord and concealed by him from the tenant. If a lessor knows or should know that a dangerous condition is not obvious to lessee, then the lessor must use due care to discover and warn of that latent condition. Timmons, 164 S.C. 361, 162 S.E. at 333.

Armstrong has presented no evidence that Thompson knew or should have known of any existing latent defect with the wooden threshold. Indeed, Armstrong and his sister both consistently testified that they were not aware of any defect in the area where the plaintiff tripped

despite regularly walking over the area. Armstrong testified that he "never had the board pop up before the incident." Armstrong and his sister testified that the defect was not recognizable until Armstrong fell. (Depo. of Armstrong, p. 137); (Depo. of Washington, p. 52). Armstrong's sister specifically testified that there was "nothing to see" about the piece of wood until it became dislodged.

Armstrong relies upon Ms. Moore's affidavit and argues that it created an issue of fact regarding whether Thompson knew or should have known of the alleged defect with the threshold. Ms. Moore, the plaintiff's witness, averred that Armstrong's sister "related to" her that she [Armstrong's sister] told Thompson that "the floor needed to be repaired." (Affidavit at ¶5). The allegations in Moore's affidavit should be disregarded because they are not based on her personal knowledge, contain hearsay and speculation. First, Armstrong concedes that the affidavit does not raise a material issue by arguing that he needs to take Moore's deposition to clarify the content of her affidavit. It certainly is not clear because Moore failed to state when the conversation with Armstrong's sister occurred. Without an indication of when the conversation took place, that allegation regarding the hearsay conversation has no probative value. It is just as likely that the alleged conversation occurred after the fall as before the fall. Even if the conversation occurred before the fall, it is rank hearsay because Moore is repeating what Armstrong's sister allegedly said to Thompson outside of her presence since she states that Armstrong's sister "related to her." Rule 801 of the *South Carolina Rules of Evidence* defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay is inadmissible unless an applicable exception applies. Rule 802, SCRE. There are no applicable exceptions which apply to the hearsay statement of Moore, and, thus, it should not be considered. *See* 30

S.C. Jur. *Evidence* § 157 ("Hearsay testimony is not entitled to any weight."); Huggler v. State, 360 S.C. 627, 634, 602 S.E.2d 753, 757 (2004)("The rule against hearsay prohibits the admission of out-of-court statements used to prove the truth of the mater asserted unless an exception to the rule applies.").

The trial court properly granted summary judgment in favor of Thompson because there is no evidence that a reasonable inspection would have revealed the alleged latent defect.

C. No duty existed because Landlord Thompson did not undertake to repair the leased premises.

South Carolina courts have recognized another exception to the general rule of no duty to repair which may arise when the landlord has undertaken to repair or improve the premises. Watson v. Sellers, 299 S.C. 426, 433, 385 S.E.2d 369, 372-73 (Ct. App. 1989); *see also* Durkin v. Hansen, 313 S.C. 343, 346-47, 437 S.E.2d 550, 552 (Ct. App. 1993) ("Where the landlord undertakes to repair or improve the demised premises... he is required to exercise reasonable care in making such repairs or improvements, and is liable for injuries caused by his negligence or unskillfulness....").

Armstrong argues that an issue of fact exists regarding whether Thompson created a hazardous condition because Thompson installed the piece of wood which "popped up" when Armstrong walked over it. However, there is no evidence that Thompson negligently installed the piece of wood as there had been no complaints about it during the eleven months that Armstrong lived in the house. The simple act of installing a piece of wood does not equate to negligence. Moreover, the case law relied on by Armstrong is inapposite because the landlord made repairs or improvements after the tenant took possession of the property. In the cases cited by Armstrong, the lessor affirmatively acted to make a repair during the time the lessee was in possession of the leased property. In Conner v. Farmers and Merchants Bank, the court held

that a landlord was liable to the tenant for personal injuries where the lessor agreed to keep the premises 'safe and comfortable' and made several attempts throughout the term of the lease to correct a water drainage problem and repair a brick floor. The lessor in Conner frequently visited the leased premises, knew of the condition, and promised to correct it. *See* 243 S.C. 132, 132 S.E.2d 385 (1963). In Conner, there was evidence that the lessor actually undertook to improve the premises: "The evidence gives rise to the reasonable inference that both undertakings were improperly and negligently done by the lessor, creating a defective condition in the premises, and that the condition, so negligently created, was the proximate cause of the plaintiff's fall and resulting injuries." *Id.* at 141, 132 S.E.2d at 389; *see also* Creighton v. Coligny Plaza Ltd. Pshp., 334 S.C. 96, 116, 512 S.E2d 510, 520 (Ct. App. 1998)(holding that partnership that owned a shopping center was not liable for negligent acts of independent contractor hired to maintain landscaping); Watson v. Sellers, 299 S.C. 426, 385 S.E.2d 369 (Ct. App. 1989)(affirming lower court's judgment where lessor attempted to repair wooden steps during leasing period after tenant asked for steps to be repaired or replaced).

Armstrong argues that Thompson testified "that before [Armstrong] moved into the home, [Thompson] replaced the flooring in the kitchen. When [Thompson] replaced the flooring, he placed a piece of wood stripping in the doorway between the kitchen and living room." (Initial Brief of Appellant). Armstrong has presented no evidence that once Thompson turned over the leased premises to Armstrong, Thompson made an attempt to repair or improve the premises. *See* Timmons v. Williams Wood Products Corp., 164 S.C. 361, 162 S.E. 329, 330 (1932)("The lessor turns over the property, and the lessee takes it as it is turned over to him."). Because Thompson did not undertake a duty to repair the premises during the tenancy of Armstrong, and because Armstrong has no evidence that any work done by Thompson was done

negligently, this court should affirm the trial court's ruling granting summary judgment to Thompson.

Armstrong also argues that Thompson created a hazardous condition by placing the wooden threshold in the rental home. Although South Carolina courts recognize that an individual may recover for injuries caused by a dangerous or defective condition on a storekeeper's premises if the injury was caused by a specific act of the defendant that created the dangerous condition, this line of cases does not apply to the facts in the instant matter. *See* Wintersteen v. Food Lion, Inc., 344 S.C. 32, 35, 542 S.E.2d 728, 729 (2001). Assuming arguendo that this court finds that this duty can be applied to landlords, Armstrong has failed to show any evidence proving the negligence of Thompson in installing the threshold or that Thompson was aware of any defect of the threshold. *See* Garvin v. Bi-Lo, Inc., 343 S.C. 625, 629, 541 S.E.2d 831, 833 (2001)(finding no genuine issue of material fact that a dangerous condition was created where there was no evidence that cans were stacked in a defective manner or that defendant was on notice that cans were rickety). Armstrong and his sister lived in the house for almost a year and noticed nothing remarkable about the threshold until the day of Armstrong's accident.

The trial court properly granted summary judgment because there was no undertaking by Thompson to repair the premises.

II. THE CIRCUIT COURT CORRECTLY GRANTED SUMMARY JUDGMENT ALTHOUGH AFFIANT MOORE HAD NOT BEEN DEPOSED BECAUSE ADEQUATE TIME FOR DISCOVERY HAD PASSED

Armstrong argues that summary judgment should have been denied as premature because Karen Moore had not yet been deposed and her knowledge of the situation not fully explored. "The plain language of Rule 56(c), SCRCP, mandates the entry of summary judgment, after adequate time for discovery against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial." CEL Products, LLC v. Rozelle, 357 S.C. 125, 129, 591 S.E.2d 643, 645 (Ct. App. 2004). Though summary judgment is a drastic remedy, this court has explained that:

> A party claiming summary judgment is premature because they have not been provided a full and fair opportunity to conduct discovery must advance a good reason why the time was insufficient under the facts of the case, and why further discovery would uncover additional relevant evidence and create a genuine issue of material fact.

Guinan v. Tenet Healthsystems of Hilton Head, Inc., 383 S.C. 48, 54-55, 677 S.E.2d 32, 36 (Ct. App. 2009).

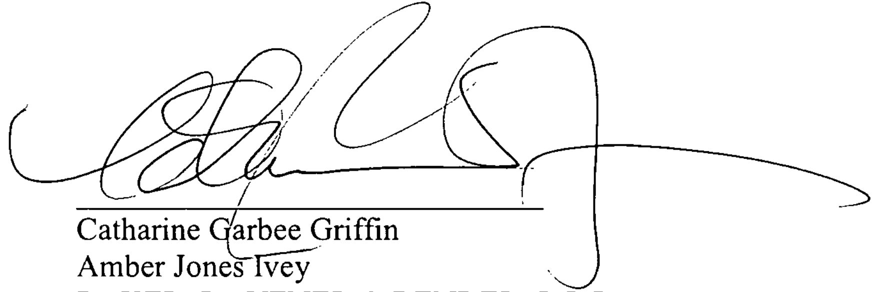
Armstrong asserts that the grant of summary judgment was premature essentially because Thompson raised questions about the admissibility of Moore's affidavit, not because sufficient time had not been given for discovery. This case originally was pending from May 14, 2009 until May of 2010. Armstrong then restored the case in May of 2011. Armstrong notes that Ms. Moore was named as a witness in the initial discovery responses. (Initial Brief of Appellant, at p. 3). The motion for summary judgment was filed in January, giving Thompson ample time of five months to finish discovery and take Moore's deposition if Thompson felt it was necessary. Furthermore, the case had been filed three years earlier which, again, provided more than sufficient time to complete discovery. Armstrong has not presented any reason why further discovery regarding Ms. Moore's statement was not made within the time allotted for discovery.

See Guinan, 383 S.C. 48, 677 S.E.2d 32 (Ct. App. 2009). The amount of time permitted for discovery in this case was more than fully adequate for the parties to gather information to support their respective positions. This court should reject Armstrong's argument and conclude that sufficient time had existed for discovery and that the court properly considered the motion for summary judgment.

CONCLUSION

For all of the above reasons, the trial court correctly found that there was no duty owed by the landlord Thompson and properly granted summary judgment in favor of Thompson. Accordingly, this Court should affirm that decision.

Respectfully submitted,



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