SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2207-15T4

SCOTT VALENTINE,

Plaintiff-Appellant,

v.

MAXIMO ALMANZAR and
ANA ALMANZAR,

Defendants-Respondents.

Argued telephonically February 21, 2017 – Decided June 12, 2017

Before Judges Simonelli and Gooden Brown.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-5292-14.

Christina A. Vergara argued the cause for appellant (Alonso & Navarrete, L.L.C., attorneys; Ms. Vergara, of counsel and on the briefs).

Monique Moreira argued the cause for respondents (Moreira & Moeira, P.C., attorneys; Ms. Moreira, on the brief).

PER CURIAM

In this slip and fall case, plaintiff Scott Valentine appeals from the January 8, 2016 Law Division order, which granted summary

judgment to defendants Maximo and Ana Almanzar and dismissed the complaint with prejudice. The issue is whether defendants had a legal duty to remove snow and ice from the public sidewalk abutting their three-family home. We conclude that because the property was residential, not commercial, summary judgment was properly granted.

We derive the following facts from the evidence submitted in support of, and in opposition to, the summary judgment motion, viewed in a light most favorable to plaintiff. Angland v. Mountain Creek Resort, Inc., 213 N.J. 573, 577 (2013) (citing Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995)).

Defendants have resided in their three-family home since 1992, and purchased it in 1994. They have a mortgage on the property, which would be paid in full in five years of the summary judgment motion. Defendants reside in one of the apartments and rent the other two apartments to non-relative tenants under written leases. Defendants receive rent totaling $3010 per month. There was no evidence that defendants or their tenants used the property for office or business purposes.

Maximo was disabled and received disability benefits, while Ana was employed and had a net income of approximately $210 per week. Defendants used the rent money to pay the property's carrying charges of $2913 per month, consisting of the mortgage,

taxes, and insurance. This left $97 per month for maintenance and repair expenses, including replacing or repairing damages on the property and walkway, purchasing salt to be used on the sidewalk, and making repairs inside the building. Because $97 did not cover all repair and maintenance expenses, defendants used their personal funds for these purposes.

On February 19, 2014, plaintiff allegedly sustained injuries when he slipped and fell on ice or snow on the public sidewalk abutting defendants' property. He filed a complaint against defendants, asserting, in part, that they breached their duty to maintain the sidewalk in a safe condition.

Following the completion of discovery, defendants filed a motion for summary judgment, arguing that as residential homeowners, they had no duty to clear snow and ice on the public sidewalk abutting their property. Applying the factors set forth in Grijalba v. Floro, 431 N.J. Super. 57, 73 (App. Div. 2013), the motion judge found that defendants owned the property and occupied one-third of it; there were no commercial entities at the property; there were additional repair expenses not covered by the rental income; and this was not a profit-generating apartment building. Citing Borges v. Hamed, 247 N.J. Super. 295, 296 (App. Div. 1991), the judge found that defendants' property was not a commercial venture, and granted summary judgment to defendants.

On appeal, plaintiff argues that the judge misapplied Grijalba in balancing the predominate use of the property as an income-generating venture, and disregarded the property's capacity to generate income and earn significant profit after the mortgage was satisfied. Plaintiff argues that the judge improperly applied Borges because unlike Borges, defendants occupied only one unit of a three-family home; rented the other two units to non-relative tenants at fair market value; and received rental income greater than the monthly carrying charges with profit that covered those charges. Plaintiff also argues that the judge considered mere conjecture in finding that defendants could not pay their mortgage if a tenant decided not to pay rent and the $97 profit did not cover the repair expenses.

We review a ruling on a motion for summary judgment de novo, applying the same standard governing the trial court. Templo Fuente De Vida Corp. v. National Union Fire Ins. Co., 224 N.J. 189, 199 (2016) (citation omitted). Thus, we consider, as the motion judge did, "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill, supra, 142 N.J. at 540. If there is no genuine issue of material fact, we must then "decide whether the trial

court correctly interpreted the law." DepoLink Court Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013) (citation omitted). We review issues of law de novo and accord no deference to the trial judge's legal conclusions. Nicholas v. Mynster, 213 N.J. 463, 478 (2013). "[F]or mixed questions of law and fact, [we] give[] deference . . . to the supported factual findings of the trial court, but review[] de novo the lower court's application of any legal rules to such factual findings." State v. Pierre, 223 N.J. 560, 577 (2015) (citations omitted). Applying the above standards, we discern no reason to reverse the grant of summary judgment.

"At common law, property owners were 'under no duty to keep the public sidewalk adjoining their premises free of snow and ice.'" Qian v. Toll Bros., Inc., 223 N.J. 124, 135 (2015) (quoting Skupienski v. Maly, 27 N.J. 240, 247 (1958)). "Generally, property owners, both commercial and residential, were 'not liable for the condition of a sidewalk caused by the action of the elements or by wear and tear incident to public use.'" Ibid. (quoting Yanhko v. Fane, 70 N.J. 528, 532 (1976), overruled in part by Stewart v. 104 Wallace St., Inc., 87 N.J. 146 (1981)).

In Stewart, supra, 87 N.J. at 149, our Supreme Court carved out an exception to the common-law rule to impose a duty only on commercial property owners to maintain public sidewalks adjacent

to the property. The Court later held that this common-law duty of commercial property owners applies to snow and ice removal. Mirza v. Filmore Corp., 92 N.J. 390, 395 (1983). "Since Stewart, residential-public-sidewalk immunity has remained intact." Qian, supra, 223 N.J. at 136 (citing Norris v. Borough of Leonia, 160 N.J. 427, 434 (1999)). "Residential property owners do not have a common-law duty to clear snow or ice from a public sidewalk and the failure to do so does not expose them to tort liability. That is so even if a municipal ordinance requires residential owners to clear their sidewalks." Ibid. (citing Luchejko v. City of Hoboken, 207 N.J. 191, 199, 211 (2011)).

In Luchejko, the Court held that the distinction between residential and commercial properties was engrained in our tort law and would not be abrogated so that a duty to maintain sidewalks would apply to residential condominium owners. Luchejko, supra, 207 N.J. at 195. However, since Stewart, our courts have placed residential rental properties in the category of commercial properties if they are not owner-occupied. Wilson v. Jacobs, 334 N.J. Super. 640, 644-45 (App. Div. 2000) (holding that a house entirely rented to tenant was commercial); Hambright v. Yglesias, 200 N.J. Super. 392, 394-95 (App. Div. 1985) (holding that a two-family house entirely rented out for profit was commercial). The "gray area of the commercial/residential distinction," Luchejko,

supra, 207 N.J. at 210, is whether an owner-occupied property with a small number of dwelling units should be considered residential or commercial if the property is also used to generate income for the owner. See Smith v. Young, 300 N.J. Super. 82, 97 (App. Div. 1997) (holding that a two-family home, one unit of which was owner-occupied and the other rented to a tenant, was unquestionably residential in use); Avallone v. Mortimer, 252 N.J. Super. 434, 438 (App. Div. 1991) (holding that where residential property is partially owner-occupied and partially rented, the issue is its predominant use); Borges, supra, 247 N.J. Super. at 296 (holding that a multi-family home partially occupied by the owner and partially rented to relatives was not commercial).

Courts must employ a "case-by-case, fact-sensitive analysis" to determine whether owner-occupied property should be considered residential or commercial. Grijalba, supra, 431 N.J. Super. at 62 (citation omitted) (quoting Stewart, supra, 87 N.J. at 160). In Grijalba, the defendant converted her owner-occupied two-family home into a three-family home and moved into the basement apartment in order to generate more rental income from the other apartments. Id. at 59-60. We reversed the trial court's grant of summary judgment to the defendant and remanded the case for a more-detailed factual determination of the use of the property and the nature of the ownership. Id. at 59. We listed the following factors for

the court to consider in determining whether the property was primarily residential or commercial:

> (1) the nature of the ownership of the property, including whether the property is owned for investment or business purposes; (2) the predominant use of the property, including the amount of space occupied by the owner on a steady or temporary basis to determine whether the property is utilized in whole or in substantial part as a place of residence; (3) whether the property has the capacity to generate income, including a comparison between the carrying costs with the amount of rent charged to determine if the owner is realizing a profit; and (4) any other relevant factor when applying commonly accepted definitions of commercial and residential property.
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> [Id. at 73.]

The focus is on the bona fide primary use of the property. As we stated in Smith:

> [W]hile the Supreme Court may have intended to include property solely held for investment purposes within the Stewart rationale, it had no intention to subsume small owner-occupied dwellings, such as two- or three-family homes, within the classification of commercial property. Such uses are clearly in a category of their own, for they are residential both in the nature of their ownership as well as in the use to which the property is put.
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> [Smith, supra, 300 N.J. Super. at 99-100 (quoting Hambright, supra, 200 N.J. Super. at 395).]

An owner-occupier of a three-family home may use part of the property for income-production, but such a factor does not change

the essential nature and status of the property as the owner's residence. In addition, whether the property owner must make mortgage payments is not the question. The relevant question is the primary use of the property. Ibid.

Here, defendants used the property as their long-time residence and rented two apartments to generate income to cover the carrying charges. The small profit they received was insufficient to cover repair and maintenance expenses, requiring them to utilize their personal funds for these purposes. Defendants are not using the property as a method to make money, but to retain their home under their tight financial circumstances. We are satisfied that the nature and purpose of defendants' owner-occupied property was primarily residential, not commercial. As residential property owners, defendants had no duty to clear snow and ice from the public sidewalk adjoining their property. Defendants, therefore, are not liable for plaintiff's alleged injuries.

Affirmed.