IN THE COURT OF APPEALS OF IOWA

No. 0-759 / 00-0787
Filed March 28, 2001

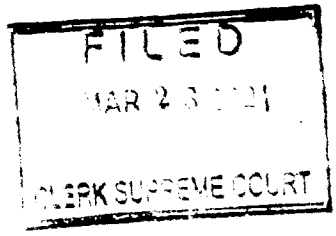
MANDY LEE KILLEN,
Plaintiff-Appellant,

vs.

THE JEDD CORP., a/k/a
CUSTOM AUTO SALES,
Defendant- Appellee,

And

D & D TOWING,
Defendant.



Appeal from the Iowa District court for Polk County, Artis I. Reis, Judge.

Plaintiff-Appellant appeals the trial court's ruling on defendant-appellee's motion for summary judgment. **AFFIRMED.**

Richard H. Doyle and Robert G. Tully of Galligan, Tully, Doyle & Reid, P.C., Des Moines, and James J. Kane, West Des Moines, for appellant.

David L. Phipps and Stephen E. Doohen of Whitfield & Eddy, P.L.C., Des Moines, for appellee.

No appearance for defendant D & D Towing.

Considered by Hayden, S.J., Honsell, S.J. and C. Peterson. S.J.*

Senior judges assigned by order pursuant to Iowa Code Section 602.9206 (2000).

HONSELL, S.J.

The district court granted Defendant-Appellee's, The Jedd Corp., motion for summary judgment requesting judgment in its favor. Plaintiff-Appellant, Mandy Lee Killen, appeals the ruling which concluded as a matter of law that Jedd did not retain sufficient control over the property being remodeled by defendant, D & D Towing, Inc. to impose a duty on Jedd to protect her from the injuries she sustained.

I. Background Facts and Proceedings.

Jedd owns a building in Des Moines, Iowa. D & D Towing leased a portion of the premises from Jedd. The lease was oral. D & D Towing installed a bathroom in a portion of the second floor of the building it leased from Jedd. Mandy Lee Killen was an employee of D & D Towing on September 1, 1997, when she entered the bathroom and the floor beneath her gave way. She was injured by the resulting ten-foot fall.

The verbal lease provided that D & D Towing would pay Jedd $500 per month for space consisting of two garage bays, a second story loft and a ground floor bathroom. Some time in June or July of 1997 D & D moved its dispatch office to the second floor of the building. Over the July 4th weekend of that year D & D constructed a second floor bathroom.

No agreement existed which alluded to Jedd maintaining, repairing or remodeling the premises. Jedd was not involved in the construction of the bathroom.

Killen sued D & D Towing and Jedd Corp. Default judgment has been entered against D & D Towing. She alleges that Jedd was negligent in failing to exercise reasonable care to keep the premises in a reasonably safe condition.

Jedd filed the motion for summary judgment asserting that it did not owe any duty to Killen, therefore it was entitled to judgment in its favor on all liability issues.

II. Standard of Review.

Summary judgment under Iowa Rule of Civil Procedure 237(c) is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See Phipps v. IASD Health Servs. Corp.*, 558 N.W.2d 198, 201 (Iowa 1997). Accordingly, we examine the record before the district court to determine whether any genuine issue of material fact exists and whether the court correctly applied the law. *See id.* The facts are viewed in the light most favorable to the party opposing the motion for summary judgment. *Id.*

III. The merits.

The Iowa Supreme Court in *Van Essen v. McCormick Enterprises Co.*, 599 N.W.2d 716, 718 (Iowa 1999) states as follows: "This case turns on whether the defendant owed the plaintiff a duty of care." *See Sankey v. Richenberger,* 456 N.W.2d 206, 207 (Iowa 1990) ([T]he threshold question in any tort case is whether the defendant owed the plaintiff a duty of care.). Whether such a duty arises out of the parties' relationship is always a matter of law for the court. *Hoffnagle v. McDonald's Corp.*, 522 N.W.2d 808, 811 (Iowa 1994). Because the existence of a duty is a question of law for the court, it may appropriately be

adjudicated on a motion for summary judgment. *See Teunissen v. Orkin Exterminating Co.*, 484 N.W.2d 589, 591 (Iowa 1992).

When considering the relationship of lessor and lessee with respect to the duty owed to a third party the court in *Van Essen,* 599 N.W.2d at 719 states: "In [the] case [of an absentee owner of rental property], the mere fact of ownership is not sufficient to impose liability for premises defect." While ownership includes the right of possession and control, "possessory rights may be 'loaned' to another, thereby conferring the duty to make the premises safe while simultaneously absolving oneself of responsibility." *Galloway v. Bankers Trust Co.*, 420 N.W.2d 437, 441 (Iowa 1988) (quoting *Merritt v. Nickelson*, 287 N.W.2d 178, 181 (Mich. 1980)). Similarly, the Restatement states the following rule with respect to the liability of a lessor: subject to certain exceptions, "a lessor of land is not liable to his lessee or to others on the land for physical harm caused by any dangerous condition, whether natural or artificial, which existed when the lessee took possession." Restatement (Second) of Torts § 356, at 240; *accord* 62 Am. Jur. 2d *Premises Liability* § 13, at 361 (1990) (In the case of injuries to third parties occasioned by the condition or the use of leased premises, it is the general rule that, prima facie, the breach of duty and therefore the liability, is that of the tenant or lessee and not that of the landlord or lessor.). The comment to Restatement section 356 amplifies this rule: [I]t is the general rule that the lessor is not liable to the lessee, or to others on the land, for injuries occurring after the lessee has taken possession, *even though such injuries result from a dangerous condition existing at the time of the transfer.* Restatement (Second) of Torts §

356 cmt. *a*, at 240 (emphasis added); *accord Wright v. Peterson*, 259 Iowa 1239, 1244, 146 N.W.2d 617, 620 (1966).

Jedd's ownership of the building standing alone does not create a duty owing to Killen. However, in the event that Jedd, alone or jointly with D & D Towing, maintained control over that portion of the premises where the injury took place Jedd could be held liable. *See Van Essen*, 599 N.W.2d at 720.

In *Willow Tree Investments, Inc. v. Wagner*, 453 N.W. 641-42 (Iowa 1990), the court states: "In reviewing a grant of summary judgment made pursuant to Iowa Rule of Civil Procedure 237(c) the question is whether the moving party has shown there is no genuine issue of material fact and is entitled to judgment on the merits as a matter of law". *Suss v. Schammel*, 375 N.W. 2d 252, 254 (Iowa 1985). The burden of demonstrating that there is no material fact in dispute is upon the moving party. *Farm Bureau Mut. Ins. Co. v. Milne,* 424 N.W. 2d 422, 423 (Iowa 1988). The party resisting the motion must show that the fact issue is such that if decided in its favor it would be a good defense to the action. *Orcutt v. Hanson,* 163 N.W. 2d 914, 917 (Iowa 1969). We view the record in the light most favorable to the party opposing the motion. *Hildenbrand v. Cox*, 369 N.W.2d 411, 413 (Iowa 1985).

There is no indication that the verbal agreement creating the lessor/lessee status required Jedd to be responsible for repairs, nor did the agreement provide Jedd with any control over D & D's business operations. The remodeling project was originated and paid for by D & D. Even if Jedd's owner was on the premises daily and not only knew of the construction of the bathroom, but indicated approval of the remodeling project, it cannot be said that Jedd maintained legal

control jointly or otherwise over the leased portion of the premises. *See Robinson v. Poured Walls*, 553 N.W.2d 873 (Iowa 1996).

We conclude that in considering the record submitted to us in the light most favorable to Jedd, the fact issue relied on by it does not create a good defense to the action because as the trial court correctly determined Jedd did not owe a duty to Killen. Therefore the decision of the trial court is affirmed.

AFFIRMED.