RENDERED: August 15, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court of Appeals

NO. 2002-CA-002104-MR

SYLVIA GAMBLE — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 01-CI-007838

FORREST CITY RESIDENTIAL MANAGEMENT, INC. — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BARBER, McANULTY, AND TACKETT, JUDGES.

TACKETT, JUDGE: Sylvia Gamble appeals from an order of the Jefferson Circuit Court granting a motion for summary judgment filed by the defendant, Forrest City Residential Management, Inc. (Forrest City), in an action to recover for injuries sustained when she slipped and fell in a snow-covered parking lot. After reviewing the applicable case law, we agree with the trial court's decision that Forrest City was under no duty to warn Gamble of the hazardous condition of the parking lot or to

clear the snow. Consequently, the trial court's decision to grant summary judgment in favor of Forrest City is affirmed.

Gamble, an elderly lady, was a tenant at American Village Apartments in Louisville, Kentucky, a property managed by Forrest City, when the accident occurred. She had lived at the apartments off and on since 1996 and, on the Sunday morning of December 3, 2000, she began to walk across the complex's snow-covered parking lot to her car in order to drive her daughter to an appointment. Gamble slipped and fell without injury upon first reaching the parking lot; however, she got up and proceeded on toward her car. Upon reaching the car, Gamble slipped and fell a second time while standing between her driver's door and a car parked next to hers. This second fall caused Gamble to suffer a fracture to her ankle which required a hospital stay and physical therapy to treat the injury.

Gamble filed a complaint against Forrest City alleging it had negligently failed to clear the apartment complex's parking lot of snow and ice and that this negligence resulted in her fall and injury. Forrest City filed a motion for summary judgment arguing that Kentucky law did not recognize a duty to clear the snow or warn against the slippery condition of the parking lot. The trial court granted summary judgment for Forrest City concluding that no duty existed for Forrest City to

either remedy or warn against the obvious natural hazard posed by the snow-covered parking lot. This appeal followed.

Summary judgment is proper only when there are no genuine issues of material fact. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991). The issue presented to the trial court in Forrest City's motion for summary judgment was whether or not it had a duty to remove snow from the apartment complex's parking lot or to warn Gamble of the hazardous condition of the parking lot. The absence or presence of a legal duty is a question of law to be determined by the trial court; therefore, if Forrest City had no legal duty to perform, then no genuine issues of material fact remain for a jury to decide.

Gamble argues Forrest City had both a contractual duty and a duty under tort law to remove the snow from the complex parking lot. The Kentucky Supreme Court previously considered the law regarding liability for injury due to natural outdoor hazards in Standard Oil Co. v. Manis, Ky., 433 S.W.2d 856 (1968), wherein the Court stated that "*natural outdoor hazards* which are as obvious to an invitee as to the owner of the premises do not constitute *unreasonable* risks to the former which the landlord has a duty to remove or warn against." (Emphasis in original.) Id. at 858. This standard was recently reaffirmed in PNC Bank v. Green, Ky., 30 S.W.3d 185

(2000), when The Kentucky Supreme Court reversed this court's decision that whether or not a hazardous condition was obvious was a jury question.

In the PNC Bank case, Grace Green slipped and fell on the sidewalk in front of her bank. The accident occurred in broad daylight and Green admitted that she was aware of the treacherous weather conditions having already nearly fallen on ice earlier that day. Nevertheless, she attempted to walk carefully along the sidewalk to reach the bank, but fell just outside the building. In that case, the trial court granted summary judgment in favor of the bank; however, the Court of Appeals reversed the trial court stating that whether the hazardous condition of the sidewalk was obvious was a matter for the jury. However, the Kentucky Supreme Court agreed with the trial court's decision in favor of the bank stating that Green's deposition testimony demonstrated her awareness of the hazard and that PNC had done nothing to make the sidewalk more hazardous.

In the case *sub judice*, at approximately 9:00 a.m., Gamble set out toward her vehicle, fell once without injury, proceeded on across the snowy parking lot, and upon reaching her car fell a second time injuring her ankle. Gamble admits that the parking lot had not been cleared and that she could see the snow covering the pavement on which she walked. These facts are

sufficiently similar to the facts in PNC Bank to support the trial court's finding that Forrest City had no duty under tort law to clear the snow or to warn Gamble of an obvious natural hazard which was apparent to her prior to her injury.

With regard to the claim that Forrest City owed her a contractual duty to clear the snow from her apartment complex's parking lot, Gamble presents two distinct theories. First, she contends that she was an intended beneficiary under a snow removal contract between Forrest City and a third party. The trial court reviewed evidence that Forrest City contracted with Landscape Lawn, Inc. to remove the snow from the apartment complex's parking lot. It is undisputed that the snow was not cleared from the parking lot prior to Gamble's fall. Gamble argues that she was the intended third party beneficiary of the snow removal contract, that Landscape Lawn breached the contract by failing to clear the snow from the parking lot, and that this breach of contract resulted in her fall and the injuries she sustained. Kentucky law is well settled that "a party beneficiary of a contract may look to the promisor directly and sue him in his own name to enforce a promise made for plaintiff's benefit, even though he is a stranger, it being sufficient that there is a consideration between the parties who made the agreement for the benefit of the third party." Taylor Bros., Inc. v. Pound, 338 S.W.2d 687,688 (1960); Louisville &

N.R. Co. v. Dry Branch Coal Co., 274 Ky. 82, 117 S.W.2d 1003 (1938); Ball v. Cecil, 285 Ky. 438, 148 S.W.2d 273 (1941); Long v. Reiss, 290 Ky. 198, 160 S.W.2d 668(1942); Saylor v. Saylor, 389 S.W.2d 904 (1965). However, Gamble filed no action against Landscape Lawn, the promisor under the contract; therefore, she cannot recover as a third party beneficiary.

Gamble's second theory against Forrest City for breach of contract involves an advertising brochure in which she claims Forrest City voluntarily assumed the duty to remove snow from the apartment complex's parking lot. Norma Smith, the resident manager of American Village Apartments, wrote the brochure in question in 1998 for distribution to prospective tenants. It contained the following language now relied upon by Gamble:

> WHEN YOUR LIFE HAS BEEN FULL OF RESPONSIBILITIES, JOB, CHILDREN AND THE TIME HAS COME THAT YOU NO LONGER HAVE THOSES RESPONSIBILITIES, AND NO LONGER WANT THE RESPONSIBILITIES OF SNOW REMOVAL, LEAF RAKING, BROKEN FURNACES AND CARING FOR THAT TOO LARGE HOME AMERICAN VILLAGE IS THE ANSWER!!!

Forrest City points out that the brochure did not constitute a promise made in return for rent paid since it was given, without consideration, to prospective tenants who were under no obligation to pay rent. The actual contract between Gamble and Forrest City is the lease which the parties executed and which contains no mention of Forrest City assuming any duty to remove

snow from the parking lot. We agree with the trial court's finding that the advertising brochure, which was distributed to prospective clients, did not give rise to a contractual duty binding Forrest City to clear the parking lot of snow.

Finally, Gamble argues that, despite the obvious natural hazard presented by a snow-covered parking lot, Forrest City owed a duty under our previous decision in Wallingford v. Kroger Co., Ky. App., 761 S.W.2d 621 (1988). Wallingford involved a deliveryman for Coca-Cola who fell and injured his back while attempting to pull a heavily loaded cart up a steep, snow-covered ramp at the back of a Kroger store. Prior to his fall, Wallingford had informed two Kroger employees that the ramp needed to be cleared of snow and ice, had requested and been refused permission to make his delivery through a front door, and had attempted to clear the ramp himself. At trial, the store manager and two other employees testified that Kroger had received complaints from several vendors that the slope of the ramp was too steep. In addition, Wallingford was prepared to introduce evidence from an expert that the ramp violated building codes and was too steep.

In distinguishing our holding in Wallingford from the previous decision in Manis, we stated as follows:

> a far different situation is presented where the invitee is compelled by his employment to use a particular path and entranceway,

> asks for assistance in making it safe and is refused, attempts to clear the path himself, proceeds cautiously, and is injured anyway.

Id. at 624. Gamble's use of the parking lot was not mandated by her employment. Furthermore, Gamble, the evidence showed, knew that her apartment complex had a maintenance worker living on the premises who could be called on nights and weekends, yet she made no effort to contact him and ask for the snow to be cleared. Finally, having already fallen without injury, Gamble decided to continue walking across the snowy parking lot. Simply put, the factors supporting our decision in Wallingford are not present in this case. Therefore, the trial court correctly rejected Gamble's argument that Wallingford was controlling and determined that Forrest City owed her no duty with regard to the snow-covered parking lot pursuant to the Kentucky Supreme Court's decision in PNC Bank.

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

| BRIEF FOR APPELLANT: | BRIEF FOR APPELLEE: |
| --- | --- |
| Thomas Johnson<br>Louisville, Kentucky | William B. Wells<br>Louisville, Kentucky |