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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
No. 1281CV03443

CHRISTOPHER O'LEARY

vs.

JOSEPH R. MULLINS, INDIVIDUALLY, CHARLENE A. MULLINS, INDIVIDUALLY, JR MULLINS FAMILY LLC, and JRM MASS MILLS III, INC.

MEMORANDUM OF DECISION AND ORDER ON MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS JR MULLINS FAMILY LLC and JRM MASS MILLS III, INC.

This is a premises liability action in which the plaintiff, Christopher O'Leary ("O'Leary" or "the plaintiff"), was seriously and permanently injured when he fell down an open air or elevator shaft on the roof of a vacant building owned by the defendants in Lowell, Massachusetts. O'Leary filed his Amended Complaint (Paper #5) on February 1, 2013, alleging claims for negligence resulting in personal injuries, including pain and suffering, against all defendants.[1] On August 24, 2015, O'Leary moved to file a Second Amended Complaint to add allegations of wilful, wanton, and reckless conduct in place of his claims of negligence, based on the same facts as set forth in his Amended Complaint. That motion was denied on September 3, 2015, by another justice of this court, on the grounds that O'Leary failed to show good cause for the

[1] O'Leary filed a notice of voluntary dismissal as to defendants Joseph R. Mullins, Individually and Charlene A. Mullins, Individually on December 2, 2013 (Paper # 13).

lengthy delay in moving to amend and failed to present evidence to support the proposed amendment, and that the timing was unfairly prejudicial to the defendants. This matter came before the court for hearing on the summary judgment motion of defendants JR Mullins Family LLC and JRM Mass Mills III, Inc. ("the defendants") on May 18, 2016. For the reasons discussed below, the defendants' motion for summary judgment is **ALLOWED**.

Background

The summary judgment record, viewed in the light most favorable to the plaintiff, as the non-moving party, reveals the following undisputed material facts:[2]

The events leading to this complaint occurred on or about September 24, 2009. At that time, the defendants owned property known as the Picker Building, a large, older, commercial-type building of about five stories, located at 100 Mass Mills Drive, in Lowell, Massachusetts. The building had been vacant and boarded up since 1988, and had no electricity and, consequently, no lights. It was marked with "no trespassing" or "private property" signs.[3] The building was also marked with a large red "X," to alert the fire department that it was unsafe to

[2] As the defendants point out, the plaintiff did not comply with Superior Court Rule 9A(b)(5)(iv) when he filed his opposition papers directly with the Court, and added additional statements of fact to a document captioned, "Joint Statement of Material Facts," without affording the defendants an opportunity to respond to those alleged facts. The defendants request that the court disregard the plaintiff's additional statements of fact or, alternatively, consider the defendants' responses thereto, which are attached as "Exhibit B" to the defendants' reply to the plaintiff's opposition. In the exercise of my discretion, I will consider the additional facts asserted by the plaintiff, as well as the defendants' responses thereto.

[3] The record is replete with references to such signs. In his deposition, however, the plaintiff stated that he did not see any "no trespassing" signs on the date of the incident or when he had been to the building previously. I agree with the defendants that these statements can only be interpreted as an indication that the plaintiff was not aware of the signs. In any event, the existence or non-existence of the signs is not dispositive of the issues before the court.

enter. At the time of the events in question, the doors and windows were boarded up with plywood to a level of eighteen feet above the ground to prevent unauthorized entry.

The defendants were aware that there were unsafe conditions in the building and that it was possible that someone could be seriously hurt. They were also aware that people periodically broke into the building by ripping off plywood to gain access, and that the police had often been dispatched to the building prior to September 24, 2009, for issues with trespassers. On one occasion, some homeless people had entered the building and built a fire in order to stay warm, and the building caught fire, requiring the fire department to respond and put the fire out. The defendants would periodically repair the exterior when they discovered that plywood had been ripped off. At the time of this incident, there was an uncovered, open, air or elevator shaft on the building's flat roof.

On September 23, 2009, O'Leary was playing basketball at Dracut High School with his friends Nick Limberopoulos and David Sayer. O'Leary was then eighteen years old, and had received his GED from Dracut High School in June, 2009. Limberopoulos and Sayer were both nineteen years old. After playing basketball, O'Leary suggested that the three friends hang out at the Picker Building. Sayer was scheduled to leave for school the next day and the young men were looking for a place where they would not be bothered.

The three men traveled to the Picker Building and entered it on the ground floor after removing a piece of unsecured plywood that was leaning against an opening at the street level. O'Leary had been to the Picker Building before with another individual, Craig Johnson, and he had gained access to the roof on that occasion. The three men entered the building in the same

location where O'Leary had previously entered. They knew that the building was unoccupied, and knew that they did not have permission to be on the property. The men brought beer with them, which they planned to drink on the roof of the building. They also brought marijuana.

The men made their way through the building and accessed the roof by going out a window and climbing up an exterior fire escape. There was adequate light to allow the men to see the roof area. The men walked around the rooftop. They observed an open air or elevator shaft on the roof. They threw bricks and other objects down the open shaft. At one point, the three of them sat in a circle on the roof near the open shaft and had a conversation. O'Leary then got up from a seated position and fell down the shaft behind his two companions. Neither Limberopoulos nor Sayer saw O'Leary fall, but they heard a noise. Sayer then called 911. O'Leary was found at the bottom of the shaft in the basement of the building, at approximately 2:55 a.m. on September 24. He had fallen approximately seventy feet. He sustained serious injuries.

Discussion

O'Leary's Amended Complaint alleges negligence based on the defendants' failure to secure the Picker Building, failure to keep the building free from dangerous and defective conditions, and failure to warn of the open shaft on the roof, a dangerous and defective condition about which they knew or should have known. The defendants contend that they are entitled to summary judgment because they owed O'Leary no duty to guard against an open and obvious danger, such as the open shaft on the roof of the unoccupied five-story building; and because, where O'Leary was an adult trespasser at the time he was injured, the defendants only owed him a

duty to refrain from wilful, wanton, or reckless conduct, which is not alleged in the complaint, and is not supported by the record evidence. O'Leary asserts that summary judgment should be denied because, while he admits that he was an adult trespasser, he contends that there are genuine questions of fact regarding whether the defendants' acts and/or omissions in causing their premises to remain in an unreasonably dangerous condition, and in failing to warn of such condition, amounted to wilful, wanton or reckless conduct.

I. Standard of Review

The court grants summary judgment when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); Kourouvacilis v. General Motors Corp., 410 Mass. 706, 714 (1991). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue. Pederson v. Time, Inc., 404 Mass. 14, 17 (1989). The moving party may satisfy this burden by submitting affirmative evidence that negates an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of his case at trial. Flesner v. Technical Commc'ns. Corp., 410 Mass. 805, 809 (1991); Kourouvacilis, 410 Mass. at 716. Once the moving party establishes the absence of a triable issue, the party opposing the motion must respond with evidence of specific facts that establish the existence of a genuine dispute. Pederson, 404 Mass. at 17. The opposing party cannot rest on its pleadings and mere assertions of disputed facts to defeat the motion for summary judgment. LaLonde v. Eissner, 405 Mass. 207, 209 (1989).

When deciding a motion for summary judgment, the court considers pleadings, deposition transcripts, answers to interrogatories, admissions on file, and affidavits. Mass. R. Civ. P. 56(c). The court reviews the evidence in the light most favorable to the nonmoving party, but does not weigh evidence, assess credibility, or find facts. Attorney Gen. v. Bailey, 386 Mass. 367, 370 (1982).

II. Duty of Care – Open and Obvious Danger

A landowner owes a duty of reasonable care to all lawful visitors to his property, which includes a duty to maintain the property in a reasonably safe condition under the circumstances, O'Sullivan v. Shaw, 431 Mass. 201, 204 (2000), and "to warn visitors of any unreasonable dangers of which the landowner is aware or reasonably should be aware." Davis v. Westwood Group, 420 Mass. 739, 742-743 (1995). However, "it is well-established in our law of negligence that a landowner's duty to protect lawful visitors against dangerous conditions on his property ordinarily does not extend to dangers that would be obvious to persons of average intelligence." O'Sullivan, *supra*, and cases cited. "Landowners are relieved of the duty to warn of open and obvious dangers on their premises because it is not reasonably foreseeable that a visitor exercising (as the law presumes) reasonable care for his own safety would suffer injury from such blatant hazards." Id. In other words, "where a danger would be obvious to a person of ordinary perception and judgment, a landowner may reasonably assume that a visitor has knowledge of it and, therefore, 'any further warning would be an empty form' that would not reduce the likelihood of resulting harm." Id., quoting LeBlanc v. Atlantic Bldg. & Supply Co., 323 Mass.

702, 705 (1949). Because the existence of a duty of care is a question of law for the court, it is "an appropriate subject of summary judgment." Jupin v. Kask, 447 Mass. 141, 146 (2006).

Whether a particular hazard is open and obvious is determined objectively, O'Sullivan, 431 Mass. at 206, based on whether a person of average intelligence would recognize the risk. Id. at 208. Certainly, a person of average intelligence would recognize that entering a vacant and boarded up building, climbing to the roof via an exterior fire escape, and standing near an open air or elevator shaft, presents an obvious risk of serious injury. See Lyon v. Morphew, 424 Mass. 828, 834 (1997) ("The hazardous nature of ascending a roof is readily apparent to a reasonably intelligent person exercising a minimal care for his own safety."); see also O'Sullivan, 431 Mass. at 207 ("Plain common sense, . . . supports the conclusion that there is no duty to warn of the risk of diving headfirst into the shallow end of a swimming pool); Barnett v. City of Lynn, 433 Mass. 662, 667 (2001) ("Common sense dictates that the danger of sliding down stairs leading to a road well-traveled by motor vehicles would be open and obvious even to an eleven or twelve-year-old child exercising reasonable care for his or her own safety.").

The plaintiff's contention that Dos Santos v. Coleta, 465 Mass. 148 (2013) stands for the proposition that the defendants had a duty to remedy the danger of the open shaft on the building's roof is unpersuasive. In Dos Santos, the Supreme Judicial Court explained that, even where a danger is open and obvious, there are some circumstances where a landowner nevertheless has a duty to remedy or warn visitors of the condition. For example, such a duty exists when the landowner creates a dangerous condition, such as placing a trampoline next to a shallow swimming pool, that "expressly [facilitates] and [invites] dangerous misuse." 465 Mass.

at 161. Likewise, a landowner has a duty to remove snow and ice from his walkway, even though such a hazard is open and obvious because "it is reasonable to expect that a hardy New England visitor would choose to risk crossing the snow or ice rather than turn back or attempt an equally more perilous walk around it." Papadopoulos v. Target Corporation, 457 Mass. 368, 379 (2010). Here, however, it was not reasonably foreseeable that a person of ordinary perception and judgment would take the risk of entering a boarded up and vacant building and climbing onto the roof. Accordingly, because the defendants had no duty to the plaintiff regarding the open and obvious condition of the building, the plaintiff will not be able to prove an essential element of his case, and the defendants are entitled to summary judgment as a matter of law.

II. Duty of Care – Adult Trespasser

There is a second reason why the defendants cannot be held liable to the plaintiff on this claim. In accordance with sound social policy, a landowner's only duty to an adult trespasser, like the plaintiff, is to refrain from wilful, wanton or reckless conduct. Schofield v. Merrill, 386 Mass. 244, 245-246 (1982). As noted previously, the complaint does not allege wilful, wanton or reckless conduct. Even if it did, however, such a theory would not be successful. Wilful, wanton or reckless conduct differs in kind from both ordinary and gross negligence. Isaacson v. Boston, W. & N.Y.S.R. Co., 278 Mass. 378, 387 (1932). An "alleged wrongdoer acts wantonly, wilfully or recklessly only when he inflicts the injury intentionally, or is so utterly indifferent to the rights of others that he acts as if such rights did not exist." Id. "The complete indifference to consequences distinguishes wrongs caused by wantonness and recklessness from torts arising from negligence." Freeman v. United Fruit Co., 223 Mass. 300, 302 (1916). "Seldom, if ever,

can wilful, wanton or reckless misconduct be predicated, where there is no intent to injure, merely upon conditions . . . rendering the premises unsafe to persons whose unlawful presence cannot reasonably be forseen." Mikaelian v. Charles Palaza & another, 300 Mass. 354, 356 (1938). The record is devoid of facts sufficient to support a theory of wilful, wanton or reckless conduct on the part of the defendants.[4] Therefore, the defendants are entitled to summary judgment on this basis, as well.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the defendants' motion for summary judgment is **ALLOWED**.

Dated: May 27, 2016

Kathe M. Tuttman
Justice of the Superior Court

[4] The plaintiff's reliance on the case of Commonwealth v. Welansky, 316 Mass. 383 (1944) in support of his contention that there are genuine questions of material fact regarding whether the defendants' conduct was wilful, wanton or reckless, is misplaced. In Welansky, a manslaughter case where a deadly nightclub fire resulted from the defendant's wilful, wanton or reckless conduct, the Supreme Judicial Court explained that "[u]sually wanton or reckless conduct consists of an affirmative act, like driving an automobile or discharging a firearm, in disregard of probable harmful consequences to another. But where, as in the present case, *there is a duty of care for the safety of business visitors* invited to premises which the defendant controls, wanton or reckless conduct may consist of intentional failure to take such care in disregard of the probable consequences to them or of their right to care." Id. at 397 (emphasis added). The Welansky theory of wilful, wanton or reckless conduct is inapposite in a case, like this one, where the injured plaintiff was a trespasser, as opposed to a lawful visitor.