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ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEES:

ADAM J. SEDIA

Rubino, Ruman, Crosmer, Smith, Sersic & Polen
Dyer, Indiana

ROBERT P. STONER

ANDREW LUCAS
Valparaiso, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

JEFFREY BROOKS,)

Appellant-Plaintiff,)

vs.)

No. 45A03-1101-CT-25

HENRY and IVA MCNEAL,)

Appellees-Defendants.)

APPEAL FROM THE LAKE CIRCUIT COURT
The Honorable Lorenzo Arredondo, Judge
The Honorable Richard McDevitt, Magistrate
Cause No. 45C01-0905-CT-104

August 29, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Jeffrey Brooks sued Henry and Iva McNeal on the theory of premises liability for personal injuries he allegedly sustained when he fell off a ladder and landed on a glass aquarium sitting on the ground on property owned by the McNeals. Brooks appeals a grant of summary judgment in favor of the McNeals in that action, presenting the following restated issue for review: Did the trial court err in concluding that the McNeals, as landlords of the property, did not owe a duty of care to Brooks, a guest on the property at the invitation of the McNeals' tenant?

We affirm.

The facts favorable to Brooks, the nonmoving party, are that since 1985, the McNeals had owned the real property in question, located at 2750 King Street in Gary, Indiana (the leased property). They began renting out that property in 1993. At the time of the incident that allegedly resulted in Brooks's injuries, Joe Cudzoil¹ had lived in the leased property for four or five years; the McNeals resided across the street. Cudzoil eventually purchased it in 2009 after this incident had occurred. Although the parties never executed a written lease during the period of Cudzoil's tenancy, both parties discussed their respective responsibilities at the outset and agreed that Cudzoil was responsible for yard maintenance for the leased property, while the McNeals would be responsible for major repairs, such as furnace problems.

¹ The tenant's name is spelled in different places throughout the appellate materials as either "Cudzoil" or "Cudziol". It appears to us that the sources utilizing the former spelling are more likely to be authoritative on that point. Therefore, we will use that spelling throughout this opinion.

Brooks, a friend of Cudzoil's, lived two houses away. On May 29, 2007, Brooks was a guest of Cudzoil's at a cookout at the leased property. The McNeals did not attend the cookout, indeed they were not even invited, and they did not know Brooks was there. During the cookout, Brooks, using a chainsaw and a step-ladder, began cutting a branch off a mulberry tree in the backyard. Near the ladder was an empty glass aquarium that had been sitting in the yard for two or three years. The aquarium, sitting on a stand, was actually taller than the small ladder upon which Brooks was standing. At some point, the ladder began to sink into the soft ground upon which it was placed and Brooks lost his balance and fell. He landed on the aquarium and sustained a severe laceration and other injuries.

On May 20, 2009, Brooks filed a complaint for damages against the McNeals and Cudzoil, alleging premises liability. On December 11, 2009, the parties stipulated that the action against Cudzoil would be dismissed without prejudice. On April 28, 2010, the McNeals filed a motion for summary judgment. On December 16, 2010, following a hearing, the trial court granted the motion and entered judgment in favor of the McNeals. Brooks appeals from that ruling.

We review a summary judgment order *de novo*. *Neu v. Gibson*, 928 N.E.2d 556 (Ind. 2010). Considering only the facts supported by evidence designated to the trial court by the parties, we must determine whether there is a "genuine issue as to any material fact" and whether "the moving party is entitled to a judgment as a matter of law." Ind. Trial Rule 56(C); *see also Kovach v. Caligor Midwest*, 913 N.E.2d 193 (Ind. 2009). We will accept as true those facts alleged by the nonmoving party. *Sees v. Bank One, Indiana, N.A.*, 839

N.E.2d 154 (Ind. 2005). Moreover, we construe all factual inferences in favor of the nonmoving party and resolve all doubts as to the existence of a material issue against the moving party. *Kovach v. Caligor Midwest*, 913 N.E.2d 193. The appellant bears the burden of demonstrating that the grant of summary judgment was erroneous. *W.S.K. v. M.H.S.B.*, 922 N.E.2d 671 (Ind. Ct. App. 2010).

As indicated above, the McNeals requested summary judgment on grounds that they had no liability for Brooks's injuries because they had surrendered full possession and control of the leased property to Cudzoil at the time Brooks was injured. Conspicuously absent from their motion, the brief supporting their motion, and the order granting summary judgment in their favor is any mention of the word "duty." Yet, there can be no doubt that the ruling in their favor was premised upon the trial court's determination that the McNeals owed no duty to Brooks at the time of his injury. Upon appeal, the parties squarely address the question of duty – and correctly so. Therefore, the central question in this appeal is whether there exists a question of fact as to whether the McNeals owed a duty to Brooks at the time of his injury.

Generally, the question whether a duty is owed with respect to the maintenance and condition of real property depends primarily upon whether the defendant was in control of the premises when the accident occurred. *Olds v. Noel*, 857 N.E.2d 1041 (Ind. Ct. App. 2006). We have summarized the rule specifically applicable in the landlord-tenant setting as follows: "As a general rule, in the absence of statute, covenant, fraud or concealment, a landlord who gives a tenant full control and possession of the leased property will not be

liable for personal injuries sustained by the tenant or other persons lawfully upon the leased property.” *Id.* at 1044 (quoting *Pitcock v. Worldwide Recycling, Inc.*, 582 N.E.2d 412, 414 (Ind. Ct. App. 1991)). There are exceptions to the general rule, but Brooks does not challenge the ruling on these bases, so we need not delve into those exceptions.

Brooks contends the general rule of non-liability does not apply in this situation because the Cudzoils did not have the requisite exclusive control of the premises. He claims that the nature and extent of the McNeals control of the property remains a question of fact owing in large part to the fact that the parties did not execute a written lease agreement. Thus, he continues, the terms of the oral lease agreement must be established by examining the parties’ conduct. He contends “[t]he course of the performance of the oral lease creates a genuine issue of material fact as to whether or not the McNeals retained the duty to maintain” the leased property. *Appellant’s Brief* at 6. According to Brooks, that course of conduct includes the following:

First, over the course of [Cudzoil’s] tenancy, the McNeals - particularly Iva - made several visits to the 2750 King Street both to inspect the property and to perform repairs on it. Iva McNeal specifically stated that she would visit to “make sure the yard was clean.” The McNeals also lived within sight of 2750 King Street, had access to its backyard, and had also spent time there on several social visits. [Cudzoil] also testified that he knew Iva McNeal’s practice was to visit 2750 King Street to inspect and repair the property, and [Cudzoil] did not testify that he found that practice objectionable or that he objected to Iva McNeal’s presence at his residence when she visited.

Id. at 8-9.

Reduced to their essence, this list includes two types of activities on the part of the McNeals in conjunction with the leased premises: (1) Inspection and repair visits, and (2)

social visits. Beginning with the latter, Brooks points to no case holding that a landlord's social visits to the tenant's home, which also happens to be the leased property, evinces a retention of control of the tenant's leasehold such as to defeat the general rule of non-liability. We cannot conceive of a public policy rationale for creating such a rule, and thus summarily decline to do so. Neither is it significant that the McNeals "lived within sight" of the leased property. *Id.* at 8.

Turning now to the former, i.e., visiting the property for purposes of inspection and repair, we note that we considered a substantially similar argument in *Olds v. Noel*, 857 N.E.2d 1041. In that case, a mail carrier slipped and fell on the sidewalk of a leased, single-family house and sued the landlord. There, as here, the plaintiff claimed the landlord was liable notwithstanding the general rule of non-liability, primarily because the landlord had not surrendered complete control and possession of the leased premises to the tenants, who were not parties to the lawsuit. In support of that claim, the plaintiff noted the landlord reserved in the lease the right of entry to make repairs for the safety, preservation, or improvement of the premises. We rejected that argument, explaining:

First, *Olds* points to no legal precedent to support his contention that a mere right to entry works to defeat the transfer of control and possession of a leased premises to the lessees of that premises. Indeed, such a provision is common in most every lease of any single—or multi-unit residential premises. To agree with *Olds* here, then, would be to rule that all of those leases leave a landlord subject to liability for any injury to any third-party invitee anywhere on the premises of a leased property. The exception would swallow the general rule.

Id. at 1046. The surrender of possession and control that triggers the general rule of non-liability need not be so complete as to utterly bar the landlord's right of entry onto the

property. As we indicated in *Olds*, the definition of surrender we apply in cases such as this must accommodate the landlord's right of entry to inspect, maintain, and repair the leased property. *See Olds v. Noel*, 857 N.E.2d 1041.

The arrangement in the oral lease between the McNeals and the Cudzoils gave the McNeals no greater right of entry upon the leased premises than did the one that, in *Olds*, we concluded did not vitiate the general rule of non-liability. The same result attains here. The right to enter the property reserved by the McNeals in the lease did not subject them to general liability upon the basis of failing to surrender possession and control to the Cudzoils.

As a final matter, we return to the factor in the instant case that Brooks contends renders summary judgment inappropriate – the fact that this was an oral lease. Brooks cites *Zubrenic v. Dunes Valley Mobile Home Park, Inc.*, 797 N.E.2d 802, 805 (Ind. Ct. App. 2003), *trans. denied*, for the proposition, “Without a written lease, both the existence and the degree of any right of entry can only be determined by the parties’ conduct, which are questions of fact.” *Reply Brief* at 2. We have reviewed the case and page to which Brooks refers and can find no support for the attribution. In fact, we can find no authority supporting the argument that the relevant terms of an oral lease cannot be established in the manner that any other facts are established for purposes of summary judgment. *See* Ind. Trial Rule 56(C) (“a party shall designate to the court all parts of the pleadings, depositions, answers to interrogatories, admissions, matters of judicial notice, and any other matters on which it relies for purposes of the motion”).

The McNeals designated portions of Joe Cudzoil's deposition in which he

acknowledged that before he moved into the house he discussed with the McNeals the terms of his occupancy, i.e., the terms of the oral lease. He acknowledged that they agreed he would take care of the yard and house, while the McNeals would take care of anything that went “wrong” with the house, such as if there was “[s]omething wrong with the furnace or, you know, stuff like that.” *Appellant’s Appendix* at 29. Iva McNeal’s designated deposition testimony confirmed Cudzoil’s assertion. She explained that although she inspected the property after Cudzoil had been there for about a month, and again every two or three months for the first year of occupancy, the McNeals did not thereafter enter onto the property except to pay social visits. Thus, the terms of the oral lease with respect to the allocation of responsibility for yard maintenance were established by the designated evidence, as was the broader fact that the McNeals had given full control and possession of the leased property to Cudzoil.

The remaining issue presented by Brooks is whether “[g]enuine issues of material fact exist regarding the McNeals’ actual or constructive knowledge of a dangerous condition on their property.” *Appellant’s Brief* at 9. In view of our conclusion that the designated evidence establishes that the McNeals did not owe a duty to Brooks for injuries suffered at the leased property because they gave full control and possession of the leased property to Cudzoil, this issue is moot.

In summary, the trial court did not err in determining that there was no genuine issue of material fact with respect to the question of whether the McNeal gave full possession and control of the leased property to Cudzoil – they did. Consequently, they owed no duty to

Brooks with respect to the incident in which he sustained personal injuries after falling on the aquarium. *See Olds v. Noel*, 857 N.E.2d 1041.

Judgment affirmed.

DARDEN, J., and VAIDIK, J., concur.