

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

GORDON FULKROD,	:	NO. 11 – 00,526
Plaintiff	:	
	:	CIVIL ACTION - LAW
vs.	:	
	:	
DOLLAR GENERAL and BUCHERT REALTY,	:	
Defendant	:	Motion for Summary Judgment

OPINION AND ORDER

Before the court is Defendant Buchert Realty’s motion for summary judgment, filed February 27, 2012. Argument on the motion was heard April 17, 2012.

In his Complaint, Plaintiff contends he fell in a pothole “in the parking lot of the Defendant’s store...” Defendant Buchert Realty contends the pothole is actually in the paved road surface of Allegheny Street,¹ and seeks summary judgment on the basis that Plaintiff has offered no proof that the pothole is located on property under its control. Plaintiff has responded with two contentions.

First, Plaintiff contends that photographs of the pothole show that the hole is in the “sidewalk area” and therefore, must be part of Defendant’s property. While the photographs do show that the pothole is in an area adjacent to the driveway which crosses the sidewalk and is contained in the area which could be defined by a line drawn from the curb/driveway corner at one side of the driveway to the curb/driveway corner at the other side of the driveway, the court believes such to be insufficient to prove ownership or control as Plaintiff offers no survey or other evidence of the boundaries of Defendant’s property or the street right-of-way or easement. Plaintiff argues the jury should be allowed to decide based on the photographs, but since Defendant denies that the pothole is on its property, and Plaintiff has nothing to show that it is, the jury would be left to merely speculate on the matter.

Second, Plaintiff contends Defendant “demonstrated its legal responsibility for maintaining the area in question by making subsequent remedial measures to the area in question”, pointing to answers to interrogatories which he contends “acknowledge repair”.

Defendant Buchert's answer to the questions, "Was the defect alleged in Plaintiff's Complaint repaired. (sic) If so, when and by whom?", does not, however, show that it made "subsequent remedial measures". Defendant Buchert stated:

Because Defendant does not know the location at which Plaintiff claims to have fallen, Defendant is unable to identify the specific defect of which Plaintiff complains. Defendant does believe that all holes in the walking surface on the real estate of Plaintiff (sic), and all holes adjacent to the same, were subsequently filled or repaired on May 11, 2010, by T&S Sealing, 3794 Pine Mountain Road, Jersey Shore, Pennsylvania, 17740.

At argument, Defendant explained that it contracted with T&S Sealing to repair a hole other than the one in question and that at the same time as it repaired that hole, T&S Sealing also repaired the hole in question without being requested to do so. According to Defendant, T&S Sealing explained in a letter to both counsel that it repaired the hole in question on its own initiative. Thus, while the repair may have been made, it was not made by or on behalf of Defendant Buchert and therefore cannot be used as proof that Defendant Buchert "demonstrated its legal responsibility for maintaining the area in question".

Plaintiff also claims, in a section of his Response entitled "Statement of Additional Undisputed Facts", that the lease demonstrates ownership of the entrance area where the fall occurred because Defendant Buchert assumed responsibility to maintain "the exterior of the premises, including but not limited to, ... all paved areas, ...", and because Defendant Buchert was granted "unrestricted use and accesses to all entrances, pathways and delivery lanes" to the premises. Neither of these lease provisions proves ownership or control, however. Allegheny Street itself is paved and surely Plaintiff does not contend that Defendant had the responsibility to maintain the street. And, the provision granting use of the entrance, if anything, implies lack of control for such a provision would be unnecessary if the entrance was already considered part of the premises being leased.

Finally, Plaintiff contends that since the description of the property describes the parcel as being "along the northern line of Allegheny Street", and since the photograph shows the pothole to lie in the area which could be defined by a straight line from driveway corner to driveway corner, the pothole must be on Defendant's property. There still is nothing to show

¹ Allegheny Street runs along the front of the parking lot of the store.

where that northern line of Allegheny Street is, however, as noted above. Thus the lease adds nothing to Plaintiff's proof and since it is not sufficient to take the issue to a jury, summary judgment is appropriate.

ORDER

AND NOW, this 19th day of April 2012, for the foregoing reasons, Defendant Buchert Realty's motion for summary judgment is hereby GRANTED.

BY THE COURT,

Dudley N. Anderson, Judge

cc: Michael Zicolello, Esq.
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Joseph Musto, Esq.
Gary Weber, Esq.
Hon. Dudley Anderson