

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

ANN M. BRYAN,		: CV-22-00321
	Plaintiff	: .
vs.		: .
MKB REAL ESTATE LLC,		: .
	Defendant	: .
vs.		: .
L & K CONCRETE LLC,		: .
	Additional Defendant	: Preliminary Objections

OPINION AND ORDER

AND NOW, this 7th day of November 2022, the Court hereby issues the following OPINION and ORDER on Defendant's Preliminary Objection to Plaintiff's Amended Complaint.

BACKGROUND

Plaintiff commenced this action on March 29, 2022 by filing a Complaint raising a single count of negligence against Defendant. Plaintiff alleges that on or about February 9, 2021, she was on Defendant's premises when she slipped and fell on ice, resulting in a hip fracture and other related injuries. Defendant filed Preliminary Objections on April 27, 2022, demurring to the portions of Plaintiff's Complaint alleging negligent design and construction of the premises.

On May 31, 2022, Plaintiff filed an Amended Complaint. The only difference between the two Complaints is in Paragraph 14(g), which was changed from an allegation that Defendant was negligent "[i]n negligently *designing, constructing, maintaining and operating* the premises such that Plaintiff was caused to fall" to an allegation that Defendant was negligent "[i]n negligently *maintaining and operating* the premises such that Plaintiff was caused to fall." Although Plaintiff deleted the

allegation in Paragraph 14(g) that Defendant negligently designed or constructed the premises in a manner that caused her to fall, she maintained the allegation in Paragraph 14(c) that Defendant was negligent, *inter alia*, “[i]n *designing, constructing,* and maintaining the premises in such a manner that invitees were at risk of injury....”

PRELIMINARY OBJECTIONS

On June 6, 2022, Defendant filed a single Preliminary Objection to Plaintiff's Amended Complaint, again demurring to Plaintiff's allegations of negligent construction and negligent design.¹ Defendant argued that, although Plaintiff alleges Defendant “leased, owned, operated, possessed, controlled and/or maintained the premises,” she does not allege that Defendant either constructed or designed the premises or had any duty to do so. In the absence of such an alleged duty, Defendant argues, Plaintiff's Amended Complaint contains insufficient averments of fact to support a theory of negligent construction or design. Defendant acknowledges that the allegations in the Complaint are sufficient to state a claim for negligently permitting the accumulation of snow or ice, but argues such claims “ha[ve] absolutely nothing to do with the design or construction of the subject property.”

In response to Defendant's Preliminary Objection, Plaintiff contends that the Complaint, when read in its entirety, contains sufficient facts to support all of Plaintiff's claims and allow Defendant to investigate and respond to those claims. Specifically, Plaintiff notes that she alleges Defendant is “the lessor, owner,

¹ Pa. R.C.P. 1028(a)(4) permits a party to bring a preliminary objection for “legal insufficiency of a pleading (demurrer).”

operator, possessor, controller, and/or maintainer of the subject premises that knew or should have known of the defective condition.” Plaintiff further alleges Defendant “had a duty, or an implied duty, to inspect, maintain, repair, control, supervise and/or oversee the at-issue premises and to warn of and correct any hazardous conditions thereof.” Plaintiff contends that these two allegations, taken together, are sufficient to establish a connection between “the negligence of the Defendant... in designing, constructing, and maintaining the premises in such a manner that invitees were at risk for injury” and the actual injury she suffered. Ultimately, Plaintiff argues that this allegation should survive to allow discovery, which may provide information to undermine or undergird the claim that Defendant negligently designed and constructed the premises.

ANALYSIS

As the parties note, when considering a preliminary objection in the nature of a demurrer, the Court must “accept all material facts set forth in the complaint as well as all inferences reasonably deducible therefrom... and decide whether, based on the facts averred, recovery is impossible as a matter of law.”² In doing so, the Court must determine “whether it is clear and free from doubt from all of the facts pleaded that the pleader will be unable to prove facts legally sufficient to establish his right to relief,” and should sustain preliminary objections that would result in the dismissal of a cause of action “only in cases that are clear and free from doubt.”³

Plaintiff’s Amended Complaint clearly alleges that Defendant had total control over the premises at the time of Plaintiff’s injury, and that during that time Defendant

² *Wagner v. Waitlevertch*, 774 A.2d 1247, 1250 (Pa. Super. 2001).

³ *Bower v. Bower*, 611 A.2d 181, 182 (Pa. 1992).

“had a duty... to inspect, maintain, repair, control, supervise and/or oversee the... premises and to warn of and correct any hazardous conditions thereon.” However, Plaintiff does not plead any facts concerning who designed or constructed the premises or whether Defendant was involved in that process. It is impossible to infer from the Complaint whether Defendant designed and constructed the premises itself, hired someone to design or construct the premises, or purchased the premises many years after its construction.

Additionally, the fact that a property owner is aware of a potentially hazardous condition and is responsible for warning of it is insufficient to establish negligent construction.⁴ This comports with the commonsense notion that the construction and maintenance of a premises are two separate endeavors. A typically nonhazardous, mundane architectural feature such as a step or a corner may become hazardous if obscured by the property owner; conversely, a property owner may render a dangerous feature such as a gap or low ceiling incapable of causing harm by appropriately warning of its existence. The Amended Complaint does not contain any facts to support a contention that the allegedly hazardous condition that caused Plaintiff’s injuries was attributable to negligent design or construction as opposed to a mundane feature that Defendant did not properly maintain.

Ultimately, Plaintiff has not alleged sufficient facts to allow her to prove Defendant had a duty related to the design or construction of the premises, as opposed to a duty to warn of pre-existing conditions on the property or maintain the

⁴ See *Watkins v. Sharon Aerie No. 327 Fraternal Order of Eagles*, 223 A.2d 742, 744 (Pa. 1966) (“The mere existence of a walkway which is at a different level from the floor of the building... is not... without more proof, a negligent construction. However, the difference in levels may become a negligent condition if it is inadequately lighted”).

property free from hazardous conditions. A breach of a duty to “inspect, maintain, repair, control, supervise and/or oversee” a property does not establish a duty related to the design or construction of the premises, especially when there is no basis upon which to conclude Defendant was involved in said design or construction. For this reason, the Court agrees with Defendant that Plaintiff has not pled sufficient facts to support a claim for negligent design or construction against Defendant.⁵


ORDER

For the foregoing reasons, the Court SUSTAINS Defendant’s Preliminary Objection to Plaintiff’s Amended Complaint. Plaintiff’s claims for negligent design and construction of the premises in Paragraph 14(c) are STRICKEN.

Defendant shall file an Answer to Plaintiff’s Amended Complaint within twenty (20) days of this Opinion and Order.

IT IS SO ORDERED.

BY THE COURT,


Eric R. Linhardt, Judge

ERL/jcr

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⁵ Should Plaintiff obtain evidence showing that Defendant was involved in the design or construction of the premises and that the design or construction had some causal connection to Plaintiff’s injuries, Plaintiff may seek to amend the pleadings.