IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

JEANETTE FULKROD, Plaintiff	:	NO. 15 – 00,912
vs.	:	CIVIL ACTION - LAW
JAMES M. FULKROD, DAWN M. FULKROD and LYNN W. EMBICK, Executor of the Estate of Lynn L. Embick, Defendants	:	Motions for Summary Judgment

OPINION AND ORDER

Before the court are the motions for summary judgment filed by the Fulkrod Defendants on November 20, 2015, and by Defendant Embick on December 24, 2015. Argument on the motions was heard January 14, 2016.

At the time of the incident giving rise to this suit, Plaintiff resided in a home on Culvert Street in Jersey Shore owned by Defendants James and Dawn Fulkrod, who were purchasing the premises from Lynn Embick through an Article of Agreement.[1] Plaintiff placed a stepladder below a window, against the house, and because of a shingle-covered board under the ladder, which covered a hole, the ladder was unstable and when Plaintiff stepped up on to it, she fell and injured her ankle. Plaintiff contends she was not aware that the shingle-covered board was there because it was overgrown with grass. She claims that Defendants were negligent for failing to warn her of what she terms a "concealed and dangerous condition".

In their motion for summary judgment, the Fulkrod Defendants argue that as landlords out-of-possession, they owed no duty to warn Plaintiff of the condition because they did not themselves have actual knowledge of it, and also

[1] The Fulkrods' agreement with Embick allowed them to sub-lease the property and they did sub-lease the property to Plaintiff.

that Plaintiff assumed the risk of falling by stepping up onto a ladder which she knew to be unstable. Plaintiff contends that Defendants need have had only constructive knowledge and that they did have such knowledge based on the condition's classification as a nuisance per se. She also denies having assumed the risk. In Defendant Embick's motion, he argues that he also had no duty, as a vendor of the property, to warn Plaintiff of the condition because he did not know or have reason to know of it. Each of these arguments will be addressed in turn.

The parties agree that the Fulkrod Defendants are landlords out-of-possession. Therefore, they can be liable to Plaintiff for a dangerous condition of the property only where they have actual knowledge of the condition. Felton v. Spratley, 640 A.2d 1358 Pa. Super. 1994). There is no dispute that the Fulkrod Defendants did not have actual knowledge of the condition; indeed, Plaintiff so stated in her deposition.

Further, Plaintiff's argument that the condition constituted a nuisance per se and thus actual knowledge was not necessary is misplaced. The "nuisance per se" concept applies only where those injured by the condition are strangers to the property. Harris v. Lewistown Trust Company, 191 A. 34 (Pa. 1937), *overruled in part on other grounds*, Reitmeyer v. Sprecher, 431 Pa. 284, 243 A.2d 395 (1968). *See also* Philadelphia Electric Company v. Hercules, Inc., 762 F.2d 303 (3d Cir. 1985). Therefore, as the Fulkrod Defendants owed no duty to Plaintiff, they are entitled to judgment as a matter of law.

Defendant Embick contends his duty is defined by the law applicable to a vendor rather than a landlord inasmuch as the property was sold to the Fulkrod Defendants under an Article of Agreement. The court agrees. *See* Welz v. Wong, 605 A.2d 368 (Pa. Super. 1992), which also makes clear that Pennsylvania

has adopted Restatement of Torts (Second) § 353 (Undisclosed Dangerous Conditions Known to Vendor). Under Section 353,

> (1) A vendor of land who conceals or fails to disclose to his vendee any condition, whether natural or artificial, which involves unreasonable risk to persons on the land, is subject to liability to the vendee and others upon the land with the consent of the vendee or his subvendee for physical harm caused by the condition after the vendee has taken possession, if
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> (a) the vendee does not know or have reason to know of the condition or the risk involved, and
>
> (b) the vendor knows or has reason to know of the condition, and realizes or should realize the risk involved, and has reason to believe that the vendee will not discover the condition or realize the risk.

Restatement of Torts (Second) § 353. Discovery indicates that Defendant Embick did not know of the condition; he testified that he remembered a grate over the basement window well, but did not testify to having known of the cover over the grate.[2] And, comments to Section 353 make it clear that a vendor is under no duty to inspect the property, that he would have reason to know of a condition *only if* "he has information from which a person of reasonable intelligence, or his own superior intelligence, would infer that the condition exists, or would govern his conduct on the assumption that it does exist". Id., Comment on Subsection (1). "Reason to know" cannot be imputed to Defendant Embick as he testified that he last lived at the premises in 1985, and had only visited thereafter, and there is no evidence that he had any information from

[2] It was the cover which made the ladder unstable, and its concealed (by overgrown grass) condition which made it unsafe, not the grate.

which he should have inferred that the condition existed. Thus, as he also had no duty to Plaintiff, he is also entitled to judgment as a matter of law.[3]

ORDER

AND NOW, this day of January 2016, for the foregoing reasons, both motions for summary judgment are hereby GRANTED. Judgment is hereby entered against Plaintiff and in favor of all Defendants.

BY THE COURT,

Dudley N. Anderson, Judge

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Hon. Dudley Anderson

[3] In light of the court's disposition, the "assumption of the risk" argument need not be addressed.