31-2-5893

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-3406-99T3

BARBARA WRIGHT,

Plaintiff-Appellant,

v.

SILVIO R. RAPPISI,

Defendant-Respondent.

Submitted January 8, 2001 - Decided FEB 1 2001

Before Judges Petrella and Wells.

On appeal from Superior Court of New Jersey, Law Division, Union County, UNN-L-5777-98.

John J. Pisano, attorney for appellant.

Craig M. Terkowitz, attorney for respondent.

PER CURIAM

Plaintiff, Barbara Wright, appeals from entry of summary judgment in favor of defendant, Silvio Rappisi, and the dismissal of her complaint. Wright allegedly tripped and fell on a public sidewalk abutting the property of Rappisi, a licensed chiropractor, who has maintained a small chiropractor office in his home since purchasing the property.

The trial judge granted Rappisi's summary judgment motion on the ground that the property in question was predominantly

residential for purposes of sidewalk liability, thereby precluding Rappisi from being found liable.

Wright argues on appeal that summary judgment was improper based on his assertion that whether the property was residential or commercial in nature is a question of fact.

The facts may be briefly stated. On September 10, 1998, Wright allegedly tripped and fell on the Ely Street side of the public sidewalk abutting Rappisi's property at the corner of Pearl Street and Ely Street in Elizabeth. The chiropractic office entrance is on Pearl Street and the residential entrance is on the Ely Street side.

Rappisi has owned the property since 1963 and has maintained a small chiropractic office in his home since purchasing the property. His office occupies 11% of the total habitable space of the property and the remaining 89% is used as his residence. For the past several years, including 1998, the year of this incident, Rappisi has been in semi-retirement and only practices on a part-time basis.[1] In 1998, he received a discount on his insurance premium from his professional liability insurance carrier due to his part time status.

Wright argued that Rappisi's property was commercial in nature and that he should thus be amenable to suit for her injuries. Rappisi argued that the property was predominantly

---

[1] Rappisi performed a total of 389 treatment sessions in 1998, an average of 7.5 sessions per week during the year.

residential in nature and on that basis he was not liable for Wright's injuries. The motion judge, primarily relying on our decision in Wasserman v. W.R. Grace & Company, 281 N.J. Super. 34 (App. Div. 1995), concluded that the property in question was predominantly residential for purposes of sidewalk liability and, therefore, granted summary judgment in favor of Rappisi.

Summary judgment must be granted if

> the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. [R. 4:46-2(c)].

To determine whether there is a genuine issue of fact the judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995). On appeal, the standard is the same. We first decide whether there was a genuine issue of material fact. If there was not, we decide whether the trial court's ruling on the law was correct. Prudential Property Ins. v. Boylan, 307 N.J. Super. 162, 167 (App. Div. 1998).

The determination of whether the property is residential or commercial for liability purposes is not a factual question that precludes summary judgment. See Wasserman v. W.R. Grace & Co.,

supra, (281 N.J. Super. at 36) (finding that there was no material question of fact although there was a question as to whether the property was commercial or residential in nature). There are no material questions of fact in this case and, thus, the question presented is whether summary judgment was appropriate as a matter of law. Ibid.; R. 4:46-2.

It is well-established that a residential property owner is immune from sidewalk liability. Liptak v. Frank, 206 N.J. Super. 336, 338-339 (App. Div. 1985), certif. denied, 103 N.J. 471 (1986). Such a property owner is only liable for the "negligent construction or repair of the sidewalk by himself or by a specified predecessor in title or for direct use or obstruction of the sidewalk ... in such a manner as to render it unsafe for passersby." Yanhko v. Fane, 70 N.J. 528, 532 (1976). However, "commercial landowners are responsible for maintaining in reasonably good condition the sidewalks abutting their property and are liable to pedestrians injured as a result of their negligent failure to do so." Stewart v. 104 Wallace St., Inc., 87 N.J. 146, 157 (1981). Thus, it is necessary to determine whether the status of the property is residential or commercial. In cases of hybrid use, such as the case at bar, "when the owner's occupancy, in terms of time or space, is greater than or equal to the rental occupancy, the property shall be considered residential regardless of whether the rental space generates a profit." Wasserman v. W.R. Grace & Co., supra, (281 N.J. Super.

at 39). Therefore, "the determination of status should focus on use rather than profit." Ibid.

In Wasserman, a pedestrian filed a personal injury action against defendant homeowner and his employer for a slip and fall on a sidewalk abutting the defendant's property. The property was used for both commercial and residential purposes. Defendant used one bedroom of the home as a business office. No customers came to defendant's home and all products that were sold were shipped from another location. Defendant's circulated business cards stated the defendant's company's address as the address of his residence and contained a telephone number, fax number and a 24-hour voice mail number. Defendant's company neither owned nor had a possessory interest in the premises and did not reimburse defendant for the use of the office space, although it did reimburse him for business expenses. The court concluded that the predominant use of the premises was residential and that summary judgment in favor of defendant's employer was appropriate. Id. at 38-39.

In this case, Rappisi's office occupies 11% of the total habitable space of the property and the remaining 89% is used as a residence. Moreover, Rappisi only practices on a part-time basis. Although Rappisi generates a profit from his chiropractic practice, under Wasserman, that is not determinative of status. Rappisi's occupancy of the property, in terms of time and space,

is far greater than the rental occupancy and the property was correctly determined to be residential.

Plaintiff argues that Wasserman is distinguishable because, unlike the defendant in that case, Rappisi saw patients at his home. However, Wasserman did not rely upon the fact that no customer actually visited the defendant's office. We noted that even if customers were invited to the defendant's residence for a business purpose, it would still not convert the property from residential to commercial, but, rather, "[i]t [would] merely change[] the status of those individuals visiting the property from social guests to business invitees." Id. at 38.

We conclude that the motion judge did not err in holding that the property was used predominantly for residential purposes as a matter of law. Moreover, Rappisi is not liable as a residential property owner because Wright presented no evidence that the alleged unevenness of the sidewalk was caused either by Rappisi or a specific predecessor in title. Therefore, Rappisi was entitled to summary judgment as a matter of law.

We affirm substantially for the reasons expressed by Judge Toy in his February 7, 2000 oral decision.

I hereby certify that the foregoing is a true copy of the original on file in my office.

Clerk