IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

RONALD A. GABLE,
Plaintiff,

v.

Civil Action No. 19-C-167
Judge David J. Sims

DEBORAH GABLE and
JOHN DOE(S)
Defendants.

ORDER

This matter comes before the Court on Defendant Deborah Gable's Motion to Dismiss pursuant to W.V.R.Civ.P. 12(b)(6). Plaintiff filed a Response in Opposition to the Motion.[1] The Court has reviewed the court file and pertinent legal authority and makes the following decision.

I. STANDARD OF REVIEW

The proper scope and standard of review in assessing a Motion to Dismiss are as follows:

> [T]he purpose of a motion under Rule 12(b)(6) is to test the formal sufficiency of the complaint. The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Dismissal for failure to state a claim is proper where it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.

Mey v. Pep Boys- Manny, Joe & Jack, 228 W.Va. 48, 717 S.E.2d 235 (2011) (internal citations and quotations omitted).

Thus, where Plaintiff sets forth allegations that, if proven to and believed by the finder of fact, would entitle him to relief under the law, the Motion to Dismiss should be denied and the case should proceed. Since the preference is to decide cases on their merits, courts presented with a motion to dismiss for failure to state a claim under Rule 12(b)(6) must construe the complaint in

[1] Plaintiff failed to comply with the Court's October 10, 2019 Order directing him to provide a courtesy copy of his Response to the Court in "Word" format via email.

the light most favorable to the plaintiff, taking all allegations as true. *Roth v. DeFelice Care, Inc.*, 226 W.Va. 214, 700 S.E.2d 183 (2010). The Court in *Roth* further stated that a trial court considering a motion to dismiss for failure to state claim must liberally construe the complaint so as to do substantial justice and that in appraising the sufficiency of a complaint on a motion to dismiss for failure to state claim, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Thus, a Plaintiff resisting a Motion under Rule 12(b)(6) has a light burden. Indeed, "if the complaint states a claim upon which relief can be granted under any legal theory, a motion under Rule 12(b)(6) must be denied." *John W. Lodge Dist. Co. v. Texaco, Inc.*, 161 W.Va. 603, 245 S.E.2d 157, 159 (1978).

II. FACTUAL BACKGROUND

This cause of action is a premises liability claim. Plaintiff is the biological father of Defendant Gable. In his Complaint, Plaintiff alleges that on or about September 18, 2017, he was "visiting" Defendant Gable's property and that Defendant Gable caused him to "fall to the ground violently and with great force." Plaintiff fails to allege in the Complaint's factual statement what caused him to fall. Plaintiff alleges that his fall caused him to suffer injuries. Plaintiff alleges in Count I of the Complaint that Defendant Gable failed to remove "golf balls and other objects and debris" from the front porch and steps.[2] It is unclear from the Complaint what caused Plaintiff to allegedly fall. Defendant Gable was apparently not home at the time of the alleged fall and was unaware that Plaintiff was "visiting" her property. Defendant Gable asserts that she did not invite

[2] It is apparent from the Complaint that Plaintiff alleges that he fell on the steps, not on the front porch, but does not state whether he fell going up the steps or down the steps.

Plaintiff to her property that day and did not provide permission for him to be on her property.[3] Nowhere in the Complaint does Plaintiff allege that he was invited onto Defendant Gable's property.

III. ANALYSIS

Traditionally, a landowner owed a different duty of care to an entrant of their land based on whether the entrant was classified as a licensee, invitee, or trespasser. *Mallet v. Pickens*, 206 W. Va. 145, 155, 522 S.E.2d 436, 446 (1999). However, in *Mallet* this distinction between licensees and invitees was abolished, and as a result, landowners and possessors of land owe any non-trespassing entrant a duty of reasonable care under the circumstances. *Id.*

"A trespasser is one who goes upon the property or premises of another without invitation, express or implied, and does so out of curiosity, or for his own purpose or convenience, and not in the performance of any duty to the owner." *Waddell v. New River Co.*, 141 W.Va. 880, 884, 93 S.E.2d 473, 476 (1956).

The owner or possessor of property does not owe trespassers a duty of ordinary care. *Huffman v. Appalachian Power Co.*, 187 W.Va. 1, 4, 415 S.E.2d 145, 148. With regard to a trespasser, a possessor of property only need refrain from willful or wanton injury. *Id.*

In this case, Plaintiff's Response attempts to clean up the allegations in the Complaint, but only creates more confusion as to the facts he is alleging. Plaintiff alleges in his Response that "a small plastic ball located in a crease of the steps between the riser and the tread" caused him to fall. Plaintiff further alleges "that the ball was not easily visible from the Plaintiff's vantage point."

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[3] Defendant Gable alleges that her relationship with Plaintiff has been acrimonious due to past litigation between the parties over ownership of the property in question. Defendant Gable further alleges that the parties have not communicated civilly for years and that Plaintiff knew that he was not welcome on her property. Plaintiff claims he is unaware of the rift.

Plaintiff then contradicts the Complaint and inexplicably alleges that he fell "on the front porch" and not on the steps. (Plaintiff's Memorandum p. 2.) Plaintiff then alleges that the small plastic ball was "hidden by the angle of the steps, paint chips, and other debris." Plaintiff's Response then reverses course and alleges that he fell "while descending the stairs." (Plaintiff's Memorandum p. 3.) Nowhere in Plaintiff's Response does he mention the "golf ball" alluded to in the Complaint.

Plaintiff's Response states that his purpose for visiting Defendant Gable's property was to inform her of the death of one of her brother's father-in-law. Thus, Plaintiff admits that he was on Defendant Gable's property without her invitation, express or implied, and did so for his own purpose or convenience, and not in the performance of any duty to Defendant Gable. Plaintiff's admission meets the legal definition of a trespasser and is fatal to his claim that he was "non-trespassing entrant" onto Defendant Gable's property.

Due to the fact that Plaintiff was a trespasser at the time he alleges that he slipped and fell, no duty of ordinary care is owed. Thus, Plaintiff's ordinary negligence claim fails as a matter of law.

Assuming *arguendo* that Plaintiff was a "non-trespassing entrant" at the time he entered onto Defendant Gable's property, a duty to exercise ordinary care to keep and maintain the premises in a reasonably safe condition would be owed. However, an exception applies when a danger is said to be "open and obvious." Under W.Va. Code §55-7-28 (2015), "[a] possessor of real property, including an owner, lessee or other lawful occupant, owes no duty of care to protect against dangers that are open, obvious, reasonably apparent or as well known to the person injured as they are to the owner or occupant, and shall not be liable for any injuries sustained as a result of such dangers."

Plaintiff's shifting version of events renders his claim that the danger was not open and obvious dubious at best. A golf ball, given the very nature of its design, is typically easily seen. However, Plaintiff backs off the allegation made in the Complaint that a "golf ball" caused his alleged fall and now contends that it was a "small plastic ball" which was hidden on the steps (if in fact that is where Plaintiff ultimately contends that he actually fell). A reasonably prudent person would have seen a golf ball on the steps (or on the porch depending where Plaintiff ultimately contends he actually fell) and exercised reasonable care in avoiding such an item. In either event, as a matter of law, Plaintiff's Complaint fails to properly state a claim upon which this court may grant relief.

West Virginia Rule of Civil Procedure 8(a) requires a pleading to include, "a short and plain statement of the claim showing that the pleader is entitled to relief." In this case, Plaintiff's Complaint fails to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, and as a result must be dismissed.[4] It is accordingly

ORDERED that the Complaint shall be and is hereby DISMISSED in its entirety and stricken from the Court's active docket. It is further

ORDERED that the Clerk shall provide an attested copy of this Order to counsel for the parties.

To which ruling the respective objections of the parties are hereby noted and preserved.

ENTER this 30th day of October, 2019.

Judge David J. Sims

A copy, Teste:

Brenda L. Miller
Circuit Clerk

[4] Plaintiff's "John Doe(s)" claim also fails as a matter of law. A simple search of the deeds on record in the County Clerk's office would reveal whether other persons had a legal title interest in Defendant Gable's property at the time of the alleged fall. Given Plaintiff's failure to ascertain this fact, Plaintiff's claim against Defendant "John Doe(s)" is also dismissed as part of this Order.