2016 IL App (1st) 151223-U

SECOND DIVISION
August 16, 2016

No. 15-1223

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

MARVIN LARSON and TRACIE LARSON, Plaintiffs-Appellants, v. DANIEL EPHRAIM, MODERN PROCESS EQUIPMENT, INC., and UNITED INSULATED AND STRUCTURES CORP., Defendants-Appellees.	))))))))))	Appeal from the Circuit Court of Cook County. No. 12 L 13091 Honorable Kathy M. Flanagan Judge Presiding

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JUSTICE SIMON delivered the judgment of the court.
Justices Neville and Hyman concurrred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred by entering summary judgment for a general contractor where the general contractor owed the subcontractor's employee a duty of care. The trial court correctly entered summary judgment for the building owner.

¶ 2 This appeal is taken from a judgment entered in a construction personal injury case. An employee of one of the subcontractors fell on a snowy roof during the course of the construction and sued the general contractor and building owner for damages. The trial court entered summary judgment in favor of the defendants and against the injured subcontractor, finding that the general

contractor and building owner did not owe the subcontractor's employee a duty of care with regard to the condition of the roof. We affirm in part, reverse in part, and remand for further proceedings.

¶ 3 BACKGROUND

¶ 4 Defendant Modern Process Equipment owns and operates a factory in Chicago. In 2010, it decided that it wanted to expand its operations and construct an addition to the factory. Modern Process hired defendant United Insulated as the general contractor for the project. Plaintiff Marvin Larson is a plumber employed by Lino & Poli Plumbing, the subcontractor hired by United Insulated to do plumbing work for the expansion project.

¶ 5 When construction of the roof area was taking place, another subcontractor, Sullivan Roofing, installed thermoplastic olefin membrane (TPO) over metal decking and polystyrene foam. Multiple witnesses testified, and nobody disputes, that TPO is slippery, especially when covered in snow and ice. After the TPO was installed, it snowed. Plaintiff testified that he was told by United Insulated's site superintendent, Carl Nickel, to go to the roof and meet with the roofers about installing stacks for the plumbing system. Plaintiff walked about five steps on the TPO and snow-covered roof and fell. Plaintiff claims that his feet slipped out from under him as a result of the hazard caused by United Insulated or Modern Process not removing the snow and ice from the roof.

¶ 6 The prime contract between Modern Process and United Insulated expressly excluded work related to "winter conditions" from the scope of United's work. The prime contract does not state that United is responsible for safety on the site or for the means or methods of accomplishing the work. The subcontractor agreement between plaintiff's employer and United Insulated requires the subcontractor to have a safety program and to have a safety representative make safety

inspections. Under the contract, plaintiff's employer is responsible for choosing the means and methods of accomplishing the work.

¶ 7 In late December 2010, it snowed on multiple occasions. Despite the initial contractual exclusion from dealing with winter conditions, United Insulated wanted to expedite the installation of the TPO so it contacted Modern Process about removing the snow. United and Modern Process both agreed that it was in the project's best interests that the snow be removed from the roof rather than to wait for it to melt. United and Modern Process entered into an agreement, confirmed by an email that states:

> "Please find UISC (United Insulated) change order cost for labor to remove snow from new roof decking and existing lower roof area at tie-in roofing detail only.
>
> - Laborer @ $82.50 per hour worked per man.
>
> Any related material or equipment costs, if required, will also be included."

Pursuant to that change order, United removed snow from the roof on multiple occasions in late December.

¶ 8 On more than one occasion leading up to plaintiff's fall, Sullivan Roofing contacted United to notify it that the roofers would not be on site because of snowy or cold conditions. According to United's own logs, on January 10, 2011, "Mike" from Sullivan Roofing called United and said his workers would not be on the job the following day because he would not allow his men to be on a snow-covered, slippery roof. Sullivan indicated that it would be back on the site on January 14th, though the roofers returned earlier because United insisted that the roof be watertight by January

17th. On January 14th, the day of the accident, there were two or three inches of snow on the ground and it was 15 to 25 degrees. No attempt was made to clear any snow or ice from the roof. After receiving direction from Nickel to go to the roof and meet with the roofers, plaintiff went up to the roof, took a few steps, and fell.

¶ 9 Plaintiff filed this case claiming that he is entitled to recover from defendants for his injuries contending that they owed him a duty to exercise reasonable care for his safety. Plaintiff's claims are brought under Illinois causes of action based on sections of the Restatement (Second) of Torts and common law negligence. Plaintiff's claim against United Insulated is based on the principle that when a general contractor takes responsibility for the safety of the jobsite, it has a duty to protect its subcontractors from unreasonably dangerous conditions. Plaintiff's claim against Modern Process is based on the principle that landowners owe invitees to their land a duty to protect against unreasonable risks of harm known by the landowner. The defendants moved for summary judgment arguing that they owed no such duty to plaintiff. The trial court agreed with defendants and issued a detailed order entering judgment in each defendant's favor.

¶ 10 ANALYSIS

¶ 11 We review a ruling on a motion for summary judgment *de novo*. *Illinois Tool Works Inc. v. Travelers Casualty & Surety Co.*, 2015 IL App (1st) 132350, ¶ 8. Summary judgment is appropriate when the pleadings, depositions, admissions, and affidavits, viewed in a light most favorable to the nonmovant, fail to establish a genuine issue of material fact, thereby entitling the moving party to judgment as a matter of law. 735 ILCS 5/2-1005 (West 2012); *Fox v. Seiden*, 2016 IL App (1st) 141984, ¶ 12. If disputes as to material facts exist or if reasonable minds may differ with respect to the inferences drawn from the evidence, summary judgment may not be granted.

Casey's Marketing Co. v. Hamer, 2016 IL App (1st) 143485, ¶ 11.

¶ 12 I. United Insulated's Motion for Summary Judgment

¶ 13 United Insulated contends that judgment was properly entered in its favor because it did not owe plaintiff a duty of care. A duty of care arises when the parties stand in such a relationship to one another that the law imposes upon defendant an obligation of reasonable conduct for the benefit of plaintiff. *Deibert v. Bauer Bros. Construction Co.*, 141 Ill. 2d 430, 437 (1990). Whether a defendant owes a plaintiff a duty of care is a question of law for determination by the court. *Ward v. K Mart Corp.*, 136 Ill. 2d 132, 140 (1990). In most cases, a general contractor that retains a subcontractor is not liable for the subcontractor's negligence toward its employees. *Cain v. Joe Contarino, Inc.*, 2014 IL App (2d) 130482, ¶72. That rule is in place because the general contractor usually does not supervise the details of the subcontractor's work and, therefore, is not properly positioned to prevent negligence, whereas the subcontractor has the right and obligation to monitor and direct the details of its own employees' work. *Id*. However, the Restatement, adopted as a cause of action in Illinois, states that:

> "One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for the physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care." Restatement (Second) of Torts § 414 (1965).

¶ 14 The comments to this section of the Restatement indicate that a general contractor, by retaining control over the operative details of its subcontractor's work, may become vicariously

liable for the subcontractor's negligence. *Calderon v. Residential Homes of America, Inc.*, 381 Ill. App. 3d 333, 341 (2008). And, even in the absence of controlling the details of the work, the general contractor may be directly liable for not exercising its supervisory control with reasonable care. *Id*. A general contractor can be liable to an injured subcontractor's employee where the general contractor has supervisory control over the work or jobsite safety and knows of a dangerous condition, but fails to take reasonable action to prevent harm. *Cochran v. George Sollitt Construction Co.*, 358 Ill. App. 3d 865, 879 (2005) (citing Restatement (Second) of Torts § 414 cmt. b). That is plaintiff's theory here—that even though United Insulated did not control the operative details of the subcontractors' work, it did supervise the job and manage jobsite safety to the requisite degree, and that it did so negligently.

¶ 15 United argues that it cannot be liable under section 414 of the Restatement because it did not have supervisory control over the project's work or safety. To support its position that it did not exercise supervisory control, United points to the parties' contracts under which the subcontractors agreed to be responsible for their own employees' safety and the means and methods of accomplishing their work. However, the evidence of the parties' actual practices demonstrates that United did supervise the safety of the roof and United retained exclusive control to remedy any weather-related dangerous conditions there.

¶ 16 Peter Heraty who was a part-owner of United Insulated at the time of the accident testified in a deposition. Plaintiff's counsel posed this question to Heraty. "Carl Nickel was responsible for making sure that the roof of this project was safe for subcontractors before permitting them to work, correct?" Heraty responded, "Yes." Daniel Ephraim, president of Modern Process was also deposed. Plaintiff's counsel asked him "If there were snow or ice conditions that were present, did

you rely on United site superintendents to make sure that the facility was safe for subcontractors?" To which Ephraim responded, "Yes, I relied on United." Phil Ephraim, the other owner of Modern Process, testified consistently with his brother Daniel. When the snow on the roof needed to be removed in the weeks leading up to the accident, United was responsible, or more fittingly, accepted that responsibility.

¶ 17 Through its section headings in its brief, United attempts to emphasize its "limited" control over the project's work and safety. Plaintiff's theory is not that United controlled so many aspects of the work that it would be generally vicariously liable for the acts of subcontractors. The theory of liability is not general in nature, it is that United assumed full supervisory control of the snow removal from the roof and it knew or should have known that an accumulation created an unreasonable risk of harm.

¶ 18 United argues that the change order did not impose any continuing obligation on it to remove snow. But the change order likewise did not limit the scope of the duty it assumed. By agreeing to the change order, United took supervisory control over the condition of the roof. United accepted the authorization to remove snow and it was the only one that received that authorization. Based on Ephraim's testimony, which United disputes, United received an open-ended, enduring authorization to remove snow. In addition, United acted in accordance with the terms of the change order on multiple occasions. Nickel was the one in charge of deciding whether snow needed to be removed. Plaintiff had no authority to order snow removal nor did any of the other subcontractors. Nickel was vested with the authority to stop work on the roof if conditions were unsafe. Nickel's daily logs indicate that he held numerous safety meetings with the subcontractors, including a meeting with all subcontractors on the day that four inches of snow

was cleared from the roof. United took on the responsibility of removing snow at least for a period, and it did not remove the snow on the day of the accident despite allegedly knowing of the allegedly dangerous condition that was present.

¶ 19 Nickel testified that on the day of the accident no one ever told him that the roof was unsafe due to snow coverage. He says that the reason they removed snow in the past was for job progress, not for safety reasons. But Nickel admits that he knows that TPO covered roofs are slippery when covered in snow and ice. He also admits that the roof was covered in snow and ice that day. By no means are general contractors supposed to act as guarantors for the safety of subcontractors. This case represents a situation where the general contractor allegedly had knowledge of the supposedly dangerous condition and was the only party in any position to remedy it. Nickel testified that he was the only one authorized to order snow removal. The determination of whether a duty exists is underpinned by the concept of foreseeability and the likelihood of potential injury. *Ward*, 136 Ill. 2d at 140. With all the information available to United at the time, the risk of harm to an unsuspecting contractor was reasonably foreseeable. See *id*. When all reasonable inferences are drawn strictly against United, and the evidence is viewed in the light most favorable to plaintiff (*Weedon v. Pfizer, Inc.*, 332 Ill. App. 3d 17, 20 (2002)), there is sufficient evidence to establish that United owed plaintiff a duty of care with regard to the condition of the roof.

¶ 20 For direct liability to exist under Restatement section 414, in addition to demonstrating that supervisory control over the subject matter exists, the general contractor's knowledge of the dangerous condition is a precondition to direct liability. *Ramirez v. FCL Builders, Inc.*, 2014 IL App (1st) 123663, ¶ 150 Without delving into the evidence insofar as it relates to any breach, there is evidence that TPO surfaces are extremely slippery when covered with snow and ice. There

is evidence that Nickel knew the roof was snow covered on the day of the accident. And there is some evidence that Nickel and United knew that the snow posed a dangerous condition on this very project—Sullivan Roofing had instructed United that its own workers would not go on the roof when it was snow covered because it was unsafe to do so. See *Canzoneri v. Village of Franklin Park*, 161 Ill. App. 3d 33, 41 (1987) (explaining the importance of the plaintiff identifying and clearly describing the defect encountered). United, knowing all those things, still directed plaintiff to the snow-covered roof to perform work. It is not unreasonable to impose a duty on United under such circumstances.

¶ 21 United argues that the "natural accumulation rule" bars plaintiff's claim under section 414 of the Restatement. Under the natural accumulation rule, a landowner or possessor of real property has no duty to remove natural accumulations of ice, snow, or water from its property. *Krywin v. Chicago Transit Authority*, 238 Ill. 2d 215, 227 (2010). United contends that because the snow and ice on the roof arrived naturally, it owed subcontractors no duty of care. This case concerns construction site safety, not general duties concerning the condition of property imposed on landowners. United acknowledges that the natural accumulation rule has never been applied to negate a claim under section 414, but asks that we apply the rule here.

¶ 22 There is no need for us to decide whether the natural accumulation rule might bar a section 414 claim under some circumstances, but it does not do so here. As we have explained, United took on a duty with regard to the snow removal and the condition of the roof and it had knowledge of the allegedly dangerous condition. It would be contrary to precedent and to established negligence principles to say that, simply because a hazard is created naturally, a general contractor cannot be subject to liability when it knows of the dangerous condition and sends an unwitting

subcontractor to encounter it. See *Kalata v. Anheuser-Busch Companies, Inc.*, 144 Ill. 2d 425, 438-39 (1991).

¶ 23 In ruling on plaintiff's section 414 claim as it relates to United, the trial court focused almost exclusively on the amount of control United retained over the means and methods of the subcontractors' work. But there is an alternative basis for liability under section 414, when, even in the absence of controlling the operative details of the work, the general contractor fails to exercise the supervisory control it does possess with reasonable care. *Cochran*, 358 Ill. App. 3d at 877. Plaintiff has produced evidence that United was aware of the dangerous condition on the roof and did not properly utilize its supervisory control, leading to his injury. See *Lederer v. Executive Construction, Inc.*, 2014 IL App (1st) 123170, ¶¶ 62-65. Plaintiff has produced sufficient evidence to create an issue of material fact as to whether he was owed a duty of care by United. Therefore, with material issues of fact in dispute, United was not entitled to have the motion for summary judgment granted and plaintiff is entitled to go forward with his negligence claim under section 414 of the Restatement.

¶ 24 II. Daniel Ephraim and Modern Process's Motion for Summary Judgment

¶ 25 Although originally lodging a claim against Modern Process under section 414 of the Restatement as it did against United, plaintiff concedes that Modern Process cannot be liable under that section. The trial court held that Modern Process (and by extension Daniel Ephraim) was entitled to summary judgment on plaintiff's other claims brought under sections 343 and 324A as well as on plaintiff's common law negligence claim.

¶ 26 Modern Process argues that summary judgment in its favor was proper because it did not owe plaintiff a duty of care with regard to the condition of the roof. On appeal, plaintiff's primary

contention against Modern Process is that he was a third party beneficiary of the change order and that Modern Process assumed a duty to the subcontractors because it had the right to determine if United was complying with the terms of the change order.

¶ 27 The language of the change order does not support plaintiff's position nor does any of the other evidence. Modern Process did not undertake any obligation to ensure that snow was cleared or that the roof was safe. It had no control over the condition of the roof at all. Modern Process delegated all aspects of the work to United Insulated as its general contractor. Modern Process did not involve itself with snow removal in any way other than agreeing to pay United for doing it. Plaintiff spends nearly its entire brief interposing arguments that United had the exclusive responsibility to remove snow from the roof and repeatedly states that Nickel was the only one authorized to order the removal of snow—tacit acknowledgments that Modern Process did not have such a responsibility.

¶ 28 As to plaintiff's more general premises liability claims, the Restatement says that:

> "A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger." Restatement (Second) of Torts § 343 (1965).

This section of the Restatement has also been adopted as a cause of action under Illinois law.

¶ 29 There is no evidence in the record that Modern Process had any notice of the snowy or icy conditions on the day of plaintiff's fall. A landowner is not liable for an injury resulting from dangerous or defective conditions on the premises unless the landowner has actual or constructive knowledge of the hazard. *Tomczak v. Planetsphere, Inc.*, 315 Ill. App. 3d 1033, 1038 (2000). The plaintiff is required to establish that the landowner knew or should have known of the defect. *Id.*; see also Restatement (Second) of Torts § 343(a). As stated above, there is no evidence to create a genuine issue of material fact that Modern Process knew or should have known of the condition of the roof on the date plaintiff fell. All the record evidence points the other way. See *Joyce v. Mastri*, 371 Ill. App. 3d 64, 79 (2007) (judgment should be entered in favor of the defendant on a premises liability claim when no evidence is presented that the defendant knew or should have known of a dangerous condition where the plaintiff was working). Moreover, after United and Modern Process agreed to the change order, Modern Process had no concern or interest with regard to the removal of snow. The evidence on file confirms that United was in charge of the jobsite and that Modern Process had no duty to plaintiff in connection with the condition of the roof. Summary judgment was properly entered in Daniel Ephraim and Modern Process's favor.

¶ 30 CONCLUSION

¶ 31 Accordingly, we affirm in part, reverse in part, and remand the case for further proceedings.

¶ 32 Affirmed in part, reversed in part, remanded.