2018 IL App (1st) 170283-U
Order filed: July 27, 2018

FIRST DISTRICT
FIFTH DIVISION

No. 1-17-0283

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JOSE JAIME PUENTE,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	No. 13 L 3696
	)	
FRANCISCO LOPEZ d/b/a LOPEZ CARPENTER,	)	
	)	
Defendant	)	Honorable
	)	Kathy M. Flanagan,
(Cleary Builders, LLC, Defendant-Appellee).	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: We affirmed the grant of summary judgment in favor of defendant-appellee on the negligence claim of plaintiff-appellant seeking damages for injuries he suffered while working for a subcontractor on a construction project. We held that, as a matter of law, defendant did not retain sufficient control over the subcontractor's work so as to be liable to plaintiff under section 414 of the Restatement (Second) of Torts.

¶ 2 Plaintiff-appellant, Jose Jaime Puente, appeals from the entry of summary judgment in favor of defendant-appellee, Cleary Builders, LLC (Cleary) on his negligence claim seeking damages for injuries he suffered while working for a subcontractor on a construction project

involving the expansion and renovation of a warehouse (the project). On appeal, plaintiff argues that material issues of fact exist as to whether Cleary, the general contractor, had retained sufficient control over the project and had notice of the dangerous conditions which led to his injuries, such that Cleary may be held liable for his injuries under section 414 of the Restatement (Second) of Torts (Restatement (Second) of Torts § 414 (1965)). We affirm.

¶ 3 I. BACKGROUND

¶ 4 Mayo Properties, LLC (Mayo), as owner of the warehouse, contracted with Cleary to act as the general contractor on the project (the general contract).[1] The general contract allowed Cleary to enter into subcontracts; accordingly, Cleary entered into a subcontract with Waikato Enterprises, Inc. (Waikato) to perform the roofing work, including the creation of skylights. Waikato hired defendant Francisco Lopez d/b/a Lopez Carpenter (Lopez), to help Waikato perform its work, including cutting the skylight openings. Plaintiff, an employee of Waikato, was injured while working at the project on January 30, 2012, when he fell through a portion of the roof that had been cut by Lopez, but had not yet been removed, for the placement of a new skylight.

¶ 5 Plaintiff's first amended complaint was filed on July 11, 2013, and raised negligence (count I) and premises liability (count II) claims against Lopez, and a negligence action against Cleary (count III) which was labeled "Restatement (Second) § 414." More specifically, as to count III, plaintiff contended that Cleary owed him a duty of care, as it had retained supervision and control over the project, and charged Cleary with certain failures, including the failure to:

[1] The general contract was made between Mayo and RCP Construction and Consulting, LLC (RCP). RCP's name was changed when Kevin Cleary became the sole owner of the company.

adequately supervise and enforce safe work practices; stop the unsafe skylight work; secure the unsafe skylight opening; or warn plaintiff of the unsafe conditions.

¶ 6 Cleary moved for summary judgment against plaintiff arguing that it had neither contractual, nor actual control over Waikato, Lopez, or plaintiff to establish a duty owed to plaintiff by Cleary pursuant to section 414 of the Restatement (Second) of Torts, and did not have actual or constructive notice of the unsafe conditions which led to plaintiff's injuries. In response, plaintiff argued that questions of material fact existed as to both issues.

¶ 7 During the summary judgment proceedings, the parties submitted various documents and transcripts of deposition testimony as exhibits. This evidence, as relevant to the issues on appeal, was as follows.

¶ 8 A. The General Contract Between Cleary And Mayo

¶ 9 As to Cleary's supervision obligations for the project, the general contract stated:

"The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for, and have control over, construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters. "

¶ 10 Under the general contract, Cleary was obligated to "require each Subcontractor *** to be bound to *** all the obligations and responsibilities, including the responsibility for safety of the Subcontractor's Work, which [Cleary] *** assumes toward the Owner and Architect." Additionally, as specifically amended by Cleary and Mayo, the general contract stated that Cleary "shall provide necessary supervision at the site during the performance of the Work."

¶ 11 Under the general contract, Cleary's obligations for safety at the project included the following: to be "responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract"; to "take reasonable precautions for safety of, and *** provide reasonable protection to prevent damage, injury or loss to *** employees on the Work and other persons who may be affected thereby"; to "erect and maintain *** reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards, promulgating safety regulations and notifying owners and users of adjacent sites and utilities"; and to "designate a responsible member of [Cleary's] organization at the site whose duty shall be the prevention of accidents".

¶ 12 B. Cleary's Subcontract with Waikato

¶ 13 The subcontract between Cleary and Waikato incorporated the terms of the general contract and also provided that Waikato was required to furnish and install a new standing seam metal roof on the warehouse portion of the building; sawcut and remove the existing metal roof so as to create 20 openings for new skylights; and provide and install a total of 30 skylights, each skylight to be 4' wide by 10' long. The location of the skylight panels on the roof "shall be as directed by [Cleary]."

¶ 14 C. The Deposition Testimony of Plaintiff

¶ 15 Plaintiff, at the time of his fall, was employed by Waikato as an electrician and laborer. His duties at the project included installing metal sheeting on the roof and he was performing that work on the day of the incident. Before the fall, plaintiff had just returned to the roof with a box of materials and was walking on the roof looking straight ahead. He fell through a portion of the roof which had been cut, but had not yet been removed, for the installation of a new skylight. The cut portion of the roof was not marked in any way. Plaintiff did not receive written

safety rules from Waikato, nor did he attend on-site safety meetings at the project. He did not know Kevin Cleary (Cleary's owner) and had never spoken to him or received anything from him. Shaun Marr, Waikato's on-site foreman, supervised and instructed plaintiff as to his work at the project.

¶ 16 D. The Deposition Testimony of Victor Garcia

¶ 17 Victor Garcia, a laborer for Waikato on the project, testified that plaintiff, on the day of the incident, was "setting clips" on the middle of the roof. At the same time, Francisco Lopez was cutting a portion of the roof for the installation of new skylights. Mr. Lopez had not yet removed the cut portion of the roof where plaintiff fell. Mr. Garcia did not see plaintiff fall, but saw him on the floor of the warehouse with a "piece of metal *** still on top of him." Mr. Garcia affirmed that no "fall protection" was used at the project. Specifically, there was no "paint or flags or anything of the sort to alert workers that there were openings in the roof."

¶ 18 E. The Deposition Testimony of Francisco Lopez

¶ 19 Generally, Mr. Lopez helped lay the roof and cut openings for the skylights at the project. A Waikato supervisor would mark the opening to be cut for the new skylights with red paint. Mr. Lopez had partially cut the opening through which plaintiff fell before plaintiff left the roof by ladder to get material. Mr. Lopez finished cutting the opening, stood up to stretch his back, and was turned away from the section of the roof which he had just cut. Mr. Lopez did not see plaintiff return to the roof. He heard a noise and saw that plaintiff had fallen through the opening.

¶ 20 F. The Deposition Testimony of Carl Daisley

¶ 21 Carl Daisley, Waikato's general and supervisory manager, was the designated safety director for Waikato on the project and a signatory to the subcontract. Prior to the project, Mr.

Daisley attended a 10-hour Occupational Safety and Health Administration (OSHA) training course. He was not present at the project on a daily basis and was not there when plaintiff fell. In Mr. Daisley's absence, Mr. Marr would assume the safety duties at the project.

¶ 22 At the start of the project, Mr. Daisley and Mr. Marr discussed safety concerns and determined that because "the high point of the roof was not above 15 feet," harnesses were not necessary under OSHA standards. Additionally, to address any hazard posed by cutting the openings for the new skylights, Mr. Daisley and Mr. Marr decided that it would be best to not cut all the openings at one time but, instead, the openings would be cut, one-by-one, as the roof was framed.

¶ 23 Mr. Daisley met with Mr. Cleary before Waikato began work at the project, but he could not recall the substance of the meetings. Waikato, generally, does not require instructions from a general contractor as to the performance of its roofing work. Mr. Cleary did not provide safety manuals to Waikato. When asked whether he relied on Mr. Cleary, "to manage safety of your employees on the roof," Mr. Daisley answered: "I really don't know how to answer that. It is my belief that it's a general contractor's responsibility to look after the welfare of everybody on the site. I think that's part of his job description." He never asked Mr. Cleary for input on safety at the project. If Mr. Cleary had told Waikato to stop work, Waikato would have complied.

¶ 24 G. The Deposition Testimony of Shaun Marr

¶ 25 Shaun Marr was the on-site foreman for Waikato at the project. The scope of Waikato's work involved the installation of a new roof with "skylights over the top of the existing roof." Waikato was in charge of this work. Mr. Cleary had no involvement with telling Waikato how to do its work, and never told Mr. Marr which equipment should be used to carry out its work.

Waikato was "free to do the work in the way it desired in order to accomplish what it had contracted to do for this job."

¶ 26 Mr. Marr's duties included "making sure everyone's working safe, going by OSHA standards." Mr. Marr would have stopped the work if he saw an unsafe practice and corrected the problem, but he had not done so prior to plaintiff's fall.

¶ 27 He and Mr. Daisley walked the site before the job began, but Mr. Cleary was not with them. For safety reasons, the two men decided to cut the skylight openings one-by-one. Mr. Marr explained that they decided to spray paint a square on each portion of the roof where a skylight was to be cut. Once the skylight was cut, the spray painted square was largely gone. To prevent falls, the laborer who cut the opening would stay there to warn other workers until the opening "was framed over and roofed." The practice was to have no unattended skylight opening.

¶ 28 On the day of plaintiff's fall, Mr. Daisley was out of town, and Mr. Marr had left the site in the morning because he was sick. There was no foreman or supervisor from Waikato at the site at the time of plaintiff's fall. After the incident, as a new safety measure, Mr. Marr and Mr. Daisley decided to spray paint around any newly cut skylight openings so as to ensure that the workers on the roof would be made aware of the openings. He did not recall if Mr. Cleary was involved in the post-accident decision to mark the skylight openings with spray paint. After the incident, Waikato workers were required to undergo fall prevention training before they could resume cutting the skylight openings.

¶ 29 H. The Deposition Testimony of Terrence Williams

¶ 30 Terrence Williams testified that, in the absence of Mr. Marr, he acted as a foreman for Waikato, and would have the responsibility to ensure the laborers were performing their duties in

a correct, safe, and timely manner, and that they had the necessary tools. Mr. Williams did not remember Mr. Cleary, but testified that "there were a couple of general contractors" at the project. After the incident, Mr. Daisley told him to attend fall protection training.

¶ 31 I. The Deposition Testimony of Kevin Cleary

¶ 32 Kevin Cleary testified that the project entailed the expansion of an existing metal and steel building requiring the installation of a new roof on the addition and "reroofing the existing sections and installing skylights." Because he "was there to manage the project" and wanted to "keep current with the progress," Mr. Cleary was at the job site daily—from 7 a.m. to the end of all work—and had an on-site trailer. There were no other Cleary employees on the project. Mr. Cleary met with each subcontractor at the start of its work to "review various protocols on this particular job site including safety."

¶ 33 Under the subcontract, Waikato was to perform the roofing work and installation of 30 skylights in compliance with OSHA standards. Mr. Cleary did not retain any control over Waikato's roofing work and its installation of the skylights. Mr. Cleary did not give Waikato any instructions on how to perform the roofing and skylight work faster, as Mr. Cleary was "not an expert [on] roofing."

¶ 34 Under the general contract, Cleary was required to and did create a safety program for the project. Mr. Cleary was the designated safety coordinator. The 17-page safety plan was identified by Mr. Cleary during his deposition and attached to the transcript as an exhibit. It covered various topics, including training and education and safety rules and procedures, and required employees to be trained in "Fall Hazards" from roofs and roof openings. Mr. Cleary, as safety coordinator, was to be "thoroughly familiar with OSHA regulations and local and state safety codes." Mr. Cleary was required to report all injuries to OSHA. If there was an injury,

Mr. Cleary was to conduct an accident investigation, and then discuss the incident "in safety and other employee meetings with [the] intent to prevent a recurrence."

¶ 35 Waikato was also required to have its own safety program under the subcontract, but Mr. Cleary did not know whether one existed. He investigated plaintiff's fall according to the provision of Cleary's safety program.

¶ 36 Mr. Cleary testified that, "fewer than five times" prior to plaintiff's fall, he had "been up on the roof and witnessed [Waikato] or who [he] believed to be [Waikato] cutting skylights." He did not recall observing "fall protection in place," nor telling Waikato, prior to the date of the fall, to use fall protection.

¶ 37 After hearing of plaintiff's fall, Mr. Cleary instructed Waikato to stop work and directed Mr. Daisley to contact OSHA and report the incident.

¶ 38 Because Mr. Mohr was not at the project at the time of the incident, Mr. Cleary contacted Waikato project manager, Larry Skenendore, and informed him of plaintiff's fall. Mr. Cleary requested that Mr. Skenendore come to the site and hold a safety meeting. After the meeting and OSHA's review, Mr. Cleary ordered Waikato to take corrective safety measures, including requiring Waikato to mark skylight openings with fluorescent paint and to take all other steps to ensure compliance with the recommendations of OSHA. On February 13, 2012, Mr. Cleary attended an OSHA fall protection training program with Waikato employees. After receiving assurances from Waikato that its employees had taken the required training and that it was following all safety measures recommended by OSHA, he "let them come back to work." He also observed that Waikato was complying with these safety directives. If he learned that a Waikato employee had not received training, he would have required that the employee be removed from the project.

¶ 39 II. The Circuit Court's Summary Judgment Order

¶ 40 On December 5, 2016, the circuit court granted Cleary's motion for summary judgment as to count III of the first amended complaint, finding that Cleary failed to retain sufficient control over the project and Waikato to owe plaintiff a duty of care. Also, the court found that Cleary had no notice of the unsafe condition of the roof.

¶ 41 On January 3, 2017, the circuit court made a finding pursuant to Illinois Supreme Court Rule 304(a) (eff. March 8, 2016), that there was no just reason to delay an appeal from the order granting summary judgment in favor of Cleary. Plaintiff has appealed.

¶ 42 III. Plaintiff's Appeal

¶ 43 On appeal, plaintiff argues that the circuit court erred in granting summary judgment in favor of Cleary, as there were material issues of fact as to whether Cleary had retained sufficient control over the project and Waikato to owe a duty of care to plaintiff under section 414 of the Restatement (Second) of Torts, and whether Cleary had notice of the unsafe work practice.

¶ 44 Summary judgment may be entered when the pleadings, depositions, and admissions on file, together with any affidavits, indicate there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2016). The court must examine the evidence in the light most favorable to the nonmoving party (*Pavlik v. Wal-Mart Stores, Inc*., 323 Ill. App. 3d 1060, 1063 (2001)), and must construe the materials of record strictly against the movant and liberally in favor of the nonmoving party. *Espinoza v. Elgin, Joliet and Eastern Ry. Co*., 165 Ill. 2d 107, 113 (1995). We review the grant of summary judgment *de novo* (*Rosestone Investments, LLC v. Garner*, 2013 IL App (1st) 123422, ¶ 23), and may affirm on any basis found in the record (*id.*).

¶ 45 Plaintiff seeks to impose liability on Cleary based on a common law negligence theory. A plaintiff who seeks recovery based on a defendant's negligence must plead and prove the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately caused by the breach. *Carney v. Union Pacific R.R. Co.*, 2016 IL 118984, ¶ 26. The primary issue in this case is whether Cleary owed a duty to plaintiff, a question of law, which may be decided on summary judgment. *Id.*

¶ 46 Generally, one who hires an independent contractor is not liable for harm caused by the independent contractor's acts or omissions, because the hiring entity has no control over the details and methods of the independent contractor's work and, therefore, it is not in a good position to prevent negligent performance. *Id.* ¶¶ 31-32. However, section 414 of the Restatement (Second) of Torts provides that the hiring entity may be found directly liable for the acts and omissions of an independent contractor, as follows:

> "One who entrusts work to an independent contractor, but who *retains the control* of any part of the work, is subject to liability for 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." (Emphasis added.) Restatement (Second) of Torts § 414 (1965).

¶ 47 Comment (c) to section 414 further explains:

> "In order for the rule stated in this Section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a

> general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that *the contractor is not entirely free to do the work in his own way*." (Emphasis added.) Restatement (Second) of Torts § 414, Comment c, at 388 (1965).

¶ 48 Neither a general right to enforce safety, nor the mere existence of a safety program, safety manual, or safety director, is sufficient to amount to retained control under section 414. *Carney*, 2016 IL 118984, ¶ 47; *Lepretre v. Lend Lease (US) Construction, Inc*., 2017 IL App (1st) 162320, ¶ 33. Even where the employer retains the right to inspect work, order changes to the plans, and ensure that safety precautions are observed and the work is done safely, he will not be held liable unless the evidence shows that he retained control over the incidental aspects of the independent contractor's work, meaning that the employer controlled both the ends and means of the work. *Ross v. Dae Julie, Inc*., 341 Ill. App. 3d 1065, 1073 (2003).

¶ 49 The best indicator of whether the employer retained control sufficient to trigger the potential for liability under section 414 is the written agreement between the employer and the independent contractor. *Carney*, 2016 IL 118984, ¶ 41 (citing *Cain v. Joe Contarino, Inc*., 2014 IL App (2d) 130482, ¶ 76). Additionally, evidence of the employer's conduct, even if in variance with the agreements, may demonstrate retained control. *Id.*

¶ 50 Here, Cleary employed Waikato as a subcontractor, and accordingly we begin our analysis of whether Cleary retained control of Waikato's work by examining the subcontract between them. The subcontract incorporated the terms of the general contract between Cleary and Mayo, which required Cleary to "supervise and direct" the project and to be "solely responsible for, and have control over, construction means, methods, techniques, sequences and

procedures and for coordinating all portions of the Work under the Contract." This court has previously considered the identical contract language, and repeatedly found that it provides for the employer's *general* right of supervision of the project, but that it does not provide the requisite retention of control of the ends and means of the subcontractor's work sufficient to impose a duty on the employer toward the injured plaintiff. See *Lepretre*, 2017 IL App (1st) 162320; *Snow v. Power Construction Co., LLC*, 2017 IL App (1st) 151226; *Fonseca v. Clark Construction Group*, 2014 IL App (1st) 130308; *Martens v. MCL Construction Corp*., 347 Ill. App. 3d 303 (2004); *Shaughnessy v. Skender Construction Co.*, 342 Ill. App. 3d 730 (2003); see also *Rangel v. Brookhaven Constructors, Inc*., 307 Ill. App. 3d 835 (1999) (holding that language in the subcontract providing that the employer "shall have the right to exercise complete supervision and control over the work to be done" by the subcontractor established only a general right of supervision and did not impose a duty toward the employee of the subcontractor who was injured at the work site).

¶ 51 Further, plaintiff points to no conduct by Cleary showing that, at the time of plaintiff's injury, it retained an amount of supervision such that it controlled the ends and means of the work performed by Waikato on the skylights, *i.e*., that Waikato was not free to complete the work in its own way. Specifically, Mr. Marr, the on-site foreman for Waikato at the project, testified that Mr. Cleary had no involvement in telling Waikato how to do its work, and never told Mr. Marr which equipment should be used to carry out its work. Mr. Marr further testified that Waikato was "free to do the work in the way it desired in order to accomplish what it had contracted to do for this job." Mr. Daisley, Waikato's general and supervisory manager, testified that Waikato generally does not require instructions from the general contractor as to the performance of its work, and that Mr. Cleary never instructed him how to get the job done. Mr.

Cleary testified consistently with Mr. Marr and Mr. Daisley, admitting that, while he was at the job site daily, he did not retain any control over Waikato's roofing work and its installation of the skylights. Mr. Cleary explained that he did not give Waikato any instructions on how to perform the roofing and skylight work faster, as Mr. Cleary was "not an expert [on] roofing." See *Carney*, 2016 IL 118984, ¶ 55 ("Defendant's mere presence at the job site, without more, is insufficient evidence of retained control for purposes of section 414.").

¶ 52 Cleary's failure to assert any control over Waikato's roofing work and its installation of the skylights distinguishes this case from two cases cited by plaintiff, *Grillo v. Yeager Construction*, 387 Ill. App. 3d 577 (2008), and *Diaz v. Legat Architects, Inc.*, 397 Ill. App. 3d 13 (2009). In *Grillo* and *Diaz*, the appellate court held that there was sufficient evidence of the respective employers' retention of control over the ends and means of the work performed by the subcontractor to support the juries' verdicts against them. Specifically, in *Grillo*, there was testimony that the employer's supervisor "actively supervised" the subcontractors and that, prior to plaintiff's injury, the supervisor had told him to stop what he was doing and to start something else, thereby indicating that plaintiff was not entirely free to do the work in his own manner. *Grillo*, 387 Ill. App. 3d at 594. In *Diaz*, the employer's superintendent stopped the subcontractor's excavation work on two occasions. *Diaz*, 397 Ill. App. 3d at 35. By contrast, the testimony here showed that Mr. Cleary did not "actively supervise" Waikato and did not stop and/or restart Waikato's work prior to plaintiff's injury.

¶ 53 Plaintiff argues, though, that the subcontract between Cleary and Waikato expressly provides that the location of the skylight panels on the roof "shall be as directed by [Cleary]" and, thus, that Cleary retained sufficient control over Waikato's work to trigger a duty to plaintiff under section 414. We disagree. To establish a duty under section 414, plaintiff must show that

Cleary controlled both the ends *and* the means of Waikato's work. *Ross*, 341 Ill. App. 3d at 1073. The installation of the skylights at the specified locations is the end result of the contract; however, the *means* for installing those skylights at the specified locations were completely controlled by Waikato. As discussed above, the testimony of Mr. Marr, Mr. Daisley, and Mr. Cleary establishes that Waikato, not Cleary, determined how Waikato was to carry out the work of installing the skylights, and the equipment to be used. As Cleary did not control the means of Waikato's work on the project, it owed no duty to plaintiff under section 414. See *Connaghan v. Caplice*, 325 Ill. App. 3d 245 (2001) (where defendant hired the contractor to work on his garage, and before completion defendant changed the location of the garage door, the appellate court held that defendant owed no duty to the injured plaintiff under section 414 because defendant only provided the ends, that is the plan and specifications, but not the means of the work).

¶ 54 With regard to safety, the general contract provided that Cleary "shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract." Cleary was obligated to "take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to *** employees on [the project] and other persons who may be affected thereby." Cleary also promised to "erect and maintain, as required by existing conditions and performance of the Contract, reasonable safeguards for safety and protection" that included "danger signs and other warnings against hazards." Moreover, Cleary was to "designate a responsible member of the Contractor's organization at the site whose duty shall be the prevention of accidents" and the designated party was Mr. Cleary.

¶ 55 The existence of a safety program, safety manual, or safety director does not constitute retained control *per se*. *Snow v. Power Construction Co., LLC*, 2017 IL App (1st) 151226, ¶ 53. The court must still conduct an analysis pursuant to section 414, *i.e.*, it must determine whether the safety program, safety manual, and safety director affected the "means and methods of the [independent] contractor's work to fall within the ambit of retained control." *Id*.

¶ 56 Review of all the deposition testimony shows that there is no evidence that, at the time of plaintiff's injury, Waikato's work on the skylights was in any way affected by Cleary's safety program, safety manual, or safety director. Mr. Cleary testified that Waikato was required under the subcontract to have its own safety program in place, and that he never provided Waikato with a copy of Cleary's safety program. Mr. Marr, Waikato's on-site foreman, testified that it was his duty to make sure his workers were working in a safe manner and complying with OSHA standards, and he had no conversations with Mr. Cleary regarding how Waikato was to perform its roofing work. Mr. Marr testified that he and Mr. Daisley, Waikato's general and supervisory manager, walked the site before the job began, without Mr. Cleary, and discussed safety concerns. Mr. Marr and Mr. Daisley, and *not* Mr. Cleary, decided for safety reasons to cut the skylight openings one-by-one and to mark the areas to be cut with painted squares, and that the laborer who cut the opening would stay there to warn other workers until the opening was framed over and roofed. Mr. Marr and Mr. Daisley determined that OSHA did not require the use of safety harnesses or other fall protection on site, a decision that was not discussed with Mr. Cleary; Mr. Cleary admitted that he gave no instructions on how to perform the roofing and skylight work because he was not an expert on roofing, and that he went on the roof less than five times prior to plaintiff's injury, and never told Waikato to provide any additional fall protection. On all these facts, Cleary's safety program, safety manual, and safety director did

provide Cleary with any retained control over Waikato's work. Therefore, Cleary owed plaintiff no duty of care under section 414.

¶ 57 Plaintiff argues, though, that Cleary exhibited its control of Waikato's work post-accident, when Mr. Cleary stopped work after plaintiff's injury and directed Waikato to take corrective safety measures.

¶ 58 Our supreme court has held that "[a]lthough evidence of post-accident remedial measures is not admissible to prove prior negligence, such evidence may be admissible for other purposes, including establishing control of property or control of a contractor's work where such control is at issue." *Carney*, 2016 IL 118984, ¶ 56.

¶ 59 Mr. Cleary testified that his post-accident remedial safety measures were designed to ensure Waikato's compliance with OSHA regulations. This court has held, though, that requiring a contractor to comply with OSHA regulations does not create a duty of care to a plaintiff injured at the work site. *Lee v. Six Flags Theme Parks, Inc*., 2014 IL App (1st) 130771, ¶ 77 (citing *Calderon v. Residential Homes of America, Inc*., 381 Ill. App. 3d 333, 343 (2008)). See also *Carney*, 2016 IL 118984 ¶ 61 (quoting *Connaghan v. Caplice*, 325 Ill. App. 3d 245, 250 (2001) (" 'the right to stop the work, tell the contractors to be careful, and change the way something [is] being done if [the defendant] felt something was unsafe' does not establish sufficient control for purposes of section 414"). Accordingly, evidence of Mr. Cleary's postaccident remedial safety measures is insufficient, as a matter of law, to establish a duty to plaintiff under section 414.

¶ 60 Next, plaintiff argues that the circuit court erred when it found no evidence that Cleary had actual or constructive notice of the unsafe condition of the roof or of Waikato's unsafe work practices. In support, plaintiff cites comment b to section 414, which states:

> "The rule stated in this Section is usually, though not exclusively, applicable when a principal contractor entrusts a part of the work to subcontractors, but himself or through a foreman superintends the entire job. In such a situation, the principal contractor is subject to liability if he fails to prevent the subcontractors from doing even the details of the work in a way unreasonably dangerous to others, if he knows or by the exercise of reasonable care should know that the subcontractors' work is being so done, and has the opportunity to prevent it *by exercising the power of control which he has retained in himself*. So too, he is subject to liability if he knows or should know that the subcontractors have carelessly done their work in such a way as to create a dangerous condition, and fails to exercise reasonable care either to remedy it himself or by the exercise of his control cause the subcontractor to do so." (Emphasis added.) Restatement (Second) of Torts § 414, Comment b, at 387-88 (1965).

¶ 61 This court has held that "comment b of section 414 comes into play" only "[w]hen the hiring entity has retained some degree of control over the manner in which the work is done by the subcontractor." *Gerasi v. Gilbane Building Co., Inc.*, 2017 IL App (1st) 133000, ¶ 45. We premised our holding on the emphasized language in comment b to section 414, which expressly states that the general contractor's liability for preventing the subcontractors from doing unreasonably dangerous work of which he was, or should have been aware, is premised on his failure to exercise "the power of control which he has retained in himself." *Id.* (citing Restatement (Second) of Torts § 414, Comment b, at 387-88 (1965)). We also cited *Carney*, noting that "[b]ecause *Carney* found, as a matter of law, that the owner did not retain control over the subcontractor's work, our supreme court was not required to address the issue of notice, which is relevant only if retained control is found to exist." *Id.* ¶ 54.

¶ 62 Thus, in the present case, the question of notice is irrelevant to our consideration, given our previous conclusion that, as a matter of law, Cleary did not retain control of the work in question performed by Waikato.

¶ 63 For the foregoing reasons, we affirm the circuit court.

¶ 64 Affirmed.