2018 IL App (1st) 171170-U

SIXTH DIVISION
August 17, 2018

No. 1-17-1170

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MIGUEL CRUZ, Plaintiff-Appellant, v. POWER CONSTRUCTION COMPANY, LLC, and BREAK THRU ENTERPRISES, INC., Defendants-Appellees.	))))))))))	Appeal from the Circuit Court of Cook County. No. 15 L 03040 Honorable Kathy M. Flanagan, Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Justices Cunningham and Delort concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court properly entered summary judgment in favor of defendants where general contractor did not retain control over any part of plaintiff's work, general contractor was not liable for premises liability, and subcontractor did not proximately cause plaintiff's injury; affirmed.

¶ 2 Plaintiff, Miguel Cruz, was injured after falling at a construction site. Plaintiff sued several defendants, including Power Construction Company, LLC (Power) and Break Thru Enterprises, Inc. (Break Thru), for construction negligence pursuant to section 414 of the Restatement (Second) of Torts, premises liability pursuant to section 343 of the Restatement (Second) of Torts, and ordinary negligence. The trial court granted summary judgment in favor

of defendants, and plaintiff now appeals. Plaintiff contends on appeal that Power retained control over the construction work, Power had notice of the unsafe working conditions, and Break Thru's actions and omissions proximately caused plaintiff's injuries. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 Plaintiff was injured on September 19, 2012, while working as a roofer for Combined Roofing at a project for Edward Health Services Corporation. Plaintiff filed a 12-count second amended complaint against Power, the general contractor; Celtic Environmental, Inc., a subcontractor; and Break Thru, a subcontractor. In his complaint, plaintiff alleged in part that defendants failed to operate the roof he was working on in a safe manner, failed to provide proper fall protection, allowed demolition work in the same area as plaintiff's roofing work, failed to properly clean up debris after demolition work, and failed to provide a safe surface from which plaintiff could work.

¶ 5 The defendants filed answers to the second amended complaint denying all material allegations contained therein, and filed a third-party complaint for contribution against plaintiff's employer, Combined Roofing. The parties engaged in lengthy discovery, which included all relevant contracts as well as several depositions.

¶ 6 Plaintiff testified in his deposition that on the date in question, he anchored his rope before tying it to his safety harness. There was a pile of bricks nearby that had been recently removed by Break Thru. Plaintiff testified that he did not slip on the pile of bricks, but rather slipped on glue that he was using to secure waterproofing to the wall. Plaintiff testified that when his rope was attached to his harness, he climbed under the safety railing and stepped onto a narrow ledge formed by the remaining bricks of the partially-demolished parapet below. The

ledge he was standing on was only as wide as one layer of bricks – about three or four inches. Plaintiff testified that he stood on this narrow ledge as he applied glue with a brush or roller to the inner wall in sections three or four feet wide at a time.

¶ 7 Genero Cruz, plaintiff's brother and the foreman for Combined Roofing, testified that he stood on a step ladder on the lower roof and handed plaintiff sections of waterproofing membrane from the lower roof below. Plaintiff testified that he had to bend down to grab the membrane from Cruz, and that the sheets of waterproofing membrane were approximately three or four feet wide and almost as tall as plaintiff. He affixed the membrane over the glue using both hands, relying on nothing but his balance and the rope to keep him from falling. Plaintiff testified that no one had instructed him to walk on the ledge in order to perform his work.

¶ 8 Plaintiff testified that he had been performing this work for about three hours when he slipped and fell. He had taken a sheet of the membrane in both hands and was preparing to affix it to the wall when he slipped on the glue and lost his balance. Plaintiff testified that in order to do his work, he had to position the rope of his fall protection around the pile of bricks, and that he did not position the rope over the bricks because that would damage the rope. Plaintiff further testified that he fell about 7 to 12 feet and landed on the lower roof. Plaintiff's testimony was that his rope never tightened to stop his fall because the rope just moved the bricks instead.

¶ 9 Cruz testified that he did not have scaffolding or a step ladder for plaintiff because they were just working with what was there, and that he did not ask anyone for that material. When asked why he did not use scaffolding or a step ladder, plaintiff stated, "Power would not allow us to use it."

¶ 10 Combined Roofing's project manager, Adam Petry, testified in his deposition that plaintiff should not have been standing on that narrow ledge. Petry testified that plaintiff should

have had more than one anchor point while doing his work, because a worker "can only work a certain distance from [his] anchor point without being outside of that 30-degree angle," and that steeper angles create an excessive "swing radius." Petry further testified that an excessive swing radius could cause a worker to fall all the way to the ground in the event of a fall. Petry submitted an incident report that stated, "Employee was tied off with harness and a rope outside the guardrails when he lost his balance and fell. The employee was approximately seven feet in the air. The rope lifeline engaged during the fall." Petry further reported plaintiff's description of the incident, which was that the "pile of bricks at top of the wall created more slack in the rope than employee was aware of. GC reinforced need for cleanup with demo contractor."

¶ 11 Petry testified that it was up to plaintiff and Cruz to determine how to safely work the project, and that Combined Roofing was responsible for sending experienced workers to the project. In his opinion, plaintiff should not have been on the narrow ledge and should not have placed his fall protection over the pile of demolished bricks. Petry also testified that Power did not provide any fall protection to Combined Roofing.

¶ 12 Matt Curan, Power's Site Safety Coordinator, completed the incident report after plaintiff's fall. He testified that subcontractors are responsible for overseeing their own safety practices and that any debris that was left in an area on the project was considered acceptable and safe, as long as it was cordoned off with barricades or tape.

¶ 13 Russ Gabbert, the superintendent of Break Thru, testified that Break Thru was hired to demolish portions of the existing structure, including brick parapet walls. Break Thru's site foreman made the decisions regarding where the bricks were placed after they were removed from the building. Gabbert testified that Power restricted the times when debris could be

removed. Gabbert stated that Power had time slots for each subcontractor for when it could remove debris.

¶ 14 Curt Pippinger, Break Thru's foreman, testified that Break Thru set the demolished bricks in orderly piles, making sure the piles did not obstruct movement on the walkways. Because the hospital was functioning throughout construction, there were set times for Break Thru to demolish materials. Pippinger testified that if Break Thru had demolished materials at the end of the day waiting for disposal, Break Thru would gather the material into a pile and place a caution flagging system around the pile of bricks. Pippinger testified that he alone supervised his employees and that he provided all instruction to them, including toolbox talks every Monday morning. If any worker had a question about how to perform the work, the worker would approach Pippinger.

¶ 15 Following discovery, Power moved for summary judgment as to the claims against it, arguing that plaintiff fell because he lost his balance after slipping on glue, not due to any conditions at the site. Power argued that there was no proximate cause and that it owed no duty under section 414 of the Restatement (Second) of Torts. It also stated in its motion that it did not control the work of Break Thru or Combined Roofing, and that it did not assume a supervisory role over the work of any subcontractor or over safety at the site. Power also maintained that it had no liability under section 343 of the Restatement (Second) of Torts because there was no dangerous condition on the premises and it did not have notice of a dangerous condition.

¶ 16 Break Thru also moved for summary judgment, contending that it owed no duty under section 414 of the Restatement (Second) of Torts because it did not retain control of any part of Combined Roofing's work. It also contended that it did not create any dangerous conditions on the site and did not breach any duty to plaintiff, noting that plaintiff did not trip over or get hurt

by any bricks, but rather he slipped on glue. Break Thru further contended that it did not possess or control the property, and thus owed no duty under section 343 of the Restatement (Second) of Torts. Break Thru also argued that plaintiff's ordinary negligence claim should fail because it followed the general contractor's instructions and did not breach any duty owed to plaintiff. Break Thru maintained that there was no causal connection between the bricks and plaintiff's fall, and that there was no evidence that any bricks or other debris had anything to do with plaintiff's fall.

¶ 17 Plaintiff filed a combined response, stating that he was forced to perform work on a narrow ledge, and that his fall protection was obstructed and interfered with because defendants left piles of loose, demolished bricks and other debris. Plaintiff argued that Power had control over safety at the site, and that it issued safety rules that every contractor was required to follow. Plaintiff asserted that Power had a safety coordinator on the site daily, and that it had the authority to control the means and methods of his work. Plaintiff argued that Break Thru was required by Power to clean the area of debris and that Power and Break Thru knew or should have known of the dangerous working conditions, narrow works surface, loose piles of bricks and debris, and improper fall protection. Plaintiff maintained that Break Thru created unsafe working conditions and Break Thru owed a duty of ordinary care to plaintiff.

¶ 18 The trial court issued a written memorandum and order on March 8, 2017. The trial court found that in regard to Power, the evidence in the record showed that it did not retain control over the means and methods or operative details of plaintiff's or any subcontractor's work. The trial court stated that while Power promulgated safety rules and had a safety coordinator at the site, the evidence failed to show that Power was aware of any dangerous condition with regard to

the work surface or fall protection. The trial court found that Power was entitled to summary judgment as to the claims of construction negligence under section 414.

¶ 19 The trial court also found that with regard to section 343 of the Restatement (Second) of Torts, there was no evidence that Power was aware of any dangerous condition with regard to the work surface or fall protection, and although Power knew about the existence of the cordoned-off piles of demolished bricks, there was no evidence that it knew that the bricks posed an unreasonable risk of harm to plaintiff. Accordingly, the trial court found that Power was entitled to summary judgment on the section 343 claim.

¶ 20 The trial court further found that summary judgment was appropriate for Power on the ordinary negligence claim, because there was no basis in the record to impose a duty on Power under the circumstances. The trial court found that there was nothing in the record that provided a causal nexus between any act or omission on the part of Power and plaintiff's fall.

¶ 21 With regard to Break Thru, the trial court stated that plaintiff "essentially concedes that there is no liability under section 414," and that there was nothing in the record that supported section 414 liability against Break Thru. The trial court noted that there was also no evidence that Break Thru was aware of plaintiff's working conditions, his work surface, or his use and adequacy of fall protection. The trial court stated that there was no evidence of a causal nexus between the location of the bricks and plaintiff's fall, especially in light of plaintiff's testimony that he slipped on glue, which caused his fall, and that the bricks did not move and his line did not get caught on any bricks. The trial court stated that there was simply no evidence to support proximate cause, and as such, the ordinary negligence claim would fail. Accordingly, the trial court found that summary judgment would be appropriate for Break Thru on all claims.

¶ 22 Plaintiff then filed a motion to reconsider, which the trial court denied, reiterating its determination that plaintiff provided no evidence of supervision, notice, or proximate cause. Plaintiff now appeals.

¶ 23 ANALYSIS

¶ 24 On appeal, plaintiff contends that the trial court improperly granted summary judgment to defendants where he presented evidence that Power, the general contractor, retained control over the work of its subcontractors, had notice of the unsafe working conditions, and Break Thru's actions and omissions proximately caused plaintiff's injuries. As an initial matter, we address defendant's claim that plaintiff's fact statement contains improper argument. It is true that plaintiff's fact statement contains bolded headings like, "The Deposition Testimony and Defendant Power's Safety Requirements Confirm Power Retained Control Over the Construction Work, Including Control for Overall Safety for the Project," and "Subcontractor Defendant Break Thru Also Created the Unsafe Working Conditions that Violated the Contract and Safety Manual and Caused the Accident." This is improper.

¶ 25 Illinois Supreme Court Rule 341(h)(6) (eff. May 25, 2018) states that the statement of facts shall "contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment." The procedural rules governing the content and format of appellate briefs are mandatory. *Voris v. Voris*, 2011 IL App (1st) 103814, ¶ 8. However, while portions of plaintiff's statement of facts are argumentative, and while we have discretion to strike a brief and dismiss an appeal for failure to comply with the applicable rules of appellate procedure, we nonetheless find that the violations do not interfere with our review, and therefore dismissal is not appropriate. *In re Detention of Powell*, 217 Ill. 2d 123, 132 (2005). We now turn to the merits of this case.

¶ 26 Summary judgment is appropriate only where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2014). In determining whether a genuine issue of material facts exists, we construe the pleadings, depositions, admissions, and affidavits strictly against the moving party and liberally in favor of the nonmoving party. *Mashal v. City of Chicago*, 2012 IL 112341, ¶ 49. A genuine issue of material fact exists "where the material facts are disputed or, if the material facts are undisputed, reasonable persons might draw different inferences from the undisputed facts." *Id*. We review summary judgment rulings *de novo*. *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 13.

¶ 27 "To state a cause of action for negligence, a complaint must allege facts that establish the existence of a duty of care owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately caused by that breach." *Marshall v. Burger King Corp*., 222 Ill. 2d 422, 430 (2006). "The question of the existence of a duty is a question of law, and in determining whether a duty exists, the trial court considers whether a relationship existed between the parties that imposed a legal obligation upon one party for the benefit of the other party." *Sameer v. Butt*, 343 Ill. App. 3d 78, 85 (2003). In contrast, "whether a defendant breached the duty and whether the breach was the proximate cause of the plaintiff's injuries are factual matters for the jury to decide, provided there is a genuine issue of material fact regarding those issues." *Marshall*, 222 Ill. 2d at 430. "In the absence of a showing from which the court could infer the existence of a duty, no recovery by the plaintiff is possible as a matter of law and summary judgment in favor of the defendant is proper." *Vesey v. Chicago Housing Authority*, 145 Ill. 2d 404, 411 (1991).

¶ 28 In the context of a construction-related injury, courts analyze whether there is common law negligence under section 414 of the Restatement (Second) of Torts. *Kotecki v. Walsh Construction Co*., 333 Ill. App. 3d 583, 587 (2002).

¶ 29 Section 414 – Retained Control

¶ 30 Generally, it is the rule in Illinois that a party who entrusts an independent contractor will not be held vicariously liable for tortious acts or omissions committed by the independent contractor. *Fonseca v. Clark Construction Group, LLC*, 2014 IL App (1st) 130308, ¶ 26. "This is because one who hires an independent contractor usually does not supervise the details of the contractor's work and is therefore not in a good position to prevent the contractor from acting negligently." *Madden v. F.H. Paschen*, 395 Ill. App. 3d 362, 381 (2009). However, if sufficient control is exercised over the independent contractor, then that rule no longer applies and section 414 of the Restatement (Second) of Torts is triggered. *Id*. at 382. Section 414 states:

> "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 his caused by his failure to exercise his control with reasonable care." Restatement (Second) of Torts § 414 (1965).

¶ 31 In *Larson v. Commonwealth Edison Co*., 33 Ill. 2d 316, 325 (1965), our supreme court implicitly recognized section 414 of the first Restatement of Torts as an expression of Illinois common law. Section 414 of the first Restatement is identical to section 414 of the second Restatement, with the exception that the latter contains an additional comment. *Carney v. Union Pacific Railroad Company*, 2016 IL 118984, ¶ 36; compare Restatement of Torts § 414 (1934), with Restatement (Second) of Torts § 414 (1965). Section 414 articulates a basis only for

imposing direct liability – because an employer of an independent contractor is typically not answerable for the contractor's negligence, "the employer's liability must be based upon his own personal negligence." Restatement (Second) of Torts, Ch. 15, Topic 1, Introductory Note, at 371 (1965). "Section 414 sets forth one way in which an employer of an independent contractor may be negligent and, thus, directly liable for physical harm to others." *Carney*, 2016 IL 118984, ¶ 36.

¶ 32 Comment *a* of section 414 states:

> "If the employer of an independent contractor retains control over the operative detail of doing any part of the work, he is subject to liability for the negligence of the employees of the contractor engaged therein, under the rules of that part of the law of Agency, which deals with the relation of master and servant. The employer may, however, retain a control less than that which is necessary to subject him to a liability as master. He may retain only the power to direct the order in which the work shall be done, or to forbid its being done in such a manner likely to be dangerous to himself or others. Such a supervisory control may not subject him to liability under the principles of Agency, but he may be liable under the rule stated in this Section unless he exercises his supervisory control with reasonable care so as to prevent the work which he has ordered to be done from causing injury to others." Restatement (Second) of Torts, § 414, cmt. a, at 387 (1965).

¶ 33 Accordingly, the question becomes whether Power retained sufficient control over its subcontractors, Break Thru and Combined Roofing, such that direct liability might attach under section 414. *Carney*, 2016 IL 118984, ¶ 38. The issue of a defendant's retained control may be decided as a matter of law where the evidence is insufficient to create a factual question. *Id.* ¶ 41.

"The best indicator of whether the defendant retained control sufficient to trigger the potential for liability under section 414 is the written agreement between the defendant and the contractor." *Id.* "But even if the agreement provides no evidence of retained control by the defendant, such control may yet be demonstrated by evidence of the defendant's conduct at variance with the agreement." *Id.*

¶ 34 Plaintiff argues that under Power's contract with the owner of the hospital, Edward Health Services Corporation, it retained control over the construction work, including control for overall safety of the project. Specifically, plaintiff points to the "General Conditions" section of the contract, which stated that Power "shall supervise and direct the Work using [Power's] best professional skill and attention." It also stated that Power "shall" be "solely responsible for all construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work."

¶ 35 We find that these provisions are part of the general rights reserved to a company like Power that employs a subcontractor, rather than evidence that Power retained control over the manner in which work by the subcontractors was performed. In *Carney*, our supreme court found that the language in the contract allowing the defendant to terminate the contract if defendant deemed the subcontractor's services to be unsatisfactory, a provision rrequiring the work by the subcontractor to be done in a workmanlike manner to the satisfaction of the defendant, and a provision giving the defendant the right to stop the work or make changes, as the interests of defendant required, were all provisions that were part of the general rights reserved to someone who employs a contractor, rather than evidence that the defendant retained control over the manner in which work by the subcontractor was performed. 2016 IL 118984, ¶ 46.

¶ 36 Likewise, in *LePretre v. Lend Lease Construction, Inc.*, the contract stated that Lend Lease would 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. 2017 IL App (1st) 162320, ¶ 31. And this court found that the provisions were part of the general rights reserved to someone like Lend Lease who employed a contractor, rather than evidence that Lend Lease retained control over the manner in which the subcontractor's work was performed. *Id*. ¶ 32.

¶ 37 Moreover, as comment *c* to section 414 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." Restatement (Second) of Torts § 414 cmt. c, at 388 (1965).

¶ 38 We find nothing in these provisions indicating that Power retained supervisory control such that Combined Roofing and Break Thru were not entirely free to do the work in their own way. Plaintiff's reliance on *Maggi v. RAS Development, Inc*., 2011 IL App (1st) 091955, does not convince us otherwise. While the provisions of the contract in *Maggi* were almost identical to the general provisions in our case, the court on appeal held that "the jury had sufficient evidence

to find the defendant vicariously liable because it retained control over the safety of the site ***." *Id.* ¶ 45. However, five years after *Maggi* was decided, our supreme court stated, citing *Maggi*, "Many appellate court decisions *** have cited section 414 of the Restatement as a basis for imposition of both direct liability and vicarious liability against the employer of an independent contractor." *Carney*, 2016 IL 118984, ¶ 36. The rule in section 414 sets out only a basis for imposing direct liability. *Id.* Accordingly, we find *Maggi* to be inapposite to the case at bar.

¶ 39 We find the recent case of *Snow v. Power Construction Company, LLC*, 2017 IL App (1st) 151226, to be more applicable. In *Snow*, the contract provisions were almost identical, and Power was the general contractor in that case as well. This court found that the contracts "showed that each subcontractor was responsible for all labor, materials, tools equipment, and supervision and to do all things necessary for the proper and complete performance of the work." *Id*. ¶ 55. This court noted that the deposition testimony and contracts established that Power reserved the right to start, stop, and inspect the progress of the work, but that each "subcontractor had control over the means and methods of the work performance." *Id*.

¶ 40 Plaintiff also relies on provisions in the contract related to job safety as evidence of Power's retained control. For example, plaintiff cites to a provision that states Power "shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the Work." Plaintiff also cites to provisions that state: (1) Power shall designate a responsible member at the project site whose duty shall be the promotion of safety and prevention of accidents; (2) Power shall take all reasonable precautions for the safety of, and provide all reasonable protection to prevent damage, injury or loss to, all of its employees at the project site and all other persons who may be affected; and (3) Power shall erect and maintain all

reasonable safeguards for safety and protection including posting danger signs, hard hat area signs, and other warnings against hazards.

¶ 41 "A general right to enforce safety, however, does not amount to retained control under section 414." *Carney*, 2016 IL 118984, ¶ 47 (citing *Joyce v. Mastri*, 371 Ill. App. 3d 64, 74 (2007)). "The mere existence of a safety program, safety manual, or safety director is insufficient to trigger [section 414]." *Madden*, 395 Ill. App. at 382. "Even if the general contractor retains the right to inspect work, orders changes to the plans, and ensures that safety precautions are observed and the work is done safely, the general contract contractor will not be held liable unless the evidence shows that the general contractor retained control over the incidental aspects of the independent contractor's work." *Fonseca*, 2014 IL App (1st) 130308, ¶ 38. Moreover, the contracts between Power and its subcontractors stated that it was the subcontractor's responsibility to ensure compliance with all safety requirements.

¶ 42 In *Carney*, the plaintiff cited three provisions in the contract: (1) the defendant could require the removal of equipment used by the subcontractor that the defendant determined was unsafe for use on its right-of-way; (2) the defendant could require the subcontractor to remove any employee or subcontractor's employee if not acceptable to the defendant; and (3) the defendant required protective gear, such as hard hats and reflective vests. *Id*. Our supreme court found that none of these provisions indicated that the defendant retained control under section 414, and moreover, the contract specifically placed the subcontractor in change of keeping "the job site free from safety and health hazards and ensur[ing] that its employees [were] competent and adequately trained in all safety and health aspects of the job." *Id*.

¶ 43 Similarly in *LePretre*, the contract at issue stated that the defendant Lend Lease "shall take reasonable precautions for the safety of, and shall provide reasonable protection to prevent

damage, injury, or loss to *** employees on the work site and other persons who may be affected thereby." 2017 IL App (1st) 162320, ¶ 31. We found that such language was not enough to show that the defendant retained control, and we likewise find the same here. In sum, we find nothing in the contract indicating that Power retained control such that the subcontractors were not entirely free to do the work in their own way.

¶ 44 Plaintiff also contends that Power's conduct evidences retained control over the work of its subcontractors. Specifically, plaintiff argues that Power solely scheduled and sequenced the subcontractors' work and the construction work, thereby exercising control over the order in which the work was done. Plaintiff also points to testimony that Power staff walked the jobsite daily and conducted safety inspections, as well as required the employees of the subcontractors to attend initial safety meetings. Finally, plaintiff contends that Power retained control over the work where Power specifically ordered Combined Roofing not to use scaffolds or ladders for the waterproofing membrane work in question.

¶ 45 However, after reviewing the deposition testimony, we find that Power did not retain control over the work via its conduct. Plaintiff testified that his employer, Combined Roofing, gave him instructions each day through its foreman, Genero Cruz. If plaintiff had any questions about his work, he asked the foreman of Combined Roofing. If he needed any additional tools, he would go through his foreman. Plaintiff testified that Combined Roofing held toolbox talks once a week for its employees on the job, and that a "safety person" from Combined Roofing would come to the project from time to time to make sure the Combined workers were safely doing their jobs. Plaintiff also testified that he was responsible for choosing where to anchor his fall protection safety rope.

¶ 46 Adam Petry, the project manager for Combined Roofing, testified that it was the responsibility of plaintiff and the foreman to determine how to safely work. Petry further testified that Combined Roofing provides its employees with the specific fall protection it is going to use on a job. Petry testified that Combined Roofing provides training on a regular basis on how to safely use the harness and lanyard systems. Petry testified that Power did not provide any fall protection to Combined, and that it was Combined's responsibility to determine how to perform its work at the site, and that the means and methods were up to Combined.

¶ 47 Further, Break Thru's foreman, Curt Pippinger, testified that any means and methods of Break Thru's work were up to Break Thru, and that he alone supervised his employees and provided all instruction to his crew. Power's superintendent Dave Solka testified that he never stopped the work of Combined and that it was up to Break Thru to determine how it would conduct the demolition work and that it was up to Break Thru to determine how to handle any demolished material. Matt Curan, the Site Safety Coordinator for Power, testified that the subcontractors were responsible for overseeing their own safe practices.

¶ 48 We find the testimony in this case to be similar to the testimony presented in *LePetre*. In that case, the defendant's superintendent testified in his deposition that the subcontractors determined their own means and methods by which they performed their work, and defendant delegated its trade-specific safety and workmanship to the subcontractors. *LePetre*, 2017 IL App (1st) 162320, ¶ 44. One of the subcontractor's superintendents testified in his deposition that he did not recall ever hearing anyone from the defendant instructing anyone from the subcontractors on how to do their work, and that the subcontractors were responsible for cleaning up if there was debris in the work area. *Id*. Workers for one of the subcontractor testified in their depositions that the only time someone from the defendant company spoke to them was during the safety

orientation on their first day. *Id*. The plaintiff testified that he took directions from his employer's superintendent, and that he did not take directions from anyone employed by the defendant regarding how to install steel, what materials to use, or where to work. *Id*. The plaintiff also testified that the defendant never stopped his work for safety reasons and did not provide safety direction specifically relating the work he was doing. *Id*.

¶ 49 Similarly here, plaintiff testified that Combined's foreman gave him work orders every day, and that if plaintiff needed instruction, his foreman would provide it. Plaintiff also testified that Combined would provide him with any necessary tools, materials, and fall protection. Plaintiff testified that if he had a question on the jobsite, he would go to his foreman, and that once plaintiff got to the job site each day, he would wait for his foreman to arrive to give him instruction. Genero Cruz, Combined's foreman, testified that no one from Power helped him with the work of Combined, and that Combined conducted its own toolbox talks.

¶ 50 Finally, to support his argument that Power retained control of the work, plaintiff points to Power's post-accident conduct, where Power formally investigated the incident and ordered Break Thru to remove the bricks from the jobsite daily. Although 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. Combined's foreman, Genero Cruz, testified in his deposition that "Yeah, they were moving daily," when asked, "After the accident, did they – did Power have Break Thru start removing the bricks?" We find that this evidence indicates that Power only sought to avoid another accident by investigating what happened and suggesting a different way to complete the work. Such conduct is insufficient to establish a duty under section 414.

¶ 51 In sum, we find that the contract provisions and deposition testimonies confirm that Power retained insufficient control over the work of its subcontractors for liability to attach under section 414. We note, as did our supreme court in *Carney*, that "[t]o hold otherwise would penalize a defendant's safety efforts by creating, in effect strict liability for personal injury to any job site employee." *Carney*, 2016 IL 118984, ¶ 61. See also *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 retention of control for purposes of section 414).

¶ 52 Plaintiff's reliance on *Lederer* does not convince us otherwise. In *Lederer*, a case that was called into question by our supreme court in *Carney*, the defendant's safety manual specifically prohibited the use of "stilts" by the general contractor or the subcontractor. *Lederer*, 2014 IL App (1st) 123170, ¶¶ 57-58. The court found that although a mere existence of a safety program, safety manual, or safety director was insufficient, standing alone, to impose liability under the retained control exception, the defendant specifically prohibited one means or method of performing the work, which was enough to subject it to liability. *Id*. Evidence in the record showed that laborers looked to the defendant to remedy a safety hazard and that the defendant had a strong presence on the site inspecting safety precautions. *Id*.

¶ 53 These facts are simply not present in the case at bar. Plaintiff contends that Power prohibited the use of scaffolding, which is akin to the defendant in *Lederer* prohibiting the use of stilts. We note that in *Lederer*, the prohibition of the use of stilts was in the defendant's safety manual. Here, there is no such allegation. Rather, the only evidence plaintiff points to the following colloquy that occurred during his deposition:

"Q: Who instructed you to walk on that ledge in order to perform your work?

A: No one.

Q: Why didn't you use a ladder or a scaffold to perform your work?

A: Because we were not allowed to use them.

Q: When you say we were not allowed to use them, what do you mean?

A: Power would not allow us to use it."

¶ 54 Besides this statement by plaintiff, there is no other indication in the record that Power prohibited the use of ladders or scaffolding, or that such use would be appropriate in this case. Plaintiff does not allege that this policy was in Power's safety manual, nor does plaintiff allege which specific person from Power stated that scaffolds or ladders were prohibited. Moreover, there is no indication in the record that scaffolding or ladders would be practical for this type of work, or that Combined requested scaffolding or ladders.

¶ 55 The evidence here fails to indicate sufficient control by defendant over plaintiff's work under the retained control exception of section 414, and thus plaintiff fails to raise a factual question necessary to survive summary judgment. See *Carney*, 2016 IL 118984, ¶ 41 ("The issue of a defendant's retained control may be decided as a matter of law where the evidence is insufficient to create a factual question.") Because we find that Power had no duty to plaintiff under section 414 of the Restatement (Second) of Torts, we need not address the issue of proximate cause as to Power. See *American National Bank & Trust Co. v. National Advertising Co.*, 149 Ill. 2d 14, 24 (1992) (to prevail in a negligence action, a plaintiff must prove that defendant owed a duty of reasonable care to the plaintiff, and that defendant breached the duty, and that the breach was the proximate cause of the plaintiff's injury); *Kotecki*, 333 Ill. App. 3d at 587 (in the context of a construction-related injury, courts analyze where there is common law negligence under section 414 of the Restatement (Second) of Torts).

¶ 56 Section 343 – Dangerous Conditions on the Land

¶ 57 We now turn to plaintiff's premises liability claim under section 343 of the Restatement, which our supreme court adopted in *Genaust v. Illinois Power Co*., 62 Ill. 2d 456, 468 (1976). Section 343 states:

> "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).

¶ 58 While it is true that a possessor of land, including a general contractor, owes its invitees a common law duty of reasonable care to maintain its premises in a reasonably safe condition, "it is axiomatic that no legal duty arises unless the harm is reasonably foreseeable." *Clifford v. Wharton Business Group, LLC*, 353 Ill. App. 3d 34, (2004). Our supreme court noted that "persons who own, occupy, or control and maintain land are not ordinarily required to foresee and protect against injuries from potentially dangerous conditions that are open and obvious." *Bucheleres v. Chicago Park District*, 171 Ill. 2d 435, 447-48 (1996).

¶ 59 Here, plaintiff alleges that the dangerous condition on the land was comprised of the narrow work surface, improper fall protection, and piles of demolished bricks and debris. However, there is simply no evidence in the record that Power was aware of any dangerous condition with regard to the work surface or the fall protection. Although Power knew about the

existence of the pile of demolished bricks, there is no evidence that Power knew the bricks posed an unreasonable risk of harm to plaintiff. Power's superintendent, Solka, testified in his deposition that he did not receive any complaints about the work of Break Thru. There is no indication from the record that any complaints were made about unsafe working conditions. Moreover, plaintiff testified that he slipped on glue, not on bricks. While he claims his fall protection did not work due to the placement of the bricks, there is nothing in the record to indicate that this was foreseeable to Power. There was nothing dangerous about the pile of bricks, and Power had no reason to foresee that plaintiff would tie his rope around the pile of bricks in the manner he did.

¶ 60 Ordinary Negligence – Break Thru

¶ 61 Plaintiff's final contention is that Break Thru's actions were the proximate causes of plaintiff's injuries, and therefore the trial court's grant of summary judgment in Break Thru's favor on his ordinary negligence claims was in error. To prevail in a negligence claim, a plaintiff must prove that the defendant owed a duty of reasonable care to the plaintiff, the defendant breached the duty of reasonable care to the plaintiff, and the breach was the proximate cause. *American National Bank & Trust Co.*, 149 Ill. 2d at 24. Generally, proximate cause is an issue of material fact to be determined by the trier of fact, but proximate cause may be determined as a matter of law where the facts show that the plaintiff would never be entitled to recover. *Wilfong v. L.J. Dodd Construction*, 401 Ill. App. 3d 1044, 1051 (2010). Proximate cause consists of two requirements: cause in fact and legal cause. *Id*. at 258. For a defendant's conduct to be a "cause in fact" of the plaintiff's injury, the conduct must constitute "a material element and a substantial factor in bringing about the injury." *Id*. If the plaintiff's injury would not have occurred absent the defendant's conduct, then the conduct forms a material element and substantial factor in

bringing about the injury. *Id*. On the other hand, "legal cause" involves an assessment of foreseeability and the court must consider whether the injury is of the type that a reasonable person would see as a likely result of his or her conduct. *Id*.

¶ 62 To establish proximate cause, the plaintiff bears the burden of "affirmatively and positively show[ing] that the defendant's alleged negligence caused the injuries for which the plaintiff seeks to recover. *Bermudez v. Martinez Trucking*, 343 Ill. App. 3d 25, 29 (2003). Liability against a defendant cannot be predicated on speculation, surmise, or conjecture. *Mann v. Producer's Chemical Co*., 356 Ill. App. 3d 967, 974 (2005). Thus, the plaintiff must establish with "reasonable certainty" that the defendant's acts or omissions caused the injury. *Id*.

¶ 63 Here, plaintiff contends that the pile of demolished bricks left in his work area by Break Thru was the proximate cause of his injury. Specifically, plaintiff alleges that his fall protection of a rope failed because the bricks were obstructing its use, requiring plaintiff to place the rope around the bricks, thereby increasing its length. Plaintiff contends that the pile of bricks obstructed a direct pathway from plaintiff to the anchor beam, and that as a result, plaintiff was required to position his rope grab line around the bricks to tie up to the anchor being. Plaintiff alleges that by doing so, the fall protection rope was too long and did not stop plaintiff's fall.

¶ 64 However, in plaintiff's deposition, when asked whether at any point between when plaintiff got on the ledge, and the point that he fell, did the pile of bricks in any way shift or move, plaintiff responded, "No." Plaintiff further testified that his line did not get hooked on or caught under any bricks. He testified that his line was taut and had little slack. Accordingly, plaintiff's testimony, even when viewed in a light most favorable to plaintiff, that the bricks prevented his rope from tightening, is not supported by any evidence. There is simply no explanation for how the pile of bricks prevented his rope from working properly. Moreover,

plaintiff specifically testified that he only anchored his rope to one point for the three hours he was working. Petry testified that this use of the fall protection was improper where it created a swing radius that was too large. Petry further testified that it was plaintiff's responsibility to determine how much slack he had in his fall protection. Petry stated that it was not safe to place a rope that was part of the fall protection system over the pile of bricks, and that from his training and experience working for Combined Roofing, he would have checked for other anchor points or had someone move the bricks before working. Plaintiff's testimony that the bricks moved during his fall does not raise a general issue of material fact connecting the pile of bricks to his fall. Accordingly, we find that there was no proximate cause on the part of Break Thru.

¶ 65 CONCLUSION

¶ 66 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 67 Affirmed.