2012 IL App (1st) 110753-U

THIRD DIVISION
March 28, 2012

No. 1-11-0753

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PATRICK J. LINSNER	)	Appeal from the
	)	Circuit Court of
	)	Cook County
Plaintiff-Appellant,	)	
	)	
v.	)	
	)	No. 05 L 12107
EXELON CORPORATION and	)	
EXELON ENERGY DELIVERY CO., LLC	)	
	)	
	)	Honorable
Defendants-Appellees.	)	Marcia Maras,
	)	Judge Presiding.

JUSTICE SALONE delivered the judgment of the court.
Presiding Justice Steele and Justice Murphy concurred in the judgment.

ORDER

HELD: Plaintiff filed a personal injury action against defendants, alleging liability on the theories of direct participant liability and voluntary undertaking. The trial court properly granted defendants' motion for summary judgment, as there was no genuine issue of material fact that defendants were not liable under either theory.

¶ 1 Plaintiff, Patrick J. Linsner, filed a personal injury action against defendants, Exelon Corporation and Exelon Energy Delivery Co., LLC. The complaint alleged that plaintiff was injured while working as a construction mechanic for Commonwealth Edison (ComEd), a subsidiary of defendants, and that defendants were liable to plaintiff for his injuries on the theories of direct participant liability and voluntary undertaking. Defendants moved for summary judgment, which was granted by the circuit court. Plaintiff now appeals. For the reasons that follow, we affirm the judgment of the circuit court.

¶ 2 BACKGROUND

¶ 3 During the pretrial phase of this case, the parties took the depositions of several individuals, and also collected various documents relevant to this action. The background set forth here is derived from these sources.

¶ 4 Defendant Exelon Energy Delivery Company LLC (EED) is a subsidiary of Exelon Corp. Exelon was formed as a holding company in the late 1990's and has no employees.[1] EED, in turn, is the parent company of ComEd. EED has no physical assets other than its ownership interest in ComEd and one other out-of-state energy company. EED was established to set strategies for the utilities to improve operational performance, especially as related to the reliability of energy delivery. To meet these goals, EED would, for example, monitor and improve storm response time as well as improve preventive maintenance programs and safety procedures. EED, however, is not tasked with

[1]Although plaintiff refers to defendants as "Exelon/EED," he makes no effort to distinguish between these two entities, nor to specifically tie Exelon to any specific activity. Because plaintiff has adduced no evidence of Exelon's involvement in any conduct connected to plaintiff's injury, we will hereafter refer to EED as the defendant in this action.

improving Com Ed's profitability, and it made no cuts in ComEd's safety budget or training; instead, Com Ed's maintenance budget has increased.

¶ 5 Although EED has input into general safety rules utilized by ComEd, it does not control how ComEd plans specific projects or supervises its own crews. Instead, ComEd projects are planned, staffed and implemented solely by ComEd employees. Similarly, the implementation of safety procedures is performed solely by ComEd.

¶ 6 The conduct of ComEd employees is governed by safety procedures contained within a printed rule book. Although the safety rule book in effect at the time of plaintiff's accident in 2005 had the name "Exelon Energy Delivery" printed on its cover, the prior versions of the book displayed "ComEd" or "Commonwealth Edison" on the cover. In addition, the rule book has largely been unchanged over the years with respect to the relevant provisions in connection with this case. In general, the prior versions of the book contained the same rules and procedures for working around energized equipment.

¶ 7 There also was no dispute that the relevant safety procedures set forth within the rule book complied with the industry standards set by the National Electrical Safety Code (NESC) and the Occupational Safety and Health Administration (OSHA). These safety procedures require employees who work around energized equipment to wear "personal protective equipment" and to maintain a minimum zone of protection from energized equipment equal to the NESC and OSHA-required clearance of at least 2 feet 1 inch. Both the ComEd-issued safety rule book and the later versions required this same minimum clearance.

¶ 8 Plaintiff has been employed by ComEd since 1988. He began as a meter reader, and received

repeated promotions. In 2000, plaintiff became a substation construction helper, and soon thereafter was promoted to the position of a "substation construction B mechanic." This meant that plaintiff was able to work under the direct supervision of a crew leader on de-energized equipment. In 2004, plaintiff was again promoted, this time to the position of "substation construction A mechanic." This meant that plaintiff's duties were increased, but that he was still not authorized to work around energized equipment.

¶ 9 Plaintiff stated that ComEd provided him with training through all stages of his employment, and that he believed he was adequately trained for his work at the substation. According to plaintiff, ComEd provided him with a book containing the safety rules that he was responsible for following. Plaintiff further stated that his training apprised him of the general rules for keeping minimum safe approach distances from certain live electrical equipment, and that he was taught to treat all equipment as energized until it was confirmed to be de-energized and grounded. Plaintiff was also taught that metal conducts electricity, and that he could be injured or killed if he was holding something metal that contacted energized equipment. He also knew that the lines located at ComEd substations are generally energized.

¶ 10 Plaintiff's injury occurred on May 14, 2005. That day, plaintiff reported to ComEd's Chicago North substation, where he was given his work assignment by his crew leader, Rocky Yamate. Yamate was an employee of ComEd. The crew, which consisted of plaintiff and two others, was assigned to the Portage substation for the day. Customarily, in the morning meetings, the crew members would go over safety issues.

¶ 11 That morning, Yamate gave a job briefing to the crew members. They were tasked with

overhauling capacitor bank No. 3, which involved removing the capacitor cans. Plaintiff stated that Yamate provided the job briefing both orally and in a written document, which set forth a checklist of special safety precautions in connection with this job. Listed in the written job briefing was the required zone of protection, which indicated a minimum approach distance requirement of 2'1" to 2'2" from any 12,000 volt energized equipment, as stated in the safety rule book. In addition, the document also highlighted the use of "safe working techniques," including the use of personal protective equipment. Plaintiff initialed the job briefing document to indicate that he read and understood the information.

¶ 12 Prior to beginning the job, plaintiff stated that he believed the work would be done de-energized. He spent much of the day on a man-lift, operating it up and down so that the crew could reach the capacitor cans on capacitor bank No. 3 to remove them.

¶ 13 After that task was completed, Yamate, the crew chief, then began taking parts off a disconnect switch for capacitor bank No. 3. This work was not part of the initial job briefing. Plaintiff stated that Yamate told the crew that a ComEd engineer wanted him to look at those parts and take them down if they needed repair. Plaintiff further stated that Yamate asked plaintiff to assist him in this additional task by loosening a bolt under the top of the structure so that Yamate could take a part off the switch. Yamate, however, stated that he did not ask plaintiff to assist him in this endeavor.

¶ 14 It is nevertheless undisputed that in order to help Yamate, plaintiff left the man lift which did not reach high enough and climbed up the structure to get to the place Yamate said the bolt was located. Plaintiff stated that because he believed that the area was de-energized, he did not use

protective gloves. Since plaintiff was not authorized to work around energized equipment, he stated that he followed the instructions of Yamate. As he attempted to remove the bolt from the structure, plaintiff found himself in an awkward position. While holding a metal tool in his hand, he reached out to reposition himself and was injured when either his hand or the metal tool came into contact with an energized bus bar connected to an adjacent capacitor bank. Plaintiff stated that he did not intentionally violate the zone of protection, as he did not realize that he was in close proximity to energized equipment. Plaintiff also stated that he did not test the equipment before approaching it to ensure that it was dead and grounded.

¶ 15 An investigation of plaintiff's accident was conducted by ComEd. The investigation report found that the job briefing provided by Yamate to plaintiff and other members of his crew prior to the accident had "failed to identify all hazards of the job site," and that a "safe work zone was not clearly delineated." In addition, the report stated that "[t]he crew did not stop and rebrief when [the] job scope changed," and although the zone of protection may have been adequate for the original scope of work, "it was not possible to safely perform the task that injured [plaintiff]."

¶ 16 Plaintiff filed suit against defendants in November 2005.[2] The pleading at issue here - plaintiff's Third Amended Complaint - alleged that EED failed to ensure the safety of the ComEd equipment, failed to provide a safe work environment at ComEd, and also failed to provide appropriate safety procedures for ComEd. Plaintiff also alleged that EED imposed an "insufficient service and training budget on ComEd" that resulted in the alleged dangerous conditions.

[2]We note that plaintiff had previously received worker's compensation benefits from ComEd as a result of the accident.

¶ 17 On February 21, 2011, the trial court granted EED's motion for summary judgment. After conducting a hearing during which both sides engaged in extensive argument, the court held that plaintiff had adduced insufficient evidence to raise a genuine issue of material fact that EED directly participated in the activities of ComEd to such an extent that its actions proved detrimental to ComEd and caused plaintiff's accident and injury.

¶ 18 In addition, although not specifically pleaded in plaintiff's Third Amended Complaint, the circuit court liberally construed the allegations contained in paragraph 6 to allow plaintiff to alternatively argue that EED was liable under a voluntary undertaking theory. The trial court also granted summary judgment on this claim.

¶ 19 Plaintiff now appeals. Additional factual background will be provided in the course of the analysis set forth in the Discussion section.

¶ 20 DISCUSSION

¶ 21 Plaintiff contends that the trial court erred in granting EED summary judgment on his claims. According to plaintiff, he adduced sufficient evidence to create a genuine issue of material fact regarding whether EED was liable under either a direct participant or voluntary undertaking theory. We disagree. For the following reasons, we affirm the trial court's grant of summary judgment.

¶ 22 The purpose of summary judgment is not to try a question of fact but, rather, to determine whether a genuine issue of material fact exists. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 42-43 (2004). The entry of 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 2005).

¶ 23 In reviewing a summary judgment ruling, we construe the record strictly against the movant and liberally in favor of the nonmoving party. *Jackson v. TLC Associates, Inc.*, 185 Ill. 2d 418, 423-24 (1998). Although summary judgment can aid in the expeditious disposition of a lawsuit, it nevertheless is a drastic means of disposing of litigation, and, therefore, should be allowed only where the right of the moving party is clear and free from doubt. *Adams*, 211 Ill. 2d at 43. A triable issue precluding the entry of summary judgment exists where the material facts are disputed or where, the material facts being undisputed, reasonable persons might draw different inferences from the undisputed facts. *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 162-63 (2007). A trial court's grant of summary judgment is reviewed *de novo*. *Roth v. Opiela*, 211 Ill. 2d. 536, 542 (2004).

¶ 24 It with these standards in mind that we hold that the trial court correctly granted summary judgment to defendants. We have carefully reviewed the evidence adduced by plaintiff in opposition to the motion for summary judgment, including the deposition testimony of various individuals familiar with events occurring prior, during and subsequent to plaintiff's accident, as well as various documents connected to this case. Even construing this record - as we must - strictly against EED and liberally in favor of plaintiff, we conclude that the trial court correctly determined that there was no genuine issue of material fact that EED was not liable to plaintiff under either the direct participant or voluntary undertaking theory.

¶ 25 *Direct Participant Liability*

¶ 26 Plaintiff contends that the evidence of record could support a finding of liability on the part of EED under the theory of direct participant liability adopted by our supreme court in *Forsythe v.*

Clark USA, Inc., 224 Ill.2d 274 (2007).

¶ 27 In *Forsythe,* the court traced the genesis and development of this theory of liability. Initially, the court noted that it is the general rule that parent corporations are not liable for the acts of their subsidiaries. *Forsythe,* 224 Ill. 2d at 282, citing *United States v. Bestfoods,* 524 U.S. 51, 61 (1998). However, the court also observed that a narrow exception to this general rule is rooted in a 1929 law review article written by then-professor William O. Douglas, in which he noted that liability had been imposed on a parent corporation in those limited situations where the parent is directly a participant in the wrong complained of. *Forsythe*, 224 Ill. 2d at 282-83, citing Douglas & Shanks, *Insulation from Liability Through Subsidiary Corporations,* 39 Yale L.J. 193, 208 (1929). Douglas posited that such liability attaches where the parent uses its ownership control to interfere in the internal management of the subsidiary, thereby overriding the independent discretion of the managers of the subsidiary. *Id.*

¶ 28 Nearly 70 years later, the U.S. Supreme Court relied upon Douglas' article to hold that a parent company could be held liable for certain injuries where the parent directly participated in the wrong complained of. *Forsythe*, 224 Ill. 2d at 283, citing *Bestfoods*, 524 U.S. at 64. The Court underscored, however, that such liability arises only under limited circumstances, and cautioned that "'the acts of direct operation that give rise to parental liability must necessarily be distinguished from the interference that stems from the normal relationship between parent and subsidiary.'" *Forsythe*, 224 Ill. 2d at 283, quoting *Bestfoods*, 524 U.S. at 71-2. "'The critical question is whether, in degree and detail, actions directed to the facility by an agent of the parent alone are eccentric under accepted norms of parental oversight of a subsidiary's facility.'" *Id.*

¶ 29 After setting forth this background, the court in *Forsythe* then turned to the case at hand. There, the plaintiff's decedent died in a fire at an oil refinery where he worked. The refinery was owned and operated by a subsidiary of the defendant. The plaintiff alleged that the defendant parent corporation committed negligence by breaching a duty to use reasonable care in imposing its business strategy on the subsidiary, which, *inter alia*, required the subsidiary to minimize operating costs and limit capital investments. The plaintiff concluded that because the actions of the parent created conditions within the refinery which led to the fire, it directly participated in the wrongdoing, and, therefore, was liable. The parent corporation filed a motion for summary judgment, which was granted by the trial court without explanation. *Forsythe,* 224 Ill. 2d at 278-79.

¶ 30 On appeal, our supreme court for the first time held that "direct participant liability is a valid theory of recovery under Illinois law." *Id*. at 290. The court explained that "[w]here there is evidence sufficient to prove that a parent company mandated an overall business and budgetary strategy and carried that strategy out by its own specific direction or authorization, surpassing the control exercised as a normal incident of ownership in disregard for the interests of the subsidiary, that parent company could face liability." *Id.* The court then explained the dual elements of such a claim:

> "The key elements to the application of direct participant liability *** are a parent's specific direction or authorization of the manner in which an activity is undertaken and foreseeability. If a parent company specifically directs an activity, where injury is foreseeable, that parent could be held liable. Similarly, if a parent company mandates an over all

> course of action and then authorizes the manner in which specific activities contributing to that course of action are undertaken, it can be liable for foreseeable injuries."

Id.

¶ 31 The court underscored that although "[p]arent companies are free to craft overall business and budgetary strategies" for their subsidiaries, they "must not interfere directly in the manner their subsidiaries undertake certain activities such that the subsidiaries are no longer free to utilize their own expertise." *Id*. at 291. Accordingly, "if parent companies do interfere directly in the manner their subsidiaries undertake certain activities, they must do so with reasonable care." *Id*. In other words, for direct participant liability to attach, the alleged wrong must be traced back to the parent through the parent's own personnel and management such that the parent is directly a participant in the wrong complained of. *Id*. at 283.

¶ 32 *Forsythe* also highlighted that acts of interference that are merely incident to the parent's ownership of the subsidiary do not give rise to liability. *Id*. at 283-84. Activities that do not give rise to a duty include "monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures." *Id* at 303 (Freeman, J., concurring)(quoting *Bestfoods*, 524 U.S. at 72).

¶ 33 Applying these principles to the facts before it, the *Forsythe* court held that the trial court erred in granting summary judgment to the defendant parent corporation. In considering the evidence adduced with regard to the parent company's direction of the acts of its subsidiary, the court noted that the president of the subsidiary was also president of the defendant parent company, and

that he directed the subsidiary to operate in a "survival mode" which was "marked by 'reduced capital spending,' 'reduced working capital investment,' and 'reduced operating expense level.'" *Forsythe*, 224 Ill. 2d at 294. The court paid particular attention to the president's stated goal that these reductions were intended to reduce capital spending to "'minimum sustainable levels'" with the goal to "replenish [the] cash balance to 200 million." *Id.* There was also evidence which supported the plaintiff's theory that the approved reductions in the subsidiary's budget actually created the dangerous conditions leading to the injury. *Id.* at 295.

¶ 34 Accordingly, the *Forsythe* court held that the plaintiff had presented sufficient evidence to raise a genuine issue of material fact as to whether the president was wearing the hat of the president of the subsidiary or that of the parent corporation when he issued these directives. The court ruled that "[i]f [the president], acting on behalf of defendant, directed or authorized the manner in which the budget cuts in this case were taken, he had a duty to do so in a non-negligent way." *Id.* at 295.

¶ 35 The evidence adduced by plaintiff in the matter at bar stands in stark contrast to that found in *Forsythe* to be adequate to withstand summary judgment. In the instant cause, plaintiff has not supported his contention that EED directly participated in any actions that proximately caused his injuries.

¶ 36 Although plaintiff contends that his injuries resulted from actions taken by EED, a large part of his argument is premised upon general allegations that EED "contributed to decisions" about materials, labor and training at ComEd facilities. Plaintiff also alleges that "EED operating organizations" established "policies, programs and procedures for ComEd," but offers no detail or evidence as to how these unidentified policies caused plaintiff's injury. We conclude that plaintiff

fails to present sufficiently specific arguments supported by evidence in the record as to *how* EED directly participated in creating *which* specific conditions at ComEd and the Portage substation which would forseeably lead to his injury.

¶ 37 As *Forsythe* teaches, general allegations that a parent monitored a subsidiary's performance and articulated general policies and procedures for that entity do not give rise to direct participant liability. Instead, as stated, the "'critical question is whether, in degree and detail, actions directed to the facility by an agent of the parent alone are eccentric under accepted norms of parental oversight of a subsidiary's facility.'" *Forsythe*, 224 Ill. 2d at 283, quoting *Bestfoods*, 524 U.S. at 71-2. Plaintiff has failed to adduce sufficient evidence to raise a genuine issue of material fact as to EED's liability under a direct participant theory.

¶ 38 Plaintiff's most specific allegations regarding EED's involvement in ComEd's safety procedures are that EED created safety publications and handouts for ComEd employees and "attempted to establish the best practices" in the area of safety. Rather than identifying specific safety practices or procedures that were created by EED, plaintiff makes the general statement that the revisions were given to ComEd employees and that the EED-issued safety rule book was consulted by ComEd employees prior to starting work. But, apart from alleging that some of the best practices were incorporated into the rule book, plaintiff offers no evidence of any specific language drafted by EED or any procedures that EED imposed or required.

¶ 39 The evidence showed that EED's role in ComEd's safety program was limited to working with ComEd to improve its general safety procedures where appropriate. It is undisputed that ComEd had existing safety rules for maintaining NESC and OSHA-mandated minimum distances

from energized equipment, for wearing personal protective equipment and for erecting barriers to energized equipment. It is also undisputed that these already-existing precepts were not substantially modified by EED during the relevant time period.

¶ 40 Plaintiff, however, points to the opinion of his expert, Donald Zipse, in support of his contention that a genuine issue of material fact was raised regarding the direct participant liability of EED. Zipse opined that EED should have mandated the use of a larger zone of protection from energized equipment, and that it was negligent in adopting a minimum zone of protection of 2' 1". As an initial matter, we note that Zipse confirmed in his deposition that the minimum zone of protection contained in the safety rule book provided to ComEd employees complied with national standards set forth by both NESC and OSHA, and that these are uniform standards which apply to public utilities. Zipse also acknowledged that this standard had been in place in the prior versions of the rule book issued by ComEd, and that implementation of safety standards and procedures was solely within the authority of ComEd.

¶ 41 A careful review of Zipse's deposition testimony reveals that a large part of his criticism of EED was its continued adherence to this national standard, with which he professed his dissatisfaction based upon his belief that it offers inadequate protection to workers. Zipse's opinion on this point, however, failed to support his contention that EED acted negligently; instead, it shows that EED and ComEd adhered to nationally-accepted standards with respect to the zone of protection.

¶ 42 With regard to the events occurring on the date of plaintiff's injury, it was undisputed that EED did not direct, supervise or authorize the work at the Portage substation which caused plaintiff's

injury. In addition, it was undisputed that EED had no input into the manner in which that specific work was performed. Rather, the evidence showed that it was ComEd which created the work plan for the capacitor bank replacement job, and that plaintiff was supervised by his crew chief, Yamate, who was employed by ComEd. Further, when a change was made with regard to the scope of the work, it was made and supervised entirely by ComEd personnel. It is further undisputed that no EED employees were at the worksite on the date of plaintiff's accident.

¶ 43 In sum, the evidence adduced showed that EED's actions conformed to what is traditionally considered the role of a parent corporation: to monitor and oversee the best practices of its subsidiary. No evidence showed that EED controlled the workplace or the manner in which the work was done. Further, EED did not mandate a decrease in any safety rules or procedures, and it was not responsible for the implementation of the safety rules and procedures already in place.

¶ 44 *Forsythe* made it clear that direct particpant liability "gives rise to a duty only in limited circumstances," and that the parent can be liable only if, "for its own benefit," it directs the actions of the subsidiary in a manner which "disregard[s] the discretion and interests of the subsidiary, and thereby creat[es] dangerous conditions." *Forsythe*, at 299. This case does not present the rare situation encountered in *Forsythe* under which a parent may be found liable under a direct participant theory. Accordingly, we hold that the trial court correctly granted summary judgment in favor of EED.

¶ 45 *Voluntary Undertaking*

¶ 46 Plaintiff also contends that the trial court erred in granting summary judgment against him on the theory that EED was liable for his injuries under the voluntary undertaking doctrine. We

disagree.

¶ 47 The voluntary undertaking doctrine is narrowly applied. *Bell v. Hutsell*, 2011 IL 110724, para. 12, 22, 28. Whether liability can be imposed by voluntary undertaking is evaluated under section 324A of the Restatesment (Second) of Torts. *Id*. at para. 12-13. Section 324A provides:

> "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the others's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking."

Id. at par. 13. "[U]nder the voluntary undertaking doctrine of liability, the duty of care to be imposed upon the defendant is limited to the extent of the undertaking." *Id* at par. 12. Whether a defendant has voluntarily undertaken a legal duty is a question of law. *Chelkova*, 331 Ill. App. 3d 716, 722 (2002).

¶ 48 As stated, plaintiff did not specifically plead the voluntary undertaking doctrine in his Third Amended Complaint. Instead, at oral argument on the summary judgment motion, the trial court allowed plaintiff to pursue this alternative theory of liability based upon the allegations contained

in paragraph 6 of the complaint. In that pleading, plaintiff alleged that it was the duty of EED "to manage **safety programs and maintenance procedures with reasonable care and caution to ensure the safety of those [ComEd] employees affected by [EED's] control of [ComEd's] procedures, including the plaintiff."

¶ 49 The evidence does not support the imposition of a voluntary duty. Plaintiff has not created a genuine issue of material fact that EED's adoption of nationally-approved safety standards increased the risk of harm to him. Plaintiff also has no support for the contention that he suffered harm because he relied upon the safety rules adopted by EED. As stated, it is undisputed that ComEd had the sole authority to implement the safety procedures, and that plaintiff's injury resulted from a job which was planned, supervised and carried out by ComEd and its employees.

¶ 50 CONCLUSION

¶ 51 For the foregoing reasons, the judgment of the circuit court is affirmed in all respects.

¶ 52 Affirmed.