2015 IL App (4th) 140495-U

NO. 4-14-0495

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
March 10, 2015
Carla Bender
4th District Appellate
Court, IL

ANDREI CALESTROV,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Sangamon County
NUDO PRODUCTS, INC.,	)	No. 12L179
Defendant-Appellee.	)	
	)	Honorable
	)	Patrick W. Kelley,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Knecht and Turner concurred in the judgment.

ORDER

¶ 1 *Held*: Where the trial court found the accident resulting in plaintiff's injuries was caused solely by the wind and not by any negligence on defendant's part, the court did not err in granting summary judgment in favor of defendant.

¶ 2 Plaintiff, Andrei Calestrov, appeals from the May 21, 2014, order of the circuit court of Sangamon County denying his motion to reconsider an earlier order granting summary judgment in favor of defendant, Nudo Products, Inc. In granting summary judgment, the court found defendant did not cause the accident. Rather, the court found the accident was caused solely by the wind. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In October 2010, plaintiff, a truck driver from Cook County, drove to defendant's place of business in Springfield, Sangamon County, to pick up products from defendant's place of business. At approximately midday, defendant's employees used forklifts to load plaintiff's

truck at the loading dock inside the warehouse. The loading process took approximately one hour. Plaintiff asked defendant's forklift operator if he could tarp his load inside. All parties agree that tarping and securing the load was plaintiff's responsibility, not that of defendant's employees. The forklift operator informed plaintiff he could not tarp his load indoors at that time, as they had heavy truck volume that day, with other trucks waiting to load. Securing the load indoors would have prevented defendant's employees from loading other trucks.

¶ 5 According to defendant's policy, drivers could wait until all other trucks had been loaded for the day and then tarp indoors if the drivers so desired. This was the policy on days, like the day at issue, where it was not raining or snowing. Plaintiff elected not to wait for the other trucks to load. Instead, he decided to tarp and secure his load outside.

¶ 6 On this particular day, an "extra tropical cyclone weather event of rare high intensity" caused winds to gust between 40 and 50 miles per hour. Defendant does not dispute the severity of the wind that day. While plaintiff was on top of the truck's flatbed trailer outside, attempting to secure the load, the wind blew him off, knocking him to the ground and causing him to fracture both heels and his wrist.

¶ 7 Plaintiff filed a personal injury lawsuit in Cook County against defendant, alleging defendant was negligent by, *inter alia*, "fail[ing] to provide a safe method and place for securing the cargo on the trailer." The Cook County circuit court granted defendant's motion for a change of venue to Sangamon County.

¶ 8 Defendant filed a motion for summary judgment, asserting it owed plaintiff no duty to allow him to tarp his load indoors. Defendant further asserted it did not cause the accident resulting in plaintiff's injuries. Plaintiff filed a response to defendant's motion for summary judgment, along with a cross-motion for partial summary judgment, in which he

claimed judgment should be entered in his favor as to defendant's liability, leaving only the disputed issue of damages for trial.

¶ 9 The trial court entered an order granting defendant's motion for summary judgment and denying plaintiff's cross-motion for summary judgment. The court found the sole cause of the accident was the wind, a natural occurrence beyond defendant's control, and not a condition on the land. The court denied plaintiff's posttrial motion.

¶ 10 This appeal followed.

¶ 11 II. ANALYSIS

¶ 12 Plaintiff contends the trial court erred in granting summary judgment on the basis that the wind was the sole proximate cause of plaintiff's injuries. In making this determination, plaintiff contends, the court overlooked the fact that plaintiff was only exposed to the wind due to defendant's negligence. According to plaintiff, when defendant forced him to tarp his load outside, defendant breached its duty of care, and, as a result, defendant's negligence was a contributing cause of his injuries.

> "The purpose of a summary-judgment proceeding is not to try an issue of fact but, instead, to determine whether a genuine issue of material fact exists. [Citation.] Although summary judgment aids in the expeditious disposition of a lawsuit, it is a drastic means of disposing of litigation and should be allowed only when the right of the moving party is clear and free from doubt. [Citation.] Thus, '[s]ummary judgment is appropriate where the pleadings, depositions, admissions[,] and affidavits on file, viewed in the light most favorable to the nonmoving party, reveal that

there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' [Citations.]

' "The burden of proof and the initial burden of production in a motion for summary judgment lie with the movant." ' [Citations.] 'Where the facts could lead a fair-minded person to draw more than one conclusion or inference, summary judgment must be denied.' [Citation.]

If a defendant raises an affirmative defense, his pleading and supporting documentation need only establish his factual position on that affirmative defense. [Citation.] Although a plaintiff is not required to prove her case at the summary-judgment stage, to survive a summary-judgment motion as the nonmoving party, she must present a factual basis that would arguably entitle her to a judgment. [Citation.] We review *de novo* the trial court's grant of summary judgment. [Citation.]" *Evans v. Brown*, 399 Ill. App. 3d 238, 243-44 (2010).

¶ 13 A complaint based on negligence must allege facts sufficient to show (1) the existence of a duty owed by the defendant to the plaintiff, (2) the breach of that duty, and (3) injury proximately resulting from that breach. *Ward v. K Mart Corp.*, 136 Ill. 2d 132, 140 (1990). To determine whether a duty exists, the court must look to the parties' relationship and decide whether, as a matter of law, the defendant had an obligation to act reasonably for the

plaintiff's protection. In this case, the relationship between plaintiff and defendant is business invitee and landowner.

¶ 14 A. Duty and Breach of Duty Analyses

¶ 15 To maintain a premises-liability claim in the case of a business invitee-invitor relationship, a plaintiff must establish the defendant knew about a condition on its premises causing an unreasonable risk of harm to its invitees or would have discovered the condition by the exercise of reasonable care. *Genaust v. Illinois Power Co.*, 62 Ill. 2d 456, 468 (1976); Restatement (Second) of Torts § 343 (1965). Notice, either actual or constructive, is an essential element of a premises-liability claim.

¶ 16 Relying on *Genaust*, the supreme court in *Ward* held that Restatement (Second) of Torts, section 343, accurately sets forth the law regarding the liability of landowners to invitees. The section states as follows:

> "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). See also *Ward*, 136 Ill. 2d at 145-46.

¶ 17 The court also adopted section 343A of the Restatement (Second) of Torts with respect to a landowner's duty when a danger can be considered "open or obvious." Section 343A provides:

> "(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." (Emphasis added.) Restatement (Second) of Torts §343 (1965). See also *Ward*, 136 Ill. 2d at 149.

¶ 18 According to section 343A, a landowner could be liable if it was reasonably expected the invitee would "proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk." Restatement (Second) Torts § 343A, Comment f, at 220 (1965). This is called the "deliberate encounter exception" to the open and obvious doctrine. *LaFever v. Kemlite Co.*, 185 Ill. 2d 380, 391 (1998). However, at the same time, the invitee is expected to exercise reasonable care for his own safety. *Ward*, 136 Ill. 2d at 152. That is, a defendant "need not anticipate the negligence of others" (*Ward*, 136 Ill. 2d at 152), as property owners are not insurers of invitees' welfare (*LaFever*, 185 Ill. 2d at 396 (citing *Ward*, 136 Ill. 2d at 156)).

¶ 19 In this case, it is undisputed defendant's employees told plaintiff he would have to move his truck from the loading dock after it was loaded and weighed in order to accommodate other trucks that needed to be loaded. However, it is also undisputed defendant's employees would have allowed plaintiff to tarp and secure his load indoors if he had waited until all other

trucks were loaded. Plaintiff, on his own volition, chose not to wait and decided to tarp and secure his load outdoors. Plaintiff testified in his deposition as follows:

> "Q. Did you ever think at the time you were securing straps on the tarp that it might be a good idea to wait awhile until the wind dies down before you do that?
>
> A. Yeah, but it was windy all day and I don't have time to wait.
>
> * * *
>
> Q. Well, you mentioned that you didn't want to wait around that's understandable but you obviously could have waited to see if the wind would die down that was one option open to you, correct?
>
> A. Maybe, but I never waited for.
>
> Q. But was there anybody, anybody or anything preventing you from waiting until, to see if the wind was died down before you tried to, to strap the load?
>
> A. Nobody but, yeah, I can't wait."

¶ 20 It is clear plaintiff had the option of waiting until the dangerous windy conditions were not a consideration for him to safely tarp and secure his load. It is also likewise clear that tarping and securing a load in the obviously windy conditions would be dangerous. It is true defendant could have predicted plaintiff would suffer harm by attempting to tarp and secure his load in the "open and obvious" dangerous windy conditions. However, "[t]he existence of a duty is not the equivalent of a breach of duty." *LaFever*, 185 Ill. 2d at 396. To prove a breach of duty, a plaintiff must prove the defendant's efforts to protect him from harm were inadequate.

LaFever, 185 Ill. 2d at 396. Plaintiff cannot prove defendant's efforts to protect him from harm caused by the wind were inadequate. Plaintiff admitted there was not "anybody or anything," including defendant, that prevented him from waiting for safer conditions. He could have tarped and secured his load indoors after all other trucks had been loaded or waited for the wind speeds to decrease. Defendant did not require plaintiff to tarp and secure his load within a certain amount of time after leaving the scales. Plaintiff had the option of waiting for safer conditions, but instead, he chose to proceed.

¶ 21 The dangerous windy conditions were known and obvious to plaintiff. He provided no evidence or persuasive argument that a reasonable person in his position would have chosen to tarp and secure his load during such conditions rather than waiting. In other words, plaintiff did not provide evidence that waiting presented an equal or worse peril. Plaintiff voluntarily chose to proceed despite reasonable alternatives. As such, defendant cannot be held liable for plaintiff's choice. See *Hastings v. Exline*, 326 Ill. App. 3d 172, 176-77 (2001) (summary judgment for the property owner was affirmed because the plaintiff knew of the danger presented yet chose to voluntarily assume the risk despite feasible alternatives to avoid the risk). Because defendant adequately offered to protect plaintiff from harm, and because plaintiff voluntarily rejected that offer, we find there remains no disputed issue of fact as to whether defendant breached a duty owed to plaintiff.

¶ 22 B. Proximate Cause

¶ 23 Despite our finding of no breach of duty on defendant's part, we will address plaintiff's argument with regard to causation. Plaintiff also challenges the trial court's order granting summary judgment based upon the court's finding of lack of causation. The court found "the evidence established that the wind was the sole cause of the accident. As such, the accident

was caused not by a condition on the land as in *LaFever* ***, which adopted Section 343 of the Restatement (Second) of Torts. Instead, the accident was caused by a natural occurrence beyond defendant's control." Plaintiff contends his injuries were caused by more than just the wind. He argues defendant's conduct, combined with the natural occurrence or act of God, was a proximate cause of his injuries. He claims defendant's conduct of "forcing [him] to leave the safety of the warehouse to strap and tarp the truckload outdoors in unrelenting strong winds was one proximate cause of the injury, combined with the wind itself."

¶ 24 " 'A loss or injury is due to the act of God, when it is occasioned exclusively by natural causes such as could not be prevented by human care, skill[,] and foresight. ' [Citations.] (injuries are caused by acts of God when such injuries are beyond the power of human agency to foresee or prevent). *** However, liability is only precluded if the alleged act of God constitutes the sole and proximate cause of the injuries. [Citation.]" *Evans*, 399 Ill. App. 3d at 246. Where a person's negligence combines with an act of God or natural occurrence, the person could be said to have proximately caused the injury. See *Wald v. Pittsburg, Cincinnati, Chicago & St. Louis R.R.*, 162 Ill. 545, 551-52 (1896).

¶ 25 We agree with plaintiff there can be combined acts that together constitute the proximate cause of an injury. However, for a person to be liable, he must be negligent. " 'If there is any intervening human agency which contributes to cause the damage it cannot be considered as caused by an act of God.' [Citations.]" *Welfelt v. Illinois Central R. R. Co.*, 149 Ill. App. 317, 326 (1909). For defendant to be liable, it must have contributed to the cause of plaintiff's injury. Defendant's employees testified in their respective depositions that, unless it was raining or snowing, defendant's policy was to not allow independent truck drivers to tarp and secure their loads within their facility until all trucks had been loaded. After all trucks for the

day had been loaded, the drivers would be free to reenter the warehouse to properly tarp and secure their loads. Defendant was not negligent by requiring plaintiff to wait until all trucks had been loaded before allowing him to tarp and secure his load indoors.

> "Proximate cause is one which produces the injury through a natural and continuous sequence of events unbroken by any effective intervening cause [Citation.] As was discussed by the Illinois Supreme Court, a 'cause vs. condition' analysis has evolved in examining whether proximate cause exists in certain situations:
>
> > '[I]f the negligence charged does nothing more than furnish a condition by which the injury is made possible and that condition causes an injury by the subsequent, independent act of a third person, the creation of the condition is not the proximate cause of the injury where the subsequent act is an intervening efficient cause which breaks the causal connection between the original wrong and the injury, and itself becomes the proximate or immediate cause.' [Citation.]" *Novander v. City of Morris*, 181 Ill. App. 3d 1076, 1078-79 (1989) (quoting *Merlo v. Public Service*

Co. of Northern Illinois, 381 Ill. 300, 316 (1942)).

¶ 26 Defendant's policy of not allowing drivers to tarp and secure their loads inside the facility until all trucks had been loaded for the day did nothing more than furnish a condition by which plaintiff's injury was possible. Defendant had no control over plaintiff's decision of where or when to secure his load. Plaintiff's decision to tarp and secure his load in the dangerous wind was his own. He admitted he could have waited, but he did not want to wait. As our supreme court held in *Merlo*, the mere creation of a condition does not constitute proximate cause of a plaintiff's injuries when there is an intervening act. *Merlo*, 381 Ill. at 316. The entry of summary judgment in defendant's favor was appropriate.

¶ 27 III. CONCLUSION

¶ 28 For the reasons stated, we affirm the trial court's judgment.

¶ 29 Affirmed.