

STATE OF MICHIGAN
COURT OF APPEALS

WESTFIELD GROUP INSURANCE
COMPANIES,

UNPUBLISHED
July 15, 2008

Plaintiff-Appellant,

v

JENKINS CONSTRUCTION, INC.,

No. 278558
Wayne Circuit Court
LC No. 03-315018-CZ

Defendant-Cross Plaintiff-Appellee,

and

JENKINS EXCAVATING, INC.,

Defendant-Cross Defendant.

Before: Fitzgerald, P.J., and Talbot and Donofrio, JJ.

PER CURIAM.

Plaintiff, Westfield Group Insurance Company (Westfield),¹ appeals as of right the trial court's grant of summary disposition in favor of defendant, Jenkins Construction, Inc. (Jenkins Construction), in this negligence, nuisance, and trespass claim. The matter arises from a loss incurred as a result of a construction project in the city of Detroit. Because plaintiff Westfield failed to establish a genuine issue of material fact on the record, summary disposition was proper pursuant to MCR 2.116(C)(10), and we affirm.

I

¹ Pursuant to an order of this Court dated February 21, 2008, Westfield Group Insurance Company is substituted as the real party in interest in place of the prior plaintiff-appellant, City of Detroit. See *City of Detroit v Jenkins Construction, Inc.*, unpublished opinion of the Court of Appeals, issued February 21, 2008 (Docket No. 278558).

The Greater Grace Temple Church hired defendant Jenkins Construction to build a new church located near Seven Mile Road and Shiawassee Avenue in the city of Detroit. The construction project included the installation of a private sewer line to be connected to the city's sewer system. In turn, defendant Jenkins Construction contracted with Jenkins Excavating, Inc. (Jenkins Excavating) to perform the excavating work. Jenkins Excavating and Jenkins Construction are separate entities, though James Jenkins is the President and sole shareholder of both companies. Plaintiff Westfield insured Jenkins Excavating under a Commercial Insurance Coverage Policy.²

During construction and excavation activities at the project site, an underground combined sewer/overflow (CSO) owned by the city of Detroit, collapsed on September 22, 2000. The CSO basin is located on property immediately adjacent to property owned by Greater Grace Temple Church. In fact, Greater Grace Temple Church had previously owned the property but sold it to the City in 1996 so the CSO could be built to collect wastewater overflow from the City's sewer system. Greater Grace Temple Church retained a perpetual easement over the underground CSO for its church parking lot.

The city of Detroit brought suit against both Jenkins Excavating and defendant Jenkins Construction alleging that as they were excavating a storm sewer trench, Jenkins Excavating "and/or" defendant Jenkins Construction deposited spoil (excavated dirt and other material) on the basin, the weight of which caused the CSO's roof to collapse. The city of Detroit's complaint set forth three counts against both defendant Jenkins Construction and Jenkins Excavating including negligence, trespass, and nuisance. Defendant Jenkins Construction asserted that Jenkins Excavating exclusively performed the work causing the collapse. Defendant Jenkins Construction also asserted that the sole cause of the collapse was the failure of Jenkins Excavating to follow the staking, fence line, and field location that Jenkins Excavating itself established to manage the spoil.

The trial court granted defendant Jenkins Construction's motion for summary disposition on the negligence claim finding that plaintiff had not provided any evidence that a question of fact existed on the record. In a subsequent order, the trial court also granted defendant Jenkins Construction's motion for summary disposition on the remaining claims of trespass and nuisance again finding that plaintiff had not provided any evidence that a question of fact existed on the record regarding these claims. Former plaintiff city of Detroit then settled its claims against Jenkins Excavating and all claims against Jenkins Excavating were dismissed with prejudice. As part of the settlement, the city of Detroit assigned to Plaintiff Westfield any claims that might still remain against Jenkins Construction. As such, plaintiff Westfield now appeals as of right the trial court orders granting summary disposition in favor of defendant Jenkins Construction.

II

² Defendant Jenkins Construction was separately insured by Home-Owners Insurance Company under a business owners policy.

Plaintiff Westfield argues on appeal that viewed in a light most favorable to plaintiff, there is evidence in the record to support its claim that defendant Jenkins Construction independently acted in ways that contributed to the collapse of the CSO. And, in its reply brief on appeal, plaintiff Westfield specifically asserts that “there are questions of fact about [Jenkins] Construction’s role in the marking of the basin and the decision on how to handle the spoil given the configuration of this site.” Defendant Jenkins Construction responds that it is not liable to plaintiff Westfield because the record is clear that it delegated all aspects of the excavation work to Jenkins Excavating including spoil removal, storage, and disposal and had absolutely no role in the CSO collapse.

III

We review rulings on motions for summary dispositions de novo. *Willett v. Waterford Charter Twp.*, 271 Mich.App. 38, 45, 718 N.W.2d 386 (2006). Summary disposition under MCR 2.116(C)(10) presents an issue of law for the Court’s determination and, thus, we review a trial court’s ruling on a motion for summary disposition de novo. *Ormsby v Capital Welding, Inc.*, 471 Mich 45, 52; 684 NW2d 320 (2004). Where the parties rely on documentary evidence, appellate courts proceed under the standards of review applicable to a motion made under MCR 2.116(C)(10). *Krass v Tri-County Security, Inc.*, 233 Mich App 661, 665; 593 NW2d 578 (1999).

A motion made under MCR 2.116(C)(10) tests the factual support for a claim. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion made under MCR 2.116(C)(10) should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co.*, 451 Mich 358, 362; 547 NW2d 314 (1996); *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001). A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue on which reasonable minds could differ. *West v Gen Motors Corp.*, 469 Mich 177, 183; 665 NW2d 468 (2003).

When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). But such materials “shall only be considered to the extent that [they] would be admissible as evidence.” MCR 2.116(G)(6); *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002); *Campbell v Kovich*, 273 Mich App 227, 230; 731 NW2d 112 (2006).

IV

Plaintiff Westfield argues that the trial court erred by failing to find a genuine issue of material fact existed regarding defendant’s independent liability for its own active negligence in causing damages as a result of the collapse of the CSO. Defendant responds that it is not liable for two reasons, first, because based on the independent contractor doctrine it is not vicariously liable for negligence; and second, because it delegated all excavation work including spoil

removal, storage, and disposal to Jenkins Excavating it is not independently liable for negligence. The trial court found that no question of fact existed on the record because plaintiff presented no evidence that defendant Jenkins Construction was independently liable separate from Jenkins Excavating, and also based on the “general rule . . . that a general contractor is not liable to third parties for the negligence of its subcontractors.”

A.

It is not disputed that defendant Jenkins Construction was the general contractor of the church construction project and Jenkins Excavating was its subcontractor. At common law, neither a landowner who enters a contract for the construction of an improvement to the land, nor a general contractor overseeing the construction project’s completion, could ordinarily be found negligent for injury to a subcontractor’s employee. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 53; 684 NW2d 320 (2004). However, in *Funk v General Motors Corp*, 392 Mich 91, 104; 220 NW2d 641 (1974), abrogated on other grounds by *Hardy v Monsanto Enviro-Chem Systems, Inc*, 414 Mich 29; 323 NW2d 270 (1982), our Supreme Court held that a general contractor could be held liable if a subcontractor clearly failed in its duty to provide proper safeguards to its employees in common work areas. To establish the liability of a general contractor under *Funk*, a plaintiff must prove four elements: (1) that the defendant contractor failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workers (4) in a common work area. *Ormsby, supra* at 57, citing *Funk, supra* at 104. A plaintiff must satisfy all elements of the common work area doctrine before a general contractor may be found negligent under this theory of liability. *Id.* But because plaintiff asserts liability on the part of defendant Jenkins Construction only for its own independent negligence, we need not engage in the vicarious liability analysis.

B.

In order to establish a cause of action for negligence, the plaintiff must be able to show that the defendant owed a duty to the plaintiff, the defendant breached that duty, the defendant’s breach caused the plaintiff’s injury, and that the plaintiff suffered damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). In the present case, the trial court found that there was no evidence that defendant Jenkins Construction was independently liable for damages caused by the collapse of the CSO. This finding was supported by the deposition of Reginald Paige, a foreman superintendent for Jenkins Excavating, who testified that Jenkins Excavating was responsible for the removal of the spoil. He also stated that Brian Biasutto, Jenkins Excavating’s project manager, was the person responsible for determining when and how to “get rid” of the spoil or to have it carted away. Paige also described conversations that took place prior to the excavation about the presence of the CSO and the importance of avoiding coming into contact with the tank during excavation. The trial court’s finding was also supported by the deposition of Darrell Greer, a project manager for defendant Jenkins Construction. Greer testified that Jenkins Excavating dug out the area, removed the spoils, and had a third party trucking company haul the spoils from the job site.

Plaintiff did not present any evidence to rebut this testimony. And plaintiff presented no evidence that defendant Jenkins Construction was independently involved in any negligent activities that caused the collapse of the CSO. Even reviewing the record in the light most

favorable to plaintiff, plaintiff's reliance on the language of the subcontract agreement between defendant Jenkins Construction and Jenkins Excavating does not rebut the testimonial evidence provided by Paige and Greer. Plaintiff relies heavily on a line in the subcontract agreement that states, "~~Remove from site all spoils removing from your work.~~" The text of the line is lined out by hand and is initialed "BB." Plaintiff asserts that the initials represent Brian Biasutto, Jenkins Excavating's project manager. But plaintiff does not provide any evidence explaining how the crossed out language directly implicates defendant Jenkins Construction and proves the elements of negligence. In fact, when asked about any implications that might arise from the crossed out language, Greer testified that he would not know of anyone else that would remove the spoils from the job site and that Jenkins Excavating actually did remove the spoils. As a result, plaintiff failed to establish the elements of negligence and no genuine issue of material fact exists, making summary disposition proper pursuant to MCR 2.116(C)(10).

V

Finally, plaintiff Westfield argues that viewing the evidence in the light most favorable to plaintiff, defendant Jenkins Construction knew or had reason to know that a nuisance and trespass were likely to occur as a result of the excavating work it hired Jenkins Excavating to perform. In support of its claim, plaintiff alleges that the work site was errantly configured, that defendant Jenkins Construction knew or should have known of logistical difficulties related to handling the spoil, and that defendant Jenkins Construction failed to clearly delegate the task of removing the spoil. Defendant Jenkins Construction asserts that despite its label, plaintiff's argument is merely another attempt to establish its negligence claim.

A court is not bound by the party's choice of labels for the cause of action because to do so would exalt form over substance. *Johnston v City of Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989). The gravamen of a party's claim is determined by reviewing the entire claim, and a party cannot avoid dismissal of a cause of action by artful pleading. See *Maiden v Rozwood*, 461 Mich 109, 135; 597 NW2d 817 (1999). Our review of the record reveals that plaintiff's allegations ultimately sound in negligence. As we found above, plaintiff failed to establish the elements of negligence and no genuine issue of material fact exists on the record, thus the trial court properly granted summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant. But even if we did consider the torts of nuisance and trespass separately, plaintiff Westfield has not presented any evidence whatsoever that create questions of fact that defendant Jenkins Construction caused a nuisance or trespass to occur at the jobsite. Thus, plaintiff's claims of trespass and nuisance also fail.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot
/s/ Pat M. Donofrio