In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-08-00451-CV

JOSE MALDONADO, Appellant

V.

D.R. HORTON, INC. AND D.R. HORTON-EMERALD, LTD., Appellees

On Appeal from the 284th District Court
Montgomery County, Texas
Trial Cause No. 05-06-05182 CV

MEMORANDUM OPINION

Jose Maldonado appeals a take-nothing summary judgment. While working as a bricklayer on a construction project, Maldonado fell approximately fifteen feet and sustained a back injury requiring surgical repair and eight days of hospitalization. He sued D. R. Horton-Emerald, Ltd. and D. R. Horton, Inc. Maldonado contends appellees are liable because the work was under their control and the work-place was unsafe. Specifically, Maldonado argues that appellees failed to provide any form of fall-restraint device.

D. R. Horton-Emerald, Ltd. filed a traditional and no-evidence motion for summary judgment, and D. R. Horton, Inc. filed a no-evidence motion. A summary judgment movant has the burden of showing it is entitled to judgment as a matter of law and there is no genuine issue of material fact. TEX. R. CIV. P. 166a(c); *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W3d 844, 848 (Tex. 2009). A no-evidence motion requires the non-movant to present evidence raising a genuine issue of material fact supporting each element contested in the motion. TEX. R. CIV. P. 166a(i); *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009). Because appellees did not retain the right to control or exercise actual control over the manner of the work of the independent contractor, appellees did not owe a duty to ensure the independent contractor performed its work in a safe manner. *See Lee Lewis Constr. Inc. v. Harrison*, 70 S.W.3d 778, 783 (Tex. 2001). We therefore affirm the trial court's judgment.

THE SUMMARY JUDGMENT EVIDENCE

D. R. Horton-Emerald asserts that Maldonado's claims are governed by Chapter 95 of the Texas Civil Practice and Remedies Code, and that section 95.003 shields Horton-Emerald from liability. Both Horton-Emerald and D. R. Horton, Inc. contend there is no evidence of a number of the elements of Maldonado's premises liability and negligence claims. The element on which our disposition rests is the assertion that there is no evidence Horton-Emerald or Horton exercised or retained control over the manner in which Maldonado's work was performed.

There is evidence in the record that D. R. Horton, Inc. purchased Emerald. D. R. Horton-Emerald, Ltd. owns the property on which the Sterling Green condominiums were being constructed. Emerald entered into an "Independent Contractor Agreement" with F. R. Construction Company, Inc. The record reveals F. R. Construction was Francisco Rodriguez Pena, Sr.'s business.[1] The contract provided that F.R. Construction, as an independent contractor, had the "right and obligation to control the manner, method and performance of the Work"; agreed to comply with all applicable federal, state, local, and county statutes, ordinances, codes, licensing requirements and standards, and OSHA requirements; was "solely responsible for protecting its employees, subcontractors, [and] material suppliers . . . from risk of death, injury or bodily harm arising from or in any way related to the Work or the construction site on which the work [was] being performed"[;] and ensured full compliance with all government safety and OSHA rules and regulations. The contract also provided that the "contractor shall be solely responsible for the content and implementation of its safety program which shall meet owner[']s minimum requirements."

Ahmad Khan, the safety manager for Horton, testified he inspected the subdivision (Sterling Green) at which Maldonado was working. Khan discussed safety, EPA, and quality control with Gary LeMaster, Horton's construction manager at Sterling Green. Khan stated he did not have interaction with the subcontractors and never gave them any

[1]Francisco Rodriguez Pena, Sr. is also referred to as Francisco Rodriguez.

instructions on safety matters. If he found something unsafe at the site, "we used to call the construction managers and stop the work."

A company document ("Safety Regulations & Backcharge Notice") contained a list of the safety matters that Khan testified he had authority to control at the jobsite. Violations of safety rules were as follows: "no hard hats"; "no safety shoes or goggles"; "sweep house before leaving"; "put all trash & construction waste in the trash bin"; "no eating, smoking, or drinking in houses"; "do not remove safety rails"; "do n[ot] park on lot or driveway"; "no shoes allowed on carpet"; "do not remove silt or courtesy fence"; and "do not move barricades." Khan stated there were no other safety matters he controlled, "[b]ecause the subcontractor ha[d] signed an agreement that he [would] comply with all the . . . safety regulations. . . ." If the subcontractors did not follow the safety rules on the sheet, the contractors could be fined, and they would not work until they were in compliance. Khan acknowledged that when working above a certain height, the worker needed a safety restraint. Khan testified that when he visited the site, the workers were following the rules, and he had not seen them doing "wrong things."

The summary judgment evidence also included the deposition testimony of Benjamin Boyde, the construction area manager for Horton. He explained he went to the Sterling Green project once a week, talked with LeMaster about what LeMaster needed, and walked around the premises. Boyde testified LeMaster was there every day, and it

was his responsibility to walk the project and make sure that people were properly doing what they were supposed to be doing.

One of the company documents stated that each supervisor must "inspect workplace to identify potential hazards and take reasonable actions to minimize the exposure of those hazards." Boyde testified that if he went to the jobsite and found a worker did not have a safety restraint at the higher floor levels, "I believe that would be a common sense issue where we might want to stop them until they abided by what they needed to." Boyde stated he could not recall ever seeing a bricklayer on the third floor.

Pena of F. R. Construction was a contractor at the Sterling Green project. Pena testified he hired Efrain Limon as a subcontractor to do the brick work; Limon furnished his own equipment, and Pena paid him for the work. The only person Pena said he talked to at the jobsite was Limon, but Pena also indicated he usually spoke with a Horton supervisor. Pena testified he did not know Ahmad Khan, but indicated he saw Ben Boyde at the jobsite but does not remember how many times. Pena testified he went to the jobsite every week, maybe two times a week, to supervise Limon's work at Sterling Green. Pena did not remember if anyone at the jobsite had a safety belt. He also indicated he did not remember if he ever saw a dangerous condition relating to the brick work at the site, nor did he remember whether he ever walked the jobsite with a supervisor.

Jose Maldonado worked for Efrain Limon. According to Maldonado, Limon told Maldonado what to do at the jobsite. There were no safety meetings. Maldonado testified that Pena was Limon's boss, and Pena told Limon what to do. Maldonado also explained there was always one Emerald safety man who walked the jobsite every day and looked over the jobs to see what was wrong. The safety man had a trailer office at the jobsite. This man told Limon what to do, but Limon did not tell Maldonado what the Emerald man said. The safety man never gave Maldonado any orders. Maldonado testified he could not talk with the safety employee, because the safety man could not talk with the workers. Maldonado testified the Emerald employee was not in charge of Maldonado and could not tell him what to do.

On the day of the accident, Limon supervised the workers while they were moving the bricks up to the higher floor levels. Limon had set up the scaffolding. Maldonado testified the scaffolds were not safe. The workers who normally moved the bricks to the higher floors were not there that day, so Maldonado was told to assist. One man stood at ground level and threw two bricks at a time to Maldonado who was standing on a roof-like structure on a porch approximately fifteen feet above ground. Maldonado had to catch the bricks and then throw them up to another man on a higher level. He complained to Limon about being positioned on the roof when the bricks were tossed up to a higher level, but Limon told Maldonado to "do it a little more and see." Maldonado explained he continued to throw the bricks up to the next floor level, because otherwise

he would not get paid. He testified he did not have a safety line when he was working on the second floor, and neither did any of the other crew. In throwing the bricks to a higher level, he lost his balance; he fell to the ground, and injured his back.

Maldonado argues that the trial court erred in granting summary judgment because the summary judgment evidence shows appellees had the requisite control and knowledge of a dangerous condition, and the contract relied on by appellees is a sham contract. Emerald argues Chapter 95 of the Civil Practice and Remedies Code shields it from liability. Both Horton and Emerald argue they are not liable, because they lacked the requisite control over Maldonado's work.

ANALYSIS

Chapter 95 of the Texas Civil Practice and Remedies Code applies to a claim that arises from the condition or use of an improvement to real property where the contractor or subcontractor constructs, repairs, renovates, or modifies the improvement. TEX. CIV. PRAC. & REM. CODE ANN. § 95.002 (Vernon 2005). To impose liability on an owner, the owner must have retained "some control over the manner in which the work is performed, other than the right to order the work to start or stop or to inspect progress or receive reports[,]" and must have "had actual knowledge of the danger or condition resulting in the personal injury. . . and failed to adequately warn." TEX. CIV. PRAC. & REM. CODE ANN. § 95.003 (Vernon 2005).

The owner of property generally does not owe a duty to ensure that an independent contractor performs its work in a safe manner. *Harrison*, 70 S.W.3d at 783; *Elliott-Willliams Co. v. Diaz*, 9 S.W.3d 801, 803 (Tex. 1999). A duty may arise, however, if the owner retains some control over the manner in which the independent contractor performs its work. *Harrison*, 70 S.W.3d at 783.

A premises owner, to be liable, must have the right to control the means, methods, or details of the independent contractor's work to the extent that the independent contractor is not entirely free to do the work his own way. *Ellwood Tex. Forge Corp. v. Jones*, 214 S.W.3d 693, 700 (Tex. App.--Houston [14th Dist.] 2007 pet. denied); *see also Dow Chem. Co. v. Bright*, 89 S.W.3d 602, 606-07 (Tex. 2002); *Koch Ref. Co. v. Chapa*, 11 S.W.3d 153, 155 (Tex. 1999). If an owner retains control over the means, methods, or details of the independent contractor's work, reasonable care must be exercised in that control. *Koch Ref. Co.*, 11 S.W.3d at 155; *Clayton W. Williams, Jr., Inc. v. Olivo*, 952 S.W.2d 523, 528 (Tex. 1997). The right to order the work to stop and start or to inspect is not the type of control sufficient to impose a duty. *See Ellwood Tex. Forge Corp.*, 214 S.W.3d at 700. Control of the work can be established by contract or by an exercise of actual control. *Id.* (citing *Bright*, 9 S.W.3d at 606).

The "independent contractor agreement" between Emerald and the contractor F. R. Construction places the control of the "manner, method, and performance of the Work" in the independent contractor and provides that the contractor is "solely responsible for

protecting its employees, subcontractors, material suppliers, and all other persons from risk of death, injury or bodily harm arising from or in any way related to the work or the construction site on which the work is being performed. . . ." Maldonado contends the contract is a sham because, as to the contract's formation, Pena cannot read or write English. Pena testified that he does not know what kind of contract he signed for Horton, and that he does not know the meaning of the term "independent contractor." Pena also testified that someone from Horton helped him fill out the contract and he does not remember whether anyone read the contract to him. Maldonado argues the undisputed facts show there was no meeting of the minds between the parties as to the rights, duties, and responsibilities under the contract.

Generally, a contract providing that the independent contractor controls the work determines the relationship between the parties. *Durbin v. Culberson County*, 132 S.W.3d 650, 659 (Tex. App.--El Paso 2004, no pet.). The general rule does not apply if the contract is a mere subterfuge designed to conceal the parties' true relationship. *Id*.

The facts in this case do not establish a contract designed to conceal the parties' true relationship. *See Nguyen Ngoc Giao v. Smith & Lamm, P.C.,* 714 S.W.2d 144, 146 (Tex. App.--Houston [1st Dist.] 1986, no writ); *see also Tamez v. Sw. Motor Transp., Inc.*, 155 S.W.3d 564, 570 (Tex. App.--San Antonio 2004, no pet.). The record establishes that Pena was appellees' contractor and that Maldonado was an employee of

Limon, Pena's subcontractor. The contract does not give a right of control to the appellees.

Maldonado argues that appellees "had the requisite control and knowledge of a dangerous condition[,]" and appellees owed a duty to him. He asserts that the appellees retained control over the work through their safety rules and regulations. The Texas Supreme Court has held that safety requirements give rise to a very narrow duty of care based on the employer's actual knowledge. *Hoechst-Celanese v. Mendez*, 967 S.W.2d 354, 357 (Tex. 1998); *see also Bright*, 89 S.W.3d at 607; *Koch Ref. Co.*, 11 S.W.3d at 156-57; *Olivo*, 952 S.W.2d at 528.

Maldonado relies on *Harrison*. *See* 70 S.W.3d 778. In *Harrison*, the president of *Lee Lewis Construction* assigned its job superintendent the responsibility to "routinely inspect the ninth and tenth floor addition . . . to see to it that the subcontractors and their employees properly utilized fall protection equipment." *Id*. at 784. There was testimony that this employee personally witnessed and approved of the specific fall protection systems that the subcontractor used. *Id*. There was also evidence that the job superintendent "'definitely did approve' the lanyard system" and "knew of and did not object to [the subcontractor's] employees using a bosun's chair without an independent lifeline." *Id*. The Supreme Court concluded the evidence was sufficient to establish that the construction company retained the right to control fall-protection systems on the jobsite. *Id*.

Here, the record reveals Khan, Boyde, and LeMaster inspected the work site, but there is no evidence that appellees' employees were assigned any task related to fall protection equipment and no evidence they assumed that task. Khan and Boyd explained that if they had observed any issue with lack of fall-restraint devices, they would have stopped the work, but they testified they never saw any problem of this type. There is no evidence that appellees gave instructions to Pena, Limon, or Maldonado regarding how to put up the scaffold, how to transfer the bricks to a higher level, or what equipment to use.

In *Bright*, the Court held that the premises owner did not exercise actual control when it had a safety representative on site who could have stopped the independent contractor's employee from working had it known of the safety hazard on its premises. *Bright*, 89 S.W.3d at 608. The Court concluded that neither the presence of Dow's safety representative at the jobsite nor Dow's "safe work permit" system constituted evidence that Dow controlled the method of the independent contractor's work or its details. *Id*. at 608-09; *see also Ellwood Tex. Forge*, 214 S.W.3d at 701-703. Here, there is no evidence that appellees controlled the means, methods, or details of the brick work, that appellees knew about the lack of fall-restraint devices, or that appellees approved these alleged practices. The trial court therefore did not err in granting the summary judgment.

We overrule issues one and two and affirm the judgment.

AFFIRMED.

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DAVID GAULTNEY
Justice

Submitted on February 22, 2010
Opinion Delivered April 8, 2010

Before McKeithen, C.J., Gaultney and Horton, JJ.