IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

JONATHAN THOMAS, et al., *Plaintiffs/Appellants*,

v.

GREYSTAR MANAGEMENT SERVICES, LP, et al., *Defendants/Appellees*.

No. 1 CA-CV 20-0662
FILED 9-21-2021

Appeal from the Superior Court in Maricopa County
No. CV2018-051995
The Honorable Theodore Campagnolo, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

Presiding Judge Peter B. Swann delivered the decision of the court, in which Judge David D. Weinzweig and Judge Paul J. McMurdie joined.

S W A N N, Judge:

¶1 Jonathan Thomas appeals the superior court's grant of summary judgment in favor of 1891 North Litchfield Road Partners, LLP, ("Litchfield") and Greystar Management Services, LP ("Greystar"). Because the superior court correctly determined that Litchfield did not owe Thomas a duty and Thomas was a lent employee of Greystar, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 On March 30, 2017, Thomas fell through a carport parking structure roof at an apartment complex in Goodyear. The apartments are owned by Litchfield, which employed Greystar to operate the apartment complex.

¶3 Thomas was employed by BG Staffing, LLC, as a handyman. In March 2017, Greystar contacted BG Staffing to hire maintenance workers for the apartment complex. BG Staffing sent Thomas to the apartment complex several days before the carport incident, and Thomas performed several odd jobs at the direction of Greystar's maintenance manager.

¶4 The maintenance manager instructed Thomas to clean debris off the carports and provided him with tools, including a blower, ladder, and broom. Thomas began cleaning the carport roofs on Monday and cleaned approximately 15 carport roofs before he fell through a roof on Thursday. For each roof, Thomas climbed up a ladder with the broom and blower, swept the debris off the side, and blew the remaining leaves, sticks, and garbage onto the parking lot below. Thomas testified that he stayed on the carports' support beams to ensure he did not fall through, as instructed by the maintenance manager. The maintenance manager denies that he ever directed Thomas to get on top of the carport roofs. Both the maintenance manager and the property manager saw him cleaning the carports multiple times and told him he was doing a great job.

¶5 On the day of the accident, Thomas was using the blower on top of a carport. As he turned back toward the ladder to get the broom,

Thomas fell through the carport roof and onto the parking lot surface below. He was then taken by ambulance to the hospital to receive treatment for head, wrist, back, and rib injuries. He sought and received workers' compensation benefits.

¶6 Thomas filed suit against Litchfield and Greystar, alleging negligence and negligence *per se*. Litchfield and Greystar filed motions for summary judgment, arguing that Thomas was a "lent" employee from BG Staffing to Greystar, and while a lent employee is entitled to workers' compensation (which Thomas received) he or she is precluded from filing a lawsuit in tort. In response, Thomas argued that he was a business invitee and Greystar did not control details of his work, making the case cognizable as a civil action. The superior court granted Greystar's and Litchfield's motions for summary judgment. Thomas appeals.

DISCUSSION

¶7 We review summary judgment rulings de novo. *Jackson v. Eagle KMC L.L.C.*, 245 Ariz. 544, 545, ¶ 7 (2019). Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). We view the evidence in the light most favorable to the non-moving party. *Read v. Keyfauver*, 233 Ariz. 32, 35, ¶ 6 (App. 2013).

I. LITCHFIELD IS NOT LIABLE FOR THOMAS'S INJURY BECAUSE THOMAS IS THE EMPLOYEE OF AN INDEPENDENT CONTRACTOR.

¶8 Thomas argues the superior court erred by granting summary judgment in favor of Litchfield because Litchfield—as the property owner—had a non-delegable duty to keep its premises reasonably safe for business invitees. However, there is a distinction between a business invitee and an independent contractor's employee. A landowner is not liable for injuries suffered by an independent contractor's employee working on the property. *Lee v. M & H Enters.*, 237 Ariz. 172, 178, ¶¶ 19–20 (App. 2015). Consequently, resolution of this issue turns on whether Thomas was working as an employee of an independent contractor at the time of his injury or Litchfield retained control over his work.

¶9 A landowner who has the right to supervise and control an independent contractor's actual work—and not just the worksite—owes a duty to exercise reasonable care. *Id.* at 178, 181, ¶¶ 22, 34; *Citizen's Util., Inc. v. Livingston*, 21 Ariz. App. 48, 52 (1973); *see also* Restatement (Second) of Torts ("Restatement") § 414; *Lewis v. N.J. Riebe Enters.*, 170 Ariz. 384, 390

(1992). To determine the nature of the relationship, we look to the contract and the "actual exercise of control over work." *Lee*, 237 Ariz. at 178, ¶ 22. The superior court may properly grant summary judgment for a landowner when no jury could reasonably conclude the landowner retained control over the work at issue. *Id.* at ¶ 23.

¶10 Here, there is no evidence that Litchfield—the apartment complex owner—was even aware that Thomas had been hired to work on the property. No Litchfield employee was on the property at the time of the incident nor aware of Thomas's presence. Beyond awareness, Thomas does not argue that Litchfield retained control over his work. Instead, he argues that the *Welker* doctrine imposes liability because Litchfield failed to "turn over" safe premises to him. But the critical question under *Welker* here is whether Litchfield "retained control of the premises where the work [wa]s being performed," not whether Litchfield "turned over" a safe apartment complex generally. *Welker v. Kennecott Copper Co.*, 1 Ariz. App. 395, 405 (1965), *rejected on other grounds by Lewis*, 170 Ariz. at 389; *see also Lee*, 237 Ariz. at 177–78, ¶¶ 17–20 (collecting *Welker*'s progeny). Our analysis therefore focuses specifically on the carport roofs, not on the apartment complex generally.

¶11 Though a landowner *does* owe a duty to disclose known, dangerous conditions to employees of an independent contractor, *Citizen's Util.*, 21 Ariz. App. at 53, this duty is limited and requires the plaintiff to show that the landowner knew, or reasonably should have foreseen, that the premises had an unreasonable risk of harm, *McMurty v. Weatherford Hotel, Inc.*, 231 Ariz. 244, 253–54, ¶ 23 (App. 2013); Restatement § 343.

¶12 Thomas cites no evidence showing that Litchfield knew the carports were in a dangerous condition, only that Greystar hired him to clean them off. Moreover, Litchfield argues, and Thomas does not dispute, that Litchfield received a "good" rating after a routine maintenance inspection on the carport stalls. An expert opinion provided by Thomas discussed the tree debris on top of the carports but the opinion identified no structural conditions rendering the carports unsafe. There is no evidence from which a jury could reasonably find that Litchfield foresaw (or should have foreseen) any risk of harm on the carport roofs, let alone an unreasonable risk of harm. Litchfield did not owe a duty of care to Thomas.

II. GREYSTAR IS NOT LIABLE FOR THOMAS'S INJURY IN TORT BECAUSE THOMAS WAS A LENT EMPLOYEE AND WAS COVERED BY WORKERS' COMPENSATION.

¶13 Thomas next argues that Greystar is liable for his injuries because he never became a "special" employee of Greystar and Greystar repudiated control over his work. We conclude that Greystar is not liable for Thomas's injury under the "lent" employee doctrine.

¶14 As a threshold issue, an injured worker may not pursue both a workers' compensation claim and a tort action against an employer. *See Anderson v. Indus. Comm'n of Ariz.*, 147 Ariz. 456, 457 (1985). The employee must affirmatively reject the workers' compensation system before the injury, or workers' compensation becomes the employee's "exclusive remedy against the employer." A.R.S. § 23-1022(A). Here, Thomas did not file a written rejection of workers' compensation against BG Staffing, but instead received workers' compensation benefits.

¶15 "An employee may have two employers, however, both of which are immune to tort liability." *Lee*, 231 Ariz. at 179, ¶ 28. The two-employer scenario can arise when an employer "lends" its employee to another employer. *Id.* at 180, ¶ 31. An employee qualifies as a "lent" or special employee if three conditions are met:

> (a) the employee has made a contract of hire, express or implied, with the special employer;
>
> (b) the work being done is essentially that of the special employer; and
>
> (c) the special employer has the right to control the details of the work.

Word v. Motorola, Inc., 135 Ariz. 517, 520 (1983) (citation omitted). Where all three conditions are met, *both* employers are liable for workers' compensation—and not liable in tort. *Id.* "In cases involving labor contractors, 'employers obtaining workers from [a labor service provider] have usually, but not invariably, been held to assume the status of special employer.'" *Lee*, 237 Ariz. at 180, ¶ 32 (citation omitted).

¶16 Thomas first asserts that he never impliedly consented to be Greystar's special employee. But in analogous cases, we have recognized that the triangular relationship between temporary staffing agencies, temporary employees, and contracting employers results in the contracting

employer "assum[ing] the status of special employer" and remaining "immune from tort liability." *Lindsey v. Bucyrus-Erie*, 161 Ariz. 457, 458 (App. 1989).

¶17 As to the second condition, Thomas does not dispute that he cleaned the carport roofs for the employer. As to the third condition, Thomas argues that Greystar both repudiated control over how he cleaned the carport roofs and that Greystar had full control over the details of his work. We apply a totality of the circumstances test to determine whether the employer had the right to control the details of the employee's work. *Lee*, 237 Ariz. at 180, ¶ 33. Factors in this determination include, among others:

> [T]he duration of the employment; the method of payment; who furnishes necessary equipment; the right to hire and fire; who bears responsibility for workmen's compensation insurance; the extent to which the employer may exercise control over the details of the work, and whether the work was performed in the usual and regular course of the employer's business.

Id. (citation omitted) (alteration in original). Ultimately, the "decisive factor" is whether the special employer has "the right to supervise and control, not the exercise of that right." *Nation v. Weiner*, 145 Ariz. 414, 418 (App. 1985).

¶18 On balance, the undisputed circumstances of the employment arrangement between Thomas and Greystar establish that Greystar had the right to control Thomas's work. The parties agree that Greystar controlled the length and duration of Thomas's employment; Greystar dictated when Thomas began the carport-cleaning project and how long Thomas's employment would last. Though BG Staffing paid Thomas via direct deposit, a Greystar representative signed off on Thomas's timecards at the end of each day. Thomas testified that Greystar provided him with the equipment he needed to clean the carport roof, including "a ladder, a leaf blower, a broom, [and] a gas can." Thomas made a workers' compensation claim for his injuries. And finally, Thomas was hired by Greystar for apartment maintenance and the specific job of cleaning carport roofs, which, Thomas testified, Greystar had done before. Greystar had "the right to supervise and control" Thomas's work at the apartment complex, making Thomas an employee of Greystar.

¶19 Thus, all three conditions are met. *Word*, 135 Ariz. at 520. We find that Thomas cannot maintain a tort action against Greystar because he was an employee of both Greystar and BG Staffing, and was eligible for (and received) workers' compensation from BG Staffing.

III. THE OPEN AND OBVIOUS DEFENSE IS NOT A JURY ISSUE.

¶20 Finally, Thomas asserts that whether the hazard was open and obvious was an issue for the jury and unsuitable for summary judgment. *See McMurty*, 231 Ariz. at 253, ¶ 24 (holding that landowners "can be relieved of liability" if the injury was the result of an open and obvious hazard); *see also Cummings v. Prater*, 95 Ariz. 20, 26–27 (1963) (noting that "the bare fact that a condition is 'open and obvious' does not necessarily mean that it is *not* unreasonably dangerous"; it is just a factor to consider and not an automatic liability shield); Restatement § 343A(1), cmt. f. Because we conclude that Litchfield had no duty as a matter of law, and Thomas was a lent employee to Greystar, we do not reach this issue.

CONCLUSION

¶21 We affirm the superior court's grant of summary judgment. As the prevailing parties, Litchfield and Greystar are entitled to recover their costs upon compliance with ARCAP 21.