19-P-714 Appeals Court

WILLIAM AULSON vs. LISA V. STONE.

No. 19-P-714.

Worcester. February 12, 2020. - June 19, 2020.

Present: Hanlon, Wendlandt, & Englander, JJ.

Negligence, Construction work, Duty to prevent harm, Employer, Independent contractor, Toward employee of independent contractor, One owning or controlling real estate, Standard of care, Causation. Practice, Civil, Summary judgment.

Civil action commenced in the Superior Court Department on January 17, 2017.

The case was heard by J. Gavin Reardon, Jr., J., on a motion for summary judgment, and a motion for reconsideration was considered by him.

David E. Hoyt for the plaintiff.
Michael J. Sherry for the defendant.

WENDLANDT, J. An employer of an independent contractor generally is not liable for physical harm caused to another by the negligent act of the contractor. The exceptions to this principle "are so numerous" and "have so far eroded the 'general

rule,' that it can now be said to be 'general' only in the sense that it is applied where no good reason is found for departing from it." Restatement (Second) of Torts § 409 comment b, at 370 (1965). This case exemplifies that the general rule, while eroded, is not dead.

The defendant, Lisa V. Stone (homeowner), retained a general contractor, AD Construction (AD or general contractor), to renovate her single-family home. AD, in turn, hired the plaintiff, William Aulson (Aulson or employee), as a carpenter for the project. The employee severed his thumb while improperly using his own table saw. He maintained that his injury was caused by the unduly crowded construction area located in the garden level of the homeowner's five-story home.

The employee appeals from the allowance of the homeowner's motion for summary judgment on his negligence claim against the homeowner. Because, inter alia, the record on summary judgment was insufficient, as a matter of law, to show that the homeowner retained the type of control over the operative details and safety protocols of the renovation required for liability, and because the employee's speculation provided insufficient basis for a jury to find the requisite causation, we affirm.

Background. We set forth the facts in the light most favorable to the nonmoving party. See LeBlanc v. Logan Hilton Joint Venture, 463 Mass. 316, 318 (2012). In July 2013, the

homeowner hired the general contractor to convert a five-level, single-family home into a two-family home.[1] The contract between the general contractor and the homeowner required the contractor to furnish all materials and perform all the work pursuant to the proposed specifications and drawings.[2] The contractor was responsible for obtaining all permits and agreed that "[a]ll work shall be completed in a workman-like manner and in compliance with all building codes and other applicable laws." Further, the contract provided that the contractor, in its sole discretion, could hire subcontractors and that, "in all instances" the contractor shall "remain responsible for the proper completion" of the project. In contrast, the homeowner was "not entitled to engage or solicit in any way or form any of the sub-contractors involved in [the] project . . . without the [c]ontractor's awareness and written approval."[3]

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[1] The remodeled home would consist of a rental unit comprising the top two floors with its own entrance, and a second unit comprising the bottom three floors.

[2] The homeowner retained an architect prior to hiring AD.

[3] Prior to purchasing the home, the homeowner identified a heating, ventilation, and air conditioning (HVAC) subcontractor for the project. When she retained the general contractor, she indicated that she "would like [AD] to work" with the HVAC subcontractor.

Throughout the renovation, including at the time of the incident at issue in this case, AD was the general contractor.[4] It hired subcontractors to complete the work and hired the employee, a carpenter.[5] The homeowner did not control the timetable for any of the stages of construction.[6]

By the time of the incident, in January 2014, the rental unit was largely complete, and the homeowner was renting it periodically on a short-term basis. As set forth supra, the bottom three floors comprised the second unit, and the homeowner had moved a mattress into the top floor of this second unit and would "occasionally stay in the house." Construction continued on the project with the garden level of the second unit both serving as the area for the storing of construction tools and

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[4] The homeowner was not a general contractor, although she had prior experience with renovation projects. In particular, prior to the renovation at issue, the homeowner was involved in a "[m]assive renovation" of her antique home in Wellesley, where she worked with "a professional architect and a contractor." She renovated "extensively" a South End duplex. She also obtained a real estate license in 2013.

[5] Aulson claimed he was AD's employee.

[6] She testified that she hoped to have the project done as soon as possible and, in response to questions from the general contractor, endeavored to make any decisions timely so as not to cause delays in the project. She also testified that if she did not make decisions timely, delays were possible, and that some of her decisions probably shortened or lengthened the overall timetable.

being actively under renovation. The employee attempted "to create a safe space to perform" his work, but was "often hindered." He spoke to the homeowner "on a number of occasions about the lack of safe space to perform work at the project."[7]

On January 27, 2014, the employee, along with a painter and a "tile guy" were working on the garden level. The employee was using his table saw on the floor rather than on a table. Both of his hands were holding a piece of pine wood, which he was "freehand cutting" at an angle.[8] The employee believed that an extension cord was pulled, causing the saw, which was not mounted on a table or otherwise restrained, to move and to sever his thumb.[9]

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[7] In his interrogatory answer, the employee asserted that he "spoke with the [homeowner] about the hazardous work area."

[8] In his interrogatory answer, the employee stated that he "was milling down a piece of pine at an improvised work area with a table saw when the cord was pulled, causing the saw to cut [his] thumb."

[9] In his interrogatory answer, the employee's account varied slightly. He asserted that, at the time of the accident, there were "two tile guys" and "who ever [sic] was in the back of the cellar." He stated that the person in the back of the cellar "pulled the cord [sic] noone [sic] ever fessed up to pulling the cord." The discrepancy in these accounts is not material to our analysis.

The employee brought a negligence claim against the homeowner. As set forth supra, the homeowner's motion for summary judgment was allowed.[10]

Discussion. "The standard of review of a grant of summary judgment is whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law." Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120 (1991), citing Mass. R. Civ. P. 56 (c), 365 Mass. 824 (1974). Summary judgment "make[s] possible the prompt disposition of controversies on their merits without a trial, if in essence there is no real dispute as to the salient facts or if only a question of law is involved" (citation omitted). Kourouvacilis v. General Motors Corp., 410 Mass. 706, 715 (1991). Where the nonmovant ultimately would bear the burden of proof at trial, the moving party "is entitled to summary judgment if [she] demonstrates . . . that [the nonmovant] has no reasonable expectation of proving an essential element of [his] case" (citation omitted). Butcher v. University of Mass., 483 Mass. 742, 747 (2019). Our review is de novo. See LeBlanc, 463 Mass. at 318.

[10] The employee's motion for reconsideration was denied.

"To prevail on a negligence claim, a plaintiff must prove that the defendant owed the plaintiff a duty of reasonable care, that the defendant breached this duty, that damage resulted, and that there was a causal relation between the breach of the duty and the damage." Jupin v. Kask, 447 Mass. 141, 146 (2006). "[T]he existence [or nonexistence] of a duty is [generally] a question of law, and is thus an appropriate subject of summary judgment." Id. The other three elements generally are considered "the special province of the jury." Id. However, where no rational finder of fact could find based on the evidence in favor of the plaintiff on the element of causation, summary judgment is proper. See, e.g., Glidden v. Maglio, 430 Mass. 694, 697 (2000).

1. Duty of homeowner.[11] The employee advanced two theories pursuant to which he contended that the homeowner owed him a duty of care as the employee of the general contractor. First, he maintained that the homeowner's duty arose because she retained control over the renovation. Second, he contended that the homeowner owed him (a lawful visitor) a duty of reasonable

[11] The employee also appeared to claim that the homeowner was vicariously liable for the general contractor's acts or omissions. The relationship between the homeowner and AD was not that of master and servant; instead, AD acted solely as the general contractor for the project. Therefore, the homeowner cannot be held vicariously liable for the negligence of the general contractor. See Corsetti v. Stone Co., 396 Mass. 1, 9 (1985), citing Whalen v. Shivek, 326 Mass. 142, 149-150 (1950).

care, which included a duty to remedy the obvious hazard of using a table saw in the crowded workspace. We address each in turn.

a. Retained control. The employee contended that the homeowner retained control over the renovation project such that she is liable for the general contractor's failure to provide a safe working environment for him. As set forth supra, the general rule is that "an employer of an independent contractor is not liable for harm caused to another by the independent contractor's negligence." Lyon v. Morphew, 424 Mass. 828, 834 (1997). Under this principle, "it is to be regarded as the contractor's own enterprise, and he, rather than the employer, is the proper party to be charged with the responsibility of preventing the risk, and bearing and distributing it." Corsetti v. Stone Co., 396 Mass. 1, 10 (1985), quoting Restatement (Second) of Torts § 409 comment b (1965).

In Corsetti, however, the court adopted the "retained control" exception to this general rule, pursuant to which, "if the employer retains the right to control the work in any of its aspects, including the right to initiate and maintain safety measures and programs, [s]he must exercise that control with reasonable care for the safety of others, and [s]he is liable for damages caused by [her] failure to do so." 396 Mass. at 10,

11. See Restatement (Second) of Torts § 414 (1965). To fall within the exception:

> "[T]he employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that [s]he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way."

Restatement (Second) of Torts § 414 comment c, at 388 (1965). See St. Germaine v. Pendergast, 411 Mass. 615, 622 (1992).

Whether an employer has retained control over the work of an independent contractor to render her liable is usually a question of fact for the jury. See, e.g., Corsetti, 396 Mass. at 11. See also St. Germaine, 411 Mass. at 622. However, where the evidence of control is insufficient as a matter of law, summary judgment is appropriate. See, e.g., Lyon, 424 Mass. at 835-836.

Two cases -- Corsetti and Lyon -- are instructive. In Corsetti, the question whether the defendant, a general contractor, retained sufficient control presented a question for the trier of fact. 396 Mass. at 11. In that case, a subcontractor's employee was injured while using scaffolding and sued the general contractor. Id. at 3. The evidence included

that, despite having retained the subcontractor, the general contractor (i) had responsibility to initiate, maintain, and supervise all safety precautions and programs in connection with the project, (ii) retained authority to carry out that responsibility under the contract with the subcontractor, (iii) had authority to direct the subcontractor to remedy safety violations and to stop work if it failed to comply, (iv) discussed safety requirements and procedures for use of scaffolding with the subcontractor, and (v) was aware that employees of the subcontractor were not using safety belts. Id. at 11. Based on this evidence, the jury could conclude that the general contractor had the ability and opportunity to prevent the work from being performed in a dangerous manner; as such, the general contractor was not entitled to judgment as a matter of law. Id. at 12. Thus, where an employer retains control over the operative details and safety aspects of a project, it may be liable to an employee of the independent contractor who is injured as a result of a lapse in safety. See Kelly v. Foxboro Realty Assocs., LLC, 454 Mass. 306, 317 n.26 (2009) (jury could find defendant retained control where defendant owned gate that caused injuries, had authority to direct gate's operation, and establish protocols for securing and opening gate); Dilaveris v. W.T. Rich Co., 424 Mass. 9, 12-13 (1996) (jury could find general contractor retained control where it

was responsible for ensuring subcontractors followed safety procedures, was in charge of onsite operations, and had authority to stop or prevent use of unsafe scaffolding); Cheschi v. Boston Edison Co., 39 Mass. App. Ct. 133, 137-138 (1995) (where landowner and general contractor both had responsibilities regarding safety protocols, proper for jury to determine whether landowner had retained sufficient control to be liable).

By contrast, where an employer does not retain control over the safety policies and procedures or the operative details of the project, it is not liable. Thus, in Lyon, the court held that the record was insufficient, as a matter of law, to find a hospital had retained sufficient control over the roof repair project so as to be liable to the employee of the roofing company hired by the hospital. 434 Mass. at 835. The employee fell from the roof while unloading roofing materials. Id. at 830. The hospital had the power to monitor the work being done, to order the work stopped if not being performed according to the contract, and to direct the independent contractor to correct safety problems. Id. However, the independent contractor provided the workers, materials, and technical expertise to perform the work and was responsible for safety precautions. Id. at 835. The court held that the hospital's authority to direct the independent contractor to correct safety

violations or to stop the work was insufficient control, as a matter of law, to fall within the retained control exception. Id. See Foley v. Rust Int'l, 901 F.2d 183, 185 (1st Cir. 1990) (general contractor's retained ability to report safety violations and to stop subcontractor's work for failure to comply with same insufficient control to trigger retained control exception, as a matter of law); McNamara v. Massachusetts Port Auth., 30 Mass. App. Ct. 716, 719 (1991) (insufficient control, as matter of law, over independent contractor who owned and maintained buses where defendant's authority to remove deficient bus from service was "analogous to that of making suggestions or recommendations, ordering alterations or deviations in performance, or [most pertinently] rejecting unsatisfactory work and demanding correction").

The record on summary judgment in this case falls squarely on the side of those cases where, as a matter of law, the defendant had insufficient control over safety protocols or the operative details to trigger liability. Here, the homeowner's contract with the general contractor expressly allocated responsibility for the renovation to the contractor. Pursuant to the contract, the contractor alone was required to furnish all materials, to perform all the work, to obtain all permits, and to ensure the work was completed in compliance with all building codes and other laws. The contractor was to ensure the

work was performed by authorized, licensed persons. Moreover, the contractor was solely responsible for hiring of subcontractors, retaining for itself ultimate responsibility for the proper completion of the renovation. Nothing in the record supports a finding that the homeowner retained control over either the operative details of the renovation or the safety protocols and procedures instituted by the general contractor.

At most, the record established that, prior to engaging the general contractor, the homeowner had been involved with other renovation projects. For the renovation at issue, she hired an architect and identified a heating, ventilation, and air conditioning (HVAC) subcontractor; once she retained AD, she stated that she would "like [AD] to work with [the HVAC subcontractor] on air conditioning." She was asked to make decisions along the way, some of which affected whether the project would be delayed. The homeowner stated that she hoped that, if she saw any safety issues, she would bring them to the attention of the general contractor. Together, the homeowner's responsibilities are the type of "general right to order the work stopped or resumed, to inspect its progress, or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations" that have been uniformly held to be insufficient, as a matter of law, to trigger the "retained control" exception to

the general rule. Lyon, 424 Mass. at 835, quoting Restatement (Second) of Torts § 414 comment c (1965).

b. Reasonable care. The employee next claimed that the homeowner owed him the same duty of reasonable care that she owes to all lawful visitors. See Poirier v. Plymouth, 374 Mass. 206, 228 (1978) (eliminating distinction between independent contractors and other lawful visitors). Specifically, he asserted that the homeowner, pursuant to the duty of reasonable care she owed to all lawful visitors, was required to provide a safe working space because "[p]ower equipment with dangerous blades such as those for cutting tile or wood presents a readily appreciated hazard if insufficient space is provided for safe working practice."

The employee is correct that the homeowner owed him the same duty of reasonable care that she owed to lawful visitors.[12] See Poirier, 374 Mass. at 228. "This duty include[d] an obligation to maintain the 'property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk.'" Dos Santos v. Coleta,

[12] The homeowner incorrectly asserted that the only duty she owed the employee was to warn him of hidden defects about which the employee did not know and could not reasonably have discovered. See Poirier, 374 Mass. at 227-228 (abrogating hidden defect rule for employees of independent contractors).

465 Mass. 148, 154 (2013), quoting Mounsey v. Ellard, 363 Mass. 693, 708 (1973). It also included a duty to warn visitors of "unreasonable dangers of which the landowner is aware or reasonably should be aware" (citation omitted). Dos Santos, supra.

Ordinarily, "[t]here is no duty to protect lawful visitors from dangers obvious to persons of ordinary intelligence." Lyon, 424 Mass. at 833. See O'Sullivan v. Shaw, 431 Mass. 201, 204 (2000) (open and obvious danger ordinarily negates all duties with respect to such danger). "If a risk is of such a nature that it would be obvious to persons of average intelligence, there is, ordinarily, no duty on the part of the property owner to warn of the risk." Young v. Atlantic Richfield Co., 400 Mass. 837, 842 (1987), cert. denied, 484 U.S. 1066 (1988). The rationale for this rule is that the open and obvious nature of the danger itself suffices to warn the visitor. "[T]he [additional] warning [by the homeowner] would be superfluous for an ordinarily intelligent plaintiff." Dos Santos, 465 Mass. at 154, quoting Papadopoulos v. Target Corp., 457 Mass. 368, 379 (2010).

However, while a homeowner may be relieved of the duty to warn of an open and obvious danger, the Supreme Judicial Court has held that the homeowner has a duty to remedy an open and obvious danger in certain circumstances. See Dos Santos, 465

Mass. at 155. In particular, the homeowner has a duty to remedy "an open and obvious danger where it 'can and should anticipate that the dangerous condition will cause physical harm to [a lawful visitor] notwithstanding its known or obvious danger.'" Papadopoulus, 457 Mass. at 379, quoting Soederberg v. Concord Greene Condominium Ass'n, 76 Mass. App. Ct. 333, 338 (2010). Relevant to the circumstances of the present case, "where there is 'reason to expect that the [lawful visitor] will 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,' such a duty to remedy arises." Docos v. John Moriarty & Assocs., Inc., 78 Mass. App. Ct. 638, 641 (2011), quoting Papadopoulos, supra. See, e.g., Dos Santos, supra at 161-163 (landowner who positioned trampoline next to shallow inflatable pool and was aware visitors jumped from trampoline into pool had duty to remedy open and obvious danger posed thereby); Papadopoulos, supra ("It is not reasonable for a property owner to leave snow or ice on a walkway where it is reasonable to expect that a hardy New England visitor would choose to risk crossing the snow or ice rather than turn back or attempt an equally or more perilous walk around it"); Docos, supra at 641-642 (whether general contractor owed subcontractor's employee duty to remedy hazardous condition caused by construction debris on active construction site

presented jury question where contractor was aware of debris and its presence violated contractor's own safety protocols as well as construction regulations and laws); Soederberg, supra at 339 (landowner had duty to remedy obvious risk posed by frozen slush on known travel path).

In the present case, as the employee correctly admitted, the danger of working with power tools that include sharp blades was obvious. Using the same without ensuring sufficient space for the safe operation of this equipment plainly heightened the risk of injury. The question then is whether this open and obvious danger was one the homeowner had a duty to remedy. Unlike in the other cases where a duty to remedy has been found, the employee in this case himself brought the table saw to the renovation project. The homeowner did not direct how the employee used the saw, where the employee plugged in the saw, or the length or the path of the extension cord used to power the saw. The employee alone determined to use the table saw on the ground rather than on a table. He chose to "freehand" cut pine wood, using both hands on the wood and apparently nothing to restrain the saw itself. Under such circumstances, we are doubtful that the homeowner had a duty to remedy the obvious hazard attendant to the employee's decision to misuse his own

table saw in the manner alleged.[13] See, e.g., Poirier, 374 Mass. at 227 ("a person who voluntarily enters into a contract of employment to repair an old and visibly decrepit monument may be in a position to demand substantial remuneration for the risk he or she is taking, but cannot demand that the monument be fortified and made safe for climbing"); LaForce v. Dyckman, 96 Mass. App. Ct. 42, 47-48 (2019) (no duty to remedy zip line). As set forth infra, we need not reach the issue because here the homeowner is entitled to summary judgment on the issue of causation.

2. Causation. Assuming arguendo that the case presents a jury question as to whether a duty arose, the homeowner is entitled to summary judgment because the employee has not shown a reasonable expectation of proving causation. "Causation is an

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[13] The employee asserted that the homeowner's duty arose from her decision to move a mattress into the third-floor bedroom, the fact that she had a real estate broker's license and had been involved in prior renovations, the planned floor plan of the garden level itself, and the employee's complaints to the homeowner that he lacked a safe space to perform work. The employee does not explain how any of these heightened the homeowner's duty, posed a hazard not present "at a typical active construction site," or violated any of the homeowner's obligations under safety regulations or laws. Docos, 78 Mass. App. Ct. at 642 & n.8 (declining to "create or impose a more exacting standard" beyond compliance with construction industry standard practices, rules set forth in regulations, contractor's own policies and contractual obligations). See Vertentes v. Barletta Co., 392 Mass. 165, 168 (1984) ("the duty owed by an employer of an independent contractor who is performing inherently dangerous work does not extend to the employees of the independent contractor").

essential element of [the burden of] proof" for a negligence claim. Glidden, 430 Mass. at 696, citing Restatement (Second) of Torts § 281 (1965). At best, the record showed that the employee believed the extension cord to which his table saw was tethered was yanked while he was milling pine wood, perhaps by someone pulling or tripping over it. He speculates that this action by an unknown person on site caused the saw suddenly to cut his thumb. There is nothing in the record (beyond speculation) to explain how or why the cord for the table saw was yanked, to identify who pulled the cord, or most significantly, to connect some property defect chargeable to the homeowner that caused (or even contributed) to the injury. See Glidden, supra at 697 (summary judgment in favor of homeowner warranted where roofer's employee injured when scaffolding fell but record, beyond "unsubstantiated conjectures," did not explain how the scaffold fell).[14]

Judgment affirmed.

Order denying motion for reconsideration affirmed.

[14] The employee's motion for reconsideration raised no new issues, and thus, the judge did not abuse his discretion in denying it. See Audubon Hill S. Condominium Ass'n v. Community Ass'n Underwriters of Am., Inc., 82 Mass. App. Ct. 461, 470-471 (2012).