

STATE OF MICHIGAN
COURT OF APPEALS

GEORGE FROMMERT,

Plaintiff-Appellant,

v

TEERA CONSTRUCTION COMPANY,

Defendant/Cross-Defendant-
Appellee,

and

KASCO, INC.,

Defendant/Cross-Plaintiff.

UNPUBLISHED

December 21, 2010

No. 292097

Oakland Circuit Court

LC No. 2008-090275-NO

Before: GLEICHER, P.J., and ZAHRA and K. F. KELLY, JJ.

PER CURIAM.

In this personal injury action, plaintiff George Frommert appeals as of right an order granting summary disposition in favor of defendant/cross-defendant, Teera Construction Company (Teera). On appeal, plaintiff argues that the trial court erred by making several factual determinations before granting summary disposition to Teera pursuant to MCR 2.116(C)(10). We conclude plaintiff's claims on appeal lack merit. We affirm.

I. BASIC FACTS

Defendant/Cross-Plaintiff, Kasco, Inc. (Kasco), was the general contractor for the construction project known at which this incident occurred. Teera was a masonry subcontractor retained by Kasco. Approximately two days prior to plaintiff's accident, Teera began to build the scaffolding from which plaintiff fell. Louis Pivetta, a partner in Teera, testified that on the day of plaintiff's accident, the scaffolding was incomplete, and the only way to access the scaffolding's platform would have been from the ground. To warn others that the scaffolding was only partially erect and not safe for use, Pivetta placed yellow cautionary tape all the way around the base of the scaffolding, at about four and a half feet above the ground. Around 7:00 a.m. on the day plaintiff fell, Pivetta observed that the yellow cautionary tape was still around the base of the scaffolding.

On the date of the accident, plaintiff and Geoff West (both employees of another subcontractor retained by Kasco) were working on the exterior of the building, next to Teera's partially erect scaffolding. West and plaintiff worked from a manlift. West testified that he checked plaintiff's safety harness before ascending to the work location. West and plaintiff were insulating the exterior of the building so that Teera could brick the exterior wall. While West and plaintiff were working on the highest point of the exterior wall, a piece of insulation fell onto a portion of the building's rooftop. West tried to maneuver the manlift to retrieve the insulation, but he could not get around the scaffolding. West then maneuvered the manlift to the scaffolding's platform, where plaintiff unhooked himself from his safety harness and walked across the scaffolding's platform. When plaintiff reached the other end of the platform, plaintiff suddenly fell approximately 20 feet to the ground. Several wooden planks also fell on top of plaintiff. After plaintiff fell, West had to use the manlift to get down to plaintiff because the scaffolding did not have any ladders for West to climb down.

At approximately 8:00 a.m., Kasco's project superintendent, Robert Toth, received a phone call from West informing Toth of plaintiff's accident. Toth immediately went to the accident scene, called 911, and informed Pivetta of plaintiff's fall. Both Toth and Pivetta arrived at the accident scene before the ambulance arrived. Pivetta testified that he observed that the yellow cautionary tape he had placed around the scaffolding was ripped apart and blowing around. By contrast, Toth did not recall seeing yellow caution tape around the base of the scaffolding upon arriving at the accident scene. Likewise, West stated he did not see any yellow cautionary tape at the bottom of the scaffolding from which plaintiff fell.¹ Plaintiff testified that he walked right under the scaffolding before going into the manlift and he did not observe yellow cautionary tape around the base of the scaffolding either before or after he fell. Plaintiff also testified that he believed the wood planks were not properly secured in the scaffolding because, after he fell, he saw from underneath the scaffolding that one of the scaffolding supports was approximately four feet shorter than the other scaffolding supports.

II. ANALYSIS

A. STANDARD OF REVIEW

This Court reviews de novo the grant or denial of a motion for summary disposition under MCR 2.116(C)(10). *Lind v Battle Creek*, 470 Mich 230, 238; 681 NW2d 334 (2004). A motion brought pursuant to MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Id.* A motion brought under MCR 2.116(C)(10) is reviewed by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Additionally, this Court considers only that evidence which was properly presented to the trial court in deciding the motion. *Pena v Ingham County Rd Comm'n*, 255 Mich App 299, 310; 660

¹ Whether the scaffolding was marked with cautionary tape is a question of fact that is not material to the issue before this Court. As developed in this opinion, plaintiff failed to establish that the duty to maintain the scaffolding was separate and distinct from the duty Teera accepted under its contract with Kasco.

NW2d 351 (2003). Summary disposition is proper if there is “no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.” *Latham*, 480 Mich at 111.

Whether a party has a legal duty is a question of law that is also reviewed de novo. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004). If the trial court determines that a party owes no duty, then summary disposition is proper. *Beaudrie v Henderson*, 465 Mich 124, 130; 631 NW2d 308 (2001). However, summary disposition is not proper if factual questions exist regarding the characteristics giving rise to the alleged duty. *Howe v Detroit Free Press, Inc*, 219 Mich App 150, 156; 555 NW2d 738 (1996). Under these circumstances, the fact-finder must resolve the issue.

B. PLAINTIFF’S NEGLIGENCE ACTION AGAINST TEERA

The prima facie elements of negligence are: (1) establishment of a duty running from the defendant to the plaintiff; (2) breach of that duty; (3) causation; and (4) damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). The question at issue here is whether defendant owed plaintiff any duty in regard to its maintenance of the scaffolding from which plaintiff fell. Teera, a subcontractor performing duties on a construction site, placed the scaffolding at the site to execute certain duties it agreed to do pursuant to its contract with Kasco. Plaintiff’s tort claim stems from Teera’s alleged misfeasance of its contractual duty under the Kasco contract. In *Fultz*, 470 Mich at 467, our Supreme Court stated,

[C]ourts should analyze tort actions based on a contract brought by a plaintiff who is not a party to that contract by using a “separate and distinct” mode of analysis. Specifically, the threshold question is whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant’s contractual obligations. If no independent duty exists, no tort action based on a contract will lie. (Footnote omitted.)

In order to determine whether a duty is separate and distinct from the contract, the language of the contract at issue must be scrutinized.² Where the contracting party takes action not within the scope of the contract and such action creates a dangerous condition to third persons, which condition should have been anticipated, a separate and distinct duty running from the contracting party to the third party may be found. *Id.* at 468-469. However, a failure to act in a manner anticipated under the contract “does not give rise to a separate legal duty in tort.” *Ghaffari v Turner Constr Co (On Remand)*, 268 Mich App 460, 467; 708 NW2d 448 (2005), citing *Fultz*, 470 Mich at 469.

We conclude the trial court did not err when it held that plaintiff failed to articulate a duty owed by Teera that was separate and distinct from the terms of the subcontract between Kasco,

² We disagree with our dissenting colleague’s conclusion that plaintiff’s claim of negligence is only tangentially related to the Teera-Kasco contract. The contract expressly addressed Teera’s obligation to utilize scaffolding in a safe manner.

the general contractor, and Teera, the subcontractor. Under the terms of the contract, Teera was required to “us[e] proper rigging, hoisting, ladders, scaffolding, guard rails, extension cords, (properly grounded), welding, soldering and burning protection, [and] barricading floor openings in construction.” Because Teera was required under the terms of the contract to use proper scaffolding at the construction site, plaintiff’s negligence claim regarding the scaffolding is based on the requirements of the contract. Thus, the duty at issue is contractual, and reasonable minds could not differ regarding the contract term.

We note that our conclusion is consistent with orders from our Supreme Court addressing similar cases. Specifically, in *Mierzejewski v Torre & Bruglio, Inc*, 477 Mich 1087; 729 NW2d 225 (2007), and *Banaszak v Northwest Airlines, Inc*, 477 Mich 895; 722 NW2d 433 (2006), the Supreme Court noted that hazards that are the subject of the contract are not new and do not give rise to a separate and distinct common law duty of care to third parties.

Affirmed.

/s/ Brian K. Zahra

/s/ Kirsten Frank Kelly