STATE OF MICHIGAN

COURT OF APPEALS

SAMI STEPHAN,

Plaintiff-Appellant,

v

UNIVERSAL WHOLESALE, INC., and JOE ZAYTOUNO,

Defendants-Appellees.

UNPUBLISHED
November 19, 2019

No. 346270
Oakland Circuit Court
LC No. 2018-162935-NO

Before: JANSEN, P.J., and BOONSTRA and LETICA, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting summary disposition in favor of defendants. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Defendants hired plaintiff as an independent contractor to paint the interior ceiling of a new warehouse and to seal its exterior brick walls. On May 23, 2016, plaintiff was using defendants' scissor lift to paint the ceiling. At around 10:00 a.m., defendant Joe Zaytouno (Zaytouno), the owner of defendant Universal Wholesale, Inc (Universal Wholesale), allowed plumbers to use the scissor lift for approximately two to three hours to do pipework.

In the meantime, plaintiff could not continue painting the ceiling because the job required that he be elevated. Plaintiff told Zaytouno that he would go outside and use his own ladder to work on sealing the exterior brick. Zaytouno said, "Okay good, [g]o for it." According to plaintiff, Zaytouno did not offer plaintiff any fall protection or warn plaintiff that the new metal roof may not have been finished and might be slick; however, plaintiff also admitted that he did not ask for any fall protection.

Once outside, plaintiff used a ladder to reach the roof. Plaintiff stated at his deposition that he went on the roof "on his own." He took a few steps off of the ladder and onto the roof, at which point he slipped and fell to the ground, injuring his leg, hip, back, and arm.

On January 5, 2018, plaintiff filed suit against defendants, alleging that their negligence caused his injuries.[1] He claimed that defendants had failed to provide him with a safe work site and had failed to warn him of the dangers of working at heights over 10 feet without proper safety equipment.

Defendants moved for summary disposition, contending that they were not liable for plaintiff's injuries because plaintiff had failed to establish the elements of the common work area doctrine. The trial court agreed and entered an order granting summary disposition in favor of defendants.

This appeal followed.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *El-Khalil v Oakwood Healthcare, Inc*, ___ Mich ___, ___; ___ NW2d ___ (2019) (Docket No. 157846); slip op at 4. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to a judgment or partial judgment as a matter of law." MCR 2.116(C)(10). See also *Finazzo v Fire Equip Co*, 323 Mich App 620, 625; 918 NW2d 200 (2018). A genuine issue of material fact exists if, when reviewing the record in the light most favorable to the nonmoving party, an issue upon which reasonable minds might differ remains open. *Debano-Griffin v Lake Co*, 493 Mich 167; 828 NW2d 634 (2013) (citations omitted). To make this determination this Court must consider "the pleadings, admissions, affidavits, and other relevant documentary evidence of the record . . . ." *Maple Grove Twp v Misteguay Creek Intercounty Drain Bd*, 298 Mich App 200, 206; 828 NW2d 459 (2012) (quotation marks and citation omitted).

III. ANALYSIS

Plaintiff argues the trial court erred by granting defendants' motion for summary disposition because sufficient evidence was presented to demonstrate that genuine issues of material fact exist regarding defendants' liability under the common work area doctrine. We disagree.

"At common law, property owners and general contractors generally could not be held liable for the negligence of independent subcontractors and their employees." *Ormsby v Capital Welding, Inc*, 471 Mich 45, 48; 684 NW2d 320 (2004). However, in *Funk v Gen Motors Corp*, 392 Mich 91, 104-105; 220 NW2d 641 (1974), overruled in part on other grounds by *Hardy v Monsanto Enviro-Chem Sys, Inc*, 414 Mich 29 (1982), the Michigan Supreme Court established the common work area doctrine as an exception to that general rule.

[1] Plaintiff's claims against Universal Wholesale were based on vicarious liability for the acts of Zaytouno.

> [F]or a general contractor to be held liable under the "common work area doctrine" a plaintiff must show that (1) the defendant, either the property owner or general 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 workmen (4) in a common work area.[2] [*Ormsby*, 471 Mich at 54.]

A plaintiff must prove all four elements of the common work area doctrine in order for a general contractor to be held liable. *Id*. at 59-60.

The parties do not dispute that Zaytouno, acting on behalf of Universal Wholesale, was acting as the general contractor of the construction site where plaintiff was injured. Therefore, the first element of the common work area doctrine is satisfied, and the question under the remaining elements is whether Zaytouno failed to take reasonable steps within his supervisory and coordinating authority to guard against readily observable dangers that created a high degree of risk to a significant number of workers in a common work area. We conclude that plaintiff failed to demonstrate a genuine issue of material fact in that regard, and that the trial court properly granted summary disposition in favor of defendants.

General contractors have a duty to take reasonable steps to guard against readily observable and avoidable dangers. *Ormsby*, 471 Mich at 53-54. "In cases in which normal safety precautions can reduce a hazardous condition so that it no longer creates a high degree of risk to workers, the general contractor's duty is to take reasonable steps to ensure that those safety precautions are taken." *Latham v Barton Malow Co*, 480 Mich 105, 112-113; 746 NW2d 868 (2008).

It is undisputed that plaintiff was not using fall protection equipment when he fell from the roof; however, the record, even viewed most favorably to the plaintiff, does not show that the danger of plaintiff falling off the roof was a readily observable and avoidable danger on the day of plaintiff's fall. Plaintiff testified that he went onto the roof "on his own" and did not ask Zaytouno about safety gear; indeed, plaintiff's testimony, and the testimony of his expert witness, is devoid of any statements that plaintiff even told Zaytouno that he would be going on the roof that day. At best, plaintiff told Zaytouno that he would be working on a ladder—but plaintiff did not fall from the ladder. On the record before this Court, we cannot conclude that the risk that plaintiff would fall after climbing onto the roof to perform a portion of his exterior painting job on that particular day was a readily observable and avoidable danger, such that Zaytouno should have insured that fall protection safeguards for the roof were in place. *Ormsby*, 471 Mich at 54.

---

[2] A common work area is one where two or more subcontractors are required to work, although not necessarily at the same time. *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 6; 574 NW2d 691 (1997).

In any event, we conclude that plaintiff did not establish that a condition of the roof from which he fell, even if it constituted a common work area,[3] created a high risk of danger to a significant number of workers. To satisfy the common work area doctrine, a significant number of workers must be exposed to the relevant danger at hand. *Ormsby*, 471 Mich at 54. Caselaw does not specify the minimum number of workers required to constitute "a significant number." However, the Michigan Supreme Court has held that two to six employees of a subcontractor exposed to danger in a common work area did not constitute a significant number of workers for purposes of the common work area doctrine. *Alderman v JC Dev Communities, LLC*, 486 Mich 906, 906 (2010).

It appears from the record that no other workers were working on the roof on the day in question. Although plaintiff argues that both roofers and masons were also exposed to the danger of the unfinished roof, we find nothing in the record to support that claim—the record is devoid of any information concerning, for example, what safety precautions roofers and masons may have used while working on the roof. Plaintiff did not testify that he saw anyone else on the roof that day. Plaintiff had one employee working for him, who was mostly "pulling paints" and was doing work on the ground during plaintiff's fall. The employee testified at his deposition that no one else was on the roof.

A party opposing a motion for summary disposition must present more than conjecture and speculation to establish that a genuine issue of material fact remains for trial. *Southfield Ed Assoc v Bd of Ed of Southfield Pub Sch*, 320 Mich App 353, 369; 909 NW2d 1 (2017). Plaintiff failed to establish that his injury occurred in a common work area that lacked adequate safety precautions. The record shows that he was the only one exposed to the danger of falling off the roof that day. Plaintiff provided the trial court with no evidence to suggest that roofers or masons were also required to work without fall protection in that area, or indeed how many employees *ever* worked in that area.

We conclude that plaintiff failed to raise a genuine issue of material fact with regard to whether Zaytouno failed to take reasonable steps within his supervisory and coordinating authority to guard against readily observable and avoidable dangers, or that a significant number of workers were exposed to the risk. *Ormsby*, 471 Mich at 53-54. Accordingly, the trial court did not err by granting defendants' motion for summary disposition. *Finazzo*, 323 Mich App at 625.

Affirmed.

/s/ Kathleen Jansen
/s/ Mark T. Boonstra
/s/ Anica Letica

[3] The record is not expansive regarding whether the roof in general constituted a common work area.