NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

IHOR MALANCHUK,

Appellant

v.

ILYA SIVCHUK T/A FOUR BROTHERS CONSTRUCTION CO.,

Appellee

IN THE SUPERIOR COURT OF PENNSYLVANIA

IHOR MALANCHUK,

Appellant

v.

ALEX TSIMURA, INDIVIDUALLY AND T/A IMPRESSIVE WINDOWS AND ALEXIS IMPRESSIVE WINDOWS
AND
TATYANA TSIMURA, INDIVIDUALLY AND T/A IMPRESSIVE WINDOWS AND ALEXIS IMPRESSIVE WINDOWS AND ALEXIS IMPRESSIVE WINDOWS, INC.,

Appellees

No. 1379 EDA 2012

Appeal from the Order Entered March 26, 2012
In the Court of Common Pleas of Philadelphia County
Civil Division at No(s): 3249 May Term 2009, 4727 April Term, 2010

BEFORE: BOWES, OTT, and STRASSBURGER,* JJ.

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* Retired Senior Judge assigned to the Superior Court.

MEMORANDUM BY BOWES, J.: **FILED DECEMBER 04, 2013**

Ihor Malanchuk appeals from the March 26, 2012 order granting summary judgment to Alex Tsimura, both individually and trading as Impressive Windows and Alexis Impressive Windows, and to Tatyana Tsimura, both individually and trading as Impressive Windows and Alexis Impressive Windows and Alexis Impressive Windows, Inc. (collectively "Tsimura"). We reverse.

Appellant was an independent contractor who, beginning in 2007, began to perform carpentry work for Ilya Sivchuk's wholly-owned enterprise, Four Brothers Construction Co., a limited liability company ("Four Brothers") (collectively "Sivchuk") on various construction jobs on a project-by-project basis. Also in 2007, Four Brothers hired Mr. Tsimura to act as a supervisor and field manager of its construction projects. There was no written contract between Four Brothers and Mr. Tsimura, who was treated as an independent contractor. Mr. Tsimura performed his work through his wife's business, Impressive Windows. Four Brothers was involved in residential and commercial interior construction and employed between ten and fifteen contractors to do carpentry and trim work.

On May 2, 2008, Appellant was severely injured after he fell from scaffolding located at a residence owned by Ilya Sivchuk on 920 Old Dolington Road, Newtown, Pennsylvania. On that day, Mr. Sivchuk had two Four Brothers' contractors, Appellant and Mr. Tsimura, perform work at his own residence.

On May 27, 2008, Appellant filed a claim under a workers' compensation policy that was issued by State Workers' Insurance Fund and that Appellant purchased for himself as a condition of working for Sivchuk. That insurance company added Sivchuk as a defendant in the worker's compensation action, which was settled for $30,000 on June 2, 2010. Sivchuk contributed to the settlement, and that accord contained a clause stating that it was agreed there was no employer-employee relationship between Appellant and Sivchuk.

On May 21, 2009, Appellant filed a personal injury action against Sivchuk at docket number 3249 May Term 2009 in the Court of Common Pleas of Philadelphia County. On April 30, 2010, Appellant filed a separate action against Tsimura at docket number 4727 April Term 2010 in the Court of Common Pleas of Philadelphia County. In both actions, Appellant raised causes of action sounding in both negligence and products liability, which were premised upon the respective defendants' action of supplying the scaffolding from which Appellant fell. Upon Sivchuk's motion filed pursuant to Pa.R.C.P. 213(a),[1] the court ordered consolidation of the two lawsuits "for the purpose of discovery, arbitration and if [the arbitration is] appealed,

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[1] Pa.R.C.P. 213(a) provides:

> In actions pending in a county which involve a common question of law or fact or which arise from the same transaction or occurrence, the court on its own motion or on the motion of any party may order a joint hearing or trial of any matter in issue in the actions, may order the actions consolidated, and may make orders that avoid unnecessary cost or delay.

trial" under docket number 3249 May Term 2009. Order of Court, 6/6/11, at 1.

Discovery was completed, and, on May 2, 2011, Sivchuk filed a motion for summary judgment. Tsimura followed suit on December 5, 2011. Appellant filed responses to the respective motions and submitted exhibits in support of his request that the motions be denied. Since Sivchuk had supplied the scaffolding in question, Appellant withdrew his products liability claim against Tsimura.

On March 26, 2012, the court granted summary judgment in favor of Tsimura as to all counts pled in the action instituted against them, granted partial summary judgment to Sivchuk as to Appellant's products liability count against Sivchuk, and denied Sivchuk's motion for summary judgment with respect to the negligence counts presented against them. Appellant filed a timely appeal from the portion of the March 26, 2012 order that granted summary judgment in favor of Tsimura. The court issued a Pa.R.A.P. 1925(b) opinion indicating that it considered this appeal as improperly filed from an interlocutory order as well as supporting its decision to grant summary judgment to Tsimura.

On appeal, Appellant raises these contentions:

> 1. Where summary judgment is granted as to all claims and all defendants in one of two consolidated actions in which the parties are not identical, is the judgment a final appealable order within the meaning of Pa. R.A.P. 341?

> 2. Does evidence of record that defendant Tsimura was a controlling contractor preclude summary judgment, and did the trial court err in granting summary judgment to the Tsimura defendants and failing to consider the evidence of record in a light most favorable to Plaintiff as the non-moving party, basing summary judgment on the testimony of the moving party and its witnesses, and failing to leave credibility determinations to the trier of fact?
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> 3. Does evidence of record that defendant Tsimura supplied the scaffolding within the meaning of the Restatement (Second) of Torts § 392 preclude summary judgment, and did the trial court err in granting summary judgment to the Tsimura defendants and failing to consider the evidence of record in a light most favorable to Plaintiff as the non-moving party, basing summary judgment on the testimony of the moving party and its witnesses, and failing to leave credibility determinations to the trier of fact?
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> 4. Did defendant Tsimura as a co-independent contractor engaged in a common enterprise owe Plaintiff a duty of care precluding summary judgment?

Appellant's brief at 3-4.

Initially, we address the question of our jurisdiction to entertain this appeal. We are permitted to exercise jurisdiction over "(1) a final order or an order certified as a final order (Pa.R.A.P. 341) [***see also*** 42 Pa.C.S.A. § 742 ("The Superior Court shall have exclusive appellate jurisdiction of all appeals from final orders of the courts of common pleas . . ."]; (2) an interlocutory order appealable as of right (Pa.R.A.P. 311); (3) an interlocutory order appealable by permission (Pa.R.A.P. 312, 1311, 42 Pa.C.S.A. § 702(b)); or (4) a collateral order (Pa.R.A.P. 313)." ***Commerce Bank/Harrisburg, N.A. v. Kessler***, 46 A.3d 724, 728 (Pa.Super. 2012) (quoting ***Stahl v. Redcay***, 897 A.2d 478, 485 (Pa.Super. 2006)). "A final

order is defined as any order that: "(1) disposes of all claims and of all parties; (2) is explicitly defined as a final order by statute; or (3) is entered as a final order pursuant to [Pennsylvania Rule of Appellate Procedure 341(c)." ***McGrogan v. First Commonwealth Bank***, 2013 WL 4519785, 11 (Pa.Super. 2013) (citation omitted).

Herein, the trial court postulated that the appeal was improper since summary judgment was not granted to all parties in that Sivchuk remains a defendant in the consolidated action. However, we conclude that our Supreme Court's decision in ***Kincy v. Petro***, 2 A.3d 490 (Pa. 2010), controls and precludes such a finding. In ***Kincy***, the Court analyzed the effect of a trial court order that consolidated two separate actions pursuant to Pa.R.C.P. 213(a). There were different parties and different theories of liability involved in each action. The Court concluded that "such an order does not result in the complete consolidation of such actions, such that the pleadings are merged and/or the actions shed their separate identities." ***Id***. at 491.

Therein, two lawsuits pertaining to the same traffic accident were filed by the occupants of the one of the cars involved in the wreck. Those actions were consolidated under Pa.R.A.P. 213(a) "for all purposes," including appeal. ***Id***. One vehicle involved in the collision contained a driver and passenger ("vehicle number one"), and that car was struck by a vehicle ("vehicle number two") occupied solely by the driver and owned by that driver's mother. The driver of vehicle number one (the "plaintiff") filed an

action against the mother of the driver of vehicle number two and that vehicle's owner. The plaintiff alleged therein that the mother was negligent in the operation of her car. This complaint was never amended, even after discovery clarified that the mother was the owner and not the driver of vehicle number two. Vehicle number one's passenger and his wife then filed a lawsuit against both the driver and owner of vehicle number two, and they raised averments of negligent driving and negligent entrustment, respectively, against the daughter/mother defendants. The two actions were consolidated.

The consolidated matter proceeded to arbitration, where the passenger in vehicle number two and his wife prevailed, and then settled their case. The plaintiff lost at arbitration and appealed to the court of common pleas. The case proceeded to trial, where nonsuit was entered in favor of the owner of vehicle number two since she was not driving her car when the collision transpired and the only allegations raised in the plaintiff's complaint involved negligent operation of vehicle number two.

On appeal to the Supreme Court, the plaintiff argued that, due to entry of the consolidation order as to all purposes, her complaint merged with that of the passenger and his wife and that his allegations of negligent driving against vehicle number two's driver should be considered as raised by the plaintiff. Our Supreme Court rejected that position. It noted that consolidation

> is used in three different senses: First, where all except one of the several actions are stayed until one is tried, in which case the judgment in the one is conclusive as to the others; second, where several actions are combined into one and lose their separate identity and become a single action in which a single judgment is rendered; and, third, where several actions are ordered to be tried together but each retains its separate character and requires the entry of a separate judgment.

Id. at 494. (citation omitted).

Our Supreme Court concluded that the second option, which is termed "complete consolidation" cannot occur "unless the actions involve the same parties, subject matter, issues, and defenses." ***Id***. It ruled that the type of consolidation encompassed by Pa.R.C.P. 213(a) does not result in complete consolidation. It held that since the two actions in question "did not involve identical parties, . . . the actions could not have been consolidated such that the actions lost their separate identities and the pleadings merged." ***Id***. at 495.

Thus, ***Kincy*** holds that each action retains its separate identity despite the entry of a consolidation order under Pa.R.C.P. 213. Applying the reasoning of ***Kincy*** herein, we must conclude that, despite the consolidation order, these two actions have retained their separate identities because different defendants are named in each lawsuit. Hence, the summary judgment order in question had the effect of terminating the lawsuit filed at 4727 April Term 2010 as to all defendants therein. It is thus a final, appealable order as to that litigation, and we have jurisdiction over this appeal.

We now examine whether the trial court properly granted summary judgment to Tsimura.

> Our standard of review of an order granting summary judgment requires us to determine whether the trial court abused its discretion or committed an error of law, and our scope of review is plenary. We view the record in the light most favorable to the nonmoving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Only where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to a judgment as a matter of law will summary judgment be entered.

Clausi v. Stuck, 2013 WL 3963715, 4 (Pa.Super. 2013) (citations and quotation marks omitted); ***see*** Pa.R.C.P. 1035.2.[2] Additionally, it is well established in this Commonwealth that, under the rule announced in ***Borough of Nanty–Glo v. American Surety Co. of New York,*** 163 A.

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[2] That rule governs motions for summary judgment and provides:

> After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law
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> > (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or
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> > (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Pa.R.C.P. 1035.2.

523, 524 (Pa. 1932), which is invoked by Appellant herein, a grant of summary judgment cannot be sustained when the moving party relied upon oral testimony in the form of affidavits or depositions to establish the absence of a genuine issue of material fact. ***Rosenberry v. Evans***, 48 A.3d 1255, 1259 (Pa.Super. 2012). The ***Nanty-Glo*** rule rests on the premise that "however clear and indisputable may be the proof when it depends on oral testimony, it is nevertheless the province of the jury to decide, under instructions from the court, as to the law applicable to the facts." ***Id***. (quoting ***Nanty–Glo***, ***supra*** at 524).

In this case, Appellant argues that Tsimura is subject to liability for his injuries on three grounds. First, Mr. Tsimura was the supervisor and on-site manager of the construction project in question and was liable for Appellant's injuries "pursuant to established law holding a controlling contractor liable for injuries to other contractors for failure to comply with OSHA regulations." Appellant's brief at 15. Second, Appellant argues that Tsimura was subject to liability under the Restatement (Second) of Torts § 392, which we examine in detail *infra*, in that he supplied the scaffolding for business purposes. Finally, Appellant maintains that Tsimura was subject to "the common law duty of care independent contractors engaged in a common enterprise owe to each other." Appellant's brief at 16.

Appellant presented the following evidence, which we must credit under the recited standard of review, to support his positions. Mr. Sivchuk's

responsibilities for Four Brothers included 1) the negotiation of contracts for the installation of interior carpentry for residences and businesses; and 2) the payment of Four Brothers' bills. Four Brothers solely used independent contractors to perform the services in question. Mr. Sivchuk also adamantly maintained that he was the only employee of Four Brothers and that any other person working for Four Brothers was an independent contractor.[3]

In his deposition taken during the workers' compensation proceeding, Mr. Sivchuk reported that he did not supervise the work of his contractors. Deposition of Ilya Sivchuk, 1/26/10, at 26.[4] Mr. Sivchuk explained that Mr. Tsimura, who was also an independent contractor of Four Brothers, "owned a company, but I hired him like a supervisor." ***Id***. at 27-28. Mr. Tsimura was paid biweekly.

Once Mr. Sivchuk received a job, he would tell Mr. Tsimura the nature and location of the work. Mr. Tsimura "handled the matter" and was in charge of assigning the business to the different carpentry contractors who worked for Four Brothers. ***Id***. at 38. Mr. Sivchuk stated that, if there were no complications with a job, he would not visit the worksite and that he did

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[3] Given this testimony, we must accept Appellant's position that all the parties at issue herein were independent contractors and that Tsimura was not an employee of Sivchuk on May 2, 2008. ***See*** Appellant's brief at 31, n.14.

[4] This deposition is included in the certified record as Exhibit F to Appellant's response to the summary judgment motion filed by Sivchuk.

so only when he received a complaint. ***Id***. at 42-43. During a deposition taken in the present proceeding, Mr. Sivchuk confirmed that he told all of the carpenters performing work for Four Brothers that Mr. Tsimura was their supervisor and the field manager of any project. Deposition, Ilya Sivchuk, 9/9/11, at 125. Additionally, "they saw a sign on the door where it says Mr. Tsimura, the manager[.]" ***Id***.

Hrihoriy Shostak, another contractor who worked for Four Brothers, confirmed that both Mr. Sivchuk and Mr. Tsimura told him that Mr. Tsimura was his supervisor on Four Brothers' projects. Deposition, Hrihoriy Shostak, 9/28/11, at 13. Mr. Shostak specifically stated that Mr. Tsimura was "a supervisor. We were supposed to listen to what he says." ***Id***. Mr. Tsimura received Occupational Safety and Health Administration ("OSHA") scaffolding training every three months.

On the day of the accident, May 2, 2008, Mr. Sivchuk "called [Mr. Tsimura]" and "told him, Alex, I want to install the moldings in my ceiling." Deposition, Ilya Sivchuk, 1/26/10, at 45. The job in question involved the installation of molding on the two-story cathedral ceiling in the entrance of Mr. Sivchuk's house on 920 Old Dolington Road. Partially assembled scaffolding for that job was already located in the home. It was owned by Four Brothers and transported to Mr. Sivchuk's home from another Four Brothers' job.

Four Brothers' carpenters reported to work each morning at about 6:00 a.m. to a building located on Franklin Street. That location was where they received their assignments for the day from Mr. Tsimura. On May 2, 2008, Appellant reported as usual to the Franklin Street building, met Mr. Tsimura, and the two men traveled to 920 Old Dolington Road together. When they arrived, Mr. Tsimura told Appellant that they were "going to finish the ceiling." Deposition, Ihor Malnchuk, 8/31/11, at 72. Mr. Tsimura next instructed Appellant, who had no OSHA scaffolding training and who never assembled a scaffold before that day, to erect the scaffolding. ***Id***. at 75. At that time, the first tier of the scaffolding was partially built, but there was no second tier, which was needed to reach the ceiling. Mr. Tsimura then left the jobsite for about one hour.

Appellant, who was left alone at the jobsite, retrieved his tools and finished assembling the scaffolding located at Mr. Sivchuk's residence. When Mr. Tsimura returned to 920 Old Dolington Road, he looked at the scaffolding and saw that it was complete. Mr. Tsimura confirmed during his deposition that he visually inspected the erected scaffolding after he returned and determined, "It was fine." Deposition Alex Tsimura, 4/1/10, at 92. There were no guardrails on the scaffolding.

Mr. Tsimura then retrieved his own tools and began to cut boards on the floor while Appellant climbed onto the second tier of the scaffolding. Appellant was looking at the ceiling when one of three boards that comprised

the floor of the second tier of scaffolding turned over on one side. Appellant fell as a result of the shifting board. Appellant broke his elbow, needed multiple surgeries, and is permanently disabled as a result of the break. It was conceded by all the parties that, under OSHA regulations, the scaffolding was required to have a guardrail. Appellant presented the report of an expert witness who opined that, at the time of the accident, the scaffolding was in violation of OSHA regulations since it lacked a guardrail and that the lack of the guardrail was the proximate cause of Appellant's fall.

Appellant first argues that he presented sufficient evidence to create a material fact as to Tsimura's breach of the duty outlined in Restatement (Second) of Torts § 384 and ***Leonard v. Commonwealth***, 771 A.2d 1238 (Pa. 2001). The Restatement (Second) of Torts, § 384 states:

> One who on behalf of the possessor of land erects a structure or creates any other condition on the land is subject to the same liability, and enjoys the same freedom from liability, as though he were the possessor of the land, for physical harm caused to others upon and outside of the land by the dangerous character of the structure or other condition while the work is in his charge.

Comment d to that provision indicates,

> A possessor of land may put a number of persons severally in charge of the particular portions of the work of erecting a structure or creating any other condition upon the land. Again, a general contractor employed to do the whole of the work may, by the authority of his employer, sublet particular parts of the work to subcontractors. In such a case, the rule stated in this Section applies to subject the particular contractor or subcontractor to liability for only such harm as is done by the particular work entrusted to him.

Additionally, comment a to this provision indicates that § 384 "applies to a person who on behalf of the possessor of land erects thereon a structure or creates any other artificial condition, whether in so doing he is acting as the possessor's servant or as an independent contractor, and whether he does the work for reward or gratuitously." Pursuant to § 384 and the decision in ***Leonard***, a person is subject to liability for OSHA violations at a worksite if the person had control over the aspect of a job involving the OSHA violation.

Appellant also relies upon ***Farabaugh v. Pennsylvania Turnpike Com'n***, 911 A.2d 1264 (Pa. 2006), where our Supreme Court applied the duty outlined in Restatement (Second) of Torts § 324A, liability to third person for negligent performance of undertaking. In ***Farabaugh***, the plaintiff's decedent was killed during the course of his work for the general contractor of a worksite while he was driving across a road used to haul materials and his truck was involved in an accident. The plaintiff instituted an action against the construction manager of the construction site and claimed that the road had not been safely maintained and that the safety violations were the proximate cause of the incident that killed the decedent.

Our Supreme Court reversed the grant of summary judgment in favor of the construction manager since the construction manager had assumed a contractual obligation to inspect and otherwise monitor the jobsite. It

concluded that the construction manager owed the plaintiff's decedent a duty pursuant to § 324A. That portion of the Restatement provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
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> > (a) his failure to exercise reasonable care increases the risk of such harm, or
> >
> > (b) he has undertaken to perform a duty owed by the other to the third person, or
> >
> > (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Restatement (Second) of Torts, § 324A. The ***Farabaugh*** Court stated that,

> Generally, a party to a contract does not become liable for a breach thereof to one who is not a party thereto. However, a party to a contract by the very nature of his contractual undertaking may place himself in such a position that the law will impose upon him a duty to perform his contractual undertaking in such manner that third persons—strangers to the contract—will not be injured thereby. It is not the contract *per se* which creates the duty; it is the law which imposes the duty because of the nature of the undertaking in the contract.

Id. at 1283. ***See also Casselbury v. American Food Service***, 30 A.3d 510, 511 (Pa.Super. 2011) (where defendant agreed to provide food services for owner of a business, defendant had contractual obligation to perform that undertaking in safe manner and was subject to liability to person who was purportedly injured due to negligence performance of that responsibility). Notably, this duty can be imposed only when the defendant has specifically undertaken a contractual responsibility for the safety of the

subject of the contract. ***Reeser v. NGK North American, Inc.***, 14 A.3d 896 (Pa.Super. 2011) (where engineering firm's only contractual undertaking was to report to plant owner the levels of a particulate emanating from plant, as opposed to engage in actions involving plant safety, a member of the public allegedly injured by high levels of that particulate could not recover against engineering firm).

Herein, the trial court concluded that there was no evidence that Mr. Tsimura had control of the job at Mr. Sivchuk's residence. We disagree. Mr. Sivchuk, in his deposition, repeatedly stated that Mr. Tsimura was the sole field manager and supervisor over all jobs assigned to Four Brothers' carpentry contractors. Mr. Sivchuk reported that he did not visit worksites absent customer complaints. Mr. Shostak confirmed that all the carpentry contractors were told by both Mr. Sivchuk and Mr. Tsimura that Mr. Tsimura was the supervisor of the jobs that they were assigned through Four Brothers.

Appellant also presented evidence that the job in question, even though it was at Mr. Sivchuk's residence, was assigned to him through Four Brothers and that Mr. Tsimura was in control of the job as a supervisor. Appellant was not contacted by Mr. Sivchuk. Rather, he went to the building that he reported to each morning for his work assignments from Four Brothers. Mr. Tsimura gave him the assignment on the day in question and traveled with him to the residence. Mr. Tsimura also directed Appellant to

assemble the scaffolding and inspected it afterwards. Mr. Tsimura had OSHA scaffolding training while Appellant did not. Hence, Appellant presented sufficient evidence that there was an issue of material fact as to whether Mr. Tsimura was in control of the installation of molding on the ceiling so as to subject him to liability under Restatement § 384.

He also presented sufficient evidence to create an issue of material fact as to whether Mr. Tsimura was directly responsible for a condition on the land, *i.e.* the hazardous scaffolding. Mr. Tsimura was under a verbal contract with Sivchuk to supervise the worksites on Four Brothers' projects and was the sole manager of the construction site on the day of the accident. He received OSHA scaffolding training every three months. Mr. Tsimura knew or should have known that the lack of a guardrail on the two-story scaffolding created a risk that Appellant would fall from that structure. Hence, he owed Appellant a duty under Restatement § 324A.

On appeal, Tsimura relies upon testimonial statements that Mr. Sivchuk and Mr. Shostak made during their depositions that Mr. Sivchuk was in control of the job at his home. However, Appellant presented countervailing evidence. First, he established that this job was treated the same as other undertakings assigned to him by Four Brothers, and Mr. Tsimura, not Mr. Sivchuk, assigned him the task and was present at the job site when the accident occurred. When we credit Appellant's evidence, as we must in this context, it refutes that Mr. Sivchuk was in control of this

particular job. Furthermore, it is established that under the ***Nanty-Glo*** rule, summary judgment may not be granted based upon testimonial evidence presented by the moving party. A jury may choose not to credit the testimony of any witness presented by Tsimura.

Second, Appellant premises liability against Tsimura based upon Restatement (Second) of Torts § 392, chattel dangerous for intended use. Initially, we observe that, "This Court has relied upon Section 392 as setting forth Pennsylvania law regarding negligent supply of a chattel." ***Drum v. Shaull Equipment and Supply Co.***, 787 A.2d 1050, 1063 (Pa.Super. 2001) (citing ***Fullard v. Urban Redevelopment Authority of Pittsburgh***, 293 A.2d 118 (Pa.Super. 1972)); ***see also Lambert v. Pittsburgh Bridge and Iron Works***, 344 A.2d 810 (Pa. 1975) (citing § 392 with approval).

> That section provides:
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> > One who supplies to another, directly or through a third person, a chattel to be used for the supplier's business purposes is subject to liability to those for whose use the chattel is supplied, or to those whom he should expect to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by person for whose use the chattel is supplied
> >
> > > (a) if the supplier fails to exercise reasonable care to make the chattel safe for the use for which it is supplied, or
> > >
> > > (b) if he fails to exercise reasonable care to discover its dangerous condition or character, and to inform those whom he should expect to use it.

Restatement (Second) of Torts § 392.

Appellant avers that Tsimura supplied the scaffolding in question for purposes of its business and failed to exercise reasonable care to make the chattel safe for the use for which it was supplied. He notes that Mr. Tsimura took possession of the scaffolding by directing Appellant to construct it, inspect it, and telling Appellant to use it. Appellant also notes that Mr. Tsimura undertook this task while he was performing his business as supervisor of Four Brothers' projects. Tsimura counters that it did not supply the scaffolding because it did not own it.

However, under § 392, a supplier of a chattel does not have to be its owner. Comment c, entitled ownership of chattel immaterial, states, "In order that the rule stated in this Section shall apply, it is not necessary that the chattel be owned by the one who supplies it. It may be leased to him or borrowed by him." An actor is a supplier if he had either "possession or control of it for the purpose of using it in connection with his business, and that he has supplied it for such purpose." Restatement (Second) of Torts § 392, comment c.

It must be recalled that the relationship among the parties was that of independent contractors. Tsimura's business was to supervise worksite operations for Four Brothers and the work of Four Brothers' other independent contractors, including Appellant. Appellant did not bring the scaffolding to the job. Rather, Mr. Tsimura, as agent for his business, exercised control over the scaffolding when instructing Appellant to build and use it so that Appellant could use it to perform his job. This direction of the

use of the chattel constituted borrowing of the item for Tsimura's business purposes of supervising the job. Thus, there was sufficient evidence to create a material fact as to whether Tsimura took possession and control of that item in furtherance of Tsimura's business as supervisor of the job in question. The trial court therefore improperly granted summary judgment as to Appellant's cause of action under Restatement § 392.

Finally, Appellant maintains that Tsimura is subject to liability under the common law negligence principle, as outlined in ***Duffy v. Peterson***, 126 A.2d 413, 416 (Pa. 1956), that "[a]ll individual sub-contractors engaged in a common enterprise owe to each other the duty of care required to business visitors." Our Supreme Court analyzed this duty in ***McKenzie v. Cost Brothers, Inc.***, 409 A.2d 362 (Pa. 1979). Therein, an employee of one subcontractor at a construction site was injured by a dangerous condition created by another subcontractor's employee, and no warning about the danger was placed at the jobsite. A nonsuit was granted to the subcontractor who employed the worker who created the hazard, and our Supreme Court reversed, reiterating that "a subcontractor on a construction job owes to employees of other subcontractors, on the same site, the care due a business visitor from a possessor land." ***Id***. at 364. ***See also Staub v. Toy Factory, Inc.***, 749 A.2d 522 (Pa.Super. 2000) (applying ***McKenzie***).

The ***McKenzie*** Court relied upon Restatement (Second) of Torts, § 384, liability of persons creating artificial conditions on land on behalf of

possessor for physical harm caused while work remains in their charge, which provides:

> One who on behalf of the possessor land erects a structure or creates any other condition on the land is subject to the same liability, and enjoys the same freedom from liability, as though he were the possessor of the land, for physical harm caused to others upon and outside of the land by the dangerous character of the structure or other condition while the work is in his charge.
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> Pursuant to Restatement (Second) of Torts, § 343,
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> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> > (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
> >
> > (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
> >
> > (c) fails to exercise reasonable care to protect them against the danger.

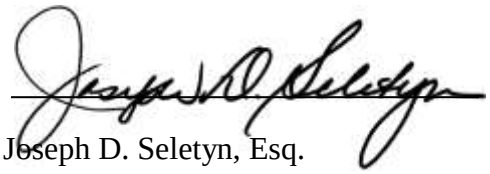
Appellant presented sufficient evidence to create a material fact that Tsimura, as another contractor on the same job created a dangerous condition on Mr. Sivchuk's land that was the proximate cause of Appellant's injuries. Mr. Tsimura, as Tsimura's agent, was in control of the jobsite when the accident occurred. He directed Appellant to erect the scaffolding, inspected it after that task was performed, and told Appellant to use it. Due to his OSHA scaffolding training, Mr. Tsimura knew or should have known

that OSHA required the scaffolding to include a guardrail and that the absence of that guardrail created the risk of a fall, which was suffered by Appellant. He created a hazardous condition on Mr. Sivchuk's land by telling Appellant, who had no OSHA scaffolding training, to build and use the structure when there were no guardrails on it.

Application to Quash Appeal is denied. Order reversed. Case remanded. Jurisdiction relinquished.

Judge Ott files a Dissenting Memorandum.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/4/2013