Affirmed and Memorandum Opinion filed July 12, 2011.

In The

Fourteenth Court of Appeals

NO. 14-10-00019-CV

DANIEL ECHARTEA, Appellant

V.

CALPINE CORPORATION, Appellee

On Appeal from the 149th District Court
Brazoria County, Texas
Trial Court Cause No. 45882

MEMORANDUM OPINION

In this premises liability action, appellant Daniel Echartea ("Echartea") appeals the trial court's order granting summary judgment in favor of appellee Calpine Corporation ("Calpine"). Echartea contends that the trial court erred in granting summary judgment because (1) genuine issues of material fact preclude summary judgment and (2) Calpine failed to prove its affirmative defense of bankruptcy discharge. We affirm.

I. Factual and Procedural Background

Freeport Energy Center LP ("Freeport") hired Calpine as the general contractor on a project for the construction of a power plant on a site owned by Dow Chemical Company ("Dow"). On July 5, 2005, Calpine entered into a contract ("the contract") with Austin Maintenance and Construction, Inc. ("Austin") under which Austin was to provide construction services to Calpine in connection with the project. Echartea was one of Austin's employees assigned to the project. On March 15, 2006, at approximately 5:45 p.m., Echartea was finishing his shift when he fell into a hole or rut in a roadway on the project site and injured his ankle.

On March 6, 2009, Echartea sued Dow and Calpine asserting causes of action for negligence and premises liability. Dow moved for summary judgment and the trial court granted its motion. On October 20, 2009, Calpine filed a motion for summary judgment, which the trial court granted on December 18, 2009. This appeal followed.

II. Standard of Review

We review summary judgments de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). Calpine's motion for summary judgment is a hybrid traditional and no-evidence motion. *See* Tex. R. Civ. P. 166a(c), (i). We therefore apply the established standards of review for each. *See Brockert v. Wyeth Pharms., Inc.*, 287 S.W.3d 760, 764 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

In a traditional motion for summary judgment, the movant bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 157 (Tex. 2004). A genuine issue of material fact exists if more than a scintilla of evidence establishing the existence of the challenged element is produced. *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004). To be entitled to traditional summary judgment, a defendant must conclusively negate at least one essential element of each of the plaintiff's causes of action or conclusively establish each

element of an affirmative defense. *Am. Tobacco Co. v. Grinnell, Inc.*, 951 S.W.2d 420, 425 (Tex. 1997). Once the defendant establishes its right to summary judgment as a matter of law, the burden shifts to the plaintiff to present evidence raising a genuine issue of material fact to defeat summary judgment. *Transcon. Ins. Co. v. Briggs Equip. Trust*, 321 S.W.3d 685, 691 (Tex. App.—Houston [14th Dist.] 2010, no pet.)

A no-evidence motion for summary judgment must be granted if (1) the moving party asserts that there is no evidence of one or more specified elements of a claim or defense on which the adverse party would have the burden of proof at trial, and (2) the respondent produces no summary judgment evidence raising a genuine issue of material fact on those elements. *See* Tex. R. Civ. P. 166a(i); *Mayer v. Willowbrook Plaza Ltd. P'ship*, 278 S.W.3d 901, 908 (Tex. App.—Houston [14th Dist.] 2009, no pet.). We sustain a no-evidence summary judgment when (a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact. *Lowe's Home Ctrs., Inc. v. GSW Mktg., Inc.*, 293 S.W.3d 283, 287–88 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (citing *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)). "Evidence does not exceed a scintilla if it is 'so weak as to do no more than create a mere surmise or suspicion'" that the challenged fact exists. *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106, 115 (Tex. 2009) (quoting *Kroger Tex. Ltd. P'ship v. Suberu*, 216 S.W.3d 788, 793 (Tex. 2006)).

In reviewing the granting of either type of summary judgment motion, we indulge every reasonable inference from the evidence in favor of the non-movant, resolve any doubts arising from the evidence in its favor, and take as true all evidence favorable to it. *Malcomson Rd. Util. Dist. v. Newsom*, 171 S.W.3d 257, 263 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). When a summary judgment does not specify the grounds upon

which the trial court ruled, as here, we must affirm it if any of the grounds on which judgment could be based is meritorious. *See Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 473 (Tex. 1995).

III. Analysis

On appeal, Echartea contends that the trial court erred in granting summary judgment in favor of Calpine on his premises liability claim because (1) he raised a fact issue regarding whether Calpine owed him a duty and whether it breached that duty, and (2) Calpine failed to prove its affirmative defense of bankruptcy discharge.

A. Duty

The three essential elements of a negligence cause of action are (1) the existence of a legal duty, (2) a breach of that duty, and (3) damages proximately caused by the breach. *See D. Houston, Inc. v. Love*, 92 S.W.3d 450, 454 (Tex. 2002). The existence of a duty owed is a threshold consideration and is a question of law for the court. *See Tex. Home Mgmt., Inc. v. Peavy*, 89 S.W.3d 30, 33 (Tex. 2002). Premises liability is a special form of negligence where the duty owed by a premises owner to a person entering on the owner's land depends upon the status of the person at the time the incident occurred. *See W. Invs., Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005). Here, it is undisputed that (1) Calpine was the general contractor on the construction project; (2) Calpine hired Austin, an independent contractor, to perform construction services in connection with the project; and (3) Echartea was Austin's employee. Under Texas law, the duties owed by premises owners and by general contractors to employees of independent contractors are generally the same. *Shell Oil Co. v. Khan*, 138 S.W.3d 288, 291 (Tex. 2004). We look to the statutory definition of duty of a premises owner to an independent contractor and its employees to determine the duty of a general contractor to an independent contractor and its employees.

Section 95.003 of the Texas Civil Practice and Remedies Code, entitled "Liability for Acts of Independent Contractors," provides as follows:

> A property owner[1] is not liable for personal injury, death, or property damage to a contractor, subcontractor, or an employee of a contractor or subcontractor who constructs, repairs, renovates, or modifies an improvement to real property,[2] including personal injury, death, or property damage arising from the failure to provide a safe workplace unless:
>
> (1) the property owner exercises or retains some control over the manner in which the work is performed, other than the right to order the work to start or stop or to inspect progress or receive reports;[3] and

---

[1] Section 95.002(1) provides that Chapter 95 applies equally to claims against a contractor or subcontractor. *See* Tex. Civ. Prac. & Rem. Code Ann. § 95.002(1) (West 2011). Although section 95.003 only refers to a property owner, agents of a property owner are also entitled to the protection afforded under this section. *See Fisher v. Lee & Chang P'ship*, 16 S.W.3d 198, 202-03 (Tex. App.—Houston [1st Dist.] 2000, pet. denied) (holding that defendant who oversaw property for owner despite no formal agreement was agent of property owner to whom section 95.003 applied); *see also Padron v. L & M Props.*, No. 11-02-00151-CV, 2003 WL 253927, at *3 (Tex. App.—Eastland Feb. 6, 2003, no pet.) (mem. op.) (applying chapter 95 to property management company); *Nagle v. GOM Shelf, L.L.C.*, No. Civ.A. V-03-103, 2005 WL 1515439, at *4 (S.D. Tex. June 24, 2005) (holding that manager of offshore platform was owner's agent and, thus, entitled to protections of chapter 95). Here, the contract between Dow and Calpine states that Calpine is Dow's "general contractor and authorized representative" and that Calpine "has the authority to manage the work" during the course of the project. An agent is defined, in part, as a "person or business authorized to act on another's behalf." *Columbia Rio Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851, 863 (Tex 2009) (quoting definition of "agent" from Webster's New Universal Unabridged Dictionary 38 (1996) in parenthetical). As Dow's agent, Calpine is entitled to the protection of section 95.003.

[2] Section 95.002(2) states that the claim must arise from "the condition or use of an improvement to real property, where the contractor or subcontractor constructs, repairs, renovates, or modifies the improvement." *Id.* § 95.002(2). Although Echartea's injury allegedly occurred when he stepped into a rut or hole on a roadway at the project site, courts have held that Chapter 95 applies where the injury arises from work being done on an improvement, despite the fact that the object causing the injury is not itself an improvement. *See, e.g.*, *Painter v. Momentum Energy Corp*., 271 S.W.3d 388, 398 (Tex. App.—El Paso 2008, pet. denied); *Fisher*, 16 S.W.3d at 201.

[3] Section 95.003(1), the first of the two elements that must be established for a premises owner to be liable under Chapter 95, codifies the common law. *See Dyall v. Simpson Pasadena Paper Co*., 152 S.W.3d 688, 699 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (en banc) (citing George C. Hanks, Jr., *When Sticks and Stones May Break Your Bones: An Overview of Texas Premises Liability Law for Business Owners*, 60 Tex. B.J. 1010, 1021 (1997)).

> (2) the property owner had actual knowledge of the danger or condition resulting in the personal injury, death, or property damage and failed to adequately warn.

Tex. Civ. Prac. & Rem. Code Ann. § 95.003 (West 2011). Therefore, to establish his claim against Calpine, Echartea had to show that (1) Calpine exercised or retained control over the manner in which Austin, as an independent contractor, and Echartea, its employee, performed the work, and (2) Calpine had actual knowledge of the danger or condition that resulted in Echartea's injury and failed to adequately warn him. *See Abarca v. Scott Morgan Residential, Inc*., 305 S.W.3d 110, 122 (Tex. App.—Houston [1st Dist.] 2009, pet. denied).

1. Control

Control may be proven in two ways: (1) a contractual right of control or (2) an exercise of actual control. *Ellwood Tex. Forge Corp. v. Jones*, 214 S.W.3d 693, 700 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (citing *Dow Chem. Co. v. Bright*, 89 S.W.3d 602, 606 (Tex. 2002)). Echartea raises both arguments in this case.

a. Contractual Control

A contract may impose control upon a party, thereby creating a duty of care. *Bright*, 89 S.W.3d at 606. "If the right of control over work details has a contractual basis, the circumstance that no actual control was exercised will not absolve the general contractor of liability." *Id.* (quoting *Elliott-Williams Co. v. Diaz*, 9 S.W.3d 801, 804 (Tex. 1999)). For a general contractor to be liable for its independent contractor's acts, it must have the right to control the means, methods, or details of the independent contractor's work. *Ellwood*, 214 S.W.3d at 700. Further, the control must relate to the injury the negligence causes. *Id.*; *Diaz*, 9 S.W.3d at 804. It is not enough that the owner has the right to order the work to stop and start or to inspect progress or receive reports. *See* Tex. Civ. Prac. & Rem. Code § 95.003(1); *Bright*, 89 S.W.3d at 606. The contractually retained right of control must be more than a general right. *See Bright*, 89

S.W.3d at 606. "[T]he right to control the work must extend to the 'operative detail' of the contractor's work." *Ellwood*, 214 S.W.3d at 701 (quoting *Chi Energy, Inc. v. Urias*, 156 S.W.3d 873, 880 (Tex. App.—El Paso 2005, pet. denied)). Determining whether a contract gives a right of control is generally a question of law for the court rather than a question of fact for the jury. *Bright*, 89 S.W.3d at 606.

In its motion for summary judgment, Calpine challenged the issue of contractual control, arguing that "[t]here [was] absolutely no evidence that Calpine retained control over the Facility Site or Plaintiff's work," and "[a]ccordingly, there is no genuine issue of material fact that Calpine retained no [sic] control over the premises or the manner in which Echartea's work was to be performed." In his summary judgment response, Echartea asserted that Calpine retained contractual control over Austin's work because it reserved to itself the duties of "providing general site lighting" and "overall safety of the site." In support of his argument, Echartea attached the contract between Calpine and Austin as Exhibit A to his response.[4] Calpine did not file a reply brief.

The contractual provision stating that the "[g]eneral contractor will provide overall site coordination and make assignments and decisions that best effect overall safety and overall progress of the project" demonstrates a right of control that is merely general in

[4] The provisions in the contract upon which Echartea relies state as follows:

> 6.5 The General Contractor will provide general site lighting. It shall be the responsibility of the Contractor to provide adequate task lighting as required for the execution of the Contractor's work.
>
> . . .
>
> 25.0 The Project Site, laydown area and temporary facility area will be extremely congested. Contractor shall coordinate his work with the work of the other contractors working on the site. The General Contractor will provide overall site coordination and make assignments and decisions that best effect overall safety and overall progress of the project.

nature and, as such, is insufficient by itself to raise a fact issue. *See id.*[5] "The Supreme Court has established that a premises owner, by requiring an independent contractor to follow its safety rules and regulations, does not owe the independent contractor's employee a duty to ensure that the employee does nothing unsafe…. Instead, the premises owner assumes only a narrow duty to ensure that its rules or requirements do not unreasonably increase the probability and severity of injury." *Ellwood*, 214 S.W.3d at 702 (citing *Hoechst-Celanese Corp. v. Mendez*, 967 S.W.2d 354, 357–58 (Tex. 1998)). There is no evidence here that the general safety rules, assignments, or decisions of Calpine increased the probability and severity of injury. However, we find that the contractual provision requiring Calpine to provide site lighting raises at least a fact issue as to whether Calpine retained a right of control over Austin and Echartea's work, particularly in light of Echartea's allegation that he was injured when he stepped into a rut or hole that he could not see because the area was dark. *See id.* at 700 ("[T]he control must relate to the injury the negligence causes."). Viewing the evidence in the light most favorable to the non-movant, we conclude that Calpine was not entitled to summary judgment on this ground because Echartea produced some evidence raising a fact issue regarding whether Calpine retained a contractual right of control over Echartea's work; in doing so, he has raised a fact issue as to one element of duty.[6]

2. Actual Knowledge

In addition to showing that Calpine had control over his work, Echartea had to show that Calpine had "actual knowledge of the danger or condition resulting in the personal injury, death, or property damage and failed to adequately warn." *See* Tex. Civ.

[5] Moreover, Echartea's characterization of the provision as a duty to provide "overall safety of the site" is inaccurate. Rather, the provision requires Calpine to provide "overall site *coordination* and make assignments and decisions *that best effect overall safety* and overall progress of the project" (emphasis added).

[6] Because Echartea could prove that Calpine either retained a contractual right of control *or* exercised actual control over his work and, further, because we find that there is a fact issue as to contractual control, we need not address Calpine's argument that it did not exercise actual control.

Prac. & Rem. Code Ann. § 95.003(2) (West 2011). Section 95.003(2) requires Echartea to prove that Calpine had *actual* knowledge—as opposed to constructive knowledge—of the alleged dangerous condition. *See Ellwood*, 214 S.W.3d at 700. In its summary judgment motion, Calpine specifically argued that (1) it had no actual knowledge of the hole or rut in the roadway that allegedly caused Echartea's injury; (2) it was Austin, not Calpine, who created the ruts and holes and who was responsible for smoothing them over; and (3) in any case, it owed no duty to warn Echartea about the condition because the alleged hazard was open and obvious, and Echartea was aware of its existence.

Having reviewed the record, we find no evidence showing that Calpine had actual knowledge of the dangerous condition that allegedly caused Echartea's injury. *See Abarca*, 305 S.W.3d at 122. On appeal, Echartea suggests that Calpine knew of the hazardous condition because "there is evidence that the location had previously been corrected because of prior ruts." Specifically, when asked in his deposition whether he knew that there were holes or ruts on the project site that might cause him to fall, Echartea testified that he did not know because "they came along and cleaned them up every once in a while"; however, later in his deposition, Echartea identified "they" as Austin. Contrary to Echartea's contention, this evidence does not show that Calpine had actual knowledge of the hole or rut that caused Echartea's injury.

Echartea also attached the affidavit of Dennis Taylor as an exhibit to his summary judgment response.[7] In his affidavit, Taylor stated that the usual and customary practice is that a landowner contracts with a general contractor who retains control over the general safety of the operation and over all common tasks and areas. Taylor further stated that, as the general contractor, Calpine was responsible for providing a safe place to work, especially in common areas such as roadways and pathways, and for filling in

[7] In his affidavit, Taylor stated that he has over thirty years of safety experience, certificates in safety, quality control, and supervision, and that he has worked for sub-contractors on Dow facilities and is familiar with the safety routines that are customary in the field. Calpine did not object to Taylor's affidavit.

ruts or holes in the common areas caused by the passage of heavy equipment. However, such testimony is no evidence that Calpine had actual knowledge of the hazardous condition in question; rather, at most, it shows that Calpine knew that it was responsible for smoothing over the ruts and holes on the project site.

Because there is no evidence that Calpine had actual knowledge of the dangerous condition that caused Echartea's injury, the trial court properly granted summary judgment to Calpine on Echartea's claim. *See Ellwood*, 214 S.W.3d at 700 (noting that Chapter 95 requires plaintiff to show both control and actual knowledge of the danger in order to prevail).[8] Accordingly, we overrule Echartea's first issue.[9]

IV. CONCLUSION

We affirm the judgment of the trial court.

/s/ Adele Hedges
Chief Justice

Panel consists of Chief Justice Hedges, Justice Frost, and Justice Christopher.

[8] Because we have determined that there is no evidence that Calpine had actual knowledge of the hazardous condition, we need not consider whether Calpine adequately warned Echartea of the danger or whether the hazard was open and obvious.

[9] In light of our disposition of Echartea's first issue, we do not reach his second issue related to bankruptcy discharge. *See* Tex. R. App. P. 47.1 (requiring appellate court opinions to be as brief as practicable but to address every issue raised and necessary to final disposition of appeal).