COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-17-00180-CV

BRENT HOCKINS — APPELLANT

V.

U.S. CERTIFIED CONTRACTORS, INC. — APPELLEE

FROM THE 16TH DISTRICT COURT OF DENTON COUNTY
TRIAL COURT NO. 15-04798-16

MEMORANDUM OPINION[1]

Brent Hockins appeals from the trial court's final judgment granting a take-nothing summary judgment in favor of U.S. Certified Contractors, Inc. (UCC). We affirm.

[1]*See* Tex. R. App. P. 47.4.

Procedural Background

Hockins sued UCC, a roofing contractor, for negligence arising from injuries he sustained after slipping in rainwater that had leaked into his place of employment. UCC had been in the process of replacing the roof of the building but did not finish the last section before forecasted rainstorms occurred. UCC had placed tarps over the open section of the roof before the rain began. Hockins specifically claimed that UCC was negligent because it (1) failed to use reasonable care in repairing the roof, (2) failed to properly patch the roof to keep rain from entering the building, (3) failed to warn him and others of the potential for wet surfaces, (4) failed to inspect its patchwork to determine if the roof was properly secured and functioning for its proper purposes, and (5) failed to perform its work as a reasonably prudent roofing contractor would have done under the circumstances.

UCC filed a combined traditional and no-evidence motion for summary judgment. In its traditional motion for summary judgment, UCC claimed that Hockins's "sole actionable claim is for negligence based on an alleged premises condition" and that this claim against it fails as a matter of law because the condition was open and obvious and, as such, UCC had no duty to warn or protect Hockins from that condition. In its no-evidence motion for summary judgment, UCC argued that Hockins had brought forward no evidence on either a premises liability or general negligence claim. The trial court granted the summary-judgment motion, but it did not specify on what ground or grounds.

Standard of Review

When a party moves for both a traditional summary judgment under rule 166a(c) and a no-evidence summary judgment under rule 166a(i), we will generally first review the trial court's judgment under the standards of rule 166a(i). *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004). If the appellant failed to produce more than a scintilla of evidence under that burden, then there is no need to analyze whether the appellee's summary judgment proof satisfied the rule 166a(c) burden for a traditional motion for summary judgment. *Id.*

A no-evidence motion for summary judgment must specifically state the elements for which there is no evidence. Tex. R. Civ. P. 166a(i); *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009). The trial court must grant the motion unless the nonmovant produces summary judgment evidence that raises a genuine issue of material fact. *See* Tex. R. Civ. P. 166a(i) & cmt.; *Hamilton v. Wilson*, 249 S.W.3d 425, 426 (Tex. 2008).

When reviewing a no-evidence summary judgment, we examine the entire record in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts against the motion. *Sudan v. Sudan*, 199 S.W.3d 291, 292 (Tex. 2006). We review a no-evidence summary judgment for evidence that would enable reasonable and fair-minded jurors to differ in their conclusions. *Hamilton*, 249 S.W.3d at 426 (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005)). We credit evidence favorable to the nonmovant if

reasonable jurors could, and we disregard evidence contrary to the nonmovant unless reasonable jurors could not. *Timpte Indus.*, 286 S.W.3d at 310 (quoting *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006)). If the nonmovant brings forward more than a scintilla of probative evidence that raises a genuine issue of material fact, then a no-evidence summary judgment is not proper. *Smith v. O'Donnell*, 288 S.W.3d 417, 424 (Tex. 2009); *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003), *cert. denied*, 541 U.S. 1030 (2004).

A no-evidence summary judgment is essentially a pretrial directed verdict because it requires the nonmovant to present evidence sufficient to raise a genuine issue of material fact on each challenged element. *Timpte Indus.*, 286 S.W.3d at 310. We apply the same legal sufficiency standard in reviewing a no-evidence summary judgment as we apply in reviewing a directed verdict. *King Ranch*, 118 S.W.3d at 750–51.

Timing of 166a(i) Motion

In his fourth issue,[2] Hockins contends that the trial court erred by granting UCC's no-evidence motion for summary judgment because an adequate time for discovery had not yet passed. Hockins failed to preserve his argument that he had not had an adequate time for discovery before the trial court granted UCC's motion because he failed to file either an affidavit explaining the need for further

[2]We address Hockins's issues out of order for ease of discussion.

discovery or a verified motion for continuance. *See Correa v. Citimortgage*, No. 02-13-00019-CV, 2014 WL 3696101, at *1 (Tex. App.—Fort Worth July 24, 2014, no pet.) (mem. op.); *Kaldis v. Aurora Loan Servs.*, 424 S.W.3d 729, 736 (Tex. App.—Houston [14th Dist.] 2014, no pet.); *see also* Tex. R. Civ. P. 166a(g); *Tenneco Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 647 (Tex. 1996) (holding same in general summary judgment context). Thus, we overrule his fourth issue.

No-Evidence Summary Judgment Proper

In his third issue, Hockins contends that the trial court erred by granting a no-evidence summary judgment because he presented more than a scintilla of evidence on all disputed elements of his claims. In its no-evidence motion, UCC argued that regardless of whether Hockins's claim is characterized as a premises liability or negligence claim, there is no evidence that it had breached any duty to Hockins or that any alleged breach proximately caused his injuries and damages. It also argued that there was no evidence that it had actual or constructive notice of a dangerous condition on the premises.

Applicable Law

Depending on the circumstances, a person injured on another's property may have either a negligence claim or a premises-liability claim against the property owner *Occidental Chem. Corp. v. Jenkins*, 478 S.W.3d 640, 644 (Tex. 2016). When the injury is the result of a contemporaneous, negligent activity on the property, ordinary negligence principles apply. *Id*. When the injury is the result of the property's condition rather than an activity, premises-liability

principles apply. *Id.* Although premises liability is itself a branch of negligence law, it is a special form with different elements that define a property owner or occupant's duty with respect to those who enter the property. *Id.* Under premises-liability principles, one in control of property, including a general contractor, generally owes those invited onto the property a duty to make the premises safe or to warn of dangerous conditions as reasonably prudent under the circumstances. *United Scaffolding, Inc. v. Levine*, 537 S.W.3d 463, 473–74 (Tex. 2017); *Occidental*, 478 S.W.3d at 644.

In evaluating whether a general contractor owes an invitee a duty of care as to the property condition, the "relevant inquiry is whether the [contractor] assumed sufficient control *over the part of the premises that presented the alleged danger* so that the [contractor] had the responsibility to remedy it." (emphasis added) *United Scaffolding,* 537 S.W.3d at 474 (quoting *Cty. of Cameron v. Brown*, 80 S.W.3d 549, 556 (Tex. 2002)); *see City of San Antonio v. Rodriguez*, 931 S.W.2d 535, 536 (Tex. 1996) (holding that leaky roof was not dangerous condition but instead caused dangerous condition of water on floor). Ordinarily, a lack of control or ownership over the area of injury precludes premises liability recovery.[3] *See City of Denton v. Page*, 701 S.W.2d 831, 835

[3]UCC did not move for traditional summary judgment on a theory that it lacked control over the part of the premises where the injury occurred. Instead, in its traditional motion for summary judgment, UCC claimed that it was undisputedly in control of the entire premises, including the floor where Hockins slipped; therefore, Hockins's action sounded solely in premises liability. Hockins disputed the issue of control, arguing in his response to the motion that UCC was

(Tex. 1986); *Hirabayashi v. North Main Bar-B-Q, Inc.*, 977 S.W.2d 704, 706 (Tex. App.—Fort Worth 1998, pet. denied). But Texas courts have in the past recognized several exceptions to this rule: (1) when an actor agrees to make safe a known, dangerous condition of real property; (2) when an actor creates a dangerous condition on premises; (3) when a lessee assumes control of adjacent property not covered by a lease; and (4) when an obscured danger on land directly appurtenant to the land owned and occupied is near where invitees enter or exit the owner or occupier's property. *See Guereque v. Thompson*, 953 S.W.2d 458, 466–67 (Tex. App.—El Paso 1997, pet. denied) (collecting cases).

Here, Hockins claims that even though UCC was not in control of the part of the premises where his injury occurred, it nevertheless owed him a duty under the first and second exceptions to the no-control general rule and that its breach of either of those duties caused his injuries. Assuming that UCC had a duty under either a premises liability theory[4] or negligence theory, we will review the

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entitled to control only the roof area where it had been working, not the entire premises. *See Palmer v. Performing Arts Fort Worth, Inc.*, No. 02-11-00434-CV, 2012 WL 2923290, at *4 (Tex. App.—Fort Worth July 19, 2012, no pet.) (holding that control is "the power or authority to manage, direct, superintend, restrict, regulate, govern, administer, or oversee" and noting that a party may occupy a premises "in whole or in part, without actually controlling it"). UCC presented evidence that it contended showed it controlled the entire premises as a matter of law but which instead showed only a right of access to the entire premises to perform parts of its work.

[4]Presumably, UCC's contention in its no-evidence motion for summary judgment that it owed Hockins no duty under a premises liability theory encompasses an argument that it was not in control of the part of the premises where the injury occurred.

evidence to determine if Hockins brought forward more than a scintilla of evidence as to the remaining elements of his claim.

Hockins's Summary Judgment Evidence

Hockins's primary responsive summary judgment evidence included his affidavit and excerpts from his deposition.

Hockins's Affidavit

In his affidavit, Hockins averred that at the time of his injury, he was the facilities and construction manager for Renal Ventures Management, LLC (RVM), a Colorado-based dialysis treatment company. RVM determined that its facility in Denton needed a new roof, and it hired UCC to do the work. The work was to be done in three phases to minimize impact to the dialysis patients using the center. The final phase was to be the part of the roof covering the dialysis treatment floor; that part was to take place between the time the center closed on Saturday and when it reopened the following Monday morning.

UCC began work in early June.[5] Although the final phase of work could have begun as early as closing on Saturday, June 8, because of the "near-certainty" that it would rain that weekend, Hockins, and Tom Claybar and Steve Slayton of UCC, agreed that they needed to postpone the final phase to a different weekend. Nevertheless, when Hockins arrived at the facility on

[5]Hockins's affidavit states that the work and his injury occurred in June 2014, but the rest of the record, including Hockins's petition and response to the motion for summary judgment, indicates that the roof work and his injury occurred in June 2013.

Saturday morning, he observed workers on the roof during business hours. He called Tom and the roof work stopped. The workers had already demolished half of the final section of the roof. Because Tom and Steve thought the rest of the roof could not be completed before the rain arrived, they suggested using tarps to cover the hole in the roof, which the workers completed late that afternoon. "Everyone" then left the facility.

Hockins further averred that he woke up around 5:00 a.m. the next morning and could hear "that it was actively raining." Because he was uncomfortable that there was no roof over the treatment floor, he drove to the facility to check on it. According to Hockins,

> 16. "When I entered the treatment area, it was immediately evident that the tarps had failed. There was a hole in [the] roof and it was raining directly into the building and onto the treatment floor and equipment. The floor was covered with water, and was as deep as my ankles in some places."
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> 17. "I immediately called RVM's Corporate Technical Director for the West Region, Kevin Duran, who told me to unplug the machines, cover them with plastic, and move them out of the pouring rain as quickly as I could. . . .[6] I went about unplugging, covering, and moving the machines. During this unavoidable process, I slipped, fell, and injured my head and shoulder."
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> 18. "Myself, Tom, Steve, several of our staff, our janitorial service, and others, worked throughout the day of Sunday, June 9, 2013 to clean the water out of the facility and confirm the machines were useable. I operated a squeegee one-handed due to my shoulder

[6]Although the trial court struck all of paragraph 17 in response to UCC's objection, for purposes of context, we include that part of paragraph 17 that merely restates what Hockins testified to in his deposition as to how his injuries occurred.

> injury. Later, I passed out due to what I later learned was a concussion suffered during my fall, which also caused me to vomit."

Hockins's Deposition Excerpts

In addition to his affidavit, Hockins also attached excerpts from his deposition as summary judgment evidence. According to Hockins, on the Saturday before his injury, he "just stopped by" and saw workers "[d]emoing the existing roof." He did not know who they were. They had started at the northeast corner of the part of the roof covering the dialysis floor and were working westward.

That Saturday evening, it started to rain, and it was raining when Hockins awoke on Sunday. He was concerned because he "thought there could be some issues, maybe some water dripping on some of the equipment." He drove to the facility even though it was scheduled to be closed that day.

When Hockins arrived, it was dark outside, but emergency lights were on inside the facility. He could not see anything about the exterior of the roof, including whether the tarping was in place or not. When he entered the facility, he saw that there was water in the lobby and that water was coming from underneath the treatment room door. He saw water "[p]ouring down from the ceiling, running down, especially down in . . . the northeast corner . . . where most of the water had accumulated." He answered "Yes" when asked, "So it may have been a combination of the rain and/or accumulated water just sitting on the

roof, but you're not sure, but it was definitely pouring down into the building?" He slipped in ankle deep water while covering the machines in the treatment room.

Analysis

Hockins argued in his response to the summary judgment motion that UCC breached a duty of care to him by failing to observe the weather, failing "to follow the agreed upon plan to delay initiation of the third phase of roof construction," and failing to adequately cover the hole in the roof. But Hockins provided no evidence about how the workers tarped the roof, why the tarping might have failed or was inadequate, or what a reasonably prudent contractor would have done differently. Nor did he provide evidence that tarping a roof generally would be inadequate for the rain that had been forecasted. Moreover, although Hockins presented evidence that water was coming into the building from the general area of where the workers had started to remove the roof, there is no evidence that the leak occurred because the tarps were not actually covering that location. Simply put, the fact that a leak occurred is no evidence that any breach by UCC created the water on the floor of the facility. *See Maldonado v. Sumeer Homes, Inc.*, No. 05-12-01599-CV, 2015 WL 3866561, at *3 (Tex. App.—Dallas June 23, 2015, no pet.) (mem. op.); *Allen v. Albin*, 97 S.W.3d 655, 666 (Tex. App.—Waco 2002, no pet.). Finally, even if we assume that UCC had control of the premises sufficient to subject it to an owner/occupier's duty, Hockins brought forward no evidence that UCC had actual or constructive notice of the water on the facility's floor. *See, e.g.*, *Brookshire Grocery Co. v. Taylor*, 222 S.W.3d 406,

407–09 (Tex. 2006); *Salinas v. AT & T Servs.*, No. 05-13-01436-CV, 2014 WL 7248086, at *2–3 (Tex. App.—Dallas Dec. 22, 2014, no pet.) (mem. op.). Thus, we conclude that the trial court did not err by granting a no-evidence summary judgment on Hockins's pleaded claims against UCC, whether they sounded in general negligence or premises liability.

We overrule Hockins's third issue. We therefore need not review his first and second issues, in which he contends that summary judgment was improper on traditional grounds. *See* Tex. R. App. 47.1; *Ford Motor Co.*, 135 S.W.3d at 600. We likewise need not decide his fifth issue, in which he contends that the trial court erred in granting UCC's objections to paragraphs 17, 19, and 20 of his affidavit and striking that evidence because even if we were to consider those paragraphs in their entirety, they do not provide evidence that UCC breached a duty to him. *See* Tex. R. App. P. 44.1(a).

Conclusion

Having overruled Hockins's dispositive issues, we affirm the trial court's judgment.

/s/ Charles Bleil
CHARLES BLEIL
JUSTICE

PANEL: WALKER and PITTMAN, JJ.; CHARLES BLEIL (Senior Justice, Retired, Sitting by Assignment).

DELIVERED: May 17, 2018