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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF LEELANAU

TODD KELLY,

Plaintiff,

v

ALBERT KOHLER and ROSE ANN KOHLER, and NORTHERN LUMBER COMPANY OF SUTTONS BAY, a Michigan corporation,

Defendants.
/

File No. 08-7945-NO
HON. PHILIP E. RODGERS, JR.

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DECISION AND ORDER GRANTING
DEFENDANTS KOHLERS' MOTION FOR SUMMARY DISPOSITION

This case involves an accident at the construction site for a residential structure. Plaintiff Todd Kelly ("Kelly") was installing siding on the Defendants Albert and Rose Kohlers' (collectively referred to as the "Kohlers") house. He was seriously injured when the scaffolding upon which he was working toppled over and he fell. He filed this action against the Kohlers as the owners of the property, alleging general contractor liability, premises liability and general negligence. Northern Lumber Company was later added as a defendant because it supplied the scaffolding.

The Kohlers filed a motion for summary disposition pursuant to MCR 2.116(C)(10). They claim that there is no genuine issue of material fact and that they are entitled to judgment as a matter of law because (1) they did not retain control of the project, (2) the common work area doctrine does not apply, (3) they did not have actual or constructive knowledge of an

allegedly dangerous condition on their property, and (4) they did not breach a common law duty owed to Kelly.

In response, Kelly contends that the Kohlers are liable because (1) Defendant Albert Kohler acted as his own general contractor, (2) the common work area doctrine applies, (3) the Kohlers knew or should have known that the defectively equipped scaffolding posed a serious risk of injury to him against which he would fail to protect himself; and (4) the Kohlers breached their common law duty to provide safe equipment, tools and appliances to workers invited onto their premises to perform work.

Retained Control and Common Work Area Theory of Liability

At common law, property owners and general contractors could not be held liable for the negligence of independent subcontractors and their employees. *Ormsby v Capital Welding, Inc,* 471 Mich 45, 53; 684 NW2d 320 (2004). But, in *Funk v General Motors Corp*, 392 Mich 91; 220 NW2d 641 (1974), the Michigan Supreme Court modified the common law by establishing the common work area doctrine as an exception to the general rule of non-liability in cases involving construction projects.

To establish liability under the common work area doctrine, a plaintiff must prove 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." *Ormsby, supra* at 54. If the plaintiff does not satisfy any one of these elements, his claim fails. *Id* at 59.

With respect to the Kohlers, owners may lose their common-law insulation from liability for the actions of independent contractors where they "act in a superintending capacity and have knowledge of high degrees of risk faced by construction workers . . ." *Funk, supra* at 106-107. For the "retained control" subset of the common work area doctrine to apply, the owner must step into the shoes of and perform the functions of the general contractor to such an extent that the owner becomes the de facto general contractor. *Ormsby, supra* at 54; *Ghaffari v Turner Constr Co*, 259 Mich App 608; 676 NW2d 259 (2003) (*Ghafffari I*), rev'd 473 Mich 16; 699 NW2d 687 (2005) (*Ghaffari II*).

In *Caldelaria v BC General Contractors, Inc*, 236 Mich App 67, 75-76; 600 NW2d 348 (1999), the Court of Appeals reviewed case law regarding the "retained control" doctrine which held that there must be a high degree of actual control and that general oversight or monitoring is insufficient. The Court also found instructive the *Funk* Court's analysis in determining that General Motors retained control of the project at issue in that case. The *Funk* Court opined that GM's representatives did more than observe whether the contract was being properly performed. In many instances, what they said, or left unsaid, determined how the work would be performed. *Funk, supra* at 108. The *Candelaria* Court concluded, "[a]t a minimum, for an owner to be held directly liable in negligence, its retention of control must have had some actual effect on the manner or environment in which the work was performed." *Candelaria, supra* at 76.

In the present case, the Plaintiff Kelly has produced no evidence that Rose Ann Kohler had anything to do with the construction project at issue. Therefore, summary disposition should be and hereby is granted in her favor on this count.

As for Defendant Albert Kohler, there is evidence that he worked in the construction industry, hanging drywall, 30 years ago. There is also evidence that Defendant Albert Kohler applied for the construction permit, purchased the plans for the house from Northern Lumber and hired the various contractors who worked on the house. The evidence shows that Defendant Albert Kohler instructed the workers to build the home according to the plans and to pick up whatever supplies they needed, including tools, appliances and equipment, at Northern Lumber and charge them to his account. There is also evidence that Defendant Albert Kohler purchased homeowners insurance (not general liability insurance) and that he stopped by the work site on a regular basis to check on the progress of the work.

There is no evidence, however, that Defendant Albert Kohler retained control of the construction project or "stepped into the shoes of a general contractor." He did not coordinate the work among the contractors, instruct the workers on *how* to do their work, or in any way direct or affect what safety measures the contractors or individual workers used to avoid the perils of the workplace.[1] Therefore, Defendant Albert Kohler did not become liable for the safety of the contractors and workers and the common work area doctrine does not apply.

[1] When analyzing common work area claims, "the danger cannot be just the unavoidable, perilous nature of the site itself." *Latham v Barton Malow Co,* 480 Mich. 105, 114; 746 NW2d 868 (2008).

Therefore, summary disposition in Defendant Albert Kohler's favor on the Plaintiff's retained control and common work area theory of liability should be and hereby is granted.

Premises Liability

To state a valid claim sounding in premises liability, "a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty; (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Benton v Dart Properties,* 270 Mich App 437, 440; 715 NW2d 335 (2006).

With respect to the duty that the Kohlers owed to Plaintiff Kelly, there is no dispute that Kelly was an invitee at the Kohlers' home construction site when the incident occurred. As such, Plaintiff Kelly was entitled to "the highest level of protection" imposed under premises liability law; the Kohlers were not only obligated to protect him from known dangers but also had "the additional obligation to make the premises safe, which requires the landowner to inspect the premises, and depending on the circumstances, make any necessary repairs or warn of any discovered hazards." *James v Alberts,* 464 Mich 12, 19-20; 626 NW2d 158 (2001), quoting *Stitt v Holland Abundant Life Fellowship,* 462 Mich 591, 596-597; 64 NW2d 88 (2000). "This duty of care generally extends to invitees who are employees of independent contractors." *Hughes v PMG Bldg Inc,* 227 Mich App1, 10; 574 NW2d 691 (1997).

Under this standard, a premises owner is liable for any injury resulting from an unsafe condition that is of such a character or that has existed for a sufficient length of time that the premises proprietor should have had knowledge of it. *Hampton v Waste Mgt of Michigan, Inc,* 236 Mich App 598, 604; 601 NW2d 172 (1999). "An owner has a duty to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition that the owner knows or should know the invitees will not discover or protect themselves against." *Id.* Thus, as the owner of the premises, the Kohlers had a duty to exercise reasonable care to protect Kelly from an unreasonable risk of harm caused by a dangerous condition of the land that they knew or should have known that Kelly would not discover, realize, or protect himself against. *Butler v Ramco-Gershenson, Inc,* 214 Mich App 521, 532; 542 NW2d 912 (1995).

"While an invitor must warn of hidden defects, there is generally no duty to warn of 'open and obvious' dangers." *Id.* In other words, "'if the particular activity or condition creates a risk of harm *only* because the invitee does not discover the condition or realize the danger,

then the open and obvious doctrine will cut off liability if the invitee should have discovered the condition and realized the danger.'" *Id,* quoting *Bertrand v Alan Ford, Inc,* 449 Mich 606, 611; 537 NW2d 185 (1995). Conversely, if the risk of harm remains unreasonably high despite the obviousness of the danger, the invitor may be required to take reasonable precautions to protect the invitee. *Hughes, supra* at 10. "Whether a danger is open and obvious depends upon whether it is reasonable to expect an average person of ordinary intelligence to discover the danger upon casual inspection." *Id.* This is an objective test. *Id* at 11.

In the present case, there is no evidence that anyone, including the Kohlers, was aware that the scaffolding where the Plaintiff was working was unsafe and prone to falling away from the house because scraps of wood, rather than footings, were used to make it level. Quite the contrary; the witnesses testified that using scraps of wood to level scaffolding was common practice on construction sites. In addition, there is no evidence that the Kohlers knew or should have known that Plaintiff Kelly would or did attach a pic and extension ladder to the top of the scaffolding and climb to a height in excess of 30 feet. Once the Plaintiff did this, the danger of falling, whether from improperly leveled scaffolding or some other cause, was open and obvious because it was, or should have been, discoverable upon casual inspection. Besides, the Plaintiff had far more experience with scaffolding and working at heights than the Kohlers. He knew how the scaffolding was set up; he attached the pic and ladder. And finally, the danger was avoidable. The scaffolding could have been set up differently or could have been attached to the house. Therefore, the Kohlers are entitled to summary disposition on the Plaintiff's premises liability theory. See *Lugo v Ameritech Corp,* 464 Mich 512, 518; 629 NW2d 384 (2001).

Finally, as our Supreme Court explained in *Orel v Uni-Rak Sales Co,* 454 Mich 561, 568; 563 NW2d 241 (1997), quoting *Merritt v Nickelson,* 407 Mich 544, 552-553; 287 NW2d 178 (1980), "[p]remises liability is conditioned upon the presence of both possession and control over the land . . . *[o]wnership alone is not dispositive.*" See also, *Kubczak v Chemical Bank & Trust Co,* 456 Mich 653, 660; 575 NW2d 745 (1998), quoting *Merritt, supra* at 552; 287 NW2d 178; *Orel, supra* at 568 ("It is well established . . . that '[p]remises liability is conditioned upon the presence of both possession and control over the land.'")

The Plaintiff did not produce any evidence that would support a finding that the Kohlers were in control of the premises during the construction. The evidence shows only that the

Kohlers owned the land and hired tradesmen to construct a house; they did not exercise control over the premises during the construction.

A motion pursuant to MCR 2.116(C)(10) tests the factual sufficiency of the Plaintiff's complaint. The trial court must consider the affidavits, pleadings, depositions, admissions, and any other evidence submitted by the parties in a light most favorable to the nonmoving party. "Summary disposition should be granted if there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law." *Robinson v Ford Motor Co,* 277 Mich App 146, 150-151; 744 NW2d 363 (2007). Based on the evidence presented, viewed most favorably to the Plaintiff Kelly, the Kohlers are entitled to summary disposition on the Plaintiff's premises liability claim.

<u>Negligence</u>

The Plaintiff also argues that the Kohlers may be liable under general principles of negligence. In particular, Plaintiff Kelly argues that the Kohlers acted as general contractor, had construction experience, and provided all the tools and materials for the job, including the scaffolding. He, therefore, contends that the Kohlers are liable for negligence in failing to provide a safe work area and appropriate safety equipment, and in failing to warn of latent dangers such as the improperly leveled scaffolding. Similarly, Plaintiff Kelly contends that the Kohlers were negligent for allowing the unsafe scaffolding to be set up and in allowing it to remain on the premises for Plaintiff's use.

These general common-law duties that the Plaintiff seeks to impose on the Kohlers, i.e., the duty to provide a safe workplace and appropriate, safe equipment, are the same duties that are the subject of the common work area exception which was discussed above. Therefore, the Court must reject the Plaintiff's attempt to hold the Kohlers liable for these same claims outside the context of the common work area doctrine.

<u>CONCLUSION</u>

Plaintiff Kelly has failed to meet his burden. He has not presented any evidence from which a jury could reasonably conclude that the Kohlers retained control of the work area or "stepped into the shoes of a general contractor" and became liable for his safety. The retained control and common work area doctrines simply do not apply.

Additionally, the Plaintiff has failed to submit any evidence from which a jury could reasonably find that the Kohlers knew, or by the exercise of reasonable care could have discovered, the unsafe condition of the scaffolding, and realized that it created an unreasonable risk of harm to the Plaintiff, especially since it has not been shown that it was unreasonably dangerous until the Plaintiff himself attached the pic and ladder and climbed to the top. The Kohlers could not have known that the Plaintiff would fail to discover the unsafe condition of the scaffolding and fail to protect himself against the danger it posed. *Prebenda v Tartaglia,* 245 Mich App168, 169; 627 NW2d 610 (2001).

Therefore, the Defendants Albert and Rose Kohler are entitled to summary disposition on all counts and it is hereby granted. The Plaintiff Kelly's claims against Defendants Albert and Rose Ann Kohler are dismissed, with prejudice.

IT IS SO ORDERED.

This decision and order is not a final order and does not close the case.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 6/25/09