

No. 1-13-0105

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

PATRICK JOSEPH CARNEY,)	Appeal from the Circuit Court of
)	Cook County, Illinois.
Plaintiff-Appellant,)	
)	
v.)	
)	
UNION PACIFIC RAILROAD COMPANY, a)	No. 07 L 8369
Corporation)	
)	
)	
Defendant-Appellee.)	
)	Honorable
)	Randy A. Kogan,
)	Judge Presiding.

JUSTICE TAYLOR delivered the judgment of the court.
Justices Howse and Epstein concurred in the judgment.

ORDER

¶ 1 *Held:* Summary judgment in favor of a railroad company was improper in a personal injury action from plaintiff who performed a task on behalf of a sub-subcontractor where there was a genuine issue of material fact as to whether the railroad

retained sufficient control over part of the work and whether it should have known of a dangerous condition on the premises and failed to warn the contractor.

¶ 2 Plaintiff Patrick Carney appeals from the judgment of the circuit court of Cook County granting summary judgment in favor of defendant Union Pacific Railroad Company (U.P.) in an action for personal injury arising from an accident suffered by plaintiff while assisting with the removal of a bridge on U.P.'s property. U.P. had entered into a contract with Happ's, Inc., who is not a party to this appeal, for the removal of that bridge; and Happ's in turn, hired Carney Group, a company owned by plaintiff's father, to assist in the demolition process. In his action against U.P., plaintiff claimed that U.P. breached its duty to him as: (1) an employer who retained control over the work entrusted to an independent contractor; (2) an employer who failed to employ a competent and careful contractor; and (3) an owner of land who failed to protect him from a dangerous condition. He now claims that summary judgment in favor of U.P. was erroneous because, contrary to the circuit court's findings, genuine issues of material fact existed as to whether U.P. retained sufficient control to exercise a duty; whether plaintiff was an employee of Carney Group and possibly outside the class of person's to whom U.P. owed a duty of care; and whether U.P. should have known of certain hidden plates under the ground, which caused plaintiff's accident.

¶ 3 BACKGROUND

¶ 4 The following facts pertaining to the accident that gave rise to the present action appear undisputed. As noted above, U.P. contracted with Happ's to demolish and remove certain unused bridges by entering into an agreement for the "removal and purchase" of those bridges by Happ's. The agreement identified Happ's as the contractor, which thereby purchased the bridges and appurtenances and agreed to provide "all superintendence, labor, tools,

equipment, materials and supplies and all other things requisite and necessary" to remove those three bridges. Happ's could not resell the trackage until it was removed from U.P.'s property. Further, the agreement provided that all work to be performed by Happ's was to be completed to U.P.'s satisfaction and the acceptance of a railroad representative. U.P. retained the right to stop the work or make changes in the work, and to terminate the contract immediately if Happ's services were, "in the sole discretion of the Railroad, deemed unsatisfactory." Happ's failure to comply with Federal Rail Administration on track safety standards could result in the loss of the contract.

¶ 5 Happ's, enlisted the assistance of Carney Group for the demolition of the bridge on Polk Street, as Happ's usually did when it took down most steel bridges. Carney Group was a bridge demolition company owned by Patrick Carney Sr., plaintiff's father, with whom Happ's had work on bridge removals for 20 years. Plaintiff worked for his father as a trader on the Chicago Board of Trade, where Carney, Sr. held a seat, and was also learning about his father's demolition business.

¶ 6 It was decided by Happ's and Carney, Sr., that the bridge on Polk Street would be removed using a crane, rather than explosives. The bridge consisted of two upright girders, or sidewalls, connected by cross beams at each end, as its floor had already been removed. While Happ's may have taken down simple girder bridges before, it had never removed a through plate girder bridge like this. When Carney, Sr. learned that there was no one on site capable of attaching the cable from the crane to the bridge girder that was going to be lifted, Carney Sr. asked plaintiff to go to the site and perform that task.

¶ 7 After the crane was connected to girder on the east side of the bridge, a welder cut the last connecting crossbeams at their junction points with that girder, but the crane could still

not lift it. Carney, Sr. noticed that one of the crossbeams had shifted towards the eastern girder, preventing the lift, and ordered the re-cutting of that beam at the point where it was pinching the eastern girder. Concerned that the western beam would collapse when the eastern beam is lifted, Carney, Sr. measured the height of the western girder to ensure that the welder would not be hit if the western beam fell. Plaintiff, who was then standing near the north end of the bridge, did not hear the discussion about the western girder being at risk of collapse, so when his father warned him to "move back," he stepped towards the western girder. As the welder re-cut that shifted beam, it snapped, and the western girder fell towards the east, trapping and severing plaintiff's legs as he fell down.

¶ 8 Plaintiff testified at a deposition that he had difficulty retreating to safety because he was standing on the remnant of the steel bridge floor plate still connected to the western girder, which came up and pushed him forward as the girder tipped inward, causing him to lose his footing. He believed that by standing on gravel and ballast, seven or eight feet off the bridge, and had no idea that he was standing on a plate. In fact, Steve Happ, the president of Happ's, testified that he was not aware that the floor plate extended as far as it did and had not seen that before. One of Happ's employees, however, testified that he saw plaintiff and his father run into each other, which is what caused plaintiff to fall.

¶ 9 U.P. representatives went to the scene of the accident once they learned about it, and starting again the next day, the bridge removal was completed by employees of Happs and Carney Group. OSHA representatives supervised the work.

¶ 10 As a result of his injuries, plaintiff settled his worker's compensation claim with Carney Group's insurer. He also filed an action against Happ's and was later granted leave to add U.P. as a defendant. U.P. added as a third-party defendant Gatwood Crane Services, Inc., the

company that provided the crane to remove the bridge, and filed a counterclaim against Happ's. Both Happ's and Gatwood settled their claims with plaintiff.

¶ 11 Representatives from Happ's and U.P. gave inconsistent answers with respect to the level of control that U.P. exercised over the bridge removal. In its interrogatory answer, Happ stated that the bridge was owned by U.P., while U.P. averred that Happ's purchased all bridges pursuant to the agreement. Happ testified at a deposition that he would notify U.P. when his company was working, and that a U.P. employee in charge of that area would check out the job. According to Happ, U.P. security personnel would drive by the site every hour. He later stated, however, that security personnel only drove by because of their trains, not to provide security to the project. Edward Benbow, U.P.'s director of track maintenance, testified at his deposition that he was not involved in supervising the work related to the removal of the Polk Street bridge.

¶ 12 With regard to whether U.P. diligently exercised control over the demolition, its manager of special projects George Meyer testified that specific plans were required for removing a bridge in a populated area, such as the one on Polk Street, and identified a provision in a plan stored in U.P.'s system noting that contractors must submit a proposed sequence of operations for review prior to construction. He acknowledged that Happ's was required to submit such a plan to U.P. However, David Reagan, a bridge supervisor for U.P. testified that he was not aware of any U.P. representatives monitoring that project, or requiring Happ's to submit any type of construction plan.

¶ 13 Insofar as U.P.'s involvement after the incident, Happ testified that U.P. did not want any more work done until a written plan was directed to U.P. and it was approved by their engineers. However, he later appeared to state that the plan that U.P. needed to see pertained

to the removal of the next bridge, not the one on Polk Street, and denied that anything was discussed by U.P. representatives about the Polk Street bridge. Tom Campbell, U.P.'s manager of bridge construction, testified that he met with Happ after the Polk Street bridge had been removed, and created guidelines for the removal of the girders of the next bridge in order to avoid another incident. While those were suggestions, a site representative could stop the work if they were not followed. Benbow, who was present at the meeting with Happ, testified that another incident would not be tolerable, and told Happ what needed to happen so that it did not happen again. According to Benbow, the removal of the bridge on Polk Street was done poorly by cutting the beams on only one side and causing the western girder to be unbalanced. He averred that if it was his job to review a plan, he would have caught that problem. After that meeting, Happ hired a company called DMD to perform the removal of the next bridge. While Happ testified that he "had" DMD perform the work, he also stated that it was U.P. that called them to the job site.

¶ 14 With respect to U.P.'s reasonableness in selecting a contractor, Campbell acknowledged that he had a duty to hire competent contractors, but stated that U.P. was not obligated to oversee Happ's work once they entered into the agreement because at that point, Happ's owned the bridge. Further, he did not know that Happ's had not removed this type of bridge before, and stated that it would not have made a difference to him. Abe Ghazai, whose job was to choose a contractor that would optimize the value of scrap metal, testified that Happ's was qualified because it was local, was in this type of business and the most economical. Like Campbell, Ghazai did not know whether Happ's had taken down this type of bridge before.

¶ 15 Henry Crouch, plaintiff's railroad expert, testified that U.P. did not use reasonable care in selecting Happ's as a contractor because it takes a special skill set to remove a through plate

bridge, which Happ's had never done. According to Crouch, Happ's lacked the requisite engineering knowledge because it would have otherwise known that by cutting the beams on only one side, leaving them attached to the other girder, would cause it to fall. He noted that aerial photos show that white ballast was covering the floor plate, which extended four or five feet beyond the last beam. Crouch stated that providing a plan telling the contractor the methods to use constitute control.

¶ 16 U.P. moved for summary judgment, which the circuit court initially denied. In doing so, the court pointed to the provisions of the agreement giving U.P. the right to stop Happ's work and removed unsafe equipment, as well as the requirement that work be performed to the satisfaction of U.P.'s representatives, as sufficient evidence of control to survive summary judgment. Further, the court found that evidence of U.P.'s lack of care in selecting a contractor was another way in which U.P. may be liable to plaintiff. While U.P. argued that its duty to select a competent contractor did not extend to that contractor's employees, the court noted that plaintiff was not an employee of Happ's.

¶ 17 Following that order, U.P. filed a motion for reconsideration, which the court granted. The court then vacated its prior order and granted summary judgment in favor of U.P. This order focused on U.P.'s potential duty as a landowner, and found that since U.P. had already sold the bridges, it owed no duty surrounding their demolition. The court also found, contrary to its prior order, that U.P. did not exercise control over the operative details and did not breach its duty to hire competent contractors.

¶ 18 Plaintiff then moved for reconsideration and the court, again, reversed itself, this time based on its equitable powers, due to its concern to the health of Happ, who would be the sole remaining defendant. U.P. then sought a supervisory order, and the Illinois Supreme Court

directed the circuit court to vacate its last order and reinstate the summary judgment order in favor of U.P. The circuit court complied and this appeal follows.

¶ 19 ANALYSIS

¶ 20 Plaintiff first contends that the trial court erred in entering summary judgment in favor of U.P. because there was sufficient evidence on the record to demonstrate that U.P. owed a duty of care to plaintiff as the employer of a contract who retained control over part of the work.

We agree.

¶ 21 The purpose of summary judgment is not to try a question of fact, but to determine whether a genuine issue of material fact actually exists. *Northern Illinois Emergency Physicians et al. v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 305 (2005). Summary judgment is appropriate when "the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no issue as to any material fact and that the moving party is entitled to judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2011). A trial court's ruling on a motion for summary judgment is reviewed *de novo*. *Weather-Tite, Inc. v. University of St. Francis*, 233 Ill. 2d 385, 389 (2009).

¶ 22 Generally, one who employs an independent contractor is not liable for the acts or omissions of the independent contractor. *Bieruta v. Klein Creek Corp.*, 331 Ill.App.3d 269, 275, (2002). However, a recognized exception to this rule is articulated in section 414 of the Restatement, which reads:

¶ 23 "One who entrusts work to an independent contractor, *but who retains the control of any part of the work*, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is

caused by his failure to exercise his control with reasonable care.” (Emphasis added.) Restatement (Second) of Torts § 414 (1965).

¶ 24 Comment *a* to section 414 explains the distinction between “vicarious” and “direct” liability, as follows:

¶ 25 “If the employer of an independent contractor retains control over the operative detail of doing any part of the work, he is subject to liability for the negligence of the employees of the contractor engaged therein, under the rules of that part of the law of Agency which deals with the relation of master and servant. The employer may, however, retain a control less than that which is necessary to subject him to liability as master. He may retain only the power to direct the order in which the work shall be done, or to forbid its being done in a manner likely to be dangerous to himself or others. Such a supervisory control may not subject him to liability under the principles of Agency, but he may be liable under the rule stated in this Section unless he exercises his supervisory control with reasonable care so as to prevent the work which he has ordered to be done from causing injury to others.” Restatement (Second) of Torts § 414, Comment a, at 387 (1965).

¶ 26 As this court noted in *Cochran v. George Sollitt Construction Co.*, 358 Ill.App.3d 865, 874 (2005), comment a clarifies that “the general contractor, by retaining control over the operative details of its subcontractor's work, may become vicariously liable for the subcontractor's negligence; alternatively, even in the absence of such control, the general contractor may be directly liable for not exercising his supervisory control with reasonable care.”

¶ 27 Comment *b* to section 414 explains the theory of direct liability. It provides:

¶ 28 “The rule stated in this Section is usually, though not exclusively, applicable when a principal contractor entrusts a part of the work to subcontractors, but himself or through a foreman superintends the entire job. In such a situation, the principal contractor is subject to liability if he fails to prevent the subcontractors from doing even the details of the work in a way unreasonably dangerous to others, if he knows or by the exercise of reasonable care should know that the subcontractors' work is being so done, and has the opportunity to prevent it by exercising the power of control which he has retained in himself. So too, he is subject to liability if he knows or should know that the subcontractors have carelessly done their work in such a way as to create a dangerous condition, and fails to exercise reasonable care either to remedy it himself or by the exercise of his control cause the subcontractor to do so.” Restatement (Second) of Torts § 414, Comment *b*, at 387–88 (1965).

¶ 29 Comment *c* to Section 414 explains that for the “retained” control exception to apply:

¶ 30 “[T]he employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to [general contractors], but it does not mean that the [sub]contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the [sub]contractor is not entirely free to do the work in his own way.” Restatement (Second) of Torts § 414, Comment *C*, at 388 (1965).

¶ 31 “The central issue is retained control of the independent contractor's work, whether contractual, supervisory, operational[] or some mix thereof.” *Martens v. MCL Construction*

Corp., 347 Ill.App.3d 303, 318 (2004). Whether a general contractor retained sufficient control to trigger liability under section 414 is generally a question of fact. *Bokodi v. Foster Wheeler Robbins, Inc.*, 312 Ill.App.3d 1051, 1059 (2000). Only when the evidence presented is insufficient to create a factual question can the issue be decided as a matter of law. *Id.*

¶ 32 Thus, the determination of whether U.P. owed a duty to plaintiff depends on whether U.P. controlled the work in such a manner that it should be held liable. As discussed above, the agreement between U.P and Happ's required that Happ's work be performed in a workmanlike manner "to the satisfaction and acceptance of a railroad representative," and according to U.P.'s Ghazai, that representative was Campbell. The contract also gave U.P. the right to terminate the agreement if the work was deemed unsatisfactory by U.P., and to remove any employee deemed incompetent or any equipment deemed unsafe. Further, it allowed U.P. to make changes in the amount and dimensions of the work as U.P. deemed appropriate. While Happ stated that U.P.'s security personnel drove by the work sites only because of U.P.'s trains, he also testified that U.P. personnel checked out the work once he notified U.P. about the next job. Further, although Benbow and Reagan denied monitoring the removal of the Polk Street bridge or requiring Happ to submit a plan, Meyer acknowledged that Happ should have been required to provide such a plan showing procedures and sequencing. U.P.'s actions following the incident further illustrate the control it retained over Happ's. See, e.g., *Maggi v. RAS Development, Inc.*, 2011 IL App (1st) 091955, ¶ 72 (evidence of remedial measures after an incident may be introduced to show control). Campbell and Benbow made clear that another incident would not be tolerable, and required a specific plan from Happ's before the following bridge could be removed. Although the safety guidelines were described as suggestions, U.P. would have stopped the next project

if those guidelines were not followed. In fact, even if it was Happ's that ultimately hired DMD to remove the following bridge, Happ testified that it was U.P. that contacted that subcontractor to come to the site. Under these circumstances, a genuine issue of material fact exists as to whether U.P. retained sufficient control over the Happ's work to become vicarious or directly liable to plaintiff, such that summary judgment in favor of U.P. was improper.

¶ 33 U.P.'s reliance on *Calderon v. Residential Homes of America, Inc.*, 381 Ill. App. 3d 333 (2008); and *Shaughnessy v. Skender Construction, Co.*, 342 Ill. App. 3d 730 (2003), is misplaced. In neither of those cases did the employer admit that pursuant to their own policies, the contractor should have been required to submit a plan before beginning to work, nor did those employers take remedial measures following the incidents as U.P. has done in this case. See *Calderon*, 381 Ill. App. 3d at 342-47; *Shaughnessy*, 342 Ill. App. 3d at 738-39.

¶ 34 Moreover, while U.P. argues that it cannot be directly liable to plaintiff because there is no evidence that it knew, or should have known, that Happ's and Carney were improperly removing one of the girders while the crossbeams were still attached to the opposite one, thereby causing it to tip over. That argument is similarly unpersuasive. As plaintiff correctly noted, Happ testified that he notified U.P., any time that his company would be performing a job, and that U.P. personnel would then check his jobs. Further, if U.P. had required Happ's to submit a specific plan for the demolition, as Mayer acknowledged to be the company's policy, it would have known of the procedure that Happ's and Carney intended to use.

¶ 35 Plaintiff next contends that the circuit court also erred in granting summary judgment to U.P. with respect to his claim that U.P. was liable for hiring an incompetent contractor. He contends that while the court correctly found that a factual question existed as to whether Happ's was incompetent in demolishing the Polk Street bridge, the court improperly ruled that

any duty to exercise reasonable care in hiring a contractor does not extend to anyone working on the premises, as plaintiff was.

¶ 36 This claim, which similarly to his first one, did not survive summary judgment at the circuit court, was based on U.P.'s duty to exercise reasonable care in hiring an independent contractor as articulated in section 411 of the Restatement:

¶ 37 "An employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor:

(a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or

(b) to perform any duty which the employer owes to third persons." Restatement (Second) of Torts, § 411, at 376 (1965).

¶ 38 In regard to the circuit court's finding that plaintiff introduced sufficient evidence of Happ's lack of competence for that particular job to survive summary judgment, we agree. Happ himself admitted that he had never taken down that type of bridge before, and plaintiff's engineering expert testified that he lacked the requisite knowledge for the job because he should have known that by cutting the beams on one side only would cause the other girder to fall. Likewise, the record contains sufficient evidence that U.P. did not exercise reasonable care in selecting Happ's because Campbell and Ghazai both admitted that they did not know that Happ's had never removed that type of bridge before, and Campbell acknowledged that it would not have made a difference. See, e.g., *Gomien v. Wear-Elver Aluminum, Inc.*, 50 Ill. 2d 19, 22-23 (1979) (evidence that employer knew, or should have known, that contractor was a negligent driver was sufficient to support claim of negligent hiring).

¶ 39 U.P., however, responds that regardless of whether there was sufficient evidence to support plaintiff's claim that it was negligent in hiring Happ's, any potential liability under section 411 would not extend to plaintiff because he was an employee working on that site and, therefore, not a "third person" as required under that section. We note that while this court has stated, in *dictum*, that an employee of a negligently hired entity is not within the class of third parties to whom a duty of care in hiring a contractor extends (*Recio v. GR-MHA Corporation*, 366 Ill. App. 3d 48, 58 (2006)), it has not ruled on whether it should be extended to an employee of a new entity hired by that negligently hired contractor. U.P. does not dispute that plaintiff was not an employee of Happ's, but argues that the evidence on record shows that he was an employee of Carney's, which was hired by Happ's, and as such, he was not within the class of "third persons" to whom U.P. duty of care in hiring a contractor extends. In support of that contention, U.P. cites various cases from another jurisdiction in which the court found that section 411 did not permit a suit by an employee of a sub-subcontractor of a negligently hired subcontractor.

¶ 40 However, having concluded that the circuit court improperly granted summary judgment with respect to plaintiff's claim under section 414 and that this case should be remanded back for further proceedings, we need not reach the issue of whether U.P.'s potential liability under section 411 extends to plaintiff. Furthermore, although plaintiff was covered by Carney Group's worker's compensation, and had been called to the work site to assist with hooking a cable, it is undisputed that he has another profession as a trader for his father, who owns Carney Group. He was also described as learning about his father's demolition business, and was only called to assist on the demolition of that bridge when the employees on site could not hook a cable. At the time of the accident, he had already hooked that cable, and while

others may have asked him to perform another task, it is unclear from the record whether he even heard it, or whether he was finished doing his father a favor and was simply "hanging around." Under these circumstances, an issue of fact exists as to whether plaintiff was even an employee of Carney Group, such that summary judgment was improper.

¶ 41 Lastly, plaintiff contends that the circuit court erred in granting U.P.'s summary judgment motion with respect to plaintiff's claim that U.P. was liable as a possessor of land for failing to protect plaintiff from the danger associated with the floor plate that extended well beyond the end of the bridge. Plaintiff maintains that while the circuit court found that nothing showed that U.P. concealed the condition, as would be required to impose liability on the vendor of land after a vendee took possession, U.P. was still the owner of that land, such that it was still liable if it had not actively concealed the floor plates.

¶ 42 Plaintiff's premises liability claim against U.P. was made pursuant to section 343 of the Restatement, which provides:

¶ 43 "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." Restatement (Second) of Torts, §343, 215-16 (1965).

¶ 44 According to plaintiff, U.P. would have to know of the danger posed by the plates because it was that company's bridge, and U.P. itself had removed similar bridges. He further

claims that U.P. should not have expected anyone to discover the floor plates because, as aerial photos showed, they were covered by ballaster, and both plaintiff and Happ testified that they did not know that they were standing on the floor plates at the time. Thus, plaintiff contends that U.P. violated its duty to plaintiff by failing to call that condition into the attention of those who would be present on the job.

¶ 45 U.P. responds that plaintiff's injuries were not caused by the plates, but by negligence in the manner in which Happ's and Carney Group were attempting to remove the bridge and, in any event, U.P. no longer owned the bridge, or its floor plate at the time of the accident. Further, U.P. argues that Happ's and Carney Group's employees were aware of the plates at that time, as they stood on it after removing the tracks, and U.P. did not have superior knowledge of that structure because the bridge had been built by another railroad. According to U.P., it had no reason to expect that Happ's and Carney Group would not realize the extent of the plate by clearing the rock that covered it and protect their workers accordingly.

¶ 46 We note that even though the agreement provided for the sale of the bridges to Happ's, the portion of the floor plate that is the subject of this claim was on U.P.'s land, covered by rocks. While plaintiff does not dispute that workers were aware of the floor plates on the bridge, nothing shows that they were aware of how long they extended on the ground, after the bridge ended. In fact, plaintiff testified that he attempted to move back before the bridge was lifted, and believed that he was far enough so as to not stand on the floor plate. Moreover, although it was the manner in which the workers cut the beams that caused the western girder to collapse, it was the floor plate that caused plaintiff to fall forward, even after he attempted to stand completely off the bridge. Under these circumstances, we conclude that a genuine issue of material fact existed as to whether U.P. should have known that workers

would discover the extent of the floor plate, which should have precluded summary judgment. See, e.g., *Wilkerson v. Schwendener, Inc.*, 379 Ill. App. 3d 491, 497-98 (2008) (summary judgment was improper where land owner failed to call attention to a dangerous condition to site workers).

¶ 47 For the foregoing reasons, we reverse the judgment of the circuit court of Cook County and remand this matter for further proceedings.

¶ 48 Reversed and remanded.