2016 IL App (1st) 142533-U

FIFTH DIVISION
September 16, 2016

No. 1-14-2533

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

RICK OSBOURNE, Plaintiff-Appellant, v. BONE ROOFING SUPPLY, INC., a domestic corporation; TEF 2274 MILWAUKEE, LLC, a limited liability company; THE EQUITABLE FUNDS, LLC, a limited liability company; and THE EQUITABLE GROUP, INC., a domestic corporation, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 2012 L 11605 Honorable Kathy M. Flanagan, Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Justice Lampkin and Justice Reyes concurred in the judgment.

ORDER

HELD: We affirm the order of the circuit court of Cook County granting summary judgment in favor of defendants.

¶ 1 This negligence action arises out of an incident where plaintiff Rick Osbourne was

injured when a portion of a roof he was working on collapsed and he fell into the building. Plaintiff appeals from a circuit court order granting summary judgment in favor of the following four defendants: Bone Roofing Supply, Inc. (Bone-Roofing); TEF 2274 Milwaukee, LLC, (TEF); Equitable Funds, LLC (Equitable Funds); and Equitable Group, Inc. (Equitable Group) (collectively defendants). On appeal, plaintiff argues that genuine issues of material fact exist which preclude summary judgment in defendants' favor. We disagree and for the reasons that follow we affirm.

¶ 2 BACKGROUND

¶ 3 In November 2011, TEF was the owner of a commercial building located at 2274 N. Milwaukee Avenue in Chicago, Illinois. At the time TEF acquired the building it was in foreclosure and was vacant. The building is a brick structure. A portion of the building's roof is barrel or curved and the remaining portion is flat. It was the flat portion of the roof that caved in after roofing materials which were to be used to repair and resurface the roof were placed upon the roof.

¶ 4 Equitable Group entered into a contract with TEF to manage the building, which included hiring contractors to repair the property for the purpose of obtaining a commercial tenant. One of the contractors Equitable Group hired was plaintiff's employer Windward Roofing & Construction, Inc. (Windward). Windward was hired to make certain repairs to the building, including repairing and resurfacing the roof.

¶ 5 On August 23, 2012, Bone-Roofing delivered roofing materials to the building pursuant to its contract with Windward. Windward employee Randy Stanton directed the loading of the roofing materials onto the roof of the building. Four days later, on August 27, the plaintiff was

working on a flat portion of the roof when it collapsed and he fell into the building sustaining serious injuries.

¶ 6 ANALYSIS

¶ 7 Plaintiff challenges the circuit court' s rulings on summary judgment. Review of a circuit court's ruling granting summary judgment is *de novo*. *Sears, Roebuck & Company v. Acceptance Insurance Co.*, 342 Ill. App. 3d 167, 171, (2003). The purpose of summary judgment is not to try an issue of fact but to determine whether a triable issue of fact exists. *Banco Popular North America v. Gizynski*, 2015 IL App (1st) 142871, ¶ 37.

¶ 8 Summary judgment is appropriate where the pleadings, depositions, and admissions on file, together with any affidavits and exhibits, when viewed in the light most favorable to the nonmoving party, indicate there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005 (c) (West 2000); *Bier v. Leanna Lakeside Property Ass'n*, 305 Ill. App. 3d 45, 50 (1999). "To resist a motion for summary judgment, the opponent must provide some factual basis that would arguably entitle him to judgment." *Fields v. Schaumburg Firefighters' Pension Board*, 383 Ill. App. 3d 209, 224 (2008).

¶ 9 Plaintiff argues the circuit court erred in granting summary judgment in favor of defendants on his negligence claims. "To state a cause of action for negligence, a plaintiff must allege facts in his complaint that establish the existence of a duty of care owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately caused by the breach." *Trigsted v. Chicago Transit Authority*, 2013 IL App (1st) 122468, ¶ 52. "[I]n determining whether summary judgment was properly granted in a negligence action, a reviewing court must first determine whether defendant owed the plaintiff a duty, which is a question of law." *Konyar v. Jonsson*, 184 Ill. App. 3d 865, 870-71 (1989). In resolving whether a duty exists, we ask

"whether defendant and plaintiff stood in such a relationship to one another that the law imposed upon defendant an obligation of reasonable conduct for the benefit of plaintiff." *Ward v. K mart Corp.*, 136 Ill. 2d 132, 140 (1990). If no duty exists there can be no recovery. *Rangel v. Brookhaven Constructors, Inc.*, 307 Ill. App. 3d 835, 837-38 (1999).

¶ 10 In this case, plaintiff has failed to present evidence sufficient to create genuine issues of material fact that any of the four defendants stood in such a relationship with him that the law imposed a duty upon defendants to protect him from the collapse of the roof.

¶ 11 Plaintiff alleged that Bone-Roofing had a duty to exercise reasonable care in loading materials onto the roof so as not to overload any part of the roof. Bone-Roofing was hired as an independent contractor to deliver roofing materials to the job site, and afterwards, to hoist and place these materials onto the roof at locations directed by Windward foreman, Randy Stanton.

¶ 12 Our supreme court has determined that as a general rule, an independent contractor owes no duty to third persons to judge the plans or instructions which it was merely contracted to follow. *Hunt v. Blasius*, 74 Ill. 2d 203, 209 (1978). Thus, if the contractor carefully carries out the plans or instructions provided to it, then the contractor is justified in relying upon the adequacy of these plans or instructions. *Id.* An exception to this rule arises only where the plans or instructions are so obviously dangerous that no competent contractor would follow them. *Id.*

¶ 13 Here, the deposition testimonies of Randy Stanton and Joseph Cholewa, a roofing estimator for Windward, show that the driver from Bone-Roofing who operated the crane which hoisted the roofing materials onto the roof of the subject building, acted under the specific instructions of Randy Stanton. Stanton's deposition testimony reveals that the driver followed his instructions on exactly where to place the roofing materials onto the roof. Moreover, no evidence was presented indicating that these instructions where so obviously dangerous that no

competent contractor would have followed them. See, *e.g.*, *Geever v. O'Shea & Sons Builders, Inc.*, 233 Ill. App. 3d 917, 922 (1992) (plaintiffs failed to point to any evidence in the record that the condominium association's instructions to contractor hired to repair balcony railings were so obviously dangerous that no competent contractor would have followed the instructions or guidelines). Plaintiff has failed to establish the existence of a duty owed to him on the part of Bone-Roofing or its driver.

¶ 14 Plaintiff next contends that defendants TEF, Equitable Funds, and Equitable Group all had a duty to exercise reasonable care in the ownership, operation, management, maintenance and control of the premises; and to supervise and inspect the property and work in progress, so that there would be good, safe, and proper conditions for persons legally and lawfully in and upon the premises to use and walk upon the premises.

¶ 15 As a general rule, one who entrusts work to an independent contractor such as plaintiff's employer Windward, is not liable for the acts or omissions of that contractor. See, *e.g.*, *Lee v. Six Flags Theme Parks, Inc.*, 2014 IL App (1st) 130771, ¶ 66. " ' This is because the principal generally does not supervise the details of the independent contractor's work and, as a result, is not in a good position to prevent negligent performance. ' " *Calderon v. Residential Homes of America, Inc.*, 381 Ill. App. 3d 333, 340 (2008) (quoting *Pestka v. Town of Fort Sheridan Co.*, 371 Ill. App. 3d 286, 300 (2007)).

¶ 16 Illinois has adopted section 414 of the Restatement (Second) of Torts, which provides an exception to this general rule and states as follows:

> "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." Restatement (Second) of Torts § 414 (1965).

¶ 17 Comment c of section 414 clarifies the types of circumstances under which this section is applicable and states as follows:

> "In order for the rule stated in this Section to apply, the 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 employers, but it does not mean that the 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 contractor is not entirely free to do the work in his own way." Restatement (Second) of Torts § 414, cmt. c (1965).

¶ 18 Generally, the best indicator of whether an employer has retained control over the independent contractor's work is the parties' contract. *Calderon*, 381 Ill. App. 3d at 343; *Joyce v. Mastri*, 371 Ill. App. 3d 64, 74 (2007). In the instant case, the contract between Windward and Equitable Group clearly shows that Windward controlled the means and methods of its work. The contract stated in relevant part:

> "The contractor shall be solely responsible for all construction under this contract, including the techniques, sequences, procedures ***. The contractor shall provide and pay for all labor, materials, and equipment, including tools, construction equipment, and machinery, utilities, and all other facilities and services necessary for proper completion of all work specified in this Contract."

¶ 19 Accordingly, defendants TEF, Equitable Funds, and Equitable Group did not owe plaintiff any duty of care because they did not control the manner or method of work performed by the plaintiff or his employer, Windward. The record shows that Equitable Group hired Windward to perform the roofing work and that Equitable Group and the other three defendants had no knowledge of roofing practices or procedures and had no involvement in the means, method or completion of this work. Randall Kuhn, the owner of Windward, acknowledged that Equitable Group relied upon Windward to provide an accurate assessment of the quality and condition of the roof.

¶ 20 In granting summary judgment in favor of defendants, the circuit court also applied section 343 of the Restatement (Second) of Torts and found that defendants TEF and Equitable Group had no actual or constructive notice that the portion of the roof which collapsed was inadequately built. And as a result, the court determined that these defendants did not owe plaintiff a duty of care as a matter of law. We do not believe the court erred in this regard.

¶ 21 Section 343 of the Restatement (Second) of Torts sets forth the circumstances under which "[a] possessor of land is subject to liability for physical harm" to persons upon his land. Restatement (Second) of Torts § 343 (1965). This section provides:

> "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 (1965); see also *Genaust v. Illinois Power Co.*, 62 Ill. 2d 456, 478 (1976).

¶ 22 Plaintiff argues that defendants TEF and Equitable Group had a duty under section 343 to exercise reasonable care to discover defects or dangerous conditions existing on the property and to either correct these defects or dangerous conditions or give sufficient warning to their invitees to enable them to avoid harm. Plaintiff contends that if defendants had exercised reasonable care they would have discovered that the roof joists on the part of the roof which collapsed were inadequately sized and spaced rendering that part of the roof underbuilt. Plaintiff argues that whether TEF and Equitable Group should have known the roof was underbuilt is a question of fact for the jury to decide and is not properly disposed of through summary judgment.

¶ 23 Plaintiff further claims that even though Josh Silverglade, the president of Equitable Group, gave deposition testimony indicating he inspected the joists before legal title was conveyed and that he observed nothing wrong with them, the issue of whether he should have known the roof was structurally defective, is also a question of fact for a jury to decide.

¶ 24 We reject plaintiff's premises liability arguments because we find the defendants exercised reasonable care by specifically hiring plaintiff's employer to assess the physical condition of the roof prior to the accident. The evidence shows that defendants TEF and Equitable Group lacked the requisite experience and knowledge to assess the physical condition of the roof and therefore hired plaintiff's employer Windward to conduct such an assessment. Under the circumstances in this case, defendants exercised reasonable care by hiring a roofing expert to inspect and assess the physical condition of the roof prior to the accident. See, *e.g.*, *Sparrow v. Talman Home Federal Savings & Loan Association*, 227 Ill. App. 3d 848, 855-56

(1992) (building owner unfamiliar with drywall exercised reasonable care to discover condition of drywall by hiring building inspector to inspect the property for any necessary repairs).

¶ 25 Moreover, since there is no evidence that defendants knew or should have known that the roof was underbuilt prior to the accident, and no evidence that they owed a duty to plaintiff, the doctrine of *res ipsa loquitur* is inapplicable. The doctrine does not apply unless a duty of care is owed to the plaintiff. *Spidle v. Steward*, 79 Ill. 2d 1, 7 (1980); *Carroll v. Faust*, 311 Ill. App. 3d 679, 687 (2000).

¶ 26 Plaintiff also contends the circuit court erred in granting summary judgment in favor of defendants on his negligence claims because genuine issues of material fact remain as to whether alleged violations of certain building code ordinances were a proximate cause of his injuries. The building code ordinances at issue are section 13-12-125(a)(1) (vacant buildings ordinance) and section 13-12-135(b)(4) (minimum requirements for vacant buildings ordinance) of the Chicago Municipal Code (Chicago Municipal Code §§ 13-12-125(a)(1), 13-12-135(b)(4) (2008)).

¶ 27 Section 13-12-125(a)(1) requires the owner of a vacant building to register the building with the City of Chicago and provides in relevant part:

"The owner of any building that has become vacant shall within 30 days after the building becomes vacant or within 30 days after assuming ownership of the building, whichever is later, file a registration statement for each such building with the department of buildings on forms provided by that department for such purposes." Chicago Municipal Code § 13-12-125(a)(1) (2008).

¶ 28 Section 13-12-135(b)(4) requires the roof on a vacant building to be adequately supported and provides in pertinent part:

"The roof shall be adequately supported ***." Chicago Municipal Code § 13-12-135(a)(4) (2008).

¶ 29 "While the issue of the existence of proximate cause is generally a question of fact, at the summary judgment stage the plaintiff must present affirmative evidence that the defendant's negligence was arguably a proximate cause of the plaintiff's injuries." *Hussung v. Patel*, 369 Ill. App. 3d 924, 931 (2007). "The existence of proximate cause cannot be established by speculation, surmise, or conjecture." *Gyllin v. College Craft Enterprises, Ltd.*, 260 Ill. App. 3d 707, 712 (1994). "[P]roximate cause can only be established when there is a reasonable certainty that defendant's acts caused the injury." *Kimbrough v. Jewel Companies, Inc.*, 92 Ill. App. 3d 813, 817 (1981).

¶ 30 In the instant case, plaintiff has not provided any evidence showing that a violation of either of the two ordinances was a proximate cause of his injuries. "Violations of an ordinance or a failure to comply with the building code, by themselves without evidence that the violations caused the injury, do not establish proximate cause." *Strutz v. Vicere*, 389 Ill. App. 3d 676, 681 (2009).

¶ 31 In regard to section 13-12-125(a)(1), plaintiff simply alleges there is a question of fact regarding whether this violation proximately caused his injuries. However, plaintiff offers no evidence to support this allegation. "Liability cannot be predicated on conjecture, rather proximate cause is established when there is reasonable certainty that the defendant's acts or omissions caused the injury." *Strutz*, 389 Ill. App. 3d at 679.

¶ 32 In regard to section 13-12-135(b)(4), which again requires that the roof on a vacant building be adequately supported, the undisputed evidence shows that TEF and Equitable Group acted reasonably under the circumstances in this case by hiring Windward to inspect the roof of

the subject building for any necessary repairs. See, *e.g.*, *Sparrow*, 227 Ill. App. 3d at 855-56 (building owner exercised reasonable care by having building inspector inspect property for any necessary repairs).

¶ 33 Windward's estimator, Joseph Cholewa, stated that Windward was hired to inspect the roof, inform the property ownership and management groups what was wrong with the roof and determine which types of repairs were necessary, and then advise them on which type of roofing system would be appropriate. Randall Kuhn, Windward's owner, acknowledged that Equitable Group relied upon Windward to provide an accurate assessment of the quality and condition of the roof.

¶ 34 The contract between Equitable Group and Windward states in part, "Replacement of bad decking is done on a time and material basis." According to Windward's superintendent, Robert Cholico, "replacement of bad decking" included replacing deteriorating joists and supports underneath the roof. The joists and supports are the very same parts of the roof plaintiff contends were defective. The evidence shows that Equitable Group hired Windward to perform the roofing work and that it had no involvement in the means, method or completion of this work.

¶ 35 Finally, we reject plaintiff's argument that the circuit court erred in striking the affidavit of his expert, Frederick Heath, or by denying his motion to reconsider. Plaintiff relied upon Heath's affidavit in an effort to impose a duty upon defendants TEF and Equitable Group to have either conducted, or engaged Windward to conduct, a thorough inspection of the building prior to commencement of the roofing work.

¶ 36 Illinois Supreme Court Rule 191(a) (eff. July 1, 2002), governs the sufficiency of an affidavit filed in support of, or in opposition to, a motion for summary judgment (*Jackson v. Graham*, 323 Ill. App. 3d 766, 777 (2001)), and provides in relevant part:

> "Affidavits in support of and in opposition to a motion for summary judgment under section 2-1005 of the Code of Civil Procedure * * * shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all documents upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto." Ill. S. Ct. R. 191(a) (eff. July 1, 2002).

¶ 37 A circuit court's decision to strike a Rule 191 affidavit generally falls within the court's sound discretion (*Kreczko v. Triangle Package Machinery Co.*, 2016 IL App (1st) 151762, ¶ 18) but when the motion to strike is made in conjunction with a ruling on a motion for summary judgment, we employ a *de novo* standard of review. *US Bank National Ass'n v. Avdic*, 2014 IL App (1st) 121759, ¶ 18.

¶ 38 The affidavit at issue failed to meet the requirements of Rule 191(a) for a number of reasons, only one of which we need address. Significantly, the affidavit did not have attached to it the documents upon which Heath relied. There is nothing attached to his affidavit other than his curriculum vitae. This factor alone is sufficient to affirm the circuit court's decision to strike the affidavit. See *Robidoux v. Oliphant*, 201 Ill. 2d 324, 339-40 (2002).

¶ 39 Attaching additional unsworn investigation materials to the motion to reconsider does not cure the original defects with the affidavit. Nor does this material qualify as newly discovered evidence that the circuit court was obligated to consider. See *Landeros v. Equity Property and*

Development, 321 Ill. App. 3d 57, 65-67 (2001); *Wilfong v. L.J. Dodd Contruction*, 401 Ill. App. 3d 1044, 1063 (2010).

¶ 40 For the foregoing reasons, we affirm the order of the circuit court of Cook County granting summary judgment in favor of defendants.

¶ 41 Affirmed.