

2014 IL App (2d) 130953-U
No. 2-13-0953
Order filed July 29, 2014

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

USAA CASUALTY INSURANCE COMPANY,)	Appeal from the Circuit Court of Du Page County.
)	
Plaintiff-Appellant,)	
)	
v.)	No. 10-L-631
)	
M.J. DUGGAN CO., A AND J ELECTRIC, INC., and CMA PAINTING AND DECORATING, INC.,)	
)	
Defendants)	Honorable
)	Kenneth L. Popejoy,
(D.M. Group, Inc., Defendant-Appellee).)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Hudson and Spence concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in granting defendant summary judgment on plaintiff's negligence claim, as plaintiff provided sufficient circumstantial evidence from which a trier of fact could reasonably infer that defendant negligently caused the fire at issue.

¶ 2 On November 16, 2008, a fire heavily damaged a home under construction at 261 Kenilworth in Glen Ellyn. Plaintiff, which insured the premises, paid the owner for the loss and was subrogated to its rights. Plaintiff sued the general contractor and several subcontractors,

including D.M. Group, Inc. (D.M.), alleging that their negligence in leaving a “homemade light cord” energized overnight caused the fire. The trial court granted D.M. summary judgment, ruling that no evidence showed that D.M. brought such a cord to the site or used it. Plaintiff appeals, contending that it presented sufficient circumstantial evidence to survive summary judgment on the issue of whether D.M. was responsible for leaving the light cord plugged in at the premises. We reverse and remand.

¶ 3 The property was owned by 261 Kenilworth LLC, which in turn was owned by Gerald and Susan Stewart. They hired M.J. Duggan Company to build a new home on the site. Duggan retained A & J Electric, Inc., as the electrical subcontractor and CMA Painting & Decorating, Inc., as the painting and drywall subcontractor. CMA subcontracted the drywall work to D.M.

¶ 4 On November 16, 2008, the home was still under construction. That morning, a fire department lieutenant called Michael Duggan of M.J. Duggan to inform him that there had been a fire at 261 Kenilworth. He went to the site to find the home heavily damaged by fire, smoke, and water. Eventually, the home was razed to the foundation and rebuilt.

¶ 5 Plaintiff paid the loss and was subrogated to the owner’s rights. It sued M.J. Duggan, A & J, CMA, and D.M. Its first amended complaint alleged that the source of the fire was a “homemade light cord” that was left “energized” overnight. Plaintiff alleged that each defendant was negligent for leaving the light cord plugged in and causing the fire.

¶ 6 Each defendant moved for summary judgment. The only motion at issue in this appeal is that of D.M. That motion asserted that plaintiff could produce no evidence that D.M. was responsible for bringing the homemade light cord to the premises or leaving it plugged in overnight. D.M. attached to the motion numerous documents, including the fire investigator’s

report and the depositions of Michael Duggan and Moises Diaz of D.M. We briefly summarize the relevant portions of these documents.

¶ 7 The fire investigator concluded that the fire originated in the void between the basement ceiling and the first floor. The cause of the fire was listed as “Undetermined.” There was no evidence of a break-in at the site.

¶ 8 Duggan testified that he supervised all of the subcontractors on the project. Typically, he would check the premises at the end of each workday to ensure that everything was secured and turned off. The day before the fire, he went to the premises in the morning and instructed D.M.’s workers on how to lock up. Duggan was going to a wedding later in the day and would not be able to personally supervise the closing of the site for the day, as was his usual practice.

¶ 9 Duggan told the workers to make sure they turned everything off and cleaned up their scraps when they left for the day. He noticed that the drywall crew was working in every corner of the basement. A string of lights left by a previous contractor was hung from the ceiling. He did not recall seeing any light fixtures on the basement floor, but D.M. would have to have brought lights down there to work, as the ambient lighting was poor. D.M. was the only subcontractor working at the site for several days before the fire.

¶ 10 Duggan stated that he left a key hidden outside the house and instructed the subcontractors where to find it so that they could get in. However, one of the sliding glass doors did not yet have hardware and could not be secured from the inside, so that anyone could have access to the home’s interior. Although there had not previously been problems with unauthorized entries, he expressed his opinion that the fire was caused by “kids or whoever” who entered the home to “drink or whatever” and left a light burning or discarded a lit cigarette.

¶ 11 Diaz testified that he and the rest of the D.M. crew were drywalling the basement on Saturday, November 15, the day before the fire. They started the drywall work on Wednesday, beginning with the first and second floors. On Saturday, they finished the basement, thus completing their work on the home. During that time, he did not see any other contractors at the site.

¶ 12 D.M. used a square fluorescent light that was generally kept in the middle of the basement but could be moved around as needed. Diaz noticed a yellow extension cord in the vicinity of a basement outlet, but D.M. never used it. They powered their screw guns with their own red extension cords that were plugged into a three-way outlet. Diaz's crew took down the light string in the basement in order to drywall the ceiling.

¶ 13 D.M. finished around 3 p.m. on Saturday. Diaz removed all of D.M.'s equipment from the site and made sure that all lights were off and that the house was locked before he left. It was dark in the basement when he left.

¶ 14 Gerald Stewart, one of the homeowners, testified that the last time he was in the home was on the Thursday or Friday before the fire. He never brought any materials or tools to the construction site. Joel Leitz of A & J believed that the cause of the fire was a homemade light cord that fire investigators found wrapped in a circle inside a pile of debris. The "pigtail" fixture was in a hallway connecting several rooms in the basement.

¶ 15 Plaintiff also submitted the affidavits of two experts. Fire investigator John Michael Agosti averred that the fire originated in a basement hallway separating a bathroom from the furnace and workshop. Within the area of origin were the remains of a homemade "pigtail" light fixture lying under a pile of debris on the floor. Agosti found the fixture, a heavily charred electrical cord that was looped around a drywall screw in the charred wooden framing around the

bathroom doorway, and a yellow extension cord that extended from the hallway into the workroom. This was the only device plugged into the electrical outlet beneath the electrical panel in the workroom. After eliminating other possible causes, he concluded that the fire was caused by the homemade light cord, which was left energized near combustible materials while no one was at the site.

¶ 16 Adam Bainbridge, an electrical engineer, agreed that the fire originated in the area identified by Agosti and the original fire investigator. He opined that the homemade light fixture had been connected to the charred electrical cord with wire nuts. Bainbridge agreed with Agosti about the cause of the fire.

¶ 17 The trial court granted D.M.'s motion for summary judgment. The court found that plaintiff presented no evidence that D.M. brought the homemade light cord to the site or used it there. Plaintiff timely appeals.

¶ 18 Plaintiff contends that it presented sufficient circumstantial evidence that D.M. was using the homemade light cord and left it plugged in overnight, causing the fire. Plaintiff points out that D.M. was the only subcontractor working at the site for three or four days before the fire. No other contractor claimed to have brought any materials or equipment to the site during that time. It was essentially undisputed that the homemade light fixture caused the fire. The fixture was found in an area of the basement where D.M. had been working. Moreover, the basement had little ambient light and, although D.M. employees were working in several areas of the basement, Diaz testified that they used only one light fixture, which they moved around as needed. Plaintiff argues that these circumstances would allow a jury to conclude that D.M. brought the fixture to the site, used it for additional lighting, and left it plugged in overnight.

¶ 19 The trial court granted D.M. summary judgment. Summary judgment is appropriate where the pleadings, depositions, admissions, and affidavits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2012). We review *de novo* a grant of summary judgment. *Sollami v. Eaton*, 201 Ill. 2d 1, 7 (2002).

¶ 20 D.M.'s summary judgment motion was essentially a "*Celotex*-type" motion, arguing that plaintiff would not be able to prove its case. See *Jiotis v. Burr Ridge Park District*, 2014 IL App (2d) 121293, ¶ 25 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)). Thus, defendant had to show that plaintiff's evidence was insufficient to avoid judgment as a matter of law. *Id.*

¶ 21 The essential elements of a cause of action based on negligence are the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately caused by that breach. *Ward v. K mart Corp.*, 136 Ill. 2d 132, 140 (1990). Proximate cause need not be proved with direct evidence. *Canzoneri v. Village of Franklin Park*, 161 Ill. App. 3d 33, 41 (1987). Rather, causation may be established by facts and circumstances that, in light of ordinary experience, reasonably suggest that the defendant's negligence produced the plaintiff's injury. *Id.* That said, proximate cause cannot be predicated on surmise or conjecture, and, therefore, causation will lie only when there exists a reasonable certainty that the defendant's acts caused the injury. *Wiegman v. Hitch-Inn Post of Libertyville, Inc.*, 308 Ill. App. 3d 789, 795 (1999). If the plaintiff cannot identify the cause of its injury or can only guess as to the cause, a trier of fact cannot find the defendant liable for negligence. *Kimbrough v. Jewel Cos.*, 92 Ill. App. 3d 813, 817 (1981).

¶ 22 In *Olson v. Williams All Seasons Co.*, 2012 IL App (2d) 110818, we reversed summary judgment for the defendant where the plaintiff presented only circumstantial evidence of causation. *Id.*, ¶¶ 27-28, 55. Here, too, plaintiff presented sufficient circumstantial evidence to survive summary judgment on the question of whether D.M. was responsible for causing the fire.

¶ 23 Initially, plaintiff presented evidence in the form of expert affidavits that the homemade light fixture was the cause of the fire, which began in the basement. D.M. was the only subcontractor working at the site for three or four days before the fire and had most recently been working in the basement. On the day before the fire, D.M.'s crew worked until late in the afternoon. There was no evidence that the owner, Duggan, or any other subcontractor brought any materials to or did any work at the site during that time.

¶ 24 Moreover, Duggan testified that D.M. was working in every part of the basement when he visited the site on November 15, although the ambient light in the basement was poor. Diaz explained that D.M. used only a single light fixture, plugged into an extension cord, that its workers could move around as needed. The fire inspector's report found no evidence of an unauthorized entry into the home prior to the fire. Duggan testified that he had not previously experienced problems with break-ins.

¶ 25 From this, a factfinder could reasonably conclude that D.M. employees brought the homemade light fixture to the site to use for additional lighting and, while leaving the premises on Saturday afternoon, left it plugged in. Thus, plaintiff presented sufficient evidence to avoid judgment as a matter of law, and summary judgment for D.M. was improper.

¶ 26 We of course express no opinion on the case's ultimate merits. We hold only that plaintiff presented sufficient evidence for the case to go forward.

¶ 27 The judgment of the circuit court of Du Page County is reversed and the cause remanded.

¶ 28 Reversed and remanded.