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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4527-14T1

PERFEITO ESTEVES and MARIA ESTEVES, h/w,

Plaintiffs-Appellants,

v.

STATE OF NEW JERSEY, COUNTY OF PASSAIC and BOROUGH OF HAWTHORNE,

Defendants,

and

AJM CONTRACTORS, INC.,

Defendant/Third-Party Plaintiff-Respondent,

v.

BERTO CONSTRUCTION, INC.,

Third-Party Defendant,

and

BOROUGH OF HAWTHORNE,

Defendant/Third-Party Plaintiff,

v.

ROCHDALE INSURANCE COMPANY,

Third-Party Defendant.

Argued November 9, 2016 – Decided April 26, 2017

Before Judges Ostrer and Leone.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Docket No. L-2978-13.

Michael S. Misher (Zarwin, Baum, DeVito, Kaplan, Schaer & Toddy P.C.) of the Pennsylvania bar, admitted pro hac vice, argued the cause for appellants (Zarwin, Baum, DeVito, Kaplan, Schaer & Toddy P.C., and Mr. Misher, attorneys; Mr. Misher, on the brief).

Douglas V. Sanchez argued the cause for respondent (Cruser, Mitchell, Novitz, Sanchez, Gaston & Zimet, LLP, attorneys; Mr. Sanchez, of counsel; Joseph P. Kreoll, on the brief).

PER CURIAM

This personal injury action arose out of a construction site accident. Plaintiffs Perfeito Esteves, a construction worker, and his wife Maria Esteves,[1] appeal from the April 29, 2015 summary judgment dismissal of their negligence complaint against defendant AJM Contractors (AJM). We affirm.

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[1] Because Ms. Esteves' claims are derivative of Mr. Esteves' negligence claims, we refer to Mr. Esteves as "plaintiff."

We discern the following pertinent facts from the motion record, viewed in the light most favorable to plaintiff as the non-moving party. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

On September 14, 2011, plaintiff injured his back when he slipped and fell on a milled road. He was carrying a large wood form, a pre-made mold used to construct curbs. Plaintiff was an employee of Berto Construction, Inc. (Berto), a concrete curb and sidewalk subcontractor of AJM, which had contracted with the Borough of Hawthorne (Borough) to undertake a road improvement project. The project involved milling and repaving roads within the Borough and replacing concrete curbs and sidewalks.

AJM's contract obliged it to ensure compliance with all Occupational Safety and Health Administration (OSHA) safety regulations, and New Jersey Department of Labor and Industry requirements. After entering its contract with the Borough, AJM subcontracted with Berto to perform the concrete work for the project.

Plaintiff had worked for Berto for nine years on sidewalk and curb projects, and was responsible for carrying and placing wood forms. Before the accident, AJM had completed milling the road, which left a ridged road surface after asphalt was removed. Plaintiff had removed a wood form from the back of a Berto truck.

The form was about twenty feet long and 123 pounds. No one was around to help plaintiff carry the form, so he carried it himself. He had already carried several forms on his own, without any difficulty. However, while carrying this particular form, plaintiff slipped, fell backwards, and landed on his buttocks, injuring his back. No one witnessed the fall.

His worker's compensation report alleged that lifting the form caused his injury. The same claim was made in his interrogatory answers: "Defendant allowed Plaintiff to participate in a dangerous activity on the job site, i.e., lifting and carrying a form by himself. The weight of the form lifted and carried by plaintiff was beyond a safe limit."

However, in his subsequent deposition testimony, plaintiff undermined the claim that the form's weight caused his injury:

> Q. And how did your accident happen?
>
> A. How it happened?
>
> Q. Yes.
>
> A. I was going to put the form, the two feet slid, and I fell backwards and the form came towards me and I pushed it back and I hurt my back.
>
> Q. What caused your feet to slide?
>
> A. It was soft, mill, because they had taken out the old asphalt and it was like, you know, gravel, you know, those stones.

Later in his deposition, plaintiff again denied that the form's weight caused his injury:

> Q. Given your answer in this interrogatory . . . what was the main cause of your accident? Was it that the ground was soft and that you slipped backwards or was the form itself too heavy for you to carry yourself?
>
> A. Because of the ground was soft.
>
> Q. Was the fact that the form was too heavy a contributing factor as well, did that also lead to the accident or did that not have an impact?
>
> . . . .
>
> A. Because the form was heavy was not an issue, it was because of the ground.

Despite plaintiff's contrary deposition testimony, his liability expert opined that AJM's failure to ensure plaintiff had help carrying the wood form caused his injury. Similarly, plaintiff's biomechanical expert concluded that carrying a wood form by oneself was an "inherently dangerous" task and placed plaintiff at a greater risk of injury, given the uneven, milled surface he had to traverse. Amalio Farro, one of AJM's project managers, testified in deposition that it was common practice for laborers to carry wood forms without assistance.

In his written decision granting AJM's motion for summary judgment, Judge Rudolph A. Filko concluded there were no material facts in dispute. Citing Alloway v. Bradlees, Inc., 157 N.J. 221,

230 (1999), the court found AJM did not breach its duty of care to plaintiff:

> Plaintiff clearly testified that he fell due to soft ground, and specifically, not because the weight of the wood form being carried. According to Plaintiff's deposition testimony, Plaintiff stated that ". . . but the cause for me was because the ground was soft." Plaintiff has essentially testified, multiple times, that the weight of the wooden form was irrelevant to the accident that caused his injuries.
>
> Additionally, none of the expert reports attribute the soft ground specifically to the cause of the fall.
>
> . . . .
>
> In light of the above, I find that there was no foreseeability or actual or constructive knowledge. Plaintiff has been doing the exact same job for nine years on jobs where AJM [Contractors] was the general contractor. There was no evidence of prior complaints of weight or inability to carry the wood forms nor was there evidence of prior accidents by Plaintiff or by other employees working for AJM Contractors. Additionally, there is no evidence of any particular OSHA standards that were breached or violated that would have caused the accident.
>
> In fact, Plaintiff's argument concerning OSHA is a red herring since Plaintiff himself clearly said the weight of the wood had nothing to do with his fall. Rather, he stated it was the soft ground that caused his fall and the subsequent injuries.
>
> I find that the proofs have not established that AJM Contractors had a duty to Plaintiff. Even assuming a duty existed

> on the part of AJM Contractors, no proof was established that would show a breach of duty that led to the injury of which is being complained.

On appeal, plaintiff asserts that AJM breached its duty to him to provide a safe work environment.

We review the trial court's grant of summary judgment de novo, employing the same standard the trial court used. Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 330 (2010). Under Rule 4:46-2, we "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill, supra, 142 N.J. at 540. "[W]here the party opposing summary judgment points only to disputed issues of fact that are 'of an insubstantial nature,' the proper disposition is summary judgment." Id. at 529 (quoting Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 75 (1954)).

Turning to plaintiff's negligence claim, he must prove four elements: "(1) a duty of care, (2) a breach of that duty, (3) proximate cause, and (4) actual damages." Townsend v. Pierre, 221 N.J. 36, 51 (2015) (internal quotation marks and citation omitted). At common law, a general contractor was not liable for a subcontractor's employee's injuries caused by "the condition of the premises or the manner in which the hired work was performed."

Tarabokia v. Structure Tone, 429 N.J. Super. 103, 112-13 (App. Div. 2012), certif. denied, 213 N.J. 534 (2013). However, this immunity does not apply if the general contractor: (1) retains control over the manner and means in which the contracted work is done; (2) knowingly contracts with an incompetent subcontractor; or (3) contracts to do work that is inherently dangerous. Id. at 113.

Under the "more modern approach," we also consider "the foreseeability of the risk of injury, both its nature and severity." Id. at 113-14 (citations omitted). In addition, a general contractor's duty depends on "identifying, weighing, and balancing several factors -- the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution." Alloway, supra, 157 N.J. at 230 (internal quotation marks and citation omitted).

However, we need not chart the precise boundaries of defendant's duty in this case. Although plaintiff contends his injury was foreseeable given the risks of carrying a wood form without help, he presented insufficient evidence to establish that defendant's alleged breach of duty caused his injury. In his deposition, plaintiff repudiated the allegations made in his interrogatory response and worker's compensation report that

carrying the wood form unassisted caused his injury. Indeed, he stated the weight of the form was not a contributing factor "[b]ecause the form was heavy was not an issue[.]" Rather, he identified the soft ground and gravel as the cause of his fall.

Plaintiff's reliance on expert opinions to establish causation is misplaced, since they contradict plaintiff's own testimony. In Townsend, supra, the Court held "[a] party's burden of proof on an element of a claim may not be satisfied by an expert opinion that is unsupported by the factual record or by an expert's speculation that contradicts that record." 221 N.J. at 55. The Court affirmed the exclusion of an expert's opinion as to the cause of a motor vehicle accident that contradicted the plaintiff's testimony. Id. at 57-58. Likewise, here, the expert's conclusions that the form's weight caused plaintiff's injury directly contradict plaintiff's testimony that the loose gravel was the cause. Notably, the experts did not assert that AJM negligently milled the road.

Plaintiff also did not explain the "patent[] and sharp[]" contradiction between his own statement in deposition, and those statements in the worker's compensation report, which he did not sign, and the interrogatory responses, which were prepared by counsel. See Shelcusky v. Garjulio, 172 N.J. 185, 201-02 (2002) (holding that, in appropriate circumstances, the "sham affidavit

doctrine" can be used to prevent a party opposing a summary judgment motion from creating material issues of fact by presenting the party's own contradicting statements). There is no reason to believe plaintiff was confused. See id. at 201. He was asked repeatedly what caused him to fall, and he stated clearly it was the road surface, not the form. Thus, the inconsistency of plaintiff's earlier written submissions with his deposition testimony is insufficient to create a genuine issue of fact.

In sum, plaintiff failed to establish a causal link between AJM's conduct and management of the site, and the injury he sustained. For these reasons, we conclude the judge properly granted summary judgment to AJM.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION