SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0664-16T2

LAWRENCE G. BOTTS, III, and
REBECCA BOTTS,

Plaintiffs-Appellants,

v.

LAFAYETTE CAMPBELL, LLC, a/k/a
LAFAYETTE TECHNOLOGY, LLC, and
DONALD MCNEIL,

Defendants,

and

239 DUNELLEN AVENUE, LLC,
and SHEENAN FUNERAL HOME,

Defendants-Respondents.

Argued February 13, 2018 – Decided May 9, 2018

Before Judges Fisher and Moynihan.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-4112-14.

Stewart M. Leviss argued the cause for appellants (Berkowitz, Lichtstein, Kuritsky, Giasullo & Gross, LLC, attorneys; Stewart M. Leviss, on the brief).

William J. Martin argued the cause for respondent Sheenan Funeral Home (Martin, Gunn & Martin, PA, attorneys; Elizabeth K. Merrill and William J. Martin, on the brief).

Patrick A. Robinson argued the cause for respondent 239 Dunellen Avenue, LLC (Robinson Burns, LLC, attorneys; Patrick A. Robinson, of counsel and on the brief; Colin R. Gibson, on the brief).

PER CURIAM

Plaintiff Lawrence G. Botts — injured when a casket lift in which he was riding dropped after its cable snapped — appeals orders granting summary judgment to his employer, Sheenan Funeral Home (Sheenan Funeral), which installed and utilized the lift, and to the building owner, 239 Dunellen Avenue, LLC (239), which leased, albeit without a written agreement, the premises to Sheenan Funeral.

I

The motion judge granted 239's motion for summary judgment, concluding, under McBride v. Port Authority of New York and New Jersey, 295 N.J. Super. 521, 525 (App. Div. 1996), absent a contractual obligation not present here, the landlord owed no duty to repair or maintain; and plaintiff failed to show 239 exercised exclusive control over the premises, and the dangerous condition was obvious.

When reviewing an order granting summary judgment, we apply "the same standard governing the trial court." Oyola v. Liu, 431 N.J. Super. 493, 497 (App. Div. 2013); see Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 539-40 (1995). We owe no deference to the motion judge's conclusions on issues of law. Manalapan Realty, LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). Applying these standards, we find no error was committed by the motion judge.

Plaintiff argues, quoting McBride, 295 N.J. Super. at 522 (alteration in original), that our decision there was misconstrued by the motion judge because — unlike here where no written lease existed — "[t]he 'dispositive issue posed by th[e] appeal' in McBride was whether a commercial landowner who leased its entire property could be held liable for injuries caused by a dangerous condition on its property 'when the lease unquestionably places responsibility for such maintenance or repair solely upon the tenant.'"

The lease terms in McBride, however, provided the basis for the "plaintiffs' thesis that a commercial landlord should be held responsible to a tenant's employee injured on the leased premises because it reserved the right to enter the leased premises to perform repairs," which McBride held is "inconsistent with the law of this State." Id. at 525. Plaintiff here ignores that portion

of our opinion recognizing our Supreme Court's adoption of the common law principle in Coleman v. Steinberg: "In the absence of an agreement to make repairs, the landlord is under no obligation to do so. That burden falls upon the tenant." Ibid. (quoting Coleman v. Steinberg, 54 N.J. 58, 63 (1969)). Contrary to plaintiff's position, we concluded:

> While some states have imposed a general tort duty of reasonable care upon landlords which may not be avoided by lease provisions, Prosser and Keeton on Torts, § 63 (5th ed., 1984), our Supreme Court has not yet accepted that concept, and plaintiff has not contended in the court below or in this court that it should be incorporated into our common law. Furthermore, in Milacci v. Mato Realty Co., 217 N.J. Super. 297, 301 (App. Div. 1987), we expressly rejected the opportunity to so hold.[1]
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> [McBride, 295 N.J. Super. at 526.]

The absence of a lease between 239 and Sheenan Funeral does not impose an obligation on 239 as landlord of the premises it, in no way, controlled. In Hopkins v. Fox & Lazo Realtors, 132

[1] In Milacci, even though a copy of the lease was not contained in the record, it was determined without dispute that the tenant State of New Jersey had exclusive control of the premises on which the plaintiff fell on accumulated sand and dirt, and for which the State contracted for custodial services. 217 N.J. Super. at 301. We rejected the plaintiff's contention that the landlord "had a non-delegable duty to see that the premises were in a safe condition" for use by the plaintiff because the landlord had not retained control over the area where the plaintiff was injured and the condition was "obvious" and "transient." Ibid.

N.J. 426, 439 (1993) (alteration in original) (citations omitted), our Supreme Court instructed that our determination of whether to impose

> a duty of care and the formulation of standards defining such a duty derive from considerations of public policy and fairness. "This Court has carefully refrained from treating questions of duty in a conclusory fashion, recognizing that '[w]hether a duty exists is ultimately a question of fairness.'" Weinberg v. Dinger, 106 N.J. 469, 485 (1987) (emphasis omitted) (quoting Goldberg v. Hous. Auth., 38 N.J. 578, 583 (1962)).
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> Whether a person owes a duty of reasonable care toward another turns on whether the imposition of such a duty satisfies an abiding sense of basic fairness under all of the circumstances in light of considerations of public policy. That inquiry involves 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. The analysis is both very fact-specific and principled; it must lead to solutions that properly and fairly resolve the specific case and generate intelligible and sensible rules to govern future conduct.

The specific facts of this case, under the Hopkins lens, place all duties regarding the premises, including the casket lift, on Sheenan Funeral. Rosemary Sheenan, the sole member of 239 since its formation in 2007, played no role in the use, improvement or maintenance of the property since it was deeded to 239 for estate planning purposes in 2008. Her husband, Thomas

Sheenan, ran the funeral business, had the casket lift installed decades prior to 239's ownership, and contracted for the lift's maintenance. Sheenan Funeral was, and had been for decades, in exclusive possession of the premises.[2] It paid all taxes, insurance premiums, and utilities, and alone maintained the buildings and grounds. Although no written lease placed the duty to maintain and repair on Sheenan Funeral, the parties' conduct certainly did. Thiokol Chem. Corp. v. Morris Cty. Bd. of Taxation, 41 N.J. 405, 417 (1964). At no time did 239 have any involvement in operations on the premises, including the lift. Notably, the lift was used not by the general public, but exclusively by Sheenan Funeral's employees. Considering the conduct of the parties, we discern none of the Hopkins factors compel imposition of a duty on 239 to plaintiff. The judge correctly granted 239 summary judgment.

[2] Plaintiff notes Sheenan Funeral was not the exclusive tenant because a dentist — also a Sheenan family member — occupied a separate but connected building. Inasmuch as this constitutes an exclusive-possession argument, it was not raised before the motion judge and we will not consider it here. Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973). The argument also lacks sufficient merit to warrant discussion, R. 2:11-3(e)(1)(E), because there is no proof the dentist had any control over the funeral operation, including the lift.

II

The motion judge also granted Sheenan Funeral's motion for summary judgment finding it did not commit an intentional wrong, and the claim was precluded by the election surrender of other remedies provision of the Worker's Compensation Act (Act), N.J.S.A. 34:15-8.

Viewing the facts in the light most favorable to plaintiff, we review the judge's legal determination de novo, owing no special deference to his legal conclusion. Zabilowicz v. Kelsey, 200 N.J. 507, 512-13 (2009).

Plaintiff argues the judge erred in granting summary judgment "because disputed issues exist as to material facts concerning both the 'conduct' and 'context' prongs outlined in Laidlow [v. Hariton Machine Co., 170 N.J. 602 (2002)]," and that the evidence viewed in the light most favorable to plaintiff shows Sheenan Funeral "'intentionally' exposed its employees" to the hazard that injured plaintiff.

We disagree and affirm the summary judgment order in favor of Sheenan Funeral substantially for the reasons set forth by the motion judge in his written amplified decision. R. 2:5-1(b). The judge correctly considered the "formidable standard" for circumventing the Act's exclusive remedy for workplace injuries when injuries result from an employer's "intentional wrong" which,

our Supreme Court has held, must be demonstrated by "a substantial certainty that injury or death will result." Van Dunk v. Reckson Assocs. Realty Corp., 210 N.J. 449, 451 (2012). The Van Dunk Court reaffirmed that to establish "substantial certainty . . . it is not enough that 'a known risk later blossoms into reality.' Rather, the standard 'demand[s] a virtual certainty.'" Id. at 461 (quoting Millison v. E.I. Du Pont de Nemours & Co., 101 N.J. 161 (1985)).

The motion judge also considered the Millison Court's mandate that

> when assessing claims of intentional wrong, [courts must] engage in a two-step analysis. First, a court considers the "conduct prong," examining the employer's conduct in the setting of the particular case. Second, a court analyzes the "context prong," considering whether "the resulting injury or disease, and the circumstances in which it is inflicted on the worker, [may] fairly be viewed as a fact of life of industrial employment," or whether it is "plainly beyond anything the legislature could have contemplated as entitling the employee to recover only under the Compensation Act."
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> [Van Dunk, 210 N.J. at 461 (second alteration in original) (quoting Millison, 101 N.J. at 178-79).]

To that end, he regarded the predicates the Van Dunk Court determined were pertinent in deciding whether an employer committed an intentional wrong: an "employer's affirmative action

to remove a safety device from a machine, prior OSHA[3] citations, deliberate deceit regarding the condition of the workplace, machine, or . . . the employee's medical condition, knowledge of prior injury or accidents, and previous complaints from employees." Id. at 471. The judge assessed plaintiff-favorable facts of intentional wrongdoing: the single riderless lift's prior cable snap in the 1990s; Sheenan's affirmation of employees' personal use of the lift; Donald McNeill's opinion[4] indicating a violation of OSHA standard 1910.179.[5]

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[3] United States Department of Labor Occupational Safety and Health Administration.

[4] The motion judge referred to Donald McNeill as plaintiff's expert. He was a named defendant and the owner of defendant Lafayette Technologies, LLC, an elevator maintenance company that inspected and maintained the casket lift.

[5] The only reference in the record to "OSHA standard 1910.179" is McNeill's answer to an interrogatory in which he references that regulation, "including but not limited to Standards 1910.179(b)(2) and 1910.179(n)(3)(v)," in contending Sheenan Funeral and 239 "were negligent in operating and maintaining the hoist, and specifically in not ensuring that no one used the hoist as an elevator." Plaintiff's expert's report does not mention that regulation. Title 29 of the Code of Federal Regulations, section 1910.179, pertains to overhead and gantry cranes; crane is defined as "a machine for lifting and lowering a load and moving it horizontally, with the hoisting mechanism an integral part of the machine." 29 C.F.R. § 1910.179(a)(1) (2016). We see no evidence in the record that the mechanism here in question was able to move a load horizontally. All documents in the record from OSHA refer to the mechanism as an elevator and do not mention section 1910.179. No matter the source, we determine that the use of the lift by persons — employees — was the standard here violated.

To that evidence we add that signs in the lift warned against its use by living passengers and that the operator switch in the lift could be reached from outside. All favorably-viewed facts, however, do not, meet the substantial certainty test to overcome the Worker's Compensation bar, especially considering there is no evidence that: Sheenan Funeral removed or altered any safety guards or engaged in deliberate deceit regarding the lift's condition; passengers using the lift were previously injured; OSHA previously issued violations; or any employee complained about the lift. We agree with the motion judge that plaintiff's evidence does not overcome the "formidable" barrier of the Act's preclusive provisions.

Affirmed.