

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION**

Larry English,)	
)	
Plaintiff,)	
)	
v.)	No. 19 L 8269
)	
Dimeo Brothers, Inc., an Illinois)	
corporation, and Juan J. Mata, individually,)	
)	
Defendants.)	

MEMORANDUM OPINION AND ORDER

Summary judgment is improper if divergent inferences may be drawn from undisputed material facts or if there exist disputed material facts. Here, it is uncontested that one defendant backed a construction excavator into the plaintiff's car, but there is uncontested testimony that the defendant checked the rearview mirrors before backing, and conflicting testimony as to whether traffic control devices had been placed on the street. Given that record, the plaintiff's summary judgment motion must be denied.

Facts

On August 22, 2018, Larry English was driving north on Marmora Avenue in Morton Grove. At the same time, Dimeo Brothers, Inc. was conducting sewer line construction on Marmora Avenue approximately 100 feet south of the Lincoln Avenue intersection. Juan Mata was driving an excavator at the construction site as a Dimeo Brothers employee when he steered the excavator in reverse and struck English's car, which then hit a second car driven by Daniel Vander Jeugd. English was injured as a result.

On July 26, 2019, English filed two negligence causes of action against Dimeo Brothers and Mata. Both counts allege that Dimeo Brothers and Mata owed English a duty of care for his safety. English claims both defendants breached their duties by: (1) operating the excavator without keeping a proper lookout; (2) backing the excavator when doing so could not be done safely; (3) driving too fast; (4) failing to reduce speed; (5) failing to use the horn; and (6) failing to exercise due care.

The case proceeded through written and oral fact discovery. The parties deposed Vander Jeugdt and Mata. (If the parties deposed English, they chose not to include his deposition in the record.) Vander Jeugdt testified that he did not remember seeing traffic control devices along Marmora Avenue. He also testified the excavator had rearview mirrors. Vander Jeugdt said that approximately five seconds passed between the time Mata moved the excavator and the three vehicles came to rest.

Mata testified that he put the excavator in reverse, looked in the rearview mirrors, and then started to back up. He did not see English's car because the excavator operated much higher than a car, and English's car was too close to the excavator. Mata further testified there were numerous construction signs and barricades in the area. "Road construction ahead" signs were located at almost every intersection along Marmora Avenue, and barricades or plastic horses with flashing lights had been placed everywhere in the road.

On February 1, 2021, English filed a summary judgment motion as to the defendants' negligence. English argues that Mata had a statutory duty under the Motor Vehicle Code, 625 ILCS 5/11-1402, to know if there was traffic behind him before backing the excavator and breached his duty by failing to take measures to protect against a collision. The defendants respond by pointing to Vander Jeugdt's and Mata's conflicting deposition testimony creating questions of material fact.

Analysis

English has filed a summary judgment motion as to the defendants' alleged negligence. The Code of Civil Procedure authorizes the issuance of summary judgment "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005. The purpose of summary judgment is not to try a question of fact, but to determine whether one exists that would preclude the entry of judgment as a matter of law. See *Land v. Board of Educ. of the City of Chicago*, 202 Ill. 2d 414, 421, 432 (2002).

To survive a motion for summary judgment, the non-moving party must present evidence establishing that genuine issues of material fact exist or that the moving party is not entitled to judgment as a matter of law. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335-36 (2002). A plaintiff as the moving party must establish the validity of its factual position on all of the contested elements of the cause of action. *Performance Food Grp. Co., LLC v. ARBA Care Ctr. of Bloomington, LLC*, 2017 IL App (3d) 160348, ¶ 18 (citing *Triple R Dev., LLC v. Golfview Apartments I, L.P.*, 2012 IL App (4th) 100956, ¶ 16, and 4 Richard A. Michael, *Illinois Practice* §§ 38.5, 40.3 (2d ed. 2011)). If the plaintiff satisfies its burden of production, the non-moving party must present evidence establishing issues of material fact. See *id.* To determine whether a genuine issue as to any material fact exists, a court is to construe the pleadings, depositions, admissions, and affidavits strictly against the moving party and liberally in favor of the opponent. See *Adams v. Northern Ill. Gas Co.*, 211 Ill. 2d 32, 43 (2004).

English argues first that the record establishes Mata's failure to exercise reasonable care when he backed the excavator into English's car. From there, he argues that Mata's lack of reasonable care constitutes a statutory violation of the Vehicle Code. 625 ILCS 5/11-1402. Since the Vehicle Code is designed to

protect human life and property, Mata's conduct presents a case of *prima facie* negligence.

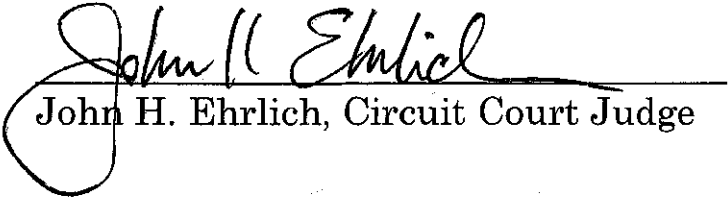
English's argument does not lead to the legal conclusion he desires. Even if English has stated the facts correctly, a statutory violation may constitute *prima facie* negligence, but it does not establish negligence *per se*. In other words, the claimed negligence may be rebutted by proof that the party acted reasonably under the circumstances despite the violation. *Davis v. Marathon Oil Co.*, 64 Ill. 2d 380, 390 (1976). Here, it is uncontested that Mata testified he checked the excavator's rearview mirrors before backing the vehicle. That would suggest he acted reasonably. Further, Mata testified that Marmora Avenue was filled with barricades, flashing lights, and signs warning drivers of the street construction. Vader Jeugdt testified that he did not remember traffic control devices in the street. The record is unclear whether he meant he did not recall seeing any devices or there were none. Thus, Vander Jeugdt's testimony, at least, creates a question of material fact. In short, the record presents facts that certainly could lead a jury to conclude that Mata's negligence was less than fifty percent.

English's second argument is that the defendants violated the Road Construction Injuries Act by failing to provide proper warning signs, signals, or barricades. 430 ILCS 105/4. This argument is erroneous as a procedural matter. English never pleaded in his complaint a cause of action based on this statute. A complaint, of course, "fixes the issues in controversy and the theories upon which recovery is sought." *Pagano v. Occidental Chem. Corp.*, 257 Ill. App. 3d 905, 911 (1st Dist. 1994). An argument based on a missing cause of action in the complaint is forfeited. *Stimeling v. Peoria Pub. Sch. Dist. 150*, 2018 IL App (3d) 170567, ¶ 38.

Conclusion

For the reasons presented above, it is ordered that

The plaintiff's summary judgment motion is denied.


John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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