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

Daniel Godines,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Skender Construction, LLC,	)	
	)	
Defendant.	)	No. 18 L 10662
Skender Construction, LLC,	)	
	)	
Third-Party Plaintiff,	)	
	)	
v.	)	
	)	
Flooring Resources Corporation,	)	
	)	
Third-Party Defendant.	)	

MEMORANDUM OPINION AND ORDER

Summary judgment is improper if the factual record reveals questions of material fact. The record presented raises questions of material fact as to whether the defendant owed the plaintiff a duty and breached that duty. On the other hand, count three of the complaint is improperly pleaded as a matter of law and must be dismissed. For these reasons, the defendant's summary judgment motion is granted in part and denied in part.

Facts

On August 8, 2017, Skender Construction, LLC and Flooring Resources Corporation entered into a subcontract agreement for the installation of carpeting on three floors of 350 North Orleans Street in Chicago. The agreement's general items required FRC,

as the subcontractor, to: conduct weekly safety meetings with its personnel; provide safety compliance with OSHA regulations; and coordinate the delivery, receipt, protection, and staging of material furnished by others but installed by FRC. The agreement's terms and conditions included the following provisions:

> 4. Coordination
> [FRC] acknowledges and agrees to attend weekly coordination meetings as required by SKENDER. . . .
> [FRC] shall have the sole responsibility of determining the placement of its work in relation to other work or established benchmarks. . . .
> [FRC] shall examine the areas and condition under which the Work will be performed. [FRC] shall notify SKENDER, in writing, of any condition that will be detrimental to the timely and proper completion of the Work. Do not proceed with the Work until the unsatisfactory condition is corrected, or until directed to proceed in writing by SKENDER.
> 6. Safety
> [FRC] agrees that it shall solely be responsible for prevention of accidents or unsafe acts of its employees. [FRC] further agrees to conduct employee health and safety orientation prior to beginning Work on the project as required. . . . Failure of SKENDER to stop unsafe practices shall not relieve [FRC] of its responsibility for safety.
> [FRC]'s safety designee shall; (1) Ensure compliance with safety rules and regulations and correction or abatement of all hazardous conditions. . . , (3) Conduct or cause to have conducted daily inspections, and document and correct all observed or potentially hazardous conditions and noncompliance with all safety rules and regulations . . . . [FRC]'s safety designee shall stop hazardous work and notify SKENDER of all hazardous conditions and noncompliance with the safety rules not within the control of [FRC]'s safety designee.

> SKENDER may erect or cause to be furnished at the site various machinery or equipment (including, but not limited to scaffolding, ladders, hoists, rigging, supports, ramps, platforms, passageways, etc.), which may from time to time upon request by [FRC] be made available for use by [FRC] at SKENDER's sole discretion. It is understood that whenever any such use is made by [FRC], SKENDER does not guarantee or make any representation concerning the safety or suitability of any such machinery or equipment, and [FRC] agrees that use thereof shall be on an "as is" basis. Whenever such machinery or equipment has been made available for use by [FRC] or its officers, employees, agents, sub-subcontractors or suppliers, it is agreed that SKENDER will not have charge of or supervision over such machinery or equipment or of the use thereof by any such persons or parties.

On November 10, 2017, Daniel Godines was working for FRC installing carpeting on the fourth floor of 350 North Orleans Street. At some point, Godines pulled an A-framed cart loaded with Masonite boards. Skender owned both the cart and the Masonite boards. As Godines pulled the cart, it tilted and fell on him. The impact broke two bones in Godines's right leg.

On October 2, 2018, Godines filed a three-count complaint against Skender. Count one is pleaded in negligence and alleges that Skender owed Godines a duty to exercise reasonable care for his safety. Godines claims, among other things, that Skender failed to provide a safe place for Godines to work, failed to provide proper equipment, allowed its cart to block Godines's work space, failed to supervise, warn, and inspect, failed to have job site rules, and failed to coordinate the work of subcontractors. Count two is pleaded as a premises liability cause of action. Godines alleges that Skender had a duty to take ordinary care for the safety of those lawfully on the premises. Godines claims that Skender, breached its duty by, among other things, failing to inspect despite knowing that inspections were necessary, failing to warn despite

knowing that warnings were necessary, improperly managing, maintaining, and controlling the premises, allowing unsafe and unstable equipment to remain on the premises, failing to secure a dangerous cart, failing to provide a safe path in which Godines could access his work, and creating a dangerous condition with an unevenly loaded cart. Count three is pleaded as a violation of Restatement (Second) of Torts section 414 and essentially restates the allegations and claims of count one.

The case proceeded through discovery. In his deposition, Godines testified that on the morning of his injury he had carried boxes of carpet tile from a pallet to the area where he and his foreman, Erol Uysaloglu, were installing the carpet tile. Godines decided that rather than carry each box 20-30 feet, he would use a pallet jack to move the pallet of carpet tiles closer to the installation area. According to Godines, there was an A-framed cart containing 70 to 75 sheets of 4'x8', quarter-inch Masonite boards located about 10 feet from the pallet. The cart blocked the only path Godines could use for the pallet jack. He knew the cart and Masonite belonged to Skender, and estimated their combined weight at more than 1,000 pounds. Godines decided to move the cart out of the way on his own. Godines pulled the cart about four to six feet before it tilted on top of him.

The record indicates that Skender never received notice of Godines's decision to move the Masonite-loaded cart and no one from FRC told Godines he could move another contractor's materials. Two Skender employees consistently testified it is common for contractors move other contractor's materials on job sites. FRC's field superintendent, Blaise Maugeri, testified the A-framed cart and Masonite was an unsafe or dangerous condition. Four deponents testified the cart was overloaded with Masonite. Maugeri further stated that full sheets of Masonite should be placed flat on pallets, not on a cart. Finally, had the cart not been loaded and blocked access, Godines would not have had to move it.

Analysis

FRC has filed a summary judgment motion. 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 Ed. of the City of Chicago*, 202 Ill. 2d 414, 421, 432 (2002).

A defendant moving for summary judgment may disprove a plaintiff's case in one of two ways. First, the defendant may introduce affirmative evidence that, if uncontroverted, would entitle the defendant to judgment as a matter of law; this is the so-called "traditional test." *See Purtill v. Hess*, 111 Ill. 2d 229, 240-41 (1986). Second, the defendant may establish that the plaintiff lacks sufficient evidence to establish an element essential to a cause of action; this is the so-called "*Celotex* test." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), *followed Argueta v. Krivickas*, 2011 IL App (1st) 102166, ¶ 6.

Regardless of the approach, if the defendant presents facts that, if not contradicted, are sufficient to support summary judgment as a matter of law, the nonmoving party cannot rest on the complaint and other pleadings to create a genuine issue of material fact. *See Harrison v. Hardin Cnty. Cmty. Unit Sch. Dist. No. 1*, 197 Ill. 2d 466, 470 (2001). Rather, a plaintiff creates a genuine issue of material fact only by presenting enough evidence to support each essential element of a cause of action that would arguably entitle the plaintiff to judgment. *Prostran v. City of Chicago*, 349 Ill. App. 3d 81, 85 (1st Dist. 2004). 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. N. Ill. Gas Co.*, 211 Ill. 2d 32, 43 (2004).

The inferences drawn in favor of the nonmovant must, however, be supported by the evidence. *Destiny Health, Inc. v. Connecticut Gen'l Life Ins. Co.*, 2015 IL App (1st) 142530, ¶ 20. A triable issue precluding summary judgment exists if the material facts are disputed, or if the material facts are undisputed but a reasonable person might draw different inferences from the undisputed facts. *Id.* On the other hand, if no genuine issue of material fact exists, a court has no discretion and must grant summary judgment as a matter of law. *See First State Ins. Co. v. Montgomery Ward & Co.*, 267 Ill. App. 3d 851, 854-55 (1st Dist. 1994).

Skender's first argument is that it owed no duty to Godines. Duty is a question of law to be decided by the court. *See Burns v. City of Centralia*, 2014 IL 116998, ¶ 13. To determine if a duty exists, a court is to analyze whether a relationship existed between the plaintiff and the defendant for which the law would impose a duty on the defendant for the plaintiff's benefit. *See Doe-3 v. McLean Cty. Unit Dist. No. 5 Bd. of Directors*, 2012 IL 112479, ¶ 22, *quoting Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 436 (2006). The "relationship" is "a shorthand description for the analysis of four factors: (1) the reasonable foreseeability of the injury, (2) the likelihood of the injury, (3) the magnitude of the burden of guarding against the injury, and (4) the consequences of placing the burden on the defendant." *Id., citing Simpkins v. CSX Transp., Inc.*, 2012 IL 110662, ¶ 18. A court's analysis of the duty element focuses on the policy considerations inherent in these four factors and the weight accorded to each based on the case's particular circumstances. *Id.*

The Illinois Supreme Court has repeatedly and consistently pointed out "it is 'axiomatic that every person owes to all others a duty to exercise ordinary care to guard against injury which naturally flows as a reasonably probable and foreseeable consequence of his act.'" *Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274, 291-92 (2007) (quoting and citing cases). As the court explained elsewhere,

> 'every person owes a duty of ordinary care to all others to guard against injuries which naturally flow as a reasonably probable and foreseeable consequence of an act, and such a duty does not depend upon contract, privity of interest or the proximity of relationship, but extends to remote and unknown persons.' Thus, if a course of action creates a foreseeable risk of injury, the individual engaged in that course of action has a duty to protect others from such injury. This does not establish a 'duty to the world at large,' but rather this duty is limited by the considerations [the four factors] discussed above. An independent 'direct relationship' between parties may help to establish the foreseeability of the injury to that plaintiff . . . but is not an additional requirement to establishing a duty in this context.

Simpkins, 2012 IL 110662, ¶ 19 (citations omitted).

Skender argues it was not reasonably foreseeable Godines would breach FRC's and Skender's contractual prohibition on handling Skender's materials and equipment without prior approval. As a legal matter, Skender seeks to use Godines and FRC's alleged contract breach as a defense to his personal injury claims. To be plain, this is a personal injury case, not a business tort or breach of contract case. Unlike plaintiffs in business tort cases, Godines is not seeking lost profits or other commercial damages, but damages for his bodily injuries. Even if this court were to assume Godines and FRC breached the contract, such a commercial injury does not eliminate the possible existence of a duty of care in a personal injury cause of action.

Skender's argument is also factually undermined even if this court assumes Godines had been properly trained and knew the contract prohibited him from moving Skender's Masonite-loaded cart. Two of Skender's own employees testified that contractors move other contractor's materials on job sites. That testimony, alone, creates a question of material fact as to whether the parties

honored the subcontract in the breach such that Godines's moving the Masonite-loaded cart was reasonably foreseeable.

Equally problematic is Skender's failure to address the remaining duty elements, each of which raise additional questions of material fact. For example, there is testimony the Masonite-loaded cart constituted a dangerous condition, evidence supporting the inference that Godines's injury was likely. The third and fourth duty elements do not favor Skender because it is questionable whether Skender faced any additional undue burden by not creating a dangerous condition Godines might encounter. Indeed, to accept Skender's argument would undermine the overriding duty owed by all persons to guard against injuries arising from foreseeable consequences. *See Forsythe*, 224 Ill. 2d at 291-92. In sum, Godines's decision to move the cart without contacting Skender merely goes to his comparative negligence, a determination within the province of a jury. *See Illinois C. R. Co. v. Haskins*, 115 Ill. 300, 304 (1885).

Skender next argues that summary judgment is appropriate for count two because the Masonite-loaded cart was not a condition on the land necessary to plead a cause of action for premises liability. In Illinois, the scope of premises liability is determined by the application of the Restatement (Second) of Torts section 343, which the Illinois Supreme Court adopted into common law. *Genaust v. Illinois Power Co.*, 62 Ill. 2d 456, 468 (1976); *see* Restatement (Second) of Torts § 343 (1965). Section 343 states:

> 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 § 343.

Under section 343, "a possessor of land, including a general contractor, owes its invitees a common law duty of reasonable care to maintain its premises in a reasonably safe condition. . . ." *Clifford v. Wharton Bus. Grp., L.L.C.*, 353 Ill. App. 3d 34, 42 (1st Dist. 2004) (citation omitted). A general contractor's actual or constructive knowledge of a dangerous condition is a precondition to direct liability. *Diaz v. Legat Architects, Inc.*, 397 Ill. App. 3d 13, 35 (1st Dist. 2009). Yet no legal duty arises "unless the harm is reasonably foreseeable." *Clifford*, 353 Ill. App. 3d at 42 (citation omitted).

Skender cites to various cases supporting its argument that the Masonite-loaded cart was not a condition of the land and, therefore, cannot support a premises liability claim. Each of those cases is distinguishable, as Godines points out in his response brief. Further, other cases have found that items left on property may constitute a condition of the land triggering a duty under section 343. *See, e.g., Kosinski v. Inland Steel Co.*, 192 Ill. App. 3d 1017, 1024 (1st Dist. 1989) (graphite left on roof was reasonably foreseeable slipping hazard); *Geraghty v. Burr Oak Lanes, Inc.*, 5 Ill. 2d 153, 161-62 (1955) (railroad tie hidden in tall grass was unsafe tripping hazard); *Waters v. City of Chicago*, 2012 IL App (1st) 100759, ¶ 18 (negligently placed barricades created foreseeable tripping hazard).

The requisites for a premises liability cause of action are present here. First, Skender plainly knew of the Masonite-loaded cart because it owned both the cart and the Masonite, and it is uncontested Skender's workers left the cart where Godines found it. Second, it is arguable whether Skender should have expected Godines would not protect himself against the cart's dangers given the general knowledge that contractors move other contractors' goods and materials at work sites. Third, it is also arguable that

Skender failed to exercise reasonable care to protect Godines by leaving a dangerous condition in the area where FRC was installing carpeting.

As to count three, Skender argues it not retain control over the means and methods of FRC's work performance, a requirement for establishing a cause of action under Restatement section 414. Restatement (Second) of Torts § 414. There is, however, a more fundamental problem with count three—there is no such thing as a cause of action based Restatement section 414. The Restatement merely identifies requirements necessary to plead a duty and a breach of that duty; since the Restatement cannot possibly address issues of proximate causation and damages specific to a case, the Restatement, itself, does not create a cause of action. And although the Supreme Court adopted section 414 into the common law, *Larson v. Commonwealth Edison Co.*, 33 Ill.2d 316 (1965), the recognized cause of action for a breach of the standards outlined in section 414 is "negligence," not "section 414." As noted, "[t]o properly state a *negligence claim* under section 414 of the Restatement, a plaintiff must allege that the defendant owed him a duty, breached that duty, and that the breach of the duty was the proximate cause of his injury." *Calderon v. Residential Homes of Am., Inc.*, 381 Ill. App. 3d 333, 340 (1st Dist. 2008) (emphasis added) (citing *Martens v. MCL Constr. Corp.* 347 Ill. App. 303, 315 (1st Dist. 2004)). In short, Count three of Godines's complaint does not state an independent cause of action; rather, his claims are merely other forms of negligence that can and should be part of his negligence claim in count one.

Conclusion

For the reasons presented above, it is ordered that:

1. Skender's summary judgment motion as to counts one and two is denied;

2. On the court's own motion, court three is dismissed with prejudice, but with leave to replead and incorporate its claims into count one; and
3. Godines is given until May 10, 2021 to file an amended complaint.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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Circuit Court 2075