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

John Orzel,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 19 L 1388
	)	
Windy City Music, Inc., Windy City Music, Inc., d/b/a Windy City Music Sound & Lighting, and American Mobile Staging, Inc.,	)	
	)	
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 did not own, supply, or erect the stage on which the plaintiff sustained his injuries. In contrast, there also exists conflicting testimony as to whether a section of stage's railing was loose and why it gave way. Given that record, one summary judgment motion must be granted, but the other denied.

Facts

American Mobile Staging, Inc. (AMS) entered into a contract with the University of Illinois at Chicago (UIC) to provide a stage for the Maxwell Street Blues Fest to be held on September 8, 2018. AMS informed UIC that AMS did not have the type of stage required. AMS then hired Windy City Music, Inc. (Windy City) pursuant to an oral contract to supply, erect, and dismantle the stage. UIC separately entered into a contact with John Orzel, owner of Creative Soundz, who provided the sound, lighting, and production equipment for the festival.

Randall Flaws co-owns Windy City. On September 8, 2018, Randall and his son, Scott, set up the festival stage. As part of the stage set up, Scott inserted each railing into its fitting while Randall tightened each railing from below to secure the railing in place. After assembling the stage, Randall twice inspected the railings to ensure they were set up properly and secure. Since Windy City was not hired to maintain a presence to monitor the stage, Randall and Scott returned to their office.

John Orzel arrived at the festival stage at approximately 9:00 a.m. and finished his set up around noon. Performances began at 1:00 p.m. Around 3:30 p.m., at the end of one of the performances, Orzel was at the rear of the stage and attempted to reach a cable. Matthew Skoller, a festival performer, witnessed the occurrence. Skoller saw Orzel climb onto an equipment case placed on the ground behind the stage. The case was approximately four-feet high and reached the level of the stage. Skoller testified that Orzel put his knees on top of the case and then grabbed the railing to pull himself up. Part of the railing came off and fell to the ground as Orzel fell backwards off the equipment case and hit his head on the cement. After Orzel's injury, Skoller inspected other sections of the railing and found other loose sections. Skoller asked for the railings to be inspected or tightened.

It is uncontested that AMS did not own, supply, or erect the stage and no one from AMS went to the festival, either before or during the stage set up, during or after Orzel's injury, or when the Flaws dismantled the stage. AMS did not inspect the stage at any point. The AMS-UIC contract did not require AMS to provide on-site labor or safety supervision and did not prohibit AMS from subcontracting work. The agreement also did not identify Orzel by name or identify a group or class to which Orzel belongs.

On February 7, 2019, Orzel filed a two-count complaint against the defendants. Count one presents a negligence cause of action against Windy City. Orzel alleges that Windy City assembled, installed, and erected the stage and owed persons

working on the stage, including Orzel, a duty of care and safety. Orzel claims Windy City breached its duty by failing to: (1) assemble, install, erect and secure the stage properly; (2) secure, attach, and fasten the railing to the stage; (3) warn persons on the stage that the railing was not secure; and (4) prevent persons from working on the stage in close proximity to the railing. Count two is also a negligence cause of action, but against AMS. Orzel repeats the same allegations as in count one, but claims that AMS breached its duty of care by failing to: (1) assemble, install, erect and secure the stage properly; (2) secure, attach, and fasten the railing to the stage; (3) warn persons on the stage that the railing was not secure; and (4) prevent persons from working on the stage in close proximity to the railing; (5) manage, supervise, and oversee the stage's erection, including the railings; (6) inspect the installation and erection of the stage; (7) warn of the dangerous condition; and (8) provide a safe worksite.

On March 31, 2021, AMS and Windy City each filed a summary judgment motion. For its part, AMS argues that it is not liable to Orzel because AMS did not own, supply, or erect the stage on which he was injured. AMS also argues it cannot be vicariously liable because Windy City was an independent contractor over which AMS did not retain any control. AMS argues further that it had no constructive notice of the alleged railing defects and AMS owed no duty to Orzel because he was not a third-party to the UIC-AMS contract. Windy City argues on its behalf that there is no evidence that Windy City breached its duty of care. Windy City also argues that Orzel has failed to establish the proximate cause of his injuries.

Orzel responded to both motions and supplied extensive exhibits in support of his positions. AMS and Windy City each submitted a reply brief.

<u>Analysis</u>

AMS and Windy City each 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 Educ. 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, a 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, a 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. A court should grant summary judgment on a *Celotex*-style motion only when the record indicates the plaintiff had extensive opportunities to establish his or her case but failed in any way to demonstrate he or she could do so. *Colburn v. Mario Tricoci Hair Salons & Day Spas, Inc.*, 2012 IL App (2d) 110624, ¶ 33.

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. Northern Ill. Gas Co.*, 211 Ill. 2d 32, 43 (2004).

AMS Motion

AMS presents four arguments in support of summary judgment, only two of which need to be addressed. The first argument—that AMS did not own, provide, or erect the stage—is a no-duty argument based on the consistent testimony of AMS co-owners Nicholas Serino and David Girardi. Orzel's only response is that AMS hired Windy City for the 2017 Maxwell Street Blues Fest at which an AMS representative was on site to ensure Windy City properly installed the stage.

Orzel's response is off point because it does not address the simple fact that AMS did not own, provide, or erect the stage. Orzel's response also misses the mark because it suggests past conduct establishes a duty, that is, since AMS had been present in 2017 it should have been present in 2018. Orzel cites no case law in support of this proposition. Further, it is fundamental that a plaintiff "must plead and prove the existence of a duty owed by the defendant to the plaintiff. . . ." *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 12. "In the absence of a showing from which the court could infer the existence of a duty, no recovery by the plaintiff is possible as a matter of law and summary judgment in favor of the defendant is proper." *Vesey v. Chicago Housing Authority*, 145 Ill. 2d 404, 411 (1991). There are not facts in this record on which, as to the 2018 event, this court may presume a duty owed by AMS to Orzel.

AMS next argues that it did not breach any duty to Orzel because AMS did not retain control over Windy City's work. This argument is based on the Restatement (Second) of Torts. As provided:

> One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others whose safety the

> employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

Restatement (Second) of Torts § 414. Long before the Restatement, Illinois adopted this principle into its common law. *See, e.g., Schwartz* v. *Gilmore*, 45 Ill. 455, 457 (1867); *Best Mfg. Co.* v. *Peoria Creamery Co.* 307 Ill. 238, 241-242 (1923). Illinois has also recognized an exception provided in the Restatement. That exception states:

> In order for the rule stated in the Section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed or to prescribe alterations and deviations. Such general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.

Restatement (Second) of Torts § 414 cmt. c; *Larson v. Commonwealth Edison Co.*, 33 Ill. 2d 316, 325 (1965). *See also* Illinois Pattern Jury Instructions, Civil, No. 55.03 (2011) (plaintiff in construction negligence case has burden to prove: (1) defendant retained some control over the safety of work; (2) defendant acted or failed to act in specified ways, and in so doing was negligent as to its retained control; (3) plaintiff was injured; and (4) defendant's negligence proximately caused plaintiff's injuries).

Orzel responds by arguing that AMS breached a contractual duty by failing to provide, install, and erect the stage or that it should have supervised or controlled Windy City's work. The fundamental error with this argument is that any recovery for a

breach of contract would lie with Windy City—the other contracting party—not Orzel. Further, there is no evidence in the record indicating the AMS-Windy City oral agreement provided AMS with any retained control over Windy City's work. Relatedly, there is nothing in the UIC-AMS written agreement that prohibited AMS from subcontracting out its work to another party. In short, Orzel's argument breach-of-contract argument fails to identify an actionable breach of duty owed by AMS to Orzel.

Absent any duty AMS owed to Orzel or any breach of that duty, this court need not address AMS's remaining two arguments.

Windy City Motion

Windy City's summary judgment motion relies heavily on the testimony of Randall Flaws, who tightened the stage railings. Randall explained in detail in his deposition how the railings are installed and then tightened by spinning two knobs at the bottom of the railings that wedge a piece of metal into a slot. Once the metal is inside the slot, the railing cannot detach. He stated the railing may feel somewhat loose, but there is no danger it will detach. Randall inspected the stage and railings twice before he left the site. Randall also testified that when he returned to the stage later in the day, he inspected every railing and found no evidence that they had been installed improperly.

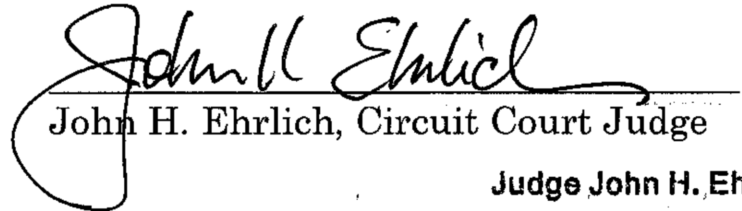
Based on these facts, Windy City argues there is no evidence it breached its duty of care to Orzel or that any breach proximately caused Orzel's injury. The record, however, does contain such evidence. Orzel points to Skoller's testimony that part of the railing detached as Orzel grabbed it. That section of the railing then fell to the ground. Even if this court assumes Randall had properly installed the railings, there remains a question of material fact as to why this particular section of railing became detached. Further, Skoller testified that his inspection revealed other sections of loose railing. Even if this

court assumes Skoller improperly concluded that other railing sections were loose, his testimony creates a question of fact because it conflicts with Randall's testimony that his subsequent inspection did not reveal any other loose railings. In short, there are sufficient conflicts in the record requiring these issues to go to a trier of fact.

<u>Conclusion</u>

For the reasons presented above, it is ordered that:

1. The AMS summary judgment motion is granted;
2. AMS is dismissed with prejudice; and
3. Windy City's summary judgment motion is denied.



John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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