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

Kenneth Ross, Plaintiff, v. Colfax Corporation, Orlando D. Varner, and T. Andrews Construction, Inc., d/b/a Tandem Construction, Inc., Defendants.	)	No. 20 L 2416
Colfax Corporation, Orlando D. Varner, and T. Andrews Construction, Inc., d/b/a Tandem Construction, Inc., Third-Party Plaintiffs, v. Action Caulking & Sealants, Inc., Third-Party Defendant.	)	

MEMORANDUM OPINION AND ORDER

In a case arising from alleged construction negligence, proximate causation is nearly always a question of fact given the independent duty of care each contractor and subcontractor owes to the employees of another. In this instance, there are duties of care arising from a permit, a contract, and the common law. For those reasons, there remain questions of material fact that make unwarranted the entry of summary judgment as a matter of law for any party.

Facts

At approximately 8:00 a.m. on October 9, 2019, Kenneth Ross was working at a construction site at 730 North Milwaukee Avenue in Chicago for his employer, Action Caulking & Sealants, Inc. At that time, Ross was in a basket atop a boom lift conducting caulking work on the building's façade. At the same time, Orlando Varner was driving a box truck owned by Colfax Corporation. Although Varner was a Delmark Corporation employee,

Delmark had a business relationship with Colfax, and Varner was running an errand on Colfax's behalf. As Varner drove past the boom lift, the truck struck the boom lift, knocking it onto its side. The collision projected Ross from the basket through an open second story window frame. Ross suffered significant injuries.

Ross filed suit against Varner, Colfax, and the construction project's general contractor, T. Andrews Construction, Inc. (Tandem). Each of the defendants filed third-party complaints for contribution against Action Caulking. Each of the defendant-third-party plaintiffs allege that Action Caulking owed Ross a duty of care and breached that duty by, among other things, failing to: (1) inspect the premises and the work undertaken; (2) operate, manage, and control the premises; (3) provide a safe workplace; (4) warn Ross of the dangerous conditions; (5) provide barricades, cones, signs, flaggers or markers; (6) enforce permits; (7) supervise the work at the scene; (8) train Ross; (9) provide Ross with proper equipment; (10) enforce safety protocols; and (11) prevent Ross from performing work in an unsafe manner. The case proceeded to discovery.

Nick Pucinelli was Action Caulking's project manager for the building at 730 North Milwaukee Avenue and executed the contract on Action Caulking's behalf. The contract provided that the Action Caulking was to "furnish and perform all work, supervision, labor, materials, cleanup, refuse removal, scaffolding, hoisting, tools, equipment, supplies, forms and form work and all other service necessary for the construction and completion of the work. . . ." Nick acknowledged that Action Caulking's scope of work included furnishing and installing caulk around the perimeter exterior of punched windows and bricked joints. He also acknowledged that the contract made Action Caulking responsible "for all safety precautions and programs in connection with the work" and "solely responsible for the safety of its employees." Nick acknowledged that although the contract required Action Caulking to provide supervision, no foreman or superintendent oversaw Ross's work at or before the time Varner's truck struck the boom lift.

The record shows that Tandem served as the general contractor for the construction of the 730 North Milwaukee Avenue building. Tandem had previously paid the fee necessary to obtain a permit from the City of Chicago to allow for the placement of a boom lift in the street. The permit provided that: "All traffic control will be the responsibility of the contractor and must comply with all [Chicago Department of Transportation] and [Manual of Uniform Traffic Control Devices] Standards."

Although Tandem supplied the boom lift, Ross was responsible for moving and parking it. On October 9, 2019, Ross parked the boom lift in the

parking lane, which lies between a bike lane immediately adjacent to the curb on one side and the southbound traffic lane on the other side. Ross did not place any warning devices around the boom lift because he did not think they were necessary, and he did not ask Tandem to provide any. Ross had used the boom lift the two previous days, October 7 and 8, without incident.

Tandem's project manager, Rafal Barabas, was at the construction site on October 9, 2019, and witnessed the occurrence. He indicated that Ross had been scheduled to conduct interior work in the building's parking garage, but Tandem re-directed him to do exterior work without notifying Action Caulking management. Barabas did not direct Ross in his work, and Tandem did not request Action Caulking to provide a traffic control flagger while the boom lift was in use. In fact, Action Caulking's agreement with Tandem did not include expenses for a flagger.

Sean Pucinelli was Action Caulking's superintendent for the project. He knew Ross would be performing caulking work from the boom lift, but did not determine how Ross would perform the work. Two days before the accident, Sean went to the worksite to inspect the work Ross was going to perform from the boom lift. Sean testified he would be at the worksite at least once a day to observe the work, but he was not at the site on October 9 when Varner's truck struck the boom lift. Had Sean known Ross was working on the boom lift without any cones or barricades around it, Sean would have brought some and made sure Ross used them.

Varner testified that he saw the boom lift and slowed down to pass it. He indicated that several other vehicles ahead of him passed the boom lift with no difficulty. Further, the northbound lane was free from traffic that made it easy to avoid coming close to the boom lift. Varner did not see a flagger or any warning cones or barricades near the boom lift. Yet as Varner approached, the boom lift's arm began lowering and pushing further out into the southbound traffic lane where he was driving. That fact, according to Varner, explains why the collision sheared of the top of the truck.

The record includes photographs of the overturned boom lift. One of the photographs shows an absence of traffic cones or barricades around the boom lift. The photograph also shows warning tape around the boom lift, but it is agreed that the tape was placed only after the boom lift had overturned.

The parties have briefed two motions. First, Action Caulking filed a summary judgment motion asking this court to dismiss the defendant-third-party plaintiffs' contribution complaints with prejudice. Second, Tandem

filed a summary judgment motion seeking dismissal with prejudice from the claims brought against it by Ross. This court will address each motion, in turn.

Analysis

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 by introducing evidence that, if uncontroverted, would entitle the defendant to judgment as a matter of law. *See Purtill v. Hess*, 111 Ill. 2d 229, 240-41 (1986).

If a 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 non-moving party 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). 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).

Action Caulking argues that Varner is the sole proximate cause of the accident that injured Ross. Proximate cause contains two elements: (1) cause in fact; and (2) legal cause. *Krywin v. Chicago Trans. Auth.*, 238 Ill. 2d 215, 225-26 (2010). Cause in fact requires that the defendant's conduct be a

material and substantial factor in bringing about the plaintiff's injury, or that, in the absence of the defendant's conduct, the injury would not have occurred. *Id.* at 226. When considering cause in fact, courts generally employ either the traditional "but for" test or the "substantial factor" test. *See Nolan v. Weil-McLain*, 233 Ill. 2d 416, 431 (2009). Under the "but for" test, "'a defendant's conduct is not the cause of an event if the event would have occurred without it.'" *Id.* (quoting *Thacker v. UNR Industries, Inc.*, 151 Ill. 2d 343, 354 (1992)). Under the "substantial factor" test, "the defendant's conduct is said to be a cause of an event if it was a material element and a substantial factor in bringing the event about." *Id.* (internal quotation marks omitted.) The supreme court has clarified that if an injury results from the subsequent, independent act of a third party, the defendant's conduct may nevertheless remain a material and substantial element of the injury if the intervening cause was of a type that a reasonable person would see as likely or foreseeable based on the defendant's conduct. *See City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 407 (2004).

As to the second element, legal cause is present if the injury is of the type that a reasonable person would see as a likely result of his or her conduct. *First Springfield Bk. & Trust v. Galman*, 188 Ill. 2d 252, 257-58 (1999); *Simmons v. Garces*, 198 Ill. 2d 541, 558 (2002); *Abrams v. City of Chicago*, 211 Ill. 2d 251, 258 (2004). In other words, legal cause involves an assessment of foreseeability. *Lee v. Chicago Transit Auth.*, 152 Ill. 2d 432, 456 (1992). Courts ask whether the injury is the type that a reasonable person would see as a "likely result" of his or her conduct, or whether the injury is so "highly extraordinary" that imposing liability is not justified. *Id.*; *see also City of Chicago*, 213 Ill. 2d at 395 (legal cause "is established only if the defendant's conduct is so closely tied to the plaintiff's injury that he should be held legally responsible for it" (internal quotation marks omitted)).

Proximate cause is generally a question of fact to be decided by the trier of fact. *Aalbers v. LaSalle Hotel Props.*, 2022 IL App (1st) 210494, ¶ 16. If, however, an alleged negligent act merely brings about a condition making the injury possible, and that condition, subject to the subsequent independent act of a third party, causes the injury, the two acts are not concurrent and the condition is not the proximate cause of the injury. *Kirschbaum v. Village of Homer Glen*, 365 Ill. App. 3d 486, 495 (3d Dist. 2006). The focal test to determine proximate cause is whether the person who allegedly brought about the condition might have reasonably anticipated the intervening cause as a natural and probable result of the first party's own negligence. *Merlo v. Public Service Co. of Northern Illinois*, 381 Ill. 300, 317 (1942); *see also First Springfield Bank*, 188 Ill. 2d 252, 257 (1999).

The evidentiary record in this case makes plain that Action Caulking's own conduct is inextricably linked to the cause of Ross's injury. To be sure, Ross's injury would not have occurred had Varner not struck the boom lift, but that is merely the last link in the causal chain. Action Caulking cannot disclaim its own responsibility for safety by arguing that the City permit made Tandem responsible for all traffic control measures. That may be true, but the Tandem-Action Caulking agreement imposed on the latter the responsibility for all safety precautions and supervision, and made Action Caulking solely responsible for its employees' safety. It is also impossible to exempt Action Caulking's conduct or lack of conduct given Sean's testimony that, had he known, he would have brought warning devices to the work site and made sure that Ross used them. Further, it is a fair inference that because Sean had been to the scene the previous two days, he knew or should have known that Ross was using a boom lift to perform caulking work. Combined, these facts imply that Action Caulking might have reasonably anticipated a collision with the boom lift as a natural and probable result of the failure to place warning devices. *See id.*

Action Caulking's argument that the boom lift was an open-and-obvious condition is also not persuasive. While the boom lift was a large object, and Varner saw it before the collision, neither Tandem nor Action Caulking supplied any warning devices near the boom lift or a flagger to keep traffic a safe distance from the boom lift. And although the permit made Tandem responsible for traffic control, nothing prevented Action Caulking from supplying devices designed to keep its own workers, such as Ross, safe.

Tandem's summary judgment argument fairs as poorly as Action Caulking's, and for the same reasons. For its part, Tandem argues that Varner is the sole proximate cause of Ross's injuries. That conclusion is unreasonable given the City permit's explicit language making Tandem responsible for all traffic control measures and requiring that those measures comply with all Chicago Department of Transportation and Manual of Uniform Traffic Control Devices standards. It is unsurprising that Tandem chose not to cite any CDOT or MUTCD standards or indicate how its failure to provide traffic control measures met those standards. In short, while Varner's collision with the lift truck was the last causal link leading to Ross's injury, it is entirely reasonable that a jury could conclude that had Tandem provided cones, barricades, or a flagger, Varner's truck would have remained at a safe distance from the boom lift's arm. Tandem's failure to act is, then, a potential proximate cause that a jury must consider.

This court's conclusions as to both summary judgment motions finds additional support in the independent duty of care owed by all parties involved in construction activities. The Supreme Court has long held that all

contractors and subcontractors owe each other a duty "to exercise ordinary care to guard against injury which naturally flows as a reasonably probable and foreseeable consequence of his act. . . ." *Nelson v. Union Wire Rope Corp.*, 31 Ill. 2d 69, 86 (1964). Such a duty is independent of any contract or privity of interest or proximity of relationship, and extends to remote and unknown persons. *Id.* (citing *Kahn v. James Burton Co.*, 5 Ill. 2d 614, 622 (1955); *Wintersteen v. National Cooperage & Woodenware Co.*, 361 Ill. 95, 103 (1935); Restatement of Torts, § 311(2). This independent duty of care has been explicitly applied to construction settings because of their inherently dangerous conditions and potential for injury. Again, as the Supreme Court has recognized: "one engaged in the construction of a building owes to another not in his employ, engaged in the same work and exercising due care for his own safety, the duty of using reasonable care to avoid injuring him." *Ziraldo v. W.J. Lynch Co.*, 365 Ill 197, 218 (1936); *see also Melchers v. Total Electric Constr.*, 311 Ill. App. 3d 224, 229 (1st Dist. 1999). There is certainly no reason to depart from such a well grounded principle given the similar facts of this case.

Conclusion

For the reasons presented above, it is ordered that:

1. Action Caulking's summary judgment motion is denied; and
2. Tandem's summary judgment motion is denied.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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