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

Kenneth Wicevic,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 18 L 1270
	)	
Clayco, Inc., Scurto Cement Construction, Ltd., and Area Erectors, Inc., and Ben Hur Steel Worx, LLC	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Summary judgment is appropriate only if no question of material fact exists and the moving party deserves dismissal as a matter of law. In this case, the evidentiary record establishes that each defendant knew at least one month in advance of the alleged hazard that later caused the plaintiff's trip, fall, and injury. For that reason, each of the four defendants' summary judgment motions must be denied.

Facts

On June 28, 2016, RELP Bailly, LLC, as the owner, and Clayco, Inc., as the contractor, executed an agreement for the construction of an Amazon warehouse located at Interstate 57 and Manhattan-Monee Road in Will County. On July 11, 2016, Clayco and Ben Hur Steel Worx, LLC executed an agreement to fabricate and erect steel at the site. Ben Hur and Area Erectors, Inc. subsequently executed an agreement to perform the steel erection at the site. On September 5, 2016, Clayco executed an agreement with Scurto Cement Construction, Ltd. to perform the project's concrete flatwork. Scurto subsequently entered into a verbal time-and-materials agreement with Figure 8, the company that

employed Kenneth Wicevic, to lay rebar mesh for the reinforced concrete decking.

On January 27, 2017, Wicevic began work on the project. Wicevic's job was to place steel mesh on top of steel decking so that concrete could be poured over the top. Before the steel mesh was placed on the decking, Nelson studs had to be fused through the decking onto a steel beam. The Nelson studs keep the concrete in place and always stick up above the top of the corrugated decking. On January 27, 2017, Wicevic and co-workers were carrying a 200-pound steel wire mesh across the corrugated decking when Wicevic tripped over a four-inch Nelson stud, fell, and was injured.

On February 14, 2019, Wicevic filed his third-amended complaint against the defendants. The complaint consists of four counts, each sounding in construction negligence against each defendant. Each count alleges that oversized Nelson studs had been installed and that each defendant knew or should have known of the tripping hazard they posed. The complaint alleges each defendant owed Wicevic a duty of ordinary care, and claims that each defendant breached its duty by, among other things: (1) failing to provide a safe workplace; (2) failing to know of the site's working conditions; (3) failing to correct the tripping hazard posed by the oversized Nelson studs; (4) allowing work to continue despite the hazard; and (5) failing to provide adequate lighting.

The case proceeded to discovery. The record establishes that the Nelson studs to be used in the construction project were to have been three-inches high, based on the depth of the corrugated decking. Ben Hur had, however, supplied four-inch Nelson studs, and Area Erectors installed the larger ones on approximately 10 percent of the corrugated floor decking without checking the size of the Nelson studs against the plans. Three-inch Nelson studs would have risen, at most, one-half inch above the walking surface and would not have constituted an OSHA violation. In contrast, the four-inch Nelson studs rose one-and-a-half to two inches above the corrugated decking and did constitute an OSHA violation.

Area Erectors' general foreman, Byron Inman, and Figure 8's foreman, Timothy Thurston, testified that all of the trades on the job, including each of the defendants, attended a December 2016 meeting at which they discussed what to do about the wrong-sized Nelson studs. One option was to cut down the four-inch Nelson studs and reset them. Ultimately, the group decided to leave the oversized Nelson studs in place and tell workers at the site to be careful.

Analysis

The defendants bring their summary judgment motions pursuant to the Code of Civil Procedure. 735 ILCS 5/2-1005. Summary judgment is appropriate if the record reveals there exists no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. 735 ILCS 5/2-1005(c). To determine whether a genuine issue of material fact exists, a court must "construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent." *Adams v. Northern Ill. Gas Co.*, 211 Ill. 2d 32, 43 (2004). "Where reasonable persons could draw divergent inferences from the undisputed material facts or where there is a dispute as to a material fact, summary judgment should be denied and the issue decided by the trier of fact." *Beaman v. Freesmeyer*, 2019 IL 122654, ¶ 22 (quoting *Espinoza v. Elgin, Joliet & E. Ry.*, 165 Ill. 2d 107, 114 (1995)).

On summary judgment, a court does not decide a question of fact, but determines whether one exists. *Coole v. Central Area Recycling*, 384 Ill. App. 3d 390, 396 (4th Dist. 2008). Further, a court does not choose between competing inferences or weigh evidence to decide which of two interpretations is more likely. *Bank Computer Network Corp. v. Continental Ill. Nat'l Bank & Tr. Co.*, 110 Ill. App. 3d 492, 497 (1st Dist. 1982). Speculation, conjecture, and guess are insufficient to withstand summary judgment. *McGath v. Price*, 342 Ill. App. 3d 19, 27 (1st Dist. 2003).

A defendant may move for summary judgment by introducing 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). Here, the defendants rely on the various contracts and subcontracts between themselves as evidence that they had contracted away to others their individual duty of ordinary care for Wicevic's safety at the construction site.

The defendants' reliance on the contracts and subcontracts overlooks an entirely different theory of liability based not on contract, but on direct negligence. The Illinois Supreme Court has long held that "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. Lynch Co.*, 365 Ill. 197, 201 (1936). *See also Cozza v. Culinary Foods, Inc.*, 311 Ill. App. 3d 615, 622 (1st Dist. 2000) (citing *Leatherman v. Schueler Brothers,* Inc., 40 Ill. App. 2d 56, 62 (4th Dist. 1963); *Zebell v. Saufnauer,* 38 Ill. App. 2d 289, 293-94 (1st Dist. 1962)). Thus, each contractor working on a construction site "owes the duty of ordinary care in performing his work in such a way as not negligently to injure the servants of the other." *Zebell,* 38 Ill. App. 2d at 297 (Bryant, P.J., dissenting) (citing *Ziraldo,* 365 Ill. at 201). *See also Markus v. Lake Cnty. Ready-Mix Co.,* 6 Ill. App. 2d 420, 427 (2d Dist. 1955).

Wicevic raises a direct negligence theory in his response brief. Wicevic points to Inman's and Thurston's testimony that all the trades involved in the construction project attended a meeting in December 2016 at which they discussed what to do with the oversized Nelson studs. Rather than take some remedial measure, the group simply decided to tell the workers to be careful when walking on the corrugated decking.

None of the defendants addressed this direct negligence theory in their respective reply briefs. Notwithstanding any

alleged duty-shifting language in the contracts and subcontracts, the defendants unquestionably knew about the oversized Nelson studs and recognized the hazard they presented before January 27, 2017. Despite that knowledge, the defendants chose only to issue a general warning to workers. Whether that warning was sufficient is a question of fact this court cannot address.

In addition, there is evidence in the record that the use of the four-inch Nelson studs may have violated an OSHA regulation. It is plain that the violation of an OSHA regulation does not create a duty of care sufficient for a negligence claim because OHSA does not create a private right of action. 29 U.S.C. § 653 (b)(4). At the same time, the violation of an OSHA regulation may serve as evidence of a failure to exercise reasonable care. *Recio v. GR-MHA Corp.*, 366 Ill. App. 3d 48, 57-58 (1st Dist. 2006) (citing *Ross v. Dae Julie, Inc.*, 341 Ill. App. 3d 1065, 1074 (1st Dist. 2003). Given that possibility, this court cannot answer the question of whether the alleged OSHA violation constituted a failure to exercise reasonable care. Given that open question, summary judgment is, once again, in appropriate.

Conclusion

For the reasons presented above, it is ordered that:

The summary judgment motions brought by Clayco, Ben Hur, Area Erectors, and Scurto are each denied.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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