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

JOSEPH ZADLO, Plaintiff, v. POWER CONTRACTORS, POWER CONSTRUCTION COMPANY, LLC, and VENTANA DBS, LLC, Defendants.	No. 17 L 13217

MEMORANDUM OPINION AND ORDER

An independent contractor's employer is generally not liable for that person's acts or omissions unless the hiring entity entrusted work to the independent contractor and retained control over the work. The record establishes that a subcontractor entrusted work to the plaintiff's employer, but whether the subcontractor retained control over the employer's work depends on unresolved factual questions. For these reasons, the subcontractor's summary judgment motion must be denied.

Facts

On May 23, 2014, Power Construction Company, LLC and Ventana DBS, LLC executed a Master Agreement governing all projects in which the two would work together in the future. Article 23 of the Master Agreement provided that Ventana "shall obtain [Powers'] written approval of all [Ventana's] sub-contractors . . . it intends to use in the performance of its Work." On June 24, 2014, Power and Ventana entered into a project specific agreement for Northwestern University's Kellogg School of Management building in Evanston. Power, as the general contractor, hired Ventana to perform curtain wall work. Article

34 of the agreement's exhibit A ("The Work") specified that: "[s]ubcontractor is responsible for Safety of their personnel during cold weather work; including the shoveling of the decks of snow and ice as necessary to continue with the progress of the Work."

On October 2, 2014, Ventana entered into a subcontract agreement with Mid-States Glass & Metals, Inc., to erect the building's curtain wall. The subcontract specified that Mid-States "is responsible for, and has control over, all construction means, methods, techniques, sequences, procedures, and coordination of all portions of the Subcontract Work, unless [Ventana] shall give specific written instruction concerning these matters." The agreement also stated that Mid-States "is fully responsible for, and has control over, all construction means, methods, techniques, sequences, procedures and coordination of the Subcontract Work related to the performance of [Mid-States'] employees and any other persons working in the area of the Subcontract Work." Mid-States agreed, in the subcontract agreement, to "furnish all necessary installation materials, labor, . . . tools, equipment, supplies, . . . safety, protection, . . . supervision," and any other facilities "required and necessary to perform prompt and efficient execution of the work. . . ." The agreement stated that Mid-States' obligation was "only to furnish services as expressly set forth therein, which is limited to providing labor for curtainwall installation, not including materials. [Mid-States] is not required to perform additional work that is not expressly described in the subcontract as subcontractor's scope of work." The subcontract agreement further stated that Mid-States "shall perform the subcontract work under the general direction of" Ventana and that Mid-States would fully comply with Ventana's safety work rules and "on Site Safety Training and Site Specific Safety Program." The subcontract agreement stated that if Ventana believed that Mid-States was performing its work in an unsafe manner, Ventana could "immediately cease work until unsafe practices are corrected." Ventana could unilaterally make any change to the subcontract work, including "in the method, manner, or sequence of the Subcontract Work." There is no mention of responsibility for snow and ice removal in the subcontract agreement.

On January 14, 2016, Joseph Zadlo was working for Mid-States erecting the curtain wall of the Kellogg School building. Zadlo was an apprentice ornamental ironworker assisting John Salicete, a journeyman ironworker. Kenneth Schraub was the jobsite foreman for Mid-States who instructed Zadlo on the work he would perform each day. As site superintendent, Schraub decided whether the conditions were too hazardous for Mid-States' employees to work.

On January 14, 2016, there was snow on the roof of the Kellogg School building. At some point, Salicete slipped and fell on the upper roof. Sometime later, Zadlo also slipped, fell, and was injured on the roof. At some point that day, Schraub was notified that both Salicete and Zadlo had fallen. Zadlo did not claim injury or fill out paperwork that day, but did so on January 20, 2016.

Sean Bresnahan was Ventana's project manager on the Kellogg School project, acting as the "go-between architects and engineers" and ensuring the installation was completed the way Ventana had designed it to look. Bresnahan completed his formal OSHA construction safety training in 2008 or 2009. Bresnahan was the only Ventana employee involved in the Kellogg School project, and the only Ventana employee regularly on site. He does not recall being told at any time during the Kellogg School project that Zadlo was injured and was not informed of the incident until "significantly after" it occurred. Bresnahan has no e-mails containing daily reports from the time period during which Zadlo slipped and fell.

On December 27, 2017, Zadlo brought this negligence action against Power Construction Company, LLC.[1] On January 21, 2018, Zadlo filed a first amended complaint, and on July 3, 2019 filed a second amended complaint naming Ventana as a defendant.

Analysis

Summary judgment is appropriate and should be granted if the pleadings, depositions, and admissions on file, together with any

[1] Also sued improperly as Power Contractors.

affidavits, show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005. A motion for summary judgment must be denied where there exist any questions of material fact. *Allegros Services, Ltd. v. Metropolitan Pier & Expo. Auth.*, 172 Ill. 2d 243, 256 (1996). Since summary judgment is a drastic means of disposing of litigation, a court has a duty to construe the record strictly against the movant and liberally in favor of the nonmoving party. *Espinoza v. Elgin, Joliet & E. Ry. Co.*, 165 Ill. 2d 107, 113 (1995).

Generally, one who employs an independent contractor is not liable for the acts or omissions of the independent contractor. *Gomien v. Wear-Ever Aluminum, Inc.*, 50 Ill. 2d 19, 21 (1971). Illinois has, however, recognized an exception to that rule in section 414 of the Restatement (Second) of Torts. As provided, a general contractor "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 for whose safety the [general contractor] owes a duty to exercise reasonable care." Restatement (Second) of Torts § 414 cmt. *c*; *see Larson v. Commonwealth Edison Co.*, 33 Ill. 2d 316 (1965).

The central issue here is whether section 414 applies and, thereby, renders Ventana, as a subcontractor, liable for Zadlo's injuries. Ventana argues that it did not owe Zadlo a duty of care because it did not entrust work to Mid-States or retain control over any part of the work. In contrast, Zadlo argues that Ventana owed him a duty of care because the terms of Ventana's contract with Powers created and supported a duty under Illinois law and because Ventana's conduct in the field established a duty under Illinois law.[2]

Ventana argues it did not entrust work to Mid-States because Ventana's contract with Powers required Ventana to obtain Powers' written approval of all sub-subcontractors. In support of its position, Ventana cites cases in which a defendant was not found to have

---

[2] Zadlo also argues that he has made a claim of direct negligence against Ventana for failing to comply with its contractual obligation to remove snow and ice, but the second amended complaint contains no such claim. Should Zadlo wish to include such a claim, he must petition to file a third amended complaint.

entrusted work to an independent contractor. These cases are distinguishable from the factual scenario here.

In *O'Connell v. Turner Construction Co.*, the court found Turner not liable for negligence under section 414 because a separate subcontractor employed O'Connell with which Turner had no direct contracts and because Turner did not select the subcontractor. 409 Ill. App. 3d 819, 823 (1st Dist. 2011), *modified on denial of reh'g* (May 20, 2011). In that instance, the court found section 414 did not apply. *Id.* In this case, however, Ventana both selected and directly contracted with Mid-States.

Ventana also cites *Henderson v. Bovis Lend Lease, Inc.*, 848 F. Supp. 2d 847 (N.D. Ill. 2012). In that case, the court held that Henderson failed to establish entrustment in a situation in which the defendant entered into a construction management agreement with the project's owner. *Id.* at 849. The agreement addressed soliciting bids from contractors and assisting in analyzing them, but specified the owner had the final decision to select contractors. *Id.* The court held that solely "pointing to contractual provisions making the construction manager responsible for soliciting bids from independent contractors and for assisting the project owner with analyzing the bids" was insufficient to establish entrustment. *Id.* at 852.

Henderson is distinguishable because in that case the contract was the only evidence on which the court could determine entrustment. *Id.* at 852. In contrast, this case has a far more extensive record. Even the *Henderson* court noted that distinction. "If the lack of formal contractual hiring authority, standing alone, precluded a finding of entrustment, then a general contractor could evade § 414 liability by ensuring that its agreement with the project owner left such authority with the project owner." *Id.* at 851. The court held that "what matters under Illinois law is whether the general contractor actually selected the subcontractor, not the number of layers between the project owner and the subcontractor." *Id.* at 853. Here, the record shows that Ventana selected Mid-States and that Powers only had to give written approval of the selection. Zadlo has, therefore, produced sufficient

evidence to establish that Ventana entrusted Mid-States with work on the Kellogg School building project.

Ventana also cites *Cabrera v. ESI Consultants, Ltd.*, as a case in which the record did not support the application of section 414. 2015 IL App (1st) 140933. In *Cabrera*, however, the parties agreed that neither defendant subcontractor had entrusted any work to Cabrera's employer. *Id.* ¶ 103. *Cabrera* is, therefore, not instructive as the defendant's entrustment was not at issue.

As to the second element of section 414, the record is unclear whether Ventana retained control over any part of Mid-States' work. This court has evaluated the record, including: the contracts previously discussed; Mid-States' daily reports to Powers for the Kellogg School project; and the depositions of Zadlo, Salicete, Schraub, and Bresnahan. The record contains conflicting evidence regarding genuine issues of material fact—most importantly the frequency of Bresnahan's presence on the Kellogg School jobsite—that precludes the granting of summary judgment in Ventana's favor.[3]

As Ventana has failed to prove section 414 does not apply, this court also notes various other issues of material fact precluding summary judgment. These include:

- Identifying the entity responsible for clearing snow and ice from Zadlo's workspace and how it was to be removed;
- An estimate on the amount of snow and ice on the roof when Zadlo slipped and fell;
- Who informed Salicete of Zadlo's fall and when;
- How and when did Schraub learn of the roof's slippery conditions;
- When did Zadlo fall, particularly in relation to Salicete's fall;
- Whether Zadlo was tied off when he slipped and fell;

[3] Ventana also raises an argument for the first time in its reply brief that Zadlo's negligence claim should be evaluated under section 343 of the Restatement (Second) of Torts, which addresses dangerous conditions on land. Ventana gives no reason why section 343 should apply given that Zadlo did not bring a premises liability claim.

- Whether Salicete told Schraub the roof was too slippery for work to continue;
- Whether Powers told Schraub that Mid-States had to continue working on the roof despite the conditions;
- The work Salicete was performing at the time he fell;
- Whether Schraub moved Salicete and Zadlo to a different location after learning of their falls;
- The frequency with which Bresnahan and other Ventana employees were at the Kellogg School construction site;
- The frequency with which Bresnahan attended Powers' progress report meetings; and
- The date on which Zadlo requested and completed an incident report.

Conclusion

For the reasons presented above, it is ordered that:

Ventana DBS, LLC's summary judgment motion is denied.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

DEC 17 2020

Circuit Court 2075