SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5411-14T1

WILLIAM MUHA,

Plaintiff-Appellant,

v.

KEAN UNIVERSITY, an entity
and DEBMARK, INC. d/b/a FASTSIGNS,
an entity in New Jersey,

Defendants-Respondents.

Argued January 18, 2017 – Decided February 8, 2017

Before Judges Yannotti and Fasciale.

On appeal from Superior Court of New Jersey, Law Division, Union County, Docket No. L-3296-11.

Cynthia A. Walters argued the cause for appellant (Budd Larner, P.C., attorneys; Ms. Walters and Terrence J. Hull, on the briefs).

Benjamin H. Zieman, Deputy Attorney General, argued the cause for respondent Kean University (Christopher S. Porrino, Attorney General, attorney; Melissa Dutton Schaffer, Assistant Attorney General, of counsel; Stephen R. Tucker, Deputy Attorney General, on the brief).

Michael C. Salvo argued the cause for respondent Debmark, Inc. d/b/a Fastsigns

(Ahmuty, Demers, & McManus, attorneys; Mr. Salvo, on the brief).

PER CURIAM

Plaintiff appeals from two June 30, 2015 orders granting summary judgment in favor of defendants, Kean University (Kean) and Debmark, Inc. d/b/a Fastsigns (Fastsigns). We affirm.

On May 26, 2010, plaintiff was injured while installing vinyl signs at the New Jersey Center for Science, Technology and Mathematics (STEM) building at Kean. Kean hired Fastsigns to manufacture and install the vinyl signs for the STEM building. Fastsigns' owner, Mark Favaloro, offered plaintiff the installation job and told plaintiff that the installation would be around forty-feet high, although the installation was actually about fifteen-feet high. Plaintiff accepted the job after visiting the site.

Plaintiff worked for Fastsigns on an as-needed basis. Plaintiff performed about seven jobs for Fastsigns at Kean prior to accepting the installation job. Favaloro would call plaintiff about jobs and plaintiff would determine if he could do the job and would price it accordingly. Typically, Favaloro would provide plaintiff with the sign material and written instructions on where to place the signs. Plaintiff was also given the clients' contact

information to schedule the installation. Moreover, plaintiff brought a majority of the other tools to install the signs himself.

Prior to the installation at the STEM building, plaintiff visited the site and met with Joe Moran, Associate Director for the Office of University Relations at Kean, and a man from Terminal Construction (Terminal). At that time, Moran told plaintiff that he would be installing certain letters and symbols on three sides of a column at the STEM building. Plaintiff asked for a lift, but Moran was unable to procure one. Plaintiff was also told that he could not use a lift that Terminal offered because the rocks around the column were uneven to roll the lift on, and Kean did not want anything ruining the grass. Terminal then offered plaintiff a forty-foot ladder to use for the job. Moran suggested that plaintiff use rags around the tips of the ladder in order not to damage the exterior of the building.

Plaintiff began the first day of the installation job at the STEM building accompanied by his father and Moran. Plaintiff retrieved the ladder from Terminal and installed part of the sign. Moran approved the location of the letters and symbols for two sides of the column and left before plaintiff started the third side of the column. Plaintiff did not have anyone hold the ladder while working on the left and right side of the column, but he had his father hold his ladder while working on the front of the column

because the front of the column was higher and on a slant. Plaintiff completed the first day of installation without incident.

Shortly after the first day of installation, plaintiff received a phone call from Favaloro asking him to return to Kean to complete installing the sign. On May 26, 2010, plaintiff returned alone. The ladder plaintiff used on the first day of installation was not available, so plaintiff went to his father's house and retrieved a ladder. As plaintiff was cleaning the column to install the sign, the ladder "kicked out" and began leaning toward the left. Plaintiff fell and hit the ground and sustained injuries. After the accident, Kean hired All Star Fabrication to install the rest of the sign, and All Star Fabrication performed the installation using a ladder.

In August 2010, plaintiff filed a Notice of Claim advising Kean that he was paralyzed from the waist down as a result of an accident and in March 2011, plaintiff filed a petition for worker's compensation benefits from Fastsigns. In August 2011, plaintiff commenced this action against Kean University and Fastsigns asserting negligence. Fastsigns filed its answer and included cross-claims against Kean for indemnification and contribution. In November 2011, Kean filed its answer and included cross-claims for defense, contribution, and indemnification against Fastsigns.

In May 2014, the worker's compensation judge dismissed plaintiff's petition holding that plaintiff was an independent contractor of Fastsigns and not an employee. On April 16, 2015, the case was arbitrated, which resulted in a $6,000,000 award with fifty percent comparative fault allocated to plaintiff. Defendants filed a trial de novo.

Both defendants moved for summary judgment on plaintiff's claims and Kean moved for summary judgment on its indemnity cross-claim against Fastsigns. On June 30, 2015, the court granted defendants' motions dismissing plaintiff's claims and denied Kean's summary judgment motion against Fastsigns in three separate orders.

On appeal, plaintiff argues that the trial court overlooked disputed material facts; applied the incorrect legal standard for determining landowner and contractor duty; and applied the incorrect "dangerous condition of public property" standard as to Kean rather than an ordinary negligence standard.

I.

Plaintiff argues that his claims against Kean should be governed by Tort Claims Act (TCA), N.J.S.A. 59:2-2, which allows liability to be imposed when a public employee's act or omission proximately causes an injury, not TCA N.J.S.A. 59:4-2, which provides that a public entity may be liable when the negligent act

or omission of its employee creates a dangerous condition of the public entity's property. Plaintiff states that Kean failed to supervise and promoted unsafe work methods, which are regarded as ministerial acts under N.J.S.A. 59:2-2. Plaintiff also contends that if N.J.S.A. 59:4-2 applied, the trial court failed to recognize disputed issues of material fact. Kean, however, argues that plaintiff was not injured by Moran's actions themselves, but by the condition which they allegedly created. Kean contends this case is governed by Ogborne v. Mercer Cemetery Corp., 197 N.J. 448 (2009).

Summary judgment may be granted when, considering the evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. R. 4:46-2(c); see also Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). When reviewing an order granting summary judgment, this court applies the same standards that the trial court applies when ruling on the motion. Oyola v. Xing Lan Liu, 431 N.J. Super. 493, 497 (App. Div.), certif. denied, 216 N.J. 86 (2013).

The TCA "provides protection for public entities involved in tort claims" and "[g]enerally, immunity prevails over liability to the extent that immunity has become the rule and liability is

the exception." Henebema v. S. Jersey Transp. Auth., 219 N.J. 481, 490 (2014).

N.J.S.A. 59:2-2 provides:

> a. A public entity is liable for injury proximately caused by an act or omission of a public employee within the scope of his employment in the same manner and to the same extent as a private individual under like circumstances.
>
> b. A public entity is not liable for an injury resulting from an act or omission of a public employee where the public employee is not liable.

N.J.S.A. 59:4-2 provides that a public entity can be liable for an injury caused by a condition of its property only if:

> [T]he plaintiff establishes that the property was in dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:
>
> a. a negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or
>
> b. a public entity had actual or constructive notice of the dangerous condition . . . a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

A public entity has actual notice of a dangerous condition "if it had actual knowledge of the existence of the condition and

knew or should have known of its dangerous character." N.J.S.A. 59:4-3(a). A public entity has constructive notice "only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character." N.J.S.A. 59:4-3(b). A public entity is not liable "for a dangerous condition of its public property if the action the entity took to protect against the condition or the failure to take such action was not palpably unreasonable." N.J.S.A. 59:4-2.

"[W]hen the negligent activities of an employee involve the creation of a dangerous condition of public property, the vicarious liability provisions of N.J.S.A. 59:2-2 must give way to the more exacting standards of N.J.S.A. 59:4-2." Ogborne, supra, 197 N.J. at 460. Moreover, "when the facts are reasonably debatable that a public employee's act or failure to act created a dangerous condition of property, and that condition of property causes an injury, the higher standard of palpably unreasonable conduct in N.J.S.A. 59:4-2 operates to trump the ordinary negligence standard . . . ." Ibid.

In Ogborne, a city employee locked the gates of a park with the plaintiff still inside. Id. at 453. The plaintiff then climbed the park fence to escape and broke her tibia. Id. at 453-

54. The Court explained that the combination of locking the gate and plaintiff being in the park made the park potentially dangerous. Id. at 461. The Court reasoned that it was debatable whether the locking of the gate rendered the park a dangerous condition, and therefore N.J.S.A. 59:4-2 applied. Ibid.

Here, the heightened standard of N.J.S.A. 59:4-2 was appropriately applied. The combination of plaintiff's use of his father's ladder and the height of the installation possibly made the STEM building dangerous. Kean's employee, like the city's worker in Osborne, arguably created a dangerous condition and therefore the trial court properly found that the vicarious liability provisions of N.J.S.A. 59:2-2 gave way to the more exacting standards of N.J.S.A. 59:4-2. See Ogborne, supra, 197 N.J. at 460.

Considering the evidence in the light most favorable to plaintiff, the court correctly concluded that plaintiff failed to establish a prima facie case under N.J.S.A. 59:4-2. Plaintiff failed to establish a dangerous condition because he was not using Kean's property at the time of the accident and he did not suggest the actual building created a dangerous condition. Plaintiff also failed to establish that Kean had actual or constructive notice of the alleged dangerous condition which plaintiff created when he used his father's ladder for the installation. Plaintiff was

alone on the day of the accident and did not inform Kean that he needed a ladder.

II.

Plaintiff contends the trial court erred by granting summary judgment to Fastsigns. He contends the court applied the wrong legal standard when the court failed to apply "a multi-factorial foreseeability analysis."

For negligence actions, a plaintiff must show that a defendant owed him a duty of care. Pfenninger v. Hunterdon Cent. Reg'l High Sch., 167 N.J. 230, 240 (2001). A person who employs an independent contractor is not liable for the negligent acts of the independent contractor. Majestic Realty Assocs., Inc. v. Toti Contracting Co., 30 N.J. 425, 430-31 (1959). However, there are three exceptions to this general rule. "An individual will be held liable if he or she: (1) retains control of the manner and means by which the work will be performed; (2) retains an incompetent contractor; or (3) retains an independent contractor to perform work that constitutes a nuisance per se." Jarrell v. Kaul, 223 N.J. 294, 317 (2015); see also Basil v. Wolf, 193 N.J. 38, 63 (2007).

Plaintiff suggests the present action is similar to Carvalho v. Toll Bros. & Developers, 143 N.J. 565 (1996), and Alloway v. Bradlees, Inc., 157 N.J. 221 (1999), where the Court used a

foreseeability analysis. We disagree. In Carvalho, a workman was killed in a deep trench that collapsed on him, and an inspector hired by the project engineer witnessed the accident. Id. at 569. Under the contract, the engineer was required to have an inspector at the construction site monitoring the progress, but the engineer did not have a contractual obligation to supervise safety procedures at the site. Ibid. The Court found that the engineer had "a legal duty to exercise reasonable care for the safety of workers on a construction site . . . ." Ibid. Unlike the present action, the engineer in Carvalho had a contractual duty to ensure compliance with the construction plans and this contractual duty involved safety concerns. Id. at 575.

In Alloway, supra, 157 N.J. 221, 225, a driver employed by a subcontractor was injured while delivering stone to a general contractor. Although the Court applied general principles of tort liability pursuant to the facts of the case, the case is distinguishable. Id. at 230-33. The Court found that several of the general contractor's employees knew that the delivery truck was defective and tried to correct the defect. Id. at 233.

Here, the trial court correctly analyzed plaintiff's claim using the traditional common law approach to independent contractors. Plaintiff's relationship with Fastsigns did not fall under any of the three exceptions to the general rule. First,

Fastsigns did not retain control of the manner or means of the work that was to be performed. Fastsigns was not present at the location on the day of the accident, did not provide plaintiff with the tools needed to install the vinyl signs other than the actual signs themselves, and provided Kean's contact information in order for plaintiff to have direct communication with Kean. There is no material dispute of fact that Fastsigns did not have control over the job.

Fastsigns also did not employ an incompetent contractor. An employer is subject to liability under the incompetent contractor exception when the employer fails "to exercise reasonable care to employ a competent and careful contractor (a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or (b) to perform any duty which the employer owes to third persons." Basil, supra, 193 N.J. at 68 (quoting Restatement (Second) of Torts § 411 (1965)).

It is undisputed that at the time of the accident, plaintiff worked full-time at Applied Graphics installing vinyl on buildings, office windows, and cars. Plaintiff had had that job for roughly five years. Fastsigns allowed plaintiff to accept or decline jobs and plaintiff accepted the job at Kean knowing that it would be at a significant height. Furthermore, plaintiff testified that he used a ladder about three times a week during

the five years he worked for Applied Graphics, and therefore he was sufficiently skilled in applying graphics on a ladder.

Fastsigns did not retain plaintiff to work on a nuisance per se. An inherently dangerous job or nuisance per se is "an activity which can be carried on safely only by the exercise of special skill and care, and which involves grave risk of danger to persons or property if negligently done." Majestic Realty Assocs., Inc., supra, 30 N.J. at 435. This "risk is different 'from the common risks to which persons in general are commonly subjected by the ordinary forms of negligence.'" Mavrikidis v. Petullo, 153 N.J. 117, 144 (1998) (quoting Restatement (Second) of Torts, § 416 comment d (1965)). "[Routine] precautions are the responsibility of the contractor." Id. at 144 (alteration in original) (quoting Restatement (Second) of Torts, § 413 comment b (1965)). Here, working on a ladder was not an inherently dangerous task and routine precautions such as having someone hold the ladder could have decreased plaintiff's chances of injury.

Affirmed.