Opinion issued July 14, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-01088-CV

FRANCISCO BUCHAN, Appellant

V.

ALLIANCE COMMUNITIES, LLC, Appellee

On Appeal from the 80th District Court
Harris County, Texas
Trial Court Case No. 2015-14697

MEMORANDUM OPINION

This is an appeal from summary judgment ordering that appellant, Francisco Buchan, take nothing from appellee Alliance Communities, L.L.C. We affirm.

Background

Buchan was injured while performing repairs at the Terra at Piney Point Apartments in Houston. The property consists of several apartment buildings managed by Alliance Communities, L.L.C. ("Alliance"), and owned by Front Range Piney Point, LP ("Front Range"). At Front Range's request, Alliance obtained a bid to perform various exterior repairs to the property, such as painting, rotted-wood replacement, gutter and masonry repairs, and carpentry work from Multi-Family Services, Inc. ("MFS"). Alliance, as agent for Front Range, signed a contract with MFS for the repairs. MFS outsourced various portions of the work to subcontractors. MFS hired subcontractor Rolando Garcia to remove and replace rotted wood. Garcia, in turn, hired Buchan to assist with the job. Buchan's role was to secure and hold a ladder used by a coworker and to transport the ladder to the next task.

High-voltage overhead electric power lines ran behind a few of the apartment buildings, parallel to the back-property line, and the perimeter fence behind those buildings was too close to the buildings to allow a proper angle for an extension ladder to reach the top of the chimney. MFS warned Garcia about the power lines at the beginning of the project and instructed Garcia not to work in that area until MFS devised a safety plan. Garcia understood and told MFS he would instruct his subcontractors accordingly.

On the day of the incident, Buchan and a coworker worked on a building near the back property line. The back side of the building was about nine feet from the perimeter fence of the property line, and the overhead power lines were about seven feet from the building. Buchan and a coworker were performing tuck-pointing, a process that adds or replaces mortar between bricks, on a chimney that was 45 to 50 feet high. In order to reach the chimney, they tied two ladders together with ropes and a strap provided by Garcia. Because of the limited space, the ladder was not properly angled when placed against the building. While the coworker was on the ladder, the ladder began to sink into the ground. Buchan attempted to hold the ladder steady by pulling it up, but the ladder fell backward and struck the power lines. The coworker was shocked and fell off the ladder, and Buchan sustained serious burns that led to the loss of his arms.

Buchan sued MFS, Alliance, and Front Range for personal-injury damages, alleging negligence, negligence per se, and gross negligence. The negligence claim was based on negligent activity and premises liability. The negligence-per-se claim was based on the defendants' alleged failure to comply with chapter 752 of the Texas Health and Safety Code, which requires the person "responsible for temporary work" that will occur within a specified distance from a high-voltage overhead powerline to notify the operator of that line to de-energize the line before and during the work. TEX. HEALTH & SAFETY CODE §§ 752.003 ("chapter 752").

Alliance filed a traditional motion for summary judgment as to all of Buchan's claims. Alliance argued that it owed no duty to Buchan because it did not control the work he performed on the property and was not the person "responsible for the work" under chapter 752, and therefore Alliance had no duty to notify the operator of the power lines and request that they be deenergized. Alliance filed a no-evidence motion for summary judgment challenging each element of each cause of action. Both motions sought a take-nothing judgment on all claims.

The trial court granted both motions in separate orders and dismissed all claims against Alliance. Buchan's claims against Front Range were severed and Buchan nonsuited his claims against MFS. Buchan appeals.

Summary Judgment

On appeal, Buchan challenges the trial court's summary judgment orders on his negligence-per-se claim.[*] He argues that his summary judgment evidence created a fact issue whether Alliance had a duty under chapter 752 of the Health and Safety Code, which requires the person responsible for work near power lines to notify authorities so they can be deenergized. Alliance responds that its summary judgment evidence demonstrated as a matter of law that it had no duty under chapter 752. We agree with Alliance.

[*] Buchan does not challenge the trial court's summary judgment orders on his negligence or gross negligence claims.

A. Standard of Review

We review a trial court's summary judgment ruling de novo. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). We consider the evidence presented in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if reasonable jurors could, and disregarding evidence contrary to the nonmovant unless reasonable jurors could not. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). We indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *20801, Inc. v. Parker*, 249 S.W.3d 392, 399 (Tex. 2008).

A movant for traditional summary judgment must establish that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. *See* TEX. R. APP. P. 166a(c); *Mann Frankfort Stein & Lipp Advisors, Inc.*, 289 S.W.3d at 848; *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985). A party without the burden of proof who conclusively negates at least one essential element of a cause of action is entitled to summary judgment on that claim. *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 508 (Tex. 2010); *see* TEX. R. CIV. P. 166a(b), (c). Once the movant produces sufficient evidence to establish the right to summary judgment, the burden shifts to the claimant to come forward with competent controverting evidence that raises a fact issue. *Lujan v. Navistar, Inc.*, 555 S.W.3d 79, 84 (Tex. 2018).

After an adequate time for discovery, a party without the burden of proof may, without presenting evidence, move for summary judgment on the ground that there is no evidence to support an essential element of the nonmovant's claim or defense. TEX. R. CIV. P. 166a(i). The motion must specifically state the elements for which there is no evidence. *Id.*; *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009). The trial court must grant the motion unless the nonmovant produces summary judgment evidence that raises a genuine issue of material fact. *See* TEX. R. CIV. P. 166a(i); *Hamilton v. Wilson*, 249 S.W.3d 425, 426 (Tex. 2008). If the nonmovant brings forward more than a scintilla of probative evidence that raises a genuine issue of material fact, then a no-evidence summary judgment cannot properly be granted. *Smith v. O'Donnell*, 288 S.W.3d 417, 424 (Tex. 2009); *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003).

When a trial court grants a summary judgment involving both no-evidence and traditional grounds, we ordinarily address the no-evidence grounds first. *See Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004). "However, if we conclude that we must affirm the trial court's summary judgment on traditional grounds, we need not review the no-evidence grounds." *Davis-Lynch, Inc. v. Asgard Techs., LLC*, 472 S.W.3d 50, 59 (Tex. App.—Houston [14th Dist.] 2015, no pet.); *Wilkinson v. USAA Fed. Sav. Bank Trust Servs.*, No. 14-13-00111-CV, 2014 WL 3002400, at *5 (Tex. App.—Houston [14th Dist.] July 1, 2014, pet. denied) (mem.

op.) (affirming summary judgment on traditional grounds, without considering alternative no-evidence grounds where evidence conclusively proved defendants were entitled to judgment as a matter of law); *see also* TEX. R. APP. P. 47.1.

B. Analysis

In its traditional motion for summary judgment, Alliance asserted two independent grounds pertinent to Buchan's negligence-per-se cause of action under chapter 752: (1) it did not violate chapter 752 because it was not "responsible for the work" and (2) it had no right to control, and did not exercise control, over Buchan's work. *See* TEX. HEALTH & SAFETY CODE § 752.003(a).

To prevail on a claim for negligence per se, the plaintiff must prove that: (1) he belongs to the class of persons the statute was designed to protect, and his injury is of the type the statute was designed to prevent; (2) the statute is one for which tort liability may be imposed when violated; (3) the defendant violated the statute without excuse; and (4) the defendant's act or omission proximately caused the plaintiff's injury. *See Perry v. S.N.*, 973 S.W.2d 301, 305 (Tex. 1998); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 549 (Tex. 1985).

The crux of a negligence-per-se claim is whether the defendant violated a statutory duty it owed to the plaintiff under the circumstances and whether that violation proximately caused the plaintiff's injuries. *Nixon*, 690 S.W.2d at 549. The statutory duty under chapter 752 is to "notify the operator of [the high-voltage

overhead line] at least 48 hours before the work [that may possibly occur within six feet of the line] begins." TEX. HEALTH & SAFETY CODE § 752.003(a). The duty is owed by the "person, firm, corporation, or association responsible" for the temporary work near the lines. *Id.*

We have held that section 752.003 imposes a duty on the party who is responsible for the work and "most knowledgeable about the need to notify the utility." *Wood v. Phonoscope, Ltd.*, No. 01-00-01054-CV, 2004 WL 1172900, at *8 (Tex. App.—Houston [1st Dist.] May 27, 2004, no pet.) (mem. op.). In *Wood*, the court affirmed summary judgment for an owner who did not have supervisory control over the details of the injured sub-subcontractor's work. *Id.* at *9–10. Similarly, we have affirmed summary judgment in favor of a building owner after a contractor was injured from touching electrical wires while painting a roof with a spray gun. *See Trail v. Friederich*, 77 S.W.3d 508, 513 (Tex. App.—Houston [1st Dist.] 2002, pet. denied). In that case, the plaintiff asserted that a fact issue existed regarding who was the person responsible under chapter 752. We held that while the owner may have some control over a work site, he may have "nothing whatever to do with the work except to authorize it and pay the contractor." *Id.* at 512. Because the owner had no right to direct the details of the plaintiff's work, he was not the "person responsible" under chapter 752. *Id.* at 513.

The summary-judgment evidence in this case shows that Alliance was not the "person responsible" under chapter 752. Alliance did not control the work and did not direct the tasks that Buchan performed. It is undisputed that Alliance did not have a contract with either Garcia or Buchan. MFS hired Garcia as a subcontractor to replace rotted wood and perform other carpentry work, and Garcia hired Buchan as his subcontractor to assist with that portion of the job.

Alliance was also not contractually responsible. Alliance, as an agent for Front Range, signed a contract for all of the repairs with MFS, but under the contract, MFS agreed to provide all labor, furnish all materials and equipment, and accept sole responsibility for providing a safe place to work for its employees and for employees of its subcontractors. MFS also certified that it was familiar with the location and conditions under which the work would be performed. Alliance did not instruct MFS or its subcontractors how to perform the details of the work.

Section 18.2 of the contract gives Alliance some responsibility for the work, but the duty is only triggered by the issuing of a directive. It states:

> Owner or Manager may issue a directive to Contractor with respect to a safety compliance issue and may require Contractor to respond promptly to such directive. Failure of Contractor to correct the violation may cause Owner or Manager at its discretion to take whatever steps are deemed to be necessary to correct said violation in order to provide a safe work site for all concerned parties.

The record does not reflect, and Buchan does not argue, that Alliance issued a directive as contemplated in this section. No other provision gives responsibility or

control to Alliance; MFS was ultimately responsible for the work and safety of the worksite. Further, under the contract, MFS indemnifies Alliance and is ultimately financially responsible for any injuries that occur at the worksite.

The record also reflects that MFS was aware of the powerline and instructed Garcia not to let his subcontractors, such as Buchan, work near the line until MFS developed a safety plan. MFS did not consult with Alliance regarding the plan or advise Alliance of its instruction to Garcia. Garcia acknowledged that Buchan was not supposed to be working in the location where the incident occurred, and that MFS and Alliance had no knowledge that Buchan was working in that area.

Under the facts of this case, though Alliance contracted with MFS to complete repairs at the apartment complex, Alliance's role was to authorize and pay for the work, and Alliance was not the "person responsible" for the work under chapter 752. *See Trail*, 77 S.W.3d at 512. We conclude Alliance conclusively established that it did not have a duty to Buchan under chapter 752, and the trial court did not err in granting summary judgment on Alliance's negligence-per-se claim.

Conclusion

We affirm the judgment of the trial court.

Peter Kelly
Justice

Panel consists of Chief Justice Radack and Justices Kelly and Goodman.