

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT-LAW DIVISION

JOSEPH NAVARRO,)
)
Plaintiff,) 2015 MAY 13 PM 3:37
)
) No.: 14 M1 300567
v.)
)
LORETTA HOSPITAL,)
)
Defendant.)

Transferred to Law Division

REPLY OF DEFENDANT, LORETTA HOSPITAL,
TO PLAINTIFF, JOSEPH NAVARRO'S RESPONSE
TO MOTION FOR SUMMARY JUDGMENT OF LORETTA HOSPITAL

A.

LORETTA DID NOT OWE A DUTY TO NAVARRO UNDER
RESTATEMENT (SECOND) OF TORTS §414(c) BECAUSE
LORETTA DID NOT CONTROL THE MEANS, METHODS OR OPERATIVE
DETAILS OF NAVARRO'S 5-W CONSTRUCTION WORK

In Count I (Construction Negligence) of Plaintiff's Complaint and in Plaintiff's Response, Plaintiff acknowledges RESTATEMENT (SECOND) OF TORTS §414(c) (1965) governs Plaintiff's negligence claim. (Exhibit A, pg. 1; Response, pgs. 1). Liability under §414(c) arises only if two conditions are satisfied: (1) the defendant "entrusts work to an independent contractor", and (2) the defendant "retains the control of any part of the work". *Martens v. MCL Constr. Corp.*, 347 Ill. App. 3d 303, 314, 807 N.E.2d 480, 489 (2004). Plaintiff has not established facts that any employee of LORETTA supervised the means and methods of construction used by Ujamaa/NAVARRO to construct the 5-W temporary wall. Plaintiff has not established anyone from LORETTA was present when NAVARRO constructed the 5-W temporary wall, that anyone from LORETTA directed his wall construction, or that anyone from LORETTA was in any way connected with NAVARRO's 5-W temporary wall construction methods. (Exhibit G, pg. 12).

Plaintiff argues LORETTA's request Ujamaa build a 5-W temporary wall to comply with an upcoming IDPH inspection was not covered by the construction documents. (Response, pgs. 2, 9). According to Plaintiff, this supports a finding of §414(c) retained control. (Response, pgs. 3, 9). The Response arguments ignore the contracts between LORETTA and Ujamaa and ignore the parties' actual practice and interaction with respect to job site control.

In Count I, par 3 of Plaintiff's Complaint, Plaintiff alleges *LORETTO was present during the overall work, including NAVARRO's ladder fall; that Defendant could stop work, refuse work, and make change orders.* (Exhibit A, pg. 1-2, par. 3). In part, these allegations allude to the AIA DOCUMENT A201-2007, GENERAL CONDITIONS, which Plaintiff claims did not govern the **April 17, 2012** activities. (Exhibit 'H', sub-exhibit 3; Exhibit 'I', sub-exhibit 3; Exhibit 'J', sub-exhibit 3).

Ujamaa's construction of the 5-W temporary wall was governed by 'THE WORK' and 'THE PROJECT.' (Exhibit 'H', sub-exhibit 3, §1.1.3, §1.1.4; Exhibit 'I', sub-exhibit 3, §1.1.3, §1.1.4; Exhibit 'J', sub-exhibit 3, §1.1.3, §1.1.4). Construction of the 5-W temporary wall meets definitions of 'THE WORK' under the AIA DOCUMENT A201-2007, GENERAL CONDITIONS, §1.1.3. (Exhibit 'H', sub-exhibit 3, §1.1.3; Exhibit 'I', sub-exhibit 3, §1.1.3; Exhibit 'J', sub-exhibit 3, §1.1.3). Under the AIA DOCUMENT A201-2007, GENERAL CONDITIONS, §3.3.3, Ujamaa was responsible to comply with all government inspections and comply with all construction rules attributable to Ujamaa's work. (Exhibit 'H', sub-exhibit 3, §3.3, §3.7.2; Exhibit 'I', sub-exhibit 3, §3.3, §3.7.2; Exhibit 'J', sub-exhibit 3, §3.3, §3.7.2). This meant, Ujamaa, not LORETTO, needed to build the 5-W temporary wall in compliance with applicable IDPH requirements. Change orders were allowed without invalidating the contract. (Exhibit 'H', sub-exhibit 3, §7.1; Exhibit 'I', sub-exhibit 3, §7.1; Exhibit 'J', sub-exhibit 3, §7.1).

Before constructing the 5-W temporary wall, Ujamaa had in place a small partition on 5-W. Ujamaa knew IDPH required separations everywhere. (Exhibit G, pg. 20). Ujamaa's construction of the 5-W temporary wall was a change order to the temporary partition Ujamaa already had in place. *Id.* Ujamaa needed a 5-W temporary wall to meet IDPH inspection requirements. (Exhibit G, pgs. 11, 20) The purpose of the 5-W temporary wall was to keep people out of the Ujamaa's construction zone and act as a fire barrier. (Exhibit F, pgs. 35, 36; Exhibit J, pg 14; Exhibit I, pg. 11).

LORETTO's request to Ujamaa that Ujamaa build a 5-W temporary wall in compliance with IDPH safety guideline is considered a change to project plans and specifications and do not create "retained control" for purpose of section §414(c). *See Rangel v. Brookhaven Constructors, Inc.*, 307 Ill. App. 3d 835,

719 N.E.2d 174 (1st Dist. 1999). At the time of NAVARRO's fall, the project was two-thirds complete. (Exhibit J, pg. 19). Change orders would be a routine part of Ujamaa's construction responsibility.

Plaintiff makes no factual showing that in advance of any IDPH inspection, LORETTA was required to provide Ujamaa construction plans for any temporary wall. LORETTA left construction details to PFB Architects and Ujamaa. (Exhibit J, pgs. 25, 29, 37, 38).

Plaintiff makes reference to whether an Interim Life Safety Plan was in place between LORETTA and Ujamaa. (Response, pg. 7, 8). Pappone said the Interim Life Safety Plan was provided by PFB Architects. (Exhibit J, pg. 24). Lay said the Interim Life Safety Plan may have been developed by Ujamaa. (Exhibit H, pgs. 52, 55). Lay was not certain if an Interim Life Safety Plan was in place on **April 17, 2012**, as he was not present. (Exhibit H, pg. 40). Plaintiff makes no allegation or showing an Interim Life Safety Plan affected the means and methods NAVARRO used to construct the 5-W temporary wall. LORETTA entrusted development of the Interim Life Safety Plan to PFB Architects and/or Ujamaa, which supports LORETTA's position the responsibility for the expansion project was assigned to PFB Architects and Ujamaa.

While PFB Architects did not provide 5-W temporary wall plans to Ujamaa, or Ujamaa did not need, or elected not to follow construction plans, LORETTA was never responsible for the 5-W temporary wall construction. If there was a problem with the 5-W temporary wall or the need for this 5-W temporary wall was an unusual request, Ujamaa could have raised the issue with PFB Architects. (Exhibit J, pg. 29). This did not occur.

Plaintiff claims LORETTA retained control over 5-W temporary wall construction because specifications came from an unknown LORETTA employee. (Response, pg. 10). This is what NAVARRO heard from an unknown person and the meaning of 'specifications' is undefined. (Exhibit E, pgs. 71, 72). NAVARRO recalled no conversations with John Pappone. (Exhibit E, pg. 82). NAVARRO's statement 'specifications' came from unknown LORETTA employee does not create a material fact LORETTA retained §414(c) control. This is especially true because Poholik confirmed Bruce Laurie told Poholik and NAVARRO where to put the 5-W temporary wall and they were not following blueprints. (Exhibit F, pg. 36).

Plaintiff argues LORETTA assumed control of Ujamaa/NAVARRO by Pappone's requesting Ujamaa build the 5-W temporary wall in the area the wall was built. (Response, pg. 9). Plaintiff did not identify any problems with either construction tools, supplies, or workspace. (Exhibit E, pgs. 95, 96, 98-99, 102, 103). Plaintiff has not established Pappone or LORETTA directed NAVARRO to do anything, or that anyone from LORETTA had anything to do with the way NAVARRO built the 5-W temporary wall. Plaintiff has not established LORETTA knew or should have known NAVARRO would try and use a ladder to hang drywall atop the threshold of stairway 5-W. (Exhibit J, pg. 14). Modifying construction plans to meet a government safety inspection does not establish LORETTA retained control. Additionally, Plaintiff offers no proof anyone from LORETTA was rushing either Ujamaa or NAVARRO to finish the 5-W temporary wall or was on site demanding wall completion. (Exhibit F, pg. 31).

Without factual reference, Plaintiff says LORETTA retained sufficient supervision of NAVARRO such that NAVARRO *was not entirely free to do the work his own way*. (Response, pg. 10). Plaintiff admits LORETTA did not instruct NAVARRO to use a ladder. According to Plaintiff, LORETTA assumed §414(c) control because LORETTA limited the means and methods NAVARRO used to build the 5-W temporary wall. (Exhibit J, pg. 14). LORETTA did not provide Ujamaa or NAVARRO with any information how NAVARRO was to construct 5-W temporary wall. *Id.* NAVARRO's instructions came from his supervisor Laurie. LORETTA did not provide any equipment or tools, and did not tell NAVARRO what tools or equipment to use. (Exhibit E, pgs. 79, 89). Upon starting the 5-W temporary wall assignment, NAVARRO made no complaints to Laurie his ladder placement or his work space was unsafe. (Exhibit E, pgs. 95, 96, 98-99, 102, 103). There are no material facts LORETTA retained a right of supervision, which affected the means and methods NAVARRO used to complete the 5-W temporary wall.

NAVARRO cannot factually establish LORETTA's §414(c) control over the way Ujamaa/NAVARRO attempted 5-W temporary wall construction. (Exhibit F, pg 19; Exhibit I, pg. 11; Exhibit J, pg. 14). Even if LORETTA had a duty of care, LORETTA's duty only required reasonable care, §414 (b). *O'Gorman v. F.H. Paschen, S.N. Nielsen, Inc.,* 2015 WL 1281750 (Ill. App. 1 Dist. 2015). NAVARRO cannot show LORETTA breached any duty to NAVARRO. Additionally, NAVARRO has not established

LORETTA had reasonable notice of any unsafe 5-W stairway construction activity. *Cochran v. George Sollitt Constr. Co.*, 358 Ill. App. 3d 865, 832 N.E.2d 355 (1st Dist. 2005).

Pursuant to 735 ILCS 5/2-1005(b), Defendant, LORETTA HOSPITAL, respectfully asks this Honorable Court grant a summary judgment on Count I (Construction Negligence) of Plaintiff's Complaint against Plaintiff and in favor of Defendant, LORETTA HOSPITAL.

B.

**LORETTA DID NOT OWE A DUTY TO NAVARRO UNDER
RESTATEMENT (SECOND) OF TORTS §343 BECAUSE
LORETTA DID NOT CREATE ANY PREMISES DEFECT AND
LORETTA WAS NOT AWARE OF NAVARRO'S 5-W CONSTRUCTION ACTIVITIES.**

In Count II (Premises Liability) of Plaintiff's Complaint and in Plaintiff's Response, Plaintiff acknowledges RESTATEMENT (SECOND) OF TORTS §343 (1965) governs Plaintiff's premises liability claim. (Exhibit A, pg. 4; Response, pgs. 1-2). To meet §343 requirements, all three elements must be established. (Response, pg. 11).

LORETTA did not owe NAVARRO a duty under RESTATEMENT (SECOND) OF TORTS §343 (1965) because LORETTA did not create any premises defect, nor was LORETTA aware of the way NAVARRO was constructing the 5-W temporary wall.

Plaintiff has not factually established NAVARRO's ladder fall was caused by condition on LORETTA's premises; similarly, Plaintiff has not presented any evidence showing LORETTA should have known of any 'defective' condition in stairway 5-W. In Count II (Premises Liability) of Plaintiff's Complaint, par. 7, Plaintiff alleges, '*there existed a dangerous condition on defendants' property, specifically, an "A frame" ladder situated on a landing in close proximity to a staircase for the use of the Plaintiff while on the premises.*' (Exhibit A, pg. 5, par. 7). NAVARRO fell off an Ujamaa ladder while hanging drywall on, a portion of a wall, NAVARRO had just built. (Exhibit E, pgs. 94-95). These facts do not establish premises liability against LORETTA. NAVARRO set up his own ladder and made his own drywall decisions. NAVARRO has not established evidence of a defect on LORETTA's premises, i.e. the building, fixtures, or the land.

As discussed previously, neither Plaintiff nor any of the Ujamaa occurrence witnesses testified there was anything defective about NAVARRO's work space. (Exhibit E, pg. 95). The stairs, steel railing, threshold, VCT tile, ladder and lighting were fine. (Exhibit E, pgs. 95, 96, 98-99, 102, 103). NAVARRO made no complaints to anyone at anytime his workspace was too confined; that Ujamaa's lack of measurements affected his wall framing; that his work tools or safety equipment were inadequate or that LORETTA did anything to cause him to fall off his ladder. (Exhibit E, pgs. 95, 96, 98-99, 102, 103).

Without factual citation, Plaintiff argues LORETTA created a 'dangerous condition' under which NAVARRO had to work because Pappone specified precisely where Ujamaa was to build the 5-W temporary wall. (Response, pg. 12). All Laurie said was Pappone asked Ujamaa to build a wall to separate Ujamaa construction space from the stairwell for an IDPH inspection. (Exhibit G, pg 19). LORETTA had no say or knowledge how Ujamaa would construct the 5-W temporary wall, which Ujamaa employee would construct the 5-W temporary wall, or that any Ujamaa employee would use a ladder to hang the drywall. In other words, LORETTA did not create a 'dangerous condition' because the 5-W temporary wall construction details were in the exclusive control of Ujamaa/NAVARRRO.

Plaintiff offers no testimony anyone from LORETTA told NAVARRO how to place his ladder on top of the 5-W threshold near an open descending staircase. (Exhibit E, pgs. 88, 89, 97-100; Exhibit F, pgs. 13-17; Exhibit G, pg. 17). NAVARRO offers no testimony anyone from LORETTA was present on 5-W after NAVARRO received Laurie's instructions to build the 5-W temporary wall. (Exhibit E, pg. 80; Exhibit F, pg. 13).

As discussed in LORETTA's MOTION FOR SUMMARY JUDGMENT, ARGUMENT B, Plaintiff has not made any showing LORETTA should have known the way NAVARRO was attempting the 5-W temporary wall construction was dangerous. Again, the testimony is NAVARRO independently attempted the 5-W temporary wall construction and LORETTA had no knowledge how NAVARRO was constructing the 5-W temporary wall. For that matter, Poholik was the only person to come upon NAVARRO's construction and only after NAVARRO completed the 5-W temporary wall framing. (Exhibit F, pgs. 9-10).

Again, where the possessor has no actual or constructive knowledge of the unsafe condition, there can be no liability. *Cochran v. George Sollitt Construction Co.*, 358 Ill. App. 3d 865, 873 (2005). In order to prove constructive notice of a dangerous condition, NAVARRO needs to establish the defect or condition existed for a sufficient amount of time so that LORETTA should have discovered the condition by the exercise of reasonable care. Here, there is no such evidence.

As already discussed, LORETTA was not responsible for safety measures relating to Ujamaa's/NAVARRO's construction of the 5-W temporary wall. These measures were exclusively controlled by Ujamaa, both contractually and by its actions. Ujamaa was in charge of its employees and the 5-W job site set up. (Exhibit G, pgs. 7-11). At all times, when NAVARRO was performing his work, he was under Ujamaa's direction. (Exhibit G, pg. 8-9). The evidence fails to demonstrate LORETTA knew of the potential hazards relating to the way NAVARRO framed the wall, set his ladder down, and attempted to hang the drywall. There are no facts establishing LORETTA should have known of NAVARRO's drywall activities at Ujamaa's job site. Similarly, no facts are alleged NAVARRO was distracted or that LORETTA should foresee NAVARRO would become distracted.

Plaintiff contends *Clifford v. Wharton Business Group, L.L.C.*, 353 Ill. App. 3d 34, 817 N.E.2d 1207 (1st Dist. 2004) supports a finding building a wall near a stairwell is a dangerous condition of the land. (Response, pg. 13). *Clifford* does not control. First, liability in *Clifford* is based on the distraction exception; here, Plaintiff does not contend there was any distraction. *Clifford*, 353 Ill. App. 3d at 48. Second, the dangerous condition in *Clifford* was an open and obvious opening in the floor that was made by defendant contractor. *Id.* at 46.

Finally, in Count II (Premises Liability) of Plaintiff's Complaint, par. 10, Plaintiff alleges, '*LORETTA should have reasonably expected that persons on the aforementioned property, including the Plaintiff, would not discover or realize the dangers associated with one or more the aforementioned unsafe conditions and/or activities.*' (Exhibit A, pg. 6, par. 10). Plaintiff has never been factually sustained this critical proof under §343(b). This is one more factor showing Plaintiff's inability to establish a §343 premises liability claim.

Pursuant to 735 ILCS 5/2-1005(b), Defendant, LORETTO HOSPITAL, respectfully asks this Honorable Court grant a summary judgment on Count II (Premises Liability) of Plaintiff's Complaint against Plaintiff and in favor of Defendant, LORETTO HOSPITAL.

Respectfully Submitted,

By: 
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5-13-15

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