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

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| JOSEPH NAVARRO, Plaintiff, | ) | |
| v. | ) | Court No: 14 M1 300567 |
| LORETTO HOSPITAL, Defendant. | ) | |

**RESPONSE TO MOTION FOR SUMMARY JUDGMENT**

In response to the motion for summary judgment filed by the Defendant, LORETTO HOSPITAL ("Defendant" or "Loretto"), Plaintiff, JOSEPH NAVARRO, through his attorneys, states as follows:

Plaintiff, a carpenter, was working on a construction project at Loretto. On April 17, 2012, he was instructed to perform an "extra" item of work, which Loretto wanted done by the following day. The task required Plaintiff to use a ladder positioned in a small space between a temporary fire barrier wall and the upper landing of a staircase. As Plaintiff was working, he fell from the ladder, down to the landing at the bottom of the stairs, and was injured. He sued Loretto under theories of construction negligence and premises liability, alleging, *inter alia*, that Loretto required Plaintiff to work on an exposed edge without the proper equipment, failed to provide him with fall protection, and caused him to work on a ladder situated on an unsafe surface. (See Complaint at Law (**Defendant's Exhibit A**), pp. 2-3, 5-6.)[1]

Loretto has moved for summary judgment on the grounds that it did not owe a duty under either the Restatement (Second) of Torts, Section 414 (1965) ("Section 414"), which governs construction negligence cases; or the Restatement (Second) of Torts, Section 343 (1965) ("Section

[1] All materials Plaintiff cites herein were filed by Loretto as exhibits to its Motion for Summary Judgment, and are cited using Loretto's designations.

343"), which applies to premises liability cases. Plaintiff submits that questions of fact remain outstanding, compelling the denial of Defendant's motion.

**The Evidentiary Record**

The City of Chicago ("City") and Loretto Hospital entered into a Redevelopment Agreement whereby the City was to finance the rehabilitation of various areas of the Loretto Hospital facility (the "Hospital"). (Deposition of John Pappone (**Defendant's Exhibit J**), pp. 7-8; see also Redevelopment Agreement (Def. Ex. J – Pappone dep. ex. no. 1), pp. 1-3.) The Redevelopment Agreement reflected that Loretto (referenced therein as the "Developer") owned the subject property and operated the Hospital (Def. Ex. J – Pappone dep. ex. no. 1, p. 3). It provided that "the Developer shall commence and complete" the various work items specified therein, within the time frames defined by the City (Def. Ex. J – Pappone dep. ex. no. 1, pp. 3, 12).



In connection with the rehabilitation, Defendant hired Ujamaa Construction, Inc. ("Ujamaa") to perform certain construction work in the "5 West" wing of the Hospital (Def. Ex. J, pp. 8-12, 20). Their agreement was signed on Loretto's behalf by John Pappone (Def. Ex. J, pp. 8-9; Loretto/ Ujamaa Agreement (Def. Ex. J – Pappone dep. ex. no. 2), p. 7). Pappone testified that his role at Loretto as Vice President of Support Services[2] included supervising and overseeing the Hospital's construction department (Def. Ex. J, p. 6). Pappone was at the Hospital every day, and visited the construction area approximately once a week to check progress (Def. Ex. J, pp. 19-21). During these visits, Pappone met with either Bruce Laurie or Brent Spoolstra of Ujamaa and walked through the area, comparing the physical work with the architectural drawings (Def. Ex. J, pp. 21-22).

On April 17, 2012, an unplanned item of work arose. Bruce Laurie, the superintendent of the Ujamaa carpenters, testified that Ujamaa was working on other tasks that day when Pappone

[2] Pappone's deposition transcript reflects that his position was "Vice President of Sports Services;" however, as clarified by the testimony of his successor, Albert Lay, the division is actually "Support Services." (See Deposition of Albert Lay (**Defendant's Exhibit H**), pp. 17, 55.)

informed him that Loretto needed a temporary wall built at the top of Stairwell 5W. (Deposition of Andrew Bruce Laurie (**Defendant's Exhibit G**), pp. 5-9.) Laurie further explained:

> Q. And was there any deadline to complete the drywall, the temporary drywall, that Joseph [Navarro] was building at the time of his fall?
>
> A. No specific deadline. We were on overtime at the time, so there was no specific deadline. Just get it done when you can.
>
> Q. And why were you on overtime?
>
> A. We had other tasks to complete, and they asked us – John Pappone had asked us to build a wall to separate our construction space from the stairwell for an IDPH [Illinois Department of Public Health] inspection.
>
> Q. John Pappone specifically directed you to do that?
>
> A. Correct.
>
> ...
>
> Q. So at some point in time John Pappone came up to you at Loretto Hospital and said, "Please get this temporary wall built and completed by the end of today;" is that right?
>
> A. Correct.
>
> ***
>
> A. They wanted to separate the stairwell from our construction space with a one-hour wall, because inside our space we did not have a one-hour wall. We just had a small partition to keep people from coming. IDPH would request that we have a one-hour separation everywhere. And he deemed that it was necessary to have one at the stairwell.

(Def. Ex. G, pp. 18-20.) A "one-hour" separation wall consists of drywall and studs (Def. Ex. G, p. 20; Deposition of Brent Spoolstra (**Defendant's Exhibit I**), pp. 11-12). It serves as a fire barrier, and its name derives from the fire rating required by the IDPH (Def. Ex. G, p. 11).

Pappone did not specifically recall the conversation with Laurie, but remembered an IDPH inspection taking place of 5 West around that time (Def. Ex. J, pp. 22-23). According to Pappone, the temporary fire partition wall would have been included in the interim life safety plan and/or on the drawings provided by the architect, "which usually accompanies construction documents" (Def. Ex. J, pp. 23-24). Pappone's testimony does not establish, though, that the contract documents for this project did, in fact, include anything dealing with the temporary wall.

Laurie assigned the task of building the temporary wall at Stairwell 5W to Plaintiff, Joseph

Navarro (Def. Ex. G, pp. 11, 22). Laurie affirmed that Plaintiff needed a ladder to accomplish the task, as he could not have reached the top of the wall without one (Def. Ex. G, p. 22). Laurie also agreed that Plaintiff had to use the ladder on both sides of the wall during its construction and installation (Def. Ex. G, p. 22). His task required him to use force to install screws while on the ladder (Def. Ex. G, p. 24).

Plaintiff, an Ujamaa carpenter, testified that Bruce Laurie was his supervisor at Loretto (Deposition of Joseph Navarro (**Defendant's Exhibit E**), p. 68). On April 17, 2012, Plaintiff was installing hand sanitizers in patient rooms when Laurie advised him of certain work that the Hospital wanted done that day for an upcoming inspection (Def. Ex. E, pp. 65-70). Regarding the wall he was building when he was injured, Plaintiff testified:

> Q. There was a barrier, a temporary wall that Ujamaa was going to –
>
> A. Now we're talking about the staircase? Yeah.
>
> ...
>
> Q. Ujamaa was going to build the wall; is that right?
>
> A. Well, yeah.
>
> Q. All right. Now, where did the – the specifications for this job come from? Did it come from the architects, if you know?
>
> A. When I came downstairs from the boiler room ... I had to get a ... jackhammer out of the gang box. And our gang box is right by the elevator. On the other side of that wall there's an elevator. And when I went down – our gang box, our tools are right there. And when I got there, I was as far as I am from you, from the person at Loretto and Bruce. They were talking right there. ... The guy goes, "I want the wall right here. Put the wall here. We have" – "especially I don't want nobody accessing this floor." ... That's what he told Bruce. ... The specifications for that wall came from the guy at Loretto.

(Def. Ex. E, pp. 71-72; see also p. 85.)

Plaintiff testified that the order to build the wall came late in the day, and that Ujamaa had to work late to get it done (Def. Ex. E, p. 73). Plaintiff was performing this assignment when he fell to the bottom of the stairs (Def. Ex. G, pp. 12-13). Based on the height of the wall – approximately eight feet off ground level – he needed a ladder for the top portion (Def. Ex. E, pp. 90-92). The area

where he had set his ladder up to do the work was a tight space, between the portion of the temporary wall he had already built and the stairs; and was dictated by where Loretto specified the temporary wall to be placed. Regarding the location where the work was to be done, "[w]e had no choice in that matter." (Def. Ex. E, pp. 75-79, 82-84, 130). Plaintiff testified that he was able to spread and lock his A-frame ladder, but that it was "[v]ery, very tight. No room for nothing." He had to do all of his work without repositioning the ladder because there was only one way it would fit in the space. (Def. Ex. E, pp. 97-98.)

Plaintiff related that he was using his screw gun to install a screw at the very top of the drywall in an area he had difficulty reaching. He had to "give it some pressure," and the force caused him to fall from the ladder and approximately 16 feet down the stairs (Def. Ex. E, pp. 92, 94-95, 115; Def. Ex. G, p. 24). The incident occurred around 6:00 p.m. (Def. Ex. E, p. 112).



Ron Poholik, another Ujamaa carpenter, testified that Loretto would tell Bruce Laurie what tasks needed to be completed, and that Laurie relayed those instructions to the Ujamaa crew (Deposition of Ronald Poholik (**Defendant's Exhibit F**), pp. 5-6, 29). Poholik was familiar with Joe Pappone of Loretto, who he saw in Ujamaa's work area every few days issuing instructions to Ujamaa's staff. According to Poholik, Pappone visited Ujamaa's work area the afternoon of April 17, 2012, at which time Pappone was "making sure that the jobs were being completed, 'cause we had a list of stuff that needed to be completed that day." (Def. Ex. F, pp. 31-33.)

Later that same day, Laurie told the crew that they would have to stay late to build a temporary wall for an IDPH inspection taking place at the Hospital the following day (Def. Ex. F, pp. 26-28). The temporary wall was not on any of the prints for the job (Def. Ex. F, pp. 35-36). Poholik helped Plaintiff with the building of the temporary wall (Def. Ex. F, pp. 5-6, 10). Poholik, standing on one side of the temporary wall, was passing materials through a cut-out to Plaintiff, who was positioned on a ladder on the side of the wall closer to the stairs (Def. Ex. F, pp. 11-15). Plaintiff was using an A-frame ladder, but because there was no room for him to spread it out, the ladder was

leaned up against the part of the temporary wall that had been built (Def. Ex. F, p. 13).[3] Poholik explained that Plaintiff was using a screw gun, and that "when he was screwing the screw into the board, it pushed him back off the ladder" (Def. Ex. F, pp. 15-16).

Poholik noted that Plaintiff should have had fall protection for this task, as it exposed him to a fall of greater than six feet. He also believed that a Baker's scaffold or some other piece of equipment would have been preferable to a ladder. (Def. Ex. F, pp. 29-30.) However, the carpenters did not have such equipment at the site, and they needed to finish this work before they could go home (Def. Ex. F, pp. 26, 30).

Pappone's successor, Albert Lay, was not employed by Loretto as of the day of the incident, but because he was responsible for answering Plaintiff's interrogatories, he has reviewed documents relating to the injury and the work taking place at the Hospital at that time (Deposition of Albert Lay (**Defendant's Exhibit H**), pp. 20-23, 55). According to Lay, the American Institute of Architects ("AIA") A201-1997 General Conditions that were made part of the Loretto/Ujamaa contract documents included language whereby safety was part of Ujamaa's responsibility. (Def. Ex. H, pp. 36-37; see also AIA A201-1997 General Conditions (Def. Ex. H – Lay dep. ex. no. 3).) These provisions, however, contained "normal standard safety information" (Def. Ex. H, p. 49). They did not encompass the work Plaintiff was doing when he was injured; and that work was not reflected in any architectural drawings:

> Q. So I'm going to hand you Exhibit 3 [the AIA A201-1997 General Conditions], and if you could show me where the drywall that Mr. Navarro testified he was building … is referenced in [the General Conditions]?
>
> …
>
> A. There's no plan in here to build this drywall.
>
> Q. Okay.
>
> A. They had no plan.

[3] As noted above, Plaintiff testified that he was able to fully spread the ladder in this space, but that it was tight and afforded no room for repositioning the ladder.

Q. I see.

A. This just speaks to the spirit of safety, general conditions for construction projects. ... There was no plan by Ujamaa architecturally to present this – dealing with a plan for how to construct this wall.

Q. All right. Who was the architect who designed the plan for the fifth floor renovations at Loretto Hospital that Mr. Navarro was working on in April of 2012?

...

A. I believe it was PFB Architects.

Q. And it's your testimony that PFB are – made no drawings whatsoever for the erection of the drywall that Mr. Navarro states he was erecting on April 17th, 2012; is that correct?

A. That is correct.

(Def. Ex. H, pp. 43-45; see also pp. 48-49.)



The only type of document that would address temporary fire barriers and other issues pertaining to fire codes would be interim life safety guidelines (Def. Ex. H, pp. 38-41, 51). Lay elaborated:

Q. Okay. Does Loretto Hospital at the present time have any safety policies, protocols, plans in place concerning any construction that takes place at Loretto Hospital?

...

A. We follow interim life safety guidelines ... for any project in the hospital.

...

Q. All right. What is that?

A. We – If there's anything that would impact the normal way of doing business or migrating through the building, we develop an interim life safety plan for our watchers, fire alarm tags, et cetera, to protect the facility until such impairment has been resolved. So we can still do business, but only with the interim measures in place to protect human safety.

(Def. Ex. H, pp. 38-39.) IDPH standards required the development of interim life safety plans for construction projects like the one Loretto was doing when Plaintiff was injured: "They [the IDPH and the Joint Commission of Hospital Accreditation] have standards that we have to follow. And there's extensive language in there, the interim life safety." (Def. Ex. H, p. 51.)

According to Lay, a hospital such as Loretto should not award a contract to a general contractor without verifying the existence of an interim life safety plan (Def. Ex. H, pp. 54-55).

Notably, though, in Lay's examination of Hospital documents pertaining to this project, he found no record that any interim life safety plan was in place as of April 17, 2012 (Def. Ex. H, pp. 20, 40-41).

**Standards to be Applied to a Motion for Summary Judgment**

Summary judgment is appropriate only where the evidence fails to establish a genuine issue as to any material fact. 735 ILCS § 5/2-1005 (c). In ruling on a motion for summary judgment, the court must construe the evidence in the light most favorable to the nonmoving party (Gen. Cas. Ins. Co. v. Lacey, 199 Ill.2d 281, 284 (2002)) and strictly against the movant (Adams v. Northern Illinois Gas Co., 211 Ill.2d 32, 43 (2004)). Even where the facts are undisputed, summary judgment must be denied if reasonable persons could draw different inferences from those facts or could differ as to the weight to be given the relevant factors of a legal standard. Duffy v. Togher, 382 Ill.App.3d 1, 7 (1 Dist. 2008); Adams, 211 Ill.2d at 43. Summary judgment is a drastic means of disposing of litigation and should be granted only where the right of the moving party is free from doubt. Simmons v. American Drug Stores, Inc., 329 Ill.App.3d 38, 42 (1 Dist. 2002).



## ARGUMENT

### I. QUESTIONS OF FACT CONCERNING LORETTO'S RETAINED CONTROL PRECLUDE SUMMARY JUDGMENT ON THE CONSTRUCTION NEGLIGENCE (SECTION 414) COUNT.

Construction negligence actions are evaluated pursuant to the Restatement (Second) of Torts, Section 414 (1965). An entity that retains control of part of the work on a construction project owes a duty, and will be subject to liability for injuries resulting from its failure to exercise its right of control with reasonable care, so long as it knew or reasonably could have known about a hazardous work practice. Moorehead v. Mustang Const. Co., 354 Ill.App.3d 456, 459 (3 Dist. 2004); Bokodi v. Foster Wheeler Robbins, Inc., 312 Ill.App.3d 1051, 1059, 1063 (1 Dist. 2000). Loretto claims that it did not retain sufficient control over the subject work to be subject to liability. This is normally a factual question. Bokodi, 312 Ill.App.3d at 1059; Wilkerson v. Paul H. Schwendener, Inc., 379 Ill.App.3d 491, 494 (1 Dist. 2008). Such is the case here, and summary judgment must be denied.

In analyzing retained control under Section 414, the courts have frequently focused on comment (c): "... [t]here must be such a retention of a right of supervision that the subcontractor is not entirely free to do the work in his own way." Moorehead, 354 Ill.App.3d at 459; see also Tsourmas v. Dineff, 161 Ill.App.3d 897, 904, 906 (1 Dist. 1987). One must look to the totality of the evidence to make this assessment. Martens v. MCL Const. Corp., 347 Ill.App.3d 303, 315, 318 (1 Dist. 2004). A defendant will not be subject to liability where its retained rights relate strictly to the "ends," leaving "the means by which those ends were achieved" to the subcontractor's discretion. By contrast, a duty *will* be imposed under Section 414 where the defendant instructs its contractors as to "what to do and how to do it, or passes such information through others." Rangel v. Brookhaven Constructors, Inc., 307 Ill.App.3d 835, 839 (1 Dist. 1999).



This case presents a unique scenario in that the work Plaintiff was doing was entirely outside the scope of the contract documents. That is why, according to Loretto's own representative, Albert Lay, the safety language in the contract documents (placing safety responsibility on Ujamaa) had no application to the construction of the temporary wall. Neither the general conditions nor the architectural drawings included any provisions dealing with this unforeseen work item. The only information Ujamaa had available to work with concerning this particular task was the information Pappone provided to Laurie. And that information necessarily placed restrictions on how Ujamaa would accomplish the task: It required Plaintiff to work in a cramped space, while exposed to a significant fall hazard, without his employer having been afforded the time to consider the use of any equipment other than what happened to be on the site at that moment.

For this same reason, Loretto's emphasis on the "ongoing 5-W construction activities" (Defendant's Motion, p. 11), in the context of this particular case, is unwarranted. The item of work Plaintiff was performing at the pertinent time was decidedly different from the "ongoing" construction work, which had been planned far in advance and which was covered in the contract documents and architectural drawings. Until the late afternoon of April 17, 2012, the Ujamaa crew

did not contemplate the construction of a temporary fire barrier wall at the top of a set of stairs. Certainly, they could not have expected that they would have to accomplish that task with less than a day's notice. But that is precisely what Pappone required of them. Ujamaa was afforded no time to plan the task or procure additional equipment that might allow it to be done more safely. Thus, while Loretto may not have explicitly instructed Plaintiff to use a ladder for the task (Def. Mot., p. 11),[4] it is clear that Plaintiff was not, in any meaningful sense, "entirely free to do the work in his own way."

Another point Defendant emphasizes is that the assignment in question was communicated to Plaintiff by Ujamaa's Bruce Laurie, not a Loretto employee (Def. Mot., p. 11). A Section 414 duty, however, can be properly found where the defendant's instructions are relayed through others. See Rangel, 307 Ill.App.3d at 839. Laurie testified that the assignment he gave to Plaintiff had been personally conveyed to him (Laurie) by John Pappone of Loretto. Plaintiff witnessed part of that conversation, and his testimony on this point is fully consistent with Laurie's. Indeed, Plaintiff testified that "[t]he specifications for that wall came from the guy at Loretto" (Def. Ex. E, pp. 71-72). Pappone may not recall the subject conversation, but that fact, at best, creates a question of fact – not grounds for summary judgment.

Finally, Defendant observes that the relationship between Loretto and Ujamaa was an owner-general contractor arrangement, as opposed to the more typical Section 414 situation wherein the plaintiff is a subcontractor's employee making a claim against the general contractor (Def. Mot., p. 12). This observation is true, but in itself, is irrelevant. Section 414's application does not depend on the defendant's status as owner, general contractor, construction manager or subcontractor. It depends on whether the evidence reveals that the defendant retained the requisite level of control over the work. For the reasons articulated above, Plaintiff submits that the contracts are not dispositive of this issue as to the "extra" work taking place at the time of his injury, and that there

[4] Incidentally, based on the wall's height, Loretto could reasonably be expected to know that the workers would need *some* type of equipment to reach the requisite height.

exist sufficient questions of fact as to Loretto's control to overcome Defendant's Motion.

## II. PLAINTIFF'S INJURY WAS OCCASIONED BY A DANGEROUS CONDITION ON THE LAND, AND QUESTIONS OF FACT CONCERNING LORETTO'S NOTICE PRECLUDE SUMMARY JUDGMENT ON THE PREMISES LIABILITY (SECTION 343) COUNT.

Premises liability cases are governed by the Restatement (Second) of Torts, Section 343:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger.

Defendant asserts that Plaintiff's claim does not relate to a "condition on the land" and that, in any event, Loretto lacked notice of the dangerous condition (Def. Mot., pp. 12-14). As further articulated below, Defendant's premise – that the only "dangerous condition" at issue in this case was the ladder Plaintiff was using – is faulty; and both of its arguments accordingly fail.



### A. Plaintiff's injuries relate to a dangerous condition on Loretto's premises.

According to Loretto, Plaintiff's allegations of a "dangerous condition" only concern the ladder Plaintiff was using, and a ladder does not constitute a "condition on the land" for purposes of Section 343 (Def. Mot., p. 13). The problem with this argument is that it is overly simplistic. The ladder, in fact, was only one part of the hazardous situation confronting Plaintiff at the time he fell.

Loretto's suggestion that Plaintiff's Complaint only encompasses the ladder (Def. Mot., p. 13) is incorrect. The Complaint actually alleges that the dangerous condition consisted of "an 'A frame' ladder *situated on a landing in close proximity to a staircase*" (Complaint at Law (Def. Ex. A), p. 5 [emphasis added]). In other words, the ladder posed a danger because of the conditions under which Plaintiff was required to use it. This concept is further developed in Count II, paragraph 8 of Plaintiff's Complaint (Def. Ex. A, pp. 5-6), wherein Plaintiff alleges that Defendant was negligent in "[r]equir[ing] Plaintiff to perform work on *an exposed edge* without the proper

equipment;" "[f]ail[ing] to ensure that *the ground of the premises* was safe for construction to be done;" and causing Plaintiff to "perform his work on a ladder *situated on dangerous or unsafe surfaces*" (subparagraphs (a), (e) and (l) [emphasis added]).

Importantly, the conditions under which Plaintiff had to work on the day of his incident were fixed features of the property. As discussed above, Pappone specified precisely where Ujamaa was to build the subject wall, and it was at the top of a staircase, in close proximity to the top stair. Moreover, for the top part of the wall, Plaintiff needed some means of elevating himself. The task had to be completed on a rush basis, so he used the equipment Ujamaa had at the site, *i.e.*, a ladder. Based on the layout of the staircase and the specified location for the wall, Plaintiff was forced to set the ladder up in a predetermined area. It was a tight space where he was exposed to a fall, not only from the ladder to the ground, but down a flight of stairs.



These facts distinguish our case from Defendant's cited authorities, Recio v. GR-MHA Corp., 366 Ill.App.3d 48 (1 Dist. 2006); Gregory v. Beazer East, 384 Ill.App.3d 178 (1 Dist. 2008) and Schaefer v. Universal Scaffolding & Equipment, LLC, 2015 WL 326876 (S.D.Ill. 2015) (Def. Mot., pp. 10, 13).[5] In Recio, the plaintiff did not even attempt to establish that her decedent's fatal injuries related to a condition on the land. She instead argued that Section 343 could properly apply to an *activity* on the land – an argument that the appellate court properly rejected as faulty. See Recio, 366 Ill.App.3d at 62-63. In Gregory, the appellate court understandably declined to conclude that asbestos gloves and blankets were "conditions on the land" for purposes of premises liability. Gregory, 384 Ill.App.3d at 191-92. And in Schaefer, the plaintiff alleged that he was struck by a scaffold component that had "popped out" and fallen from the overall scaffold. Schaefer, 2015 WL 326876 at *1, 3. There is no indication that Plaintiff's allegations concerned anything beyond the scaffold, which is clearly a piece of equipment as opposed to a "condition on the land." Thus, it is

[5] Defendant also cites Torres v. Gutmann Leather LLC, 2014 IL App (1st) 122460-U. As to this decision, Plaintiff would simply point out that it is unpublished and non-precedential.

not surprising that the magistrate found Section 343 inapplicable. Id., at * 6.

Clifford v. Wharton Business Group, L.L.C., 353 Ill.App.3d 34 (1 Dist. 2004), supports a conclusion that the features of the property in this case constituted "conditions of the land" for purposes of Section 343. In Clifford, the plaintiff was injured when he fell into a stairwell opening. Clifford, 353 Ill.App.3d at 36. The evidence revealed that Plaintiff was required to build a wall in close proximity to the opening, and that he was thrown into the opening when that wall collapsed. He alleged, *inter alia*, that the defendant failed to protect the opening and permitted "dangerous conditions" to exist on the site. Id., at 37. The appellate court rejected the defendant's assertion that the plaintiff's claim was not predicated on a "condition on the land" as required to go forward on a premises liability theory. Id., at 41-42. The court went on to conclude that the circuit court had erred in granting summary judgment for the defendant as to the Section 343 claim. Id., at 46-48.



Just as the stairwell opening in Clifford constituted a condition on the land, the existing stairwell and staircase in our case satisfy this Section 343 prerequisite. It was because Plaintiff needed to work immediately adjacent to the staircase that he was at an increased risk of falling from a height. These facts form an adequate basis for the Section 343 Count of Plaintiff's Complaint.

**B. Loretto had ample notice of the unsafe condition that caused Plaintiff's injuries.**

A plaintiff in a negligence case need not show notice at all when the evidence supports a determination that the defendant created the dangerous condition. Reed v. Wal-Mart Stores, Inc., 298 Ill.App.3d 712, 715-17 (4 Dist. 1998); see also Mueller v. Phar-Mor, Inc., 336 Ill.App.3d 659, 667-68 (1 Dist. 2000). The reasoning behind this rule is that the defendant's involvement in the condition's creation provides the requisite notice. Mark Twain Illinois Bank v. Clinton County, 302 Ill.App.3d 763, 769 (5 Dist. 1999).

Constructive notice of a dangerous condition, where it must be shown, is generally a question of fact. Hornacek v. 5th Ave. Property Management, 2011 IL App (1st) 103502, ¶ 29. A plaintiff can show constructive notice by, *e.g.*, demonstrating that the danger existed for a sufficient time that the

defendant should have discovered it through the exercise of reasonable care. Alternatively, however, "a defendant who has notice of facts which would cause a reasonable person to inquire further may be charged with having notice of other facts that might have been discovered after a reasonable inquiry." Smolek v. K.W. Landscaping, 266 Ill.App.3d 226, 228-29 (2 Dist. 1994).

Like its other Section 343 argument, Defendant's "notice" argument focuses exclusively on the ladder. This is an overly narrow approach that disregards the realities of the situation. The Plaintiff's use of the ladder was dangerous because of the features of the property where he was required to use it – features that forced him to work in a cramped space under conditions that posed an unreasonable risk of falling from a height.



Arguably, Plaintiff should not be required to prove notice because Defendant effectively created the dangerous situation that caused Plaintiff's injury. Prior to that day, there were absolutely no plans to build a temporary wall at the top of this staircase. The specifications and conditions for that work were solely defined by Pappone's directions to Bruce Laurie as to the type of wall needed (a temporary wall that would satisfy IDPH's "one-hour" fire barrier requirements), where it was to be placed (directly at the top of an existing staircase) and when it had to be built (on a rush basis, by the following day). Moreover, the temporary wall was something the Hospital needed in order to pass an IDPH inspection, and thus related directly to Loretto's business operations.

If a showing of notice is required, the evidence of record raises a question of fact as to this issue. Defendant's argument to the contrary is primarily based on the safety provisions found in the contracts (Def. Mot., pp. 13-14), but as discussed in Section I, *supra*, the particular item of work at issue in this case was not governed by those provisions. Nor has any evidence been adduced that there were other drawings or contract documents (*e.g.*, a set of "interim life safety guidelines") that pertained to the construction of the temporary fire barrier wall. The information applicable to that particular task was limited to the instructions John Pappone conveyed to Bruce Laurie on April 17, 2012. This unique facet of our case also serves to distinguish cases like Cochran v. George Sollitt

Const. Co., 358 Ill.App.3d 865 (1 Dist. 2005), where notice to the defendant was found to be lacking. In Cochran, the court found that the defendant had no reason to know about an unsafe ladder setup in a remote area of the jobsite. There, though, the plaintiff's employer devised the setup less than an hour prior to the injury, and did so without discussing the task with the defendant. Cochran, 358 Ill.App.3d at 868-70, 872-73. These facts plainly do not match up with our situation.

Once again, Clifford, *supra*, provides a better analogy. There, the court found that the defendant had constructive knowledge of the hazard that caused the plaintiff's injury (the stairway opening). The court reasoned that the placement of the opening was dictated by the defendant's own building plans and specifications – as was the need for the plaintiff to build a wall in close proximity to that opening. Clifford, 353 Ill.App.3d at 36-37, 45-47. While the wall in our case, of course, was *not* included in the plans and specifications, its placement *vis à vis* the staircase was entirely dictated by Loretto. Having instructed Ujamaa to build a wall at the top of a staircase, with less than a day's notice, Loretto cannot reasonably deny notice of the hazards attendant to that task. As in Clifford, questions of fact concerning constructive notice foreclose the possibility of summary judgment.



## CONCLUSION

For all of these reasons, the court must deny Loretto's motion for summary judgment.

Dated: May 06, 2015

Respectfully submitted,

By:_____