SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1689-21

GUSTAVO CIFUENTES and
DINUSA P. FELID, his wife,

Plaintiffs-Appellants,

v.

EMIRO FRANCO and JANICE
PINTO,

Defendants-Respondents,

and

VIVINT SOLAR, INC.,
SOLMETRIC CORPORATION,
VIVINT SOLAR FINANCING
I, LLC., VIVINT SOLAR
FINANCING II PARENT, LLC,
VIVINT SOLAR FINANCING
III, LLC, VIVINT SOLAR
REBECCA PROJECT COMPANY,
LLC, VIVINT SOLAR
FINANCING V, LLC, VIVINT
SOLAR AALIYAH PROJECT
COMPANY, LLC, VIVINT SOLAR
PROVIDER, LLC, VIVINT SOLAR
MIA PROJECT COMPANY, LLC,
VIVINT SOLAR HOLDINGS, INC.,

VIVINT SOLAR LICENSING, LLC,
and VIVINT SOLAR DEVELOPER,

Defendants.

Submitted May 2, 2023 – Decided May 30, 2023

Before Judges Messano, Gilson and Rose.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-0135-20.

Clark Law Firm, PC, attorneys for appellants (Gerald H. Clark, Mark W. Morris, Jake W. Antonaccio, of counsel and on the briefs).

Chasan Lamparello Mallon & Cappuzzo, PC, attorneys for respondents (Thomas A. Morrone, of counsel and on the brief; James B. Shovlin, on the brief).

PER CURIAM

Plaintiff Gustavo Cifuentes appeals from a January 7, 2022 Law Division order, dismissing on summary judgment his negligence complaint against defendants Emiro Franco and Janice Pinto.[1] Because there was no cognizable

[1] All references to plaintiff in our opinion are to Gustavo Cifuentes. The per quod claim of his wife, Dinusa P. Felid, was wholly derivative. The remaining defendants (collectively, Vivint Solar) are not parties to this appeal. Some of the Vivint Solar defendants were dismissed from the litigation by stipulation of the parties; the remaining Vivint Solar defendants were dismissed on summary judgment.

evidence in the record to support a reasonable inference that the defendant homeowners were responsible for plaintiff's injuries, we affirm.

We summarize the facts from the motion record in a light most favorable to plaintiff as the non-moving party. See R. 4:46-2(c); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). The incident occurred on February 2, 2018, when plaintiff fell "about ten [to] twelve feet" from a ladder on defendants' Saddle Brook property and sustained injuries to both ankles.

Employed as a field service technician for Vivint Solar, plaintiff was dispatched to defendants' home following several complaints by the homeowners that squirrels were building nests under the solar panels the company had previously installed on their one-story home. Plaintiff testified at deposition that his supervisor, Thomas Perkowski, instructed him "to go take pictures of the house" because defendants "thought the squirrels was [sic] getting into the siding." Perkowski "wanted [plaintiff] to take pictures to see if there was any damages [sic] to the homeowners' siding." Perkowski did not instruct plaintiff to remove the nests or perform any other work.

Franco, however, was not content with that plan of action. Expressing his dissatisfaction with Vivint Solar, Franco "direct[ed plaintiff] to get up there and fix it, figure out the problem." Plaintiff explained:

> So after about five minutes of going back and forth of him telling me to get up there and fix the problem, I told him, "Listen, I cannot get up there and fix the problem. All I can do is set up a ladder. If you would like, I will set up a ladder and take pictures under the panels and see if I see anything under the panels." [Franco] then said, "Okay. Well, if that's all you can do, then set up the ladder and get the pictures and let me know." And then [Franco] went inside.

Franco did not threaten plaintiff. Nor did plaintiff contact his supervisor about the demand of the homeowner. Plaintiff did not recall "any problem with the surface of the driveway where [he] set up the ladder." He ascended the ladder to the roof where "there was a squirrel right in front of [him] about a few inches away." Plaintiff explained, "It hissed at me. I got a little frantic. I got scared. I tried to go down the ladder and that's when I fell." Plaintiff later clarified he made it down the ladder "maybe a few steps before [he] fell."

Pertinent to this appeal, plaintiff's January 2020 complaint alleged defendants negligently caused him to suffer serious personal injuries when he fell from the ladder by creating or permitting the existence of a dangerous condition. Following the close of discovery and Vivint Solar's motion for summary judgment, defendants cross-moved for the same relief. Defendants adopted Vivint Solar's arguments, and further asserted they had "breached no duty owed to plaintiff."

Plaintiff filed a response brief, and defendants filed a reply brief, without leave of court. See R. 1:6-3(b) (requiring leave of court for a cross-movant's reply brief). Defendants countered plaintiff's reliance on our decision in Nielsen v. Wal-Mart Store # 2171, 429 N.J. Super. 251 (App. Div. 2012), arguing defendants did not control the manner and means of plaintiff's work.[2]

At the outset of oral argument on January 7, 2022, Judge Robert M. Vinci addressed plaintiff's contention that defendants' reply brief was improperly filed for failure to seek leave of court. The judge afforded plaintiff's counsel the opportunity to address any new arguments raised on reply; plaintiff's counsel acknowledged he had anticipated defendants' "manner and means" claim in his responding brief. Plaintiff urged the judge find the "bundle of facts in this case" created a question for the jury's consideration as to whether there was a dangerous condition on defendant's property.

Following argument, Judge Vinci rendered a cogent oral decision granting defendants' cross-motion. Relying solely on plaintiff's allegations as the non-moving party, the judge recounted the facts underscoring his decision. The

[2] Plaintiff's appendix includes the legal argument page of defendants' moving brief and their entire reply brief. Plaintiff did not provide Vivint Solar's moving brief or his responding brief. See R. 2:6-1(a)(2) (prohibiting the appending of trial briefs on appeal "unless . . . the question of whether an issue was raised in the trial court was germane to the appeal").

judge noted "plaintiff testified that his fall was not caused by anything related to the house itself, including the siding, roof or driveway."

Judge Vinci's decision tracked the seminal law, commencing with the general rule that "a landowner has 'non-delegable duty to use reasonable care to protect invitees against known or reasonably discoverable dangers.'" Rigatti v. Reddy, 318 N.J. Super. 537, 541 (App. Div. 1999) (quoting Kane v. Hartz Mountain Indus., Inc., 278 N.J. Super. 129, 140 (App. Div. 1994)); see also Model Jury Charges (Civil), 5.20(F), "Duty Owed—Condition Of Premises" (rev. Nov. 2022).

Reciting the principles espoused by the Court in Olivo v. Owens-Illinois, Inc., Judge Vinci recognized the landowner's duty to an independent contractor's employee "includes the obligation of making a reasonable inspection to discover dangerous conditions." 186 N.J. 394, 406 (2006). The judge further recognized the "well-settled exception to this rule" articulated by the Court in Muhammad v. New Jersey Transit, i.e., "the duty to provide a reasonably safe working place for employees of an independent contractor does not relate to known hazards which are part of or incidental to the very work the contractor was hired to perform." 176 N.J. 185, 199 (2003) (quoting Wolczak v. Nat'l Elec. Prods. Corp., 66 N.J. Super. 64, 75 (App. Div. 1961)). As the judge correctly noted,

however, "this exception only applies when the landowner does not retain control over the means and methods of the execution of the project." See Olivo, 186 N.J. at 407 (quoting Muhammad 176 N.J. at 198).

Applying those legal principles to the facts of this case, Judge Vinci concluded "defendants simply did not breach any duty owed to . . . plaintiff." The judge reasoned: "The only potentially dangerous condition that plaintiff identifie[d] is the existence of squirrels under the . . . solar panels and being up . . . on a ladder." The judge elaborated:

> With respect to the squirrels, this was the very reason plaintiff was at the property in the first place. The existence of the squirrels was well-known to . . . plaintiff when he set . . . the ladder and climbed up toward the area where the squirrels were located. The existence of this . . . condition was expressly . . . disclosed to plaintiff by defendants when they made the service call to Vivint and . . . again directly to plaintiff before he climbed the ladder.

Addressing plaintiff's argument that "all the facts taken together [constituted] a dangerous condition" the judge stated: "being up on a ladder is not a dangerous condition"; "plaintiff's job included climbing ladders in situations like this"; and "[h]e was well aware of the dangers of climbing a ladder." The judge also found "defendants didn't owe plaintiff a duty because

. . . plaintiff was an independent contractor, and the alleged hazard was incidental to the very work plaintiff was hired to perform."

Judge Vinci also rejected plaintiff's contention that defendants retained control over the means and method of his work. The judge reasoned:

> [D]efendants didn't provide the ladder. They didn't set up the ladder. They didn't control either where or how plaintiff climbed the ladder. . . . [P]laintiff set up his own ladder . . . in the location he alone selected and climbed the ladder. Defendants were inside the house and had nothing to do with the means or method . . . of the work. Plaintiff controlled exactly how and where he ascended the ladder.

In doing so, the judge found unpersuasive plaintiff's reliance on Nielsen, where we held Walmart "fail[ed] to warn of a hazardous condition that the independent contractor [wa]s not there to repair, but only to traverse in order to reach another location to be addressed by the service the independent contractor ha[d] agreed to provide." 429 N.J. Super. at 265. Distinguishing the facts of that case, Judge Vinci stated, "Walmart directed the route that the plaintiff had to take to perform his job and directed him into an area outside the boundaries of the Walmart, where [the] plaintiff slipped and fell as the result of a dangerous condition on the property not owned or controlled by Walmart." See id. at 254-55. Conversely, Judge Vinci concluded, "In this case, if defendants owed plaintiff a duty of care, they satisfied that duty by expressly notifying . . .

plaintiff and his employer of the existence of the alleged dangerous condition." This appeal followed.

Plaintiff maintains defendants owed him a duty to protect him from dangerous conditions on their property; the contractor's hazard exception does not apply because plaintiff's assigned work "did not include climbing a ladder to diagnose a squirrel problem and [defendants] interfered with the manner and means of the work"; and the trial court erroneously considered arguments raised for the first time in defendants' procedurally defective reply brief. Plaintiff further asserts the motion judge erroneously: decided factual questions bearing upon comparative negligence, breach of duty, and proximate cause; and relied on facts not contained in the record. More particularly, plaintiff claims he "was never told there were squirrels nesting under [d]efendants' solar panels."

After de novo review, Rios v. Meda Pharm., Inc., 247 N.J. 1, 13 (2021), we reject plaintiff's reprised claims. We affirm the order granting summary judgment substantially for the thoughtful and thorough reasons articulated by Judge Vinci in his accompanying decision. Employing the same standard as the motion judge, ibid., we conclude there are no material factual disputes that would otherwise warrant consideration by a jury. We have also considered plaintiff's claims of error regarding the judge's factual findings in view of the

record and governing law and conclude they lack sufficient merit to warrant discussion in a written decision. R. 2:11-3(e)(1)(E).

We simply add the undisputed record reveals plaintiff was expressly instructed by his supervisor that defendants complained squirrels were nesting under the solar panels, and his task was solely to photograph any resulting damage to the panels. Franco demanded plaintiff either fix the squirrel problem or remove the solar panels. Plaintiff refused both demands, offering to ascend his ladder to get a better view under the panels; he opted to do so while defendants remained in their home. Plaintiff's injuries were caused by hazards known to him when he commenced the work he was hired to perform. Muhammad, 176 N.J. at 199. Judge Vinci's decision that defendants neither caused the method nor means of the work is unassailable.

Affirmed.