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This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2536-21

ROBERT MCCAULEY and
MARYANN MCCAULEY, h/w,

Plaintiffs-Appellants,

v.

AMERICAN PROPERTY
MANAGEMENT GROUP, LLC,

Defendant-Respondent.

Submitted March 15, 2023 – Decided June 8, 2023

Before Judges Currier and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Docket No. L-1669-20.

Sacchetta and Baldino, attorneys for appellants (Thomas F. Sacchetta, of counsel and on the briefs; Randi S. Greenberg, on the briefs).

Post & Schell, PC, attorneys for respondent (Christopher T. Chancler, of counsel and on the brief; Karyn Dobroskey Rienzi, on the brief).

PER CURIAM

In this personal injury action, plaintiff[1] appeals from the March 18, 2022 order granting defendant summary judgment. We affirm.

William Marley is defendant's principal and sole owner. Marley is employed by American Millwright and Rigging (AMR), a business that builds, repairs, and moves heavy machinery and equipment. Plaintiff worked at AMR as a mechanic; Marley was his boss. Marley testified there was no written lease between defendant and AMR but AMR paid rent to defendant for the use of the property, paid the utilities, and was responsible for maintenance and repairs to the property.

On the day of plaintiff's injury, he was working for AMR on defendant's property. He and another employee, Anthony Bertett, were instructed by Marley to use a forklift to lift an extruder and place it on a flatbed truck for transport to a client. Bertett drove AMR's biggest forklift out of the shop, but then saw plaintiff had already loaded the extruder onto a smaller forklift. Plaintiff had positioned the forklift to load the extruder from the passenger side of the flatbed

[1] Robert McCauley brought a claim against defendant as a result of injuries he sustained while working on property owned by defendant. His wife, Maryann McCauley, asserted a derivative claim for her per quod damages. We refer to Robert as plaintiff.

truck. Plaintiff got off the forklift and climbed into the bed of the truck to make sure the extruder was safely loaded.

Bertett testified he got on the forklift, lifted the extruder on the forklift and lowered it onto the bed of the truck. However, he needed to move the extruder to the middle of the truck so he lowered the forklift's forks and backed up so the extruder was closer to the edge. As Bertett began to lift the extruder, it started to tilt, so he "tried to lower it so it [would not] fall over" but the extruder fell over, striking plaintiff's leg. Bertett then backed up the forklift to get the extruder off plaintiff's leg. Bertett testified the forklift was not moving when it tipped, his foot was on the brake and the gear was in neutral.

Bertett said the area on which he was operating the forklift was made of compacted gravel. He testified that AMR employees use that specific area on the property for loading activities because it is "the area without potholes" and is flat. He stated he did not have any prior issues loading equipment in that area. Bertett said the only place there were potholes "was around the side and we never did any loading or unloading actions there." Bertett recalled looking quickly at the loading area and did not see any potholes where they were working.

Plaintiff testified he was asked to move a piece of machinery with a forklift into a flatbed truck. Plaintiff said initially he got the "bigger" forklift and pulled it out of the shop, but then Marley told him to get a different "smaller" forklift. So he did. As plaintiff was standing in the flatbed truck, Bertett lifted the extruder and as it moved towards him, plaintiff said the forklift "dipped." Plaintiff descried the loading area as composed of dirt and hard stone.

Plaintiff did not know why the forklift "dipped," but thought it may have been because of one of the "many potholes in the yard." He said, "[T]he whole yard was filled with potholes." However, plaintiff did not see the forklift wheels go into a pothole before the accident, although he had seen that occur on other instances. He stated he complained to Marley "on several occasions" about the potholes and asked why Marley "never blacktopped the surface." Plaintiff described the area where the accident occurred as being composed of dirt and hard stone.

The record does not contain any photographs of the area of the property where the accident occurred as it looked on the day of these events.

Defendant moved for summary judgment, contending there was no factual dispute that AMR rented the property from defendant and performed all maintenance and repairs on the property. Therefore, defendant asserted it did

not owe plaintiff a duty and was not liable for any injuries plaintiff may have sustained while working on the property. Defendant also contended plaintiff had not proffered any evidence to support his claim that a pothole on the property caused the extruder to fall off the forklift.

In an oral decision issued March 18, 2022, the trial judge granted defendant's motion for summary judgment. The judge found there was an oral lease between defendant and AMR, and the testimony was unrefuted that AMR was responsible for the maintenance and repairs to the property. In addition, the judge found there was "no identification of [a] specific depression or declivity on the property" that caused these events. He also determined the composition of the property was not a dangerous condition. And that plaintiff had not established defendant was aware of any dangerous condition. Therefore, defendant was entitled to summary judgment.

On appeal, plaintiff asserts the trial court erred in granting defendant summary judgment because there were disputed material facts regarding: the existence of a lease between defendant and AMR; the instructions to plaintiff regarding which forklift to use; and whether there was evidence of a defective condition on the property.

We apply the same standard as used by the trial court and review the grant or denial of a motion for summary judgment de novo. Samolyk v. Berthe, 251 N.J. 73, 78 (2022).

Under Rule 4:46-2(c), a motion for summary judgment must be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." A court should "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

Summary judgment should be granted "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Friedman v. Martinez, 242 N.J. 449, 472 (2020) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)).

Plaintiff asserts that defendant, as the property owner, had a duty to provide plaintiff with a safe workplace and defendant breached its duty in

permitting a dangerous condition to exist on its property that caused plaintiff to sustain injuries.

"[A] negligence cause of action requires the establishment of four elements: (1) a duty of care, (2) a breach of that duty, (3) actual and proximate causation, and (4) damages." Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 406 (2014) (alteration in original) (quoting Jersey Cent. Power & Light Co. v. Melcar Util. Co., 212 N.J. 576, 594 (2013)). The burden is on the plaintiff to establish each element "by some competent proof." Ibid. (first citing Buckelew v. Grossbard, 87 N.J. 512, 525 (1981); and then citing Overby v. Union Laundry Co., 28 N.J. Super. 100, 104 (App. Div. 1953)).

Whether a defendant owes a legal duty to a plaintiff is a question of law for the court to decide. Robinson v. Vivirito, 217 N.J. 199, 208 (2014). Defendant contends it did not owe plaintiff a duty of reasonable care because it was not responsible for the maintenance of the property.

The trial judge found that, although there was no written lease agreement between AMR and defendant, there was "testimony to the effect that there was a lease and that the lease provided that the tenant, [AMR], was responsible for maintenance of the property." The judge concluded an oral lease existed based on the testimonial evidence that AMR paid rent to defendant for the use of the

property, paid for the utilities, and AMR was responsible for maintenance and repairs of the property. Plaintiff has offered no evidence to dispute the court's finding of an oral lease agreement.

In considering the duty of a commercial landlord to a tenant, we have stated that "[i]n the absence of an agreement to make repairs, the landlord is under no obligation to do so. That burden falls upon the tenant." McBride v. Port Auth. of N.Y. & N.J., 295 N.J. Super. 521, 525 (App. Div. 1996) (quoting Coleman v. Steinberg, 54 N.J. 58, 63 (1969)); see also Model Jury Charges (Civil), 5.20C(c), "Duty of Owner to Tenant Leasing Entire Premises and to Others on Premises" (approved May 1977) ("Generally, on the renting or leasing of a building or lands for other than residential purposes, . . . the landlord is under no liability for injuries sustained by the tenant or his/her guests or employees, by reason of the unsafe condition of the leased premises."); Shields v. Ramslee Motors, 240 N.J. 479, 489 (2020) (first alteration in original) (quoting McBride, 295 N.J. Super. at 525) (stating that a "plaintiff['s] thesis that a commercial landlord should be held responsible to a tenant's employee injured on the leased premises because it reserved the right to enter the leased premises to perform repairs is inconsistent with the law of this [s]tate.").

Therefore, as a commercial landlord, defendant did not owe plaintiff, AMR's employee, a duty of care. As a result, although we need not further address plaintiff's contentions, we will briefly do so.

Whether plaintiff was instructed to use a particular forklift is not a material fact regarding the issue in this case. Plaintiff has previously only contended that the condition of the property was the proximate cause of his accident. On appeal, plaintiff now alleges the condition of the property, and the use of the wrong forklift, were both proximate causes of the accident and his injuries. But it is undisputed that AMR owned the forklifts and controlled its equipment. AMR also controlled its employees and the manner of the work. Therefore, the issue whether plaintiff was using the appropriate forklift to do the work is not material to the summary judgment determination. Defendant was not responsible for controlling plaintiff's work duties. Therefore, plaintiff cannot establish the required element of proximate cause to sustain a claim of negligence.

Plaintiff also has not demonstrated any condition of the property was the proximate cause of the accident. Bertett stated, "The only place there w[ere] ever potholes was around the side and we never did any loading or unloading actions there." More specifically, he said he "took a quick look at the ground

and did[] [not] see a pothole" before he got onto the forklift. Plaintiff stated he did not see the forklift wheels encounter a pothole prior to the accident. He only speculated that was the cause of the accident.

Even if plaintiff could establish there was a pothole in the vicinity of these events, he did not demonstrate defendant had actual or constructive notice of the condition. A plaintiff "must prove, as an element of the cause of action, that the defendant had actual or constructive knowledge of the dangerous condition that caused the accident." Prioleau v. Ky. Fried Chicken, Inc., 223 N.J. 245, 257 (2015) (quoting Nisivoccia v. Glass Gardens, Inc., 175 N.J. 559, 563 (2003)). There was no evidence that defendant had either actual or constructive notice of any potholes in the loading area. To the contrary, Bertett stated he "inspected the ground" before he got on the forklift that day and saw no potholes.

There is no disputed material issue of fact sufficient to defeat defendant's summary judgment motion. Defendant did not owe plaintiff a duty of care, having ceded its tenant, AMR, the maintenance and repair responsibilities. Moreover, plaintiff has not shown the existence of a dangerous condition or that such condition was the proximate cause of his accident and injuries. The summary judgment order is supported by the credible evidence in the record.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION