SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1752-22

YONG SOK KIM,

Plaintiff-Appellant,

v.

1655 VALLEY ROAD LLC, ABE SOLAR LLC, QUALITY FACILITY SERVICES, QUALITY FACILITY SOLUTIONS INC., SIGNATURE ACQUISITIONS, LLC,

Defendants-Respondents,

and

QUALITY FACILITY SOLUTIONS INC.,

Third-Party Plaintiff-Respondent,

v.

SIGNATURE ACQUISITIONS, LLC,

Third-Party Defendant-Respondent.

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Submitted March 19, 2024 – Decided June 18, 2024

Before Judges Natali and Puglisi.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-2946-19.

Law Offices Rosemarie Arnold, attorneys for appellant (William R. Stoltz and Daniel S. Suh, of counsel and on the briefs).

Law Office of James H. Rohlfing, attorneys for respondents 1655 Valley Road LLC, ABE Solar LLC, and Signature Acquisitions, LLC (Michael A. Mourtzanakis, on the brief).

Galvano & Xanthakis, attorneys for respondent Quality Facility Solutions Inc. (Matthew D. Kelly, on the brief).

PER CURIAM

In this personal injury action, plaintiff Yong Sok Kim appeals from two January 6, 2023 Law Division orders granting defendants Quality Facility Solutions, Inc. (QFS), 1655 Valley Rd LLC (1655), and Signature Acquisitions, LLC (Signature) summary judgment. Having considered the parties' arguments in light of the record and applicable legal principles, we reverse and remand for further proceedings.

I.

We derive the following facts from the summary judgment record and view them in the light most favorable to plaintiff. See Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). While employed by Bogush Plumbing, plaintiff was dispatched "on an emergency basis" to a commercial office building located at 1655 Valley Road in Wayne to repair an industrial electric water heater. The building is owned by defendant 1655, who retained defendant QFS as building manager. Defendant Signature is described as the property manager. Once on-site, plaintiff was to shut the water off, locate the unit's label (or jacket sticker), and report the unit's information and specifications on the label to his supervisor, Scott Belvin, who would then provide the client with a quote for the repair.

At his deposition, plaintiff explained he arrived at the property and met Marco Pinto, the site superintendent. Pinto directed plaintiff to the water heater in the mechanical room of the basement. When they arrived, there was approximately half an inch of water on the floor. Plaintiff asked Pinto if the power to the heater was shut off, and Pinto responded he "shut the panel off, the breakers off." Plaintiff then took a picture of the unit's light and toggle switch, both of which indicated the unit was off. A sticker under the toggle switch read,

"CAUTION PILOT SWITCH ONLY OPENS PILOT CIRCUIT. MAIN DISCONNECT MUST BE OPENED BEFORE SERVICING."

Plaintiff removed a panel from the unit to locate the jacket sticker. Because water was still running from the heater, he used a ladder and turned off the water at the top of the unit. He then looked into the panel and saw the water heater's "soaking wet" instruction manual booklet at the bottom of the unit. Plaintiff explained Pinto gave him "something," to assist him in reaching the booklet, but could not recall "if it was a stick or like a little – a grabbing cord or something," and stated it was made of either metal or wood. Using that instrument, plaintiff reached into the panel to retrieve the booklet and was electrocuted. Plaintiff sustained injuries and was subsequently airlifted to a hospital.

It is undisputed plaintiff did not independently check the breaker panel nor did he use a voltmeter to determine whether the water heater was energized. He acknowledged the proper procedure for a plumber faced with a similar situation would be to ensure the breaker panel is off and use a voltmeter to ensure the unit is not energized.

When asked about his training or instruction from other plumbers with respect to accepting the word of a third party that power is shut off, plaintiff stated:

> I mean, of course people say that but, when you are at a job like this, when you talk to someone . . . you know when people are kind of confident. And if this gentleman is a supervisor for a unit like this, he was confident enough to say the way he explained, I shut the panel off--
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> . . .
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> For him to say that in that confident way. So[,] I took his word, if that makes sense.

Plaintiff also testified, "I have done, or I have experienced or I have seen, other plumbers who are licensed that would do the same thing as I would." Further, plaintiff stated:

> Again, in a perfect world, this wouldn't have happened, if I were to get a [voltmeter] and double-checked and everything. But in an emergency like that, it is like, you're in your zone and you got to fix the problems in terms of what it is, if that makes sense. So I was, like, in a tunnel vision where it was an emergency, water was coming out, I had to get, like, this water to stop, and I guess I didn't fully do it properly or correctly.

At his deposition, Pinto testified at the time of the incident, he was the site superintendent of the building located at 1655 Valley Road and was "in charge of the building." He further explained repairing a water heater was outside his

expertise and his role was "simply to call the vendor and [the vendor] would do all the work." Pinto stated he did not make any representations to plaintiff concerning power to the water heater, but remembers plaintiff giving him a flashlight "to illuminate the area that [plaintiff] was going to work in." Pinto also explained he was employed by QFS, but also reported to David Korn of Signature for instructions and approval on certain projects.

Korn testified for defendants 1655 and Signature and stated he was employed by Signature as an operations manager at the time of the incident and managed the building. As operations manager, Korn stated he oversaw "different buildings and different building managers . . . on the day-to-day operations." He described Pinto as the "building manager" for 1655 Valley Road responsible for inspecting the property, responding to tenants, conducting minor maintenance repairs, and contacting vendors for major maintenance repairs. Korn testified Pinto should have been aware of the location of the circuit breaker leading to the mechanical room.

Korn explained 1655 and Signature are owned by the same individual and each building Signature owns, including 1655 Valley Road, is a separate entity. Korn further stated 1655 Valley Road is "self-managed." With respect to Pinto's employment, he testified he approved maintenance work to be done by Pinto,

and he, in consultation with QFS, approved Pinto's vacation time and ultimately initiated the process to terminate Pinto for failing to come to work.

Belvin, plaintiff's supervisor, who is not a licensed plumber, testified "the first thing" plaintiff should have done was ensure the power to the heater was turned off. Plaintiff's expert, Jeffrey Balan, P.E., agreed and also opined, "generally speaking," one should not rely on the word of another when one's own safety is at risk. When asked if plaintiff's deviation from that general rule was reasonable, he stated:

> Based on my understanding of water being collected on the floor and meeting with a property maintenance manager at the site and -- and, again, based on my understanding, [plaintiff] was told that the power was off. So[,] with having water and electricity -- if that was live -- that they don't, obviously, mix well, that could cause a lot of issues and it is dangerous.
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> So while it's always a good idea to make sure that the power's off and all that, but if you['re] relying on somebody who knows the building a whole lot better than you do as the first time showing up at a site, I would probably rely on that. That -- that's just -- because of the emergency situation of the circumstances here.

Balan further stated, "[s]o [plaintiff is] relying on . . . somebody who is familiar with the building and the electrical systems with the building as far as

where they are and how to shut it off and all of that, and that's what he did." With respect to plaintiff not testing the heater with a voltmeter, he explained:

> He should have tested it . . . there's no doubt about it. I mean, professionally I'm not going to sit here and say that what he did . . . couldn't have been avoided. Obviously if he would have done the test of the . . . multimeter or what have you, he would have been able to see . . . that the equipment is still energized.

In his expert report, Balan opined to a reasonable degree of engineering and scientific certainty, "[w]hile [plaintiff] should have checked the power feed to the water heater to ensure it was turned off, he did take the word of the [m]aintenance [m]anager of the building," and "[i]t would be logical to assume the maintenance manager would be more familiar with the building and its functions than [plaintiff]." Balan also explained Pinto "was supposed to be familiar with all aspects of the building, specifically the breaker location of the water heater but he apparently wasn't," resulting in the heater remaining energized.

In April 2019, plaintiff commenced this action against defendant 1655, and thereafter amended his complaint to include defendants QFS and ABE Solar.[1] QFS then filed a Third-Party Complaint against Signature, and plaintiff

[1] Plaintiff does not challenge the portion of the January 6, 2023 order granting summary judgment to the ABE Solar LLC.

again amended his complaint to include Signature as a defendant. In his three-count complaint, plaintiff alleged defendants negligently allowed the premises to be improperly maintained, caused the premises to remain in a dangerous condition, and did not warn plaintiff of hazardous conditions resulting in plaintiff's injuries.

At the close of discovery, all defendants moved for summary judgment on the basis they were not liable for injuries an independent contractor sustained while performing the contracted work. In opposition, plaintiff contended his status as an independent contractor was not a bar to recovery because Pinto, "the person who was ostensibly supposed to be responsible for the maintenance of the building," negligently made an affirmative statement about shutting off power to the water heater, which caused plaintiff's injuries. Plaintiff argued defendant QFS owed him a duty of care, notwithstanding his status as an independent contractor, due to Pinto's negligent statement and "general negligence principles." Plaintiff also argued there were issues of fact as to whether defendants 1655 and Signature exercised control over Pinto such that they too may be held vicariously liable for Pinto's actions and statement.

The court considered the parties' written submissions and oral arguments and entered orders granting the motions. In its oral decision, the court first

addressed defendants 1655 and Signature, and stated defendants hired plaintiff's employer to examine and repair a water heater. The court explained even if Pinto "may have been in error when he said that the breaker was off," plaintiff's claim could not succeed because "there is no right for the contractor employee to sue the place that he was contracted to work on if his own negligence caused him to get injured. That's why he has workers' comp[ensation]." The court found "there was no duty nor proximate cause or any liability for the building owner for the contractor where they did not create the hazardous condition." The court did not address plaintiff's argument defendants 1655 and Signature exercised control over Pinto such that they could be held vicariously liable for his actions and statement.

With respect to defendant QFS, the court explained plaintiff "heedlessly" did not "check[] or review" Pinto's statement about the power, and reasoned "[t]he fact that the employee of [QFS] may have been in error is of no moment to the work that [plaintiff] was engaged to perform. It was his independent duty." The court also stated, "[t]his hazardous condition is exactly why the contractor came out to service the malfunctioning water heater." Ultimately, the court found "there are no facts, and the plaintiff does have an adequate remedy for his injuries, which is that he was hurt while performing duties for this

employer, which was the contractor, not because of the facility or because of the building management company." This appeal followed.

II.

Before us, plaintiff argues the court erred in granting defendants' motions for summary judgment and contends the court disregarded issues of fact with respect to Pinto's affirmative statement he shut off power to the water heater and whether such rendered QFS vicariously liable, and whether 1655 and/or Signature exercised sufficient control of Pinto such that they too may be vicariously liable.[2] Plaintiff also asserts the court erred in concluding, in essence, plaintiff's comparative negligence was sufficient to warrant summary judgment.

Plaintiff acknowledges absent Pinto's alleged statement, defendants would not be liable for his injuries. He argues, however, the independent contractor

[2] Before us, plaintiff also raises a negligent hiring claim that was not alleged in plaintiff's complaint, discussed at oral argument, or addressed in the court's January 6, 2023 oral decision. "It is a well-settled principle that our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available 'unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.'" Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (quoting Reynolds Offset Co., Inc. v. Summer, 58 N.J. Super. 542, 548 (App. Div. 1959)). Because neither exception applies, we decline to address this argument.

exception to the general rule requiring landowners to use reasonable care to protect invitees against known or reasonably discoverable dangers does not absolve defendants of liability arising from an employee's affirmative and knowingly false statement that increased his risk of injury.

Plaintiff further argues the court erred in concluding Pinto's statement was inconsequential as to whether a duty of care existed and such was "simply not in line" with Alloway v. Bradlees, Inc., 157 N.J. 221, 232-33 (1999), and its progeny. Plaintiff asserts because his injury was foreseeable given Pinto's conduct, and because the minimal effort required to warn plaintiff, "public policy would clearly support imposing a duty upon Pinto (and therefore anyone who was his employee/principal) for his negligent misrepresentation."

Defendant QFS argues it is not liable for plaintiff's negligent actions that occurred while he was an independent contractor conducting the work he was hired to perform. With respect to plaintiff's reliance on Pinto's alleged misrepresentation, defendant QFS argues plaintiff's expert and employer testified plaintiff should not have relied upon Pinto's statement and should have instead personally verified the heater was not energized. QFS also contends once plaintiff closed the water valve, there was no longer an ongoing emergency

and, as such, there was "no valid reason" plaintiff did not personally ensure the heater was not energized.

QFS argues plaintiff, not defendant, was the professional with specialized knowledge and expertise, and had the ability to verify Pinto's statement about the power being shut off. Additionally, QFS contends to allow plaintiff to shift the blame of his negligence to another, when plaintiff had a non-delegable duty to ensure his own safety, would undermine the intent and purpose of independent contract law.

Defendants 1655 and Signature also argue they are not liable for the negligent acts of a hired contractor that occurred while the contractor was performing the very work he was hired to perform. Further, they contend because they did not reserve or assert any control over plaintiff, or even have a representative present when plaintiff was conducting the work, they are not liable for plaintiff's negligence. Notably, 1655 and Signature do not address plaintiff's arguments with respect to their vicarious liability arising from their alleged control over Pinto.

"We review decisions granting summary judgment de novo," C.V. v. Waterford Twp. Bd. of Educ., 255 N.J. 289, 305 (2023), applying the same standard as the trial court, Townsend v. Pierre, 221 N.J. 36, 59 (2015). Like the

motion judge, we "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." C.V., 255 N.J. at 305 (quoting Samolyk v. Berthe, 251 N.J. 73, 78 (2022)). "Summary judgment is appropriate if 'there is no genuine issue as to any material fact' and the moving party is entitled to judgment 'as a matter of law.'" Ibid. (quoting R. 4:46-2(c)).

A prima facie case of negligence "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." Jersey Cent. Power & Light Co. v. Melcar Util. Co., 212 N.J. 576, 594 (2013). "As a general rule, a landowner has 'a nondelegable duty to use reasonable care to protect invitees against known or reasonably discoverable dangers.'" Moore v. Schering Plough, Inc., 328 N.J. Super. 300, 305 (App. Div. 2000) (quoting Rigatti v. Reddy, 318 N.J. Super. 537, 541 (App. Div. 1999)).

Notwithstanding this non-delegable duty, "the landowner '[i]s under no duty to protect an employee of an independent contractor from the very hazard created by doing the contract work.'" Rigatti, 318 N.J. Super. at 541-42 (alteration in original) (quoting Dawson v. Bunker Hill Plaza Assocs., 289 N.J.

Super. 309, 318 (App. Div. 1996)). "This exception is carved out of the landowner's general duty to protect his invitees because the landowner may assume that the independent contractor and [its] employees are sufficiently skilled to recognize the dangers associated with their task and adjust their methods accordingly to ensure their own safety." Accardi v. Enviro-Pak Sys. Co., 317 N.J. Super. 457, 463 (App. Div. 1999).

The hazard incident to the work exception will not apply, and a property owner may be held liable for the injuries sustained by the employee of an independent contractor, when the property owner retains control of the manner and means of work, ibid., or interferes with or participates in the work, Izhaky v. Jamesway Corp., 195 N.J. Super. 103, 107 (App. Div. 1984); cf. Slack v. Whalen, 327 N.J. Super. 186, 194 (App. Div. 2000) (holding property owners were not liable for independent contractor's negligence when the property owners "were not present during the actual work day" and did not "participate in, nor interfere with the means and method" of plaintiff's work).

In Izhaky, an independent contractor relocating an electrical switch and installing wall outlets was injured by a live wire. 195 N.J. at 105. Prior to the electrical work, employees of the property owner engaged in "preparatory carpentry work," consisting of removing a wall containing the switch and

placing "electrical components in a dropped ceiling where [the contractor] was later to reach for them and receive the shock and injuries for which he sue[d]." Id. at 107. We rejected the property owner's argument it was immune from liability under the hazard incident to work exception and held the "participation by [the property owner] in the work, including some degree of involvement with the electrical system, removes the limited immunity provided by [the exception]." Id. at 107.

In reaching our decision in Izhaky, we noted Wolczak v. National Electric Products Corp., 66 N.J. Super. 64 (App. Div. 1961), the case on which defendant relied, "specifically indicts such owner participation," in that in Wolczak, we held "active interference of the owner in the manner of doing the work may implicate him in negligence for injuries to the employees . . . related to the manner in which the work is performed or to the furnishing of defective equipment." Id. at 106 (quoting Wolczak, 66 N.J. Super. at 73). We further explained "[a] showing of control by the owner over the operation is not necessary" to hold the landowner liable. Ibid. See Piro v. Public Service Electric & Gas Co., 103 N.J. Super. 456 (App. Div. 1968), aff'd o.b. 53 N.J. 7 (1968).

When the exception does not apply, a landowner has a duty to an independent contractor to provide a reasonably safe workplace and warn of dangerous conditions, see Olivio v. Owens-Illinois, Inc., 186 N.J. 394, 406-07 (2006), and whether a condition requires a warning depends on the foreseeability of injury, see Nielsen v. Wal-Mart Store #2171, 429 N.J. Super. 251, 264-65 (App. Div. 2013); Gallas v. Public Service Electric & Gas Co., 56 N.J. 101, 110 (1970). The foreseeability of an injury "is 'crucial' in determining whether a duty should be imposed." J.S. v. R.T.H., 155 N.J. 330, 338 (1998) (quoting Carter Lincoln-Mercury, Inc. v. EMAR Grp. Inc., 135 N.J. 182, 194 (1994)).

"Foreseeability requires a determination of whether the defendant was reasonably able to ascertain that his allegedly negligent conduct could injure the plaintiff in the manner it ultimately did." Robinson v. Vivirito, 217 N.J. 199, 212 (2014). "Foreseeability is a fluid concept that escapes a simple definition." Taylor by Taylor v. Cutler, 306 N.J. Super. 37, 44 (App. Div. 1997). It "embodies an element of awareness or knowledge on the part of the [defendant] that the class of persons represented by the plaintiff were at risk as a result of the [defendant's] conduct." Id. at 47.

In determining the extent of a defendant's duty of care, courts consider the foreseeability of the risk of injury, and then weigh and balance (1) the

relationship of the parties; (2) the nature of the attendant risk; (3) the opportunity and ability to exercise care; and (4) the public interest in the proposed solution. Alloway, 157 N.J. at 230 (citing Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 439 (1993)). "Ultimately, all considerations must be balanced 'in a "principled" fashion leading to a decision that both resolves the current case and allows the public to anticipate when liability will attach to certain conduct.'" Coleman v. Martinez, 247 N.J. 319, 338 (2021) (quoting G.A.-H. v. K.G.G., 238 N.J. 401, 414 (2019)).

III.

Guided by these principles, we conclude the court erred in granting defendants' motions for summary judgment. Plaintiff's factual assertions, which we must accept as true for the purposes of determining defendants' summary judgment motions, Rule 4:46-2(c), establish Pinto told plaintiff he had shut off power to the water heater by switching off the circuit breaker. Plaintiff relied on Pinto's statement and was electrocuted when he reached into the water heater with an object Pinto gave him. The reasonableness of plaintiff's reliance on Pinto's statement is an issue of fact not appropriately decided on summary judgment. Indeed, plaintiff's expert opined it was "logical" for plaintiff to assume Pinto, as site superintendent, was familiar with the building's functions.

With respect to Pinto's duty to plaintiff, we acknowledge a landowner generally does not have a duty to protect a contractor against hazards created by the contracted work. See Rigatti, 318 N.J. Super. at 541-42. In Nielsen, we referred to Rigatti and explained, "the exception would render it unnecessary for an occupier of land to warn a roofer --hired to fix a hole in a roof --about a hole in the roof." 429 N.J. Super. at 265. This case, however, is factually distinct from Rigatti and similar cases involving the negligence of independent contractors. Indeed, the question here is whether Pinto interfered with or participated in plaintiff's work such that the hazard incident to work exception does not apply to defendants, and whether, as such, defendants owed plaintiff a duty of care. Because we are satisfied there is a triable issue of fact as to Pinto's participation in plaintiff's work, and, as such, whether such participation resulted in defendants owing plaintiff a duty of care, we conclude the court erred in granting defendants' summary judgment.

Giving plaintiff all reasonable inferences, it is evident Pinto, the site superintendent, participated to some degree in plaintiff's work. While we acknowledge Pinto's participation may not have been as robust as the participation described in Izhaky, he led plaintiff to the mechanical room,

accepted a flashlight from plaintiff to illuminate the area plaintiff was working in, informed plaintiff he had "shut the panel off, shut the breakers off," and provided plaintiff with an instrument plaintiff then used to reach into the water heater resulting in his injuries. Indeed, Pinto's actions and affirmative statement he turned off the power, constitute a factual question as to whether such participation in plaintiff's work created liability for defendants. See Izhaky, 195 N.J. Super. at 107; see also Sanna v. Nat'l Sponge Co., 209 N.J. Super. 60, 68-69 (App. Div. 1986) (noting defendant's "direct participation" in furnishing materials to an independent contractor made involuntary dismissal of plaintiff's case improper as "a jury could find that defendant exercised the requisite control over the jobsite to create a liability exposure").

Further, it was foreseeable plaintiff's reliance on Pinto's statement he shut off the power to the water heater via the circuit breaker could lead to plaintiff's injuries. Indeed, Pinto was with plaintiff in the mechanical room with half an inch of water on the ground, and after Pinto informed plaintiff he shut the power off, plaintiff went to work on the electric water heater assuming it was not energized.

With respect to the nature of the relationship of the parties, and their opportunity and ability to exercise care, we must analyze these questions in the

context of the specific facts of this case. Hopkins, 132 N.J. at 439. It is not disputed Pinto was site superintendent of the building and plaintiff was on the premises as an employee of a third-party contractor to fix the water heater. Pinto was with plaintiff from the time plaintiff arrived at the building to his injury. At any time prior to the injury, including when plaintiff directly asked him, Pinto had the opportunity and ability to put plaintiff on notice he was unsure of the unit's electrical status.

Finally, our conclusion is consistent with the general principles of negligence as well as the limited exception afforded to landowners who hire independent contractors. Plaintiff's expert, Balan, opined, "[w]hile [plaintiff] should have checked the power feed to the water heater to ensure it was turned off, he did take the word of the [m]aintenance [m]anager of the building," and "[i]t would be logical to assume the maintenance manager would be more familiar with the building and its functions than [plaintiff]." Indeed, but for Pinto's actions and affirmative statement, defendants would not have been liable for plaintiff's injuries.

IV.

Plaintiff next argues there is a triable issue of fact as to whether defendants 1655 and Signature exercised sufficient control over Pinto to deem them

vicariously liable for his injuries. Plaintiff contends 1655 and Signature are, for all intents and purposes, the same entity and controlled Pinto's day-to-day activities. Further, plaintiff explained while Pinto was employed by QFS, he also reported to Korn, an employee of Signature and operations manager for the property at 1655 Valley Road, for specific tasks, maintenance vendor approval, and vacation requests. Plaintiff also notes Korn testified he made the decision to terminate Pinto.

With respect to the relationship between 1655 and Signature, plaintiff explains "[t]he exact nature of the contractual relationship . . . (if any) is unclear, as no contract between these entities has been provided, despite repeated requests for same." Plaintiff also notes Korn testified because the two entities are owned by the same individual, the property was "self-managed."

As noted, defendants 1655 and Signature addressed neither their corporate structure nor their control over Pinto in their brief before us. In light of the court's conclusion no defendant owed plaintiff a duty of care, the court also did not address plaintiff's argument defendants 1655 and Signature were vicariously liable for Pinto's actions and statement, and did not make necessary factual findings with respect to 1655's and Signature's control over Pinto, if any. As

such, we decline to consider that issue in the first instance. The parties, of course, are fee to address the issue, as appropriate, on remand.

Reversed and remanded. We do not retain jurisdiction.