SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2651-22

BESNICK GJANA,

Plaintiff-Appellant,

v.

DAIBES ENTERPRISES, LLC, 525 LIVINGSTON DFT 2017, LLC, and WATERSIDE CONSTRUCTION, LLC,

Defendants-Respondents,

and

ROBERT TRAVERS and LITA BROS CONSTRUCTION, LLC,

Defendants.

Submitted May 28, 2024 – Decided June 12, 2024

Before Judges Mayer and Paganelli.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-5736-20.

Ardinez A. Domgjoni (Domgjoni Law Office, PLLC), attorney for appellant.

Shafron Law Group, LLC, attorneys for respondents (Jonathan R. Vender, on the brief).

PER CURIAM

Plaintiff Besnick Gjana appeals from a March 31, 2023 order granting summary judgment to defendants Daibes Enterprises, LLC (Daibes Enterprises), 525 Livingston DFT 2017, LLC (525 Livingston), and Waterside Construction, LLC (Waterside) (collectively, defendants). We affirm.

We recite the facts from the motion record. 525 Livingston owned property located on Livingston Street in Norwood. On March 3, 2017, Waterside and 525 Livingston entered into a contractor agreement (Agreement) to build a shopping center with residential apartments (construction project).

The Agreement stated, "[Waterside] shall fully execute the [w]ork described in the [c]ontract [d]ocuments, except as specifically indicated in the [c]ontract [d]ocuments to be the responsibility of others." 525 Livingston agreed to pay Waterside for its work in the amount of $15,185,259, subject to additions and deductions consistent with the Agreement. The Agreement was signed by Fred Daibes on behalf of 525 Livingston, and Paul Daibes on behalf

of Waterside. Neither the Agreement, nor any related subcontract documents, referenced "Daibes Enterprises."

Sometime in September 2018, plaintiff's cousin, who worked for Waterside, secured a job for plaintiff working for Waterside. Because plaintiff did not speak English, he received work instructions from his cousin, as well as Waterside's foreman, Manual ("Manny") Cires.

On October 1, 2018, plaintiff reported to work at the construction project. Cires instructed plaintiff to remove improperly installed windows and gave plaintiff a ladder to do so. According to plaintiff, Cires stated, "I know . . . this ladder's not too stable[,] but I don't have another one."

Plaintiff used the ladder to reach a small window above a larger window. He was approximately six feet above the ground when he lost his balance and fell from the ladder. Plaintiff broke his leg as a result of the fall.

At his deposition, plaintiff explained he lost his balance because the ladder was unstable. He testified, "[T]he ladder was missing a part that keeps the step on it at the top st[ep]. The one that extends it higher, a part of it was missing so we had to put some type of screw there to stabilize it." Plaintiff did not dispute that Waterside provided the ladder he used to remove the windows at the

construction project. After plaintiff fell, Waterside prepared an employee accident report.

In 2020, plaintiff filed a workers' compensation claim against Waterside. On September 30, 2020, plaintiff also filed a personal injury lawsuit against defendants, including Waterside.

During his deposition, plaintiff testified he was employed by "a company called Waterside" and began working for Waterside one week prior to his accident. Plaintiff further testified he knew nothing about 525 Livingston. While plaintiff initially said he worked for Daibes Enterprises, he retracted this statement, asserting, "I don't know who Daibes Enterprises is at all. I . . . know only the Waterside company. I know my cousin. And I know that team leader guy—Manny." Plaintiff confirmed he received a paycheck but was not certain who paid him. Plaintiff testified Fred Daibes was the "president" of Waterside. However, plaintiff explained he never interacted with Fred Daibes or anyone associated with Daibes Enterprises.

A superintendent for Waterside, who worked with the company in 2018, also gave deposition testimony. The superintendent identified Waterside as the general contractor for the construction project. The superintendent testified plaintiff was "an employee of Waterside." He also confirmed Cires was

plaintiff's team leader and a Waterside foreman, and that Cires likely gave instructions to plaintiff's cousin, who then translated the instructions to plaintiff. On the date of his deposition, the superintendent was an employee of Daibes Sons and testified Daibes Enterprises was an "umbrella company" that owned Waterside.

Also deposed was Waterside's project manager in 2018. The project manager explained plaintiff was paid by check for work as a general laborer. The project manager gave the following testimony: Waterside's officers were Fred Daibes and Tom Pelligrino; Fred Daibes was affiliated with 525 Livingston; and Fred Daibes signed the Agreement with Waterside on behalf of 525 Livingston. When asked about Daibes Enterprises at his deposition, the project manager responded as follows:

> Q: . . . Fred Daibes, does he have an affiliation with Daibes Enterprises?
>
> A: Yes.
>
> Q: What is his affiliation with Daibes Enterprises?
>
> A: Daibes Enterprises isn't a stand[-]alone entity or a company.
>
> Q: Okay.
>
> A: It's just kind of an umbrella or a name that the rest of the entities are under.

> Q: When you say, the rest of the entities, what do you mean by that?
>
> A: Waterside Construction. And typically when they purchase properties they will purchase each one under a new LLC.
>
> Q: Okay. Does [] Paul Daibes have any affiliation with Daibes Enterprises?
>
> Again, understanding that it's kind of an umbrella organization.
>
> A: Yes, it's basically an umbrella and we're[,] you know, all kind of under the umbrella.

The project manager also testified regarding the Agreement. He explained Waterside hired subcontractors to perform specific trade work at the construction project. He further confirmed Daibes Enterprises had no involvement in the work at the construction project.

At the close of discovery, defendants filed a motion for summary judgment. Defendants argued they owed no legal duty to plaintiff regarding job site safety. Additionally, defendants asserted plaintiff's claims were barred by the exclusivity provision under the Workers' Compensation Act (WCA), N.J.S.A. 34:15-1 to -147. Defendants noted plaintiff did not dispute he was employed by Waterside. Defendants also noted, plaintiff filed a workers' compensation claim identifying Waterside as his employer.

After hearing oral argument, the motion judge granted defendants' motion for summary judgment and dismissed plaintiff's complaint with prejudice. The judge found the WCA barred plaintiff's claims against Waterside. He also concluded Daibes Enterprises and 525 Livingston owed no duty to plaintiff.

Further, the judge rejected plaintiff's argument that Waterside's failure to procure workers' compensation insurance rendered the WCA inapplicable. As the judge explained, if Waterside failed to pay any workers' compensation award, then plaintiff could collect from the Uninsured Employers Fund (Fund).

In determining plaintiff was an employee of Waterside, the judge made the following factual findings: plaintiff's cousin obtained a job for plaintiff working for Waterside; plaintiff reported to Waterside's foreman and team leader; plaintiff worked for Waterside at a different job site a week prior to his accident; "plaintiff was paid by Waterside . . . by check"; and plaintiff filed a workers' compensation claim against Waterside.

In rejecting plaintiff's argument that 525 Livingston owed a duty to him, the judge stated "[p]laintiff ha[d] not even come close to establishing any basis to [im]pose liability on 525 Livingston in this case." The judge further stated Daibes Enterprises owed no duty because it was "not improper for separate corporations to share common owners and officers . . . [and] Daibes [could not]

be held liable because it [was] an umbrella company affiliated in some manner with Waterside."

On appeal, plaintiff argues the judge erred in concluding his claims against Waterside were barred by the WCA because defendants failed to obtain workers' compensation insurance and thus should not be afforded protections under the WCA. Plaintiff further asserts the question of whether he was a Waterside employee presented a genuine issue of material fact precluding summary judgment. Plaintiff also contends the judge erred in finding 525 Livingston and Daibes Enterprises did not owe a duty to him. We reject these arguments.

We review a judge's decision on a motion for summary judgment de novo, applying the same standard as the trial court. Samolyk v. Berthe, 251 N.J. 73, 78 (2022). 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." Ibid. (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)); see also R. 4:46-2(c).

To defeat a summary judgment motion, the non-moving party must establish the existence of a "genuine issue [of] material fact," and must do "more

than point[] to any fact in dispute." Globe Motor Co. v. Igdalev, 225 N.J. 469, 479 (2016) (alterations in original) (emphasis omitted) (quoting Brill, 142 N.J. at 529). Having reviewed the record, we are satisfied plaintiff failed to present a genuine fact dispute for trial and, therefore, the judge properly granted summary judgment to defendants.

We first address plaintiff's employment status. The WCA provides an exclusive remedy for injuries sustained in an "accident arising out of and in the course of employment." N.J.S.A. 34:15-7; N.J.S.A. 34:15-8. The New Jersey Supreme Court has "long recognized that [the WCA] is remedial legislation and should be given liberal construction in order that its beneficent purposes may be accomplished." Kocanowski v. Twp. of Bridgewater, 237 N.J. 3, 10 (2019) (quoting Est. of Kotsovska v. Liebman, 221 N.J. 568, 584 (2015)).

"For more than a century, the [WCA] has provided employees injured in the workplace 'medical treatment and limited compensation without regard to the negligence of the employer.'" Vitale v. Schering-Plough Corp., 231 N.J. 234, 250 (2017) (internal quotation marks omitted) (quoting Est. of Kotsovska, 221 N.J. at 585). It has been described as a "historic 'trade-off,'" Laidlow v. Hariton Machinery Co., 170 N.J. 602, 605 (2002) (quoting Millison v. E.I. du Pont de Nemours & Co., 101 N.J. 161, 174 (1985)), where the employer

"assumes an absolute liability[,] [but] gains immunity from common-law suit, even though he [may] be negligent, and is left with a limited and determined liability in all cases of work-connected injury," Vitale, 231 N.J. at 250 (first alteration in original).

The WCA requires employers to properly compensate injured employees and obtain workers' compensation insurance. N.J.S.A. 34:15-71 to -72; N.J.S.A. 34:15-79(a). Despite these mandates, the statute provides a mechanism for injured employees to receive compensation in the event an employer fails to purchase the mandated insurance coverage or refuses to compensate an injured employee.

Under the WCA, the Fund "provide[s] for the payment of awards against uninsured defaulting employers who fail to provide compensation to employees or their beneficiaries in accordance with the provisions of the workers' compensation law." N.J.S.A. 34:15-120.1(a). The Fund is subrogated to the rights of the employee to the extent of any payment. N.J.S.A. 34:15-120.5.

Here, plaintiff was an employee of Waterside and, in fact, testified at deposition that he was a Waterside employee. Plaintiff's receipt of payment for work from Waterside and submission of a workers' compensation claim against Waterside, coupled with the deposition testimony of Waterside's superintendent

and project manager, further supported plaintiff's status as an employee of Waterside.

Additionally, plaintiff pursued a workers' compensation claim against Waterside. By agreeing to proceed with a WCA claim against Waterside, plaintiff relinquished his right to any other method or type of compensation. See N.J.S.A. 34:15-8. As plaintiff's employer, Waterside was entitled to invoke the exclusivity bar of the WCA. If Waterside fails to pay any sums awarded by the workers' compensation court, plaintiff may present his claim to the Fund, which permits recovery for an injured employee in situations where the employer fails to pay a compensation award or lacks workers' compensation insurance.

We next address plaintiff's arguments that 525 Livingston and Daibes Enterprises owed him a duty of care. We disagree.

We first examine whether 525 Livingston, as the property owner, owed a duty of care to plaintff. To prove a negligence claim, a plaintiff must establish the following: (1) a duty of care, (2) a breach of that duty, (3) injury proximately caused by the breach, and (4) damages. Robinson v. Vivirito, 217 N.J. 199, 208 (2014). "[W]hether a defendant owes a legal duty to another" is "generally [a] question[] of law for the court to decide." Ibid.

In the context of a property owner's duty to an employee of an independent contractor, the property owner generally owes "a duty to provide a reasonably safe work place." Olivo v. Owens-Ill., Inc., 186 N.J. 394, 406 (2006) (quoting Muhammad v. N.J. Transit, 176 N.J. 185, 199 (2003)). However, such a duty does not extend to "known hazards which are part of or incidental to the very work the contractor was hired to perform," Muhammad, 176 N.J. at 199 (quoting Wolczak v. Nat'l Elec. Prods. Corp., 66 N.J. Super. 64, 75 (App. Div. 1961)), as long as "the landowner does not retain control over the means and methods of the execution of the project," id. at 198. The known-and-incidental-hazards exception to imposing liability against a property owner was created because "[t]he landowner may assume that the worker, or his superiors, are possessed of sufficient skill to recognize the degree of danger involved and to adjust their methods of work accordingly." Id. at 199 (quoting Wolczak, 66 N.J. Super. at 75).

Here, plaintiff claims 525 Livingston retained control over the means and methods for removing improperly installed windows at the construction project. See Sanna v. Nat'l Sponge Co., 209 N.J. Super. 60, 67 (App. Div. 1986) (noting that prior "decisions stressed the degree to which the landowner participated in,

actively interfered with, or exercised control over the manner and method of the work being performed at the time of the injury").

Plaintiff mistakenly relies on Carvalho v. Toll Brothers and Developers, 143 N.J. 565 (1996) in support of his argument regarding 525 Livingston's duty of care. However, plaintiff failed to demonstrate that 525 Livingston, unlike the engineer in Carvalho, retained the requisite control over the means and methods of the work at the construction project. Id. at 576.

Here, 525 Livingston had no responsibility for ensuring compliance with the plans for the construction project or supervising the construction project's progress. Additionally, 525 Livingston had no authority to halt work on the construction project to address safety concerns. 525 Livingston, as the property owner, did not have the requisite degree of control over the construction site, as did the engineer in Carvalho, to impose a duty.

Plaintiff also relies on Costa v. Gaccione, 408 N.J. Super. 362 (App. Div. 2009) in support of his argument regarding the duty of care owed by 525 Livingston. However, Costa is readily distinguishable from the facts in this case. In that case, the issued contruction permit identified the property owner as the "person responsible for the work." Id. at 365-66.

Here, although 525 Livingston is the property owner, the Agreement between 525 Livingston and Waterside unequivocally delegated responsibility for the construction project to Waterside. Moreover, Waterside, not 525 Livingston, signed the subcontractor agreements for the construction project. Further, Waterside employees were present at the construction project, and managed and supervised the work at the construction project.

We also agree Fred Daibes's role as a managing member of both 525 Livingston and Waterside failed to raise any genuine issues of material fact related to 525 Livingston's duty of care. Although Fred Daibes was a managing member of both 525 Livingston and Waterside, that fact does not support plaintiff's contention 525 Livingston participated in, or exercised control over, the window removal work.

On this record, we are satisfied the Agreement between 525 Livingston and Waterside delegated work at the construction project to Waterside. Waterside had the exclusive duty to supervise and control plaintiff's work. Plaintiff failed to establish 525 Livingston retained any control over the means and methods of the work at the construction project so as to owe a duty of care to plaintiff.

We next consider whether Daibes Enterprises owed a duty of care to plaintiff. Similar to our analysis regarding 525 Livingston, whether Daibes Enterprises owed a duty to plaintiff depends on whether Daibes Enterprises retained control over the manner and means of the work performed, knowingly engaged an incompetent subcontractor, or contracted for inherently dangerous work.

We are satisfied on this record that Daibes Enterprises had no involvement in the construction project, site safety, or employee supervision. To the extent that Daibes Enterprises is "an umbrella company" and had shared members and officers with co-defendants, that fact is insufficient to impose a duty of care on Daibes Enterprises.

As our Supreme Court has stated, "[a] professional corporation and its [] owner are separate entities and the immunity of the workers' compensation laws that shields the corporation from tort liability to employees does not extend to the owner of the corporation." Lyon v. Barrett, 89 N.J. 294, 304 (1982); see also Strasenburgh v. Straubmuller, 146 N.J. 527, 549 (1996) ("A corporation is regarded as an entity separate and distinct from its shareholders.").

While Fred Daibes was affiliated with Waterside, 525 Livingston, and Daibes Enterprises as a common owner and/or officer, his affiliation with each

entity did not impose liability on Daibes Enterprises for plaintiff's injury. Plaintiff proffered no evidence Daibes Enterprises assumed the role of a contractor for the construction project to owe a duty of care to plaintiff.

Here, the record demonstrated Waterside hired its workers, directed the work, issued payment to its workers for the work performed, and ensured the safety of its workers. Daibes Enterprises had no responsibility for these acts. Plaintiff failed to proffer any evidence that Daibes Enterprises managed or oversaw any aspect of the construction project.

On these facts, we are satisfied the judge properly held neither 525 Livingston nor Daibes Enterprises owed a duty of care to plaintiff.

Affirmed.