CASENOTE: CLAIM BARRED BY PRIVETTE - NO RETAINED CONTROL

LAWATYOURFINGERTIPS ®
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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

JOHNNY V. ALLEN,
Plaintiff and Appellant,
v.
AMY'S KITCHEN, INC.,
Defendant and Respondent.

A148194

(Sonoma County
Super. Ct. No. SCV-256195)

Plaintiff Johnny V. Allen appeals from a summary judgment entered against him on his negligence claim against defendant Amy's Kitchen, Inc. (Amy's). Allen's finger was crushed while he was participating in the installation of industrial equipment at a food manufacturing plant owned by Amy's. Allen was an employee of Bryson Enterprises, Inc. (Bryson), which was hired by Amy's as an independent contractor. Allen recovered workers' compensation from Bryson for his injury and sued Amy's on a claim of negligence. Employees of independent contractors injured in the workplace cannot sue the party that hired the contractor to do the work absent exceptional circumstances. (*Privette v. Superior Court* (1993) 5 Cal.4th 689 (*Privette*).) The trial court found no exceptions to the *Privette* rule applicable on the evidence presented. We shall affirm the judgment.

Statement of Facts

Amy's hired Bryson to unload a food mixer from a delivery truck and install the mixer at Amy's Santa Rosa facility. Amy's project coordinator, Robert Gates, contacted the mixer manufacturer to confirm the weight of the mixer because Bryson "wanted to size the correct size crane for the job." The manufacturer's sales representative wrote to Gates and Bryson's shop foreman

stating the mixer's weight to be "approximately 6600 pounds." The mixer was delivered to Amy's facility on the morning of July 3, 2014.

Precision Crane Services, Inc. (Precision), Bryson's subcontractor, unloaded the mixer using a truck crane and forklift Precision supplied. Gates testified in his deposition that the crane alone was unable to lift the mixer because it appeared "the mixer was heavier than what was expected."[1] Once lifted from the truck, Precision lowered the mixer onto stainless steel machine skates supplied by Precision. Precision moved the mixer into place by pushing it from behind with its forklift.

Bryson employees Allen and Scott Llewellyn were on site to assist in moving the mixer, drilling holes, and bolting the mixer to the floor.[2] Allen and Llewellyn observed Precision remove the mixer from the truck and push it into the facility. Allen testified that the mixer was on the forklift and within a few inches of its place for installation when Llewellyn asked him to straighten one of the four skates. According to Llewellyn, he was satisfied with the mixer's placement but Gates instructed him and Allen to move the mixer another inch.[3] Llewellyn says he and Allen "thought we could do it by sliding the mixer over on the wheeled skates. One of the wheels, however, was misaligned and wasn't moving. We decided to jack the mixer up slightly, take weight off the wheel and then adjust it. As I operated the jack, [Allen] attempted to adjust the wheel."

The hydraulic jack was brought to the worksite by Llewellyn. Llewellyn "had been told that the mixer was approximately 6,600 pounds" but he brought a jack with a lifting capacity of only 4,000 pounds, believing it "would be sufficient." Allen had his hand under the mixer attempting to adjust the wheeled skate when the jack "gave way, causing the machine to fall and crush [Allen's] finger."

Discussion

I. *Summary judgment standard*

"On appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained. [Citation.] Under California's traditional rules,

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[1] It is undisputed that the crane had difficulty lifting the mixer for "some reason" but there is no evidence as to the mixer's actual weight or the crane's lifting capacity, thus making it uncertain whether the mixer was heavier than the manufacturer's estimate of "about 6,600 pounds" or if the crane was unable to lift 6,600 pounds.

[2] Allen testified that Llewellyn was his foreman but Llewellyn declares he was not Allen's foreman, only a coworker with "experience" and "more seniority." The distinction is immaterial to the issues on appeal.

[3] Amy's objected to portions of Llewellyn's declaration and other evidence proffered by Allen but the objections were overruled in their entirety. Amy's renews those objections on appeal. Without deciding the merits of Amy's objections we shall, for purposes of this appeal, consider all the evidence proffered by Allen.

we determine with respect to each cause of action whether the defendant seeking summary judgment has conclusively negated a necessary element of the plaintiff's case, or has demonstrated that under no hypothesis is there a material issue of fact that requires the process of trial, such that the defendant is entitled to judgment as a matter of law." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.)

II. *Liability of the hirer of an independent contractor*

"Generally, when employees of independent contractors are injured in the workplace, they cannot sue the party that hired the contractor to do the work." (*Seabright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, 594, citing *Privette, supra,* 5 Cal.4th 689.) "The California Supreme Court has explained why the hirer of an independent contractor is usually not held liable for injuries to the contractor or its employees. The independent contractor 'has authority to determine the manner in which inherently dangerous . . . work is to be performed, and thus assumes legal responsibility for carrying out the contracted work, including the taking of workplace safety precautions' to protect himself and his employees. [Citations.] Thus, the hirer will not be held vicariously liable for injuries resulting from the contractor's negligence in failing to perform its task safely. [Citation.] The remedy for the contractor's injured employee is workers' compensation, which is a cost ultimately borne by the contractor's hirer." (*Gravelin v. Satterfield* (2011) 200 Cal.App.4th 1209, 1214.)

"The general rule that a contractor and its employees may not recover tort damages from the contractor's hirer has few exceptions." (*Gravelin v. Satterfield, supra,* 200 Cal.App.4th at p. 1214.) The undisputed facts show Allen was employed by an independent contractor to perform work on Amy's property and was injured while performing that work. Accordingly, *Privette* bars Allen's action absent a triable issue of fact as to whether an exception applies that would permit him to recover against Amy's. (*Privette, supra,* 5 Cal.4th at p. 692.)

III. *Retained control*

One exception to the general rule of nonliability permits a contractor's employee to recover from the hirer of the contractor where the hirer retains control over the work performed by the contractor and "exercised the control that was retained in a manner that affirmatively contributed to the injury of the contractor's employee." (*Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 210, italics omitted.) Allen contends that Amy's retained control over the work and affirmatively contributed to his injury because Gates, Amy's project coordinator, showed the workmen "where to place the machine and what route to take" and decided "to move forward with the transport and installation despite concerns about the adequacy of the equipment available to do the job."

The record fails to show Amy's retained control and affirmatively contributed to Allen's injury. There is no evidence that Amy's choice of location for the mixer or route of transport was unsafe or in any way contributed to Allen's injury. The only evidence concerning possible inadequacy of equipment related to Gates's observation that the subcontractor's crane appeared unable to lift the mixer from the truck. Even if, as Allen maintains, Gates directed the workmen to remove the mixer from the truck despite the crane's inability to lift a heavier-than-expected mixer, that action did not contribute to Allen's injury. Allen was not injured during removal of the mixer from the truck but during its installation in the factory. While Gates, according to Llewellyn, di-

rected the workmen to move the mixer an additional inch, he did not direct the manner of that movement. Allen testified it was his coworker Llewellyn who directed him to straighten one of the four wheeled skates under the mixer and Llewellyn declared that he and Allen jointly "decided to jack the mixer up slightly, take weight off the wheel and then adjust [the wheel]." Llewellyn used a jack with a lifting capacity of only 4,000 pounds despite knowing the mixer was "approximately 6,600 pounds." Allen was injured when the jack—supplied by Allen's employer and operated by his coworker—"gave way, causing the machine to fall and crush [Allen's] finger." There is no evidence that Gates knew the jack's lifting capacity was inadequate for the task and, even if he did, there is no evidence that Gates directed use of the jack or otherwise directed the means and methods of moving the mixer. "[T]he act of directing [an unsafe condition] is active participation" but "the passive permitting of an unsafe condition to occur is not an affirmative contribution." (*Tverberg v. Fillner Construction, Inc.* (2012) 202 Cal.App.4th 1439, 1448.)

IV. *Retained duty*

"[A]n independent contractor's hirer presumptively delegates to that contractor its tort law duty to provide a safe workplace for the contractor's employees." (*Seabright Ins. Co. v. US Airways, Inc., supra,* 52 Cal.4th at p. 600.) It is thus the contractor, not the hirer, who is usually responsible for complying with workplace safety regulations for the benefit of the contractor's employees. (*Id.* at p. 601.) Allen acknowledges this rule but argues that Amy's affirmatively retained the duty to provide a safe workplace for its contractors' employees by adopting certain internal operating procedures. Allen points to a corporate document entitled "Contractors Procedures" that directs project coordinators to provide contractors with safety rules and to "[p]eriodically monitor contractor activity to ensure compliance" with those rules. Allen argues that the document evinces Amy's assumption of a duty to assure compliance with all workplace safety rules, including federal safety regulations requiring that "any object lifted by a jack not exceed the jack's rated weight capacity." (29 C.F.R. § 1926.305(a)(1).)

The document does not show that Amy's assumed a duty of care toward contractors' employees, as Allen argues. To the contrary, the document states that "[c]ontractors and their employees are required to comply with all requirements" of federal and state workplace safety agencies and that the contractor "is responsible for ensuring" that all of Amy's safety rules are "followed while performing work at any Amy's location." The contractor, not Amy's project coordinator, is obligated to comply with safety regulations, including the regulation Allen cites concerning hydraulic jacks. Amy's project coordinator simply monitors contractors for compliance with its corporate policy and Amy's safety rules and reports violations to the contractor and management. A hirer's general oversight of contractor performance does not convert the hirer into a guarantor of workplace safety. "[M]ere retention of the ability to control safety conditions is not enough" to impose liability on a hirer. (*Hooker v. Department of Transportation, supra,* 27 Cal.4th at p. 209; see also, e.g., *Khosh v. Staples Construction Co., Inc.* (2016) 4 Cal.App.5th 712, 718 ["a general promise to be 'responsible for site safety' did not constitute a specific promise to undertake a particular safety measure"].)

Disposition

The judgment is affirmed.

Pollak, J.

We concur:
McGuiness, P.J., Jenkins, J.

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