Filed 11/8/11 DeFrates v. Clark CA1/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

CHARLES DEFRATES, Plaintiff and Appellant, v. ROBERT CLARK, Defendant and Respondent.	A131222 (Mendocino County Super. Ct. No. SCUKCVPO0852449)

I. INTRODUCTION

Plaintiff and appellant Charles DeFrates appeals from the trial court's judgment granting defendant and respondent Robert Clark's motion for summary judgment. DeFrates argues that the trial court erred when it found that Clark was not personally liable for DeFrates' on-the-job injuries, because Clark's actions as the hirer of DeFrates's employer, R.G. Clark Construction, Inc., did not affirmatively contribute to DeFrates's injuries. We agree with the trial court and hence affirm the judgment.

II. FACTUAL AND PROCEDURAL BACKGROUND

DeFrates was injured on January 15, 2007, while working as a foreman for R.G. Clark Construction, Inc. (R.G. Clark Construction) on property located at 111 Cleveland Lane in Ukiah.

On August 17, 2006, Clark hired R.G. Clark Construction to build a townhouse style duplex at 111 Cleveland Lane, Ukiah. Clark is the sole owner of R.G. Clark Construction and also owns the property on Cleveland Lane. Clark visited the property

most days and stayed about an hour when he did so. He did not perform manual labor at the site.

One of DeFrates's duties as foreman was to make sure the workers on site worked in a safe environment. Before the workers began to place felt or roofing paper on the roof, Clark told DeFrates to construct scaffolding for safety. Clark provided scaffolding, planks and lumber from his home to be used in the construction. DeFrates told Clark that he did not want to construct the scaffolding because it would not be safe and there was not enough material. DeFrates instead asked Clark to provide roof jacks for the roof construction. Clark told DeFrates that he and his crew could work safely without roof jacks. DeFrates did not himself provide any additional safety equipment and construction commenced without any safety equipment.

After the conversation with Clark, DeFrates slipped and fell while working on the roof of the duplex. He injured himself in the process. A day or two after falling off the roof, DeFrates returned to work as a foreman. Approximately three to four months after the accident, DeFrates was laid off for lack of work. DeFrates received worker's compensation for his injuries.

DeFrates sued Clark individually for personal injury on October 1, 2008. Clark moved for summary judgment on the ground that worker's compensation was DeFrates's sole remedy. The trial court agreed, finding that "there is no evidence proffered that Clark owned or supplied the materials for the scaffolding in his individual capacity." The court pointed out that it was not disputed that "Clark left the job site telling his *employees* that they could get the job done safely without roof jacks . . . ." (Italics added.) The court also found that "[t]here is certainly no admissible evidence that Clark was acting as a landowner in that alleged conversation." The court then went on to hold that, moreover, even if Clark was acting in his individual capacity as a hirer, "there is no evidence in the separate statements that the scaffolding, or more particularly, the materials for the scaffolding, in this case caused or contributed to the plaintiff's injury."

After the trial court granted summary judgment, DeFrates moved for a new trial on the ground that he had not been given notice of the ground upon which the trial court

granted summary judgment. He argued that, had he been given such notice, he would have "responded with both facts and law to support Plaintiff's cause of action that a triable issue of fact on the affirmative conduct of Robert Clark causing injury does exist. If Plaintiff had been given the opportunity to respond, Plaintiff would have further raised the legal issue that one who assumes to act, even though gratuitously, may thereby become subject to a duty of acting carefully." The trial court granted this motion.

After further briefing, the court held that Clark did not affirmatively contribute to DeFrates's injuries. The trial court reasoned that allegedly faulty scaffolding supplied by Clark was never used and, therefore, Clark did nothing to affirmatively contribute" to DeFrates's injury. The court again granted summary judgment and also incorporated by reference its original decision.

DeFrates then filed this timely appeal.

III. DISCUSSION

A. *Standard of Review*

A reviewing court reviews a grant of summary judgment de novo, deciding "independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law." (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.) "Under California's traditional rules, 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." [Citations.] (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334-335.) "In ruling on the motion, the court must 'consider all of the evidence' and 'all' of the 'inferences' reasonably drawn therefrom [citation], and must view such evidence [citations] and such inferences [citations] in the light most favorable to the opposing party." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843, citing Code Civ. Proc., § 437c, subd. (c).)

B. *Legal Principles*

DeFrates argues that the trial court erred in granting summary judgment. He contends that Clark is personally responsible for his (DeFrates's) injuries because Clark, in his capacity as the person who hired DeFrates's employer, R.G. Clark Construction, supplied defective safety equipment to the jobsite. We disagree.

Generally, an employee of an independent contractor such as DeFrates may not bring a tort suit against the hirer of the independent contractor: "In *Privette v. Superior Court* (1993) 5 Cal.4th 689 (*Privette*) and *Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253 (*Toland*), [the Supreme Court] held that an employee of a contractor may not sue the hirer of the contractor under either of the alternative versions of the peculiar risk doctrine set forth in sections 413 and 416 [of the Restatement Second of Torts]." (*Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 200-201 [(*Hooker*)].) The employee is "restricted instead to a claim against the contractor under the workers' compensation insurance system." (*McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219, 222 (*McKown*).) Here, of course, DeFrates received workers' compensation for his injuries. Clark, as hirer, is presumed to have delegated the responsibility for the safety of the workers to the independent contractor, R.G. Clark Construction. (*Kinsmen v. Unocal Corp.* (2005) 37 Cal.4th 659, 671.)

Although a hirer has "no duty to act to protect the employee when the contractor fails in that task," he may assume this duty through his own affirmative conduct. (*Kinsmen v. Unocal Corp.*, *supra*, 37 Cal.4th at p. 674.) In *Hooker*, the court articulated a two-part standard for a hirer's liability to the employee of an independent contractor. First, the "hirer . . . retain[s] control over safety conditions at a worksite" and second, "negligently exercises that control in a manner that affirmatively contributes to an employee's injuries . . . ." (*Hooker, supra*, 27 Cal.4th at p. 213.)

C. *Retention of Control*

The first ground upon which the trial court granted summary judgment was that Clark's provision of materials for scaffolding and his statement to his employees that roof jacks were not necessary were actions done in Clark's capacity as DeFrates's employer.

Workers' compensation, therefore, was DeFrates's sole remedy. In support of this conclusion, the court pointed out that DeFrates himself stated in his separate statement of material facts that "Clark left the job site telling his employees that they could get the job done safely without roof jacks . . . ." In addition, DeFrates describes Clark as not only the owner of the property, but also as the "representative of the employer R.G. Clark Construction." In addition, DeFrates put forward no evidence, much less undisputed evidence, that Clark acted with regard to safety matters in an independent capacity rather than as DeFrates's employer.

DeFrates, however, argues that the fact that Clark owned a rental unit on the same property as the construction site and kept that property in order, made decisions regarding materials to be used in constructing the property, changed the construction plans, asked employees to work on his business rental, and used materials from his home, such as the wooden planks he told his employees to use for scaffolding, establishes that Clark's directions regarding safety on the job site were given in his capacity as the hirer of R. G. Clark Construction rather than as DeFrates's employer. We do not agree. DeFrates's catalogue of various activities Clark engaged in on the property does not establish that when Clark gave DeFrates safety instructions he did so as an individual, rather than as DeFrates's employer. As we have noted, the only undisputed evidence in the separate statements directly relevant on this point is that Clark gave safety instructions to his "employees," and was the "representative of the employer R. G. Clark Construction." DeFrates cannot, therefore, seek damages for his injuries from Clark as an individual. His sole remedy was workers' compensation. For this reason alone, summary judgment was appropriate.

D. *Affirmative Contribution*

The trial court also found that Clark was not liable to DeFrates because he did not affirmatively contribute to DeFrates's injury (*Hooker*, *supra,* 27 Cal.4th at p. 213) in that the allegedly faulty scaffolding supplied by Clark was never used and therefore, did not affirmatively contribute to DeFrates's injuries. Although the trial court did not make this clear, this was apparently a second ground on which summary judgment was granted.

Thus, even assuming that Clark gave DeFrates safety instructions in his capacity as the hirer of R.G. Clark Construction, Inc., he was not liable for DeFrates's injuries because there was no affirmative contribution.

Thus, in *McKown, supra,* 27 Cal.4th at page 223, a hirer who retained control of safety conditions at a WalMart store, and provided a forklift that was the direct cause of an employee's injuries, was found to have affirmatively contributed to those injuries. Here, in contrast, the scaffolding Clark provided was rejected by DeFrates, who thought it was unsafe. Because the scaffolding Clark provided was never used, it did not affirmatively contribute to DeFrates's injuries.

DeFrates, citing *Browne v. Turner Construction Co.* (2005) 127 Cal.App.4th 1334 (*Browne*), argues that even if the equipment was not used, it still may affirmatively contribute to an employee's injuries. *Browne* is inapposite; in that case, a hirer provided hydraulic lifts and then removed them before they could be used. Instead, the injured employee was "required" to use a ladder. In addition, the hirer removed "anchoring cables to which workers would secure or 'tie off' their safety lanyards." The hirer itself had a rule that all employees were required to " 'tie off' " when they were more than six feet above the ground. The employee argued that, because of this conduct, the hirer "had effectively 'determin[ed]' that he would work in violation of the tie-off rule." (*Id.* at p. 1338.) It was "undisputed that [the hirer and employer] undertook to arrange and supply the means and methods of work, including safety systems and devices, which they then withdrew before the work was completed, leaving plaintiff with no safe means of completing the work. There was no evidence that this was done in the expectation that plaintiff's employer could, would, or should make substitute arrangements. It is true that the catenary lines had been removed some two months before plaintiff's injury, but there was no evidence that plaintiff's employer had the opportunity, or would have been permitted, to replace those lines. . . . In short the evidence raises the strong possibility, at least, that defendants not only actively contributed to plaintiff's injuries, but actually *created* the situation in which they were likely to occur." (*Id.* at pp. 1345-1346.)

The court went on to hold that, in such a situation, "defendants may be liable under general tort principles for breaching a duty of care arising from their own voluntary endeavor to protect plaintiff and others from injury." (*Browne, supra,* 127 Cal.App.4th at p. 1346.) The court concluded that summary judgment was not appropriate because the question of whether a duty had arisen and whether it had been breached could not be determined on the record before it.

DeFrates's use of *Browne* to support his contention that Clark induced the employees to rely on him, as hirer, for all future safety equipment, is misplaced. In holding that liability in this circumstance can be premised on a tort concept of induced reliance, the *Browne* court did not ignore the affirmative contribution requirement set out in *Hooker*. (*Browne, supra,* 127 Cal.App.4th at p. 1347, fn. 4.) Instead, the *Browne* court noted that the employee relied on the hirer's initially gratuitous provision of that specific equipment, which induced him to not obtain his own equipment. (*Id.* at p. 1345.)

Unlike the hirer in *Browne,* Clark did not provide safety equipment that DeFrates expected to use, only to remove it directly before the project was to begin. DeFrates began work with the option of using the scaffolding and that option was never removed. DeFrates, who was himself responsible for safety on the site, decided not to use the scaffolding. Nor is there anything in *Browne* to suggest that assuming a duty to provide one type of equipment will make a hirer responsible for all safety equipment for the duration of the project. To the contrary, the court noted "a duty thus voluntarily undertaken is not limitless. A Good Samaritan does not enslave himself eternally to the beneficiary of his undertaking merely by once rendering aid. [Citation] Here, however, defendants made no attempt to show that they had disengaged from their undertaking without worsening plaintiff's position or otherwise affirmatively contributing to his injuries." (*Browne, supra,* 127 Cal.App.4th at p. 1348.) Clark did not worsen DeFrates' position by providing the scaffolding. In fact, to the extent Clark was operating as a hirer, he had no duty to provide any safety equipment to the employees. He gratuitously provided scaffolding and, when DeFrates elected not to use it, his assumed duty ended.

In sum, Clark as hirer did not assume a lasting duty towards the employees on the job site when he provided scaffolding. Therefore, there is no material issue of fact as to whether Clark can be liable as hirer for his failure to provide additional safety equipment. Nor is there any material issue of fact as to whether Clark's provision of the scaffolding affirmatively contributed to DeFrates's injury. The trial court did not err in granting summary judgment.

IV. DISPOSITION

The judgment is affirmed.

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Haerle, J.

We concur:

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Kline, P.J.

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Lambden, J.