Filed 5/21/18 Gudino v. Kalkat CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

MARIA GUDINO et al., Plaintiffs and Appellants, v. BHUPINDER SINGH KALKAT, Defendant and Respondent.	C080625 (Super. Ct. No. 161834)

Amador Gudino fell to his death while working on the framing of defendant Bhupinder Kalkat's new house. Gudino's widow, individually and as guardian ad litem for her children (the heirs), brought suit for damages against Kalkat. Kalkat successfully moved for summary judgment, on the grounds that he had no liability as the employer of an independent contractor under *Privette v. Superior Court* (1993) 5 Cal.4th 689 (*Privette*) and its progeny, which limit employer liability under certain circumstances, explained *post*.

On appeal, the heirs contend *Privette* does not control because Kalkat furnished unsafe equipment--a forklift with defective brakes--that affirmatively contributed to Gudino's death. They further contend there is a triable issue of fact as to whether Kalkat retained control over safety conditions at the job site and negligently exercised that control. We find the heirs failed to raise a triable issue of fact to bring this case within an exception to the limits on liability explained by *Privette* and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Kalkat hired JKD Construction as the framing contractor for the construction of his large house in Live Oak. The contract provided that JKD was responsible for compliance with all Cal-OSHA requirements for safety and fall protection. The contract also required JKD to carry current workers' compensation and liability insurance.

Amador Gudino was an employee of JKD and worked on the framing of Kalkat's house. On October 18, 2012, he fell to death while working on a second story balcony. A Cal-OSHA investigation determined the framing work was conducted without adequate fall protection. Cal-OSHA found several violations, most relating to the absence of fall protection.

Gudino's survivors and heirs, his wife and three children, received workers' compensation benefits. The heirs alleged entitlement to increased benefits due to JKD's serious and willful misconduct. The matter was resolved by a compromise and release.

The heirs brought suit against Kalkat and others. The complaint alleged negligent exercise of retained control, negligent provision of required safeguards and precautions, negligent provision of unsafe equipment, negligent selection of contractor, and breach of a non-delegable duty.

Kalkat moved for summary judgment, contending workers' compensation was the heirs' exclusive remedy. Kalkat argued that under *Privette* he had no liability as the hirer of an independent contractor. He argued there were no facts to support the allegation that

he retained and exercised control over the premises or that he affirmatively contributed to the cause of the accident.

In support of the motion for summary judgment, Kalkat provided evidence of the heirs' receipt of workers' compensation benefits and the Cal-OSHA investigation and report.

In opposition, the heirs provided the building permit, which showed Kalkat as the owner-builder. The heirs also provided two declarations from former employees of JKD Construction. Adrian Estrada worked at the Kalkat residence before the date of the accident. He declared employees used forklifts to raise pallets to stand on. There were two forklifts available; one was owned by JKD and the other by Kalkat. The brakes on Kalkat's forklift did not work. Estrada had seen Gudino use Kalkat's forklift, but not at the time of the accident. Gudino's brother, Toribio, also worked on site but left before the accident. He declared he and his brother regularly worked at heights above 20 feet and used forklifts to raise pallets to work on. There were two forklifts; the one supplied by Kalkat had defective brakes. Once they put blocks behind the wheels to keep it from moving. He had heard Estrada complain about the brakes to Kalkat and Kalkat had responded he was aware of the problem.

The heirs also supplied excerpts from the deposition of Jerry Pierce, the job superintendent. He testified Kalkat came by the construction site once a day; he was fascinated by how the house was being built. Kalkat never physically helped with the construction, had no employees, and never gave advice or said something was being done incorrectly. Kalkat provided a forklift and that forklift was near Gudino when he fell; photographs showed two ladders and a plank on the balcony where Gudino fell near the forklift.

The heirs argued that under *McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219 (*McKown*) a hirer of an independent contractor was liable for furnishing unsafe or defective equipment and that was what happened here. Further, Kalkat knew there were

inadequate fall protections but failed to provide adequate alternatives. He provided a forklift that he knew had defective brakes. The heirs argued this evidence supported the inference that Kalkat's actions were unreasonable and negligent.

In reply, Kalkat offered excerpts from the deposition of Pierce to show that Kalkat was not at all involved in the construction; he was present at the site often, but only because he was fascinated by the ongoing project. Kalkat objected to the declarations of Estrada and Toribio on the grounds of lack of foundation and relevance.[1] He argued the heirs failed to raise a triable issue of fact that Kalkat retained control over safety conditions and exercised such control in a manner that affirmatively contributed to the fall. He further argued there was no evidence the forklift was involved in the accident.

The trial court granted the motion for summary judgment, finding no evidence the forklift contributed to the accident. The court entered judgment for Kalkat.

DISCUSSION

I

Privette *and Its Progeny*

"At common law, a person who hired an independent contractor generally was not liable to third parties for injuries caused by the contractor's negligence in performing the work." (*Privette, supra,* 5 Cal.4th at p. 693.) Over time, exceptions arose to this common law rule, one of which was contracted work that posed an inherent risk of injury, known as the peculiar risk doctrine. (*Ibid*.) In *Privette,* our Supreme Court considered the potential conflict between application of the peculiar risk doctrine and the system of workers' compensation. (*Id*. at p. 691.)

The court concluded "in the case of on-the-job injury to an employee of an independent contractor, the workers' compensation system of recovery regardless of fault

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[1] The trial court did not rule on these objections; thus, we will consider the declarations.

achieves the identical purposes that underlie recovery under the doctrine of peculiar risk. It ensures compensation for injury by providing swift and sure compensation to employees for any workplace injury; it spreads the risk created by the performance of dangerous work to those who contract for and thus benefit from such work, by including the cost of workers' compensation insurance in the price for the contracted work; and it encourages industrial safety." (*Privette, supra*, 5 Cal.4th at p. 701.)

Privette held peculiar risk liability did not extend to employees of an independent contractor. When "the injuries resulting from an independent contractor's performance of inherently dangerous work are to an employee of the contractor, and thus subject to workers' compensation coverage, the doctrine of peculiar risk affords no basis for the employee to seek recovery of tort damages from the person who hired the contractor but did not cause the injuries." (*Privette, supra,* 5 Cal.4th at p. 702.)

In *Toland v. Sunland Housing Group, Inc*. (1998) 18 Cal.4th 253, 264, the Supreme Court held that *Privette* applies not only when, as in *Privette*, recovery is sought under the theory the hirer is liable for the contractor's negligence in spite of providing in the contract that the contractor take special precautions (Rest.2d Torts, § 416), but also when recovery is sought under the theory that that the hirer failed to provide for special precautions in the contract (Rest.2d Torts, § 413). "In either situation, it would be unfair to impose liability on the hiring person when the liability of the contractor, the one primarily responsible for the worker's on-the-job injuries, is limited to providing worker's compensation coverage." (*Toland*, at p. 267.)

In *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235, our high court held that an employee of a contractor may not sue the hirer of the contractor under the negligent hiring theory.

In *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198 (*Hooker*), the Supreme Court considered whether an employee of a contractor may sue the hirer of a contractor for the tort of negligent exercise of retained control. The court held "a hirer of

an independent contractor is not liable to an employee of the contractor merely because the hirer retained control over safety conditions at a worksite, but that a hirer is liable to an employee of a contractor insofar as a hirer's exercise of retained control *affirmatively contributed* to the employee's injuries." (*Id.* at p. 202.)

Another exception to the *Privette* rule is where the hirer of the independent contractor provides unsafe equipment that affirmatively contributes to the employee's injury. "[W]hen a hirer of an independent contractor, by negligently furnishing unsafe equipment to the contractor, affirmatively contributes to the injury of an employee of the contractor, the hirer should be liable to the employee for the consequences of the hirer's own negligence." (*McKown, supra*, 27 Cal.4th at p. 225.)

"A useful way to view the [*Privette* line of] cases is in terms of delegation. . . . [I]n *Privette* and its progeny, we have concluded that, principally because of the availability of workers' compensation, [the] policy reasons for limiting delegation do not apply to the hirer's ability to delegate to an independent contractor the duty to provide the contractor's employees with a safe working environment. In fact, the policy in favor of delegation of responsibility and assignment of liability is so strong in this context that we have not allowed it to be circumvented on a negligent hiring theory. Nonetheless, when the hirer does not fully delegate the task of providing a safe working environment, but in some manner actively participates in how the job is done, and that participation affirmatively contributes to the employee's injury, the hirer may be liable in tort to the employee." (*Kinsman v. Unocal Corp*. (2005) 37 Cal.4th 659, 671.)

The heirs rely on the exceptions to the *Privette* rule set forth in *Hooker* and *McKown*. Both require that the hirer's own negligence, in exercising retained control or providing unsafe equipment, affirmatively contributes to the employee's injury.

II

Summary Judgment

"The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence." (Code Civ. Proc., § 437c, subd. (c).)

"A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto." (Code Civ. Proc., § 437c, subd. (p)(2).)

We review the trial court's grant of summary judgment de novo. (*State of California v. Allstate Ins. Co*. (2009) 45 Cal.4th 1008, 1017-1018.) We employ the same three-step analysis as the trial court. " 'First, we identify the issues raised by the pleadings, since it is these allegations to which the motion must respond; secondly, we determine whether the moving party's showing has established facts which negate the opponent's claims and justify a judgment in movant's favor; when a summary judgment motion prima facie justifies a judgment, the third and final step is to determine whether the opposition demonstrates the existence of a triable, material factual issue. [Citations.]' " (*Waschek v. Department of Motor Vehicles* (1997) 59 Cal.App.4th 640, 644.)

III

Negligent Exercise of Retained Control

The heirs contend there is a triable issue of fact whether Kalkat retained control over safety conditions and negligently exercised such control in a manner that affirmatively contributed to Gudino's death. They rely on evidence that Kalkat was the owner-builder of the project and that he visited the job site every day; the heirs argue these facts show Kalkat retained control over the safety measures.

In *Hooker, supra,* 27 Cal.4th at page 215, the court found plaintiff raised triable issues of fact as to whether defendant Caltrans retained control over safety at the worksite. Evidence that Caltrans retained control came from the Caltrans construction manual. The manual provided that Caltrans was responsible for obtaining the contractor's compliance with safety laws and regulations. A Caltrans construction safety coordinator was required to be familiar with highway construction and traffic management and able to recognize and anticipate unsafe conditions. This coordinator was to visit the site periodically to observe the contractor's operation and affected traffic conditions. The Caltrans resident engineer had authority to set schedules for correction of dangerous conditions and to shut down operations until dangerous conditions were corrected. (*Id.* at p. 202.)

The heirs provided no such evidence of retained control over safety conditions here. The construction contract provided that JKD was responsible for compliance with all Cal-OSHA requirements for safety and fall protection. It had no provision for Kalkat to be involved in safety conditions. While Kalkat visited the worksite every day, the evidence (excerpts of Pierce's deposition) was that he did so only to observe the framing and never participated in the work, gave directions, or called out problems. In short, the heirs failed to provide any evidence to raise a triable issue of fact as to retained control. Because there is no evidence Kalkat *had* control, we need not reach the issue of whether

there was a triable issue of fact concerning Kalkat's alleged negligent exercise of control and its affirmative contribution to the accident.

IV

Providing Unsafe Equipment

The heirs contend that *Privette* does not apply to this case because Kalkat provided unsafe equipment, a forklift with defective brakes, "that resulted in decedent falling to his death." They assert the holding in *McKown* is directly on point.

In *McKown*, the plaintiff was an employee of an independent contractor hired to install sound systems in defendant Wal-Mart's stores. The installation of the sound system involved running wires and installing speakers in the store's ceiling. Wal-Mart requested the contractor use Wal-Mart's forklifts whenever possible. The forklift Wal-Mart provided had a work platform with a four-foot extension to raise the platform. For safety, the extension was to be chained to the forklift, and the platform was to be chained to the forklift or the extension. The Wal-Mart forklift had only one chain that secured the extension to the forklift. While a colleague was driving the forklift and McKown was working on the platform, the platform hit a ceiling pipe and disengaged from the extension. The platform and McKown fell 12 to 15 feet to the floor. (*McKown, supra,* 27 Cal.4th. at p. 223.)

Relying on *Hooker,* our Supreme Court held a hirer of an independent contractor should be liable for negligently furnishing unsafe equipment to the contractor that affirmatively contributes to the injury of the contractor's employee. (*McKown, supra,* 27 Cal.4th at p. 225.) The court found that even though Wal-Mart only requested, but did not insist, that the contractor use its forklift, the economic importance to the contractor of its several contracts with Wal-Mart, and the practical difficulties involved in procuring a replacement forklift, justified in apportioning liability to Wal-Mart. (*McKown, supra,* 27 Cal.4th at pp. 225-226.)

In *McKown*, there was evidence the unsafe equipment, a forklift without a chain securing the platform, contributed to the accident. The unsecured platform (with McKown on it) fell when it hit a pipe. Here, the heirs provided *no* evidence connecting the forklift to the accident. They rely on declarations of former coworkers that the forklift was used to support a pallet on which they stood and photographs that showed two ladders and plank going to the forklift. The Cal-OSHA investigation report indicated there was a forklift with raised forks holding a pallet and two ladders in the opening where Gudino was working. But there was no evidence that Gudino was standing on the pallet or otherwise using Kalkat's forklift *when he fell*. Further, there was no evidence the allegedly defective brakes of the forklift played any role in the accident. There were no witnesses to the fall and no findings that the forklift was connected to the accident in any way.

The heirs contend the evidence permits a reasonable inference that "it is more reasonable or probable that the forklift had defective brakes and the defect contributed to decedent's fall and death." This argument is based on pure speculation as to what might have happened and is unsupported by the record of known facts. To create a triable issue of material fact to defeat summary judgment, a plaintiff must provide substantial responsive evidence. (*Leek v. Cooper* (2011) 194 Cal.App.4th 399, 417.) "[R]esponsive evidence that gives rise to no more than mere speculation cannot be regarded as substantial, and is insufficient to establish a triable issue of material fact." (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 163.)

The trial court did not err in granting summary judgment.

DISPOSITION

The judgment is affirmed. Kalkat shall recover costs on appeal. (Cal. Rules of Court, rule 8.278 (a)(1), (2).)

/s/
Duarte, J.

We concur:

/s/
Raye, P. J.

/s/
Robie, J.