VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 43-3-18 Ancv

Emilo vs. Bread Loaf Construction Co. et al

ENTRY REGARDING MOTION

Title:	Motion for Summary Judgment; Response; Reply to Opposition (Motion 1)
Filer:	Philip C. Woodward; Carey C. Rose; Philip C. Woodward; Marikate E. Kelley
Filed Date:	June 01, 2020; December 01, 2020; December 15, 2020

The motion is DENIED.

Roxanna Emilo (Plaintiff) alleges that on November 11, 2015, she was walking on the newly re-opened sidewalk next to a construction site owned by the Town of Middlebury (Town) when she slipped and fell, injuring herself. Pursuant to 24 V.S.A. § 901(a), Plaintiff brought a tort claim against the Town, alleging that the Town failed to ensure that the construction site was properly lit, and alleging that the lack of light caused her to fall. In particular, Plaintiff claims that the Town failed to replace an outdoor light that normally illuminated the sidewalk where she was walking. Although the light in question was situated on property owned by the Ilsley Public Library, it had been disabled due to the construction. According to Plaintiff, adequate replacement lighting was not in place at the time of her fall.

In this Motion for Summary Judgment, the Town argues that it cannot be liable because it did not have a duty to Plaintiff. It argues that the construction contractor, Bread Loaf Corporation (Bread Loaf), had total control over the construction site and was thus solely responsible for making sure the construction site was adequately lit.

The court may only grant summary judgment if, "viewing the evidence most favorably to the nonmoving party, there are no genuine disputed issues of material fact and the prevailing party is entitled to judgment as a matter of law." *LeClair v. LeClair*, 2017 VT 34, ¶ 10, 204 Vt. 422. To make out a negligence claim, "a plaintiff must show that the defendant owed the plaintiff a duty that was breached, which proximately caused injury to the plaintiff." *Id.* Furthermore, "[w]hether a duty is owed is primarily a legal question." *Id.* The court may look to the Restatement Second of Torts to determine whether a duty is owed. *Id.* ¶ 11 n. 4; see also *Gero v. J.W.J. Realty*, 171 Vt. 57, 60–61 (2000) (analyzing a premises liability claim under § 343 of the Restatement).

The Restatement explains premises liability as follows:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
> (c) fails to exercise reasonable care to protect them against the danger.

Restatement (Second) of Torts § 343 (1965).

With respect to cases involving construction sites where both an owner and a contractor are potentially involved, "[i]t is settled law that where the alleged defect or dangerous condition arises from the contractor's methods and the owner recognizes *no supervisory control* over the operation, no liability attaches to the owner under the common law." *Gero*, 171 Vt. at 62 (quoting *Lombardi v. Stout*, 604 N.E.2d 117, 119 (1992)) (emphasis added).

In *Gero*, the Supreme Court found that the owner of a construction site was not liable for an employee's injuries when the employee was injured falling off a dirt mound ramp on the site. First, the Supreme Court held that the trial court did not err when it granted judgment as a matter of law in favor of the owner after considering the plaintiff's evidence about whether the owner had participated in past decisions to remove other dirt piles on the site. *Id.* at 60. Second, the Supreme Court indicated it *would* have made a difference if the landowner had been actively involved in the creation of the specific dirt mound ramp that caused the plaintiff's injury. *Id* at 63. The Court emphasized that the contractor was wholly in control of the construction site: the contractor "constructed the mound itself and decided, of its own accord, to use the dirt mound ramp" as part of its construction operation. *Id.* Most importantly, the Court found "no evidence to indicate, nor does plaintiff argue" that the property owner "exercised any supervisory control or input over any part of the ramp's construction." *Id.*

Here, unlike in *Gero*, there is evidence that the Town exercised some level of "supervisory control" over the lighting on the construction site. The contract between the Town and Bread Loaf purports to make Bread Loaf responsible for all safety issues on the construction site.[1] Bread Loaf Contract, Art. 6. In practice, Town employees attended weekly meetings with Bread Loaf and participated in decisions regarding the construction site, including decisions about the exact placement of new permanent lighting. *See* Town's Statement of Undisputed Material Facts at 31–35; Bread Loaf Meeting Minutes 8/3/15. During one such meeting, the Town and Bread Loaf discussed the fact that the library light was not working, and "it was

[1] In a footnote, the *Gero* court noted that a contract between a landowner and a construction contractor could be "potential evidence" of the "actual control" exercised by the construction contractor, but did not hold that such contracts are dispositive by themselves. 171 Vt. at 61, n. 4.

requested that the Town replace the non working lightbulb for safety concerns." Bread Loaf Meeting Minutes 85/19/15.

When it later became clear that power to the library light had been cut, the Town made a specific choice not to replace the disabled library light. According to Town employee Kathleen Ramsay, "we deemed that that was not a worthwhile expense" because "it was going to be removed after the construction project when the permanent lighting was installed." *See* Plaintiff's Opposition to Defendant's Motion for Summary Judgment at 4; Deposition of Kathleen Ramsay at 32:14–33:15. Finally, one week prior to Plaintiff's accident, Kathleen Ramsay raised a "safety concern" about the fact that part of the sidewalk next to the construction site was poorly lit, and requested that Bread Loaf install temporary lighting. Deposition of Kathleen Ramsay at 25:4–26:7; Bread Loaf Meeting Minutes 11/3/2015. These ongoing discussions between the Town and Bread Loaf indicate that the Town may have continued to exercise some control over what happened on the site, even while construction was ongoing.

Thus, there is a genuine dispute over the material fact as to whether the Town exercised supervisory control over specific details of the construction project, particularly with respect to lighting. As a result, the Town's motion for a ruling that it owed no duty to Plaintiff must be *denied*.

Electronically signed pursuant to V.R.E.F. 9(d) on January 28, 2021 at 11:24 AM.

Mary Miles Teachout

Mary Miles Teachout
Superior Court Judge