Filed 7/3/12 Sedlak v. Bradigan CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

MICHAEL G. SEDLAK, JR., Plaintiff and Appellant, v. NEVA WILLIAMS BRADIGAN, Defendant and Respondent.	2d Civil No. B232239 (Super. Ct. No. 56-2007-00285342-CU-PO-VTA) (Ventura County)

Appellant Michael G. Sedlak, a subcontractor's employee, was injured when a trench he was excavating collapsed and partially buried him. He received workers' compensation through his employer. He filed a complaint against multiple parties, including respondent Neva Williams Bradigan (Williams). The operative complaint alleges a cause of action for negligence, including negligence per se, against Williams in her capacity as a member of the homeowner's association which hired Sedlak's employer and as signator of an agreement with Ojai Valley Sanitary District on behalf of the association as project manager.

Williams sought summary judgment on the grounds that the *Privette*[1] doctrine limited Sedlak's remedies to workers' compensation. The trial court agreed and granted the motion.

On appeal, Sedlak asserts that the trial court erred in granting summary judgment because issues of material fact exist as to whether Williams retained control over the worksite and affirmatively contributed to his injury by failing to ensure that the trench was shored to prevent its collapse and failing to warn of a concealed dangerous condition. He also asserts liability based on Williams's failure to enforce OSHA regulations and under a joint enterprise theory. We affirm.

FACTUAL AND PROCEDURAL HISTORY

Lower Arbolada Sewer Association (Association) was formed by several Ojai property owners to convert from septic tanks to a sewer system owned and operated by the Ojai Valley Sanitary District (District). The District and the Association entered into a contract which provided, inter alia, that the District would inspect the work to ensure compliance with the District's requirements. The Association agreed to (1) pay all project-related fees, including District inspection fees; (2) create plans; (3) acquire necessary easements; and (4) assume all risk of loss and liability prior to project completion. Williams signed the agreement on behalf of the Association as "Project Manager." As project manager, she was involved with providing information to the other homeowners in the Association and was responsible for project finances. She testified that she was generally aware of trench safety regulations but that the engineering, construction and inspection of the project were the responsibility of others.

The original contractor hired for the project, Dial Construction (Dial), mistakenly trenched and installed 200 feet of sewer pipe outside an easement

[1] *Privette v. Superior Court* (1993) 5 Cal.4th 689.

granted for that purpose. Frank's Rooter (Frank's) was hired by Williams on behalf of the Association to dig a new trench and install sewer pipes within the easement. Sedlak was employed by Frank's.

Frank's began working on the project on June 12, 2006. Sedlak observed Williams at the site on June 15 and heard her orally approve the removal of an oak tree so that the trench could continue in a straight line. On Friday, June 16, Frank's employees were digging a trench within the easement owned by the Association. During an inspection that day, the District's inspector observed that the trench needed shoring. He advised Frank's onsite supervisor, Tom Rutherford, to stop all work until the shoring was installed. Rutherford agreed. He called Frank's owner, Frank Sheltren, to discuss the need for shoring. Sheltren ordered Rutherford to stop work and tell Frank's employees to stay out of the trench until it was shored. He told Rutherford to order shoring materials for delivery the following Monday, June 19. Later that day, Sheltren came to the construction site and personally instructed his employees, including Sedlak, to stay out of the trench until shoring was in place.

The District inspector returned to the job site at 8:00 a.m. on Monday, June 19, expecting to see a shored trench. Instead, he saw Sedlak in the trench partially buried in dirt. Sheltren arrived about five minutes later and explained that the shoring had not yet arrived because of an ordering error. Williams was not at the construction site when the trench collapsed.

Sedlak filed a complaint for damages against the Association, the District, the homeowners, including Williams, and Dial. After summary judgment was granted to the District,[2] Sedlak was granted permission to amend the cause of action against Williams. The amendment alleges that Williams was liable for

[2] We affirmed the judgment in favor of the District in a prior opinion. (*Sedlak v. Ojai Valley Sanitary Dist.* (Aug. 3, 2011, B222509 [nonpub. opn.].)

Sedlak's injuries because she retained control over the project, affirmatively contributed to Sedlak's injuries, and violated a nondelegable duty to enforce OSHA regulations.

Williams filed an answer denying the allegations and, subsequently, filed a motion for summary judgment on the grounds that *Privette* and its progeny precluded liability. Sedlak opposed the motion, arguing that summary judgment was inappropriate because triable issues of fact existed regarding (1) whether Williams negligently exercised retained control over the project and affirmatively contributed to Sedlak's injuries, (2) whether Williams failed to provide notice of a concealed dangerous condition, (3) whether Williams breached a nondelegable duty owed to Sedlak to shut down the project as provided in OSHA regulations, and (4) whether District was in a joint enterprise with the other defendants, making Williams liable for the other defendants' negligence. The trial court granted Williams's motion for summary judgment and this appeal followed.

DISCUSSION

Standard of Review

"The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute. [Citation.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) Summary judgment is appropriate "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." (Code Civ. Proc., § 437c, subd. (c).) A defendant who moves for summary judgment or summary adjudication bears the initial burden to show that the action or cause of action has no merit-that is, "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." (*Id*. at subds. (a), (p)(2).)

On appeal, we conduct a de novo review of the record to "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 Nat., Inc.* (2000) 24 Cal.4th 317, 334.) We apply the same procedure used by the trial court: We examine the pleadings to ascertain the elements of the plaintiff's claim; the moving papers to determine whether the defendant has established facts justifying judgment in its favor; and, if the defendant did meet this burden, plaintiff's opposition to decide whether he or she has demonstrated the existence of a triable issue of material fact. (*Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 84-85.)

Development of the Privette Doctrine

In *SeaBright Insurance Company v. U.S. Airways, Inc.* (2011) 52 Cal.4th 590, our Supreme Court recently reviewed the evolution of the *Privette* doctrine. In *Privette v. Superior Court*, *supra*, 5 Cal.4th, page 697, the court held that the Worker's Compensation Act provided the exclusive remedy for injury or death of an employee against an employer who obtains workers' compensation insurance coverage. In light of that limitation on the independent contractor's liability to its injured employee, *Privette* concluded that it would be unfair to permit the injured employee to obtain full tort damages from the hirer of the independent contractor.

In *Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253, 267, the court held that the hirer of an independent contractor had no obligation to

specify the precautions an independent hired contractor should take for the safety of the contractor's employees and absent an obligation, there can be no liability in tort.

These principles were further refined in *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, holding that an independent contractor's employee can sometimes recover in tort from the contractor's hirer if the hirer retained control of the contracted work and failed to exercise control with reasonable care. (*Id.* at p. 206.) The court held that the hirer cannot be liable merely because it retained the ability to exercise control over safety at the worksite, but that a hirer is liable if it exercised the control that was retained in a manner that affirmatively contributed to the injury of the contractor's employee. (*Id.* at p. 210.)

In *Kinsman v. Unocal Corporation* (2005) 37 Cal.4th 659, the Supreme Court further explained its holdings in *Privette, Toland,* and *Hooker*. Those decisions, the Court observed, were grounded on a common law principle that when a hirer delegated a task to an independent contractor, it in effect delegated responsibility for performing that task safely, and assignment of liability to the contractor followed that delegation. (*Id.* at p. 671.) The court concluded that a hirer is presumed to delegate to an independent contractor the duty to provide the contractor's employees with a safe working environment. (*Ibid.*)

In *Tverberg v. Fillner Construction, Inc.* (2010) 49 Cal.4th 518, the Court again focused on delegation of duty as an important principle underlying *Privette* and its progeny. It held that the independent contractor had authority to determine the manner in which inherently dangerous work was to be performed, and thus assumed legal responsibility for carrying out the contracted work, including the taking of workplace safety precautions. (*Id.* at p. 522.)

In sum, "[t]he *Privette* line of decisions discussed above establishes that an independent contractor's hirer presumptively delegates to that contractor its

tort law duty to provide a safe workplace for the contractor's employees."[3] (*SeaBright Ins. Co. v. U.S. Airways, Inc.*, *supra*, 52 Cal.4th at pp. 598-600.)

Retained Control

Sedlak contends that triable issues of material fact exist regarding the *Hooker* exception to the *Privette* doctrine. To demonstrate retained control, he relies on provisions in the agreement between the Association and the District and Williams's status as project manager. The agreement provisions relied on by Sedlak state: "Owner shall perform all of its obligations hereunder and shall conduct all operations with respect to the construction of the System in a good, workmanlike and commercially reasonable manner, with the standard of diligence and care normally employed by duly qualified persons utilizing their best efforts in the performance of comparable work and in accordance with generally acceptable practices appropriate to the activities undertaken. Owner shall employ at all times consultants with the requisite experience necessary to administer and coordinate all work related to the design, engineering, acquisition, construction and installation of the System."

Sedlak's argument was considered in *Kinney v. CSB Construction, Inc.* (2001) 87 Cal.App.4th 28. In that case, the appellate court held similar contractual provisions giving a general contractor authority to ensure that safe working conditions existed were sufficient to at least raise a triable issue of fact as to retention of control of workplace safety. (*Id.* at p. 33.) Nonetheless, the court affirmed summary judgment for the general contractor because it interpreted *Privette* and *Toland* as requiring some affirmative conduct that contributed to the injury in addition to retained control. (*Id.* at p. 39.)

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[3] For purposes of analysis under *Privette*, "there is no legal distinction between a general contractor and a landowner who hires independent contractors; both are 'hirers' within the meaning of the doctrine. [Citations.]" (*Michael v. Denbeste Transp., Inc.* (2006) 137 Cal.App.4th 1082, 1097.)

Affirmative Contribution

Sedlak contends that Williams affirmatively contributed to his injury by failing to stop the work until shoring was provided and failing to warn Sedlak of an alleged dangerous unstable soil condition created by proximity of Frank's trench to the trench Dial had excavated. He relies on the fact that Williams was at the job site four days prior to the accident and, at that time, approved the removal of an oak tree so that the new trench could continue in a straight line and remain within the easement.

An affirmative contribution occurs when the hirer "'. . . is actively involved in, or asserts control over, the manner of performance of the contracted work. . . . Such an assertion of control occurs, for example, when the [hirer] directs that the contracted work be done by use of a certain mode or otherwise interferes with the means and methods by which the work is to be accomplished. . . .' [Citation.]" (*Hooker v. Department of Transportation*, *supra*, 27 Cal.4th at p. 215.) An "affirmative contribution need not always be in the form of actively directing a contractor or contractor's employee. There will be times when a hirer will be liable for its omissions, [such as when] the hirer promises to undertake a particular safety measure, then [fails] to do so . . . ." (*Id.* at p. 212, fn. 3.) The Court concluded that there was no affirmative contribution and no tort liability where the evidence established at most that the contractor's safety personnel were aware of an unsafe practice and failed to exercise the authority they retained to correct it. (*Id.* at p. 202.)

The hirer of an independent contractor assumes no liability to employees of the contractor by retaining the right to assure satisfactory completion of the work. There must be "direct management over the means and methods of the independent contractor's work" and control over the operative details of the work. (*Zamudio v. City and County of San Francisco* (1999) 70 Cal.App.4th 445, 453.) It

is not enough if the hirer only has a "general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way." (Rest.2d Torts, § 414, com. c.)

Here, the undisputed evidence shows that Frank's employed its own onsite supervisor. In addition, the District inspector performed daily inspections of the excavation, and Williams was not at the site at the time of the accident. The record shows that Frank's provided all equipment and materials for the work, and only Frank's employees were involved in excavating the trench. There is no evidence that Williams retained authority to direct work through means and methods different than those selected by Sedlak's employer.[4] (See, e.g., *Millard v. Biosources, Inc.* (2007) 156 Cal.App.4th 1338, 1348 [general contractor not liable where it did not control means or methods of subcontractor's work and general contractor's employee was not at worksite when accident occurred]; and see *Michael v. Denbeste Transportation, Inc.*, *supra*, 137 Cal.App.4th 1082 [where evidence showed general contractor failed to intervene in subcontractor's working methods, such failure was not affirmative contribution required to impose liability on general contractor].) And, even if Williams retained authority to control the

[4] The trial court did not err in ruling inadmissible the declaration of Sedlak's safety expert, Jerry Hildreth, that Williams retained control of the work and knew or should have known that the methods used by the subcontractor created a dangerous condition. (See, e.g., *Travelers Casualty & Surety Co. v. Superior Court* (1998) 63 Cal.App.4th 1440, 1462 ["Expert declarations cannot create a triable question of fact if the expert's opinion is based upon factors which are remote, speculative, or conjectural"].)

work or impose safety measures or shut down the project because unsafe conditions existed, there is no evidence that she exercised that retained control in any manner that affirmatively contributed to Sedlak's injury. (See, e.g., *Hooker v. Department of Transportation*, *supra*, 27 Cal.4th at pp. 214-215 [where no evidence that hirer retained exclusive control over work site safety, failure to exercise retained control is not a negligent exercise of control].)

Failure to Warn

Sedlak asserts that triable issues of fact exist as to whether Williams failed to warn of a concealed dangerous condition which caused the trench to collapse, i.e., the proximity of Frank's trench to the trench previously excavated by Dial. There is no merit in this contention.

In *Kinsman v. Unocal Corporation*, *supra*, 37 Cal.4th 659, the Court observed that "when there is a known safety hazard on a hirer's premises that can be addressed through reasonable safety precautions on the part of the independent contractor, . . . the hirer generally delegates the responsibility to take such precautions to the contractor, and is not liable to the contractor's employee if the contractor fails to do so." (*Id.* at pp. 673-674.) *Kinsman* goes on to hold that "the hirer as landowner may be independently liable to the contractor's employee, even if it does not retain control over the work, if (1) it knows or reasonably should know of a concealed, pre-existing hazardous condition on its premises; (2) the contractor does not know and could not reasonably ascertain the condition; and (3) the landowner fails to warn the contractor. [Fn. omitted.]" (*Id.* at p. 675.) The facts here do not fall within *Kinsman*. In that case, the landowner "conceded it was aware of the hazards of asbestos dust by the 1950's." (*Id.* at p. 665.)

In *Gavelin v. Sattersfield* (2011) 200 Cal.App.4th 1209, 1214, the court explained: "The general rule that a contractor and its employees may not recover tort damages from the contractor's hirer has few exceptions. [¶]. . .[¶]

[A] hirer [is not] liable if the hazard is apparent, or becomes apparent, and the 'contractor nonetheless failed to take appropriate safety precautions.' [Citation.] An example is where a worker continued excavations despite increasing ground saturation and was injured when the oil-saturated ditch caved in. [Citations.] A hirer is also not liable where a worker is injured because the contractor 'has failed to engage in inspections of the premises implicitly or explicitly delegated to it.' [Citation.] Although '[a] landowner's duty generally includes a duty to inspect for concealed hazards,' the 'responsibility for job safety delegated to independent contractors may and generally does include explicitly or implicitly a limited duty to inspect the premises as well.' [Citation.] 'Thus, for example, an employee of a roofing contractor sent to repair a defective roof would generally not be able to sue the hirer if injured when he fell through the same roof due to a structural defect, inasmuch as inspection for such defects could reasonably be implied to be within the scope of the contractor's employment. . . .' [Citation.]" (Citing *Kinsman v. Unocal Corp.*, *supra*, 37 Cal.4th at pp. 675-677 & *Abrons v. Richfield Oil Corp.* (1961) 190 Cal.App.2d 640, 646.)

Here there is no admissible evidence that the Dial trench was a concealed hazard or that Williams knew or should have known the Dial trench made Frank's trench unsafe.[5] Moreover, there is no evidence from which a reasonable inference can be drawn that Frank's was unaware of the Dial trench. To the contrary, the evidence establishes the Dial trench was excavated outside the easement because oak trees blocked the easement. Instead of cutting down the trees, Dial decided to excavate around them. The evidence establishes that Frank's was hired to excavate a second trench within the easement next to the one that Dial had excavated. Under these circumstances, the only reasonable inference that can

[5] For the reasons stated in footnote 4, *ante*, the Hildreth declaration does not establish a triable issue of material fact in this regard.

be drawn was that Frank's knew or should have known of the presence of the Dial trench and the *Privette* rule of nonliability applies.

Nondelegable Duty

Sedlak argues that Williams is chargeable with negligence per se because she had a nondelegable duty imposed by statute and regulation obligating her to ensure that the excavation work was performed safely. (See *Felmlee v. Falcon Cable TV* (1995) 36 Cal.App.4th 1032, 1038-1039 ["Nondelegable duties may arise when a statute provides specific safeguards or precautions to insure the safety of others"].) Sedlak relies on numerous OSHA regulations regarding trench safety and the opinion of its expert, Jerry Hildreth, that Williams violated OSHA by not ordering that the trench be shored. The argument is without merit.

In *SeaBright Insurance Company v. U.S. Airways*, *supra*, 52 Cal.4th 590, our Supreme Court laid to rest the uncertainty created by appellate court decisions concerning the nondelegable duty rule. In that case, our Supreme Court held that the *Privette* rule applies when the party that hired the contractor failed to comply with workplace safety requirements imposed by OSHA. The Court concluded: "By hiring an independent contractor, the hirer implicitly delegates to the contractor any tort law duty it *owes to the contractor's employees* to ensure the safety of the specific workplace that is the subject of the contract. That implicit delegation includes any tort law duty the hirer owes to the contractor's employees to comply with applicable statutory or regulatory safety requirements. [Fn. omitted.]" (*Id.* at p. 594; see also *Tverberg v. Fillner Construction, Inc*, *supra*, 49 Cal.4th at p. 522 [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"].)

Sedlak cannot recover in tort from Williams on a theory that his workplace injury resulted from Williams's breach of what Sedlak describes as a nondelegable duty under OSHA regulations to take safety measures to prevent a trench collapse.

Joint Enterprise Liability

Sedlak asserts that a triable issue of material fact exists as to whether Williams is liable because she was in a joint enterprise with the Association and the District. Again, the argument is without merit.

"'A joint venture . . . is an undertaking by two or more persons jointly to carry out a single business enterprise for profit.' [Citation.] 'There are three basic elements of a joint venture: the members must have joint control over the venture (even though they may delegate it), they must share the profits of the undertaking, and the members must each have an ownership interest in the enterprise. . . .' [Citation.]" (*Unruh-Haxton v. Regents of University of California* (2008) 162 Cal.App.4th 343, 370; *Ramirez v. Long Beach Unified School Dist.* (2002) 105 Cal.App.4th 182, 193.)

Here, as in *Ramirez,* there was no joint venture because "[t]he facts before us do not involve a for profit enterprise." (*Ramirez v. Long Beach Unified School Dist.*, *supra,* 105 Cal.App.4th at p. 193.) And, for the reasons stated above, neither the Association nor the District retained control over the project--therefore, there was no actionable negligence of others to be imputed to Williams.

Conclusion

The circumstances here fall directly within the *Privette* doctrine. A hirer cannot be placed at greater risk for tort liability than the independent contractor. The uncontroverted evidence is that Sedlak sustained substantial and severe injuries in the collapse of the trench. He has received compensation under the Worker's Compensation Act. He has sought a greater recovery by recourse to

the general tort law. In order to do so, it was incumbent upon him to demonstrate that Williams was more than the Association's representative for the project or that she hired Sedlak's employer in that capacity. Under the relevant case law, Williams is deemed to have delegated responsibility for workplace safety to Frank's when she hired the contractor to do remedial work on the sewer line. The record is devoid of evidence that she exercised any control over the site to override that delegation of authority. Worker's compensation is the exclusive remedy under the circumstances presented here.

The judgment is affirmed. Respondent shall recover costs on appeal.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Kent M. Kellegrew, Judge

Superior Court County of Ventura

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