

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, LAW DIVISION

BRETT GOODWIN,

Plaintiff,

v.

AKZO NOBEL CHEMICALS, INC., and  
AKZO NOBEL, INC.,

Defendants.

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AKZO NOBEL CHEMICALS, INC., and  
AKZO NOBEL, INC.,

Third-Party Plaintiffs,

v.

MOREY INDUSTRIES, INC., d/b/a  
WESTMONT ENGINEERING COMPANY,  
AMBITECH ENGINEERING  
CORPORATION, LINDBLAD  
CONSTRUCTION COMPANY OF JOLIE,  
INC.,

Third-Party Defendants.

No. 05 L 86

Hon. Thomas P. Quinn

ORDER

These matters come before the court on third-party defendants Ambitech Engineering Corporation's ("Ambitech") and Linblad Construction Company's ("Linblad") motions for summary judgment pursuant to 735 ILCS 5/2-10005. This case arises out of an incident where plaintiff Brett Goodwin allegedly fell in or around a gravel walkway and trench. On January 17, 2001, plaintiff was employed by Westmont Engineering Company ("Westmont"), and working at or near the Akzo Nobel McCook Plant in McCook, Illinois ("McCook Plant"). Plaintiff allegedly fell in or around a gravel walkway and trench ("dangerous condition") while carrying a

metal channel on the south side of the McCook Plant, thereby causing him to sustain injuries ("incident"). On the date of the incident, both Ambitech and Linblad were subcontractors for the construction project at the McCook Plant. In conjunction with the construction project at the McCook Plant, Ambitech was acting as the construction manager, and Linblad was to perform excavation activities. Plaintiff originally brought suit against Akzo Nobel Chemicals Inc., and Akzo Nobel, Inc. (collectively "Akzo"). Subsequently, Akzo brought contribution actions against both Ambitech and Linblad.

Summary judgment is a fact motion. Its purpose is not to try a question of fact, but to determine the existence or absence of a genuine issue as to any material fact. *Perfection Corp. v. Lochinvar*, 349 Ill. App. 3d 668 (2004). A plaintiff does not have to prove her case at the summary judgment stage, but she must present some evidentiary facts in support of her cause of action. *Calhoun v. The Belt Railway Company of Chicago*, 314 Ill. App. 3d 513, 517 (2000). Summary judgment is a drastic method of disposing of a case and it should not be employed unless the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the right of the moving party to judgment as a matter of law is free from doubt. *Purtill v. Hess*, 111 Ill. 2d 229 (1986). Therefore, where reasonable persons could draw divergent inferences from the undisputed material facts or where there is a dispute as to a material fact, summary judgment should be denied and the issue decided by the trier of fact. *Pyne v Witmer*, 129 Ill. 2d 351 (1989). "[A] plaintiff is not required to prove her case at the summary judgment stage, [but] she must present a factual basis that would arguably entitle her to judgment in her favor. *Churkey v. Rustia*, 329 Ill. App. 3d 239, 245 (2002).

Ambitech argues that its motion should be granted because it was not in control of the work plaintiff was performing, nor aware of the dangerous condition that allegedly caused plaintiff's injuries. In opposition, Akzo asserts that Ambitech is liable to plaintiff because it "was at all times responsible for monitoring the construction means, methods, sequence, schedule and procedures used in construction of the project" (Akzo Resp. at 2).

The court agrees with those arguments advanced by Ambitech in support of its position. However, it finds that it is only necessary to address the retained control argument. It is important to note that in its response, Akzo fails to address Ambitech's argument that it did not have either actual or constructive notice of the dangerous condition that allegedly caused plaintiff's injuries.

In Illinois, "a contribution claim presumes that both the third-party plaintiff and the third party defendant are liable, since the third-party plaintiff will only require contribution if it was first held liable to the underlying plaintiff." *American Country Ins. Co. v. Cline*, 309 Ill. App. 3d 501, 515 (1999). The general rule pertaining to a general contractor's liability for the negligence of a subcontractor's employee is that "one who employs an independent contractor is not liable for the acts or omissions of the latter." *Shaughnessy v. Skender Construction Company*, 342 Ill. App. 3d 730, 736 (2003). However, an exception to this general rule is that "one who employs an independent contractor but retains control of any part of the work is subject to liability for physical harm to others that is caused by the employer's failure to exercise his control with reasonable care." *Id.* at 737. Section 414 of the Restatement (Second) of Torts states:

**Negligence in Exercising Control Retained by Employer.** One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

Restatement (Second) of Torts § 414 (1965). To have a proper understanding of § 414, it is necessary to consider its comments. The comments relevant to the instant analysis provide:

**Comment a:**

If the employer of an independent contractor retains control over the operative detail of doing any part of the work, he is subject to liability for the negligence of the employees of the contractor engaged therein, under the rules of that part of the law of Agency which deals with the relation of master and servant. The employer may, however, retain a control less than that which is necessary to subject him to liability as master. He may retain only the power to direct the order in which the work shall be done, or to forbid its being done in a manner likely to be dangerous to himself or others. Such a supervisory control may not subject him to liability under the principles of Agency, but he may be liable under the rule stated in this Section unless he exercises his supervisory control with reasonable care so as to prevent the work which he has ordered to be done from causing injury to others.

**Comment b:**

When a principal contractor entrusts a part of the work to subcontractors but superintends the entire job through a foreman, the principal contractor is subject to liability if he (1) fails to prevent the subcontractors from doing even the details of the work in a way unreasonably dangerous to others, (2) knows or should know the work was being so done, and (3) has the opportunity to prevent it by exercising his retained power of control.

**Comment c:**

In order for the rule stated in this Section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely 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 retention of a right of supervision that the contractor is not entirely free to do the work in his own way.

Restatement (Second) of Torts § 414 at 387-388 (1965).

"To state a claim for negligence under section 414, the plaintiff must allege that the defendant owed him a duty and breached that duty, and that plaintiff's injury was proximately caused by the breach." *Shaughnessy*, 342 Ill. App. 3d at 737. "Whether a duty exists is a question of law and, under section 414, turns on whether the defendant controlled the work in such a manner that he should be held liable." *Id.* "A general right to supervise the work of an independent contractor is not sufficient to impose liability." *Rangel v. Brookhaven*, 307 Ill.App.3d 835 (1965). Additionally, "a general right of control over safety is also insufficient to impose liability." *Ross v. Dae Julie*, 341 Ill.App.3d 1065 (2003). Concerning the retained control exception, the court in *Cochran v. George Sollitt Constr. Co.* stated:

The central issue is retained control of the independent contractor's work, whether contractual, supervisory, operational, or some mix thereof. The party who retains control is the logical party upon whom to impose a duty to ensure worker safety. Penalizing a general contractor's efforts to promote safety and coordinate a general safety program among various independent contractors at a large jobsite hardly serves to advance the goal of work site safety. A party who retains some control over the safety of the work has a duty to exercise that control with ordinary care. Nevertheless, the existence of a safety program, safety manual or safety director does not constitute retained control *per se*; the court must still conduct an analysis pursuant to the section 414 retained control. We recognize of course, that if a defendant's safety program sufficiently affected a contractor's means and methods of doing its work, then such program could bring the defendant within the ambit of the retained control exception.

358 Ill. App. 3d 865, 876 (2005).

For purposes of the duty analysis, *Shaughnessy v. Skender Construction Company* is instructive. 342 Ill. App. 3d 730 (2003). In *Shaughnessy*, plaintiff was injured while working at a construction site as an employee of a subcontractor. The general contractor of the construction site filed a motion for summary judgment arguing that it did not owe a duty to plaintiff because it did not retain sufficient control over the subcontractor's employees' work. *Id.* at 732. In its

decision, the *Shaughnessy* court noted that the contract between the owner of the construction site and the general contractor of the construction site provided that the general contractor was to "supervise and direct the work and be responsible for and control the construction means, methods, techniques, sequences and procedures for coordinating all portions of the work, unless the contract provided otherwise." *Id.* at 733. Additionally, the *Shaughnessy* court pointed out that the general contractor "agreed to be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the contract and to employ a superintendent whose duties included the prevention of accidents." *Id.*

Furthermore, in making its decision the *Shaughnessy* court considered plaintiff's deposition testimony. At his deposition, plaintiff testified, *inter alia*, that: (1) an employee of the general contractor informed him where to park at the construction site; (2) he received all of his work orders from his employer's foreman and never spoke with the general contractor's superintendent; (3) he provided his own hand tools and the rest of the equipment that he used was provided by his employer; and (4) his employer's foreman gave him his assignment. *Id.* at 735, 738.

In addition to the contractual language and plaintiff's deposition testimony, the *Shaughnessy* court looked to the interactions between the general contractor and plaintiff and his employer. In doing so, the *Shaughnessy* court noted that the evidence demonstrated, *inter alia*, that: (1) the general contractor employed a superintendent, who was on the site on a daily basis, to coordinate the different contractors at the site, ensure that the project was built to plans, on time and stayed within budget. *Id.* at 733; (2) the superintendent could stop the work if he noticed unsafe conditions or work practices; and (3) in regards to plaintiff's employer's work,

the superintendant showed him where to store materials, which areas of the parking lot not to block and (3) which entrance to use. *Id.* at 733, 734.

After considering all the evidence before it, the *Shaughnessy* court concluded that the evidence did not indicate that the general contractor controlled the manner by which plaintiff completed his work. *Id.* at 738. The *Shaughnessy* court explained that the contractual language only gave the general contractor a general right to stop, start, and inspect the progress of the work. *Id.* Furthermore, the *Shaughnessy* court found that the evidence did not establish that the general contractor retained control over plaintiff's work to an extent that plaintiff "was not free to complete the work either in his own way or according to his employer's instructions." *Id.* Based on all the evidence before it, the *Shaughnessy* court held that the general contractor did not retain sufficient control over plaintiff's work "to raise an issue that defendants owed a duty to plaintiff under the retained control exception of section 414." *Id.* at 740.

In the instant action, the evidence submitted to the court is insufficient to support a finding that Ambitech retained sufficient control over Westmont and consequently plaintiff's work to impose liability upon it pursuant to § 414. It is undisputed that pursuant to section 3.6 of the contract between Ambitech and Akzo ("contract") that Ambitech was:

responsible for management [of] all SUB-CONTRACTORS, including monitoring of construction means, methods, sequence, schedule and procedures used in the construction of the Project and monitoring of construction safety. (including personnel and operations), and for Sub-Contractor(s) performance in accordance with the Sub-Contractor(s) agreement with the OWNER or CONTRACTOR acting as OWNER's agent.

(Ambitech/Akzo contract, § 3.6, Ambitech mot. ex 4). The contractual language contained in § 3.6 of the contract do not expressly give Ambitech control over the means and methods of the subcontractors' work at the McCook Plant. In fact, the language utilized conveys less rights

upon Ambitech than those contractually retained by the General Contractor in *Shaughnessy*. Thus, the express language contained in § 3.6 of the contract is insufficient to establish that plaintiff was not free to perform his work in his own way or according to Westmont's instructions.

Furthermore, a review of the deposition testimony supports a finding that Ambitech, similar to the general contractor in *Shaughnessy*, did not retain/exercise sufficient control over plaintiff's work to impose liability upon it pursuant to § 414. First, the testimony of plaintiff's expert, Kenneth Yotz, concerning retained control and Ambitech's "oversight" responsibility is primarily based on the contractual language contained in § 3.6. Therefore, because the language contained in § 3.6 amounts to no more than a general right retained by Ambitech to start, stop and monitor the work of the subcontractors at the McCook Plant, Yotz's testimony is not sufficient to establish the level of retained control required to impose liability under § 414. Second, David Gibson's, the Ambitech employee who was acting as Akzo's representative at the McCook plant, testimony demonstrates that Ambitech did require compliance with a general safety policy at the McCook Plant, but that it did not direct the means and methods of how Westmont employees, including plaintiff, were to complete their assignments (Gibson dep. at 41-42, 125:11-13, 134:15-18, 141:5-15). Additionally, at Gibson's deposition, he: (1) agreed that there was nothing in Ambitech's design that included the steps that the contractors should take to complete their work; and (2) testified that his role "was to coordinate their [the subcontractors] activities just to keep work flow smoothly" (Gibson dep. at 16, 20, 32:20-23). Third, plaintiff's deposition testimony does not indicate that Ambitech controlled the operative details of his or any Westmont employees' work at the McCook plant. In fact, the name Ambitech Engineering does not mean anything to plaintiff (pl. dep. at 71:16-20, 117). Fourth, Charles Plank, Project

Leader at the McCook Plant, testified that Gibson was hired to watch over and coordinate the work at the McCook Plant (Plank dep. at 13, 116:18-21). Thus, based on a review all of the evidence submitted to the court, Akzo has failed to establish that Ambitech owed a duty to plaintiff under the retained control theory contained in § 414.

Next, the court will address Linblad's motion for summary judgment. Linblad asserts that summary judgment should be granted in its favor because "it is undisputed and unrebutted that Linblad's actions did not constitute negligence which proximately caused plaintiff's accident" (Linblad mot. at 8). In support of its position, Linblad principally relies on the deposition testimony of plaintiff and James Norman, Linblad's foreman at the McCook Plant. In opposition, Akzo argues, *inter alia*, that the evidence supports a finding that Linblad did create the dangerous condition.

In Illinois, "in order to recover on a theory of negligence, the plaintiff must show that the defendant owed him a duty, that the defendant breached that duty, that he suffered injury as a result of that breach and that defendant's breach of duty or negligence was the proximate cause of his injuries." *Castro v. Brown's Chicken & Pasta, Inc.*, 314 Ill. App. 3d 542, 547 (2000). In addressing the proximate cause element, the court in *Bermudez v. Martinez Trucking* explained that:

[T]he proximate cause element of a negligence action may be established through the presentation of circumstantial, rather than direct, evidence that supports more than one logical conclusion. However, the conclusion or inference that arises from this circumstantial evidence must be one that can reasonably be drawn. This is because liability on a negligence basis cannot be predicated upon mere surmise, guess or conjecture as to the cause of the injury. Rather, "proximate cause can only be established when there is a reasonable certainty that the defendant's acts caused the injury.

343 Ill. App. 3d 25, 29 (2003).

In the instant action, the court recognizes that evidence has been presented to support a finding that the dangerous condition did not exist the day before the incident and was not created by Linblad (pl. dep. 54:11-21, 105: 7-16; Gibson dep. at 117-118, 127:20-24, 153; Ficek dep. at 4-7; Norman dep. at 95:9-12; Verdone dep. at 18:5-15). However, there is also evidence that supports plaintiff's position that is based on more than mere surmise, guess and conjecture. Charles Plank, project leader at the McCook plant on the date of the incident, testified that Linblad was the only approved contractor for trenching operations at the McCook plant, and that Linblad was the only contractor that was involved in changing the earth (Plank dep. at 40:13-23). Furthermore, at his deposition, James Norman seemed to agree that Linblad, or its subcontractor, was responsible for all trenches on the construction site as of January 17, 2001 by responding "That's the only ones working in the area" (Norman dep. at 58:1-6). Moreover, Gibson testified that Linblad was the only contractor at the McCook Plant doing excavation and trenching in January of 2001 (Gibson dep. at 100:14-20). Additionally, there is testimony that supports a finding that a ditch existed on the south end of the McCook plant where plaintiff allegedly suffered his injuries (Verdone dep. at 23:1-13; Gibson dep. at 118:2-22). Thus, based on the circumstantial evidence presented by plaintiff, a reasonable person could logically conclude that Linblad's activities with respect to its work at the McCook plant were a proximate cause of plaintiff's injuries. Therefore, summary judgment is improper with regards to Linblad.

Accordingly, third-party defendant Ambitech Engineering Corporation's Motion is GRANTED, and third-party defendant Linblad Construction Company's motion is DENIED. With regards to third-party defendant Ambitech Engineering Corporation, there exists no just

reason to delay the enforcement or appeal of this order pursuant to Illinois Supreme Court Rule 304(a).

Judge Thomas P. Quinn

**ENTERED**  
JUDGE THOMAS QUINN - 0238  
AUG 14 2008  
DOROTHY B. OWEN  
CLERK OF THE CIRCUIT COURT  
OF COOK COUNTY, IL  
DEPUTY CLERK