RANDY L. EMERICK and, ANTHONY R. SECHRIST Plaintiffs	:	IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA
vs.	:	
LEZZER COMMERCIAL DOORS OF WILLIAMSPORT, Original Defendant	:	NO. 03-00,543
vs.	:	
ALLISON, INC., individually and d/b/a/ ALLISON CRANE & RIGGING, Additional Defendant	:	MOTION FOR SUMMARY JUDGMENT

Date: March 10, 2005

OPINION and ORDER

Before the court for determination is the Motion for Summary Judgment of Defendant Allison, Incorporated (hereafter "Allison") filed November 17, 2004. The court will grant in part and deny in part the motion.

Background

Lezzer Commercial Doors of Williamsport, Incorporated (hereafter "Lezzer") owned a parcel of land located at 3580 West Fourth Street, Williamsport, Pennsylvania. Lezzer planned to construct a commercial building on that parcel. To that end, Lezzer hired Robert Williams Construction (hereafter "Williams Construction"). Williams Construction's role in the project was to construct the shell of the commercial building. Plaintiffs Randy L. Emerick (hereafter "Emerick") and Anthony R. Sechrist (hereafter "Sechrist") were employees of Williams Construction.

On December 12, 2001, employees of Williams Construction, including Emerick and Sechrist, were engaged in constructing the roof of the structure. At that time, an employee of Allison, Brad Witmer, was lifting roof-decking material onto the trusses, which spanned the width of the structure, via a crane. The bracing of the trusses was not complete and was continuing as the roof-decking material was being loaded onto the trusses. At some point, the trusses collapsed causing Emerick and Sechrist to fall to the ground. Emerick and Sechrist both sustained bruises and broken bones. Emerick and Sechrist filed a Complaint on April 2, 2003 asserting their injuries were caused by the negligence of Lezzer. On June 10, 2003, Lezzer filed a Complaint against Allison joining it as an additional defendant.

Allison argues that it is entitled to summary judgment because it owed no duty to Emerick or Sechrist. Allison contends that Lezzer's negligence allegations are misplaced since they appear to allege that Allison was responsible for the construction and stability of the roof. Allison asserts that it was responsible only for the hoisting of material onto the trusses. In this regard, Allison asserts that no evidence has been produced to support a conclusion that this was done in other then a reasonably safe manner.

Discussion

Initially, it is appropriate to set forth the standard for determining a motion for summary judgment. A party may move for summary judgment after the pleadings are closed. Pa. R.C.P. 1035.2. Summary judgment may be properly granted "…when the uncontraverted allegations in the pleadings, depositions, answers to interrogatories, admissions of record, and submitted affidavits demonstrate that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law." ***Rauch v. Mike-Mayer***, 783 A.2d 815,

821 (Pa. Super. 2001); ***Godlewski v. Pars Mfg. Co.***, 597 A.2d 106, 107 (Pa. Super. 1991). The movant has the burden of proving that there are no genuine issues of material fact. ***Rauch***, 783 A.2d at 821. In determining a motion for summary judgment, the court must examine the record " '… in the light most favorable to the non-moving party accepting as true all well pleaded facts in its pleading and giving that party the benefit of all reasonable inferences ….'" ***Godlewski***, 597 A.2d at 107 (quoting ***Banker v. Valley Forge Ins. Co.***, 585 A.2d 504, 507 (Pa. Super. 1991)). Summary judgment will only be entered in cases that are free and clear from doubt and any doubt must be resolved against the moving party. ***Garcia v. Savage***, 586 A.2d 1375, 1377 (Pa. Super. 1991).

Summary judgment may be properly entered if the evidentiary record "… either (1) shows that the material facts are undisputed or (2) contains insufficient evidence of facts to make out a *prima facie* cause of action or defense." ***Rauch***, 783 A.2d at 823-24; *See also*, Pa.R.C.P. 1035.2. If the defendant is the party bringing the motion under Pa.R.C.P. 1035.2(2), then "… he may make the showing necessary to support the entrance of summary judgment by pointing to material which indicates that the plaintiff is unable to satisfy an element of his cause of action." ***Id***. at 824. "Conversely, the [plaintiff] must adduce sufficient evidence on an issue essential to [his] case and on which [he] bears the burden of proof such that a jury could return a verdict favorable to the [plaintiff]." ***Ibid***. If the plaintiff fails to establish a *prima facie* case, then summary judgment is proper as a matter of law. ***Ack. v. Carrol Township***, 661 A.2d 514, 516 (Pa. Cmwlth. 1995).

A plaintiff must prove four elements to make out a negligence cause of action. A plaintiff must establish: (1) the existence of a duty or obligation recognized by law, requiring

the actor to conform to a certain standard of conduct; (2) a failure on the part of the defendant to conform to that duty, or breach thereof; (3) a causal connection between the defendant's breach and the resulting injury; and (4) actual loss or damage suffered by the complainant. ***Atcovitz v. Gulph Mills Tennis Club***, 812 A.2d 1218, 1222 (Pa. 2002); ***Rabutino v. Freedom State Realty Co.***, 809 A.2d 933, 938 (Pa. Super. 2002). "The primary element in any negligence cause of action is that the defendant owes a duty of care to the plaintiff." ***Althaus by Althaus v. Cohen***, 756 A.2d 1166, 1168 (Pa. 2000); ***Gutteridge v. A.P. Green Servs., Inc.***, 804 A.2d 643, 655 (Pa. Super. 2002), *app. denied*, 829 A.2d 1158 (Pa. 2003). Whether a duty should be imposed is a question of law for the court to decide. ***Sharpe v. St. Luke's Hosp.***, 821 A.2d 1215, 1219 (Pa. 2003); ***Brisbine v. Outside in School of Experiential Education, Inc.***, 799 A.2d 89, 95 (Pa. Super. 2002), *app. denied*, 816 A.2d 1101 (Pa. 2003).

It is well settled in Pennsylvania that a "…'[a] subcontractor on a construction job owes to other employees of other subcontractors, on the same site, the care due a business visitor from a possessor [of] land.'" ***Staub v. Toy Factory, Inc.***, 749 A.2d 522, 533 (Pa. Super. 2000) (quoting ***McKenzie v. Cost Bros., Inc.***, 409 A.2d 362, 364 (Pa. 1979)). In determining the care owed an employee of another subcontractor, the Pennsylvania Supreme Court has held that sections 343 and 384 of the Restatement (Second) of Torts as being applicable. ***Id***. at 533-34. Section 343 provides:

> §343 Dangerous Conditions Known to or Discoverable By Possessor
>
> 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). Section 384 provides:

> § 384 Liability of Persons Creating Artificial Conditions on Land on Behalf of Possessor for Physical Harm Caused While Work Remains in Their Charge
>
> One who on behalf of the possessor of land erects a structure or creates any other condition on the land is subject to the same liability, and enjoys the same freedom from liability, as though he were the possessor of the land, for physical harm caused to others upon and outside of the land by the dangerous character of the structure or other condition while the work is in his charge.

Restatement (Second) of Torts §384 (1965). The rule stated in §384 will only impose liability upon the subcontractor for the harm caused by the particular work entrusted to him. ***Weiser v. Bethlehem Steel Corp***, 508 A.2d 1241, 1245 (Pa. Super. 1986). Thus, a subcontractor has a duty to exercise reasonable care to protect the employees of other subcontractors from harm which might be done to them by dangerous conditions in the work it was contracted to perform and which the other subcontractor employees are not likely to discover or protect themselves against. ***Id***. at 1246.

As a subcontractor on this job, Allison did owe Emerick and Sechrist a duty of care. It owed them the duty of care a possessor of land owes a business invitee. However, that duty of care only applies to the work Allison was hired to perform. As such, Allison was not

responsible for ensuring the structural soundness of the trusses. Allison was hired to lift the trusses into position and to lift the roof-decking material onto the trusses. Therefore, Allison would only be liable for conditions arising out of this work.

Two theories have been advanced by Lezzer in support of holding Allison liable for Emerick and Sechrist's injuries caused by conditions Allison allegedly created. The first is that Allison operated the crane in such a manner while lifting the roof-decking material onto the trusses as to cause them to topple. This negligent operation could have occurred in one of two ways. The first being that the crane exerted a lateral force on the trusses by hitting them with a load of roof-decking material. The second being that the crane exerted a downward force on the trusses causing them to displace laterally when the crane placed a load of roof-decking material onto the trusses. The second theory is that Allison continued to place roof-decking materials onto the trusses despite it being evident that the trusses were in a weakened or unstable condition.

As would relate to the first theory, there is no evidence that could establish that Allison exerted a lateral force on the trusses while it was lifting the roof-decking material on to them. Evidence has been presented that the trusses oscillated back and forth before the collapse; however, there is no evidence linking the placement of the roof-decking material to this oscillation. In fact, there is a dearth of evidence describing how the roof decking material was lifted off of the ground and onto the trusses. The only light shed on this subject is the testimony of Mark Montgomery, an employee of Williams Construction.

Montgomery was on the trusses directing Witmer where to place the bundles of roof-decking material. Deposition of Mark Montgomery, 7, 8 (October 29, 2004). Nowhere in his

deposition does Montgomery testify that he witnessed the crane operator strike one of the trusses with a load of roof-decking material. To the contrary, Montgomery testified that he had no concern as to the manner in which the crane was operated stating, "Everything was done professionally, you know, the way it should have been." Id. at 38. He also testified that the bundles had been placed straight down on to the trusses. Id. at 37. According to the testimony of the very individual who was directing the placement of the roof-decking material, the crane operator never struck the trusses with a load. Based upon the evidence presented, it would be speculation to conclude that the oscillation was caused by the crane hitting the trusses with a load of roof decking material.

There has also been no evidence presented that the crane operator caused the trusses to disperse laterally. Emerick testified that the trusses upon which the loads of roof-decking material had been placed had moved laterally such that he was unable to install the precut two by four braces. Deposition of Randy Emerick, 98-100 (May 21, 2001). Montgomery testified that he did not observe any lateral movement of the trusses when the loads were placed upon them. This was because his attention was not focused on the trusses at the bottom of his feet, but on directing the incoming loads. Montgomery Deposition, 20. Montgomery stated that it was possible that the trusses supporting the loads moved laterally, but he was not sure. Ibid. Even if it is true that the trusses upon which the loads were placed did move laterally, there is no evidence demonstrating that it was the manner in which the load was actually placed by the crane operator that caused the displacement.

While Emerick may have testified that the trusses had moved, he did not testify that the loads were placed, i.e. dropped, on the trusses so as to cause the movement. Montgomery was

the individual directing the placement of the loads onto the trusses and would have had first hand knowledge as to how the loads were placed upon the trusses. He did not testify that the crane slammed the loads down or that he felt a jarring when the loads were placed upon the trusses. While there may be evidence that the trusses had moved laterally, there is no evidence linking that movement to the manner in which Witmer placed the load upon the trusses.

As to the second theory, there has been evidence presented which could establish that Allison continued to place roof-decking material on the trusses despite their unstable condition. After the collapse, Montgomery talked to Witmer. He testified that:

> Well, I fell – like I said I fell right in front of the crane and everything. And he got the bar, give (sic) me the bar. I got Tony Sechrist out and they already had the other guy out. And said, mean, I can't believe this happened. And the crane operator said, well **I seen it coming**. That was his exact words. He said **I seen the trusses getting closer together from the bottom**.

Montgomery Deposition, 11-12. (emphasis added). If Witmer knew that the trusses were getting closer together, then he knew or should have known that the trusses were unstable. One does not have to be an expert in the construction of roofs to know that if the trusses are moving under the weight of the loads, then it is safe to say that something is askew.

There is also evidence which is corroborative of Witmer being aware of the danger created by the weight of the roof-decking material he was placing on the trusses. In his deposition, Robert Williams, the owner—operator of Williams Construction, stated that the crane operator had said to him that "…he thought we had a lot of weight up there." Williams Deposition, 20, 36.

If Witmer continued to place weight on the unstable trusses or to an excess he recognized existed, then Allison created a condition for which it had a duty to protect Emerick and Sechrist against. Therefore, if it is determined that Allison breached this duty and it was the cause of their injuries, then Allison would be liable to Emerick and Sechrist.

The Court recognizes that the statements attributable to Witmer are hearsay.[1] However, the statements are still admissible as substantive evidence. A statement is not deemed inadmissible as hearsay if it is an admission by a party opponent. Pennsylvania Rule of Evidence 803(25) provides that a statement is admissible if it is offered against a party and is "… a statement by the party's agent or servant concerning a matter within the scope of the agency or employment relationship." Pa.R.E. 803(25)(D). The proponent of the statement must establish three elements for the statement to be admissible: (1) the declarant was an agent or employee of the party opponent; (2) the declarant made the statement while employed by the principal; and (3) the statement concerned a matter within the scope of the agency or employment. ***Sehl v. Vista Linen Rental Serv.***, 763 A.2d 858, 862 (Pa. Super. 2000). As would pertain to the third element, "[m]erely because the agent made the statement while performing within the scope of his employment does not satisfy the requirement that the statement also concerns a matter within the scope of the employment." ***Ibid***. "[T]he statement must still concern a subject matter within the declarant's scope of employment or agency." ***Ibid***.

[1] Hearsay is defined as "… a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Pa.R.E. 801(c).

Witmer's statement to Montgomery satisfies the three criteria and can be offered against Allison. There is no dispute that Witmer was an employee of Allison at the time of the accident. There is some dispute as to whether such a statement was made. In his deposition, Witmer denied ever making such a statement. He was asked the following question, "Did you make any statements to anyone after the accident to the effect that you knew or had an opinion that the building was going to collapse." Deposition of Brad Witmer, 12 (November 17, 2003). To which Witmer responded, "No, sir." Ibid. Whether or not Witmer did make such a statement is an issue of fact that must ultimately be determined by the trier of fact. For purposes of the summary judgment motion, the court must view the record in the light most favorable to Emerick, Sechrist, and Lezzer as the non-moving parties. As such, the court must find that Witmer did make the statement. This would satisfy the second element since Allison employed Witmer at the time of and immediately following the collapse of the trusses, when the alleged statement is to have been made.

As to the third element, the court finds that Witmer's statement concerned a matter within his scope of employment. Allison was hired to provide the services of one of its cranes. Witmer was employed by Allison to operate that crane. The operation of that crane entailed hoisting trusses and roof-decking material off the ground and into position on the structure. Witmer was required to perform these duties in a safe manner. This not only entailed being careful with the actual placement of the materials, but also being vigilant as to the condition of the surface upon which he was placing the materials. The statement concerned Witmer's knowledge regarding the condition of the surface he was placing the loads on; therefore, it

concerned a matter within his scope of employment. Having met all three of the elements, Witmer's statement to Montgomery would be admissible as substantive evidence.

Allison points out that Montgomery was unable to definitively state as to what point in the sequence of events that Witmer saw the collapse coming. Montgomery had no knowledge as to whether Witmer had seen the trusses coming together immediately before or several minutes prior to the collapse. Montgomery Deposition, 28-29. The resolution of this issue has no effect on the duty Allison owed Emerick and Sechrist. If Witmer was aware that the trusses were moving closer together, whether it was fifteen minutes or fifteen seconds before the collapse, the duty owed to Emerick and Sechrist still exists. The question of when Witmer acquired this knowledge becomes important when determining whether Witmer breached that duty. Whether Witmer had sufficient time to act upon his duty before the collapse goes to the reasonableness of his actions and would fall under the question of whether Witmer breached his duty. This is a question for the jury to determine and has no effect on the issues presented in the motion for summary judgment.

Allison also points out that Robert Williams qualified Witmer's statement. Williams testified in his deposition as follows:

> Q: Did you talk to the crane operator after the collapse?
>
> A: Yeah.
>
> Q: And what was the nature of that conversation?
>
> A: The only thing I remember him saying that stuck out was I seen it coming. That's what he said. I seen it coming. And I questioned him I said, well, if you seen it coming, why didn't you stop. He goes I don't mean it that way. He goes – I think he meant it in the context that he saw everything start, you know. Not

> like he foreseen the accident, but he saw it coming. Now, you can take it one way or the other.
>
> Q: And what context did you take it?
>
> A: After I thought about it and he explained it to me, I understood.
>
> Q: How did he explain it to you?
>
> A: That it was – he saw it happening. Not that he had foreseen it happening. But he was watching it happening.

Deposition of Robert Williams, 42-3 (November 17, 2003). Whether Witmer meant that he saw the accident unfold or that he realized something was wrong is an issue of fact for the jury to determine. For summary judgment purposes, the court must find that, in his statement, Witmer meant that he saw the collapse coming and that he saw the trusses moving closer together. Therefore, the William's testimony has no effect on the determination of the summary judgment motion.

As to Witmer's statement to Robert Williams, it too satisfies the criteria to be admissible under Pa.R.E. 803(25)(D). The statement was made the day of the accident. Allison employed Witmer on the day of and at the time of the accident. The statement concerned a matter within Witmer's scope of employment because it related to the integrity of the surface upon which he was placing the loads of roof-decking material. As discussed *infra*, being watchful as to the condition of the trusses was part of his duties as a crane operator.

Accordingly, the motion for summary judgment will be granted in part and denied in part.

ORDER

It is hereby ORDERED that the Motion for Summary Judgment of Defendant Allison, Incorporated filed November 17, 2004 is GRANTED IN PART and DENIED IN PART.

Allison Incorporated did owe Plaintiffs Randy L. Emerick and Anthony R. Sechrist the duty of care a possessor of land owes to a business invitee.

The motion is GRANTED in that evidence has not been presented which demonstrates that the actual physical movement of the roof-decking material by the crane created a condition responsible for the collapse of the trusses.

The motion is DENIED in that evidence has been presented from which a jury could find Allison created a condition for which it owed a duty to Plaintiffs by continuing to place weight in the form of loads of roof-decking material onto a roof structure it knew to be unstable.

BY THE COURT:

William S. Kieser, Judge

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