

IN THE SUPREME COURT OF THE STATE OF NEVADA

BEAZER HOMES USA, INC. D/B/A
BEAZER HOMES HOLDINGS CORP.,
Appellant,
vs.
TERRA CONTRACTING, INC.,
Respondent.

No. 56263

FILED

MAY 23 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Angelina*
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order, certified as final under NRCP 54(b), dismissing appellant's indemnification and contribution claims against respondent. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

The underlying case arose from a personal injury action by plaintiff Gregory Lee against appellant Beazer Homes USA, Inc. d.b.a. Beazer Homes Holdings Corp., respondent Terra Contracting, Inc., and American Asphalt.¹ In its answer to Lee's complaint, Beazer asserted four cross-claims against Terra. Terra filed a motion for summary judgment, contending that Beazer's claims were without merit because Lee's injuries were due to Beazer's sole negligence. The district court granted Terra's motion and entered summary judgment against Beazer. The district court also awarded Terra costs against Beazer. Beazer now appeals and argues that the district court erred in granting summary judgment because

¹American Asphalt is not involved with this appeal.

genuine issues of material fact exist, and that the district court erred in awarding costs because the court did not distinguish between the costs associated with the original complaint and the costs associated with the cross-complaint. We agree that genuine issues of material fact remain and now reverse.²

Facts and Procedural History

Beazer is the developer of the Sundance development in North Las Vegas. Beazer entered into a subcontract agreement with Terra, under which Terra was to install light poles for the development. Under the subcontract agreement, Terra promised to perform all work in a safe, reasonable manner and to take reasonable steps to protect employees and other persons at the jobsite. As a result, Terra placed stakes and caution tape as barricades around the holes it dug for the bases of the light poles. However, after Terra dug the holes, work was suspended because of a change required by the City of North Las Vegas.³

In March 2006, Lee fell into one of the holes dug by Terra and was injured. Terra had placed stakes and caution tape around the hole

²Because the district court's award of costs was conditioned on Terra's status as the prevailing party, the award of costs is also reversed. Additionally, we note that the district court's award of costs was an abuse of discretion because it failed to distinguish between the costs incurred to defend against Lee's claims and the costs incurred to defend against Beazer's cross-claims. Under NRS 18.020, a prevailing party is entitled to costs when the plaintiff is seeking to recover more than \$2,500 in money or damages. However, as between cross-parties, a prevailing party may only recover the costs attributable to the cross-complaint from the non-prevailing party.

³The city required bigger masts and bigger bases for the light poles.

that Lee fell into. Terra claimed that one of Beazer's superintendents authorized American Asphalt to remove the caution-tape barrier and to install a sidewalk in the area. American Asphalt explained that it had replaced Terra's barrier with cones and caution tape. However, the responding North Las Vegas police officer reported that on the night of the accident, there were no barriers of any kind around the subject hole.

As a result, Lee commenced an action against Beazer and Terra alleging negligence.⁴ In its answer, Beazer asserted cross-claims against Terra for (1) breach of contract, (2) express indemnification, (3) equitable indemnification, and (4) contribution. Beazer claimed that Terra had a duty to indemnify and defend Beazer in all cases that arise out of or are connected to Terra's work on the site. Terra answered both Lee's complaint and Beazer's cross-claims. Terra subsequently filed a motion for summary judgment against Beazer and Lee arguing that there were no genuine issues of material fact. It also contended that Lee could not prove the breach and causation elements of his negligence claim because it was undisputed that American Asphalt had removed Terra's barrier around the hole, which Terra claimed was an intervening act. Additionally, Terra argued that by failing to timely respond to its requests for admission, Lee admitted that Terra did not breach a duty of care owed to him.

Terra also argued that Beazer could not prove a breach of contract because Beazer had allowed another contractor to remove Terra's safety measures. Terra further contended that it did not have a duty to

⁴Lee filed an amended complaint on July 31, 2007, which added American Asphalt as an additional defendant.

indemnify or defend Beazer because the accident was due to Beazer's sole negligence and the subcontract agreement expressly excludes cases arising from the sole negligence of Beazer. It asserted that Beazer was not entitled to equitable indemnification or contribution because Lee could not prove that Terra had breached a duty of care toward him or caused his injuries.

Beazer filed a limited joinder and opposition to Terra's motion for summary judgment.⁵ In its opposition, Beazer contended that summary judgment against it was not appropriate because genuine issues of material fact remained.

The district court granted Terra and Beazer's motion for summary judgment as to Lee, but did not dismiss the cross-claims because Beazer's breach of contract claim against Terra for failure to defend was not resolved by the grant of summary judgment against Lee. However, in chambers, the district court entered an order granting Terra's motion as to Beazer. Terra subsequently filed a motion seeking \$44,534.50 in attorney fees and \$12,649.14 in costs. Beazer opposed Terra's motion, and sought reconsideration of the district court's entry of summary judgment.

At the hearing for the motion for reconsideration, the district court denied Beazer's motion for reconsideration and explained that it had

⁵Beazer joined Terra's motion to the extent that Lee's complaint against Beazer would also be dismissed. Beazer argued that Lee had failed to timely respond to its requests for admission and those requests must be deemed admitted. Additionally, Beazer contended that because Terra is an indispensable party to this action, the district court was required to dismiss Lee's complaint against Beazer if the court dismissed Lee's claims against Terra.

granted the motion for summary judgment because it was undisputed that Beazer allowed American Asphalt to remove the barricades, and, therefore, Beazer was solely negligent. The district court also granted in part Terra's motion for attorney fees and costs. It ordered Beazer to pay all of Terra's costs without considering whether the costs were incurred due to Beazer's cross-claim or Lee's complaint.

Discussion

Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Wood, 121 Nev. at 729, 121 P.3d at 1029. "[W]hen reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party." Id. An issue of material fact is genuine when the evidence is such that a rational jury could return a verdict in favor of the nonmoving party. Id. at 731, 121 P.3d at 1031. Whether a factual issue is material is determined by the controlling substantive law. Id.

"This court reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court." Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Under NRCP 56, the burden of proving that there is no genuine issue of material fact lies with the moving party. Maine v. Stewart, 109 Nev. 721, 726-27, 857 P.2d 755, 758-59 (1993). However, once the moving party satisfies his or her burden as required by NRCP 56, the burden shifts to the nonmoving party to show the existence of a genuine issue of material fact. Id. at 727, 857 P.2d at 759.

Based on our holding in Reyburn Lawn, Terra's duty to defend is "limited to claims directly attributed to [Terra's] scope of work but does not include defending against claims arising from the negligence of other

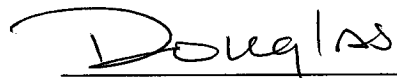
subcontractors or [Beazer's] own negligence". Reyburn Lawn v. Plaster Development Co., 127 Nev. ___, ___, 255 P.3d 268, 278 (2011). "[A]n owner is responsible for seeing that an excavation made for his benefit upon a public street is adequately safeguarded" and this duty arises "from authority over and control of the work." Dixon v. Simpson, 74 Nev. 358, 360, 362, 332 P.2d 656, 658-59 (1958). A subcontractor's duty to guard terminates when it completes the work and surrenders control of the work. Id. at 362, 332 P.2d at 658-59.


Here, by contract, Terra had assumed Beazer's duty under NRS 455.010 to safeguard the hole that caused Lee's injuries. Furthermore, unlike the subcontractor in Dixon, Terra had not surrendered control of the work back to Beazer, nor had it completed its contracted work. Id. at 362, 332 P.2d at 658-59. Therefore, Terra was responsible for ensuring the safety of the area. While Beazer may have been negligent in permitting another subcontractor to remove and replace the barricade installed by Terra, the record suggests that Terra should have anticipated that out-of-sequence work may be conducted by the developer and other independent contractors. The evidence also suggests that Terra had a duty to monitor and adequately safeguard the excavation site.

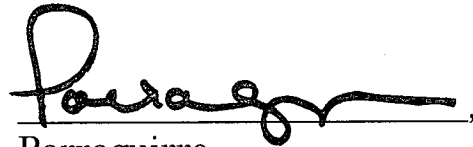
Therefore, genuine issues of material fact exist that preclude the award of summary judgment: (1) whether it was reasonably foreseeable that other contractors would move Terra's barricades such that Terra had a duty under the contract to monitor the site to ensure its

safety; (2) whether Terra used inadequate safety procedures; and (3) if inadequate, whether they contributed to the accident.⁶ Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.


_____, J.
Douglas


_____, J.
Gibbons


_____, J.
Parraguirre

⁶Additionally, we note that the proposed order granting summary judgment submitted by Terra's counsel did not comply with NRCP 56(c) because it did not set forth the undisputed material facts and legal determinations. Although the district court stated the basis of its ruling orally at the hearing for the motion for reconsideration, it should not accept proposed orders that do not set forth the facts and legal reasoning necessary to justify the entry of summary judgment.

cc: Hon. Kenneth C. Cory, District Judge
Leonard I. Gang, Settlement Judge
Barron & Pruitt, LLP
Selman Breitman, LLP
Eighth District Court Clerk