LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO
JOURNAL ENTRY
Hon. D. Chris Cook, Judge

Date Oct. 25, 2018 Case No. 17CV193469

WESTERN RESERVE MUTUAL
Plaintiff

David Jarrett
Plaintiff's Attorney

VS

SEAN GARROW, ET AL.
Defendant

All Defense Counsel
Defendant's Attorney

This matter is before the Court on:

1) Defendant, 15478 Grafton Eastern Road, LLC's, Motion For Summary Judgment, filed March 9, 2018;

2) Third-Party Plaintiff, Sean Garrow's, Brief in Opposition, filed June 11, 2018;

3) Defendant, Ohio Bureau of Workers' Compensation's, Opposition to Motion For Summary Judgment of 15478 Grafton Eastern Road, LLC, filed June 11, 2018;

4) Defendant, 15478 Grafton Eastern Road, LLC's, Reply to Ohio Bureau of Workers' Compensation Opposition to Motion For Summary Judgment, filed July 3, 2018;

5) Defendant, 15478 Grafton Eastern Road, LLC's, Reply to Third-Party Plaintiff, Garrow's and Defendant, Schantz', Opposition to Motion For Summary Judgment, filed July 3, 2018; and

6) Third-Party Plaintiff, Sean Garrow's, Surreply in Opposition to 15478 Grafton Eastern Road, LLC's, Motion For Summary Judgment , filed July 13, 2018.

Oral argument was had on August 8, 2018.

THE COURT RULES THAT: 15478 Grafton Eastern Road, LLC's, Motion For Summary Judgment is not well-taken and hereby DENIED.

See Judgment Entry. No Record.

IT IS SO ORDERED.

JUDGE D. Chris Cook

cc: All Counsel of Record

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INTRODUCTION

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STATEMENT OF PERTINENT FACTS

Defendant, Third-Party Plaintiff, Sean Garrow ("Garrow"), worked at a bar/restaurant called the Jailhouse Tavern, LLC ("Jailhouse"). Jailhouse leases property from 15478 Grafton Eastern Road, LLC ("Grafton LLC"), the property owner, and is located at that same address in Grafton, Ohio ("The Premises.")

On July 22, 2017, Garrow was cleaning a food truck owned by Jailhouse that was parked alongside the east side of the restaurant within an Ohio Department of Transportation ("ODOT") right-of-way. Garrow was standing near the food truck when Defendant, Dannie Yoder ("Yoder") lost control of his vehicle and struck Garrow pinning him to the food truck. Directly after Yoder struck Garrow, Defendant Lee Schantz ("Schantz"), who was also operating a vehicle, struck Yoder's vehicle causing further injury to Garrow.

As a result of the accidents, Garrow was seriously injured.

SUMMARY JUDGMENT STANDARD OF REVIEW

The Ninth District Court of Appeals has recently stated the standard of review for summary judgment. "This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). This Court uses the same standard that the trial court applies under Civ.R. 56(C), viewing the evidence in the light most favorable to the nonmoving party and resolving any doubt in favor of the non-moving party. See *Viock v. StoweWoodward Co.*, 13 Ohio App.3d 7, 12 (6th Dist.1983). Pursuant to Civ.R. 56(C), summary judgment is proper if: (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. Citing, *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327 (1977)." *Petroskey v. Martin*, 9th Dist. Lorain No. 17CA011098, 2018-Ohio-445, at ¶ 15.

"The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). Specifically, the moving party must support the motion by pointing to some evidence of the type listed in Civ.R. 56(C). *Id.* at 292-293. If the moving party satisfies this burden, then the non-moving party has the reciprocal burden to demonstrate a genuine issue for trial remains. *Id.* at 293. The non-moving party may not rest upon the mere allegations or denials in their pleadings, but must point to or

submit evidence of the type specified in Civ.R. 56(C). Id. at 293; Civ.R. 56(E). *Petroskey* at ¶ 16.

And, "Once the moving party satisfies this burden, the non-moving party has a reciprocal burden to 'set forth specific facts showing that there is a genuine issue for trial.' * * * The non-moving party may not rest upon the mere allegations or denials in his pleadings, but instead must submit evidence as outlined in Civ.R. 56(C)." *Id.* at 293; Civ.R. 56(E). Additionally, expressions of speculation or assumptions in deposition testimony and affidavits are insufficient to sustain the non-movant's burden. See *Dailey v. Mayo Family Ltd. Partnership*, 115 Ohio App.3d 112, 117 (7th Dist.1996). *Messer v. Summa Health System,* 9th Dist. Summit No. 28470, 2018-Ohio-372, at ¶ 31.

ANALYSIS

The gravamen of Grafton LLC's dispositive motion is: 1) the lease between Grafton LLC and Jailhouse is an "absolute net lease" that places all responsibility to maintain the demised property, The Premises, on Jailhouse; 2) as Grafton LLC is a landlord out-of-possession, it is not liable for any injuries, damages, or losses occurring on The Premises; and 3) even if Grafton LLC is a landlord in possession, the intervening, superseding negligence of Yoder and Schantz break any causal connection for Grafton LLC's negligence and Garrow's injuries.

Garrow's response is likewise threefold: first, Garrow argues that due to the nature of the corporate structure and ownership of Grafton LLC and Jailhouse, no valid, enforceable lease exists; second, even if a valid, enforceable lease exists, there is a genuine issue of material facts as to the amount of control over The Premises exercised by Grafton LLC, such that liability may attach; and third, the determination of intervening causation is a question of fact that must be made by the trier of fact.

THE OUT-OF-POSSESSION LANDLORD

At the outset, the Court notes that both parties identify the axiomatic maxim of law that an out-of-possession landlord is generally not liable to third parties for the condition of the leased premises. (Citations omitted).

Grafton LLC is an "out-of-possession" landlord to the extent that it does not control the day-to-day operation of the Jailhouse, is not physically located at The Premises, has no employees, and has no bank accounts. It is merely a "holding company" that owns real estate. However, whether Grafton LLC substantially relinquished all control over The Premises or exercised enough control over it such that liability may attach is a question of fact.

In determining whether or not a lessor substantially relinquished control over leased property, courts look to the facts of each particular case. From *Stackhouse v. Close* (1911), 83 Ohio St. 339, and its progeny to the present, this fact-driven analysis goes to the weight of the evidence and the credibility of the witnesses. Thus, it is for the finder of fact at trial, not the Court on summary judgment, to decide the contested issues.

Here, Garrow posits numerous examples of Grafton LLC's control over The Premises that a jury might find overcome the presumption of immunity[1]. For instance, Jailhouse and Grafton LLC altered a right of way held by the Ohio Department of Transportation ("ODOT") in order to create additional parking. Thereafter, ODOT demanded that The Property owner, Grafton LLC, remedy the situation as it posed a potential danger to motorists. In response, Grafton LLC directed Jailhouse's manager, Mike Roth ("Roth"), to take whatever steps were necessary to comply.

Moreover, Roth executed an ODOT permit application for construction of the right-of-way on behalf of Grafton LLC as their agent.

And there is evidence in the record that Grafton LLC retained the services of an engineering and surveying company to assist Jailhouse with the ODOT permit application.[2]

There is also evidence in the record that Laszlo Tromler ("Tromler"), the principal of Grafton LLC, Jailhouse, and the parent company of those entities[3], was aware of ODOT's concerns regarding the right-of-way and paid-for and directed the parties' response.

THE VALIDITY OF THE LEASE

In addition to arguing that Grafton LLC did not really relinquish control of The Premises, Garrow urges that the lease between Grafton LLC and Jailhouse is ". . . not a true contract . . ." and thus, Grafton LLC is not a landlord out-of-possession.

In support of the proposition, Garrow points to the fact that Jailhouse has never paid any rent to Grafton LLC, despite a contractual mandate to do so in the amount of $1,500 per month. And, it appears that a significant amount of maintenance and improvements to The Premises were paid by Kentrom, not Jailhouse, as required by the lease.

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[1] Or perhaps better stated, "no liability."
[2] B.L. Robinson Engineering & Surveying Co.
[3] Kentrom Enterprises, LLC.

Moreover, there was no consideration paid by Jailhouse to Grafton LLC when The Premises was transferred to Grafton LLC from Jailhouse.

Regardless, given these facts and circumstances, and others posited by Defendant, Ohio Bureau of Workers Compensation in their opposition brief, genuine issues of material fact exist as to the propriety of the lease between Grafton LLC and Jailhouse.

IS THERE A DUTY BY A LANDLORD TO ITS TENANTS' EMPLOYEES

The case cited by both parties on this issue is *Shump v. First Continental*, 71 Ohio St.3d 414, 1994-Ohio-427. *Shump* mandates that a ". . . landlord owes the same duties to persons lawfully upon the leased premises as landlord owes to the tenant."

Accordingly, any duty of care Grafton LLC owes to Jailhouse, Grafton LLC owes to Jailhouse's employees, which include Garrow.

But what is that duty?

This question is answered *supra* and reiterated by *Shump*. "Where a party other than the owner possesses a premises (as in the case of a leased premises), under the common law of premises liability, the possessor or occupier and not the owner owes the applicable legal duty to the entrant." *Id.* at ¶ 2.

But there are exceptions. *Shump* continues, "In point of fact, the exceptions nearly have swallowed up the general rule of landlord immunity. Some of the commonly accepted exceptions that give rise to landlord liability include the following: concealment or failure to disclose known, nonobvious latent defects; **defective premises held open for public use**; **defective areas under the landlord's control**; failure to perform a covenant to repair; **breach of a statutory duty**; and negligent performance of a contractual or statutory duty to repair. *Id.* at ¶ 6, emphasis added.

In the case at bar, there is evidence that Tromler, Roth, and Grafton LLC were all aware of ODOT's concerns regarding the SR 83 right-of-way and the fact that is was supposed to be kept clear of obstructions. By placing the food truck in this area, a jury could certainly conclude that Jailhouse, with Grafton LLC's blessing, created a defective condition on The Premises.

Also as noted *supra*, a jury could conclude that the right-of-way was under the control of Grafton LLC.

Finally, as argued by Garrow, there is a statute that expressly forbids the placing of obstructions (like a food truck) ". . . within the bounds of any road or highway . . ." RC 5515.03.

Again, a jury could certainly conclude that Grafton LLC implicitly (by knowledge of the ODOT issue) or expressly (by Roth as an agent of Grafton LLC) breached this statutory duty by placing the food truck in the right-of-way.

IF GRAFTON LLC WAS A LANDLORD IN POSSESSION AND ITS VIOLATION OF RC 5515.03 WAS THE PROXIMATE CAUSE OF GARROW'S INJURY, WAS THE NEGLIGENCE OF YODER AND/OR SCHANTZ A SUPERSEDING, INTERVENING ACT THAT BROKE THE CHAIN OF CAUSATION SUCH THAT GRAFTON LLC IS DIVESTED OF LIABILITY

Grafton LLC argues[4] next that even if it is a landlord in possession and had control of the property where the accident occurred, it is still not liable because the proximate cause of Garrow's injuries was the negligence of Yoder and Schantz when they smashed into Garrow and the food truck.

In reviewing this issue, both parties cite the Court to the matter of *Cascone v. Herb Kay Co.,* 6 Ohio St.3d 155 (1983). In *Cascone,* an automobile mechanic was injured when a hydraulic lift came down on him. The trial court granted summary judgment to the company which did the repair work on the lift and the appellate court confirmed. The Ohio Supreme Court reversed and stated, "In the totality of the material presented to the trial court, and construing such evidence most strongly in the appellant's favor, there reasonably appear to be genuine issues of material fact that should be presented to a jury." *Id.* at ¶ 1.

The Supreme Court enunciated the standard of review for the application of this doctrine thus, "An important factor that must be considered in determining whether an intervening cause breaks the causal chain is that of the foreseeability by the original tortfeasor of the intervening cause or causes which evolve into the situation causing the injury complained of." *Id.*

And, "The test, as set forth in the Ruling Case Law approved in *Mouse*[5] and *Mudrich*[6], is whether the original and successive acts may be joined together as a whole, linking each of the actors as to the liability, or whether there is a new and independent act or

[4] In its' Reply Brief.
[5] Citation omitted.
[6] Citation omitted.

cause which intervenes and thereby absolves the original negligent actor. Such a determination involves a weighing of the evidence, and an application of the appropriate law to such facts, **a function normally to be carried out by the trier of the facts.**" *Id.*, emphasis added.

In this case, the defendants Grafton LLC and/or Jailhouse, moved a (presumably) large food truck into the right-of-way on a busy state thoroughfare in order to clean it. This right-of-way bordered the intersection of SR 83 and SR 57. A jury could certainly find that it was foreseeable that vehicles might enter the right-of-way and thus collide with any obstruction placed therein, including a large food truck. Hence the obvious rationale behind RC 5515.03.

To that end, Grafton LLC's reliance on *Avanesyan v. King,* 9th Dist. No. 22325, 2005-Ohio-2966, is misplaced. The facts in *Avanesyan* and the facts in the matter at bar are inapposite. In *Avanesyan,* an accident occurred at a construction site at an intersection; here, the accident occurred in a right-of-way where defendants placed an unmarked obstruction.

In the final analysis, whether or not the accident resulted from the negligence of Grafton LLC, Jailhouse, or both, or perhaps the superseding, intervening negligence of Yoder and/or Schantz is a question for a jury, not a legal issue for the Court.

CONCLUSION

After review of the pleadings, extensive briefing, the Affidavits and other Civ. R. 56(E) materials, perusal of Civ. R 56(C) as well as the relevant case law supplied by the parties and Court and the oral arguments of counsel, the Court rules as follows:

There are genuine issues of material fact in dispute. As such, Defendant, 15478 Grafton Eastern Road, LLC's, Motion For Summary Judgment is not well-taken and hereby DENIED.

Final pre-trial set for August 27, 2019 @ 2:00 pm. Jury trial set for September 23, 2019 @ 8:30 am.

IT IS SO ORDERED.

JUDGE D. Chris Cook