Filed 2/13/19 Sandoval-Mora v. Romm Remodeling, Inc. CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ANASTACIO P. SANDOVAL-MORA, Plaintiff and Appellant, v. ROMM REMODELING, INC., et al., Defendants and Respondents.	B287482 (Los Angeles County Super. Ct. No. BC605857)

APPEAL from a judgment of the Superior Court of Los Angeles County. Elizabeth A. Lippitt, Judge. Affirmed.

Levin & Hoffmann, Robert S. Levin and James E. Hoffmann for Plaintiff and Appellant.

Yoka & Smith, Christopher E. Faenza, Mary Childs, Gina N. Giovacchini; Greines, Martin, Stein & Richland, Robert A. Olson and Cynthia E. Tobisman for Defendants and Respondents.

Appellant Anastacio Sandoval-Mora (appellant) was severely injured when he fell from the second-story roof of a house he was painting. At the time of his fall, appellant was employed by and working for LA Construction Services, Inc. (LA Construction),[1] which had been hired as an independent contractor to perform painting at a residential construction project. Respondent Ronen Yehezkel supervised the construction project, and his wife, respondent Malli Yehezkel, and their company, respondent Romm Remodeling, Inc. (collectively, respondents), also were involved with the project to varying degrees.

Appellant sued respondents for negligence and premises liability. On respondents' motion for summary judgment, the trial court found applicable our Supreme Court's long recognized *Privette* doctrine, which bars contractor liability for injuries sustained by employees of subcontractors hired by the contractor. (*Privette v. Superior Court* (1993) 5 Cal.4th 689 (*Privette*).) Thus,

---

[1] At oral argument, counsel for appellant stated the parties disputed who employed appellant. However, counsel's statements conflict with both the briefing on appeal as well as the undisputed facts in the appellate record. For example, in his opening brief on appeal, appellant stated that, "[a]t the time of the incident, Sandoval was employed by LA Construction Services, Inc. . . . , a painting subcontractor that had been hired to perform work on the Project." In addition, as reflected on the separate statement of undisputed facts submitted in connection with the summary judgment motion at issue in this appeal, appellant stated the following fact was "undisputed": "At the time of his fall, [appellant] was working as a painter for an independent contractor named LA Construction Services." In light of the record and briefing before us, we proceed on the basis that appellant was in fact employed by LA Construction.

the trial court granted summary judgment in favor of respondents. Although appellant agrees the *Privette* doctrine applies, he contends issues of fact exist as to whether an exception to the doctrine also applies. It is on this ground that appellant appeals.

As discussed below, we find no triable issue of material fact and, therefore, affirm the judgment.

BACKGROUND

1. Events Preceding Appellant's Lawsuit

Unless otherwise indicated, the following facts are undisputed.

Monica and Yuval Margalit and respondents Malli and Ronen Yehezkel entered into an agreement for the construction of four homes in Encino, California (the project). Under the agreement, the Margalits and another individual agreed to pay for the property on which the homes were to be built (Encino property or work site), and the Yehezkels agreed to construct the homes on the Encino property. The Margalits are the owners of Gaviota Partners, LLC, the entity that owned the Encino property. The Yehezkels are the principals of respondent Romm Remodeling. Although it is disputed whether Ronen was hired individually or as part of Romm Remodeling, it is undisputed Ronen was responsible for supervision of the project and to ensure it was moving along. The parties also dispute whether Ronen was responsible for overseeing individual subcontractor's safety measures, and whether Malli or Romm Remodeling supervised the work site at all. Appellant claims all respondents acted as the general contractor or the equivalent for the project.

Gaviota Partners hired independent contractor LA Construction to paint one of the houses on the Encino property.

On November 6, 2015, while working as a painter for LA Construction at the Encino property, appellant fell approximately 25 feet from the second-story roof of a house and suffered severe injuries. At the time of his fall, appellant was not using safety equipment. A few months before appellant's fall, scaffolding at the work site was removed. Appellant claims Ronen was directly responsible for removal of the scaffolding. The parties dispute whether scaffolding—had it been in place—would have prevented appellant's injuries.

None of the respondents "directed LA Construction or any of LA Construction's employees as to what, if any, safety precautions to take or not to take to protect themselves on the job site." Similarly, none of the respondents "prevented LA Construction or any of LA Construction's employees from taking safety precautions to protect themselves on the job site."

2. Complaint

Appellant sued respondents, as well as his employer LA Construction and the property owner Gaviota Partners for negligence and premises liability.[2] In his complaint, appellant alleged respondents were negligent and reckless in their "ownership, maintenance, management, operation, and/or possession of" the Encino property because they failed "to provide any form of fall protection and/or warnings." Appellant also alleged that, by "failing to provide any form of fall protection and/or warnings," respondents violated California Occupational Safety and Health Administration (Cal-OSHA) regulations.

---

[2] Neither Gaviota Partners nor LA Construction is a party to this appeal.

3. Summary Judgment and Appeal

Respondents moved for summary judgment. According to respondents, because it was undisputed appellant injured himself while working for an independent contractor, respondents had no responsibility for his injuries. Respondents argued the undisputed facts of this case fell squarely within the *Privette* doctrine, which reflects California Supreme Court precedent starting with *Privette*, *supra*, 5 Cal.4th 689, and which holds contractors who hire subcontractors are not liable for injuries sustained at the work site by employees of the subcontractors. Moreover, respondents argued there was no evidence that they retained control over safety at the work site or, if they had, that they exercised such control negligently.

In opposition, appellant countered that triable issues of fact existed both as to Ronen's responsibility for safety at the work site as well as to Malli's and Romm Remodeling's levels of involvement with the project. Appellant also noted it was undisputed that, months prior to appellant's accident, Ronen ordered the removal of scaffolding at the work site. Appellant stated, "The gravamen of the complaint is that the defendants were negligent in failing to provide any form of fall protection or other safety measures of any kind, which failure also constituted violations of statutes, including, provision of Title 8 of CAL-OSHA."

In their reply in support of summary judgment, respondents argued that even if respondents had general supervisory authority over the work site, including as to safety, that was insufficient as a matter of law to impose liability on respondents for appellant's injuries. Respondents also argued that by removing scaffolding three months before appellant's fall

respondents did not affirmatively interfere with the subcontractor's ability to provide a safe work site. Indeed, respondents pointed out it was undisputed they did not preclude LA Construction from taking any safety measures it deemed necessary, including installing scaffolding. And for the first time, respondents argued there was no evidence supporting appellant's suggestion that the removed scaffolding would have prevented his injuries.

Appellant objected to respondents' reply brief both because it raised a new argument (with respect to the scaffolding) and because, due to a delivery problem, appellant did not receive a copy of the reply until two court days before the hearing on the motion.

At the hearing, the court addressed appellant's objections to the reply brief and offered to continue the hearing so that appellant could respond. At one point, counsel for appellant stated, "[W]e are waiving the objection to its timeliness," but later stated, "[W]e will take the extra time, your honor, to reply." However, counsel for respondents suggested that the trial court simply ignore the reply brief and assume "that the scaffolding was a safety measure that could have been taken by somebody." And although respondents' counsel claimed the scaffolding issue was "a total red herring and utterly irrelevant," counsel was amenable to the trial court granting appellant additional time to address the scaffolding issue. Eventually, the parties and the trial court agreed the court would not consider the reply brief.

After taking the matter under submission, the trial court issued its ruling granting respondents' motion for summary judgment on November 6, 2017, and filed its final order granting summary judgment on November 27, 2017. The court held

respondents had satisfied their burden to demonstrate the *Privette* doctrine applied. The court also ruled that although the parties disputed whether respondents (and in particular Ronen) were responsible for safety at the work site, even if respondents had general authority over work site safety, that alone was insufficient as a matter of law to overcome the *Privette* doctrine. The trial court explained that appellant had failed to demonstrate that respondents affirmatively contributed to appellant's injury. The court was not persuaded that by removing the scaffolding months before appellant's fall, Ronen or the respondents had affirmatively contributed to the accident, or that the scaffolding would have prevented appellant's injuries. In so ruling, the trial court referred to and appeared to rely on the reply brief.

Appellant appealed.

DISCUSSION

1. Summary Judgment and Standard of Review

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).) "The defendant bears the initial burden of showing the plaintiff cannot establish one or more elements of the plaintiff's cause of action. [Citation.] If the defendant carries his burden, the burden shifts to the plaintiff to establish a triable issue of material fact." (*Khosh v. Staples Construction Co., Inc.* (2016) 4 Cal.App.5th 712, 716 (*Khosh*); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, 853.) "[O]n summary judgment, a moving party need only show it is entitled to the benefit of a presumption affecting the burden of producing evidence in order to shift the burden of

proof to the opposing party to show there are triable issues of fact." (*Alvarez v. Seaside Transportation Services LLC* (2017) 13 Cal.App.5th 635, 644 (*Alvarez*).)

We review the trial court's grant of summary judgment de novo. (*Khosh*, *supra*, 4 Cal.App.5th at p. 716.) "We consider all evidence set forth in the moving and opposition papers, except evidence to which objections were properly sustained," and we liberally construe the evidence offered in opposition to summary judgment. (*Ibid.*) We resolve all doubts about the evidence in favor of the party opposing summary judgment. (*Ibid.*)

2. Relevant Law

a. The *Privette* Doctrine

Beginning with its 1993 decision in *Privette*, *supra*, 5 Cal.4th 689, our Supreme Court repeatedly has recognized that the hirer of an independent contractor "presumptively delegates to that contractor its tort law duty to provide a safe workplace for the contractor's employees." (*SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, 600 (*SeaBright*); *id.* at pp. 597, 598–600.) This principle—referred to as the *Privette* doctrine or *Privette* presumption—generally precludes an employee of an independent contractor from suing the hirer of that contractor for work-related injuries suffered by the employee. (*Khosh*, *supra*, 4 Cal.App.5th at p. 717.) More recently, in *SeaBright*, our Supreme Court explicitly held that the hirer's presumptive delegation of duty to the contractor "includes any tort law duty the hirer owes to the contractor's employees to comply with applicable statutory or regulatory safety requirements," including Cal-OSHA safety requirements. (*SeaBright*, at pp. 594, 603.)

The rationale behind the *Privette* doctrine is "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.' " (*SeaBright*, *supra*, 52 Cal.4th at p. 600.) In addition, the *Privette* doctrine recognizes that because the liability of the contractor—the person primarily responsible for the worker's work-related injuries—is limited to providing workers' compensation coverage, "it would be unfair to permit the injured employee to obtain full tort damages from the hirer of the independent contractor. That was especially so because (1) the hirer likely paid indirectly for the workers' compensation insurance as a component of the contract price [citation], (2) the hirer has no right to reimbursement from the contractor even if the latter was primarily at fault [citation], and (3) those workers who happen to work for an independent contractor should not enjoy a tort damages windfall that is unavailable to other workers." (*Id.* at p. 599.)

In the same way the *Privette* doctrine protects a hirer from liability, the doctrine also extends to protect the hirer's agent or project supervisor from liability for damages sustained by an employee of an independent contractor. (*Ruiz v. Herman Weissker, Inc.* (2005) 130 Cal.App.4th 52, 55.) Thus, in this opinion we use the term "hirer" broadly to include not only the hirer but also agents or project supervisors of the hirer.

The *Privette* doctrine's presumption in favor of the hirer is not conclusive, but may be rebutted and, for purposes of summary judgment, affects the burden of producing evidence, not the burden of proof. (*Alvarez*, *supra*, 13 Cal.App.5th at pp. 642, 643.)

b. Exception to the *Privette* Doctrine

The *Privette* doctrine is not without exceptions, one of which is at issue here. Specifically, a hirer of an independent contractor may be held liable for work-related injuries suffered by an employee of that contractor when the hirer both (1) retained control over safety conditions at the work site and (2) negligently exercised that control in a manner that affirmatively contributed to the employee's injuries. (*Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 213 (*Hooker*); *Alvarez*, *supra*, 13 Cal.App.5th at p. 641; *Khosh*, *supra*, 4 Cal.App.5th at p. 717.)

In order to demonstrate that a hirer affirmatively contributed to the injuries of an independent contractor's employee, the employee must show the hirer " 'engage[d] in some active participation.' " (*Alvarez*, *supra*, 13 Cal.App.5th at p. 641.) For example, the employee may show that the hirer directed the contractor as to the manner or performance of the work, actively participated in how the job was to be done, or negligently supplied unsafe equipment to the contractor. (*McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219, 222; *Khosh*, *supra*, 4 Cal.App.5th at p. 718.) However, a "hirer's failure to correct an unsafe condition, by itself, does not establish an affirmative contribution." (*Khosh*, at p. 718.) In other words, even when a hirer is aware of unsafe conditions but does nothing to correct them, hirer liability does not necessarily exist. (*Hooker*, *supra*, 27 Cal.4th at p. 215.) Conversely, if a hirer of an independent contractor specifically promised to undertake a particular safety measure—as opposed to overseeing general safety of the work site—but negligently failed to fulfill that promise, the hirer may

be liable for injuries sustained by the contractor's employee. (*Khosh*, at pp. 718–719.)

3. Summary Judgment Was Proper

The parties correctly agree that because appellant was not employed by respondents but was an employee of independent subcontractor LA Construction, the *Privette* presumption applies here. Thus, we begin with the understanding that respondents presumptively delegated to LA Construction their tort law duty to provide a safe workplace for LA Construction employees, including appellant. (*SeaBright*, *supra*, 52 Cal.4th at p. 600.)

Appellant's main position on appeal is that summary judgment was improper because factual issues exist with respect to whether an exception to the *Privette* doctrine applies. First, appellant claims respondents, or at least Ronen, retained control over subcontractor's safety at the work site. Although the parties dispute whether respondents retained control of work site safety, for present purposes we assume respondents retained general supervisory control over safety at the work site.[3]

Second, appellant contends respondents negligently exercised their control over safety in such a way as to affirmatively contribute to appellant's injuries. Appellant asserts that by ordering the removal of scaffolding at the work site months before his fall, Ronen or all of the respondents affirmatively contributed to appellant's injuries. Appellant also argues Ronen's removal of scaffolding violated Cal-OSHA regulations. However, under prevailing case law, these points do

---

[3] There is no evidence to suggest Ronen or any of the respondents retained specific and exclusive control over the safety of LA Construction employees. Indeed, the undisputed facts are to the contrary.

not raise a material issue of fact as to whether respondents affirmatively contributed to appellant's injuries such that an exception to the *Privette* doctrine might apply. Thus, in light of the undisputed facts and case law delineated above, we conclude no exception applies and summary judgment for respondents was proper.

a. Absence of Scaffolding

The undisputed facts demonstrate LA Construction was at all times in control of the safety of its employees, including appellant. As noted above, it is undisputed that none of the respondents "directed LA Construction or any of LA Construction's employees as to what, if any, safety precautions to take or not to take to protect themselves on the job site." And similarly, none of the respondents "prevented LA Construction or any of LA Construction's employees from taking safety precautions to protect themselves on the job site." Thus, despite any general safety oversite that respondents possessed, LA Construction ultimately was responsible for the safety of its employees, including appellant. As such, under clear Supreme Court precedent appellant cannot hold respondents liable for his injuries sustained at the work site while employed by LA Construction. (*Hooker*, *supra*, 27 Cal.4th at p. 202.)

Similarly, despite the fact that Ronen was aware of the absence of scaffolding at the work site, this too is insufficient to impose hirer liability. In *Hooker*, *supra*, 27 Cal.4th 198, the California Department of Transportation (Caltrans) hired a general contractor to construct an overpass. (*Id.* at p. 202.) A crane operator employed by the contractor died as a result of a crane accident while working on the overpass. (*Ibid.*) There were facts showing both that Caltrans may have retained control of

safety at the work site and that Caltrans safety personnel were aware of the unsafe practice that led to the operator's death but did nothing to stop or to correct that unsafe practice. (*Id.* at pp. 202–203, 215.) Nonetheless, because Caltrans did not direct or order the unsafe practice, our Supreme Court held the facts of that case did not demonstrate that Caltrans "affirmatively contributed" to the crane operator's death and, as such, were insufficient to overcome the *Privette* presumption. (*Id.* at pp. 202, 215.)

This case falls squarely within the rationale of *Hooker*. Here, we assume respondents retained general control over work site safety. We further assume scaffolding would have prevented or alleviated appellant's injuries.[4] And the facts demonstrate Ronen knew there was no scaffolding in place when appellant fell but did nothing to correct that presumably unsafe condition. However, there are no facts showing Ronen or any respondent directed or required LA Construction or its employees to work without scaffolding. Rather, as in *Hooker*, *supra*, 27 Cal.4th at page 215, at most, respondents permitted appellant to work without scaffolding. This does not constitute an affirmative contribution to appellant's injuries and, therefore, is insufficient as a matter of law to overcome the *Privette* presumption. (*Ibid.*; see *Khosh*, *supra*, 4 Cal.App.5th at p. 719.)

---

[4] This is the factual issue respondents raised for the first time in their reply brief in support of their summary judgment motion below. Respondents claimed there was no factual support for appellant's assertion that had scaffolding been present at the work site, it would have prevented his injuries. The trial court and the parties agreed this disputed issue should not be considered below.

b. Removal of Scaffolding

Appellant claims respondents' affirmative contribution to his injuries is evident in the fact that, three months prior to appellant's fall, respondents were responsible for the removal of scaffolding at the work site. Appellant cites *Browne v. Turner Construction Co.* (2005) 127 Cal.App.4th 1334 (*Browne*) as support for this proposition. But *Browne* is factually distinct. In *Browne*, the plaintiff, an employee of a subcontractor at a construction site, was injured when he fell from a ladder while installing a fire sprinkler system. (*Id.* at p. 1337.) The plaintiff sued the owner of the property and the general contractor overseeing the construction project alleging they were negligent when they removed from the work area two types of safety equipment that the plaintiff claimed would have prevented his fall. (*Ibid.*) A couple of months before the plaintiff's fall, the defendants had removed a "fall protection system" that included anchors to which workers could secure themselves in order to prevent falling. (*Id.* at p. 1338.) And just one day before plaintiff sustained his injuries, the defendants removed hydraulic lifts that would have prevented his fall. (*Id.* at pp. 1339, 1345.) In addition, the evidence showed the defendants "wanted the work finished without delay, and that they might not have permitted a lift to be brought back into the [work area] even if one had been obtained." (*Id.* at p. 1345.) And there was no evidence that the subcontractor (the plaintiff's employer) "had the opportunity, or would have been permitted, to replace" the fall protection system. (*Ibid.*)

Under the facts of *Browne*, the Court of Appeal concluded the *Privette* doctrine did not apply and, therefore, reversed summary judgment in favor of the defendants. (*Browne*, *supra*,

127 Cal.App.4th at pp. 1337, 1346.) The court held that the evidence there raised "the strong possibility, at least, that defendants not only actively contributed to plaintiff's injuries, but actually *created* the situation in which they were likely to occur." (*Id.* at pp. 1345–1346.) In distinguishing the facts before it from those in cases where the *Privette* doctrine applied, the *Browne* court explained those cases "may be understood, and are perhaps best understood, as resting on the principle that the hirer of an independent contractor has *no duty* to protect *an employee of the contractor* from the consequences of *the contractor's negligence*. Insofar as the plaintiff's injuries result from the contractor's negligence, without any affirmative contribution by the hirer, the latter cannot be found to have violated any duty to the plaintiff." (*Id.* at p. 1345.)

The obvious factual similarity between *Browne* and this case is that, in both, the hirer removed safety equipment from the work site. That appears to be the extent of any significant similarities between the two cases. In contrast with *Browne*, the undisputed facts here demonstrate that although Ronen arranged for the removal of scaffolding at the work site, he did so three months before appellant's accident. Thus, respondents did not "abruptly" remove safety equipment. Moreover, there are no facts suggesting respondents were pressuring LA Construction to complete its work without delay or that respondents would have prohibited LA Construction from providing scaffolding for its workers. Indeed, the undisputed facts confirm respondents neither directed nor prevented LA Construction from taking safety precautions for its employees. Thus, we conclude *Browne* does not support appellant's position here. Similarly, we agree with respondents that *Ray v. Silverado Constructors* (2002) 98

Cal.App.4th 1120 and *Whitford v. Swinerton & Walberg Co.* (1995) 34 Cal.App.4th 1054, on which appellant also relies, do not assist appellant here.

c. Cal-OSHA Regulations

Appellant also argues respondents should be held liable for his injuries because they failed to comply with specified Cal-OSHA regulations. However, assuming respondents were required to comply with the specified regulations, respondents' failure to do so is not grounds to hold them liable for appellant's injuries. Again, our Supreme Court has made this clear. In *SeaBright*, *supra*, 52 Cal.4th 590, the court considered whether the *Privette* doctrine applied when a hirer "failed to comply with workplace safety requirements [specifically including Cal-OSHA regulations] concerning the precise subject matter of the contract, and the [worker's] injury is alleged to have occurred as a consequence of that failure." (*Id.* at p. 594.) The court held the *Privette* doctrine applied in such circumstances, stating the *Privette* doctrine's "implicit delegation includes any tort law duty the hirer owes to the contractor's employees to comply with applicable statutory or regulatory safety requirements." (*Ibid.*)

d. Remaining Arguments

Finally, appellant's remaining arguments do not change our conclusion. Although, as appellant correctly points out, some facts are in dispute (e.g., the precise roles Malli and Romm Remodeling occupied with respect to the project), those facts are not material to the ultimate issue before us. As discussed above, the undisputed material facts compel a finding in favor of respondents. Appellant also correctly points out that, although the parties agreed the trial court should not consider respondents' reply brief in support of their motion for summary

judgment, it appears the trial court might have considered the reply brief. Nonetheless, we conclude the new factual issue raised in the reply brief—namely, whether the absence of scaffolding at the work site caused appellant's injuries—is irrelevant to determination of respondents' motion. In other words, as noted above, even assuming that the absence of scaffolding caused appellant's injuries, it was not respondents' duty to ensure a safe work site for appellant and even with respondents' general supervisory control over work site safety the facts do not demonstrate respondents affirmatively contributed to appellant's injuries.

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

ASHMANN-GERST, J.

HOFFSTADT, J.