

COURT OF APPEALS OF GEORGIA

Adcox v. Atlanta Building Maintenance Company, Inc., 301 Ga. App. 74

687 S.E.2d 137 (2009) · No. No. A09A1467 · Decided November 16, 2009

SUMMARY

Timothy Adcox sued a janitorial services contractor and subcontractor after slipping on ice allegedly formed from discarded mop water in an employer's parking lot. The Georgia Court of Appeals affirmed summary judgment for the contractor, holding that the evidence did not show the contractor negligently caused the injury or assumed sufficient control over the independent subcontractor to support vicarious liability. The court concluded that the contractor's general supervision and indication that mop water could be discarded behind the building did not defeat the independent-contractor relationship.

CASE DETAILS

COURT	Court of Appeals of Georgia
WRITING FOR THE COURT	Adams, Judge; Adams; Blackburn; Doyle
JURISDICTION	Georgia
DECIDED	November 16, 2009
DOCKET	No. A09A1467
DISPOSITION	affirmed
PROCEDURAL POSTURE	Adcox appealed from the trial court's grant of summary judgment to Atlanta Building Maintenance Company, Inc. (ABM) in a negligence action arising from his slip and fall on ice. The trial court denied summary judgment to ABM's subcontractor, JMS Building Maintenance, Inc.; that ruling was not at issue in the appeal.
STANDARD OF REVIEW	Summary judgment is reviewed de novo. The evidence and all reasonable conclusions and inferences are viewed in the light most favorable to the nonmoving party.
PRECEDENTIAL VALUE	published precedential opinion of the Court of Appeals of Georgia
PARTIES	Timothy Adcox v. Atlanta Building Maintenance Company, Inc.

TOPICS

vicarious liability

negligence

summary judgment

standard of review

appellate procedure

PRACTICE AREAS

torts

negligence

vicarious liability

civil procedure

appellate procedure

QUESTIONS PRESENTED

1. Whether ABM was directly negligent for breaching a duty of care in connection with the disposal of mop water.
2. Whether ABM was vicariously liable for JMS's alleged negligence because ABM retained or exercised control over the time, manner, and method of JMS's work.
3. Whether the evidence created a genuine issue of material fact precluding summary judgment for ABM.

HOLDINGS

1. ABM was entitled to summary judgment on Adcox's direct-negligence claim because Adcox presented no evidence that ABM discarded the mop water, acted negligently, knew JMS was disposing of it dangerously, or breached a duty by generally indicating that mop water could be discarded somewhere behind the building.
2. ABM was not vicariously liable for JMS's alleged negligence because JMS was an independent contractor and the evidence did not show that ABM assumed control over the time, manner, or method of JMS's work or interfered so as to create a master-servant relationship.
3. Summary judgment for ABM was proper because the record presented no genuine issue of material fact and ABM was entitled to judgment as a matter of law.

KEY QUOTATIONS

"That test asks 'whether the contract gives, or the employer assumes, the right to control the time, manner, and method of executing the work as distinguished from the right merely to require certain definite results in conformity to the contract.'" (687 S.E.2d at 140)

"Instructions such as giving a deadline for performance or requiring that work be completed at night or before the open of business each day do not amount to control over the time of the work because they do not purport to 'control specifically when any particular duties were to be performed.'" (687 S.E.2d at 141)

"Rather, it is no more than a general indication that the mop water could be discarded in back of the building." (687 S.E.2d at 142)

FACTUAL BACKGROUND

Timothy Adcox slipped and fell on ice in the parking lot of an ADT Security facility after responding to an alarm on a cold January night. ADT had hired ABM to provide janitorial services, and ABM subcontracted the work to JMS. JMS's employee had discarded mop water near the rear of the building, and Adcox alleged that the water froze and caused his fall. ABM's agreement with JMS designated JMS as an independent contractor, gave JMS

control over its work and employees, and reserved ABM's general power to inspect the work and require conformity with the contract.

PROCEDURAL HISTORY

Adcox sued ABM and JMS after allegedly slipping on ice formed from discarded mop water in his employer's parking lot. Both defendants moved for summary judgment. The trial court granted ABM's motion and denied JMS's motion, and Adcox appealed the judgment in favor of ABM. The Court of Appeals affirmed.

DISPOSITION

affirmed

CASES CITED

- Matjoulis v. Integon Gen. Ins. Corp., 226 Ga. App. 459(1), 486 S.E.2d 684 (1997)
- Kelley v. Piggly Wiggly Southern, 230 Ga. App. 508, 496 S.E.2d 732 (1997)
- Braswell v. FoodMax of Ga., 225 Ga. App. 463, 466(2), 484 S.E.2d 86 (1997)
- Feggans v. Kroger Co., 223 Ga. App. 47, 476 S.E.2d 822 (1996)
- Ross v. Ninety-Two West, Ltd., 201 Ga. App. 887, 891(3), 412 S.E.2d 876 (1991)
- Slater v. Canal Wood Corp., 178 Ga. App. 877, 881(1), 345 S.E.2d 71 (1986)
- Cotton States Mut. Ins. Co. v. Kinzalow, 280 Ga. App. 397, 401-402, 634 S.E.2d 172 (2006)
- Lane v. Montgomery Elevator Co., 225 Ga. App. 523, 525(1), 484 S.E.2d 249 (1997)
- Larmon v. CCR Enterprises, 285 Ga. App. 594, 596, 647 S.E.2d 306 (2007)

OPINION

ADAMS, J.

687 S.E.2d 137 (2009) ADCOX v. ATLANTA BUILDING MAINTENANCE COMPANY, INC. No. A09A1467. Court of Appeals of Georgia. November 16, 2009. *138 Gray, Rust, St. Amand, Moffett & Brieske, Michael David St. Amand, Atlanta, for appellant. Dickerson & Van Sant, David M. Van Sant, Cumming, Hamilton, Westby, Antonowich & Anderson, Hall, Booth, Smith & Slover, Denise Weiner Spitalnick, John Christopher Hillis, Andrew J. Hamilton, Atlanta, for appellee.

ADAMS, Judge. Timothy Adcox alleges that he slipped and fell on ice in his employer's parking lot. He brought suit against his employer's janitorial services contractor and subcontractor because the ice allegedly formed when used mop water was discarded in the parking lot. Both contractor and subcontractor moved for summary judgment.

The contractor argued that it did not owe a duty to Adcox because it did not own or occupy the premises and it was not responsible for its subcontractor's actions. The trial court granted the

contractor's motion and denied the subcontractor's motion. Adcox appeals the ruling in favor of the contractor.

We affirm. Summary judgment is proper when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. A de novo standard of review applies to an appeal from a grant of summary judgment, and we view the evidence, and all reasonable conclusions and inferences drawn from it, in the light most favorable to the nonmovant.

(Citations omitted.) *Matjoulis v. Integon Gen. Ins. Corp.*, 226 Ga.App. 459(1), 486 S.E.2d 684 (1997). Construed in favor of Adcox, the evidence shows that he was employed by ADT Security as a service manager. On Sunday night, January 23, 2005, between 8:00 and 10:00 p.m., the 44-year-old Adcox received a call that an alarm had gone off in the ADT building indicating that the back door sensor had been tripped.

Adcox asked that the police be sent, and he went there himself after the police had a chance to inspect. It was a very cold and windy night, but it had not been raining. Adcox normally parked out front, but, because the back door was indicated, he drove around back and parked near the back stairs. At the back of the ADT facility, there are two doors about one door width apart about loading dock height; they both open onto a small landing surrounded by a metal railing with about six or seven metal stairs running down from the middle of the landing to the parking area for the loading dock.

Adcox parked one car spot to the right of the stairs and walked directly left of his car toward the stairs. After about three or four steps, Adcox slipped and fell on ice and slid up against the bottom steps. He landed flat on his back.

After he got up, he saw ice on the ground and ice on the steps. There was less ice on higher stairs and no ice on the landing. The ice on the pavement extended straight out from the stairs, with some under the bottom stairs as well. He continued on his mission, but he did not go up the stairs; rather, he drove around and entered through the front door. He turned the alarm off, inspected the office for problems, but did not see anyone in the building.

Adcox alleges that he suffered injuries as a result of the fall. Some time prior to his injury, ADT had hired Atlanta Building Maintenance Company, Inc. ("ABM") to perform the janitorial services at the building. ABM, in turn, subcontracted the work to J.M.S. Building Maintenance, Inc. ("JMS").

In that regard, ABM *139 and JMS entered into an agreement entitled "Independent Contractor Agreement" dated April 17, 2003 and signed by Carlos Mesa. Mesa testified that JMS employed five or six people in January 2005, but only one employee was on the ADT premises on the night in question.[1] Mesa had trained that person on how to do his job, including telling him how and where to dispose of mop water.

Mesa instructed that the dirty mop water should be dumped out the back door "over the railing to the side of the building." This area is to the side of the steps. He added that it should be close to the dumpster "... between the dumpster and the dock door," that it should be thrown over the rail some distance rather than poured straight down, and that it should be away from the building.

He never instructed the employee to throw the water down the stairs nor over the front railing nor where a person would walk to the stairs from the parking lot. Mesa also instructed that the employee could walk away from the building and to a grassy area across the parking lot to dump the water.

The choice between the two was the employee's, and, according to Mesa, it depended on what was near the stairs and "common sense." Mesa did not give special instructions for disposing of the water in cold temperatures.

Finally, Mesa admitted that the interior security camera system at ADT captured a picture of a JMS employee near a mop bucket; the picture is time stamped as 7:31 that evening. And Mesa admitted that his employee threw water somewhere out of the back of the building that night. Adcox alleges the water turned to ice and that he slipped on that ice. 1. Adcox contends the trial court erred by granting summary judgment in favor of ABM because ABM owed a duty of care to keep the premises safe and breached that duty.

Adcox does not claim that ABM owed a duty as an "owner" or "occupier" under OCGA § 51-3-1. Rather, he claims that ABM is liable because "janitorial contractors, such as ABM and JMS, have a duty to use ordinary care in providing janitorial services" and that there is an issue of fact as to whether it breached that duty. But even assuming the duty, Adcox has no evidence that ABM actually provided any janitorial services to ADT other than through its independent contractor.

Janitorial service contractors whose actions cause injury to a third party certainly can be held liable to those parties. See *Kelley v. Piggly Wiggly Southern*, 230 Ga. App. 508, 496 S.E.2d 732 (1997) (circumstantial evidence of a connection between both contractors and the cause of the plaintiff's fall). But there is no allegation in this case that ABM threw out the mop water or otherwise acted negligently so as to cause Adcox's injuries.

The only suggestion of ABM playing a role related to the alleged fall is Mesa's testimony that ABM said the mop water could be discarded in the back of the building. This is insufficient to support liability. Adcox has not shown that there was anything wrong with that instruction. He has presented no nonhearsay evidence to show that ADT objected to discarding the water out back or that ABM had any knowledge that JMS was allegedly disposing of the water in a dangerous manner.

Also, Mesa did not aver that ABM told him where in the back of the building the water could be thrown nor give him any instruction on what to do in cold weather. Thus Adcox has not shown that

ABM breached any duty by recommending that the mop water could be discarded somewhere out back, and, accordingly, Adcox has no claim against ABM for negligence arising out of its own actions.

2. Adcox contends there is a question of fact as to whether ABM is vicariously liable for JMS's actions. With regard to vicarious liability, in Georgia "[a]n employer generally is not responsible for torts committed by his employee when the employee exercises an independent business and in it is not subject to the immediate direction and control of the employer."

OCGA § 51-2-4. This rule applies to janitorial contractors who retain independent subcontractors to actually perform the work. See, e.g., *Braswell v. *140 FoodMax of Ga.*, 225 Ga.App. 463, 466(2), 484 S.E.2d 86 (1997) (janitorial contractor not liable for torts of independent subcontractor).

In janitorial service cases, the standard test applies for determining whether the subcontractor is an independent contractor. See, e.g., *Feggans v. Kroger Co.*, 223 Ga.App. 47, 476 S.E.2d 822 (1996). That test asks "whether the contract gives, or the employer assumes, the right to control the time, manner, and method of executing the work as distinguished from the right merely to require certain definite results in conformity to the contract."

(Citations and punctuation omitted.) *Ross v. Ninety-Two West, Ltd.*, 201 Ga.App. 887, 891(3), 412 S.E.2d 876 (1991). And, "[if] the contract clearly... denominates the other party as an independent contractor, that relationship is presumed to be true unless the evidence shows that the employer assumed such control." *Id.* Adcox contends there is a conflict in the evidence regarding whether ABM retained or exercised sufficient control of the time, manner and method of cleaning the premises.

We disagree. (a) The agreement between ABM and JMS is entitled "Independent Contractor Agreement" and it states that the parties intended that JMS be an independent contractor: The parties intend that the Contractor, in performing services herein specified, shall act as an independent contractor and shall have control of his/her work and the manner in which it is performed.

Although ABM retained "a general power of supervision, to ensure that the work conforms to the contract, including the right of inspection and the right to request corrections of work as needed," retention of the right to require certain definite results in conformity to the contract does not defeat independent contractor status. *Feggans*, 223 Ga.App. at 48-49, 476 S.E.2d 822.

It is well recognized that merely taking steps to see that the contractor carries out his agreement, by supervision of the intermediate results obtained, or reserving the right of dismissal on grounds of incompetence, is not such interference and assumption of control as will render the employer liable. (Punctuation omitted.) *Slater v. Canal Wood Corp. etc.*, 178 Ga.App.

877, 881(1), 345 S.E.2d 71 (1986). See also *Cotton States Mut. Ins. Co. v. Kinzalow*, 280 Ga.App. 397, 401, 634 S.E.2d 172 (2006). The contract further provides that JMS was free to contract with others; that JMS was "not an agent or employee of ABM" and not entitled to ABM employee benefits; and that ABM had no right to control "the manner in which the work is to be done and shall, therefore, not be charged with the responsibility of preventing risk to the contractor or his/her employees."

Rather, JMS had full authority and responsibility over its employees, including hiring and firing. The agreement provides that JMS would indemnify, defend and hold harmless ABM from any claims from any other source arising out of the contractor's actions and that JMS would obtain insurance to fully protect both JMS and ABM from such claims.

In connection with services performed under the agreement, the contract states that the premises "shall be under the exclusive management and control of [JMS], except" in connection with ABM's general power of supervision quoted above. These provisions clearly and thoroughly provide for an independent contractor relationship. See, e.g., *Cotton States*, 280 Ga.App. at 401-402, 634 S.E.2d 172.

Adcox argues that, under the agreement, ABM retained control over the time, manner and method of JMS's work because the contract mentions separate "plans and specifications": Contractor agrees to perform any and all services generally performed by Contractor in his/her usual line of business (or required or requested by ABM or necessary for the completion of the project according to plans and specifications given to subcontractor) including, but not limited to, the following: General cleaning i.e. dusting, vacuuming, sweeping, general lavatory cleaning, etc....

But these plans and specifications are not in the record and there is no evidence of spoliation that would give rise to a presumption or inference. See generally *Lane v. Montgomery *141 Elevator Co.*, 225 Ga.App. 523, 525(1), 484 S.E.2d 249 (1997).[2] In short, given that "the contract... clearly denominates the other party as an independent contractor, that relationship is presumed to be true unless the evidence shows that the employer assumed such control."

Ross, 201 Ga.App. at 891(3), 412 S.E.2d 876. (b) Here, the undisputed evidence shows that ABM did not assume such control. An employer is liable for the negligence of a contractor "[i]f the employer... interferes and assumes control so as to create the relation of master and servant or so that an injury results which is traceable to his interference." OCGA § 51-2-5(5).

Adcox contends that ABM assumed such control by telling JMS "exactly how to clean the property, including where to discard the used mop water." The facts show otherwise. Mesa averred that he received his instructions from ABM: "they showed me what to do," including all the areas that needed cleaning. ABM instructed him that JMS would be responsible for emptying the trashcans, vacuuming, dusting, mopping the floors, and cleaning the breakrooms and bathrooms.

These instructions merely repeat the broad requirements of the contract, which tell JMS where to clean and the general scope of the work. They do not dictate the time, manner or method of executing the work. ABM told Mesa the days that cleaning was needed and that it had to be completed outside of normal business hours, which were Monday through Friday, 8:00 a.m. to 5:00 p.m.

Although Mesa stated that ABM told him the hours to work, he explained that he did not keep track of employee hours worked nor pay by the hour because the employees "don't have to spend any time, just do their job and leave."

In fact, the ADT office is small, and it only took one person about an hour and a half to clean it. This evidence does not create an issue of fact regarding whether ABM dictated the time JMS was required to perform the work. Instructions such as giving a deadline for performance or requiring that work be completed at night or before the open of business each day do not amount to control over the time of the work because they do not purport to "control specifically when any particular duties were to be performed."

Feggans, 223 Ga.App. at 48, 476 S.E.2d 822 (requiring work between 11:00 p.m. and 7:00 a.m. insufficient to defeat independent contractor status). See also *Larmon v. CCR Enterprises*, 285 Ga.App. 594, 596, 647 S.E.2d 306 (2007) (contract required delivery by a certain time but the manner and method of performing the contract were left to the contractor's discretion).

Although ABM had someone observe JMS's work from time to time, ABM did not provide a regular on-site supervisor. The ABM observer would check whether the dusting, mopping and other work was satisfactory. In this vein, Mesa testified that he understood ABM had the right to direct his company as to how the job was to be performed. This is consistent with the contract language that gave ABM the right "to ensure that the work conforms to the contract, including the right of inspection and the right to request corrections of work as needed."

Again, the general right of inspection to ensure conformity to the contract does not preclude an independent contractor relationship. See *Slater*, 178 Ga.App. at 881(1), 345 S.E.2d 71; *Feggans*, 223 Ga.App. at 49, 476 S.E.2d 822. "Such activity evidences [ABM's] right to require certain results under its agency contract, as opposed to its controlling of the time, method and manner by which the results are achieved."

Cotton States, 280 Ga.App. at 401, 634 S.E.2d 172. Under the contract, JMS was required to use its own materials, tools, and equipment except that JMS could borrow or rent equipment from ABM. Despite the contract language, ABM in fact provided all of the equipment that JMS used at the job site, such as vacuum cleaner, mop, and buckets. JMS provided only the labor.

But, ABM's "willingness to supply these materials to its agents does not intrude into the agents' ability to control the daily operations of his business." *Cotton States*, 280 Ga.App. at 401, 634

S.E.2d 172. *142 Finally, Mesa had a conversation with ABM about where the used mop water would be discarded. He does not remember the content of the conversation, except he recalls that ABM indicated the water could be discarded in the back of the building.

Jeremy Fort, the ABM manager of the ADT account, added that he never instructed Mesa to discard the water "over the rail at the stairs at the rear of the building." Given the explicit terms of the contract and the other facts and circumstances, we find ABM's indication that the mop water could be discarded in back of the building was insufficient as a matter of law to constitute an assumption of control by ABM "so as to create the relation of master and servant or so that an injury results which is traceable to [its] interference."

OCGA § 51-2-5(5). Rather, it is no more than a general indication that the mop water could be discarded in back of the building. Under the contract, ABM had delivered full and complete possession of the premises to its independent contractor JMS, and it was Mesa, on behalf of JMS, who gave the worker the specific instructions about where to discard the water.

Judgment affirmed. BLACKBURN, P.J., and DOYLE, J., concur. NOTES [1] There may have been two employees other nights, but there is no non-hearsay evidence in the record that two were there that night. [2] Mesa recalls receiving that information in writing, but he no longer has it.