Commonwealth of Massachusetts
County of Middlesex
The Superior Court

CIVIL DOCKET#: **MICV2012-02521-J**

RE: Gomes v Nittany Construction Inc. et al

TO: James E. Harvey Jr, Esquire
O'Malley & Harvey
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Boston, MA 02110-1735

CLERK'S NOTICE

SEE ATTACHED COPIES.

Dated at Woburn, Massachusetts this 5th day of June, 2014.

Michael A. Sullivan,
Clerk of the Courts

BY: James Lynch
Assistant Clerk

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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 12-02521

RICHARD A. GOMES

vs.

NITTANY CONSTRUCTION, INC.;
MARMELO BROTHERS CONSTRUCTION, INC., third-party defendant

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The plaintiff, subcontractor employee Richard A. Gomes ("Gomes"), brought an action against the defendant, general contractor Nittany Construction, Inc. ("Nittany"), alleging negligence, breach of the implied warranty of merchantability, and breach of the warranty of fitness for a particular purpose. The claims arise out of Gomes's fall that occurred when a scaffolding plank on which he stood broke. Nittany brought a claim for breach of contract against its subcontractor, and Gomes's employer, third-party defendant Marmelo Brothers Construction, Inc. ("Marmelo") for failing to indemnify Nittany. Now before the court is Nittany's motion for summary judgment on all of Gomes's claims.[1] On March 3, 2014, the court held a hearing on Nittany's motion. For the reasons set forth below, this court concludes that Nittany's motion will be **ALLOWED**.

BACKGROUND

The following facts are undisputed, unless otherwise noted, and are taken from the joint

[1] In its motion, Nittany also moved for summary judgment against Marmelo. However, at the hearing before this court, Nittany represented that it is no longer pursuing summary judgment against Marmelo.

appendix included with the summary judgment materials.[2] In August or September 2010,[3] Nittany entered into a contract with owner DSM Realty to serve as general contractor for the construction of a Market Basket Store (the "Project") located on Middlesex Turnpike in Burlington, Massachusetts. Exhibit M, Standard Form of Agreement Between Owner and Contractor (hereinafter "Prime Contract"), at 1. The Prime Contract provided, in relevant part:

> "The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for, and have control over, construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters. If the Contract Documents give specific instructions concerning construction means, methods, techniques, sequences or procedures, the Contractor shall evaluate the jobsite safety thereof and, except as stated below, shall be fully and solely responsible for the jobsite safety of such means, methods, techniques, sequences or procedures. If the Contractor determines that such means, methods, techniques, sequences or procedures may not be safe, the Contractor shall give timely written notice to the Owner and shall not proceed with that portion of the Work without further written instructions from the Owner."

Exhibit M, Contract General Conditions, § 3.3.1.[4]

The Prime Contract contained a provision for the "Protection of Persons and Property,"

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[2] Ordinarily, when ruling on a motion for summary judgment, the court relies on the statement of undisputed material facts submitted pursuant to Superior Court Rule 9A(b)(5). See Godfrey v. Globe Newspaper Co., 457 Mass. 113, 121 (2010) ("If the statement of undisputed facts is to have any meaning, the motion judge must be able to rely on it."). "Rule 9A(b)(5) is an 'anti-ferreting' rule designed to assist a trial judge in the all-too typical situation in which the parties throw a foot-high mass of undifferentiated material at the judge." Dziamba v. Warner & Stackpole LLP, 56 Mass. App. Ct. 397, 399 (2002). Despite the well-known importance of this rule, Nittany's statement of undisputed material facts is wholly insufficient. It merely restates the plaintiff's allegations in the complaint and fails to cite to any of the materials in the summary judgment record. For example, one "undisputed fact" is that: "The plaintiff alleges that Nittany was the general contractor at a construction site . . . ." The parties have thus given the court the burden of reviewing the record to determine which material facts are undisputed. Although the court need not consider any motion that fails to comply with Rule 9A's strictures, see Superior Court Rule 9A (b)(6), the court has reviewed the record to determine the facts.

[3] There is no clear date on the portion of the contract contained in the joint appendix.

[4] The General Conditions are incorporated into the Prime Contract. Exhibit M, Prime Contract, at 2.

which provided, in part, that: "The Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract." Id. § 10.1. It continued:

> "The Owner places special emphasis on the protection of persons and existing structures, and [the] Contractor shall take reasonable precautions for the safety of, and shall provide reasonable protection to prevent damage, injury or loss to-
>
> .1 employees on the Work and other persons who may be affected thereby;
>
> .2 the Work and materials and equipment to be incorporated therein, whether in storage on or off the site, under care, custody or control of the Contractor or the Contractor's Subcontractors or Sub-subcontractors
>
> . . . ."

Id. § 10.2.1.

The Prime Contract also required Nittany to "comply with and give notices required by applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities bearing on safety of persons or property or their protection from damage, injury or loss." Id. § 10.2.2.

Nittany hired Marmelo as a subcontractor for the Project. See Exhibit D, Subcontract, at 1. The Subcontract between Nittany and Marmelo stated, in relevant part:

> "The Subcontractor shall take reasonable safety precautions with respect to performance of this Subcontract, shall comply with safety measures initiated by the Contractor and with applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities for the safety of persons and property in accordance with the requirements of the Prime Contract."

Id. § 4.3.1. In the course of its work, Marmelo erected pipe staging[5] on the Project construction site (the "site"), which was removed and re-erected in different locations. Exhibit C, Deposition of

[5] Pipe staging is a type of scaffolding. Exhibit C, White Deposition, at 14-15.

Michael T. White ("White Deposition"), at 22. Marmelo provided its own planking and scaffolding that it used at the site. Id. at 15.

Michael T. White ("White"), a Nittany employee, was the construction superintendent and designated safety officer for the Project. Exhibit C, White Deposition, at 9-10, 36. White was responsible for overall safety at the site. Id. at 37. Accordingly, White conducted daily inspections of the site. Id. at 25.[6] White intervened when a subcontractor did not follow proper safety polices, such as proper use of ladders and safety hats. Id. at 29. White also conducted weekly "toolbox talks" with the subcontractor forepersons. Id. at 30. White believed that the subcontractors' forepersons were solely responsible for ensuring that their employees adhered to Nittany's Safety Polices and Procedures Manual ("Nittany's Safety Manual"), including the provisions related to scaffolding. Id. at 33-35. White did not attempt to determine whether Marmelo's foreperson, Tony Costa ("Costa"), complied with Nittany's Safety Manual. Id. at 28. He assumed that Costa performed daily inspections of the scaffolding, but he neither discussed nor confirmed this with Costa.[7] Id. White's inspection of the scaffolding staging was limited to whether it contained guard rails, and he did not inspect the quality of erection or the condition of the scaffolding or its components.[8] Id. at 22-24.

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[6] The precise nature of these inspections is unclear. White later testified that he did not conduct daily site inspections, but rather the inspections were "[j]ust general overall with the job . . . [i]t wasn't anything specific." Exhibit C, White Deposition, at 28-29. It is unclear what this means. White additionally testified about some of the specific actions he took relating to safety. See supra.

Nittany does not retain inspection records once a job is complete. Id. at 26-27.

[7] Nittany's president, James Chadwick ("Chadwick"), contradicts this view of White's responsibilities regarding compliance. Chadwick expected White to ensure that subcontractor forepersons were compliant with Nittany's Safety Manual procedures. Exhibit L, Deposition of James Chadwick, at 52-53.

[8] Chadwick expected White to inspect subcontractor scaffolding when it was completely assembled to ensure that it was safely erected. Exhibit L, Deposition of James Chadwick, at 43. He did not believe that White had any responsibility to oversee the erection process. Id.

On Tuesday September 28, 2010, Antonio Marmelo was the acting foreman because Costa was not on site. Exhibit K, Deposition of Antonio F. Marmelo ("Antonio Marmelo Deposition"), at 79-80. That morning, Marmelo employee James Garcia ("Garcia") spread the planks on the third level of the scaffolding. Exhibit H, Deposition of James Garcia ("Garcia Deposition"), at 12-14; Exhibit I, Deposition of Paulo DaCosta ("DaCosta Deposition"), at 16. Garcia did not know where the planks came from because when he arrived on site they were already with the scaffolding frames ready to be assembled. Exhibit H, Garcia Deposition, at 12-13. It is undisputed that the planks had previously been stored in the Marmelo garage, but it is unclear how long they had been on the site. They had either been used on the scaffolding since July or August or had arrived from the garage four to five days prior.[9] Garcia inspected each plank before laying it on the scaffolding because he did not want to use a damaged or cracked plank. Id. at 13. Garcia did not notice anything unusual about the planks, including the one that subsequently broke under Gomes. Id. at 13-14. White did not inspect the planks or the scaffolding that Marmelo employees assembled on September 28, 2010. Exhibit C, White Deposition, at 23-24.

After Garcia spread planks on the third level, he stopped work and left the site to obtain additional materials. Exhibit H, Garcia Deposition, at 14. That morning, Gomes had helped the mason mix mortar and prepare blocks for installation.[10] Exhibit G, July Deposition of Richard A.

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[9] Garcia testified that the only place Marmelo stored the planks used on the site was in its garage. Exhibit H, Garcia Deposition, at 26. Another Marmelo employee, Paulo DaCosta ("DaCosta), testified that the planks had been stored in the garage and had come to the site one or two days before the fall. Exhibit I, DaCosta Deposition, at 21-23. Antonio Marmelo testified that the planks had been stored in a garage prior to coming onto the Project site in July or August. Exhibit K, Antonio Marmelo Deposition, at 72. He further testified that since July or August the planks been repeatedly used for Marmelo's scaffolding. Id. at 72-75.

[10] Marmelo employed Gomes as a forklift operator. Exhibit J, Deposition of Steven Marmelo, at 15. In this role, Gomes drove a forklift, but he also performed some mason tender work, built scaffolding, and mixed mortar. Id.

Gomes ("Gomes Deposition I"), at 37. The masonry work also stopped until Garcia returned with the materials. Id. at 36. After work was stopped, and without any instruction to do so, Gomes decided to install the last two safety rails on the third level of scaffolding. Exhibit E, October Deposition of Richard A. Gomes ("Gomes Deposition II"), at 120. Gomes did not inspect the planking as he walked on the third level. Exhibit G, Gomes Deposition I, at 40. One of the third-level planks on which Gomes stood broke, and he fell down between two planks. Exhibit F, Plaintiff's Answers to Interrogatories, at 4. Gomes then called out for another Marmelo employee, Paulo DaCosta ("DaCosta"). Id. DaCosta approached Gomes and saw him on the third level of scaffolding laying on his side with one foot through a broken plank. Exhibit I, DaCosta Deposition, at 19. DaCosta helped Gomes up and threw the broken plank on the ground so that someone would put in it the trash. Id. at 19-20, 25. He saw that the plank was broken, but he did not inspect it or observe if it was cracked or rotted. Id. at 25. The plank was subsequently discarded without further inspection. Id. Gomes suffered injuries to his left shoulder. Exhibit F, Plaintiff's Answers to Interrogatories, at 2.

DISCUSSION

I. Standard of Review

The court will grant a motion for summary judgment where, viewing the facts in the light most favorable to the nonmoving party, there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56 (c); Cabot Corp. v. AVX Corp., 448 Mass. 629, 636-637 (2007). The moving party may prevail by showing, with reference to materials described in Rule 56, that the party with the burden of proof at trial has no reasonable expectation of proving an essential element of the claim at trial. See Mass. R. Civ. P. 56 (c); Cabot Corp., 448 Mass. at 637, citing Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991).

The court rarely grants summary judgment in negligence actions because they involve questions of fact that are normally reserved for a jury. Manning v. Nobile, 411 Mass. 382, 388 (1991); Nutt v. Florio, 75 Mass. App. Ct. 482, 485 (2009). The court may grant summary judgment, however, "when no rational view of the evidence permits a finding of negligence . . . ." Patterson v. Christ Church in the City of Boston, 85 Mass. App. Ct. 157, 159 (2014), quoting Roderick v. Brandy Hill Co., 36 Mass. App. Ct. 948, 949 (1994). Summary judgment is thus particularly appropriate where the moving party demonstrates that the nonmoving party cannot establish an essential element of the negligence claim. Nutt, 75 Mass. App. Ct. at 485. To succeed on a negligence claim "a plaintiff must show that the defendant breached a duty of care, that the plaintiff suffered a loss, and that the defendant's breach caused the loss." Id.

II. Negligence

Gomes argues that Nittany had a duty, evidenced in the Prime contract, various OSHA regulations, and safety statutes, to provide a safe work place and ensure the safety of work materials. Gomes contends that Nittany breached this duty by failing to inspect the plank or to ensure that it was properly inspected and maintained and that this breach caused his injury. He argues that had Nittany fulfilled its duty, it would have discovered the "problem with the plank." Nittany argues that it did not control Marmelo's assembly of the scaffolding and did not have a reasonable opportunity to inspect the plank because the scaffolding was not yet assembled at the time of Gomes's fall. It also argues that there is no evidence of what caused the plank to break, and without such evidence, Nittany cannot be deemed negligent. The court will address the latter argument first.

A. Causation

To establish causation, the plaintiff "need only show 'that there was a greater likelihood or

probability that the harm complained of was due to causes for which the defendant was responsible than from any other cause . . . .'" Mullins v. Pine Manor Coll., 389 Mass. 47, 58 (1983), quoting Carey v. General Motors Corp., 377 Mass. 736, 740 (1979) (internal citation omitted). A plaintiff, therefore, need not eliminate "all possibility that the defendant's conduct was not a cause," but the plaintiff must present sufficient evidence to allow a reasonable jury to conclude that there is a greater likelihood that the defendant's actions caused the harm than another cause. Id., quoting Carey, 377 Mass. at 740.

Causation is generally a question of fact for the jury. Id. Speculation regarding causation, however, is insufficient to oppose a motion for summary judgment. See Glidden v. Maglio, 430 Mass. 694, 696-698 (2000) (affirming summary judgment for defendant general contractor where plaintiff failed to produce any evidence, other than speculative conclusions, regarding what caused scaffolding to collapse resulting in plaintiff's injury); c.f. Fidalgo v. Columbus McKinnon Corp., 56 Mass. App. Ct. 176, 182-183 (2002) (recognizing directed verdict for defendant is appropriate if expert opinion regarding causation is based on speculation alone).

Here, Gomes asserts that had Nittany fulfilled its duty regarding the plank, it would have discovered the "problem" that caused Gomes's fall. The only evidence regarding the broken plank is that: (1) Marmelo stored it in its garage prior to its use on the site; (2) the plank had been on the site since either the Thursday or Friday before the accident or since July or August, in which case Marmelo had used it in its scaffolding until it broke; (3) Garcia, the Marmelo employee who assembled the scaffolding just before the plaintiff's fall, inspected the plank as he laid it down and did not notice any defects; (4) Gomes did not examine the plank before it broke; and (5) Marmelo employee DaCosta did not inspect the broken plank for defects or see any defects before he discarded

it.

This limited evidence about the plank's condition does not support an argument that Nittany's alleged breach was more likely the cause of Gomes's injury than any other cause. There is no evidence suggesting that the plank had a problem that Nittany would have discovered. In fact, Gomes has presented no evidence about what caused the plank to break; for example, whether it was a visible or invisible defect or manufacturing defect.[11] Furthermore, the only evidence about the plank's condition from the date of the accident is that a Marmelo employee inspected the plank and did not observe any defects. Any additional evidence about the plank's condition is not forthcoming because DaCosta immediately discarded the plank after the accident.

Gomes has thus merely invited a trier of fact to speculate about the condition of the plank and about what a Nittany employee would have discovered had it fulfilled its purported duty to inspect or otherwise supervise the safety of the scaffolding. Even if Gomes established the other essential elements of negligence, a jury would be forced to speculate about whether Nittany's breach caused the plank to break. See Glidden, 430 Mass. at 697-698 (unsubstantiated conjectures about cause of scaffolding collapse could not "support any claim that some [] defect chargeable to the defendant caused (or even contributed) to the collapse"). Such speculation is insufficient to survive a motion for summary judgment. See id. at 696-698; Benson v. Massachusetts Gen. Hosp., 49 Mass. App. Ct. 530, 532-533 (2000) (recognizing that a plaintiff may not defeat summary judgment by "invit[ing] a decision by the trier of fact resting on speculation").

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[11] The lack of evidence regarding causation does not invoke the doctrine of *res ipsa loquitur* under these facts. This doctrine allows a trier of fact to infer negligence where "an accident is of the kind that does not ordinarily happen unless the defendant was negligent in some respect and other responsible causes including conduct of the plaintiff are sufficiently eliminated by the evidence." Enrich v. Windmere Corp., 416 Mass. 83, 88 (1993). There are a number of causes unattributable to Nittany, such as invisible manufacturing defects, that could have caused Gomes's fall. Gomes has not presented evidence to exclude these alternate causes.

Viewing the undisputed facts in the light most favorable to Gomes, even if Nittany breached a duty that it owed Gomes regarding the plank, there is no evidence that this breach caused the plank to break. Therefore there is no evidence from which a rational jury could determine that there is a greater likelihood that Nittany's negligence caused Gomes's injury than any other cause. Summary judgment for Nittany on Gomes's negligence claim is therefore appropriate.[12]

III. Breach of Implied Warranty Claims

Gomes's breach of implied warranty claims under art. 2 of the Uniform Commercial Code. See G. L. c. 106, §§ 2-314 (implied warranty of merchantability); 2-315 (implied warranty of fitness for a particular purpose) also fail. The factual basis for these breach of implied warranty claims is unclear, although it appears that Gomes asserts two bases. First, Gomes's complaint states that Nittany "impliedly warranted that the worksite would be of safe and of merchantable quality" and fit for its ordinary and reasonable purpose. Second, in his opposition memorandum, Gomes contends, without citing any authority, that once the plank "came onto [Nittany's] construction site [] Nittany became responsible for warranting that the materials, and therefore the work site itself, would be safe and fit for the ordinary and reasonable purpose contemplated for its use." Gomes also characterizes Nittany as a "seller of goods." He therefore argues that Nittany breached the implied warranties relative to the site itself and relative to the plank.

As a threshold matter, the implied warranties of merchantability and of fitness for a particular purpose only apply to transactions involving goods. See G. L. c. 106, § 2-102. With certain exceptions not relevant here, goods are defined as "all things . . . movable at the time of

[12] Since Gomes has failed to support an essential element of his claim, summary judgment is appropriate, and the court need not consider what, if any, duty Nittany owed the plaintiff. See Glidden, 430 Mass. at 698, n.6.

identification to the contract for sale . . . ." G. L. c. 106, § 2-105. These warranties therefore do not have any application to the site itself, which by definition is not a good, and Gomes's claims insofar as they are based on an alleged breach of warranty of merchantability fail.

Even if Gomes's claims relate to the planks as discrete items, the claims must fail. "[A] warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." G. L. c. 106, § 2-314. To be liable for breach of warranty, the defendant must be a "manufacturer, seller, lessor, or supplier of goods." G. L. c. 106, § 2-318; Guzman v. MRM/Elgin, 409 Mass. 563, 569 (1991). Here, it is undisputed that Marmelo obtained and provided the planks and scaffolding for its employees to use at the site. Nittany did not manufacture, sell, lease, or supply the planks to Marmelo. It follows that Nittany cannot be held liable for the breach of warranty of merchantability.

A seller impliedly warrants that its goods shall be fit for a particular purpose where it knows, or should know, at the time of contracting, that the buyer requires the goods for a particular purpose and is relying on the seller's skill or judgment to choose suitable goods. G. L. c. 106, § 2-315. As concluded supra, the undisputed facts indicate that Nittany did not sell, supply, or otherwise provide the plank to Marmelo or Gomes. Nittany, therefore, cannot be liable for breach of the implied warranty of fitness for a particular purpose under G. L. c. 106, § 2-315. Summary judgment for Nittany is appropriate on Gomes's breach of implied warranty claims.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Nittany's motion for summary judgment is **ALLOWED** and judgment shall enter for the defendant Nittany Construction, Inc. On claims of the plaintiff.

Bruce R. Henry
Justice of the Superior Court

Dated: June 5, 2014