NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1592-14T2

ARMANDO HECTOR LOPEZ-MONTES and
IRMA ARELLANO, his wife,

Plaintiffs-Appellants,

and

MUGRE'S DRYWALL,

Plaintiff,

v.

FINAL KOTE, LLC, HORIZON
DEVELOPMENT GROUP, FERGUSON
CONSTRUCTION, JOHN FERGUSON,
and ANGEL MENENDEZ,[1]

Defendants-Respondents,

and

BONIFACIO GONZALEZ, SAS INSURANCE
AGENCY, INC., MARIO NUNEZ, DELOS
INSURANCE COMPANY, JOAN FRANK,
SELECTIVE INSURANCE COMPANY OF
AMERICA, and A&L INSURANCE,

Defendants.

Argued March 7, 2016 – Decided December 16, 2016

Before Judges Fasciale, Nugent and Higbee.

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[1] Defendant Menendez is also referred to as Melendez at various places in the record.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-679-09.

Gary S. Shapiro argued the cause for appellants (Shapiro & Sternlieb, LLC, attorneys; Mr. Shapiro, on the brief).

Adam T. Warcholak argued the cause for respondent Final Kote, LLC (Faust Goetz Schenker & Blee, attorneys; Mr. Warcholak, of counsel and on the brief).

Joseph A. Venuti, Jr. argued the cause for respondent John Ferguson and Ferguson Construction (Swartz Campbell, LLC, attorneys; Mr. Venuti, on the brief).

The opinion of the court was delivered by

NUGENT, J.A.D.

This personal injury action arose out of a construction site accident. Plaintiffs Armando Hector Lopez-Montes and Irma Arellano[2] appeal from the March 30, 2012 summary judgment dismissal of their complaint against defendants Horizon Development Group, John Ferguson, Ferguson Construction Company, Final Kote, LLC, and Angel Menendez. Our review of the record leads us to conclude that genuinely disputed issues of material fact precluded summary judgment as to defendants John Ferguson, Ferguson Construction Company, and Final Kote, LLC.

[2] Because Irma Arellano's claim is derivative, we refer to Armando Hector Lopez-Montes as "plaintiff" throughout this opinion.

Accordingly, as to those defendants, we reverse and remand for trial.

Plaintiff sustained injuries on February 9, 2007, when he fell from a ladder while spackling the elevator shaft of a home under construction in Brigantine, and commenced this personal injury action by filing a complaint on February 9, 2009. Plaintiff amended the complaint twice. The second amended complaint consisted of five counts: three seeking compensatory damages from defendants Horizon Development Group (Horizon), Ferguson Construction and its principal, John Ferguson, Final Kote, LLC (Final Kote), Bonifacio Gonzalez, and Angel Menendez; and two seeking from the remaining defendants workers' compensation insurance coverage for Mugre's Drywall, plaintiff's company, or damages for a lapse in that coverage.

All defendants filed answers except Gonzalez, who defaulted. The court eventually entered default judgment against him. The workers' compensation claims were resolved, after which plaintiff voluntarily dismissed the complaint against defendants SAS Insurance Agency, Inc., Mario Nunez, Delos Insurance Company, Joan Frank, Selective Insurance Company of America and A&L Insurance. Following completion of discovery, defendants Horizon, Ferguson Construction, John

Ferguson, Final Kote, and Menendez filed summary judgment motions, which the trial court granted. This appeal followed.[3]

These are the facts viewed most favorably to plaintiff, the non-moving party. Schiavo v. Marina Dist. Dev. Co., 442 N.J. Super. 346, 366 (App. Div. 2015), certif. denied, 224 N.J. 124 (2016); R. 4:46-2(c).

On February 9, 2007, plaintiff, a drywall subcontractor and the sole principal of Mugre's drywall, sustained injuries when he fell from a makeshift scaffold while taping and spackling sheetrock in the elevator shaft of a three-story home under construction in Brigantine. According to plaintiff, he had a verbal subcontract with Final Kote to complete the taping and spackling on the project after the sheetrock was installed.[4] The sheetrock installation had been completed the previous day.

Plaintiff and two other Mugre's employees were the only people present when the accident occurred. While plaintiff testified Final Kote previously provided scaffolding at job

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[3] Plaintiff withdrew its opposition to Horizon's summary judgment motion but inadvertently included Horizon in his notice of appeal. The appeal against Horizon has since been dismissed and a stipulation of dismissal filed.

[4] Plaintiff testified at his deposition that defendant Bonafacio, who was Final Kote's foreman, gave him the subcontract. Final Kote's principal testified at his deposition that Bonafacio was employed by Angel Menendez, another sheetrock contractor.

sites, none were available on the date of the incident. In addition, while in the elevator shaft, plaintiff noticed there were no holes in the sheetrock, which are customarily left to allow the worker to insert safe scaffolding. Consequently, plaintiff contacted Gonzalez, who allegedly told plaintiff to use the ladder left in the elevator shaft. Plaintiff maintains he told Gonzalez that using the ladder was unsafe, but Gonzalez told him to proceed anyway.

Plaintiff completed the work on the first two floors of the elevator shaft and then proceeded to the third floor. There, he assembled a makeshift platform "by resting the legs of a ladder on the second floor opening of the elevator shaft and extending the ladder upward across the elevator shaft at an angle." To prevent the ladder from moving, he placed two spackle buckets next to the ladder's legs. He then rested a plank on the third floor that "extended across the elevator shaft and attached it to a ladder rung." While working on the makeshift platform, plaintiff fell, plunged down the three-floor elevator shaft, and was injured.

Plaintiff developed his liability claims in large part by deposing defendants' principals. Horizon, the landowner, contracted with Ferguson Construction to build the project. The September 1, 2006 "Construction Agreement" obligated Horizon, as

owner, to pay Ferguson Construction, the "Contractor[,] a management fee to supervise/construct a single-family home on the referenced site."[5] Article [Six] of the Construction Agreement required Ferguson Construction to perform the following duties:

> 6.1 All work shall be in accordance to the provisions of the plans and specifications. All systems shall be in good working order.
>
> 6.2 All work shall be completed in a workman like manner, and shall comply with all applicable national, state and local building codes and laws.
>
> 6.3 All work shall be performed by licensed individuals to perform their said work, as outlined by law.
>
> 6.4 Contractor shall obtain all permits necessary for the work to be completed (payment for which shall be made by the owner).
>
> 6.5 Contractor shall remove all construction debris and leave the project in a broom clean condition during the course of construction, while each dwelling will be professionally cleaned upon completion.
>
> 6.6 Upon satisfactory payment being made for any portion of the work performed,

[5] The Construction Agreement was not signed. The parties do not appear to dispute that the absence of signatures was an oversight and that the terms of the Construction Agreement controlled the relationship between Horizon and Ferguson Construction. In any event, there was ample evidence in the record to support the proposition that Horizon and Ferguson Construction intended the terms of the Construction Agreement to control their relationship and the construction of the project.

> Contractor shall furnish a full and unconditional release from any claim or mechanics' lien for the portion of the work for which payment has been made.

Brian Musto, one of Horizon's two principals, testified at his deposition that Ferguson Construction was the general contractor for the project. Under the Construction Agreement, Ferguson Construction was responsible to bid the job, engage subcontractors, and "oversee the construction from permit to certificate of occupancy." Musto expected Ferguson Construction to provide daily supervision, be present whenever work was performed, oversee all phases of construction, and be responsible not only for the work at the job site, but also for job site safety. In keeping with Musto's expectations, Ferguson was to stop any activity conducted in an unsafe manner.

John Ferguson, Ferguson Construction's principal, testified at his deposition he "managed the day-to-day activities" as well as the overall project. Ferguson Construction did not provide tools or equipment for the project. He acknowledged he had the authority to stop work performed in an unsafe manner.

John Ferguson also testified he expected scaffolding to be used for the installation of the sheetrock in the elevator shaft. He believed Final Kote would provide the scaffolding, since they did so on other occasions.

Matthew Ruzzo, Final Kote's sole principal, testified Final Kote agreed in a subcontract with Ferguson Construction to install the sheetrock on the project. Final Kote in turn subcontracted its work to three other companies: Menendez's company to do the sheetrock; "Mugre's Drywall [to] do the finishing"; and Lobo Clean Out Service to clean up. Plaintiff's company was to finish taping and spackling.

Final Kote's employees would check on the overall quality of the work. Ruzzo also believed his employees checked to ensure the work was done safely. However, Ruzzo testified he did not go to the project himself. He further alleges his company did not provide scaffolding; rather, he expected the sheetrocker and taper to bring their own.

Plaintiff produced a twenty-five page expert report discussing numerous industry standards and explained how Ferguson and Final Kote deviated from those standards. The report further discussed how such violations contributed to or caused plaintiff's fall. The report concluded:

> It is my opinion that both Ferguson Construction and Final Kote violated the principles and practices of construction safety management because they failed to plan, monitor and ensure that the work done in this elevator shaft was done safely and in compliance with OSHA regulations. It is my opinion that both defendants violated the aforementioned OSHA regulations because they would be considered by OSHA to be

> controlling employers, that is, which had the authority to control the safety of work being performed at this site. It is my opinion that Ferguson Construction violated their contract because they failed to comply with OSHA regulations. It is my opinion that the above failures were the cause of Mr. Lopez's injuries.[6]

Based on this record, the trial court granted summary judgment to defendants Horizon, Ferguson Construction, John Ferguson, Final Kote, and Angel Menendez.

We "review[] an order granting summary judgment in accordance with the same standard as the motion judge." Bhagat v. Bhagat, 217 N.J. 22, 38 (2014); see also Townsend v. Pierre, 221 N.J. 36, 59 (2015). We "must review the competent evidential materials submitted by the parties to identify whether there are genuine issues of material fact and, if not, whether the moving party is entitled to summary judgment as a matter of law." Bhagat, supra, 217 N.J. at 38; see also Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995); R. 4:46-2(c). A trial court's determination that a party is entitled to summary judgment as a matter of law is "not entitled to any special deference," and is subject to de novo review. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

[6] Plaintiff's expert also submitted supplemental reports disputing contrary opinions from opposing experts.

When evaluating the motion record, we view the facts in a light most favorable to the non-moving party, "keeping in mind '[a]n issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion . . . would require submission of the issue to the trier of fact.'" Schiavo, supra, 442 N.J. Super. at 366. A motion for summary judgment will not be defeated by bare conclusions lacking factual support, Petersen v. Twp. of Raritan, 418 N.J. Super. 125, 132 (App. Div. 2011), self-serving statements, Heyert v. Taddese, 431 N.J. Super. 388, 413-14 (App. Div. 2013) (alteration in original), or disputed facts "of an insubstantial nature." Pressler & Verniero, Current N.J. Court Rules, comment 2.1 on R. 4:46-2 (2016). "Competent opposition requires competent evidential material beyond mere speculation and fanciful arguments." Hoffman v. Asseenontv.Com, Inc., 404 N.J. Super. 415, 426 (App. Div. 2009).

That standard in mind, we turn to the order granting summary judgment. In general, "a contractor has a duty to maintain the premises on which it performs work in a reasonably safe condition for persons who the contractor may reasonably expect to come onto the site." Raimo v. Fischer, 372 N.J. Super. 448, 453 (App. Div. 2004) (citing Alloway v. Bradlees, Inc., 157 N.J. 221, 228-33 (1999)). "The discharge of this duty

includes the performance of reasonable inspections to ensure that the construction site is in a safe condition." Ibid. (citing Carvalho v. Toll Bros. & Developers, 143 N.J. 565, 577-78 (1996)).

The duty of care defendant contractors owe to a subcontractor's employee depend upon "the foreseeability of the risk of injury . . . . [and] 'identifying, weighing, and balancing several factors — the relationship of the parties, the nature of the intended risk, the opportunity and ability to exercise care, and the public interest in the proposed solution.'" Alloway, supra, 157 N.J. at 230 (quoting Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 439 (1993)). "In determining the scope of [such a] duty[,] . . ., the applicability of federal safety regulations, specifically OSHA regulations, is highly relevant." Id. at 233-34. Significantly, our Supreme Court has explicitly held "the violation of OSHA regulations without more does not constitute the basis for an independent or direct tort remedy." Id. at 236. Consequently, "the finding of an OSHA violation does not ipso facto constitute a basis for assigning negligence as a matter of law; that is, it does not constitute negligence per se." Ibid. (quoting Kane v. Hartz Mountain Indus., 278 N.J. Super. 129, 144 (App. Div. 1994), aff'd o.b., 143 N.J. 141 (1996)).

Equally significant, the Supreme Court explained: "[f]acts that demonstrate an OSHA violation constitute evidence of negligence that is sufficient to overcome a motion for summary judgment." Id. at 240-41; see also Izzo v. Linpro Co., 278 N.J. Super. 550, 556 (App. Div. 1995) (reversing summary judgment entered in favor of general contractor, and noting that plaintiff had distinct claim that defendants violated general contractors non-delegable duty to ensure compliance with OSHA regulations).

In the case before us, in opposition to defendants' summary judgment motions, plaintiff produced an expert report explaining, among other things, that Ferguson Construction and Final Kote had violated OSHA regulations. Neither the trial court nor the parties have cited or discussed the Supreme Court's pronouncement in Alloway that facts demonstrating OSHA violations constitute evidence of negligence sufficient to overcome a motion for summary judgment.[7]

We note that Ferguson Construction argues it was not a general contractor, but rather a construction manager. This

[7] Defendants have produced expert reports disputing the application of OSHA standards. The trial court, appropriately, did not resolve the disputes among experts, but rather appears to have accepted under the summary judgment standard plaintiff's report concerning the OSHA violations.

assertion is disputed by Horizon and by Final Kote. We have considered Ferguson Construction's and Final Kote's remaining arguments and found them to be without sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(1)(E).[8]

We affirm the order granting summary judgment as to defendants Horizon and Menendez. We reverse the summary judgment order as to defendants John Ferguson, Ferguson Construction, and Final Kote and we remand plaintiff's claims against these defendants for trial.

Affirmed in part, reversed in part, and remand for trial. We do not retain jurisdiction.

[8] Plaintiff has not made an argument against Menendez and thus has apparently abandoned that claim. See Liebling v. Garden State Indem., 337 N.J. Super. 447, 465-66 (App. Div.) (citation omitted), certif. denied, 169 N.J. 606 (2001). John Ferguson and Ferguson Construction are not treated as separate defendants for purposes of the summary judgment motion. For that reason, we deny John Ferguson's summary judgment motion. Our denial of John Ferguson's motion should not be construed as indicating either that he does or does not have any personal liability in this matter.