

IN THE COURT OF APPEALS OF TENNESSEE

FILED
December 24, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

JOHN L. RICE	:	HAMILTON CIRCUIT
	:	CA No. 03A01-9607-CV-00225
Plaintiff-Appellant	:	
	:	
vs.	:	HON. WILLIAM L. BROWN
	:	JUDGE
	:	
	:	
VERONICA J. SABIR	:	AFFIRMED IN PART,
	:	REVERSED IN PART, AND
Defendant-Appellee	:	REMANDED

JOHN D. McMAHAN, WITH McMAHAN & ASSOCIATES, OF CHATTANOOGA, TENNESSEE, FOR APPELLANT

SAMUEL R. ANDERSON and SHANE USARY, WITH LUTHER-ANDERSON, OF CHATTANOOGA, TENNESSEE, FOR APPELLEE

O P I N I O N

Sanders, Sp.J.

The Plaintiff has appealed from a summary judgment for the Defendant in Plaintiff's suit for personal injuries.

The Plaintiff-Appellant, John L. Rice, sued the Defendant-Appellee, Veronica J. Sabir, for personal injuries he received when he fell from the roof of a residence belonging to the

Defendant, which was leased to and was occupied by Gwenzella Chandler at the time of the accident.

In his complaint, the Plaintiff alleged that in July, 1944, the residence owned by Ms. Sabir and occupied by Ms. Chandler had a severe mildew accumulation. Ms. Chandler, on behalf of Ms. Sabir, employed his services to remove the cause of the mildew accumulation by trimming the overhang of trees located next to the residence and cleaning out the gutters on the house. On July 22, 1994, the date of his employment, he got on the roof of the residence to trim the trees and clean the gutter for the purpose of correcting the mildew problem, for the benefit of the Defendant, and to make the premises habitable. During the course of these repairs, he lost his footing and balance and fell off of the roof, resulting in serious and permanent personal injuries. He alleged there was a heavy accumulation of mildew on the roof of the building, causing it to be very slick. The accumulation of the mildew and resulting slickness of the roof caused him to lose his footing and fall. He alleged the Defendant was negligent in failing to provide him a safe place to work, in failing to warn him of the hazards and defects in the roof, and failing to maintain her premises in a safe condition, and that her negligence was the proximate cause of his injuries. As pertinent, Plaintiff stated in his complaint: "The Plaintiff files this action under the general liability and negligence law of this state. However, in the alternative, out of an abundance of caution, Plaintiff avers, since he was acting as an employee of the Defendant, that he is entitled to worker's compensation...."

The Defendant, for answer, admitted she was the owner of the property and it was leased to and occupied by Gwenzella

Chandler. She denied, however, she had employed the Plaintiff or that she had authorized Ms. Chandler to hire him to perform work for her. She denied she had any knowledge of Ms. Chandler's employing the Plaintiff. She had no knowledge of his accident until some two weeks after it occurred. She denied she was guilty of any acts of negligence or that she was liable to the Plaintiff for any reason for any amount.

The Defendant filed a motion for summary judgment pursuant to Rule 56, TRCP. She alleged the Plaintiff had failed to establish a required element of negligence in that there was no duty owed by the Defendant to the Plaintiff and the Plaintiff assumed the risk of his activities by entering upon the roof with knowledge of the alleged defect.

Defendant filed an affidavit in support of her motion. In her affidavit, she restated the allegations in her answer and further stated she had never authorized Gwenzella Chandler to make any repairs to the property nor had she authorized her to employ the Plaintiff or anyone else to perform any work on the premises. She, the Defendant, had never employed the Plaintiff to perform any work on the property. She did not authorize the Plaintiff to get on the roof of her property. Defendant denied she had any knowledge of the condition of the roof of her property when the Plaintiff alleged he was on it.

In response to Defendant's motion for summary judgment, Plaintiff filed his affidavit. He stated in his affidavit Ms. Chandler told him the Defendant, Ms. Sabir, had requested her to employ him to trim the tree limbs overhanging the roof of the residence and clean out the guttering to eliminate the mildew that

was accumulating on the house. He climbed upon the roof of the property to make the necessary repairs to eliminate the mildew. A thick layer of mildew had accumulated on the roof of the house, making it very slick. Because the roof was slick, he lost his footing and fell off the roof. Ms. Sabir failed to warn him of the dangerous condition of the roof. Had he known of the existence of the mildew on the roof, he would not have attempted the repairs of the roof.

The Plaintiff also filed the affidavit of Gwenzella Chandler. In her affidavit, Ms. Chandler stated that in March, 1994, she notified Ms. Sabir of the severe mildew problem at the residence. Ms. Sabir contacted some people about correcting the problem. Later, however, Ms. Sabir told her they were "all booked up" and told her to take care of the problem. Ms. Chandler further said that in the second week in July, 1994, she talked to Ms. Sabir again about a the mildew problem. Ms. Sabir told her the mildew problem was caused by the overhanging of the tree limbs and the gutter was stopped up. Ms. Sabir told her to have John Rice get on the roof and trim the trees. Ms. Chandler said that prior to July 23, 1994, Ms. Sabir had knowledge John Rice was to perform the work but did not warn her or John Rice of the dangerous condition of the roof prior to John Rice's fall.

Upon the hearing on the motion, the court sustained the motion for summary judgment and dismissed the complaint.

The Plaintiff has appealed, saying the court was in error. We are constrained to affirm in part and reverse in part and remand for further proceedings.

In passing upon the motion, the court, as pertinent, said: "The affidavit of Ms. Sabir states, and it's uncontradicted, that she never hired Mr. Rice, never knew he was on the job, that Ms. Chandler had no authority to hire anyone to make repairs to her house...." "Mr. Rice states in his affidavit that Gwenzella Chandler told him that Veronica Sabir had authorized the repairs and authorized him to do it. That's clearly hearsay...." "First of all, there was no relationship or authorized repair or employment of John Rice by Veronica Sabir. Secondly, if in fact there was, the Court finds that based upon current case law, there would have been no duty between Ms. Sabir and Mr. Rice in that he was in fact an independent contractor; that at the time he went on the roof, the condition of the roof certainly could be observed by him with regard to mildew or any other defects that would be observed by anyone climbing on the roof; that they would have been as readily observable by him as they would have been by Ms. Sabir, who testified in an affidavit that she didn't even know any such conditions existed." The court also found Mr. Rice was "not an employee within the meaning of the Workers' Compensation Act."

Upon oral argument of the case, counsel for the Appellant stated the court's ruling on the question of worker's compensation was not an issue on appeal. We, accordingly, affirm the action of the trial court in sustaining the motion for summary judgment as to Plaintiff's claim for worker's compensation.

We concur with the trial court that there was no proof Ms. Sabir had personally employed Mr. Rice and the statement in Mr. Rice's affidavit about what Ms. Chandler told him that Ms. Sabir had told her was not competent evidence.

We find, however, the conflicting statements in the affidavits of Ms. Sabir and Ms. Chandler as to whether or not Ms. Sabir had authorized Ms. Chandler to employ Mr. Rice to perform certain work for and on her behalf create a dispute of a material fact which makes summary judgment inappropriate. Also, the proof fails to show the nature of the employment, if there was in fact any employment, of Mr. Rice by Ms. Sabir. We, accordingly, hold the court was in error in declaring the Plaintiff was an independent contractor.

"[I]f the mind of the court entertains any doubt whether or not a genuine issue exists as to any material fact it is its duty to overrule the [summary judgment] motion." **Byrd v. Hall**, 847 S.W.2d 208, 211 (Tenn.1993) (quoting **Poore v. Magnavox Co.**, 666 S.W.2d 48, 49 (Tenn.1984)).

We, accordingly, affirm the judgment of the trial court in part and reverse in part. It is affirmed in dismissing the complaint as to the issue of worker's compensation. To the extent it is not affirmed, it is reversed. The case is remanded to the trial court for a trial on the merits of the remaining issues.

The cost of this appeal is taxed one-half to the Appellee and one-half to the Appellant.

Clifford E. Sanders, Sp.J.

CONCUR:

Houston M. Goddard, P.J.

Herschel P. Franks, J.