Affirmed and Opinion filed March 30, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-00145-CV

BONNIE BUCEK AND MILAN BUCEK, IND. AND AS NEXT FRIENDS AND GUARDIANS OF MARCUS BUCEK, Appellants

V.

FERCAN KALKAN AND FATIMA KALKAN, IND. AND DBA COLLEGE REAL ESTATE MANAGEMENT CO., AND SEFA KOSEOGLU AND PIA KOSEOGLU, Appellees

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On Appeal from the 272nd District Court
Brazos County, Texas
Trial Court Cause No. 44,381-272

O P I N I O N

This is an appeal from a take-nothing summary judgment in favor of appellees Fercan and Fatima Kalkan and Sefa and Pia Koseoglu against appellants Bonnie, Milan and Marcus Bucek. Appellants allege the trial court erred in granting summary judgment as appellees failed to negate all of appellants' claims, and as a material fact issue existed regarding joint enterprise. We affirm.

While attempting to cut down a tree in the course of his employment, sixteen-year old appellant Marcus Bucek fell from the tree, rendering him a paraplegic. Appellants filed suit against Marcus's

employers, the owners of the premises, appellees and others. At the time of the accident, appellees Koseoglu were in the process of purchasing the premises, but had not yet closed on the transaction. For purposes of this appeal, all parties other than appellees Kalkan and Koseoglu have either settled with the Buceks or are otherwise not involved at this point.

In their fourth amended petition, appellants alleged appellees were liable for the accident under theories of negligence and negligence per se. Appellees moved for summary judgment on grounds that they were not the owners of the premises and, regardless, that they owed no duty to Bucek. Appellants amended their pleadings to allege liability against all the defendants as a "joint enterprise," and for negligent hiring. Appellees amended or supplemented their motions for summary judgment to negate the claims, and the trial court granted summary judgment in favor of appellees.

Summary judgment is proper only when the movant establishes that there are no genuine issues of material fact and proves that he is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 545, 548 (Tex. 1985). In determining whether any issues of material fact exist, the court must take all evidence favoring the non-movant as true, indulge every reasonable inference in favor of the non-movant and resolve any doubts in favor of the non-movant. *Id*.

For a defendant to prevail on summary judgment, he must establish that as a matter of law, no material issues of fact exist on one or more elements of each of plaintiff's causes of action pleaded. *Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995). Summary judgment in favor of a defendant, which disposes of the entire case, is proper only if, as a matter of law, plaintiff could not have prevailed on any claim raised. *See Delgado v. Burns*, 656 S.W.2d 428, 429 (Tex. 1983).

Appellants allege that appellees failed to negate all of appellants' causes of action, particularly given appellees' contradictory deposition testimony on more than one disputed factual allegation. As to this latter contention, we have reviewed the disputed testimony as referenced by appellants and find that although appellee Kalkan may have testified inconsistently on a few factual allegations, none of the inconsistencies involved allegations that were dispositive or material to the summary judgment motions. Contrary to appellants' position, we do not find that the credibility of appellee Kalkan was a dispositive factor to the summary judgment. *Casso v. Brand*, 776 S.W.2d 551, 558 (Tex. 1989).

Moreover, we find that appellees did address or otherwise negate at least one element to each of the claims raised by appellants. As to appellants' "joint enterprise" claim, appellants' sixth amended petition alleged existence of a joint enterprise among *all* of the defendants; on appeal, appellants allege they proved a joint enterprise only as among the four appellees. As appellants argument on appeal is not the same as that raised below, this argument is waived. In any event, appellees clearly negated existence of a joint enterprise even if limited to the appellees as parties. Under *Blount v. Bordens*, 910 S.W.2d 931, 933 (Tex. 1995), four elements must be proven in order to establish a joint enterprise: (1) an agreement among the members of the group; (2) a common purpose; (3) a community of pecuniary interest, and (4) an equal right to control the enterprise. In reviewing the summary judgment evidence, we find that none of these elements was established. While appellants' arguments and record references establish communications between and among various defendants at various times and for various purposes, the evidence falls short of establishing any of the four necessary elements necessary to establish a joint enterprise.

As to appellants' negligence and negligence per se claims, appellees argued and established that they did not own the property, owed no duty to Marc Bucek, had no liability to the employee of an independent contractor and had no control over the details of the tree removal. Appellants contend that summary judgment was improper because these defenses or factors did not address all of appellants' claims. We disagree. By establishing that they owed no duty to Marc Bucek, appellees negated at least one element of the remaining claims raised by appellants.

Appellants' issue on appeal is overruled, and the judgment below is affirmed.

/s/ Bill Cannon
Justice

Judgment rendered and Opinion filed March 30, 2000.

Panel consists of Justices Cannon, Draughn, and Lee.[*]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[*] Senior Justices Bill Cannon, Joe L. Draughn, and Norman R. Lee, sitting by assignment.