COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

SUPERIOR COURT
CIVIL ACTION
No. 1683CV01110

ALEXANDER WHITMORE & others[1]

vs.

CAPE COD CUSTOM CAR STORAGE & others[2]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT R.J. BEVILACQUA CONSTRUCTION CORP.'S MOTION FOR SUMMARY JUDGMENT

There is no dispute in this case that the Plaintiffs, Alex Whitmore and Jared Bernier (together "Plaintiffs"), suffered serious, life-altering injuries at a construction site in Hyannis, Massachusetts when a boom lift in which they were working collapsed. There also is little doubt that the Plaintiffs' injuries resulted from the negligence of some party, as boom lifts do not and should not fall through the floor while men are working on them.[3] Plaintiffs filed suit against a number of entities that either owned the Site, managed the businesses operating out of the Site, were potential purchasers of the Site, assisted the potential purchasers with Site management, or, in the case of R.J. Bevilaqua Construction Corp. ("Bevilaqua Construction"), had provided a verbal estimate for demolition work at the Site.

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1 Individually and on behalf of his minor children, Memphis Steven Whitmore and Forrest Michael Whitmore, and Jared Bernier.

2 Holly Management and Supply Corporation, Hyannis Imported Cars Limited Partnership, 499 Route 6A, Inc. b/b/a Premier Cape Cod, R.J. Bevilaqua Construction Corp., K&V Construction, Inc., Laham Management and Leasing, Inc., and Dirt Free Leasing, LLC.

3 That one or more of the Defendants thus may be liable does not mean all are and each must be evaluated independently.

Bevilaqua Construction has moved for summary judgment on all claims and cross-claims asserted against it. For the reasons stated below, the motion is **ALLOWED**.

BACKGROUND

The undisputed facts, and the disputed facts viewed in the light most favorable to the Plaintiffs, are as follows. See Attorney Gen. v. Bailey, 386 Mass. 367, 371 (1982), cert. denied, 459 U.S. 970 (1982). Plaintiffs were employed by Environmental Remediation Services, Inc. ("ERS"), an environmental remediation company. The accident at issue ("Incident") occurred on June 10, 2016 at 268 Stevens Street in Hyannis ("Site"), which was owned by Hyannis Imported Cars LP ("HIC"), an entity controlled by an individual named Stuart Bornstein ("Bornstein"). Six months earlier, on January 27, 2016, Laham Management and Leasing, Inc. ("Laham Management"), an entity controlled by Joseph Laham ("Laham"), had entered into a Purchase and Sale Agreement with HIC to buy the Site.[4]

Laham wanted to demolish the Site, which had been an auto dealership, and build a new collision center. Well before June 10, 2016, Laham engaged K&V Construction, Inc. ("K&V"), run by Thomas McHugh ("McHugh"), to assist with work connected to the purchase of the Site. Laham and McHugh together inspected the Site, and, prior to the Incident, McHugh was given keys to the Site by Bornstein or one of his agents.

Bevilaqua Construction provides excavation, landscaping, material processing and demolition services. Bevilaqua Construction holds septic and water licenses but does not have a construction license. It is not a structural engineer, has no structural engineering expertise, and was not retained to evaluate the structural integrity of the Site. Bevilaqua Construction also has

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[4] Other than K&V Construction, Inc. and Bevilaqua Construction, the remaining corporations and limited partnerships named as defendants in this case are either associated with Bornstein or with Laham.

no knowledge of environmental remediation. Months prior to the Incident, Robert Bevilaqua ("Bevilaqua"), the owner and principal of Bevilaqua Construction, toured the Site for 10 to 20 minutes and gave a verbal estimate of the cost to demolish the Site. However, as of the date of the Incident, there was no oral or written agreement that Bevilaqua Construction would perform demolition services at the Site.

Before a building can be demolished, it must be assessed for environmental hazards. Although a person may apply for a demolition permit before remediation, if environmental hazards are identified, remediation must be completed before the demolition permit can issue and demolition begin. On May 2, 2016, McHugh filed an application for a demolition permit with the Town of Barnstable. The permit identified McHugh as the contractor and provided his contractor's license number. The next day, May 3, 2016, the company Laham retained to perform an environmental assessment of the Site, Axiom Partners ("Axiom"), issued a report identifying the presence of asbestos and other hazardous materials at the Site that required removal. The report was addressed to Laham and McHugh. There is no evidence that Bevilaqua Construction had anything to do with Axiom or the environmental assessment.

That same day, May 3, 2016, Axiom emailed Laham and McHugh and offered to "reach out" to two potential remediation companies, send them the report, and see if they could perform the necessary remediation. It turned out that neither of those companies agreed to perform remediation services at the site. McHugh then asked Bevilaqua if he knew of any remediation companies. That request from McHugh was the first time Bevilaqua had communicated with anyone about the Site since giving a verbal estimate for demolition services many months prior.

Bevilaqua agreed to ask ERS to submit a proposal for remediation at the Site as a favor to McHugh and Laham.[5] He was not paid to provide a referral, and had no personal relationship with ERS, its contact, Gary Pelletier, or any other ERS employees. ERS visited the Site. Bevilaqua did not accompany ERS. ERS provided a proposal dated May 4, 2016 directed to Bevilaqua Construction. Bevilaqua forwarded the proposal to McHugh who forwarded it to Laham. On May 16, 2016, McHugh filed another application with the Town of Barnstable, this time for a building permit to construct a new collision center. As before, McHugh was the identified contractor and provided his contractor's license number for that construction work.

Laham made the decision to hire ERS and McHugh retained ERS to do the remediation services at the Site. McHugh notified Axiom that he had hired ERS. McHugh confirmed that

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[5] Plaintiffs offer no admissible evidence that Bevilaqua did not obtain the quote from ERS as a "favor" to McHugh and Laham. In response to Bevilaqua Construction's Rule 9A(b)(5) statement number 54, which states, in part, "Bevilaqua agreed to request a proposal from ERS as a favor to McHugh and/or Laham," citing Bevilaqua's deposition at page 49, Plaintiffs responded: "Disagree. Mr. Bevilaqua did not testify *on page 49* that he obtained a proposal from ERS 'as a favor' to McHugh and/or Laham." (Emphasis added). That denial is not sufficient. The Court has reviewed Bevilaqua's deposition and, *on page 48*, Bevilaqua testified as follows:

> Q. At the time that you were getting a proposal for ERS and then passing it along to Joe or Tom, it was your hope, is it fair to say, that you would do the demolition work there?
> ***[Objection omitted]
> A Yes, I guess.
> Q. Okay. Any I'm just distinguishing that from you weren't doing this as a favor, meaning you had no relationship to possibly doing work at the site, right?
> ***[Objection omitted]
> A. *I was just doing a favor.*
> Q. Right. I understand that. But, *in doing the favor*, you thought that you *might be the demolition contractor*; is that fair to say.
> A. I wasn't sure.

(Emphasis added). Bevilaqua undeniably testified, one page before that cited, that he believed he was doing a favor for McHugh and or Laham. Also, Plaintiffs offered no contrary admissible evidence that the referral was not a favor. Plaintiffs offered no evidence that Bevilaqua had an obligation, contractual or otherwise, to identify or retain an environmental remediation company at the Site, and no evidence, as opposed to argument, that Bevilaqua was not simply providing a referral, *gratis,* at the request of longtime professional colleagues.

ERS could work at the Site on June 10, 2016. McHugh arrived at the Site early on June 10, 2016 to let the ERS employees into the building. When ERS's ladders could not reach the lightbulbs in the ceiling, McHugh asked Bornstein whether ERS could use a 22,000 pound boom lift, owned by defendant, Dirt Free Leasing, Inc., an entity owned or controlled by Bornstein. After Bornstein agreed, McHugh obtained the keys for the boom lift and drove it from where it was stored to the Site for ERS's use. McHugh then left the Site. The boom lift then crashed through the floor of the building severely injuring the Plaintiffs.

Bevilaqua had only two interactions with ERS between the time he sought the proposal for the remediation work and the Incident. On June 6, 2016, McHugh asked Bevilaqua to find out if ERS would remove light bulbs at the Site. Bevilaqua conveyed that question to ERS and conveyed ERS's answer to McHugh. On June 9, 2016, ERS told Bevilaqua that ERS would be ready to work on the Site on June 10, 2016. Bevilaqua then called McHugh to find out if ERS could work at the Site June 10, 2016.

Importantly, Laham had no expectation that Bevilaqua Construction would serve as the general contractor or remediation contractor at the Site and did not hire Bevilaqua Construction to be on Site when ERS performed its work.[6] Laham did not expect Bevilaqua Construction to supervise ERS. Plaintiffs agree that a licensed project manager was required to be on the Site during the remediation work, and that Ed Kearney of Axiom was supposed to arrive at the Site the morning of the Incident. Bevilaqua Construction did not pay ERS and no money paid to ERS

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[6] Although Plaintiffs "disagreed" with Bevilaqua Construction's Rule 9A(b)(5) statement number 65, they again offered no contradictory admissible evidence. It was Plaintiffs' obligation on summary judgment to "respond and allege specific facts which would establish the existence of a genuine issue of material fact in order to defeat a motion for summary judgment." Pederson v. Time, Inc., 404 Mass. 14, 17 (1989). They may not "rest on . . . mere assertions of disputed facts to defeat the motion for summary judgment." Delva v. Brigham & Women's Hosp., Inc., 72 Mass. App. Ct. 766, 768 (2008), citing LaLonde v. Eissner, 405 Mass. 207, 209538 (1989).

for its remediation work was funneled through Bevilaqua Construction. Bevilaqua Construction did not perform any demolition work at the Site until April and May of 2017, nearly a year after the Incident and after the closing of the sale of the Site to Laham.

DISCUSSION

Plaintiffs assert three claims for relief against all defendants: Negligence (Count I), Premises Liability (Count II), and Loss of Consortium (Count III). Several co-defendants[7] have asserted contribution cross-claims against Bevilaqua Construction pursuant to G.L. c. 231B, §1, and K&V has asserted a cross-claim for indemnification.

Bevilaqua Construction argues that it is entitled to summary judgment on the negligence claim because (i) it owed no duty of care to the Plaintiffs, and (ii) nothing it did or failed to do was the proximate cause Plaintiffs' injuries. On the premises liability claim, Bevilaqua Construction argues that it cannot be liable because it did not own or control the Site. Finally, Bevilaqua Construction asserts that, if it is not liable to Mr. Bernier or Mr. Whitmore, then it cannot be liable for loss of consortium to Mr. Whitmore's children, for contribution to its co-defendants, or to K&V on a theory of common law indemnity.

I. Summary Judgment Standard

"Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Correia v. Fagan, 452 Mass. 120, 129 (2008). "[A] party moving for summary judgment in a case in which the opposing party will have the burden of proof at trial is entitled to summary judgment if he demonstrates, by reference to material described in Mass. R. Civ. P. 56(c), . . . unmet by countervailing

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[7] K&V, Holly Management and Supply Corporation, and 499 Route 6A, Inc. b/b/a Premier Cape Cod.

materials, that the party opposing the motion has no reasonable expectation of proving an essential element of that party's case." Alicea v. Commonwealth, 466 Mass. 228, 234 (2013), quoting Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991). The Court views "'the facts, together with all reasonable inferences to be drawn from them, in the light most favorable to the nonmoving party . . . .'" Cesso v. Todd, 92 Mass. App. Ct. 131, 135 (2017), quoting Pugsley v. Police Dept. of Boston, 472 Mass. 367, 370-371 (2015).

In negligence cases, "[t]he question of causation is ordinarily for the jury." Johnson v. Summers, 411 Mass. 82, 88 (1991), cert den., 502 U.S. 1093 (1992). "Only when no rational view of the evidence warrants a finding that the defendant was negligent may the issue be taken from the jury." Irwin v. Ware, 392 Mass. 745, 764 (1984) (internal citation omitted); see Nutt v. Florio, 75 Mass. App. Ct. 482, 485 (2009).

II. Negligence

To establish negligence, the Plaintiffs must prove that Bevilaqua Construction owed them a duty of care, that it breached that duty, and that Bevilaqua Construction's breach of the duty of care caused injury or harm to the Plaintiffs. The existence of a duty of care is thus the first and threshold requirement for a claim of negligence. "Before liability for negligence can be imposed, there must first be a legal duty owed by the defendant to the plaintiff, and a breach of that duty proximately resulting in the injury." Davis v. Westwood Group, 420 Mass. 739, 742-743 (1995), citing O'Gorman v. Antonio Rubinaccio & Sons, 408 Mass. 758, 760 (1990); Yakubowicz v. Paramount Pictures Corp., 404 Mass. 624, 629 (1989). The "determinative issue" in this case is the "existence of a legal duty." Afarian v. Massachusetts Electric Company, 449 Mass. 257, 261 (2007). "Whether such a duty exists is a question of law." Davis, supra at 743 (citations omitted).

A. Bevilaqua Construction Owed No Duty to Plaintiffs Based On Its Alleged Status as "General Contractor"

Bevilaqua Construction argues at length about the law governing negligent referrals and that it owed no duty to the Plaintiffs as a result of its referral of Laham's remediation project to ERS – which it calls a gratuitous act and a professional courtesy. However, Plaintiffs do not pursue a theory of negligent referral. In their opposition to summary judgment, and at the hearing on this matter, Plaintiffs argued only that Bevilaqua Construction assumed the duties of a general contractor and therefore owed a duty to ERS and its employees to keep the construction site safe.

Plaintiffs rely on OSHA regulations and Massachusetts regulations that "provide that a general contractor has the overall responsibility for safety at a construction site." (Pl. Br. at 7). As an initial matter, the Massachusetts regulations that defined a "general contractor" and imposed a "nondelegable duty on general contractors to ensure the safety of worksites" have been repealed as preempted by OSHA. See Craffey v. Embree Constr. Group, Inc., 2017 WL 1175886 at *1 (Mass. App. Ct. Rule 1:28, March 29, 2017), citing 1322 Mass. Reg. 189 (Sept. 23, 2016) ("This regulation [454 Code Mass. Regs. §§10.00 et seq.] is being repealed because it is superseded by the Federal Occupational Safety and Health Act."). Even if they were still operable, both the Massachusetts regulations, and the analogous OSHA regulations, make clear that, for a contractor to be liable for overall workplace safety at a job site, it must have a contract with the owner to perform the general construction work and have "general supervisory authority over the worksite, including the power to correct safety and health violations itself or require others to correct them." Id. at *2. That comports with the common law obligation imposed on general contractors. See Kostrzewa v. Suffolk Construction Co., Inc., 73 Mass. App. Ct. 377, 378-379 (2008), rev, den., 453 Mass. 1103 (2009) ("A general contractor has a duty to its

subcontractor's employees if it 'retains the right to control the work in any of its aspects, including the right to initiate and maintain safety measures and programs.'"), quoting Corsetti v. Stone Co., 396 Mass. 1, 10 (1985).

Here, on the undisputed record evidence, no reasonable jury could find that Bevilaqua Construction was the general contractor, or the de facto general contractor at the Site either pursuant to regulation or the common law. Accordingly, the Court finds that Bevilaqua Construction owed no duty to ERS or its employees.

Although there is a dispute as to the characterization of Bevilaqua Construction's role, there are no material disputes of fact about its conduct. Bevilaqua Construction referred the remediation work to ERS, and conveyed information between ERS and McHugh, including whether or not ERS would remove light bulbs and that ERS was available to begin work on June 10, 2016. That is the full extent of Bevilaqua Construction's relationship with ERS and conduct related to the remediation work or the Incident. That conduct is wholly insufficient to impose a duty of care.

There is also no dispute about the obligations and conduct that Bevilaqua Construction did not undertake. At the time of the Incident, Bevilaqua Construction had no contract, written or oral, with the owner (Bornstein) or prospective purchaser (Laham) of the Site. Bevilaqua Construction did not apply for the demolition or the construction permit for the Site; McHugh did. Bevilaqua Construction did not give ERS access to the Site; McHugh did. Bevilaqua Construction did not ask Bornstein whether ERS could use the boom lift on Site; McHugh did. Bevilaqua Construction did not deliver the boom lift to ERS at the Site; McHugh did. Bevilaqua Construction did not pay ERS or forward payment to ERS. Laham had no expectation that Bevilaqua Construction would oversee or supervise ERS. Rather, Plaintiffs agree that the

licensed project manager that was to be on the Site during the remediation work was Ed Kearney of Axiom. Plaintiffs have offered no evidence that Bevilaqua Corporation had the ability to control the work of ERS or the safety programs at the Site. In fact, Bevilaqua Construction did not perform any demolition work until nearly a year after the Incident.

On those undisputed facts, no reasonable jury could conclude that Bevilaqua Construction was the general contractor or de facto general contractor at the time of the Incident, or that Bevilaqua Construction exercised such oversight and control of the Site or ERS that it owed a duty of care to ERS and its employees.

B. Bevilaqua Construction Owed No Duty to Plaintiffs Based on Its Conduct

Even if it was not the general contractor, Bevilaqua Construction could owe a duty of care to the Plaintiffs based on its conduct. As a general matter, every actor owes a duty to exercise reasonable care to avoid harming others, and Bevilaqua Construction could be found to have violated that duty even if it exercised no control over the Site or ERS if its conduct was the proximate cause of the Incident. "[C]ourts will find a duty where, in general, reasonable persons would recognize it and agree it exists." Afarian, supra at 262. In other words, the Court must consider the foreseeability of harm from the conduct at issue to find the existence of a duty. Id. ("A precondition to this duty [of care] is, of course, that the risk of harm to another be recognizable or foreseeable to the actor.") To impose a duty on Bevilaqua Construction, then, this Court must find that the harm that occurred – a boom lift collapsing through the floor of the Site – was a reasonably foreseeable risk from Bevilaqua Construction's conduct – making the referral to ERS and serving as a conduit of information between ERS and McHugh. See Jupin v. Kask, 447 Mass. 141, 147 (2006) ("a defendant owes a duty of care to all persons who are foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonably dangerous.") (quotation and citation omitted).

On the undisputed facts in evidence the Court concludes, as a matter of law, that the harm was not a reasonably foreseeable result of Bevilaqua Construction's conduct. E.g., Hebert v. Enos, 60 Mass. App. Ct. 817, 820–821 (2004) (summary judgment appropriate if plaintiff "has no reasonable expectation of proving that the injury to the plaintiff was a foreseeable result of the defendant's negligent conduct.") (quotation and citation omitted).

On the negligence claim, therefore, summary judgment is appropriate where Bevilaqua Construction (i) was not the general contract or de facto general contractor, (ii) did not control ERS its work or the Site, and (iii) the harm was not the reasonably foreseeable result of Bevilaqua Construction's conduct.

III. Premises Liability

An "owner or possessor of land" or one who controls property "owes a common law duty of reasonable care to all lawful visitors [including] an obligation to maintain the premises in reasonably safe condition and to warn visitors of any unreasonable dangers of which the landowner is aware or reasonably should be aware." Davis v. Westwood Grp., 420 Mass. 739, 743 (1995) (quotation and citations omitted). In opposing summary judgment, Plaintiffs have made no separate argument with respect to their premises liability claim. However, the undisputed facts in the record establish that Bevilaqua Construction did not own the Site and, for the reasons stated above, had no control over the Site at the time of the Incident. Summary judgment therefore is appropriate on the premises liability claim as well.

IV. Remaining Claims and Cross-Claims

All of the remaining claims and cross-claims depend on the existence of a viable claim against Bevilaqua Construction. Because both substantive claims against Bevilaqua Construction will be dismissed on summary judgment, the minor children of Plaintiff, Alexander

Whitmore, cannot pursue their claims for loss of consortium. Sena v. Com., 417 Mass. 250, 264 (1994) ("claim for loss of consortium requires proof of a tortious act that caused the claimant's [parent's] personal injury."). For the same reason, the co-defendants' claims for contribution must fail. "Contribution claims are derivative and not new causes of action." Berube v. Northampton, 413 Mass. 635, 638 (1971). "No right of contribution exists unless the party would be 'directly liable to the injured person.'" LeBlanc v. Logan Hilton Joint Venture, 463 Mass. 316, 326 (2012), quoting O'Mara v. H.P. Hood & Sons, 359 Mass. 235, 238 (1971).[8]

Finally, K&V had filed a cross-claim for indemnification against Bevilaqua Construction but did not oppose the motion for summary judgment. Common law indemnity "allows someone who is without fault, compelled by operation of law to defend himself against the wrongful act of another, to recover from the wrongdoer the entire amount of his loss . . . " Ferreira v. Chrysler Group, LLC, 468 Mass. 336, 343-344 (2014). Bevilaqua Construction has satisfied its burden on summary judgment of establishing that K&V was not "without fault." The undisputed evidence of K&V's direct involvement in the Incident, including delivering the boom lift to ERS for use at the Site, and the fact that K&V identified itself to the town as the demolition and construction contractor for the Site suffice. Therefore, on summary judgment, the burden shifted to K&V to present contrary evidence that would permit it to proceed with its claim for indemnification. See Stop & Shop Supermarket Co. v. Loomer, 65 Mass. App. Ct. 169, 171(2005). K&V offered no

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[8] LeBlanc supports the general rule that, when summary judgment enters for a defendant on its alleged liability to the injured party, any cross-claims for contribution must be dismissed. LeBlanc was unusual because the plaintiff had settled with the cross-claimants after summary judgment had entered for the contribution defendants. In those circumstances, where the plaintiff had no incentive to appeal the summary judgment ruling, the Court permitted the cross-claimants to appeal the summary judgment decision on liability to preserve their right to seek contribution. Id. at 327.

evidence and did not oppose Bevilaqua Construction's motion for summary judgment. Therefore, summary judgment is appropriate on K&V's indemnification cross-claim.

ORDER

For the foregoing reasons, Bevilaqua Construction's Motion for Summary Judgment is **ALLOWED.**

Debra A. Squires-Lee
Justice of the Superior Court

September 19, 2018