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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

132

HOLLY HOUSE, INC., d/b/a CAFE KLOS,

Plaintiff-Appellee,

and

GARY DVORAK,

Plaintiff,

vs.

CEDAR RAPIDS CIVIL DEVELOPMENT ASSOCIATION,

Defendant-Appellant,

and

GEE GRADING & EXCAVATING, INC.,

Defendant.

Filed November 26, 1985

5-386
84-1734

Appeal from the Iowa District Court for Linn County - Thomas L. Koehler, Judge.

Defendant appeals an adverse judgment in an action for damages arising out of a building demolition. **AFFIRMED.**

Steven K. Warbasse of White & Warbasse, Cedar Rapids, Iowa, for defendant-appellant.

Robert R. Rush of Lynch, Dallas, Smith & Harman, Cedar Rapids, Iowa, for plaintiff-appellee.

Heard by Donielson, P.J., Schlegel, and Hayden, JJ.

SCHLEGEL, J.

Defendant Cedar Rapids Development Association appeals an adverse judgment in an action for damages arising out of a building demolition. We affirm.

Defendant Cedar Rapids Development Association (CDA) is a nonprofit organization incorporated for the purpose of acquiring land, both on a short-term and long-term basis, to provide parking facilities in downtown Cedar Rapids. In 1982, its president, Mr. Peter Bezanson, became the prime mover and spearheaded negotiations for the purchase of the Allison and Magnus Hotels. Under Bezanson's direction, CDA planned to raze the hotels and create more downtown parking facilities. The Magnus Hotel was situated immediately adjacent to the building that housed plaintiff's restaurant, the Holly House Cafe.

Plaintiff had entered into a three-year lease in his building and purportedly had also obtained an option to buy the building at the end of his lease term. Bezanson initially desired to buy plaintiff's building along with the Allison and the Magnus Hotels, but was unable to reach an agreement with the owner until the spring of 1984.

Once CDA acquired ownership of the hotels, it immediately began soliciting demolition bids from contractors. The bids ranged from $204,750 to $118,000. The lowest bid came from Gee Grading (Gee), who had originally bid the project at $162,190. Gee submitted the $118,000 bid, however, when Bezanson disclosed to Gee that other bids were much lower than the original estimate. Gee felt, at the time of the $118,000 bid, that he could still make a small profit by getting the job done quickly. But in May of 1983, Bezanson convinced Gee that in order to get the job he needed to bid lower than $100,000 for the project. Therefore, Gee submitted a final bid on May 3, 1983, of $95,000. This bid was accepted by CDA two days later.

CDA did not inquire into Gee's experience in taking down a building, but relied rather only upon Gee's general reputation as a general contractor. Gee, in fact, had no experience in taking down a building next to a restaurant and the vast majority of Gee's past work involved excavating and grading rather than demolition. CDA provided two sheets of architectural specifications for Gee to follow during its destruction of the hotels, but these specifications were given to Gee only a few days prior to his final bid and were never discussed between Gee and the architect who drew them.

In April, 1983, plaintiff became aware of the proposed demolition of the Magnus Hotel. He was not contacted by anyone from CDA, so he had his attorney write a letter to Bezanson on April 28, 1983, expressing his concern about the effects of the demolition on his business. Bezanson did not respond to plaintiff's letter, but instead gave Gee a copy of the letter after the acceptance of Gee's final bid. Bezanson then suggested that Gee talk to plaintiff about the potential problems.

The biggest problem concerned a common wall that existed between the cafe and the Magnus Hotel. Bezanson and CDA were aware of this when they signed the contract with Gee, but Gee did not discover the problem until he responded to plaintiff's letter. The existence of the common wall was significant because it made the demolition job much more difficult and expensive. Gee told Bezanson that he wanted a modification of the contract, but Bezanson refused and felt CDA should receive a credit since there would be less work for Gee to do. Eventually, however, Bezanson agreed to relieve Gee of responsibility for any additional repairs or work necessary to preserve the wall. CDA then sent engineers into plaintiff's restaurant to photograph the basement and walls to make sure that any damage was the result of the demolition.

The demolition of the hotels began in early June of 1983, and the dust, vibration, and noise lasted until the end of July, 1983. Nearly every aspect of plaintiff's business was adversely affected during this period. Plaintiff's customers expressed concern for their safety not only in coming and going, but also while eating at the cafe. Near the end of the demolition of the Magnus Hotel plaintiff was forced to close his business. The demolition had created a hole in his roof approximately 2-3 feet in diameter, and also caused a separation of the roof and the wall on the inside of the restaurant. Plaintiff was unable to reopen his restaurant after the 4th of July due to construction debris and damage to the exterior of his business. Plaintiff complained of this interference in his business to Bezanson, but Bezanson refused to take any steps to help the situation. On July 12, 1983, the CDA Board met to review plaintiff's complaints and decided to "sit tight and keep on with demolition . . . (with) all due caution."

In early August, 1983, the city inspector condemned plaintiff's building and plaintiff was forced to leave. After the condemnation, a large crane was put up against the weakened wall for support and remained there for several months. Gee halted its demolition in October, 1983, and Loomis Brothers Construction Company was brought in by CDA to stabilize the wall and make the replacements necessary to put the wall in the condition it was before the demolition started. Loomis Brothers did not finish bracing the wall until June, 1984.

In the spring of 1984, plaintiff asked Bezanson about the status of the building and was informed that CDA had purchased the building and was going to tear it down. Plaintiff was then told that he had until April 1, 1984, to get his equipment out of the restaurant or it was going to be hauled away.

Plaintiff filed the original petition against defendants CDA and Gee Construction Company on July 15, 1983, alleging the demolition caused material interference with the operation of the restaurant and forced it to close. On

June 6, 1984, plaintiff amended his petition to include allegations of negligence and nuisance against CDA. The case was tried before a jury in Linn County and the jury rendered a verdict against CDA and Gee. Judgment was entered against CDA and Gee and only CDA appeals.

On appeal CDA raises the following issues: (1) that the evidence was insufficient to generate a jury issue on the theory of negligence; (2) that the evidence was insufficient to generate a jury question on the theory of nuisance; (3) that evidence of lost profits and moving and relocation expenses should not have been admitted or considered by the jury as elements of damage; and (4) the jury's award of damages was excessive and unsupported by the evidence. We affirm the trial court on all issues.

I. Scope of Review. At the trial court level, CDA moved for a directed verdict on the grounds that there was insufficient evidence to submit issues of negligence, nuisance, and damages to the jury. The trial court overruled the motion as well as defendant's Motion for New Trial. Our review of alleged errors in overruling a Motion for Directed Verdict and Motion for New Trial is identical to the allegations of error in submitting issues to a jury. In ruling on a Motion for Directed Verdict, a trial court must view the evidence in its light most favorable to the adverse party. When a plaintiff has adduced substantial evidence in support of each element of his cause of action, the Motion for Directed Verdict should be overruled. B & B Asphalt Co. v. T.S. McShane Co., 242 N.W.2d 279, 284 (Iowa 1976). The "substantial evidence" test applies to the determination as to whether an issue should be submitted to the jury in the instructions. Anderson v. Low Rent Housing Commission, 304 N.W.2d 239, 249 (Iowa 1981).

We review this appeal at law and will reverse only if there is no substantial evidence supporting the court's fact findings or if there was an error in the

application of law. Iowa R. App. P. 4. The evidence is viewed in the light most consistent with the judgment. R.E.T. Corporation v. Frank Paxton Co., Inc., 329 N.W.2d 416, 418-19 (Iowa 1983).

II. Negligence. In his amended petition, plaintiff specified his allegations of negligence claiming that defendant CDA was negligent because: (1) CDA failed to select and employ a competent contractor to perform the demolition; (2) it failed to adequately investigate or inspect the building prior to demolition; (3) it failed to adequately supervise or control the demolition; and (4) it failed to take adequate precautions to protect the Cafe Klos from damage.

Neither party has cited nor can we find any Iowa case law addressed to the general subject of the liability of an employer for negligence in hiring a careless, reckless, or incompetent independent contractor. The theory does exist in common law and has been codified in the Restatement. 41 Am.Jur.2d Independent Contractors § 26 (1968); 57 C.J.S. Master & Servant § 592 (1948); W. Prosser, Law of Torts Note 1 at 469 (4th Ed. 1971); Restatement (Second) of Torts § 411 (1965). See also Note 24 Drake Law Review p. 654, The Independent Contractor Rule and Its Exceptions in Iowa (1975).

Plaintiff's allegation of negligent hiring, however, pertains to only a portion of his overall claim of negligence. Plaintiff's three remaining specifications relate to CDA's duties arising from Bezanson's agreement with Gee to relieve Gee from responsibility concerning the damage to the common wall between the Magnus Hotel and plaintiff's restaurant.

The Iowa Supreme Court in Giarratano v. Weitz Company, 259 Iowa 1292, 1300-1301, 147 N.W.2d 824, 829 (1967), adopted the Restatement (Second) of Torts § 414, which provides:

> "One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reason-

> able care, which is caused by his failure to exercise his control with reasonable care."
>
> In comment "a" under this section it is stated:
>
> "If the employer of an independent contractor retains control over the operative detail of doing any part of the work, he is subject to liability for the negligence of the employees of the contractor engaged therein, under the rules of that part of the law of Agency which deals with the relation of master and servant. . . ."

We hold that CDA owed a duty to plaintiff to prevent any damage to the common wall and therefore the wall of plaintiff's cafe. The evidence of Bezanson's agreement with Gee and the fact that CDA not only had photos taken of plaintiff's basement and walls before demolition started, but also the fact that CDA hired Loomis Brothers to repair the wall, clearly demonstrates CDA's acceptance of that duty. We therefore affirm the trial court's submission of this issue to the jury.

III. Nuisance. The record contains many accounts of not only dust and noise affecting plaintiff's business but also vibration from the steel balls striking the adjacent hotel, fences making access to the restaurant impossible, telephone lines out and sewer backing up. The Iowa Supreme Court has consistently held that noise and dust may be of such character and intensity to constitute a nuisance. Claude v. Weaver Construction Co., 261 Iowa 1225, 1228, 158 N.W.2d 139, 142 (1968); Bates v. Quality Ready-Mix Co., 261 Iowa 696, 702-05, 154 N.W.2d 852, 857 (1968). "Even one who contracts out nuisance-causing work to independent contractors may have the duty, upon notice, to take reasonable, prompt, and efficient means to suppress the nuisance." Page County Appliance Center v. Honeywell, 347 N.W.2d 171, 176 (Iowa 1984).

Bezanson had notice from plaintiff's attorney as early as April, 1983, that the demolition would very likely cause disruption and damage to the cafe. The record clearly shows that Bezanson chose to ignore the potential problem,

even when he absolved Gee of any responsibility concerning the common wall. We hold that the trial court properly submitted the issue of nuisance to the jury.

IV. Evidence of Lost Profits. CDA asserts that the plaintiff should not have been allowed to present evidence of lost profits of the cafe due to its necessary closing. Plaintiff, on the other hand, cites Harsha v. State Savings Bank, 346 N.W.2d 791, 798 (Iowa 1984), wherein the supreme court said, "If factual data are presented which furnish a basis for compilation of probable loss of profits, evidence of future profits should be admitted and its weight, if any, should be left to the jury." Evidence of plaintiff's 1982 tax return, and testimony of plaintiff's operating profit for June, 1983, were properly received at trial. And, although plaintiff did not produce an economic expert to testify concerning projected profits, plaintiff himself was thoroughly examined and cross-examined as to his business practices. We hold there was sufficient factual data to provide a basis for compilation of probable loss of profits, with the weight of the evidence left for the jury to determine its merit. The trial court did not err in overruling CDA's objection to evidence of lost profits and was correct in submitting this issue to the jury.

V. Jury Verdict. Defendant next alleges that the damages awarded plaintiff were excessive, influenced by passion and prejudice, and not supported by substantial evidence.

Based upon the evidence of plaintiff's lost profits from August 1, 1983 through May 31, 1984, and the loss of perishable food, fixed expenses and unrecovered improvements to the building which was ultimately demolished, the jury's verdict of $30,840.39 against CDA is well supported by the evidence and within the scope of the damage instruction requested by CDA and given by the court. "It is not fatal that some uncertainty may exist in the specific amount

of damage, so long as it clearly appears that some damages have been sustained." R E T. Corporation v. Frank Paxton Co., Inc., 329 N.W.2d 416, 420 (Iowa 1983).

We hold, therefore, that the damages awarded plaintiff should not be disturbed.

VI. Moving and Relocation Expenses. Defendant argues that because plaintiff would have moved at the end of his lease term, June 1, 1984, that the jury's damage award including moving and relocation expenses constituted error.

Plaintiff testified that he began moving in April of 1984, and the court therefore properly instructed the jury to consider only for "loss of interest on prematurely incurred moving expenses." Given the limiting instruction by the court, together with the fact that the jury's verdict would have been much higher had it indeed awarded moving expenses, defendant CDA's argument is without merit.

Because we find the trial court did not err in any of the issues raised by defendant CDA, we affirm the judgment below.

AFFIRMED.