

On April 19, 2021, Plaintiff Rito Duran Torres reported to work at the Echelon at Reverchon Bluffs Construction site located at 2603 W. Davis St, Dallas Texas, that was owned and controlled by Defendants. During the work day Defendants forced Plaintiff Torres to utilize the temporary stairs from the second floor to the first. As he was utilizing the subject stairs, due to their faulty construction he fell. Plaintiff Torres later learned that the temporary stairs had not been constructed in a safe and reasonable manner and were not equipped with certain safety features. As a direct and proximate result of Defendants negligence, Plaintiff Torres suffered severe and disabling injuries.

Exhibit A, p. 4.

2. Trial is set for October 14, 2024. Absent any discovery, Plaintiff cannot prove his negligence claim and Defendants are entitled to summary judgment as a matter of law on all of Plaintiff's claims.

II. SUMMARY JUDGMENT GROUNDS

3. Defendants move for summary judgment on all of Plaintiff's claims on the grounds that an adequate time for discovery has passed and Plaintiff has no admissible evidence to raise a genuine issue of material fact on each of the following elements of Plaintiff's claims:

- a. Negligence:** Plaintiff has no evidence of elements one, two, or three of his negligence claim. Specifically, Plaintiff has no evidence that: (1) Defendants owed Plaintiff a duty of care; (2) Defendants breached any duty to Plaintiff; or (3) Defendants' alleged breach proximately caused Plaintiff's injuries.
- b. Respondeat Superior:** Plaintiff has no evidence of elements two or three of his respondeat superior theory. Specifically, Plaintiff has no evidence: (2) of an employer-employee relationship between any of these defendants and any potential tortfeasor; or (3) that any potential tortfeasor was working within the course and scope of any nonexistent employment with any of these defendants.

- c. **Gross Negligence:** Plaintiff has no evidence of the objective or subjective elements of a gross negligence claim.

III. NO-EVIDENCE MOTION FOR SUMMARY JUDGMENT

A. Summary Judgment Standard

4. After an adequate time for discovery, a defendant may move for summary judgment, without presenting summary judgment evidence, on grounds that the plaintiff has no evidence of one or more essential elements of a claim on which the plaintiff has the burden of proof at trial. Tex. R. Civ. P. 166a(i). The defendant need only state the elements as to which there is no evidence, and the trial court must grant the motion unless the plaintiff produces legally sufficient evidence to raise a genuine issue of material fact on each challenged element. *Id.*; see also *B.C. v. Steak N Shake Operations, Inc.*, 598 S.W.3d 256, 259 (Tex. 2020).

5. Because a no-evidence summary judgment is essentially a pretrial directed verdict, courts apply the same legal-sufficiency-of-the-evidence standard they apply in reviewing a directed verdict. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 750-51 (Tex. 2003). Under that standard, the non-movant must produce more than a scintilla of evidence to raise a fact issue on each of the challenged elements. *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004).

6. More than a scintilla of evidence means the evidence rises to a level that would enable reasonable and fair-minded people to differ in their conclusions. *Id.* at 601. Less than a scintilla of evidence exists when the evidence is so weak as to do no more than create a mere surmise or suspicion of a fact. *Id.*

B. Adequate Time for Discovery Has Passed

7. Plaintiff filed this lawsuit on April 6, 2023. See Exhibit A, Plaintiff's Original Pet. In the preceding sixteen months, Plaintiff did not serve a single written discovery request, nor

did he request any depositions. The case is set for trial on October 14, 2024 and the discovery period is closed.¹ Therefore, Plaintiff has had an adequate time for discovery and the issues in this Motion are ripe for consideration.

C. Plaintiff has Adduced No Evidence of at Least Three Required Elements of his Negligence Claim

8. To prevail on a general negligence claim, Plaintiffs must prove that (1) Defendants owed them a legal duty; (2) that Defendants breached that duty; and (3) that the alleged breach proximately caused the Plaintiff's injuries. *Nabors Drilling, U.S.A., Inc. v. Escoto*, 268 S.W.3d 401, 404 (Tex. 2009). Plaintiff has no evidence to support any element of his claim. Specifically, there is (1) no evidence that Defendants owed Plaintiff a legal duty, (2) no evidence that Defendants breached any legal duty owed to Plaintiff, and (3) no evidence that any alleged breach proximately caused the Plaintiff's injuries. Therefore, Defendants are entitled to summary judgment on Plaintiff's negligence claim as a matter of law.

1. *Duty*

9. "Whether a duty exists is a threshold inquiry and a question of law; liability cannot be imposed if no duty exists." *Kroger Co. v. Elwood*, 197 S.W.3d 793, 794 (Tex. 2006). Plaintiff cannot produce any evidence that Defendants owed a duty to Plaintiff under any admissible evidence and Defendants are, therefore, entitled to summary judgment. *See e.g. Chrismon v. Brown*, 246 S.W.3d 102, 113-15, n.12 (Tex. App.—Houston [14th Dist.] 2007, no pet.) ("[movant] was not required to outline in its motion the legal analysis under which it claims no duty arises under the facts and circumstances surrounding this occurrence."); *Patino v. Complete Tire, Inc.*, 158 S.W.3d 655, 660 (Tex. App.—Dallas 2005, pet. denied) (affirming

¹ The court did not enter a scheduling order in this case and the discovery period therefore closed on March 4, 2024. *See* Tex. R. Civ. P. 190.3(b)(1)(A)(2).

summary judgment motion which asserted simply that “Plaintiff cannot prove the existence of a specific legal duty owed to him”).

2. Breach of Duty

10. Plaintiff has no evidence that any of these Defendants breached any duty owed to Plaintiff. Specifically, Plaintiff has no evidence that Defendants breached in the following ways:

- a. Failed to ensure that the stairs in which Plaintiff Torres was required to utilize were free from dangerous conditions and failed to ensure they were constructed properly.
- b. Failed to make the subject worksite safe for workers, such as Plaintiff Rito Duran Torres.
- c. Failed to provide adequate training to and supervision of their employees to ensure that workers were not exposed to dangerous conditions.
- d. Failed to inspect the work site to ensure that workers were not exposed to dangerous conditions associated with the subject stairs.
- e. Failed to establish and implement adequate policies and procedures to ensure that workers were not exposed to dangerous conditions. Moreover, Defendants failed to establish and implement adequate policies and procedures to ensure that they own employees safely and accurately performed required procedures.
- f. Failed to properly manage, maintain, repair inspect and/or monitor their worksite, including the subject stairs.
- g. Failed to exercise ordinary care to protect Plaintiff Torres and other workers by failing to adequately warn Plaintiff Torres of the dangerous conditions and among other things, failing to provide reasonable safe equipment and a reasonably safe worksite.
- h. Failing to have employees present that would ensure dangerous conditions did not exist.

Ex. A, p. 5-6.

11. Without sufficient, competent summary judgment evidence that these Defendants breached any duty owed to Plaintiff, Plaintiff’s negligence claim fails as a matter of law.

3. Causation

12. Further, Plaintiff has no evidence that any of these Defendants’ alleged breach of duty proximately caused Plaintiff’s injuries. Therefore, Plaintiff’s negligence claim must fail as a matter of law.

D. Plaintiff has No-Evidence of at Least Two Elements of His Respondeat Superior Claim

13. Plaintiff alleges that “Defendants² are liable for the damages caused by the negligent acts of its employee(s) or agent(s) under the doctrine of respondent superior.” Ex. A, p. 6. The elements of liability under the theory of respondeat superior are: (1) plaintiff was injured as a result of a tort; (2) the tortfeasor was an employee of the defendant; (3) the tort was committed while the employee was acting within the scope of employment in that it was within the employee’s general authority; in furtherance of the defendant’s business; and for the accomplishment of the object for which the employee was hired. *Goodman*, 80 S.W.3d 573, 577 (Tex. 2002); *GTE Sw., Inc. v. Bruce*, 998 S.W.2d 605, 617-18 (Tex. 1999).

14. Plaintiff cannot establish a theory of respondeat superior against any of these Defendants to hold them vicariously liable because Plaintiff has no evidence of elements 2 or 3. As to the second element, Plaintiff possesses no evidence to support the existence of an employer-employee relationship between any of these defendants and any potential tortfeasor. As to the third element, Plaintiff possesses no evidence that any potential tortfeasor was working within the course and scope of any nonexistent employment with any of these defendants. With two elements of respondeat superior claim unsatisfied, this claim must fail as a matter of law. Accordingly, any claims against Defendants based on respondeat superior should be dismissed with prejudice.

E. Gross Negligence

15. In order to succeed on a claim of gross negligence, Plaintiff must prove by clear and convincing evidence both objective and subjective components that Defendants’ acts or omissions:

² As with all other allegations in his Petition, Plaintiff makes a universal allegation against all five Defendants.

(A) which, when viewed objectively from the standpoint of the actor at the time of its occurrence, involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and

(B) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

TEX. CIV. PRAC. & REM. CODE § 41.001(11). Evidence of simple negligence alone is insufficient to prove gross negligence. *See* TEX. CIV. PRAC. & REM. CODE § 41.003(b); *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 921 (Tex. 1998); *see also Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 21 (Tex. 1994).

16. Plaintiff's gross negligence claim fails because a finding of negligence is a prerequisite to a finding of gross negligence. *Shell Oil Co. v. Humphrey*, 880 S.W.2d 170, 174 (Tex. App.— Houston [14th Dist.] 1994, writ denied) (“[a]lthough gross negligence refers to a different character of conduct, a party's conduct cannot be gross negligence without being negligent.”). For the reasons discussed above, Plaintiff is unable to establish his negligence claim.

17. Assuming *arguendo*, that Plaintiff can provide adequate evidence supporting his negligence claim, there is still no evidence satisfying the elements of gross negligence. Plaintiff has not offered, and cannot offer, any evidence that Defendants had actual, subjective awareness of an extreme degree or risk, and that Defendants proceeded with conscious indifference to the rights, safety, or welfare of Plaintiff. Without sufficient, competent summary judgment evidence of these elements, Plaintiff's gross negligence claim must be dismissed as a matter of law.

IV. CONCLUSION

18. Plaintiff has failed to conduct any discovery in the sixteen months since he filed this lawsuit and has produced no evidence that these Defendants were negligent or grossly

negligent, either directly or by a theory of respondeat superior. Therefore, Defendants are entitled to final summary judgment as a matter of law on Plaintiff's claims.

WHEREFORE, Defendants ICB Construction, LLC, ECM Development, LLC, Echelon SFR Owner LLC, and Echelon SFR Investor Holdings, LLC pray that, after hearing, the Court grant this Motion and render final summary judgment in favor of these Defendants, dismiss Plaintiff's claims with prejudice, and tax Defendants' costs of court against Plaintiffs. Defendants also pray for all other relief, special or general, at law or in equity, as this Court deems just.

Respectfully submitted,

COOPER & SCULLY, P.C.

/s/ Julie A. Shehane

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CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of this Motion on the following counsel of record on this 16th day of August, 2024, via e-file service, in compliance with the Texas Rules of Civil Procedure:

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