

CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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Blackwell v Vasilas 2/24/16

Application of *Privette* Doctrine Where Owner Hires Unlicensed Contractor; Labor Code section 2750.5; Independent Contractor

As a commercial enterprise, Defendant Vasilas buys residential real estate, fixes up and improves the properties and then resells them. Although he performs some of the minor fix-ups and improvements himself, Vasilas is not a licensed contractor and relies on the knowledge and expertise of contractors in their respective fields to perform "significant, extensive, or potentially hazardous work." Vasilas's usual practice when engaging a potential contractor is to provide a general description of the work and request a quote; if the quote is acceptable, then Vasilas agrees and schedules the work with the contractor. With regard to the work that results from this procedure, Vasilas testified:

"I do not tell contractors how to do their jobs, participate in, assist with, or oversee the contractor's work, or otherwise actively direct the manner or mode of a contractor's performance. I stay out of the way. I assume, and expect, the contractors that I hire know how to perform their trade in a safe

manner, and I expect them to take whatever measures they deem necessary to perform their jobs safely. I do not inquire into, discuss, or involve myself with on-the-job safety issues."

Plaintiff Blackwell's allegations and claims are all based on construction-related work performed at 4401 Topa Topa Drive in La Mesa (the Property), a two-story residential real estate investment property Vasilas purchased in early 2013. The contractors at issue in this action are Enrique Gomez Jimenez (Gomez), hired by Vasilas to perform stucco work, and Blackwell, hired by Vasilas to perform rain gutter work. Gomez has not participated in the litigation; all of the evidence in the record is from Blackwell and Vasilas.

Defendant Vasilas hired Gomez according to the procedure described above: Vasilas explained the work he wanted done, Gomez provided a quote, Vasilas orally agreed, Gomez did the work, and Vasilas paid Gomez \$7,900 for his work. Gomez owned, assembled and erected the scaffolding; Vasilas did not participate in any manner, let alone supervise, its assembly or erection. Vasilas had seen Gomez using the scaffolding without incident, and Vasilas was unaware of anything that suggested there was a risk the scaffolding might fall if used in the manner Blackwell claims to have used it. To Vasilas the scaffolding appeared stable and safe.

Vasilas also hired Plaintiff Blackwell according to the procedure described above — which was consistent with the procedure Vasilas had used in hiring Blackwell on other projects. In response to Vasilas's request for a bid on the rain gutter work, Blackwell inspected the Property on his own; at Vasilas's request, Blackwell provided Vasilas with two bids, one for gutters around the entire structure, and one for gutters around only a portion of the structure; Vasilas orally agreed to the quote for the full building; and Blackwell agreed to return the following week to install the gutters. Other than telling Blackwell exactly where the downspouts and gutters were to be placed, Vasilas did not have any discussions or communications with Blackwell regarding the manner or method of installation, including the equipment and safety precautions Blackwell would use in the installation.

On the day of the accident, Blackwell arrived at the Property with all of his own equipment, tools and supplies necessary to install the rain gutters. Blackwell saw the scaffolding around a portion of the structure and continued working. The scaffolding did not look dangerous and Blackwell assumed it was safe, although he does not know much about scaffolding. Before beginning his work, Blackwell did not talk to Vasilas (who was at the Property); i.e., there was no mention of the job or job-site safety generally or of the scaffolding specifically.

Blackwell used an extension ladder to access the roof. As he progressed around the building, Blackwell eventually reached that portion covered by the scaffolding. He leaned his ladder on the top rail of the scaffolding in order to access the roof where the gutter was to be installed. He then climbed up the ladder while carrying a two-foot section of aluminum gutter across his arms. As Blackwell reached the top of the ladder, he stepped off a rung onto the scaffolding — whereupon the scaffolding collapsed and fell away from the exterior of the residence. Blackwell fell 10 feet to the ground, landing on a pile of bricks and injuring himself.

As a result of the collapse of the scaffolding, Blackwell sued Vasilas, alleging one cause of action for general negligence. Following discovery, Vasilas filed a motion for summary judgment. Vasilas presented two arguments in support of his position that he had no duty to Blackwell. First, Vasilas argued that *Privette v. Superior Court* (1993) 5 Cal.4th 689 (*Privette*) and its progeny precluded application of the peculiar (or special) risk doctrine. Second, Vasilas argued that, under general principles of premises liability law, because he had no actual or constructive knowledge that the scaffolding was dangerous, he had no duty to warn Blackwell of the allegedly dangerous condition.

By minute order, the trial court granted Vasilas's motion for summary judgment, ruling as follows on the legal issues presented: *Privette* precluded Blackwell's claims, and no exception (allowing for application of the peculiar risk doctrine) applied; Vasilas did not owe Blackwell a common law duty of due care with regard to the scaffolding on the Property; and, once again relevant to the issue on appeal, *Gomez was not Vasilas's employee for purposes of applying the doctrine of respondeat superior* to find Vasilas liable for Gomez's alleged torts. The court entered judgment against Blackwell in September 2014, and Blackwell timely appealed in December 2014.

On appeal, Blackwell refocuses his presentation, arguing only that, **because Gomez was an unlicensed contractor**, Gomez was Vasilas's employee for purposes of respondeat superior and thus liable to Blackwell for Gomez's negligence in assembling or maintaining the scaffolding at the job site. **Blackwell relies on Labor Code section 2750.5 for the proposition that an unlicensed contractor is the hirer's employee as a matter of law.** From the premise that Gomez was Vasilas's employee, Blackwell presents a number of theories by which he contends Vasilas owed him a duty of care related to the scaffolding and safety at the Property on the day of the accident: Vasilas was **directly liable for negligently hiring and supervising Gomez**; under the doctrine of respondeat superior, Vasilas was liable for all torts committed by Gomez;

Privette did not shield Vasilas from liability, since Vasilas necessarily retained control over Gomez's work; and Vasilas could not escape liability by delegating to Gomez the responsibility for safety.

A defendant like Vasilas has the burden of *persuasion* that one or more elements of the cause of action at issue "cannot be established" or that "there is a complete defense to that cause of action." (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar*, at pp. 849, 850, 853-854.) In attempting to meet this burden, the defendant has the initial burden of *production* to make a prima facie showing of the nonexistence of any triable issue of material fact. (*Aguilar*, at p. 850.) If the defendant meets this burden, then the burden of *production* shifts to the plaintiff to establish the existence of a triable issue of material fact. (*Id.* at pp. 850-851.)

Where respondeat superior is an issue, an initial determination is often whether the alleged tortfeasor is an independent contractor or employee of the hirer. **In potential *Privette* situations, that is because, subject to certain policy considerations, a hirer like Vasilas cannot be held vicariously liable for the negligence of his independent contractors.** (*Tverberg v. Fillner Construction, Inc.* (2010) 49 Cal.4th 518, 528; *Toland*, at pp. 265-266; *Privette* at p. 693.) For purposes of **determining independent contractor status, under the common law courts must examine several factors, the most important of which is whether the hirer had the right to**

control the detailed manner and means by which the work was to be performed: "Under this rule, the employer's right to exercise complete or authoritative control must be shown, rather than mere suggestion as to detail. A worker is an independent contractor when he or she follows the employer's desires only in the result of the work, and not the means by which it is achieved." (*Jackson v. AEG Live, LLC* (2015) 233 Cal.App.4th 1156, 1179)

Accordingly, as part of his motion for summary judgment, Vasilas set forth the following evidence in support of his position that Gomez (the alleged tortfeasor) was an independent contractor, not his employee: Vasilas was referred to Gomez, whom he did not know prior to the job at the Property; Vasilas hired Gomez by way of an oral agreement; Vasilas does not have any particular knowledge or experience working with or around scaffolding; the scaffolding was Gomez's property that Gomez brought to the job site; Vasilas did not direct Gomez to assemble the scaffolding; and Vasilas did not supervise or participate in the assembly of the scaffolding. Based on this evidence, the Justices assume without deciding that Vasilas met his initial burden of production of a prima facie evidentiary showing that, **under common law**, Gomez was an independent contractor — as required by *Aguilar*, at page 850.

However, "section 2750.5 codifies the general tort standard for independent contractor status" (*Foss v. Anthony Industries* (1983) 139 Cal.App.3d 794, 798 (*Foss*)), pursuant to which Vasilas had an additional evidentiary burden to meet *under statutory law* in order to establish that Gomez was an independent contractor— a burden Vasilas never mentioned, let alone attempted to meet, as part of his motion.

Section 2750.5 begins as follows: "**There is a rebuttable presumption affecting the burden of proof that a worker performing services for which a license is required pursuant to [the Contractors' State License Law (Bus. & Prof. Code, § 7000 et seq.)], or who is performing such services for a person who is required to obtain such a license is an employee rather than an independent contractor.**" In subdivisions (a) through (c), section 2750.5 then lists certain factors that are required for proof of independent contractor status.

"Proof of independent contractor status includes satisfactory proof of these factors:

(a) That the individual has the right to control and discretion as to the manner of performance of the contract for services in that the result of the work and not the means by which it is accomplished is the primary factor bargained for.

(b) That the individual is customarily engaged in an independently established business.

(c) That the individual's independent contractor status is bona fide and not a subterfuge to avoid employee status.

A bona fide independent contractor status is further evidenced by the presence of cumulative factors such as substantial investment other than personal services in the business, holding out to be in business for oneself, bargaining for a contract to complete a specific project for compensation by project rather than by time, control over the time and place the work is performed, supplying the tools or instrumentalities used in the work other than tools and instrumentalities normally and customarily provided by employees, hiring employees, performing work that is not ordinarily in the course of the principal's work, performing work that requires a particular skill, holding a license pursuant to the Business and Professions Code, the intent by the parties that the work relationship is of an independent contractor status, or that the relationship is not severable or terminable at will by the principal but gives rise to an action for breach of contract." (§ 2750.5.)

Following these subdivisions, section 2750.5 continues with this paragraph:

"In addition to the factors contained in subdivisions (a), (b), and (c), any person performing any function or activity for which a license is required pursuant to [the Contractors' State License Law (Bus. & Prof. Code, § 7000 et seq.)] **shall hold a valid contractors' license as a condition of having independent contractor status.**"

More than 30 years ago, the court ruled that this language "absolutely denies independent contractor status to a person required to have such a license who is not licensed." (*Foss*, at p. 797.)

Foss involved a wrongful death claim following an accident in which a truck owned by a contractor and driven by the contractor's employee struck and killed a motorcyclist. (*Foss*, at p. 796.) Defendant Anthony Industries (Anthony) had hired the contractor to excavate a swimming pool site, and the contractor's employee was returning to the job site after dumping a load of debris from the excavation. The contractor was required by the applicable chapter of the Business and Professions Code to be licensed to do the excavation work, but was not so licensed. At trial, following the close of plaintiff's case, the court granted Anthony's motion for a nonsuit on the bases (1) section 2750.5 and its rebuttable presumption applied only in workers' compensation cases, and (2) plaintiff, who had the burden of proof, had not introduced any evidence to establish that the contractor was Anthony's employee rather than an independent contractor. The Appellate Court reversed.

First, based on both its express language and its legislative history, section 2750.5 applies in tort cases. (*Foss*, at pp. 797-799.) Second — as determinative in the present appeal — because the rebuttable presumption in section 2750.5 is a procedural provision affecting the burden of proof, *plaintiff* did not have to prove that the contractor was Anthony's employee; rather, *Anthony* was required to present sufficient evidence that the contractor was licensed (in addition to evidence supporting the other statutory requirements under subds. (a)-(c) of § 2750.5) in order to avoid

the statutory presumption that the contractor was Anthony's employee. (*Foss*, at p. 799.) Thus, in *Foss*, since the contractor was required to be, but was not, licensed to do the excavation work, section 2750.5 precluded as a matter of law any consideration that the contractor was an independent contractor. (*Foss*, at p. 797.)

There is a strong public policy behind the presumption affecting the burden of proof in section 2750.5. It imposes liability on the party who is benefited by the labor and is capable of spreading the risk through obtaining insurance (namely, the hirer), and it encourages those who hire others to employ workers who have demonstrated the competence and financial responsibility necessary to obtain a contractor's license. (*Foss*, at p. 799.)

In the present appeal, the DCA assumes without deciding that the same uncontradicted evidence that established a prima facie showing that Gomez was an independent contractor under the *common law* (described *ante*) is also satisfactory proof of the factors in subdivisions (a)-(c) of section 2750.5 required to establish independent contractor status under this *statutory law*. However, that assumption is not determinative: *In addition to the factors contained in subdivisions (a)-(c)*, for Vasilas to meet his burden of showing Gomez was an independent contractor, the second to last paragraph of section 2750.5 (set forth in a blocked indented quotation

ante) also **required Vasilas to present sufficient evidence that Gomez was licensed.** (*Foss*, at p. 799.) Without such a showing, section 2750.5 denies independent contractor status to Gomez as a matter of law. (*Foss*, at p. 797.)

The Fourth DCA noted that section 2750.5 contains an express provision affecting the burden of proof for a party in a tort action to establish someone's independent contractor status. (*Foss*, at pp. 797-799.) Applying the (rebuttable) presumption affecting the burden of proof under section 2750.5 to Vasilas's motion for summary judgment, the Justices conclude that Vasilas did not meet his *initial* burden of persuasion that one or more elements of the cause of action at issue "cannot be established" or that "there is a complete defense to that cause of action." (Code Civ. Proc., § 437c, subd. (p)(2).) To establish that Gomez was an independent contractor (as opposed to Vasilas's employee), *in addition* to presenting evidence of the requisite factors to determine independent contractor status under subdivisions (a), (b) and (c) of section 2750.5, Vasilas *also* was required to present evidence that Gomez was licensed. (*Foss*, at p. 799.) (Alternatively, Vasilas could have presented evidence that the services performed by Gomez did not require a license. (§ 2750.5.)) Not having presented *any* evidence as to Gomez's licensure — either that Gomez had the required license or that no license was needed for the services Gomez performed — Vasilas did not meet his initial burden of establishing that

Gomez was an independent contractor. For this reason, the evidentiary burden never shifted to Blackwell to establish the existence of a triable issue of material fact. (*Aguilar*, at pp. 850-851; *Garcia*, at p. 1042.)

Accordingly, the trial court erred in granting Vasilas's motion for summary judgment. The judgment is reversed.

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