STATE OF MICHIGAN

COURT OF APPEALS

JOHN GREMO,

Plaintiff-Appellee,

v

SPECTRUM FINISHINGS, INC., a Michigan corporation,

Defendant/Cross Plaintiff/
Third-Party Plaintiff-Appellant,

and

OVEN SYSTEMS, INC.,

Defendant/Cross Defendant,

and

CATERPILLAR INDUSTRIAL, INC.,

Defendant,

and

INDUSTRIAL OVENS SPECIALISTS and
PHIL BJERNING,

Third-Party Defendants.

UNPUBLISHED
April 18, 1997

No. 189610
Macomb Circuit Court
LC No. 91-3942 NO

Before: O'Connell, P.J., and Markman and M.J. Talbot*, JJ.

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* Circuit judge, sitting on the Court of Appeals by assignment.

PER CURIAM.

This case is before us on remand from the Michigan Supreme Court as on leave granted. *Gremo v Spectrum Furnishings, Inc*, 450 Mich 872 (1995). Defendant Spectrum Furnishings, Inc. (Spectrum), appeals the trial court's denial of its motion for partial summary disposition. We affirm in part and reverse in part.

Spectrum contracted with Oven Systems, Inc. (OSI), to rebuild and expand a paint drying oven at its facility. OSI subcontracted part of the installation to Industrial Oven Specialists, Inc. (Industrial Oven), plaintiff's employer. Approximately one week before the scheduled installation, an OSI representative contacted a Spectrum vice-president and asked if Spectrum would have a forklift available for OSI's use in installing the oven. Spectrum agreed to allow OSI full-time use of its forklift. Industrial Oven's president also received permission from Spectrum's vice-president for his workers to use Spectrum's forklift.

Plaintiff, three coworkers, and an OSI representative were installing a 300-pound shaft in a motor on one of the ovens they were rebuilding. Industrial Oven's president operated the forklift provided by Spectrum. The forks of the forklift were raised approximately seven feet above the floor, when the right fork fell off the forklift carriage. As it fell, its tip struck plaintiff in the top center of his head, causing him severe injuries. Plaintiff filed a complaint against Spectrum and other defendants, alleging counts against Spectrum for breach of duty owed to a bailee in a mutual benefit bailment, breach of express and implied warranties of fitness for the ordinary and expected use of the forklift and fitness for a particular use, premises liability,[1] and a violation of the Michigan Motor Vehicle Owners Liability Statute. Spectrum filed a motion for summary disposition, pursuant to MCR 2.116(C)(8) and (C)(10) on plaintiff's mutual benefit bailment, express and implied warranties, and premises liability claims. The trial court denied Spectrum's motion.[2]

On appeal, Spectrum first argues that the court erred in concluding that a reasonable jury could find that a mutual benefit bailment had been created. Whether the facts of a particular situation create a bailment is, in general, a question of fact for the jury to decide. *Goldman v Phantom Freight, Inc*, 162 Mich App 472, 480; 413 NW2d 433 (1987). A bailment for mutual benefit, also known as a bailment for hire, has been defined as "one wherein a person gives to another the temporary use and possession of property, other than money, for a reward, the latter agreeing to return the property to the former at a future time. . . . In determining whether or not there is a lucrative bailment, the nature and amount of the compensation are immaterial, as the law will not inquire into its sufficiency or the certainty of [the compensation] being realized." *Godfrey v City of Flint*, 284 Mich 291, 295-296; 279 NW 516 (1938).

Spectrum contends that its bailment of the forklift to plaintiff's employer was merely gratuitous, and that the trial court erred in finding that a jury could find that a mutual benefit bailment was created on these facts. We disagree. Spectrum's vice-president stated in his deposition that the timing of the installation was the most important aspect of its contract with OSI other than price. This deponent agreed to have Spectrum's employees unload equipment as it was delivered as an accommodation to OSI. Although we recognize that Spectrum did not expressly acknowledge in deposition that the forklift

was loaned to OSI in order to ensure that they would be able to meet Spectrum's deadlines, we believe nevertheless that a jury could infer that Spectrum received a benefit from its accommodations of OSI's work, including the loan of the forklift, thus creating a mutual benefit bailment. *Godfrey, supra*. We recognize that alternative inferences can also be drawn with respect to Spectrum's motives for loaning the forklift. We also appreciate Spectrum's arguments that the timely performance of OSI's work was never in jeopardy and that, as a result, ensuring such performance could not have been their inducement for the loan. Spectrum will be free to raise these issues before the factfinder. It is not our view that any bailment made in a business context will necessarily create a mutual benefit bailment but it will often be the case with regard to such bailments that a sufficient inference can be drawn of such benefit that summary disposition will be inappropriate.

Spectrum further argues that accommodating the timely installation of the oven is not a sufficient tangible benefit to establish a mutual benefit bailment, especially when the contract required timely installation. We understand Spectrum's argument that, even if the forklift was loaned for the purpose of ensuring timely performance of OSI's work, such performance was already required of OSI under the contract. However, we do not believe that we are required to assess the benefit derived from a bailment in terms of whether it was the equivalent of additional contractual consideration. Defendant has cited no cases which set forth such a standard in assessing whether or not a mutual benefit bailment has arisen. It would be sufficient that the loan of the forklift merely accorded Spectrum a greater sense of assuredness that the work would be performed on time or that it would not be performed in an overly hasty, and perhaps unworkmanlike manner. As noted above, when determining whether or not a mutual benefit bailment has been created, "the nature and amount of the compensation are immaterial." *Godfrey, supra*, at 296. Moreover, the question of whether a bailment has been created is a question of fact. *Goldman, supra*, at 480. Where the nature of a bailment is in dispute, the question of whether the bailment is one for the mutual benefit of the parties or was merely gratuitous should be submitted to the jury. 8 Am Jur 2d, "Bailments," § 21.

Spectrum next asserts that even if a mutual benefit bailment was created, the trial court erred in denying its motion for summary disposition because it owed no duty to plaintiff. The question of whether a duty exists is a question of law for the court to decide. *Moning v Alfono,* 400 Mich 425, 436-437; 254 NW2d 759 (1977). The determination of whether the defendant had a duty toward the plaintiff is "essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person." *Id.* at 438-439. In the context of bailments, where a mutual benefit bailor has knowledge of defects in the bailed item or of its dangerous qualities that are not known to the bailee, the bailor may be held liable for injuries caused by the failure to make such disclosure. *Goldman, supra* at 479.

> One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier

(a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and

(b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and

(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous. [*Id.* at 478, citing 2 Restatement Torts 2d § 388.]

Spectrum submits that it had no reason to believe that OSI or Industrial Oven would not realize the dangerous condition of the forklift, and therefore it is not liable for plaintiff's injuries. However, plaintiff submitted evidence in the lower court about the forklift's missing or inoperable safety features -- including a missing head rest, a missing lug and washer recommended by the manufacturer if the head rest were removed, and the inoperable lock pins. A jury could reasonably find that some of these defects would not be discoverable upon a casual inspection even by an experienced forklift operator. Accordingly, the trial court did not err that a jury could find that Spectrum had a legal duty to inform plaintiff's employer of the facts that made the forklift dangerous.

Spectrum also argues it was not liable under a theory of gratuitous bailment, and presents four distinct sub-issues for this Court's consideration. Spectrum first contends that the forklift was a simple tool, that its potentially dangerous condition or characteristics were readily apparent or visible upon casual inspection, and that it therefore could reasonably expect the average user of ordinary intelligence to recognize these characteristics. See *Eason v Coggins Church*, 210 Mich App 261, 264; 532 NW2d 882 (1995). However, as noted above, there are genuine issues of fact regarding whether the forklift's defects were open and obvious or were latent.

Spectrum next contends that it had no duty to warn because the forklift's operator and plaintiff were experienced users of forklifts. However, the authority Spectrum cites for this contention is not on point with the facts of this case. Spectrum next argues that its failure to warn was not the proximate cause of plaintiff's injuries because the forklift's operator and plaintiff were both aware that the forklift had no back rest and did not request any repair of the forklift. As noted above, there are genuine issues for the fact finder regarding whether the forklift's other missing safety features were latent. The trial court did not err in ruling that a reasonable jury could conclude that Spectrum's failure to warn of the forklift's defective condition was a proximate cause of plaintiff's injuries. Finally, Spectrum argues that the condition of the forklift was not the cause in fact of plaintiff's injuries. Under the present facts, in accordance with the general rule, the cause in fact of a plaintiff's injuries is a question of fact for the factfinder. *Moning, supra,* at 438.

Spectrum avers that the trial court erred in finding that the plaintiff sufficiently pleaded breach of express and implied warranties. In *Jones v Keetch*, 388 Mich 164, 168; 200 NW2d 277 (1972), the Michigan Supreme Court adopted the common law rule that a bailment may contain an implied warranty of fitness "for a particular purpose known to the bailor. . . . The implied warranty is said to be raised by the delivery of the chattel to the bailee, where the quality or fitness of the article for the use specified is

not visible and the defect is not discernible by an ordinary observer." Spectrum argues that the cases cited by the trial court involved mutual benefit bailments, and therefore the case at bar is distinguishable. As we stated above, plaintiff has presented sufficient facts from which the jury could find that a mutual benefit bailment was created. Therefore, we are not persuaded by Spectrum's position with respect to plaintiff's claim of breach of implied warranties.

However, we agree with Spectrum that plaintiff did not allege any facts relating to an express warranty. In his second amended complaint, plaintiff alleged that defendant "expressly and impliedly" warranted that the forklift was "fit for the ordinary and expected and intended uses and anticipated misuses" and that "it was free from any dangerous and defective conditions." However, plaintiff failed to provide any factual support for his claim that express warranties were made. Thus, the trial court should have granted summary disposition on that portion of plaintiff's warranty count that alleged breach of an express warranty.

Affirmed in part; reversed in part. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Peter D. O'Connell
/s/ Stephen J. Markman
/s/ Michael J. Talbot

[1] The parties stipulated to the dismissal with prejudice of the premises liability claim.

[2] Both parties have argued depositions that were not part of the lower court record when Spectrum's motion was denied. We have not considered this evidence. This Court's review is limited to the record presented in the trial court. *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990).