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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

KATHERINE BREEDEN, Plaintiff and Appellant, v. JOSEPH FARZAM LAW FIRM et al., Defendants and Respondents.	B286512 (Los Angeles County Super. Ct. No. BC649335)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard L. Fruin, Jr., Judge. Affirmed.

Joseph J. M. Lange Law Corporation and Joseph J. M. Lange for Plaintiff and Appellant.

Klinedinst, Heather L. Rosing and Robert M. Shaughnessy for Defendants and Respondents.

Katherine Breeden appeals from a judgment entered against her after the trial court granted summary judgment in favor of Joseph Farzam Law Firm and attorney Joseph Farzam (collectively, Farzam) in this action for legal malpractice. We affirm.

BACKGROUND

In her complaint, Breeden alleges she retained Farzam to file a lawsuit against Carnival Cruise Line (Carnival) based on her claim she was injured aboard a cruise ship due to Carnival's negligence. Farzam did not file a lawsuit on her behalf, and the statute of limitations on a personal injury claim against Carnival ran. Breeden alleges Farzam's failure to file a lawsuit constitutes malpractice, and she was damaged as a result.

Farzam moved for summary judgment, arguing Breeden's malpractice cause of action fails as a matter of law because she cannot demonstrate Farzam's actions or omissions caused her any loss or damage because she could not have prevailed in an action against Carnival.[1]

[1] Farzam disputes he breached any duty to Breeden. He maintains he timely informed her she did not have a viable claim against Carnival and his firm would not be filing a lawsuit on her behalf. Breeden claims Farzam did not notify her of his firm's position until after the statute of limitations had run and she lost her claim against Carnival. This issue is not a basis for the summary judgment motion or appeal, and we need not address it further.

Farzam's Evidence and Argument in Support of Summary Judgment Motion

Undisputed Facts

Breeden was a passenger on a Carnival cruise ship when she claimed she slipped and fell on the lido deck while playing a scavenger hunt—musical chairs game that was administered by a Carnival crewmember. She claims she injured her ankle.[2]

In support of the motion for summary judgment, Farzam presented evidence establishing the following undisputed facts:

At approximately 1:00 p.m. on the date of the accident, while Breeden was sitting near the pool on the lido deck with her boyfriend and her son, the crewmember solicited volunteers for the game. Breeden and other passengers volunteered to play, and the crewmember told them the game was called "Last Man Standing."

In papers submitted in connection with the motion for summary judgment, Farzam and Breeden agreed the game was "similar to musical chairs, wherein the participants were asked to retrieve an item at each round of the Game (in order: towel, sunscreen, sandals, another item [unidentified], salt, pepper, mustard, ketchup, fork, a picture with the crew, and additional items thereafter), and then return to an area where two rows of chairs were located at the end of each round. [Citation.] With each round played, a chair was removed. [Citation.] Thus, the last person to return to the chairs each round was out of the game."

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[2] The nature and extent of the injury is not addressed in the record before us.

Breeden testified at her deposition that she played the game for around 15-20 minutes before her accident. As she retrieved items from around the lido deck and brought them back to the chairs, she either walked fast or ran. She knew she would lose the game if she did not move quickly. During the game, she wore sandals on her feet.

After several rounds of the game had been played, the crewmember asked the participants to retrieve salt. According to Breeden's deposition testimony, she ran from the game chairs toward the dining tables in the cafeteria area of the lido deck. The dining area was crowded with people, so she slowed down to a fast walking pace. As she made her way to a salt shaker, she came within around five feet of a beverage station and three to four feet of a trash can. She observed people holding drinks in their hands. After she retrieved the salt and moved out of the dining area, she ran back to the game chairs. In the next round, the crewmember asked the participants to retrieve pepper, and Breeden went back to the dining area and grabbed a pepper shaker.

Next, the crewmember asked the participants to retrieve either mustard or ketchup. As Breeden explained at her deposition, she again made her way from the game chairs to the dining tables. She grabbed the requested condiment and as she was walking fast to get back to the game chairs, the crewmember announced that he also wanted the participants to retrieve the other condiment (either mustard or ketchup). She immediately turned to go back and as she did, her right foot slipped to the right side, causing her to fall into a "split" position. Her fingers touched the ground, breaking her fall and preventing her legs from reaching the floor. She "heard a pop," then pulled her legs

together and stood up without assistance. She did not observe anything on the deck in the area where she fell (e.g., liquid or food). Nor did she feel anything on the floor when her fingers touched the deck (e.g., wetness or stickiness). She did not inspect the floor where she fell or ask a crewmember to do the same. She played the game for another 15 minutes (several more rounds). She stated at her deposition that she eventually quit the game because she was limping and in pain due to her ankle injury.[3]

About four hours after Breeden stopped playing the game, she went to the "front desk" and asked to see a doctor about her ankle. She was told she could pay $150 to see a doctor that evening or wait until regular office hours the next day and see the doctor at no cost. She chose to wait. She iced her ankle that evening, but did not take any pain medication.

The following morning, Breeden saw the doctor and filled out a Passenger Injury Statement form. She wrote on the form that while she was running during the game, she "slipped on wet floor" and twisted her ankle.

At her deposition, Breeden testified there was something on the deck that she slipped on, but she had no idea what it was. She did not know if the deck was wet or if there was some other substance on it (e.g., food). She did not believe there was any weather condition that caused the deck to be wet. She never perceived the deck to be slippery prior to or after the time she fell.

Breeden is not aware of any similar accidents.

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[3] The record does not contain a statement or testimony from any witness to the accident, other than Breeden.

Argument

In the summary judgment motion, Farzam argued Breeden could not have prevailed in an action against Carnival (and therefore cannot prevail in a malpractice action against Farzam based on the firm's failure to file a lawsuit against Carnival) because (1) Carnival did not have a duty to warn about risks associated with the game as any risks "were open and obvious to a reasonable person using common sense and were not unique to being shipboard" and (2) Breeden cannot show Carnival had actual or constructive notice of any dangerous condition, given she herself "cannot identify the alleged dangerous condition with any specificity" or "provide any proof thereof."

Plaintiff's Opposition

In her written opposition to the summary judgment motion, Breeden argued Carnival had a duty to warn of dangers of which it was aware or should have been aware but which may not have been apparent to a reasonable passenger. She claimed she "had no real opportunity to appreciate the dangers posed by the Game due to her not knowing what the game was when she started playing it, her unfamiliarity with the surroundings (especially when compared to Carnival's familiarity), and the rapidly changing nature of the game."

Breeden also argued, assuming the danger was not open and obvious, she would not have been required to prove Carnival had actual or constructive notice of the danger because Carnival created the dangerous game, which required participants "to walk fast, run, and abruptly change directions on the lido deck and areas thereon in which it was not safe to do so," and "keep their eyes off the deck because they had to look for items not located on the ground, but rather on tables and other areas that

required them to look up as opposed to down." She further stated "Carnival did not provide [her] with any type of warning or instructions as to what the Game would entail prior to the start thereof, and the Game was dynamic and rapidly changing at the whim of the Carnival crewmember," who encouraged participants to run.

With her opposition, Breeden submitted a declaration from a registered professional safety engineer, who reviewed documentary evidence from the case, including Breeden's deposition and a video marked as an exhibit to the deposition. Breeden's boyfriend recorded the video, which shows Breeden playing the game after the accident but does not show the accident.[4] The safety engineer compared the flooring he saw in the video with flooring on other Carnival ships he had tested for slip resistance, and he opined that the flooring where Breeden fell was "an inherently slippery surface that was rendered more slippery and dangerous by an unknown, but foreseeable, substance such as water, beverages, or food."[5] The safety engineer also concluded "Ms. Breeden was acting reasonably by wearing appropriate and reasonable footwear and slowing down when encountering other passengers on the Lido Deck. The Lido Deck is indeed a pool deck and the Carnival Crew should have enforced the common 'no running' rule for pool areas, rather than encourag[ing] passengers such as Ms. Breeden to violate it."

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[4] Breeden lodged a copy of the video with this court and we have reviewed it.

[5] The engineer was never aboard the ship where Breeden had her accident.

Breeden also submitted her own declaration, supporting statements she made in her opposition, including the following: "Due to the number of people and crowded conditions, while in the dining area, I could not see my feet unless I pushed the people out of the way to do so."

Trial Court's Ruling

After hearing oral argument, the trial court granted the summary judgment motion and entered judgment in favor of Farzam.

DISCUSSION

Standard of Review

A trial court should grant summary judgment "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) A defendant may establish a right to summary judgment by showing that one or more elements of the cause of action cannot be established or that there is a complete defense to the cause of action. (Code Civ. Proc., § 437c, subd. (p)(2).) Once the moving defendant has satisfied this burden, the burden shifts to the plaintiff to show that a triable issue of material fact exists as to each cause of action. (*Ibid*.) A triable issue of material fact exists where "the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.)

"We review the trial court's decision de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections were made and sustained." (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 65-66.) We

view the evidence and the inferences reasonably drawn from the evidence "in the light most favorable to the opposing party." (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 843.)

Applicable Law

To prove a cause of action for legal malpractice, a plaintiff must establish "(1) the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the breach and the resulting injury; and (4) actual loss or damage resulting from the attorney's negligence." (*Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1199.) Here, Farzam argued in the summary judgment motion, and the trial court concluded, Breeden could not prove the causation element of her legal malpractice cause of action in that she cannot show Farzam's actions or omissions caused her any loss or damage because she could not have prevailed in an action against Carnival.

As the parties agree, federal maritime law would have applied to an action against Carnival "involv[ing] an alleged tort committed aboard a ship sailing in navigable waters." (*Keefe v. Bahama Cruise Line, Inc.* (11th Cir. 1989) 867 F.2d 1318, 1320.)[6]

A cruise ship owner or operator "is not liable to passengers as an insurer, but only for its negligence." (*Kornberg v. Carnival Cruise Lines, Inc.* (11th Cir. 1984) 741 F.2d 1332, 1334.) It "owes passengers a 'duty of reasonable care' under the circumstances."

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[6] Eleventh Circuit and Florida federal district court cases are applicable here, as the ticket contract for Breeden's cruise required her to file any action against Carnival in Miami, Florida.

(*Sorrels v. NCL (Bahamas) Ltd.* (11th Cir. 2015) 796 F.3d 1275, 1279.) To prove a negligence claim under maritime law, a plaintiff must establish "(1) the defendant had a duty to protect the plaintiff from a particular injury; (2) the defendant breached that duty; (3) the breach actually and proximately caused the plaintiff's injury; and (4) the plaintiff suffered actual harm." (*Lipkin v. Norwegian Cruise Line Ltd.* (S.D.Fla. 2015) 93 F.Supp.3d 1311, 1319.)

"A cruise ship operator's duty to warn extends to known dangers that are neither apparent nor obvious to passengers. [Citation.] Conversely, there is no duty to warn passengers of open and obvious dangers, *i.e.*, those conditions that should be obvious by the ordinary use of one's senses. [Citation.] Whether a danger is open and obvious is determined from an objective, rather than a subjective, point of view." (*Salazar v. Norwegian Cruise Line Holdings, Ltd.* (S.D.Fla. 2016) 188 F.Supp.3d 1312, 1316.)

Where a danger is open and obvious and " 'one commonly encountered on land and not clearly linked to nautical adventure,' " a cruise ship operator's liability "turns on whether it had notice—either actual or constructive—of the condition." (*Salazar v. Norwegian Cruise Line Holdings, Ltd.*, *supra*, 188 F.Supp.3d at p. 1317.)

Analysis

Farzam met his/its burden on summary judgment by showing Breeden cannot establish the causation element of her legal malpractice cause of action. Farzam's failure to file an action on her behalf against Carnival could not have caused her any loss or damage because she could not have prevailed on a negligence claim against Carnival. As a matter of law, Breeden

cannot establish Carnival owed her a duty to protect her from the ankle injury she allegedly suffered aboard the ship.

Carnival had no duty to warn Breeden of risks associated with the game because any such risks were open and obvious to a reasonable person and were no different than risks one might encounter on land while playing the scavenger hunt-musical chairs game. Breeden argues Carnival had a duty to warn her about risks because she was "not familiar with the Game, the lido deck, and the associated hazards." The risk of slipping while moving quickly in a crowded dining area where people are eating and drinking is an open and obvious one. (See *Salazar v. Norwegian Cruise Line Holdings, Ltd.*, *supra*, 188 F.Supp.3d at pp. 1316-1317 [as a matter of law on summary judgment, cruise ship operator had no duty to warn passengers about spilled liquid on a dance floor because the "fact that passengers were drinking and dancing provided adequate warning that the dance floor had the potential to be slick because the possibility that drinks might be spilled by patrons of various levels of intoxication is obvious to a reasonable person"].) There were no hidden dangers here. Using her senses, Breeden was in the same position to perceive any risks as the Carnival crew.

Because the risks were open and obvious, Breeden could not have prevailed on a negligence claim against Carnival unless she established Carnival had actual or constructive notice of the condition—the alleged substance on the deck. Breeden cannot demonstrate notice. Nor does she even try in her appellate briefing. The undisputed facts show Breeden cannot identify the alleged substance on the deck (assuming there was one). She did not see it. There is no evidence anyone else saw it. She did not feel it when her fingers touched the floor. She does not know how

long it was there. She is not aware of similar accidents. (See *Weiner v. Carnival Cruise Lines* (S.D.Fla. Oct. 22, 2012, No. 11-CV-22516) 2012 U.S. Dist. LEXIS 151395, *9, 14 ["That Weiner perceived his slip was caused by liquid on the floor is not evidence showing that Carnival knew or had reason to know of a dangerous condition at the time of the accident"].) "A plaintiff must show 'specific facts demonstrating, at least, that the purported defect was detectable with sufficient time to allow for corrective action.' " (*Salazar v. Norwegian Cruise Line Holdings, Ltd.*, *supra*, 188 F.Supp.3d at p. 1318.)

Breeden argues she would not have been required to establish actual or constructive notice of the dangerous condition in an action against Carnival because "Carnival created the dangerous situation by organizing a game that emphasized speed and changing tasks over areas of the ship [where] it knew, or should have known, it was unsafe to do so." (See *McLean v. Carnival Corp.* (S.D.Fla. Mar. 14, 2013, 12-24295) 2013 U.S. Dist. LEXIS 35395, *13 [where plaintiff alleged "the gangway's design and assembly—as well as Carnival's disembarkation procedures—created an unsafe or foreseeably hazardous condition . . . no allegation of notice [was] necessary to survive the Motion to Dismiss"]; *Caldwell v. Carnival Corp.* (S.D.Fla. 2013) 944 F.Supp.2d 1219 [same].)

In *Vollman v. Royal Caribbean Cruises Ltd.* (S.D.Fla. Mar. 16, 2011, 10-20062) 2011 U.S. Dist. LEXIS 157347, the plaintiff, who was injured on a cruise ship when she jumped over a guard rail while playing a scavenger hunt game administered by a crewmember, argued in opposition to the defendant's motion for summary judgment that the cruise ship operator created the dangerous condition by organizing and administering the game.

(*Id*. at *1-4, 8-10.) The district court rejected this argument, finding there was "nothing about the way the game was being conducted which was not obvious to Plaintiff." (*Id*. *9.) Later, in denying the plaintiff's motion for relief from the order granting summary judgment, the district court added, "even assuming that Defendant created an atmosphere in which passengers believed that speed was the object of the game, Plaintiff does not succeed. . . . [Citation.] . . . Plaintiff took a chance by choosing to climb over an obvious guard rail, and injured herself in the process. Defendant should not be made to pay for the Plaintiff's unfortunate but completely knowing and voluntary choice." (*Vollman v. Royal Caribbean Cruises Ltd.* (S.D.Fla. May 6, 2011, 10-20062) 2011 U.S. Dist. LEXIS 48852, *5.)

Here, Breeden volunteered to play a game in which any risks were open and obvious, as explained above. Moreover, Carnival's organization and administration of a scavenger hunt-musical chairs game was unrelated to the alleged hazard on the deck. The game Breeden played did not cause there to be an unidentified substance on the deck where she slipped.[7]

Breeden has not shown a triable issue of material fact. She has presented no evidence of a danger that would not have been apparent to a reasonable participant in the game. Nor has she presented any evidence indicating Carnival knew or should have known about the alleged substance on the deck. Accordingly, she

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[7] Breeden does not claim the ship's flooring was defective. She did not find it to be slippery prior to or after her accident. She claims she slipped because there was an unidentified substance on the deck. Thus, her expert's opinion that the flooring was inherently slippery is not relevant to the circumstances of this case.

has not demonstrated a triable issue of material fact tending to show she could have prevailed on a negligence claim against Carnival. Thus, she cannot show Farzam's failure to file a lawsuit against Carnival caused her any loss or damage. Summary judgment in favor of Farzam in this legal malpractice action was proper.

DISPOSITION

The judgment is affirmed. Respondents are entitled to recover costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, Acting P. J.

We concur:

BENDIX, J.

CURREY, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.