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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

LESLIE PAGE, Plaintiff and Appellant, v. PORTOFINO HOTEL PARTNERS, L.P., Defendant and Respondent.	B270243 (Los Angeles County Super. Ct. No. BC518851)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elia Weinbach and Michelle W. Court, Judges. Reversed and remanded.

Brownstein Thomas and Mark C. Thomas for Plaintiff and Appellant.

Sedgwick, Kanika D. Corley, Michael M. Walsh and Douglas Collodel for Defendant and Respondent.

Leslie Page appeals the judgment entered after the trial court granted summary judgment in favor of Portofino Hotel Partners, L.P. in Page's premises liability action. Page contends triable issues of material fact exist as to whether Portofino breached its duty of care by setting up a stage in a manner that created a dangerous gap between the back of the stage and the wall and then failing to provide safety measures or a warning. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Complaint*

On July 12, 2013 Page attended the Redondo Beach Chamber of Commerce leadership banquet at the Portofino Hotel where she was to be installed as the Chamber's chairman-elect. As she stood on stage along with several other honorees and posed for photographs, Page stepped backward and fell into a gap between the stage and the wall, breaking bones in her foot and suffering ligament damage. Page sued Portofino for premises liability and negligence, alleging hotel employees had negligently installed the stage by placing it in a corner on a diagonal, creating a dangerous triangular gap between the stage and the wall. She also alleged Portofino had breached its duty of care by failing to warn her of the dangerous condition or provide "fall prevention devices" such as railings.

2. *Portofino's Motion for Summary Judgment or, in the Alternative, Summary Adjudication*

Portofino moved for summary judgment or, in the alternative, summary adjudication as to each of the two causes of action alleged. In support of its motion Portofino submitted the declaration of Jeff Mastin, a licensed architect and certified access specialist who had been hired by the hotel after the

accident to evaluate the temporary stage utilized for the event—a platform 18 inches above the floor with an adjacent small staircase in the front/side of the stage for ingress and egress. In his declaration Mastin explained that regulations promulgated by the California Division of Occupational Safety and Health (Cal-OSHA) required guardrails to be provided only when a platform is more than 30 inches above the floor. Mastin also stated he had reviewed all applicable building codes and regulations and none required warnings to alert people of the edge of the stage or the installation of fall prevention devices.

Portofino also included with its moving papers declarations from Portofino employees in charge of event management who stated Portofino had no notice of anyone falling from the back of the stage, which had been set up in the same manner and used for the annual Chamber of Commerce event for the previous three years. Although one individual, William Leonardi, stumbled when leaving the front/side of the stage at a Chamber of Commerce dinner at the hotel in 2012, Leonardi testified at his deposition in the instant matter that he had stumbled on a stair in the front of the stage, not a gap in the back, and that he had done so because he was not paying attention. Portofino also argued the gap was "open and obvious," and individuals on the stage would necessarily be aware of it, obviating the need for warnings. (It did not include any of its own evidence concerning the gap's measurements; Page's opposition papers included evidence measuring the gap at four feet from the back of the stage to the farthest point of the wall.) Finally, a Portofino employee stated in a declaration the Chamber of Commerce had approved Portofino's plan to place the stage on a diagonal; the

stage set-up had been depicted in a diagram sent to the Chamber along with the catering contract prior to the event.[1]

In her opposition papers Page contended triable issues of material fact existed as to whether Portofino had created a dangerous condition by setting up the stage on a diagonal and had breached its duty of care by failing to warn her of the danger or to provide safety features to prevent individuals from falling off the back of the stage. Page testified she had directed her attention toward the audience and had not seen the gap as she backed up to make room for other individuals.

Page also submitted the declaration of Jason A. Droll, Ph.D., a cognitive brain scientist and human factors specialist at MEA Forensic Engineers and Scientists. In Droll's opinion, even individuals who knew of the gap would be unlikely to maintain that awareness when on stage surrounded by people: "When not directing [her] attention towards others on stage, an individual on stage would be expected to direct [her] attention in the direction of the audience, towards the front of the stage. Shifting attention towards other people nearby, especially when collisions may occur, is a natural phenomenon. Due to these natural and common shifts of attention, it is also natural that people may not notice, or not continue to attend to, other scene elements, including the rear stage edge." Droll also included photographs depicting the stage in the same set-up as on the

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[1] The diagram Portofino sent to the Chamber of Commerce showed a screen (without measurements) placed in the gap behind the stage. Testimony from a Portofino employee submitted with Page's opposition indicated the screen had been removed by the hotel on the day of the event at the request of an unidentified Chamber representative.

night of Page's fall and measurements that showed a four foot gap between the back of the stage and the wall.

The trial court granted Portofino's motion for summary judgment, ruling Portofino had not breached its duty of care as a matter of law. The court found Portofino had carried its burden on summary judgment by demonstrating it had complied with industry standards in setting up the stage and Page had failed to demonstrate a triable issue of material fact that Portofino's conduct fell below any applicable standard of care for the industry. The court emphasized Page had presented no evidence as to the applicable standard of care or whether that standard had been breached: "[Dr. Droll's expert testimony on human attention] is not the same as an opinion that the stage fell below industry standards . . . ."

DISCUSSION

1. *Standard of Review*

A motion for summary judgment is properly granted only when "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).) We review a grant of summary judgment de novo and decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. (*Hartford Casualty Ins. Co. v. Swift Distribution, Inc*. (2014) 59 Cal.4th 277, 286; *Schachter v. Citigroup, Inc*. (2009) 47 Cal.4th 610, 618.) The evidence must be viewed in the light most favorable to the nonmoving party. (*Ennabe v. Manosa* (2014) 58 Cal.4th 697, 703; *Schachter*, at p. 618.)

When a defendant moves for summary judgment in a situation in which the plaintiff would have the burden of proof at

trial by a preponderance of the evidence, the defendant may, but need not, present evidence that conclusively negates an element of the plaintiff's cause of action. Alternatively, the defendant may present evidence to "'show[] that one or more elements of the cause of action . . . cannot be established' by the plaintiff." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853 (*Aguilar*); see Code Civ. Proc., § 437c, subd. (p)(2).) "The moving party bears the burden of showing the court that the plaintiff has not established, and cannot reasonably expect to establish, the elements of his or her cause of action." (*Ennabe v. Manosa*, *supra*, 58 Cal.4th at p. 705, internal quotation marks omitted; accord, *Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 720; see *Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1002-1003 ["the defendant must present evidence that would preclude a reasonable trier of fact from finding that it was more likely than not that the material fact was true [citation], or the defendant must establish that an element of the claim cannot be established, by presenting evidence that the plaintiff 'does not possess and cannot reasonably obtain, needed evidence'"].)

Once the defendant's initial burden has been carried, the burden shifts to the plaintiff to demonstrate, by reference to specific facts, not just allegations in the pleadings, there is a triable issue of material fact as to the cause of action. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar*, *supra,* 25 Cal.4th at p. 850.) "There is a triable issue of material fact if, and only if, 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" at trial. (*Aguilar*, at p. 850; *Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, 722.)

2. *The Court Erred in Granting Portofino's Motion for Summary Judgment*

The elements of Page's negligence and premises liability claims are essentially the same: Page bore the burden at trial of demonstrating Portofino had a duty to its hotel guests to exercise reasonable care in keeping the premises safe; Portofino breached that duty; and Portofino's breach caused Page's damages. (See *Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1205 [owner of commercial property owes duty to customers to exercise reasonable care in keeping premises reasonably safe]; *Peterson v. Superior Court* (1995) 10 Cal.4th 1185, 1206 [hotel proprietors owe duty to guests "'to protect them against unreasonable risk of harm"']; see also *Howard v. Omni Hotels Management Corp.* (2012) 203 Cal.App.4th 403, 421-432 (*Howard*) [hotel's duty of reasonable care to guests encompasses duty to correct dangerous condition or to warn of dangerous condition when hotel knows or should know of dangerous condition].)

a. *Portofino failed to carry its burden on summary judgment to show it did not breach its duty of care*

Although Portofino acknowledged it had a duty to Page to exercise reasonable care in setting up the stage, it asserted in its motion that she could not establish it had breached that duty. Relying on Mastin's expert declaration, Portofino argued the stage had been set up in compliance with Cal-OSHA requirements and in accordance with all applicable building code standards. (See *Elsner v. Uveges* (2004) 34 Cal.4th 915, 928 [Cal-OSHA provisions, like any other statute or regulation, may be used in the negligence context to establish either the existence of duty or the applicable standard of care].)

Had Mastin's declaration been as Portofino (and the court) described, it may well have been sufficient to shift the burden to Page to demonstrate a degree of care higher than compliance with industry standards was required in this case. (See *Lawrence v. La Jolla Beach & Tennis Club, Inc.* (2014) 231 Cal.App.4th 11, 31 [a defendant property owner's compliance with a law or a safety regulation is relevant to whether a defendant acted with due care; still, compliance with industry standards will not be dispositive "'if there are other circumstances requiring a higher degree of care'"]; *Howard, supra,* 203 Cal.App.4th at p. 421 [same].) However, Mastin stated only that there was no requirement that an 18-inch stage include guardrails or other fall prevention devices or warnings. He did not opine in any way whether the placement of the stage on a diagonal with a significant gap in the back satisfied industry standards or whether that gap created a dangerous condition. Because Mastin's declaration was insufficient to carry Portofino's initial burden on summary judgment, the burden never shifted to Page. (See *Fazio v. Fairbanks Ranch Country Club* (2015) 233 Cal.App.4th 1053, 1060 ["[b]ecause Fairbanks did not meet its initial burden, summary judgment was not warranted"]; *Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509, 1534 [if defendant fails to carry its initial burden of showing entitlement to judgment as a matter of law, burden does not shift to plaintiff; and motion is properly denied without regard to plaintiff's opposition]; Code Civ. Proc., 437c, subd. (p)(2).)

b. *Portofino did not carry its burden on summary judgment to show it had no actual or constructive knowledge of a dangerous condition*

Portofino alternatively moved for summary judgment on the ground it had no notice of the dangerous condition and thus no duty to correct or to warn Page about it. (See *Ortega v. Kmart Corp., supra,* 26 Cal.4th at p. 1206 [a landowner is not the insurer of a visitor's personal safety; to be liable for failing to correct or warn of a dangerous condition, the landowner must have either actual or constructive knowledge of the dangerous condition or have been able to discover the condition which, if known to him, "'he should realize as involving an unreasonable risk to invitees on his premises'"].)

The trial court concluded Portofino plainly had notice of the gap behind the stage since it had created it. Moreover, by its own admission in its moving papers, the gap was "open and obvious." Thus, as the court found, Portofino's situation was distinguishable from the landowners' in the cases it had cited in which the landowner neither knew nor should have known of a dangerous condition on its property. (Cf. *Ortega v. Kmart Corp.*, *supra*, 26 Cal.4th at p. 1206; *Moore v. Wal-Mart Stores, Inc.* (2003) 111 Cal.App.4th 472, 476.)

Portofino contends the court erred because the issue was not whether it knew of the gap itself, but whether it knew or should have known the gap created an unreasonable risk of injury. It argues the lack of similar incidents was sufficient, at the very least, to shift the burden of production to Page on this question; and the court erred in concluding otherwise. No error occurred. Although a lack of prior similar incidents may well be relevant and admissible to show a landowner acted with due care

in failing to correct a purportedly dangerous condition (see *Lawrence v. La Jolla Beach & Tennis Club, Inc.*, *supra*, 231 Cal.App.4th at p. 31; *Lupash v. City of Seal Beach* (1999) 75 Cal.App.4th 1428, 1434), such evidence alone is not sufficient to establish plaintiff cannot prevail on her negligence action. (*Weirum v. RKO General Inc.* (1975) 15 Cal.3d 40, 47 ["The mere fact that a particular kind of an accident has not happened before does not . . . show that such accident is one which might not reasonably have been anticipated.' [Citation.] Thus, the fortuitous absence of prior injury does not justify relieving defendant from responsibility for the foreseeable consequences of its acts"]; see *Lawrence,* at p. 31 [same]; *Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1605 [lack of prior incidents "is not sufficient by itself to eliminate the existence of a defect or otherwise demonstrate appellant cannot prove such a dangerous condition"]; see also *Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, 848 [defendant's declaration that no one had complained horse was unfit for competition is not enough to establish defendant's due care as a matter of law or shift the burden to plaintiff on summary judgment to raise triable issue of material fact; absence of complaints does not put to rest ultimate factual question whether defendant knew or should have known horse was unfit for competition].)

DISPOSITION

The judgment is reversed. The matter is remanded to the trial court to vacate its order granting summary judgment, to enter a new order denying Portofino's motion and to conduct further proceedings not inconsistent with this opinion. Page is to recover her costs on appeal.

PERLUSS, P. J.

We concur:

SEGAL, J.

MENETREZ, J.*

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