Filed 11/6/18 Sunden v. Majestic Office Park Owner, LLC CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

DIANE L. SUNDEEN, Plaintiff and Appellant, v. MAJESTIC OFFICE PARK OWNER, LLC, et al., Defendants and Respondents.	B276314 (Los Angeles County Super. Ct. No. BC526925)

APPEAL from judgments of the Superior Court of Los Angeles County, Elizabeth A. Lippitt, Judge. Reversed.

Law Offices of Jack L. Mattingly, Jack L. Mattingly; Esner, Chang & Boyer, Stuart B. Esner and Shea S. Murphy for Plaintiff and Appellant.

Bradley & Gmelich, John K. Flock, Lena J. Maderosian and Thomas P. Gmelich for Defendant and Respondent Majestic Office Park Owner, LLC.

Manning & Kass, Ellrod, Ramirez, Trester, Jeffrey M. Lenkov and Steven J. Renick for Defendant and Respondent ABM Security Services, Inc.

Ropers, Majeski, Kohn & Bentley, Tim M. Agajanian, Terry Anastassiou and German A. Marcucci for Defendants and Respondents Crown Energy Services, Inc., and Crown Building Maintenance Co.

Plaintiff Diane L. Sundeen appeals from the judgments entered after the trial court granted summary judgment motions filed by defendants Majestic Office Park Owner, LLC (Majestic);[1] ABM Security Services, Inc. (ABM); and Crown Energy Services, Inc., doing business as Able Engineering Services, and Crown Building Maintenance Co., doing business as Able Building Maintenance Co. (collectively, Able). Sundeen tripped on the raised edge of a piece of carpet temporarily placed on the floor of an elevator while it was being used to carry freight. The trial court found the condition of the carpet was a trivial defect, and therefore was not dangerous as a matter of law. Sundeen contends the evidence creates a triable issue of fact as to whether Sundeen's fall was caused by an unreasonably dangerous condition. We agree and reverse.

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[1] Majestic was erroneously sued under the name Magestic Office Park Owner, LLC.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Sundeen's Complaint*

On November 7, 2013 Sundeen filed a complaint against Majestic and Doe defendants, alleging causes of action for general negligence and premises liability. Sundeen alleged defendants were negligent in "placing a loose piece of carpet on the floor of the elevator so that loose edges were at the entrance to the elevator creating a dangerous condition . . . for people . . . when entering or exiting said elevator," and in failing to warn elevator users of the condition. Sundeen based her premises liability cause of action on the same allegations. On March 7, 2014 Sundeen filed amendments to the complaint substituting Able and ABM for the Doe defendants.

B. *The Motions for Summary Judgment or, in the Alternative, Summary Adjudication*

On June 30, 2015 Able filed a motion for summary judgment or summary adjudication. On July 2, 2015 ABM and Majestic each filed a motion for summary judgment or summary adjudication. In support of their motions, defendants submitted deposition testimony and other evidence as to the condition of the elevator and the circumstances of Sundeen's fall, including the deposition testimony of Sundeen, her coworker Lupe Castillo, and Sundeen's manager Diana Ogandjanian. Defendants also submitted deposition testimony from the persons most knowledgeable for Majestic (Douglas Hansford) and Able (Ivan Arias), deposition testimony from Majestic property manager Caroline Prydekker and ABM employee Demetrius Parker, and ABM's security contract with Majestic.

According to the deposition testimony, Sundeen worked in a building owned by Majestic located at 15400 Sherman Way in Van Nuys, California. Able performed day porter and janitorial services in the building. ABM provided security services.

Shortly before 7:00 a.m. on November 8, 2011 Sundeen arrived at the building with Castillo. Sundeen parked her car in the parking lot under the building and walked upstairs with Castillo to the building lobby, which contained a bank of three elevators. The elevator bank contained a single button to call an elevator. After pressing the button, one of the three elevators arrived, and Sundeen and Castillo entered. The elevator that responded to the call was temporarily being used to move furniture and other freight, so a piece of carpet had been placed on the floor of the elevator and padding on the walls. The interiors of the three elevators were identical, except for the carpet and padding.

Sundeen described the carpet as "thin," approximately one-quarter to one-half inch thick. The edge of the carpet was not taped to the floor. The carpet was in poor condition, described by witnesses as "worn," "torn," "cut," "loose," and "stretched out." Sundeen testified she had seen carpet on the elevator floor during construction in the previous "months" that was not lying flat.

Sundeen entered the elevator first with Castillo behind her. As she was entering the elevator, Sundeen tripped on the front edge of the carpet and fell.

Sundeen did not see the carpet on the floor until after she tripped. After falling, Sundeen noticed for the first time that the front edge of the carpet did not lie flat; it was raised less than one inch from the elevator floor. Castillo also observed the carpet's

front edge was raised around one-half inch from the floor of the elevator.

When Ogandjanian learned of Sundeen's fall, she ran downstairs and saw Sundeen in the elevator. Ogandjanian testified the carpet's edge was raised approximately five-eighths of an inch. Ogandjanian had seen the carpet in the same elevator on at least 20 occasions during the prior month or longer. Ogandjanian had previously noticed the carpet's edge was raised, and had discussed with coworkers the accident risk posed by the carpet's condition.

Defendants argued the raised carpet edge was a trivial defect and did not constitute a dangerous condition as a matter of law. They asserted that even if the carpet was raised and was not secured to the floor, the elevation of one inch or less was trivial and did not give rise to liability. Able and ABM also argued they were not subject to premises liability because they were not the owners of the property.[2]

C. *Sundeen's Oppositions*

In opposition to each motion, Sundeen argued there was a dispute as to the condition of the carpet in the elevator and that the court should consider the circumstances other than that the carpet was raised less than an inch, including the carpet's worn condition, that it was unevenly lifted, that it was not taped to the floor, and that the lighting changed from the lobby to the elevator.

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[2] Able does not argue on appeal that it did not have control of the elevator, instead focusing only on the trivial defect doctrine.

Sundeen filed a declaration by Brad P. Avrit, a civil engineer, stating his opinion that the buckling of the carpet along its front edge "creat[ed] a height differential upon which Ms. Sundeen tripped." Avrit opined the carpet created an unsafe condition and did not conform with flooring industry standards.

Sundeen also submitted deposition testimony from ABM security guard Roger Dy, who testified that when companies used one of the elevators to move freight, ABM guards were responsible for ensuring that padding was installed to protect the interior of the elevator, although the guards did not install the padding themselves. He also testified ABM guards were to report any dangerous conditions they observed to their supervisors. Dy read from a previous statement that at the time of the accident he was "about to get the yellow [warning] sign at the elevator No. 1 so employees will not have access to said elevator." Prydekker, Majestic's property manager, similarly testified at her deposition that ABM guards were tasked with asking building tenants not to ride an elevator when it was being used to move freight.

Defendants filed evidentiary objections to the Avrit declaration and other evidence submitted by Sundeen.

D. *The Trial Court's Hearing and Ruling*

At the March 1, 2016 hearing the trial court commented, "what distinguishes how the court rules is not just the nature of the defect but the surrounding circumstances. Aggravating factors, such as lighting, debris, a history of similar injury." After hearing argument of counsel regarding the surrounding circumstances, the court found the raised carpet edge was a trivial defect, and it granted the three summary judgment

motions. The trial court stated, "The carpet's a trivial defect. You didn't allege any other circumstances that would contribute to it." The court did not address defendants' evidentiary objections.[3] The court directed counsel for Majestic to prepare an order.

On March 23, 2016 the trial court entered an "Order and Judgment" granting summary judgment in favor of Majestic "for all the reasons stated on the record." The trial court entered an "Order and Judgment" with similar language as to Able. As to ABM, the court entered an "Order Re: ABM Security Services, Inc.'s Motion for Summary Judgment." However, the order has the same language as the other two judgments, including that "it is ordered, adjudged and decreed" (capitalization & boldface omitted) that Sundeen "take nothing by her [c]omplaint" and ABM recover its costs as the prevailing party. On the unique

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[3] Where the trial court fails to rule on evidentiary objections in the context of a summary judgment motion, on appeal the court presumes the objections have been overruled, with the objector having the burden to renew its objections in the Court of Appeal. (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 534.) Because we conclude defendants have not carried their burden on summary judgment, we do not reach defendants' evidentiary objections to Sundeen's evidence because we consider only defendants' evidence. (See *Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 963 ["The plaintiff opposing the motion . . . has no burden to present any evidence until the defendant meets his or her initial burden."]; *Barber v. Chang* (2007) 151 Cal.App.4th 1456, 1463 ["If the evidence does not support judgment in the defendant's favor, we must reverse summary judgment without considering the plaintiff's opposing evidence."].)

facts of this case and to facilitate this appeal as to all defendants, we treat this final order as a judgment. (See *Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 698; *Hall v. Superior Court* (2016) 3 Cal.App.5th 792, 805; see also Code Civ. Proc., § 577 ["A judgment is the final determination of the rights of the parties in an action or proceeding."].) Sundeen timely appealed from the judgments.

DISCUSSION

A. *Standard of Review*

Summary judgment is appropriate only if there are no triable issues of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607, 618 (*Regents*); *Delgadillo v. Television Center, Inc.* (2018) 20 Cal.App.5th 1078, 1085.) """"We review the trial court's decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained.'" [Citation.] We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party."'" (*Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 347; accord, *Husman v. Toyota Motor Credit Corp.* (2017) 12 Cal.App.5th 1168, 1179 (*Husman*).)

A defendant moving for summary judgment has the initial burden of presenting evidence that a cause of action lacks merit because the plaintiff cannot establish an element of the cause of action or there is a complete defense. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th

826, 853; *Husman, supra*, 12 Cal.App.5th at pp. 1179-1180.) If the defendant satisfies this initial burden, the burden shifts to the plaintiff to present evidence demonstrating there is a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.*, at p. 850; *Husman*, at pp. 1179-1180.) We must liberally construe the opposing party's evidence and resolve any doubts about the evidence in favor of that party. (*Regents, supra*, 4 Cal.5th at p. 618; *Husman*, at p. 1180.) "'[S]ummary judgment cannot be granted when the facts are susceptible to more than one reasonable inference . . . .'" (*Husman*, *supra*, at p. 1180; accord, *Rosas v. BASF Corp*. (2015) 236 Cal.App.4th 1378, 1392.)

B. *The Trivial Defect Doctrine Does Not Support the Trial Court's Ruling Granting Summary Judgment*

Defendants contend they owed no duty to Sundeen because any defect in the carpet placed in the elevator was trivial as a matter of law. We disagree.

1. *The trivial defect doctrine*

"The elements of a negligence claim and a premises liability claim are the same: a legal duty of care, breach of that duty, and proximate cause resulting in injury." (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1158; accord, *Castellon v. U.S. Bancorp* (2013) 220 Cal.App.4th 994, 998.) "[L]andowners are required 'to maintain land in their possession and control in a reasonably safe condition' [citation], and to use due care to eliminate dangerous conditions on their property [citations]." (*Taylor v. Trimble* (2017) 13 Cal.App.5th 934, 943-944; accord, *Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1205 [an owner owes patrons "a

duty to exercise reasonable care in keeping the premises reasonably safe"].)

Under the trivial defect doctrine, liability for dangerous conditions does not extend to "'minor, trivial or insignificant'" defects that create no substantial risk of injury. (*Stathoulis v. City of Montebello* (2008) 164 Cal.App.4th 559, 566 (*Stathoulis*); *Kasparian v. AvalonBay Communities, Inc.* (2007) 156 Cal.App.4th 11, 27 (*Kasparian*).) As the Court of Appeal in *Stathoulis* explained, "Some defects are bound to exist even in the exercise of reasonable care in the maintenance of property and cannot reasonably be expected to cause accidents." (*Stathoulis*, at p. 566; accord, *Cadam v. Somerset Gardens Townhouse HOA* (2011) 200 Cal.App.4th 383, 389 (*Cadam*) [" 'Minor defects such as the crack in [the plaintiff's] walkway inevitably occur, and the continued existence of such cracks without warning or repair is not unreasonable.' "]; *Ursino v. Big Boy Restaurants* (1987) 192 Cal.App.3d 394, 397 (*Ursino*) ["[I]t is impossible to maintain 'heavily travelled surfaces in a perfect condition and . . . minor defects such as differences in elevation are bound to occur in spite of the exercise of reasonable care by the party having the duty of maintaining the area involved.'"].)

The trivial defect doctrine applies equally to public and private entities. (*Cadam*, *supra,* 200 Cal.App.4th at p. 388 [sidewalk defect in privately owned townhome development]; *Kasparian*, *supra*, 156 Cal.App.4th at p. 27 [recessed drain in private apartment complex]; *Ursino*, *supra*, 192 Cal.App.3d at p. 397 [private restaurant sidewalk]; *Graves v. Roman* (1952) 113 Cal.App.2d 584, 586-587 (*Graves*) [walkway in private office building].)

The determination whether a defect is trivial depends on its nature and all the surrounding circumstances. (*Stathoulis*, *supra*, 164 Cal.App.4th at pp. 566-567; *Kasparian*, *supra*, 156 Cal.App.4th at p. 27; *Caloroso v. Hathaway* (2004) 122 Cal.App.4th 922, 927 (*Caloroso*); *Dolquist v. City of Bellflower* (1987) 196 Cal.App.3d 261, 267-268 (*Dolquist*).) The size of the defect is only one of the relevant factors. (*Stathoulis*, at pp. 566-567 ["Although the size of a crack or pothole is a pivotal factor in the determination, 'a tape measure alone cannot be used to determine whether the defect was trivial.'"]; *Caloroso*, at p. 927 ["The decision whether the defect is dangerous as a matter of law does not rest solely on the size of the crack in the walkway, since a tape measure alone cannot be used to determine whether the defect was trivial."]; *Dolquist*, at p. 267 ["the court should *not* rely solely on the size of the particular defect"].)

The appellate courts have considered whether other circumstances rendered a defect more or less dangerous than the size of the defect would indicate, including the condition of the area, the shape and configuration of the defect, jagged or uneven edges, the visibility of the defect, the plaintiff's knowledge of the condition, whether the defect has caused other injuries, and any other circumstances that might have aggravated or mitigated the risk. (*Stathoulis, supra*, 164 Cal.App.4th at p. 567 [reversing grant of summary judgment as to three irregularly shaped potholes around an inch deep]; *Kasparian, supra*, 156 Cal.App.4th at p. 27 [reversing grant of summary judgment as to 1/4 inch recessed drain where recess was uneven and could not easily be detected]; *Dolquist, supra*, 196 Cal.App.3d at pp. 267-268 [reversing grant of summary judgment as to steel bar

protruding 1/4 inch from concrete in parking lot where condition would not readily be detected by pedestrian].)

"'Where reasonable minds can reach only one conclusion—that there was no substantial risk of injury—the issue is a question of law, properly resolved by way of summary judgment.'" (*Stathoulis*, *supra*, 164 Cal.App.4th at pp. 567; accord, *Kasparian, supra*, 156 Cal.App.4th at p. 27.) Conversely, where "reasonable minds may differ as to whether the defect is dangerous," no determination may be made as a matter of law. (*Kasparian*, at p. 28.)

2. *The trivial defect doctrine does not apply to placement of the carpet in the elevator*

The trivial defect doctrine has only been applied to defects in permanent surfaces, typically arising out of regular use and the passage of time, such as the difference in elevation between concrete slabs or depth of a pothole or drain. (See, e.g., *Cadam*, *supra*, 200 Cal.App.4th at pp. 385-386 [separation between walkway segments]; *Stathoulis*, *supra*, 164 Cal.App.4th at pp. 563-564 [three potholes in street]; *Kasparian*, *supra*, 156 Cal.App.4th at p. 28 [recessed drain grate]; *Caloroso, supra*, 122 Cal.App.4th at p. 925 [crack in walkway]; *Ursino, supra*, 192 Cal.App.3d at p. 398 [same].) Here, by contrast, Sundeen argues defendants created a dangerous condition by negligently placing a worn and loose piece of carpet in an elevator to accommodate movement of freight, but allowing passenger use. Sundeen's oppositions to summary judgment did not rest on the dangers of a minor difference in elevation, but rather, defendants' alleged role in negligently placing the carpet in the elevator without warning passengers or prohibiting their use of the elevator.

The cases cited by defendants that apply the trivial defect doctrine to features other than sidewalks, including those in private buildings, are distinguishable because each involved a defect in a permanent surface. (See *Davis v. City of Pasadena* (1996) 42 Cal.App.4th 701, 703 [steps converging at a right angle with a handrail]; *Graves, supra*, 113 Cal.App.2d at pp. 586-587 [1/8 inch height differential in brass stripping abutting recessed linoleum adjacent to elevator doors]; *Robson v. Union Pacific R. R. Co.* (1945) 70 Cal.App.2d 759, 760 [1/4 inch deep chip in tile flooring].)

A loose piece of carpeting temporarily placed in an elevator for a specific purpose does not implicate the recognition underlying the trivial defect doctrine that "[s]ome defects are bound to exist even in the exercise of reasonable care in the maintenance of property and cannot reasonably be expected to cause accidents." (*Stathoulis, supra*, 156 Cal.App.4th at p. 566.) The trial court erred in applying the trivial defect doctrine to the uneven carpeting in the elevator.

3. *Even if the trivial defect doctrine applied, defendants did not carry their burden to show the placement of the carpet was a trivial defect as a matter of law*

Even if we were to treat the placement of the carpet as a defect, it was not trivial as a matter of law. Defendants focus on the size of the height differential between the raised carpet edge and the elevator floor to support their contention the condition of the carpet was a trivial defect. In their separate statements of fact in support of their motions for summary judgment, ABM and Able relied solely on evidence that the raised carpet edge "was protruding no greater than one inch." Majestic relied only on

evidence that the height of carpet's raised edge was between "one-half to one inch from the floor" and that the area of the accident was well lit.[4] Defendants failed to offer evidence relating to the surrounding circumstances sufficient to demonstrate that Sundeen could not establish a dangerous condition. (*Stathoulis, supra*, 164 Cal.App.4th at p. 566 ["The decision whether a crack or other defect in a walkway is dangerous does not rest entirely on the size of the depression."]; *Caloroso, supra*, 122 Cal.App.4th at p. 927 ["[A] tape measure alone cannot be used to determine whether the defect was trivial."].)

The facts of *Kasparian* are on point. There, an elderly resident was walking along a familiar walkway of brick pavers leading from her apartment to a trash receptacle when she tripped on a recessed drain. (*Kasparian, supra*, 156 Cal.App.4th at p. 15.) The trial court granted summary judgment for the defendant, finding the drain was a trivial defect because it was less than one-half inch deep and the plaintiff fell on a sunny day with nothing obstructing her view of the drain. (*Id*. at p. 17.) We reversed, concluding the evidence the drain was not flush with the surrounding brick, the drain depression was uneven, and the depression may have been difficult to see created triable issues of fact as to whether there was a dangerous condition. (*Id*. at pp. 28-30.)

As in *Kasparian*, the trial court's focus here was "too narrow" (*Kasparian, supra*, 156 Cal.App.4th at p. 28), relying on the height of the carpet's edge while overlooking whether the carpet's condition and placement created a dangerous condition

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[4] There is no material dispute that the elevator was well lit.

in light of the surrounding circumstances. Defendants' own evidence showed the carpet was in a state of disrepair at the time of Sundeen's accident. In deposition excerpts offered in support of defendants' motions, Sundeen testified the carpet was "worn" and "loose." In excerpts offered by Able and ABM, Sundeen also testified the carpet was "stretched out." Ogandjanian and Castillo similarly testified the carpet was "torn" and "cut," respectively. In addition, the carpet was not taped down, making it vulnerable to shifting or moving. A reasonable trier of fact could find that the carpet's worn, torn, and loose state created a greater likelihood of injury than the height alone would indicate. (See *Stathoulis, supra*, 164 Cal.App.4th at p. 569 [irregular shape of potholes with jagged edges created triable issue of fact].)

The location of the carpet's raised edge at the entrance to the elevator was another factor a trier of fact could consider in determining whether the placement of the carpet was trivial as a matter of law. As argued by Sundeen, the carpet would first be seen when the elevator doors opened and passengers began to enter. Indeed, Sundeen did not see the carpet until after she had fallen. She testified she was looking straight ahead, not at the floor, as she began to board the elevator just before the accident.[5]

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[5] Majestic contends Sundeen failed to raise in the trial court her argument that the defect would be difficult to see, thereby forfeiting it on appeal. But in her opposition to Majestic's motion, Sundeen argued the carpet's edge was "unexpected and not conspicuous." Majestic and Able also contend Sundeen's complaint failed adequately to allege the condition of the carpeting was not visible, and thus she may not make the argument at the summary judgment stage without first amending her complaint. (See *Hutton v. Fidelity National Title*

On appeal defendants contend Sundeen's knowledge of the condition of the carpet for months before the incident supports the finding the defect was trivial. But even if Sundeen was aware that carpet previously had been used in the elevator to move freight, this is only one circumstance the trier of fact would consider. For example, a reasonable trier of fact could conclude Sundeen had no way of knowing the elevator that responded to her call would be the one with carpet on the floor or that it would be in a dangerous condition.

In light of the surrounding circumstances, defendants have failed to carry their burden to establish as a matter of law there was no dangerous condition.

C. *ABM Is Not Entitled to Summary Judgment on Other Grounds*

ABM contends even if we do not affirm the granting of summary judgment based on the trivial defect doctrine, it is entitled to summary judgment on other grounds. First, ABM argues it did not owe Sundeen a duty of care because its agents did not place the carpet in the elevator; second, any breach of its duty did not cause Sundeen's injury because the condition was

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Co. (2013) 213 Cal.App.4th 486, 499 [defendant moving for summary judgment need not refute liability on theory of liability not alleged in complaint].) However, Sundeen's causes of action for negligence and premises liability adequately pleaded that a dangerous condition was created by defendants "placing a loose piece of carpet on the floor of the elevator so that loose edges were at the entrance to the elevator." Sundeen was not required to plead her causes of action with a level of specificity that would include a description of how the loose edge caused her to fall.

open and obvious. In addition, ABM asserted for the first time at oral argument that because any actions it took were at Majestic's direction, it cannot be liable. Each of these contentions lacks merit.

A defendant moving for summary judgment has the initial burden of presenting evidence that the plaintiff cannot establish an element of the cause of action. (Code Civ. Proc., § 437c, subd. (p)(2); *Delgadillo v. Television Center, Inc.*, *supra*, 20 Cal.App.5th at p. 1085.) A defendant's control over property is sufficient to create a duty of care owed to persons using the property. (*Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1162, 1166 [affirming reversal of summary judgment because there were triable issues of fact as to landlord's control of strip of city land where landlord had "maintained the lawn . . . and, subsequent to the incident at issue, constructed a fence surrounding the entire lawn"]; *Annocki v. Peterson Enterprises, LLC* (2014) 232 Cal.App.4th 32, 37 [trial court should have allowed plaintiff to plead that defendant restaurant failed to warn patrons leaving the restaurant that only a right turn could safely be made from its parking lot although accident occurred on adjacent roadway].)

ABM points to deposition testimony that when an elevator was used to move freight, the moving company, not ABM security guards, installed the protective carpet and padding. However, that ABM's guards did not place the carpet and padding in the elevator does not prove ABM lacked control over the elevator. ABM submitted no evidence showing its lack of control over the elevator. Therefore, ABM did not carry its initial burden.

Even if ABM had carried its initial burden, Sundeen presented evidence sufficient to demonstrate a triable issue of fact as to ABM's control of the elevator. ABM guard Dy testified

that if furniture was being moved, he was "responsible for making sure that somebody had padded the elevators." Dy also testified ABM guards were tasked with warning passengers not to ride the elevator being used for freight and employing yellow warning signs or cones to prevent tenants from riding that elevator. Dy testified further that one of his duties as a guard was to report dangerous conditions he observed so they could be remedied.

As to ABM's second argument that the condition in the elevator was open and obvious, ABM has forfeited the issue on appeal by failing to raise it below. (*Pittman v. Beck Park Apartments Ltd.* (2018) 20 Cal.App.5th 1009, 1026 [an argument """"may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it""""]; *Professional Collection Consultants v. Lauron* (2017) 8 Cal.App.5th 958, 972 [""""[I]t is fundamental that a reviewing court will ordinarily not consider claims made for the first time on appeal which could have been but were not presented to the trial court.""""].)

Even if this argument were properly before us, ABM has failed to carry its burden on summary judgment because the defense that a defect was open and obvious applies only to the duty to warn, and "[does] not relieve defendant of all possible duty, or breach of duty, with respect to [the hazard]." (*Martinez v. Chippewa Enterprises, Inc.* (2004) 121 Cal.App.4th 1179, 1184 [assuming plaintiff's awareness of wet surface constituted constructive notice, it did not resolve defendant's duty to address the dangerous condition]; accord, *Jacobs v. Coldwell Banker Residential Brokerage Co.* (2017) 14 Cal.App.5th 438, 447 ["obviousness will not negate a duty of care when it is foreseeable

that, because of necessity or other circumstances, a person may choose to encounter the condition"].)

ABM's contention at oral argument that it cannot be liable because it acted solely at Majestic's direction was likewise forfeited, both by ABM's failure to raise the argument below and its failure to raise this argument in its briefs on appeal. (*Pittman v. Beck Park Apartments Ltd., supra*, 20 Cal.App.5th at p. 1026; *AmeriGas Propane, L.P. v. Landstar Ranger, Inc.* (2010) 184 Cal.App.4th 981, 1001, fn. 4 ["'[W]e need not consider any issue which, although raised at oral argument, was not adequately raised in the briefs.'"].) Regardless, this contention too lacks merit. "One who assumes to act as an agent is responsible to third persons as a principal for his acts in the course of his agency . . . [¶] . . . [¶] [w]hen his acts are wrongful in their nature." (Civ. Code, § 2343; accord, *Hall v. Rockcliff Realtors* (2013) 215 Cal.App.4th 1134, 1141 [real estate agent had duty to notify visitors to property of concealed dangerous conditions where the agent had actual or constructive knowledge].) An agent "'carr[ying] on an activity upon land on behalf of the possessor is subject to the same liability . . . for physical harm caused thereby to others upon . . . the land as though he were the possessor of the land.'" (*Vandermost v. Alpha Beta Co.* (1985) 164 Cal.App.3d 771, 776, fn. 1 [restaurant's employee subject to same liability as restaurant for asserted failure to protect plaintiff from acts of third parties], quoting Rest.2d Torts, § 383; accord, *Roberts v. Del Monte Properties Co.* (1952) 111 Cal.App.2d 69, 77 [independent contractor operating and maintaining property for owner liable for injuries on property caused by contractor's employee].) ABM was therefore

liable for the actions it took as Majestic's agent if it breached the duty of care owed to building patrons.

Given Prydekker's testimony that ABM was tasked with warning passengers of the freight elevator's condition and preventing them from using it, as well as Dy's testimony that he was "about to get the yellow [warning] sign" at the time of the accident, there are questions of fact as to whether ABM had a duty to warn and protect elevator passengers as an agent of Majestic, precluding summary judgment.

DISPOSITION

The judgments are reversed, and the matter remanded for further proceedings not inconsistent with this opinion. Sundeen is entitled to recover her costs on appeal.

FEUER, J.

WE CONCUR:

PERLUSS, P. J.

ZELON, J.