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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

BEN COHEN, Plaintiff and Respondent, v. EYAL SHEMESH, Defendant and Appellant.	B261419 (Los Angeles County Super. Ct. No. LC098650)

APPEAL from a judgment of the Superior Court of Los Angeles County. Elia Weinbach, Judge. Affirmed.

Samuel C. Konugres for Plaintiff and Appellant.

Masserman & Ducey, Mitchell F. Ducey and Terri L. Masserman for Defendant and Respondent.

Plaintiff and appellant Ben Cohen (Cohen) appeals from the summary judgment entered in favor of defendant and respondent Eyal Shemesh (Shemesh) on Cohen's complaint for damages Cohen suffered when he fell down stairs on property owned by Shemesh. Cohen contends: (1) the finding that a missing tile on the stair landing was a "trivial defect" was contrary to the evidence, and (2) there was a triable issue of material fact as to whether, in addition to the missing tile, the absence of a handrail was a proximate cause of Cohen's injuries. We affirm.

STANDARD OF REVIEW

In reviewing an order granting summary judgment, we assume the role of the trial court and redetermine the merits of the motion. In doing so, we must strictly scrutinize the moving party's papers. The declarations of the party opposing summary judgment, however, are liberally construed to determine the existence of triable issues of fact. All doubts as to whether any material, triable issues of fact exist are to be resolved in favor of the party opposing summary judgment. While the appellate court must review a summary judgment motion by the same standards as the trial court, it must independently determine as a matter of law the construction and effect of the facts presented. (*Dominguez v. Washington Mutual Bank* (2008) 168 Cal.App.4th 714, 719-720.)

Summary judgment is granted when a moving party establishes the right to the entry of judgment as a matter of law. (Code of Civ. Proc., § 437c, subd. (c).)[1] The pleadings determine the issues to be addressed by a summary judgment motion and the declarations filed in support of such a motion must be directed to the issues raised by the pleadings. (*Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 84.) A defendant moving for summary judgment meets its burden of showing that there is no merit to a cause of action by showing that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. (§ 437c, subds. (o)(2), (p)(2).) If the defendant does so, the burden shifts back to the plaintiff to show that a triable issue of

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1 Unless otherwise indicated, all statutory references are to the Code of Civil Procedure.

fact exists as to that cause of action or defense. In doing so, the plaintiff cannot rely on the mere allegations or denials of his pleadings, "but, instead, shall set forth the specific facts showing that a triable issue of material fact exists . . . ." (§ 437c, subd. (p)(2).) A triable issue of material fact exists "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. [Fn. omitted.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.)

FACTUAL AND PROCEDURAL BACKGROUND

From October 2009 through July 2011, appellant Cohen rented a room in a single family residence on the 5700 block of Beckworth Avenue in Tarzana, which at all relevant times was owned by respondent Shemesh. Several stairs led from the driveway to a landing in front of the home's main entry. A brief description of the stairs where both falls occurred is helpful. Three stairs lead up from the driveway to a landing in front of a pair of French doors which are the main entry to the house; the landing extends several feet to the left of the stairs and is railed; on the right side of the stairs, a railed porch comes out as far as the bottom step; there is no stair railing on either side of the stairs; the stairs, landing and porch are tiled; there is a missing tile at the base of the post located on the landing, on the left side of the stairs; there is another missing tile at the base of the post on the front corner of the railed porch.

In June 2010, Cohen's roommate, Arie Bloom, fell as he was stepping off the bottom stair onto the driveway. Bloom sued Shemesh for the injuries Bloom allegedly sustained in that fall (*Bloom vs. Shemesh*), alleging a broken stair and the lack of any handrail were the proximate causes of his fall and concomitant injuries. In April 2012, Bloom and Shemesh entered into a settlement agreement pursuant to which Bloom agreed to dismiss *Bloom v. Shemesh* and release Shemesh from all known and unknown claims in exchange for which Shemesh agreed to pay Bloom $3,000; the settlement agreement included a non-admission of liability term.

On January 28, 2011 (after Bloom fell but before he filed *Bloom v. Shemesh*), Cohen fell as he was stepping off the landing and onto the top stair of the same stairs.

Cohen believed his foot stuck at the spot where there was a missing tile. As he described the event at his deposition, Cohen began by putting his weight onto his left foot, but when he tried to step down onto the first step with his right foot, his right foot "didn't move, and by the time I discovered that I'm stuck, I realized I'm halfway, airborne (indicating)."

Seeking damages for injuries he sustained in the fall, Cohen filed the complaint in this case in October 2011. The complaint states two cause of action. The first cause of action for general negligence alleged Cohen's injuries were proximately caused by Shemesh's negligent ownership, use, operation and maintenance of the property. The second cause of action for premises liability alleged Shemesh failed to "take reasonable steps to avert the accident. Fixing the problem (or at least giving adequate warnings) would not have been unreasonably expensive or difficult. A serious injury was the probable consequence of not fixing the problem (the accident was foreseeable). [Shemesh's] failure (his negligence) caused [Cohen's] accident."

At his deposition, Cohen explained the "condition that caused [him] to fall" was a missing tile at the base of a porch railing post on the top landing. On a photograph, Cohen marked with an "X" where his "right shoe got stuck." Cohen described another photograph as a picture of his feet, wearing the shoes he was wearing when he fell, which "recreat[ed]the position [Cohen] was standing at before" he attempted to walk down the stairs.

Cohen testified he first became aware of the missing tile in February 2010. In September 2010 (three months after Bloom fell and almost one year before Cohen fell), Cohen filed a complaint with the Los Angeles Department of Building and Safety (LADBS) regarding unsafe conditions at the property. LADBS inspector Angel Sindayen met Cohen at the property to discuss his complaint. Apparently dissatisfied with Sindayen's conclusions, Cohen caused LADBS senior building inspector Martin Nelson Weight, to also inspect the property.

LADBS inspectors Sindayen and Weight were both deposed. Sindayen testified that he did not recall Cohen pointing out a missing tile, and Sindayen did not note in his

report any missing floor tiles as a matter requiring follow up when he inspected the property in response to Cohen's September 2010 complaint. In his inspection, Sindayen saw no condition on the front porch (i.e. landing) that required follow up, including any missing floor tile. There is no building or municipal code section "that deals with missing tiles on a stair." In Sindayen's opinion, the missing floor tile seen in photographs does not constitute a safety violation because the missing tile is not "in the path of the walkway."

Weight testified that a handrail is not required on stairs in a residential building if the overall height of the stairs is less than 30 inches, or there are less than four risers. Weight testified that stairs at issue here were comprised of the bottom landing, three risers, and the top landing, the overall height of which appeared to be less than 30 inches. But Weight was concerned that, in the photograph, it looked like the stair heights may deviate more than the one-quarter-inch deviation permitted by the code in 2005, when the permit for the stairs was issued.

Motion for Summary Judgment

On August 5, 2014, Shemesh filed a motion for summary judgment (MSJ). The thrust of the MSJ was that the missing tile Cohen identified as the cause of the fall that resulted in his injuries was a "trivial" defect as a matter of law, and a property owner is not liable for damages caused by a "minor, trivial or insignificant defect" in property. Additionally, Shemesh argued he had no duty to warn of the missing tile both because it was a trivial defect and because it was an open and obvious condition of which Cohen was aware. Shemesh identified 15 undisputed material facts in support of the MSJ. The evidence in support of those facts was Cohen's and Sindeyen's depositions, as well as the photographs about which they were questioned.

The essence of Cohen's opposition to the MSJ was that there was a triable issue of material fact as to whether, in addition to the missing tile, his injuries were caused by the absence of a handrail or the inconsistent height of the steps, and that expert testimony was necessary to "assist in deciding which" was the cause of his injuries. Cohen's opposition to the MSJ was not supported by any declarations. For example, there was no

declaration from Cohen or anyone else attesting to the actual overall height of the stairs from bottom landing to top landing. Likewise, there was no declaration attesting to the actual height of each step. There was no evidence of the date the residence was built and no evidence of what building code provisions were in effect and governed at the time the residence was built. In a "Separate Statement of Disputed Material Fact and Evidence," Cohen disputed four of Shemesh's 15 undisputed facts and asserted five undisputed material facts of his own. Cohen's assertions of disputed facts were supported by a "Compendium of Exhibits" which included, among other things, excerpts from Cohen's and Weight's depositions, photographs and excerpts from various building codes.[2] Cohen argued the evidence in these exhibits was sufficient to establish a triable issue of material fact as to whether his injuries were caused by building code violations, including the lack of a handrail and excessive deviation in stair heights. Although Weight testified that no handrail was required, Cohen argued the various building codes were to the contrary. Cohen also argued that negligence can be inferred from the fact that Bloom fell on the same stairs and Shemesh paid Bloom $3,000 to settle Bloom's claim for damages arising out of injuries he sustained in that fall.

The trial court granted summary judgment in favor of Shemesh. It concluded inspector Sindayen's testimony that the missing tile was not in the path that most people would use to walk down the stairs established that "the missing tile was trivial as matter of law;" the trivial nature of the alleged property defect that caused Cohen's fall, as well as its open and obvious nature (Cohen had known about the missing tile for almost one

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[2] The trial court sustained Shemesh's evidentiary objections to the following six exhibits: the notice identifying *Bloom v. Shemesh* as a related case (Exhibit 1), a judgment against Shemesh in an unrelated unlawful detainer case (Exhibit 2), letters from Bloom's attorney to Shemesh's attorney in the context of *Bloom v. Shemesh* (Exhibits 5, 14), the complaint in *Bloom v. Shemesh* (Exhibit 6), and excerpts from various building codes (Exhibit 15). Exhibit 15 was comprised of excerpts from the following building codes: (1) *Residential Stairway and Handrail Requirements of the City of Modesto, based on the 2007 California Building Code (CBC)*; (2) *Stairs/Handrails and Guards, a handout from the Building and Development Department of the City of Chico*; and (3) *The California Building Code*.

year) were complete defenses to Cohen's general negligence and premises liability claims. The trial court further held that Cohen failed to meet his burden of producing evidence showing the existence of a triable issue of material fact as to either defense. Cohen presented no evidence that the missing tile was not trivial and a statement in the pleadings that the proximate cause of his damages could have been the absence of a handrail and/or stairs of differing heights does not constitute evidence of such. The trial court was not persuaded that Shemesh's settlement of *Bloom v. Shemesh* was evidence that the stairs were in a dangerous condition inasmuch as there was no evidence that the cases were similar or that Shemesh admitted liability for Bloom's injuries.

Cohen timely appealed.

DISCUSSION

A. *The Trivial Defect Ruling*

Cohen challenges the trial court's trivial defect ruling. He argues the trial court erred in failing to consider the lack of a handrail (which Cohen characterizes as a building code violation) and Bloom's prior fall as "aggravating factors" sufficient to undermine the trivial defect finding. Implicit in this argument is that the trial court erred in sustaining Shemesh's objections to evidence relating to Bloom's action against Shemesh and evidence of the building code provisions. We disagree.

The elements of a negligence claim are "(1) a legal duty to use due care; (2) a breach of that duty; and (3) the breach was the proximate or legal cause of the resulting injury. [Citations.]" (6 Witkin, Summary of Cal. Law (9th ed. 1990) Torts, § 835.) A landlord may be held liable to a tenant for negligence when the tenant incurs injuries due to a defective condition of the property. (*Lewis Operating Corp. v. Superior Court* (2011) 200 Cal.App.4th 940, 945.)

"The duty of care imposed on a property owner, even one with actual notice, does not require the repair of minor defects." (*Ursino v. Big Boy Restaurants* (1987) 192 Cal.App.3d 394, 398.) Known as the "trivial defect defense," under this doctrine it "is well established that a property owner is not liable for damages caused by a minor, trivial or insignificant defect in property. [Citation.]" (*Caloroso v. Hathaway* (2004)

122 Cal.App.4th 922, 927.) Whether a defect is trivial is a question of law. (*Ibid*.) In making its determination, the trial court should consider "whether there existed any circumstances surrounding the accident which might have rendered the defect more dangerous than its mere [physical appearance] would indicate. . . . The court should also look at other factors such as whether the accident occurred at night in an unlighted area. Furthermore, the court should see if there is any evidence that other persons have been injured on this *same defect*." (*Fielder v. City of Glendale* (1977) 71 Cal.App.3d 719, 734, italics added.)

Here, Cohen does not contend that the missing tile, in and of itself, was not a trivial defect. Thus, the burden shifted to Cohen to produce evidence from which a reasonable trier of fact could conclude other circumstances rendered the missing tile more dangerous than its physical appearance would otherwise suggest. (*Aguilar*, *supra*, 25 Cal.4th at p. 850.) Cohen did not produce evidence of any such circumstances.

There was no evidence that other persons were injured by the *same defect*. Evidence that Bloom fell on the same stairs was irrelevant because there was no evidence that Bloom's and Cohen's falls were the result of the *same defect*. On the contrary, the undisputed evidence was that Cohen's foot stuck where there was a missing tile located on the *top landing* whereas Bloom's foot stuck on a broken *bottom stair*. Since the evidence was irrelevant, the trial court did not err in sustaining Shemesh's evidentiary objections to evidence relating to Bloom's fall. Even assuming the evidence was admissible, it was not sufficient to establish a triable issue of material fact whether Bloom and Cohen were injured on the *same defect*.

Also unpersuasive is Cohen's argument that the trial court should have considered the lack of a handrail as a factor in making its trivial defect finding because the lack of a handrail was a building code violation. The flaw in Cohen's argument is that he did not produce any evidence from which a reasonable trier of fact could conclude the lack of a handrail was a building code violation in this case. The evidence Cohen relied on to support his argument is inspector Weight's testimony and the excerpts of building codes.

But the trial court sustained Shemesh's evidentiary objections to the building code excerpts.

We begin with the observation that Cohen did not lay the usual foundation for documents submitted as evidence in support of or opposition to a motion for a MSJ (a declaration attesting that the document is a true and correct copy of whatever it is). Aside from that procedural defect, it is inarguable that provisions from building codes adopted by the City of Modesto and Chico have no relevance to a property in Los Angeles and the trial court did not err in sustaining Shemesh's objections to them. Even assuming the California Building Code (CBC) is relevant, the CBC pages Cohen submitted are irrelevant because they are not dated and so it is impossible to tell whether the provisions were the ones that governed at the time the stairs were built. This is a point Weight made at his deposition. Further, although at first blush it appears Cohen attached pages 13 through 33 of the CBC, closer inspection reveals that page 17 is omitted. Page 16 discusses "Stairways and Landings" and page 18 discusses "Guardrails;" there is no provision relating to "Handrails."

Even if we were to consider the excerpts from the City of Modesto and Chico relating to handrails, those provisions state that handrails are required on stairs with *four or more* risers and there was no evidence that the stairs at issue here had four or more risers. Weight testified the stairs had three risers. Weight maintained this was so even though a person walking up the stairs would have to raise their leg four times to get from the driveway to the top landing. Weight explained: "In my opinion, we have a landing, a riser, a riser, a riser that leads to another landing, even though you have to raise your leg four times." Put another way, "The way I see this picture, I see three steps leading to a landing." Cohen introduced no evidence contrary to Weight's testimony that the stairs had a bottom landing, three risers and a top landing.

On this record, Cohen has failed to meet his burden to produce evidence from which a reasonable trier of fact could conclude other circumstances rendered the missing tile more dangerous than its physical appearance. (*Aguilar*, *supra*, 25 Cal.4th at p. 850.)

B. *Cohen Did Not Establish a Triable Issue of Material Fact as to Whether His Injuries Were Caused by the Absence of a Handrail*

Cohen contends the trial court erred in not considering "the absence of a code required handrail to be a triable issue of material fact unless its absence directly caused injury." We disagree.

"The failure of a person to exercise due care is presumed if: [¶] (1) He violated a statute, ordinance, or regulation of a public entity; [¶] (2) The violation proximately caused death or injury to person or property; (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance or regulation was designed to prevent; and (4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted." (Evid. Code, § 669, subd. (a).)

Under Evidence Code section 669, violation of a building code is negligence per se if the injury resulted from an occurrence of the nature which the code provision was designed to prevent. (*Morris v. Horton* (1994) 22 Cal.App.4th 968, 972; Evid. Code, § 669.) Building code provisions prescribing handrails, like those prescribing the height and width of stairs, are designed to ensure the safety of persons using the staircase. (*Morris,* at p. 972.) The construction and application of a statute, ordinance or regulation to undisputed facts "constitutes a question of law to be determined by the court. [Citations.]" (*Vaerst v. Tanzman* (1990) 222 Cal.App.3d 1535, 1542.)

Here, Cohen argues the trial court conceded that there was a triable issue of material fact as to whether a handrail was required, but then the trial court came to the erroneous conclusion that a code violation does not create a triable issue of material fact unless the code violation "directly contributed to the fall." His argument is based on the following statement in the written Order Granting Motion For Summary Judgment: "[I]nspector Weight testified that there were problems with the elevation of the risers, and also that there may have been a handrail requirement on the stairs, but no handrail was present. [¶] [Shemesh] correctly notes in reply that code violations do not create triable issues of material fact unless there is evidence that the code violation directly contributed

to the *fall.* . . . . [¶] [Cohen] herein argues that the deviation in the rise of the stairs and/or the lack of a handrail 'could have' contributed to his fall, but he provides no evidence to support his conclusion. Notably, his entire deposition testimony centers on the contention that he fell due to the problem with the missing tile." (Italics added.)

As we read the statement, the trial court used the word "fall" as an imprecise synonym for "injury." Understood in this manner, it is a correct statement of law: under Evidence Code section 669, subdivision (a), a building code violation does not create a triable issue of material fact unless there is evidence that the code violation proximately caused the *injury*. Cohen has failed to produce any such evidence.

As we explained in the preceding section, Cohen did not produce any evidence from which a reasonable trier of fact could conclude that the lack of a handrail was a building code violation. Nor did he produce any evidence that the failure to have a handrail was beneath the standard of care under any other theory. Even assuming it was a building code violation, Cohen did not testify in declaration or deposition form that the absence of a handrail caused or even contributed to his injuries. At his deposition, Cohen was clear that his foot stuck on the missing tile.

On this record, Cohen has not shown the existence of a triable issue of material fact as to whether the lack of a handrail caused his injuries.

DISPOSITION

The summary judgment is affirmed. Shemesh shall recover his costs on appeal.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.