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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

LINDA REITMAN, Plaintiff and Appellant, v. ADR/PREFERRED BUSINESS PROPERTIES, Defendant and Respondent.	B278888 (Los Angeles County Super. Ct. No. BC548892)

APPEAL from a judgment of the Superior Court of Los Angeles County, Holly J. Fujie, Judge. Affirmed.

Ivie, McNeill & Wyatt, Rickey Ivie and Chandler A. Parker, for Plaintiff and Appellant.

Gates, O'Doherty, Gonter & Guy, F.X. Sean O'Doherty and Thomas A. Scutti, for Defendant and Respondent.

Plaintiff and appellant Linda Reitman (Reitman) tripped and fell over a raised portion of a tree well cover on a sidewalk in front of real property owned by 26 Oak Partners, LLC (Oak Partners). Reitman sued Oak Partners and the City of Los Angeles, alleging a single cause of action for premises liability. Two years into the litigation, Reitman named Oak Partners' property management company, respondent ADR/Preferred Business Properties (ADR), as an additional defendant. Shortly thereafter, Oak Partners filed a motion for summary judgment arguing, among other things, Reitman could not demonstrate Oak Partners owed her a duty of care. ADR joined in Oak Partners' summary judgment motion and the trial court granted summary judgment for ADR, finding it owed no duty to Reitman because it did not own, possess, or control either the sidewalk or the tree that caused the portion of the tree well cover to rise.[1] We consider whether the trial court's grant of summary judgment for ADR was proper.

I. BACKGROUND

A. The Accident

Oak Partners owned real property located at 4940 Van Nuys Boulevard in Sherman Oaks, California (the Property). The Property is the site of a commercial office building and an adjacent parking structure. Oak Partners also owned and arranged to maintain ficus trees that were directly in front of the office building.

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[1] Oak Partners settled with Reitman before the summary judgment hearing and is not a party to this appeal.

Oak Partners did not own a myrtle tree located on the edge of the sidewalk nearest the street and 18 feet from the closest of the ficus trees, nor its roots or its tree well. Oak Partners did not participate in the design, planning, planting, pruning, trimming, cutting or repair of the myrtle tree, or any alteration or work performed on, underneath, or next to the myrtle tree or its roots. Oak Partners also did not participate in the design, planning, installation, construction, reconstruction, or repair of the myrtle tree's tree well, and did not participate in any alteration of, or work performed on, underneath, or next to, the tree well.

Oak Partners entered into a property management agreement with ADR pursuant to which ADR was obligated to manage, operate, and maintain the Property. The agreement describes the Property as "an office building and adjacent parking structure at 4940 Van Nuys Blvd., in Sherman Oaks" and specifies it is "the only real property to come under the terms of this Agreement." The agreement specified ADR was to maintain "the Property" by performing, among other things, "the cleaning and maintenance of public, common areas, and tenant spaces as required per lease, repairs and maintenance of all building systems including, but not limited to, the plumbing system, electrical system, carpentry and décor, HVAC system, elevator system, as such may be the responsibility of [Oak Partners] under the lease terms of the respective tenants." ADR was retained to manage the Property from September 2012 through August 2013.

In July 2013, Reitman tripped while walking on the sidewalk near the myrtle tree. Specifically, Reitman tripped on an upraised concrete slab covering the tree well immediately surrounding the myrtle tree.

B. Reitman's Lawsuit

Reitman filed a form complaint against the City of Los Angeles, Oak Partners, and Doe defendants in June 2014. The complaint asserted a cause of action for premises liability and alleged "[d]efendants maintained and/or owned the sidewalk located adjacent to [the building on the Property], ... caused and allowed a dangerous condition to develop on the Property . . . . [and] failed to warn Plaintiff of the dangerous condition." In mid-March 2016, Reitman amended the complaint to substitute ADR for one of the Doe defendants.

C. Summary Judgment

1. Procedural matters and the parties' arguments

Shortly after ADR was named as a defendant, Oak Partners filed a motion for summary judgment arguing it owed Reitman no duty of care. Specifically, Oak Partners argued it did not own, possess, or control the sidewalk or myrtle tree, and had not created the alleged dangerous condition. The motion also argued Reitman could not establish Oak Partners had breached any duty owed to Reitman or caused her damages.

With its summary judgment motion, Oak Partners submitted a declaration from David Knell (Knell), a professional land surveyor who opined, based on the grant deed conveying ownership of the Property, that Oak Partners did not own the portion of the sidewalk where the myrtle tree and upraised concrete slab were located.[2] Oak Partners also submitted a

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[2] Knell determined the tree well's concrete slab that Reitman tripped on was approximately ten feet outside the boundary to Oak Partners' real property line.

declaration from Albert Ghiam, its managing member, who declared Oak Partners had not been involved in designing, planning, or working on the sidewalk or the myrtle tree's tree well—nor in the maintenance of the myrtle tree itself.

After Oak Partners filed its summary judgment motion, ADR answered the complaint and filed an ex parte application to continue the trial date. The appellate record does not contain a transcript of the hearing on the application, but the record does indicate Reitman appears to have entered into a stipulation (also not included in the record) that "allowed ADR to join" Oak Partners' summary judgment motion. Presumably on that basis, the trial court determined (1) ADR would be permitted to join Oak Partners' motion for summary judgment as a moving party and (2) all rulings on the motion would be equally applicable to ADR.

Reitman opposed Oak Partners' and ADR's (via joinder) summary judgment motion. Reitman argued there were triable issues of material fact regarding Oak Partners' ownership of the sidewalk and its control over the allegedly dangerous condition—the raised tree well concrete slab. Reitman submitted three expert declarations with her opposition: (1) the declaration of Michael P. Russell, a real estate broker who opined on the meaning of the word "public" in the property management agreement's description of ADR's duties (i.e., "the cleaning and maintenance of public, common areas, and tenant spaces as required per lease"); (2) the declaration of Robert D. Hennon, a professional land surveyor who opined that "if the public street easement known as Van Nuys Boulevard were vacated by the City of Los Angeles, . . . fee title ownership of said area . . . would be held by the then owners of the [Property]."; and (3) the three-

page declaration of an arborist, Guy Stivers (Stivers), who opined that watering of the ficus tree closest to the myrtle tree had allowed water to drain under the concrete paving and over to the myrtle tree, which then caused the myrtle to grow vigorously, increased the size of the tree's roots, and lifted the tree well cover on which Reitman tripped.[3]

Prior to the summary judgment hearing, Oak Partners informed the trial court it had reached a settlement with Reitman. Thus, only counsel for ADR appeared at the hearing to argue in favor of granting summary judgment.[4]

2. The trial court's ruling

The trial court found ADR did not owe a duty of care to Reitman because ADR (1) did not own, possess, maintain, or control the portion of the sidewalk with the raised tree well cover on which Reitman tripped, and (2) did not contribute to that

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[3] The substance of Stivers' opinion was set forth in the final two paragraphs of his declaration. Those two paragraphs, quoted in full, state: "10. It is my opinion that irrigation from the closest ficus tree drained under the concrete paving toward the . . . myrtle [tree]. The drainage was facilitated by ficus tree roots lifting the concrete paving in search of water. The irrigation drainage caused the . . . myrtle to grow vigorously, increasing the size of the tree's buttress roots that lifted the concrete tree well cover several inches. Ms. Reitman tripped over the lifted concrete tree well cover. [¶] 11. It is my further opinion that this condition, the lifted concrete tree well cover, existed for five to seven years prior to Ms. Reitman's fall."

[4] No transcript of the hearing is included in the appellate record.

dangerous condition. The trial court specifically found it was undisputed Oak Partners did not own the sidewalk where the myrtle tree was located;[5] the agreement between Oak Partners and ADR to maintain the premises explicitly applied only to the building owned by Oak Partners and the adjacent parking structure, not the sidewalk; the fact that Oak Partners contracted with ADR to maintain its premises was insufficient to create a triable issue as to whether it maintained the sidewalk; and the possibility that the maintenance of the ficus trees may have inadvertently caused the myrtle tree to grow was not enough to impose a duty of care on Oak Partners or ADR. The trial court entered judgment in ADR's favor.

II. DISCUSSION

The dispute between the parties centers on whether ADR owed Reitman a duty of care with respect to the raised portion of the tree well. The resolution of this issue turns on the answer to two questions. First, was there a triable issue of material fact on the question of whether ADR had a contractual duty to maintain the myrtle tree's tree well?[6] And second, was there a triable issue

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[5] The trial court acknowledged Hennon's opinion that Oak Partners held fee title ownership to the center line of the street if the public street easement were vacated, but the court noted Reitman had provided no evidence the easement had been vacated.

[6] The issue of whether Oak Partners owned the entirety of the sidewalk is irrelevant to the resolution of the appeal from summary judgment in favor of ADR. As we shall discuss in greater detail, the scope of ADR's contractual responsibilities were defined not by the precise boundaries of Oak Partners' real

of material fact as to whether ADR contributed to the "dangerous condition" of the raised tree well by irrigating and maintaining a ficus tree located on Oak Partners' property?

The answer to both questions is no. The plain language of the property management agreement limits the area ADR was contractually obligated to manage to the "office building and adjacent parking structure" at the Property, and the agreement is not reasonably susceptible to Reitman's interpretation—one that treats the tree well of the myrtle tree located more than 18 feet away from the building on the Property as part of the Property's "public" space that ADR was obligated to maintain. In addition, Stivers' conclusory opinion concerning the effect of ficus tree irrigation fails to create a triable issue of fact concerning whether ADR contributed to the dangerous condition such that it could owe Reitman a duty of care.

A. Standard of Review

"""A trial court properly grants a motion for summary judgment only if no issues of triable fact appear and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); [citation].) 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. [Citation.]" [Citation.] We review the trial court's decision de novo, liberally construing the evidence in

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property interest but by the terms of the property management agreement. There is also no evidence in the summary judgment record that ADR had been maintaining the myrtle tree or the area of its tree well.

support of the party opposing summary judgment and resolving doubts concerning the evidence in favor of that party.' (*State of California v. Allstate Ins. Co.* (2009) 45 Cal.4th 1008, 1017-1018[ ].)" (*Ennabe v. Manosa* (2014) 58 Cal.4th 697, 705.)

B. The Trial Court Properly Granted Summary Judgment for ADR

"The general rule in California is that . . . 'each person has a duty to use ordinary care and "is liable for injuries caused by [its] failure to exercise reasonable care in the circumstances . . . ."' [Citation.]" (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 771; Civ. Code, § 1714, subd. (a).) "'In premises liability cases, summary judgment may properly be granted where a defendant unequivocally establishes its lack of ownership, possession, or control of the property alleged to be in a dangerous or defective condition.' (*Gray v. America West Airlines, Inc.* (1989) 209 Cal.App.3d 76, 81[ ]; *Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 134[ ].) Generally, absent statutory authority to the contrary, a landowner is under no duty to maintain in a safe condition a public street or sidewalk abutting upon his property (*Sexton v. Brooks, supra,* 39 Cal.2d at p. 157), or to warn travelers of a dangerous condition not created by him but known to him and not to them (37 Cal.Jur.3d, Highways and Streets, § 70, pp. 178-179)." (*Seaber v. Hotel Del Coronado* (1991) 1 Cal.App.4th 481, 487-488; accord, *Medina v. Hillshore Partners* (1995) 40 Cal.App.4th 477, 481 ["Absent a special relationship, the landowner has no duty to protect members of the public . . . on a public sidewalk or street"].)

"One exception to this general rule is when a person's conduct or activity on another's land causes or increases the risk

from a hazardous condition on that land." (*Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1178.) "A duty to protect others from harm arises in cases such as these because the defendant either created the dangerous condition on someone else's property . . . or by some affirmative conduct aggravated the danger to the plaintiff . . . ." (*Id.* at p. 1179.)

1. ADR had no contractual duty to maintain the sidewalk area where the tree well of the myrtle tree was located

"'Contract interpretation presents a question of law which this court determines independently.' (*Ben–Zvi v. Edmar Co.* (1995) 40 Cal.App.4th 468, 472[ ].) ""The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties.' [Citation.] 'Such intent is to be inferred, if possible, solely from the written provisions of the contract.' [Citation.] 'If contractual language is clear and explicit, it governs.' [Citation.]"' (*Powerine Oil Co., Inc. v. Superior Court* (2005) 37 Cal.4th 377, 390[ ].)" (*P & D Consultants, Inc. v. City of Carlsbad* (2010) 190 Cal.App.4th 1332, 1340.)

"'The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.' ([Civ. Code,] § 1641.) 'A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties.' ([Civ. Code,] § 1643.) 'The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them

by usage, in which case the latter must be followed.' ([Civ. Code,] § 1644.) [¶] In sum, courts must give a "'reasonable and commonsense interpretation'" of a contract consistent with the parties' apparent intent. [Citation.]" (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2003) 107 Cal.App.4th 516, 525-526.)

"When a dispute arises over the meaning of contract language, the first question to be decided is whether the language is 'reasonably susceptible' to the interpretation urged by the party. If it is not, the case is over. [Citation.] If the court decides the language is reasonably susceptible to the interpretation urged, the court moves to the second question: what did the parties intend the language to mean?" (*Southern Cal. Edison Co. v. Superior Court* (1995) 37 Cal.App.4th 839, 847-848.)

The property management agreement is not reasonably susceptible to the interpretation Retiman proffers, namely, that in referring to an obligation to maintain "public" spaces the agreement "would necessarily include any portion of real property that could be used by members of the public, such as a public sidewalk." The agreement explicitly defines "the only real property to come under the terms of this Agreement" as "[t]he property described and identified as an office building and adjacent parking structure at 4940 Van Nuys Blvd., in Sherman Oaks." Another provision of the agreement specifies ADR was to perform "the cleaning and maintenance of public, common areas, and tenant spaces as required per lease . . . ." A natural reading of the agreement thus indicates that the "public" areas the agreement required ADR to maintain were only those areas within the limited scope of the "office building and adjacent parking structure."

Reitman arguments to the contrary run counter to the agreement's terms. Even if, as Reitman argues, there was a disputed issue of fact regarding whether Oak Partners owned the sidewalk, that would not alter the agreement's definition of the property to be managed and the scope of ADR's responsibilities. Reitman seems to believe that the scope of ADR's engagement would be automatically expanded if Oak Partners owned the sidewalk. However, the agreement's express limitation of the property at issue to the "office building and adjacent parking structure" precludes such an interpretation.

Reitman also relies on the declaration of her industry custom and practice expert, Michael Russell, for the proposition that the "public" areas mentioned in the agreement included the public sidewalk. Because we hold the express terms of the agreement are not reasonably susceptible to Reitman's proffered interpretation, the Russell declaration, offered as extrinsic evidence of the property management agreement's meaning, is not properly part of our interpretive analysis. (*Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 522 ["[E]xtrinsic evidence is not admissible in order to give the terms of a written instrument a meaning of which they are not reasonably susceptible"]; accord, *G & W Warren's, Inc. v. Dabney* (2017) 11 Cal.App.5th 565, 576; see also *In re Tobacco Cases I* (2010) 186 Cal.App.4th 42, 47 ["'Where the parties have reduced their agreement to writing, their mutual intention is to be determined, whenever possible, from the language of the writing alone'"].)

Even were we to consider the Russell declaration, it does not address the limited definition of "Property" used by the parties in the property management agreement. Russell did generally opine that the term "public area" in a property

management agreement "never refers to an area inside of the commercial building" and that it is standard in commercial agreements for "public area" to refer to "public areas such as the sidewalk adjacent to the building." But an opinion that the public area included the "sidewalk adjacent to the building" is not substantial evidence on which a jury could rely to specifically conclude that a tree well near the street curb and some 18 feet from the building on the Property would be part of the sidewalk that fits within Russell's conception of the customary usage of the term "public area." (See *Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 162-163 [plaintiff must produce "substantial responsive evidence" sufficient to establish a triable issue of material fact].)

2. Reitman did not raise a triable issue of material fact as to whether ADR created or contributed to the dangerous condition

Reitman argues ADR owed her a duty of care because ADR "contributed to" the condition that caused Reitman injury and the defect is thus "somehow attributable to" ADR. Reitman derives this contention from a single line in *Jones v. Deeter* (1984) 152 Cal.App.3d 798 (*Jones*), which states that "[w]hen the defect in the sidewalk is somehow attributable to the abutting property owner, the sidewalk accident decisions doctrine does not apply." (*Id.* at p. 803.) *Jones*, however, does not stand for the broad proposition Reitman urges.

In *Jones*, the plaintiff tripped over a break in the sidewalk which was allegedly caused by the roots of a magnolia tree pressing up from underneath the concrete. (*Jones*, *supra*, 152 Cal.App.3d at p. 801.) The tree, which was planted in a parkway

between the sidewalk and the street, was habitually maintained by the city. (*Id.* at pp. 805-806.) *Jones* explains, as noted above, that the sidewalk accident doctrine does not apply when the defect in the sidewalk is "somehow attributable to the abutting property owner." (*Id.* at p. 803.) However, *Jones* also explains the circumstances under which a defect is "attributable" to the abutting owner: "In settings where the abutting owners have planted the trees or have habitually trimmed or cared for them, these abutting owners have the duty to maintain the trees in a safe condition toward pedestrians. The contrary situation exists when the city has planted the trees on the parkway and has performed all necessary maintenance on them. Under these latter circumstances, the duty to maintain the trees in safe condition rests with the city; dangerous conditions caused by the trees are attributable to the city, not to abutting owners." (*Id.* at p. 805.) The *Jones* court concluded the alleged defect or dangerous condition there, a break in the sidewalk caused by growth of tree roots, was attributable to the city because the city "habitually" maintained the trees. (*Id.* at pp. 805-806.)

The summary judgment evidence did not demonstrate ADR maintained the myrtle tree, habitually or otherwise. The evidence showed Oak Partners did not own, had not planted, and did not maintain or otherwise do any work on the myrtle tree. The evidence also indicated that Oak Partners and ADR believed the City of Los Angeles maintained the tree, and ADR understood it was not allowed to do any work on that tree.

Reitman's reliance on the declaration of arborist Stivers does not suffice to create a genuine factual dispute requiring trial. Stivers' declaration stated he inspected the Property in May 2016. Stivers opined the pavement between the ficus tree

and the myrtle tree was lifting, and this was "most likely" because ficus roots were growing under the pavement in search of water. He also opined that irrigation from the ficus tree closest to the myrtle tree drained under the concrete paving toward the myrtle tree, and that the irrigation drainage caused the myrtle tree to "grow vigorously," increasing the size of the tree's roots. Finally, Stivers opined the dangerous condition, the lifted concrete tree well cover, had existed for five to seven years prior to Reitman's fall.

Stivers' declaration was conclusory and quite thin on foundation. He provided no significant explanation for his opinion that additional water caused the myrtle tree's roots to "grow vigorously." The trial court would have been justified in disregarding the Stivers' declaration in its entirety. (See *McGonnell v. Kaiser Gypsum Co.* (2002) 98 Cal.App.4th 1098, 1106 ["An expert's speculations do not rise to the status of contradictory evidence, and a court is not bound by expert opinion that is speculative or conjectural. [Citations.] Plaintiffs cannot manufacture a triable issue of fact through use of an expert opinion with self-serving conclusions devoid of any basis, explanation, or reasoning"].) But even considering Stivers' opinion in assessing whether summary judgment was proper, the declaration does not raise a triable issue of material fact as to whether ADR owed Reitman a duty for two independent reasons.

First, irrigating a ficus tree located eighteen feet away from a myrtle tree near the curb of a sidewalk does not constitute affirmative conduct contributing to the dangerous condition of the myrtle tree's roots breaking out from a tree well—at least absent evidence, and there was none here, that the party irrigating the ficus knew or should have suspected the irrigation would by some

underground process affect the myrtle tree. None of the factors courts consider when deciding to impose a duty of care would support the existence of a duty in such circumstances. (See, e.g., *Jacobs v. Coldwell Banker Residential Brokerage Co.* (2017) 14 Cal.App.5th 438, 446 [discussing factors identified in *Rowland v. Christian* (1968) 69 Cal.2d 108, including "the foreseeability of harm to the plaintiff, the burden to the defendant[,] and the consequences to the community of imposing the duty"].)

Second, Stivers opined that the raised concrete tree well cover existed for five to seven years prior to Ms. Reitman's fall. ADR, however, was retained to manage the property just from September 2012 through August 2013. Stivers states only that "irrigation from the closest ficus tree" caused the myrtle tree to grow vigorously; there is nothing in his declaration that suggests it was irrigation *by ADR* (or its agent) that was responsible for, or aggravated, the vigorous root growth. The Stivers declaration therefore cannot be substantial evidence on which a jury could rely to find the dangerous condition was attributable to ADR, or that ADR aggravated or contributed to the dangerous condition.

DISPOSITION

The judgment is affirmed. Respondent shall recover its costs on appeal.

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BAKER, J.

We concur:

KRIEGLER, Acting P.J.

DUNNING, J.*

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