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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

STEVEN TEPPER et al., Plaintiffs and Appellants, v. ALAN NOELLE ENGINEERING et al., Defendants and Respondents.	2d Civil No. B285253 (Super. Ct. Nos. 15CV02718 & 15CV00404) (Santa Barbara County)

Steven and Noriko Tepper (the Teppers) brought this action against the architect and an electrical engineer on a theater remodeling project. They contend that batteries installed in an office emitted toxic gases that damaged Steven Tepper's lungs. The trial court granted both defendants summary judgment under the "completed and accepted" doctrine. The doctrine releases design professionals from liability for patent defects once the construction is completed and accepted by the building's owner. The trial court also granted the engineer

summary judgment on the ground that he owed no duty to the Teppers.

We reverse. The defendants failed to show the defect was patent as a matter of law, and the engineer failed to show it owed no duty to the Teppers.

FACTS

The Granada Theatre in Santa Barbara is owned and operated by the Santa Barbara Center for the Performing Arts (the Theatre). Between March of 2007 and December of 2008 the theatre underwent renovations.

The renovations included the installation of batteries and a power inverter as a backup to the theatre's electrical system. The inverter was installed in the theatre's electrical room and the batteries were installed in the adjacent production manager's office (the office). Both rooms are in the basement. The office is approximately 120 square feet in size. The batteries were contained in two large orange metal storage lockers with ventilation slots on the top and bottom. Signs on the outside of the lockers warned of high voltage. The lockers containing the batteries were two to three feet from the desk.

The installation manual for the inverter and batteries calls for the inverter to be installed in a cool, dry place with "normal ventilation for human habitation." The manual notes that California regulations require that the batteries be installed in a "service room." The manual also provides that the batteries are not to be installed in a sealed room or container. The manual warns, "Batteries contain corrosive acids or caustic alkalis and toxic materials and can rupture and leak if mistreated," and "Every type of battery can produce hydrogen gas."

Phillips Metsch Sweeney Moore Architects, Inc. (Architect) designated the office as the place where the batteries would be installed. Alan Noelle Engineering (Engineer) approved the installation. The Theatre owner was provided with a copy of the inverter and battery installation manual.

After the remodel the office was occupied by David Johnson. In October 2011 the Theatre's director of programs and activities, Kate Kurlas, e-mailed Johnson: "Hi Dave, Can you confirm why you moved out of the basement production office? Some of us have concerns about the safety of sitting so close to high voltage equipment. I'd like your opinion on this. Also, can you let me know what exactly that high voltage equipment does? [¶] Thanks!" Johnson replied: "I primarily moved because the office was too small (caused by the equipment being there, though not designed to be there) and too remote from the sight of the stage. Secondarily, the ventilation in that room and many rooms in the basement is nearly imperceptible. I like to have air, and coupled with the lack of facts about the batteries felt the low ventilation may be a problem for my long term usage."

After Kurlas e-mailed Johnson she asked a Theatre employee, Zander Furlong, to review all of the operations and maintenance manuals and put them in binders. There is no evidence the Theatre took any further steps to ensure the safety of the office.

The Theatre hired Steven[1] in March 2012 as the facilities manager. He occupied the office. There are two ventilation registers in the office. But Steven could not feel any ventilation. At some point he raised a ceiling tile and noticed there was no air duct attached to the ventilation registers.

[1] We use Steven Tepper's first name for clarity.

Steven claims he started to smell a rotten egg odor in November or December 2013. In February 2014 he picked open the locks on the battery cabinets and noticed some of the batteries were beginning to bulge. In July 2014 Kurlas noticed that the batteries in the cabinets were bulging. Kurlas declared this was the first time she realized that the batteries posed some hazard. By October 2014, there was a strong odor of rotten eggs in the office, the temperature in the office had risen to over 100 degrees, and the battery cabinets were hot to touch. A testing of the air in the office revealed a sulfuric acid concentration roughly six times the safe level.

An electrochemist, John Olson, declared that all of the evidence leads to the conclusion the batteries suffered "thermal runaway." Thermal runaway can be caused by overcharging. An increase in temperature causes the batteries to emit gas, including toxic sulfur gases.

The Teppers brought an action against the Theatre and its managers alleging they had actual knowledge of the dangerous condition but concealed their knowledge from Steven. They brought a separate action against Architect and Engineer alleging Architect negligently designed, and Engineer negligently approved, the placement of the batteries. Both actions alleged toxic sulfur gases emitted by the batteries damaged Steven's lungs. The trial court granted Architect's motion to consolidate the actions.

DISCUSSION

Standard of Review

Summary judgment is properly granted only if all papers submitted show there is no triable issue as to any material fact and the moving party is entitled to a judgment as a

matter of law. (Code Civ. Proc., § 437c, subd. (c).) The court must draw all reasonable inferences from the evidence set forth in the papers except where such references are contradicted by other inferences or evidence which raise a triable issue of fact. (*Ibid*.) In examining the supporting and opposing papers, the moving party's affidavits or declarations are strictly construed and those of the opponent liberally construed, and doubts as to the propriety of granting the motion should be resolved in favor of the party opposing the motion. (*Szadolci v. Hollywood Park Operating Co.* (1993) 14 Cal.App.4th 16, 19.)

The moving defendants have the initial burden of showing that one or more elements of a cause of action cannot be established. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) Where they have carried that burden, the burden shifts to the plaintiffs to show a triable issue of material fact. (*Ibid*.) Our review of the trial court's grant of the motion is de novo. (*Id*. at p. 767.)

The Completed and Accepted Doctrine

The Teppers contend the trial court erred in granting Architect and Engineer summary judgment based on the "completed and accepted" doctrine. We agree because there is a triable issue of fact whether the defect here was latent.

"[W]hen a contractor completes work that is accepted by the owner, the contractor is not liable to third parties injured as a result of the condition of the work, even if the contractor was negligent in performing the contract, unless the defect in the work was latent or concealed. [Citation.] The rationale for this doctrine is that an owner has a duty to inspect the work and ascertain its safety, and thus the owner's acceptance of the work shifts liability for its safety to the owner, provided that a

reasonable inspection would disclose the defect. [Citation.]" (*Jones v. P.S. Development Co., Inc.* (2008) 166 Cal.App.4th 707, 712 (*Jones*), disapproved on other grounds in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 532, fn. 7.)

The doctrine applies to patent defects, but not latent defects. (*Neiman v. Leo A. Daly Co.* (2012) 210 Cal.App.4th 962, 969 (*Neiman*).) A defect is patent if an average consumer would have discovered the defect in the course of a reasonable inspection. (*Creekridge Townhome Owners Assn., Inc. v. C. Scott Whitten, Inc.* (2009) 177 Cal.App.4th 251, 256.) Whether a defect is patent or latent is a question of fact, unless the defect is obvious in the context of common experience. (*Ibid.*)

The "completed and accepted" doctrine has been applied where the defect would be obvious to any reasonable building owner. It has been applied to water pooling on a concrete floor, creating a slip and fall hazard (*Sanchez v. Swinerton & Walberg Co.* (1996) 47 Cal.App.4th 1461), machine mounting bolts protruding from the floor, creating a tripping hazard (*Jones*, *supra*, 166 Cal.App.4th 707), and an improperly delineated stairway in a theater, creating a falling hazard (*Neiman*, *supra*, 210 Cal.App.4th 962).

The Teppers allege Steven's injury was caused by toxic gases being emitted into an inadequately ventilated room through the process known as thermal runaway. Assuming inadequate ventilation can be classified as a patent defect, thermal runaway, at least as a matter of law, cannot. The effect of thermal runaway did not become manifest until 2014 when Steven and Kurlas noticed the batteries were bulging. More importantly, it took expert analysis to determine the cause was thermal runaway.

Nevertheless, Architect and Engineer rely on the existence of the installation manual for the inverter and batteries as evidence of a patent, rather than latent, defect. But Architect and Engineer cite no authority for the proposition that the property owner has a duty to review technical manuals to determine for itself whether an electrical appliance is properly installed. And even assuming such a duty, the installation manual does not mention thermal runaway. At most it warns that batteries contain toxic materials that can rupture and leak if "mistreated." The manual does not define "mistreated."

Architect and Engineer point out that the batteries were installed in a small room and contained in bright orange lockers with prominent warning signs on the front. But the signs warned about high voltage, not thermal runaway or toxic gases. A reasonable trier of fact could determine that thermal runaway and the resulting release of toxic gases is a latent defect.

Architect and Engineer claim that the e-mail of October 2011 between Kurlas and Johnson shows that the Theatre management was aware of the problem. Kurlas's e-mail expresses concerns about the danger of sitting too close to high voltage equipment, not toxic gases in an improperly ventilated office. Johnson's reply relates to Kurlas's expressed concern. The e-mail does show Johnson knew the office had inadequate ventilation. But it does not show Theatre management knew that the inadequate ventilation could combine with thermal runaway to produce a toxic environment in the office.

Moreover, the test of whether a deficiency is patent is an objective one; that is, what a reasonable consumer would discover on a reasonable inspection. (*Tomko Woll Group Architects v. Superior Court* (1996) 46 Cal.App.4th 1326, 1339.)

The test is not whether any particular person or persons discovered the defect. (*Ibid*.)

Architect and Engineer claim that the allegations of the complaint include a judicial admission of the Theatre's knowledge. In their complaint against the Theatre, the Teppers allege "Plaintiff is informed and believes that from as early as January[] 2008, Defendants had actual knowledge of the danger, safety and health hazards presented by the existence and placement of the 60 large industrial batteries in the sealed, locked metal cabinets in close proximity to Plaintiff and others, and their own failure to follow or adhere to the safety requirements relating to the batteries as set forth in the Operations & Maintenance Manual, but intentionally failed to disclose this information to Plaintiff." But the complaint against Architect and Engineer, with which the complaint against the Theatre was consolidated, contains no allegation that the Theatre was aware of the danger. The Teppers argue they may properly plead inconsistent counts.

Architect and Engineer cite *Gentry v. eBay, Inc.* (2002) 99 Cal.App.4th 816, for the proposition that a plaintiff may properly plead inconsistent theories of recovery but not inconsistent facts. *Gentry* says: "'While inconsistent *theories* of recovery are permitted [citation] a pleader cannot blow hot and cold as to the *facts* positively stated. [Citations.]' [Citation.]" (*Id*. at pp. 827-828; see *Manti v. Gunari* (1970) 5 Cal.App.3d 442, 449.)

Here the facts are not positively stated; they are stated on information and belief. Where the exact nature of the facts are in doubt or the defendant's liability depends on facts not well known to the plaintiff, the pleading may properly set forth

alternative theories in varied and inconsistent counts. (*Rader Co. v. Stone* (1986) 178 Cal.App.3d 10, 29.) Where, as here, the building project was completed four years before Steven started working at the Theatre, no judicial admission arises from pleading inconsistent facts in an unverified complaint. The Teppers can properly allege that the Theatre had knowledge of the hazard as early as January 2008 in causes of action against the Theatre, while alleging no such knowledge in causes of action against Architect and Engineer.

Finally, Architect and Engineer's reliance on Code of Civil Procedure section 337.1 is misplaced because the defect was latent. Subdivision (a) of the section provides in part: "[N]o action shall be brought to recover damages from any person performing or furnishing the design, specifications, surveying, planning, supervision or observation of construction or construction of an improvement to real property more than four years after the substantial completion of such improvement for any of the following: [¶] (1) Any patent deficiency in the design, specifications, surveying, planning, supervision or observation of construction or construction of an improvement to, or survey of, real property; [¶] . . . [¶] (3) Injury to the person or for wrongful death arising out of any such patent deficiency." A reasonable trier of fact could determine that Steven's injury arose out of a latent, not patent, defect.

Engineer's Duty of Care

The Teppers contend the trial court erred in granting Engineer summary judgment based on lack of duty. We agree because there is a triable issue of fact as to duty.

A design professional who is not subordinate to any other design professional has a duty to third parties even in the

absence of privity. (*Beacon Residential Community Assn. v. Skidmore, Owings & Merrill LLP* (2014) 59 Cal.4th 568, 581 (*Beacon Residential Community*).) Engineer has the initial burden of showing the Teppers cannot establish the existence of a duty. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853.)

The trial court found it is undisputed that Engineer's role in the project was limited to preparing the "Submittal Review Document." Engineer describes the Submittal Review Document as "merely document[ing] the previous design decision by [Architect] and owner to put the batteries and cabinet in the subject location as part of the remodel of the Theatre in 2007-2008."

But Engineer's own affidavit shows its role went beyond merely documenting decisions made by others. Alan Noelle declared he was hired after the design was complete "to provide responses to issues which arose because the engineer of record was no longer involved." He further declared: "There was an owner representative present in a meeting in early 2007 where the type of batteries to be installed was discussed, including by me, at which time all present were made aware that the batteries were to arrive in a cabinet. This design was approved and accepted in that meeting. When I discussed the batteries, I explained that the batteries must be serviced, as specified in the manual." Finally he stated: "By approving the [Submittal Review Document] I followed the exact specifications of the manufacturer, which allowed the batteries to be placed in an office that had ventilation, which the subject office had." But there was evidence that the office vents are not, in fact, connected

to air ducts, even though Engineer declared that the plans show ventilation.

A reasonable trier of fact could conclude that Engineer was acting as a design professional who discussed and approved the installation of the batteries in the office. Although Engineer did not participate in preparing the original plans, a reasonable trier of fact could conclude he was not subordinate to any other design professional at the time of the final approval.

The trial court stated it is undisputed Steven was not an employee of the Theatre at the time Engineer worked on the project and that Steven was not a specifically intended beneficiary of the Submittal Review Document. No specific person need be the intended beneficiary of the design professional's work. (See *Beacon Residential Community*, *supra*, 59 Cal.4th at p. 571 [architect owes duty of care to future homeowners in condominium development].) A reasonable trier of fact could conclude Engineer knew or should have known the Theatre basement would be used by Theatre employees who could be harmed by Engineer's negligence.

Engineer claims it is undisputed that the batteries were installed according to the manufacturer's instructions. But the claim goes to whether Engineer breached his duty. The trial court granted summary judgment on the ground that Engineer had no duty. In any event the installation manual requires the batteries to be installed in a service room, not an office.

DISPOSITION

The judgment is reversed. Costs on appeal are awarded to the Teppers.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Pauline Maxwell, Judge

Superior Court County of Santa Barbara

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