Filed 10/31/17 Rokni v. Kavian LLC CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ROKNEDIN ROKNI, Plaintiff and Appellant, v. KAVIAN LLC et al., Defendants and Respondents.	B269208 (Los Angeles County Super. Ct. No. BC523107)

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

Southern California Law Group and Ross K. Reghabi for Plaintiff and Appellant.

Veatch Carlson, John E. Stobart, Shawn C. Halbert; Hartsuyker, Stratman & Williams-Abrego and William L. Friedman for Defendants and Respondents.

SUMMARY

The sole proprietor of a property management company, independent contractor Roknedin Rokni (plaintiff), was assaulted by two young men while on the premises of an apartment building he managed for the owner, Kavian LLC (defendant). He sued defendant and its two comanaging members (Vida and Siavoush (Sy) Hamadani) for negligence and breach of contract. He alleged defendants were negligent for urging plaintiff to return to the property after an earlier disturbance and failing to provide a safe working environment. Plaintiff also alleged he and defendants then entered into a contract agreeing that defendants would pay for all damages incurred by plaintiff resulting from the assault and battery, and defendants "failed to perform to the terms of the contract[.]"

The trial court sustained demurrers by the Hamadanis, and granted defendant Kavian LLC's motion for summary judgment. Plaintiff appeals the latter ruling. We affirm the judgment.

FACTS

1. The Parties and the Incident

These facts are undisputed, or drawn from plaintiff's own deposition testimony.

Plaintiff is an independent contractor "operating under the fictitious business name of Millenium Property Management." He has worked in property management for over 25 years, and had managed defendant's property on South Oxford Street in Los Angeles, where the assault occurred, since April 2006. Plaintiff was hired "to do the property management for the apartment building," under a written property management agreement he incorporated by reference in his second amended complaint.

Some of his responsibilities included collecting rents, property inspections, arranging and contracting for maintenance and repair work, showing apartments to prospective tenants and testifying at unlawful detainer hearings. (While the parties do not mention it, the property management agreement also stated: "Should an emergency situation arise placing the homeowner or property in jeopardy, [plaintiff] may immediately remedy the situation without further authority from [defendant].")

Plaintiff was usually at the Oxford Street property two to three times each week. Mr. Hamadani did not visit the property very often, going there "approximately every two to three months during the time that [plaintiff] was managing it."

On October 27, 2011, plaintiff received a telephone call from the resident manager of the Oxford Street building, asking him to come to the building because her son (Salvador Rivera, a nontenant) was there, playing loud music and causing a disturbance. Plaintiff relayed the information to Mr. Hamadani, who asked plaintiff to go to the building, "which was part of his contract." (Plaintiff testified that the "action of going to the building" was "part of the contract.")

Mr. Hamadani told plaintiff to call the police. Plaintiff called 9-1-1 before he left his home office to go to the building. It took him several hours to get there because of traffic. He arrived in the late afternoon.

When plaintiff arrived, the resident manager told him the police "had already been there, but had to leave for another call." Salvador Rivera was still there, and he and his brother Angel (who was a tenant in the building) "seemed to be under the influence of alcohol." Salvador began yelling expletives and "threatened to burn down the building so [plaintiff] called 9-1-1

again and was told by the police to wait by his car until the police arrive." While he was waiting, the resident manager came to wait with him "and Angel came out and threw a punch at him that missed; plaintiff called 9-1-1 again and drove away." (Plaintiff testified the police told him to get inside his car, and "we're going to be on the phone with you until you tell us where you parked and we send the crew there and they accompany you to the building." Plaintiff made this 9-1-1 call at 7:11 p.m.)

The police came at "[a]bout eight something," and plaintiff "was talking to Mr. Hamadani" on the telephone while the police were "still on the property," telling Mr. Hamadani "the situation, and he was telling me don't leave the building . . . push for them to arrest the guy who's saying that [he's going to burn the building], Salvador."

Plaintiff asked the police officers to arrest both Salvador and Angel. The sergeant in charge then came to the property and, after talking to both brothers, sent Angel upstairs to his apartment. The police "handcuffed [Salvador], they put him in the car, and they took him." This was "after 9:08 p.m.," "[m]aybe 10:00 [p.m.]"

After Salvador was arrested, plaintiff returned to his home office. (Mr. Hamadani "wanted me to stay and be sure that Angel was going to stay there [in his apartment]," but plaintiff told him "I have to go back, . . . I've been at the building since late afternoon, I have certain things to do, I go back to my home office and then I come back.")

Plaintiff talked to Mr. Hamadani again, at "about ten something," and Mr. Hamadani told him, "Salvador was arrested so now you can go back and check out the building." Plaintiff testified that Mr. Hamadani "wanted to be sure that the property

is still, you know, quiet, basically go and observe that everything is quiet . . . ." Plaintiff told Mr. Hamadani that he was "going to make a report to the police station as well in writing . . . at the headquarters." Plaintiff's understanding was that Mr. Hamadani "wanted me to go because police did not arrest both parties, he wanted me to go and check the property, he was concerned about having, you know, one being arrested, the other one going back to the unit, he was concerned that – go and check out the property, and he apologized basically for asking me to go back again. He said, I know you've been there at the property for so long, so many hours, but I want to ask you again to go back to the property."

Plaintiff returned to the Oxford Street property, "[b]ecause [Mr. Hamadani] told [him] to go there." After plaintiff arrived at the property the second time, "past 11:00 [p.m.]," he "was assaulted by Angel and Salvador, who, unbeknownst to plaintiff" had been released by the police and returned to the property. Angel "sandwiched" plaintiff between the car door and the car, and plaintiff hit Angel. Angel "went down but not for long," and plaintiff got back inside his car, backed out of the driveway and called 9-1-1. Angel got up and hit plaintiff's front windshield with a metal chair, and continued to throw things at plaintiff and tried to get in the car, but could not. Within minutes, police cars and a helicopter arrived.

Plaintiff testified that Salvador and Angel "had always been respectful to [plaintiff] in the past," so their behavior was "extremely" surprising to him.

After the October 27, 2011 incident, defendant promised to pay plaintiff's medical bills and other charges (undisputed fact No. 24).

By letter dated November 29, 2011, plaintiff gave defendant "a preliminary estimate based on the on going expenses due to October 27th at [the property], in which I need to get reimbursed for my time based on already discounted amount of $65.00/Hr plus the out of pocket spent on the expenses invoiced to me, the following are majority of the expenses due to attack incident."

Plaintiff's letter then itemized expenses for time spent at the property during the incident, time spent in court, filing costs for obtaining a restraining order against Angel and Salvador, police interviews, damages to his car, and rental car expenses. Plaintiff's letter stated that "more police interview is scheduled my medical bill I was told by Vida Hamadani there will be no charge to me." The letter concluded: "Time of Shock and Aggravation Pain and Suffering is not calculated yet."

On the second page of plaintiff's letter, Mr. Hamadani wrote, signed and dated this statement: "These charges will be forwarded to our insurance company and in case they do not pay, [defendant] will pay the damages incurred."

Defendant paid plaintiff for the expenses itemized in his letter. Plaintiff did not send defendant any additional bills; he "just informed over the phone." Defendant paid nothing further.

2. Trial Court Proceedings

Plaintiff sued defendant and Mr. and Mrs. Hamadani on October 1, 2013. The operative second amended complaint alleged causes of action for negligence, breach of contract, and fraud. Plaintiff alleged defendants "had prior knowledge of the two assailants['] prior record and abrasive character, yet failed to provide a safe working environment"; and the assailants' "vicious and dangerous traits and propensities . . . were known or should

have been known to Defendants . . . ." Plaintiff recited Mr. Hamadani's written, signed statement on plaintiff's November 2011 letter, and alleged defendants "failed to perform to the terms of the contract . . . ." Plaintiff also alleged Sy and Vida Hamadani "falsely and fraudulently promised plaintiff in writing . . . that Sy would be responsible for all costs associated with the injuries sustained" by plaintiff, but had no intention of performing those promises.

All defendants demurred to the fraud cause of action, and Mr. and Mrs. Hamadani demurred to the entire complaint. The trial court granted the demurrer to the fraud cause of action without leave to amend, and sustained the Hamadanis' demurrer to the negligence and breach of contract claims with leave to amend. Plaintiff did not amend the complaint.

Defendant filed an answer, and later moved for summary judgment. Evidence was adduced of the facts described above. In addition, a declaration from Mr. Hamadani stated that he "never gave [plaintiff] instructions on how to perform" the property management job, did not supply any equipment, did not specify methods to be used, and "did not retain any control over how the property management services were to be accomplished." Mr. Hamadani further stated he "had never met Salvador or Angel prior to this incident," and "did not instruct [plaintiff] on how to handle the disturbance at the property other than that he should call the police. Since [plaintiff] was the property manager for the building he was in a much better position to know how to handle the situation than me." Mr. Hamadani stated he "had no reason to believe that [plaintiff] or anyone would be assaulted or injured by anyone at the property on that date."

Mr. Hamadani stated he "offered to pay some of [plaintiff's] medical bills and other charges associated with the incident," and "I paid everything that was listed in the November 29, 2011 letter, and every bill that [plaintiff] submitted to me." Further, plaintiff "never sent me any other bills or charges other than what was indicated in his November 29, 2011 letter and I never made any promises or representations that I would pay anything else."

In opposition to summary judgment, in addition to various of the facts we have described, plaintiff's declaration stated:

When plaintiff told Mr. Hamadani that Salvador and Angel were threatening to burn the building, Mr. Hamadani "instructed me to go to the subject property and investigate the situation." Mr. Hamadani "said that I [(plaintiff)] was hired to manage the property and demanded that he did not want the building burned down," and "asked and demanded of me to prevent the property's destruction." Angel "injured me for having stood against he and his brother and preventing the destruction of defendants' property, all at the instruction of the Defendants." Plaintiff further stated that "[m]y scope of work was never inherently dangerous," and "[i]f Sy Hamadani had not instructed me to inspect and defend the property I would have probably not been there and would not have become so injured."

As for his expenses, plaintiff declared that defendants "informed me that they would cover all my expenses and medical bills associated with the injuries in this complaint. In consideration for their agreement to pay my expenses associated with the injuries, I refrained from terminating the property management agreement by giving 30 days' notice, as was permissible thereunder. I also relied on Defendants' promises in

seeking out and obtaining further medical treatment that I could not personally afford."

After the incident, plaintiff opened a claim with defendant's insurer, but the insurer denied the claim, concluding that legal liability for the loss did not lie with defendant.

Plaintiff stated his November 2011 itemized list of damages was for the period of October 27 through November 29, 2011, totaling $6,825.74, and that "I have incurred over $20,000.00 in expenses." Plaintiff visited a doctor recommended by Vida Hamadani on November 15, 2011. The doctor prescribed an MRI, and plaintiff asked the Hamadanis to pay for it. Plaintiff sought continued pain management treatment with that doctor, and consulted several other doctors.

Plaintiff stated that: "During my follow up visits with doctors I was informed that my right shoulder and my neck required surgery at the expense of $37,000.00 with follow up physical therapy for another $10,000.00." Medical evaluations from several doctors were attached to plaintiff's declaration. Plaintiff further stated: "I called and informed [defendant's] managing members, that the damages had increased to $67,000.00 and that I would require surgery, but [defendant] and its managing members reneged on their promise to pay."

The trial court granted defendant's summary judgment motion. In its minute order, the court also stated that no amended complaint had been filed, so the individual defendants "are dismissed this date with prejudice."

On December 7, 2015, judgment was entered against plaintiff "on plaintiff's entire complaint," and plaintiff filed a timely notice of appeal from the judgment.

DISCUSSION

1. Standard of Review

A defendant moving for summary judgment must show "that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to the cause of action." (Code Civ. Proc., § 437c, subd. (p)(2).) Summary judgment is appropriate where "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (*Id.*, subd. (c).)

Our Supreme Court has made clear that the purpose of the 1992 and 1993 amendments to the summary judgment statute was " 'to liberalize the granting of [summary judgment] motions.' " (*Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal.5th 536, 542; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 848.) It is no longer called a "disfavored" remedy. "Summary judgment is now seen as 'a particularly suitable means to test the sufficiency' of the plaintiff's or defendant's case." (*Perry,* at p. 542.) On appeal, "we take the facts from the record that was before the trial court. . . . ' "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." ' " (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037, citation omitted.)

2. This Case

Plaintiff has not appealed the trial court's dismissal of the fraud claim and the claims against the individual defendants. He challenges only the summary judgment rulings, contending there were triable issues of material fact on each claim.

a. The negligence claim

Plaintiff's first contention is that he "was never the employee of an independent contractor," and therefore is not barred from relief under *Privette v. Superior Court* (1993) 5 Cal.4th 689 (*Privette*). He is mistaken.

Privette held that "the hirer of an independent contractor is not *vicariously* liable to the contractor's *employee* who sustains on-the-job injuries resulting from a special or peculiar risk inherent in the work." (*Tverberg v. Fillner Construction, Inc.* (2010) 49 Cal.4th 518, 521 (*Tverberg*) [describing *Privette*].) Plaintiff tells us this principle is immaterial, because he directly contracted with defendant to manage the property (and thus, as he states in his declaration, was himself the independent contractor).

Tverberg holds otherwise: "Unlike a mere employee, an independent contractor, by virtue of the contract, has authority to determine the manner in which inherently dangerous construction work is to be performed, and thus assumes legal responsibility for carrying out the contracted work, including the taking of workplace safety precautions. Having assumed responsibility for workplace safety, an independent contractor may not hold a hiring party *vicariously* liable for injuries resulting from the contractor's own failure to effectively guard against risks inherent in the contracted work." (*Tverberg, supra,* 49 Cal.4th at p. 522; *id.* at p. 528 ["It would be anomalous to allow an independent contractor to whom responsibility over the hired work has been delegated to recover against the hirer on a peculiar risk theory while denying such recovery to an independent contractor's *employee*, a person who lacks any authority over the hired work."]; see also *Gravelin v. Satterfield*

(2011) 200 Cal.App.4th 1209, 1214 ["the [*Privette*] rule applies when the independent contractor, rather than his or her employee, is injured"].)

Plaintiff's next contention appears to be that the *Privette* doctrine precludes vicarious liability of the hiring party, but does not operate to bar liability for the hirer's own negligence – here, "the act of instructing [plaintiff] to encounter these dangerous individuals at the subject premises." The hirer is, of course, liable for his own negligence. (See, e.g., *Tverberg, supra,* 49 Cal.4th at p. 529 [remanding for consideration of "whether defendant could be held *directly* liable on a theory that it retained control over safety conditions at the jobsite"].)

But here, plaintiff presented no evidence that, as he alleged in his complaint, "defendants had prior knowledge of the two assailants[] prior record and abrasive character, yet failed to provide a safe [work] environment," or that defendant maintained control over safety conditions at the apartment building.

Defendant submitted evidence that Mr. Hamadani "had never met Salvador or Angel prior to this incident," and "had no reason to believe that [plaintiff] or anyone would be assaulted or injured by anyone at the property on that date." Plaintiff presented no evidence to the contrary, and his own evidence demonstrated he knew both assailants, and both of them "had always been respectful to [plaintiff] in the past," so their behavior was "extremely" surprising to him.

Further, both parties thought Salvador (who made the threats to burn the building) was in custody, and plaintiff stated that, when he returned to the property the second time, at Mr. Hamadani's request, Mr. Hamadani "wanted to be sure that

the property is still, you know, quiet, basically go and observe that everything is quiet . . . ." Plaintiff admits that property inspections were his contractual responsibility, and the contract states that in an emergency, "[plaintiff] may immediately remedy the situation without further authority from [defendant]."

In short, nothing in plaintiff's declaration or deposition testimony supports the notion that defendant, who visited the apartment building once every two or three months, "retained control over safety conditions" (*Tverberg, supra,* 49 Cal.4th at p. 529), or that defendant knew of a dangerous condition of property of which plaintiff was unaware, or was otherwise directly liable for plaintiff's injuries. Summary judgment was entirely proper.

b. The breach of contract claim

On appeal, plaintiff contends that a question of fact precluded summary judgment, namely: "whether [defendant's] oral promises to pay [plaintiff's] medical bills that were detrimentally relied upon gave rise to a contractual obligation on a promissory estoppel theory . . . ." Specifically, the entirety of plaintiff's argument, citing his own declaration, is this:

"[I]mmediately after the subject incident, [defendant], through its managing member, praised [plaintiff] for his work, and promised him that they would cover all of his expenses and medical expenses associated with the injuries caused by the third parties at the subject building," and "[i]n reliance upon this promise, [plaintiff] not only refrained from terminating the management contract (which allowed termination on 30 days' notice), but he relied on [defendant's] oral promise and assurances of payment for his medical expenses in incurring such medical expenses, which he could not otherwise afford."

Plaintiff's contention is without merit.

First, in the operative complaint, plaintiff did not plead a claim for promissory estoppel based on an oral (or any other) promise. Promissory estoppel is " 'a doctrine which employs equitable principles to satisfy the requirement that consideration must be given in exchange for the promise sought to be enforced.' " (*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal.4th 305, 310.) "The elements of the doctrine of promissory estoppel . . . are as follows: 'A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.' " (*C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 6.)

As the trial court observed, plaintiff's second amended complaint alleged a claim for breach of a written contract. Plaintiff alleged that he "relied on the promise made by the Defendant, signed and dated on November 28, 2011," and that the defendants "committed a material breach by not performing the said agreement."[1]

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[1] The complaint's allegations related to breach of contract are these: "29. After the incidents, Plaintiff and Defendant Sy entered into a contractual agreement – that Defendants would pay for medical treatment for Plaintiff's injuries and repair or replace his personal property. [¶] 30. The pertinent part of the contract stated, that 'the charges will be forwarded to the insurance company and in case they do not pay, [defendant] or Sy will pay the damages incurred,' by the Plaintiff. Vida's own language in the Contract clearly expressed that there will be no charges to Plaintiff; all of which was ratified, adopted and agreed

"Under settled summary judgment standards, we are limited to assessing those theories alleged in the plaintiffs' pleadings. [Citations.] ' "The burden of a defendant moving for summary judgment only requires that he or she negate plaintiff's theories of liability *as alleged in the complaint*. . . . ' "[A] motion for summary judgment must be directed to the *issues raised by the pleadings*. The [papers] filed in response to a defendant's motion for summary judgment may not create issues outside the pleadings and are not a substitute for an amendment to the

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to by Sy. (Marked and Incorporated [by] reference herein as Exhibit '2') [¶] 31. Plaintiff did, or substantially complied with the terms of the contract, such as receiving medical care from his doctors. . . . Yet, Defendants[] failed to uphold their contract, neglected their duty, and Plaintiff was harmed by Defendants' failure. [¶] . . . [¶] 42. Defendant Sy viewed the Plaintiff's preliminary estimates of costs and created a written contract with the Plaintiff. Defendant Sy examined the Plaintiff's preliminary costs estimates and wrote: 'These charges will be forwarded to our insurance company and in case they do not pay, [defendant] or Sy will pay the damages incurred.' (Marked and Incorporated [by] reference herein as Exhibit '2') [¶] 43. Defendant Sy signed and dated on November 28, 2011. [¶] 44. Defendants Sy and Vida promised that the charges would be forwarded to the Defendant's insurance company. Sy stipulated in writing that in the case that they do not pay, [defendant] or Sy 'will pay damages incurred.' [¶] . . . [¶] 46. Plaintiff relied on the promise made by the Defendant, signed and dated on November 28, 2011. In the case that the Defendant's insurance denied liability, Sy or [defendant] promised to accept the all [*sic*] liability of damages incurred by Plaintiff. [¶] 47. . . . Defendant Sy and [defendant] are jointly and severally liable under the contract because they committed a material breach by not performing the said agreement."

pleadings." ' " ' [Citation.] ' "The function of the pleadings in a motion for summary judgment is to delimit the scope of the issues: the function of the affidavits or declarations is to disclose whether there is any triable issue of fact within the issues delimited by the pleadings." ' [Citation.] '[A] plaintiff wishing "to rely upon unpleaded theories to defeat summary judgment" must move to amend the complaint before the hearing.' [Citations.]" (*Falcon v. Long Beach Genetics, Inc.* (2014) 224 Cal.App.4th 1263, 1275.) In short, plaintiff cannot change his theory of the case on appeal.

Second, defendant presented evidence there was no breach of the contract plaintiff alleged, and plaintiff failed to offer evidence to the contrary. Mr. Hamadani's declaration acknowledged he "offered to pay some of [plaintiff's] medical bills and other charges associated with the incident"; that plaintiff "sent me a letter dated November 29, 2011 with a list of charges and bills"; that he "paid everything that was listed in the November 29, 2011 letter, and every bill that [plaintiff] submitted to me"; and that plaintiff "never sent me any other bills or charges other than what was indicated in his November 29, 2011 letter and I never made any promises or representations that I would pay anything else."

In response, plaintiff disputes Mr. Hamadani's statements, but the evidence he offers in support raises no factual issue. He cites his deposition testimony that "over the phone I told him because when I saw him last, these were – the bills were still continuing to buildup." Plaintiff testified he did not give Mr. Hamadani any further written bills, and when asked "Any paper bills?" he replied: "Because I told him I have attorney, he said he has insurance agent, and because his wife is also Farmers

agent she said whatever bill you have, we are obtaining from our other source, but I did call him about the bills." Plaintiff also cites several paragraphs of his declaration, but none of these raises any factual dispute countering Mr. Hamadani's statements.

To summarize: the only evidence is that defendant agreed to pay the expenses itemized in plaintiff's letter, and defendant did so. Assuming the letter created an enforceable contract, the evidence is that defendant fully performed by paying the amounts there stated. (As the trial court observed, "how can any trier of fact reasonably construe [Mr. Hamadani's handwritten note that "[t]hese charges" would be forwarded to the insurer and if they did not pay, defendant would "pay the damages incurred"] as a promise to pay " 'for any and all damages that [plaintiff] incurred,' whether [plaintiff] has to have spinal surgery that cost a hundred thousand dollars or anything else? Where – how can that possibly be construed that way?")

Again, there was no error in the trial court's grant of summary judgment for defendant.

DISPOSITION

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

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.