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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THOMAS STRATTON, Plaintiff and Appellant, v. DOUGLAS KEOUGH et al., Defendants and Respondents; INSURANCE COMPANY OF THE WEST, Intervener and Appellant.	B265175 (Los Angeles County Super. Ct. No. BC521663)

APPEAL from a judgment of the Superior Court of Los Angeles County, Teresa A. Beaudet, Judge. Affirmed.

Grassini, Wrinkle & Johnson, Roland Wrinkle and Marshall Shepardson for Plaintiff and Appellant.

Murtaugh Meyer Nelson & Treglia, Jillisa L. O'Brien and Patrick M. Laurence for Defendants and Respondents.

Cannon & McCarthy and Daniel B. McCarthy for Intervener and Appellant.

INTRODUCTION

After tripping on a concrete pad and falling into an electrical distribution panel installed by Keough Electric Corp. (KEC) and Douglas Keough (together defendants), plaintiff Thomas Stratton filed his negligence and fraud action. Plaintiff and his worker's compensation carrier, the Insurance Company of the West (ICW), appeal from the judgment entered against them after the trial court granted defendants' summary judgment motion determining, as a matter of law, that defendants had established the affirmative defense of the "completed and accepted" doctrine. Under this defense, once a contractor has completed its work and the owner has accepted it, the contractor is no longer liable to third parties injured as the result of a patent defect in the contractor's work. Plaintiff also challenges the dismissal of his fraud cause of action. We disagree with the contentions of plaintiff and ICW and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Viewing the evidence according to the usual rules (Code Civ. Proc., § 437c, subd. (c);[1] see also *Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 612), KEC provided a written proposal to Mitchell Environmental Concrete, Inc. (Mitchell) to install an electrical substation and distribution panel for a new metal shredder at Kramar's Iron & Metal, Inc. (Kramar's). The purpose

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[1] All further statutory references are to the Code of Civil Procedure.

of the distribution panel was to feed electrical power to the motors that run Kramar's metal shredder. Not encompassed in KEC's bid was installation of the concrete slab on which the electrical equipment was to be erected. The concrete housekeeping pads were poured by Mitchell. KEC began work on its proposal at Kramar's in January 2012.

Plaintiff was an employee of KEC and served as the foreman on the project. KEC erected the distribution panel on top of the elevated concrete pad. As of August 2012, both the distribution panel and the concrete pad on which it sits were installed at Kramar's.

On August 25, 2012, plaintiff texted Keough that the previous day was plaintiff's last at KEC and that he had accepted a job with Kramar's. Plaintiff then texted: " '*Kramar is done*.' " (Italics added.) Plaintiff testified in deposition that when he sent this text, he meant that KEC's work on the project was complete. Ronald Kramar confirmed that in his view, when he hired plaintiff, KEC had finished its job. After he was hired by Kramar's, plaintiff did not see anyone from KEC performing work on the project and as far as he knew, no one from Kramar's requested that KEC perform further work on the electrical distribution panel.

On August 30, 2012, KEC submitted the "Final Invoice" to Kramar's for payment. Mitch Libow, a consultant hired by Kramar's to supervise the construction of the metal shredder project, reviewed and approved KEC's Final Invoice on behalf of Kramar's on August 31, 2012. Libow wrote on the bottom of the invoice: " 'Norris substation and mill electrical and distribution foundations. Ground grids and other concrete work. OK. MNL. 8/31/12.' " Libow testified that, by "distribution foundations," he

was referring to the concrete pads on which KEC's electrical panels were installed. Libow also testified that he wrote the note to ensure that KEC was paid on its Final Invoice, and that he was unaware of any reason why KEC should not be paid on that invoice. Kramar's paid KEC in full.

KEC left Kramar's and did not return to perform any further work between August 30, 2012 when it submitted its Final Invoice, and the day plaintiff was injured, because KEC had completed the entire scope of work contained in its proposal. The distribution panel was able to feed power to the motors to operate the metal shredder by August 30, 2012. Before plaintiff's injury, Kramar's was using the panel to supply power to operate the shredder during metal-shredding test runs. After plaintiff's injury, Kramar's did not have an electrician on staff, and so it hired KEC to perform various electrical services, none of which work related to KEC's 2011 proposal.

Neither Kramar's, nor any inspector who inspected the work in July 2012, nor employee of the City of Los Angeles, has ever informed KEC that the concrete pad underlying the distribution panel needed to be corrected, repaired, or extended, or that the clearances around the distribution panel were insufficient, unacceptable, or required correction. Plaintiff testified that " 'almost everybody on the job knew' " that the concrete pad needed more clearance. Before leaving KEC, plaintiff repeatedly told Keough that "we needed to get [Mitchell] out there to pour the right amount of concrete for the clearance" and that Keough always responded that he " 'would take care of it.' " Keough's response was never more specific than that he "would take care of it." Plaintiff testified twice that he did not know what that response meant. After plaintiff began working

for Kramar's but before he was injured, he told Ronald Kramar and Libow, "once or twice," that the pad needed to be extended.

Although plaintiff has no memory of it, he tripped on the concrete pad and fell into the electrical panel on September 18, 2012, and sustained injuries.

Plaintiff's operative complaint against KEC and Douglas Keough, among others, alleged negligence and misrepresentation, and sought punitive damages. Plaintiff contended that the concrete pad underlying the distribution panel extended only a few inches beyond the front of the panel. This configuration constituted a tripping hazard for any user working in the panel's vicinity, plaintiff contended, and violated the California Electric Code, which requires that the pad extend at least three feet beyond the front of the panel. ICW filed its complaint in intervention. In their answer, defendants raised the "completed and accepted" doctrine as an affirmative defense. Defendants then moved for summary judgment on the ground that the negligence action was barred by the "completed and accepted" doctrine, the alleged fraudulent misrepresentation was too vague to be actionable, plaintiff's reliance was unjustified as a matter of law, and the punitive damages request rose or fell with the fraud cause of action.

The trial court granted the summary judgment motion. After sustaining defendants' objections to plaintiff's expert witness' declaration, the court found there was no triable issue of material fact, and so as a matter of law, defendants established their affirmative defense to the negligence cause of action based on the "completed and accepted" doctrine. With respect to the representation that Keough "would take care of it," the court held, as a matter of law, the promise was too vague to be

actionable and even if the statement were an actionable promise, it was undisputed that plaintiff did not rely on it. Plaintiff and ICW filed their timely appeals from the dismissal of the lawsuit.

CONTENTIONS

Appellants contend that the trial court erred in granting the summary judgment motion.

DISCUSSION

1. *Summary judgment principles*

Summary judgment is properly granted if there is no triable issue of material fact and the issues raised by the pleadings may be decided as a matter of law. (§ 437c, subds. (b)(1) & (c).)

A defendant meets its burden in moving for summary judgment by showing that one or more essential elements of the plaintiff's cause of action cannot be established, or by establishing a complete defense thereto. (§ 437c, subd. (o)(2); *Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 849.) If the moving defendant meets its initial burden, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or a defense. (*Aguilar*, at p. 849.)

"We independently review an order granting summary judgment. [Citation.] We determine whether the court's ruling was correct, not its reasons or rationale. [Citation.] 'In practical effect, we assume the role of a trial court and apply the same rules and standards which govern a trial court's determination of a motion for summary judgment.' [Citation.]" (*Shugart v. Regents of University of California* (2011) 199 Cal.App.4th 499, 504–505.) "In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all

of the evidence set forth in the papers, except that to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence . . . ." (§ 437c, subd. (c).) We view the evidence in the light most favorable to the party opposing summary judgment. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.)

2. *The completed and accepted doctrine*

" '[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.]' [Citations.] Stated another way, 'when the owner has accepted a structure from the contractor, the owner's failure to attempt to remedy an obviously dangerous defect is an intervening cause for which the contractor is not liable.' [Citation.] The doctrine applies to patent defects, but not latent defects. 'If an owner, fulfilling the duty of inspection, cannot discover the defect, then the owner cannot effectively represent to the world that the construction is sufficient; he lacks adequate information to do so.' [Citation.]" (*Neiman v. Leo A. Daly Co*. (2012) 210 Cal.App.4th 962, 969, fn. omitted (*Neiman*), quoting from *Sanchez v. Swinerton & Walberg Co*. (1996) 47 Cal.App.4th 1461, 1466-1471 (*Sanchez*) & *Jones v. P.S. Development Co., Inc*. (2008) 166 Cal.App.4th 707, 712 (*Jones*), disapproved on another ground in *Reid v. Google, Inc*. (2010) 50 Cal.4th 512, 532, fn. 7.)

The initial contention of plaintiff and ICW on appeal is that the "completed and accepted" doctrine was abrogated 58 years ago by our Supreme Court in *Dow v. Holly Manufacturing Co.* (1958) 49 Cal.2d 720 (*Dow*), and later in *Stewart v. Cox* (1961) 55 Cal.2d 857 (*Stewart*). Appellants have not forfeited the contention for failure to raise it below, defendants' argument to the contrary notwithstanding, because it is a legal question and our review is de novo. Nonetheless, the contention is unavailing.

In *Dow*, a defective gas heater asphyxiated the plaintiffs' decedents. The danger was latent rather than patent. *Dow* held that the contractor was liable to the plaintiffs. (*Dow*, *supra*, 49 Cal.2d at p. 728.) *Dow* abandoned the requirement of privity between the subcontractor and plaintiff, but not the "completed and accepted" doctrine. (*Id.* at p. 724; see *Sanchez*, *supra*, 47 Cal.App.4th at p. 1469.) In 1996, after extensive review of the California authority, *Sanchez* concluded that the "completed and accepted" doctrine remains a viable affirmative defense, except as in *Dow*, when the defect is latent, in which case the contractor could still be held liable for negligent construction after the owner has accepted the work. (*Sanchez*, *supra*, at pp. 1466-1470.)

Jones "agree[d] with the *Sanchez* court on this matter" (*Jones*, *supra*, 166 Cal.App.4th at p. 716), and rejected the contention that *Stewart* abrogated the "completed and accepted" doctrine. (*Ibid.*) In *Stewart*, the plaintiffs sued the concrete subcontractor alleging negligence in the construction of a swimming pool that leaked and damaged the plaintiffs' property. (*Stewart*, *supra*, 55 Cal.2d at p. 860.) *Stewart* disagreed that the subcontractor was immune from liability by the owner's acceptance of the pool, explaining that the plaintiffs were not experts on pools and hence could not recognize the hazards posed.

(*Id*. at p. 865.) That is, the defect was latent. *Sanchez* and *Jones,* have analyzed the relevant case law and, along with *Neiman*, have all applied the "completed and accepted" doctrine as an affirmative defense for construction professionals in the summary judgment context. The doctrine remains alive. In fact, our Supreme Court denied review of the two most recent cases, *Jones* and *Neiman*.

As for the factors and circumstances in which a contractor's work is deemed "completed and accepted," the doctrine is applied when the contract has been discharged and the owner has asserted control (*Klingenstein v. Miehle P. P. etc. Co*. (1919) 41 Cal.App. 352, 355-356; *Chance v. Lawry's, Inc*. (1962) 58 Cal.2d 368, 372-373; but see *Hall v. Barber Door Co*. (1933) 218 Cal. 412, 414 [where subcontractor retained control, doctrine inapplicable]); when the defective equipment is installed and in full operation, and the contractor has left the premises without retaining control (*Jones*, *supra*, 166 Cal.App.4th at p. 717); or when the work is deemed complete, the owner has walked through and accepted the defective structure and opened it to the public. (*Neiman*, *supra*, 210 Cal.App.4th at p. 970.)

Jones was a Transportation Security Administration (TSA) employee working at Los Angeles International Airport when he tripped over the seismic anchoring bolts that secured an explosive detection system (EDS) machine. (*Jones*, *supra*, 166 Cal.App.4th at p. 709.) He sued, among others, the electric company and its subcontractor responsible for obtaining the bolts, installing them, and garnering the necessary governmental approvals. (*Id*. at p. 713.) The defendants had no access to, or control over, the EDS machine after July 2003, when their work on the site was complete. (*Ibid*.) The TSA accepted the EDS

machine and put it into full operation before the accident. (*Ibid.*) Jones testified that he knew the anchors protruded and tried to steer clear of them as he walked around the machine. He also discussed the hazard with his coworkers and mentioned it to a " 'lead' " in his chain of command. (*Ibid.*) Nonetheless, the defendants were never asked to return to the site to make changes or repairs to the anchors. (*Ibid.*) In affirming the summary judgment, the *Jones* court held that the evidence indisputably established that before the accident, the anchors had been installed and the TSA put the machine into service in the area reserved for TSA employees; there was no evidence that defendants performed work on the machine *after* the anchors were installed. The facts that the defendants had not fully discharged their contract at the airport, kept workers elsewhere on the premises after the plaintiff's accident, and the inspection company did not approve the electric work until four months after plaintiff's injury, did not undermine applicability of the "completed and accepted" doctrine. (*Id.* at p. 717.) " ' "By acceptance and subsequent use, the owners assume to the world the responsibility of its sufficiency, and to third parties, the liability of the contractors has ceased, and their own commenced." [Citation.]' " (*Ibid.*, quoting from *Sanchez*, *supra*, 47 Cal.App.4th at p. 1466.) Thus, the evidence was that the owner manifested its acceptance by its conduct concerning the machine. (*Jones*, at p. 717.) As *Jones* is strikingly similar to this case, we follow its rationale.

3. *The undisputed evidence shows that KEC's work was completed and accepted.*

a. *KEC's work was complete in August 2012.*

It is undisputed that by August 30, 2012, the distribution panel and concrete pad on which it sat had been installed and the electrical panel was able to feed power to operate the metal shredders. By texting Keough that "Kramar is done," plaintiff meant that KEC's work on the project was complete. No one associated with Kramar's informed KEC that the concrete pad needed correction, repair, or extension, or that the clearances around the distribution panel were insufficient. KEC left the premises as of August 30, 2012 and did not return to Kramar's or perform any further work on the distribution panels before plaintiff's injury. Defendants have demonstrated completion and so the burden shifted to plaintiff to raise a material factual dispute.

Plaintiff disagrees that defendants carried their summary judgment burden of production. He argues that his text "Kramar is done" is insufficient evidence that KEC's work was complete. But, as delineated above, the text is not the only evidence defendants presented.

Plaintiff attempted to create a triable issue of fact by submitting the declaration of Daniel F. Johnson, a licensed electrical contractor. KEC objected to large portions of the declaration, mostly on the ground that as a lay witness, Johnson gave improper legal opinions. The trial court sustained "[a]ll objections" and noted that Johnson articulated an incorrect test under the "completed and accepted" doctrine. On appeal, plaintiff did not address this evidentiary ruling and so he forfeited appellate review of it. (*Badie v. Bank of America* (1998)

67 Cal.App.4th 779, 784-785.) ICW did address the ruling, but only in its reply brief. "Points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before. To withhold a point until the closing brief deprives the respondent of the opportunity to answer it or requires the effort and delay of an additional brief by permission. [Citation.]" (*Campos v. Anderson* (1997) 57 Cal.App.4th 784, 794, fn. 3.) Neither appellant has suggested a good reason for failing to raise the issue in their opening briefs to enable defendants to answer it in their respondents' briefs and so citation to Johnson's declaration does not demonstrate a triable factual issue.

Nor does plaintiff succeed in disputing completion based on Keough's statement that he "would take care of it." Plaintiff argues KEC's work was not complete as this promise showed that more work was forthcoming to correct the concrete pad's clearance. The evidence that plaintiff cites to demonstrate a dispute is his own deposition testimony that before he left KEC's employ, he told Keough five to 10 times that "we needed to get [*Mitchell*] out there to pour the right amount of concrete for the clearance." (Italics added.) Whether plaintiff believed from his statement that Keough would get Mitchell to pour more concrete, or that KEC, who was not the concrete subcontractor would do the work, is not evidence that the work KEC actually contracted to do was not complete. In short, plaintiff has not demonstrated a triable issue of material fact that KEC's work was complete in August 2012.

b. *Kramar's accepted KEC's work before plaintiff was injured*.

As for acceptance, it is undisputed that Libow, Kramar's consultant hired to supervise the metal shredder project, reviewed and approved KEC's Final Invoice on August 31, 2012 after determining that the concrete pad was " 'OK' " and so Kramar's paid KEC in full. By then, Kramar's was using the distribution panel to operate the metal shredders. Neither Kramar's nor any inspector ever asked KEC to return and make changes or repairs to the concrete pad or the distribution panel, and KEC did not return to Kramar's between August 30th and plaintiff's accident. The undisputed evidence shows Kramar's accepted KEC's work before plaintiff's accident by inspecting the equipment and concrete, paying KEC in full for the work, taking control of the electrical panel on the concrete slab, and putting it into operation. (*Jones*, *supra*, 166 Cal.App.4th at p. 717.)

Plaintiff argues that no agent of Kramar's accepted the job by representing that it was safe and so defendants' evidence was insufficient to meet their burden on summary judgment. He asserts that Libow's approval of the Final Invoice "is light years away from conclusively establishing that the owner 'examined the work and thereafter represented that it was safe,' " especially because Libow did not know whether the concrete pad was safe. Plaintiff has both the law and the facts wrong. In *Jones*, acceptance occurred when the EDS machine was installed and operated and the contractor had left the premises without retaining control over the machine. (*Jones*, *supra*, 166 Cal.App.4th at pp. 717-718.) Acceptance there was manifested by the conduct concerning the machine. (*Id*. at p. 717.) As *Sanchez* stated, "having a duty to inspect the work

and ascertain its safety before accepting it, the owner's *acceptance represents it to be safe* and the owner becomes liable for its safety." (*Sanchez*, *supra*, 47 Cal.App.4th at p. 1466, italics added.) Thus, no literal announcement of safety is required; acceptance by conduct represents safety. Factually, Libow never testified he did not know whether the pad violated the electric code and so he relied on the City's inspectors to *establish safety*.

4. *Plaintiff's remaining legal contentions are without merit.*

Plaintiff contends that under the "completed and accepted" doctrine, the contractor may be liable under ordinary tort principles for a "reasonable time" between acceptance and the injury. The passage of three weeks between the project's completion and acceptance on the one hand and his injury on the other, he argues, is insufficient to trigger the "completed and accepted" doctrine. However, recognizing the absence of California authority for this proposition, plaintiff cites Louisiana law, and relies on the inadmissible Johnson declaration for the factual assertion that 18 days is not reasonable. We are not bound by the former and may not consider the latter (§ 437c, subd. (c)).

Plaintiff contends, even if the "completed and accepted" doctrine were still the law in California, that we nonetheless must consider the factors for determining whether a duty is owed to third parties set forth in *Biakanja v. Irving* (1958) 49 Cal.2d 647. His justification is that *Stewart*, *supra*, 55 Cal.2d 857, although a "completed and accepted" doctrine case, nonetheless analyzed the defendant's duty using the *Biakanja* factors. (*Id.* at p. 863.) Distinguishing *Stewart,* and indeed *Dow*, however, is that the defects in those cases were latent: in the context of contributory negligence, *Stewart* explained that the plaintiffs

were not experts in pool construction and would not have realized the dangers posed by the cracks in the concrete. (*Id*. at p. 865.) More recently, in determining that the *Biakanja* factors did not on balance preclude application of the "completed and accepted" doctrine, *Sanchez* explained, "Given the obviousness of the danger both to the owner and to users, there no longer is a close connection between defendants' conduct and plaintiff's injury. The failure [of the owner] to take precautions against injury and steps to remedy the problem are far more closely connected. Additionally, inasmuch as the defect was patent and, thus, the structure could have been rejected or the defect corrected by the owner, the policy against preventing future harm is not served by imposing liability on the contractor." (*Sanchez*, *supra*, 47 Cal.App.4th at pp. 1471-1472.) The same reasoning applies here. Kramar's failure to take action to fix the slab supersedes any omission on KEC's part. Also, plaintiff saw the clearance problem, both as an employee of KEC and of Kramar's, and did not recommend rejecting the work before putting it to use.

Plaintiff will not be heard to argue that we should apply a "nuisance per se exception" to the "completed and accepted" doctrine. Plaintiff's complaint nowhere alleges nuisance per se. The issues are framed by the pleadings and the summary judgment motions need only respond to the allegations in the complaint. (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242.) "To allow an issue that has not been pled to be raised in opposition to a motion for summary judgment in the absence of an amended pleading, allows nothing more than a moving target"

and undermines the efficacy of the summary judgment procedure. (*Id*. at p. 1258, fn. 7.)[2]

5. *There is no triable issue of fact that the defect was patent*.

"In the context of a patent defect, the word 'patent' ' "refers to the patency of danger and not merely to exterior visibility." ' [Citation.]" (*Sanchez*, *supra*, 47 Cal.App.4th at p. 1470.) In *Sanchez*, water collected on the uncovered landing of a stairway to the building. The appellate court determined that the danger posed was patent. The presence of standing water was obvious and apparent to any reasonably observant person, as was the danger that the water might create slippery surfaces and cause one to slip and fall. (*Ibid*.) The defect was also patent as a matter of law because it was discoverable by the inspection an owner would make in the exercise of ordinary care and prudence. (*Id*. at pp. 1470-1471.) Additionally, it was undisputed that on several occasions before the accident, the owner's agents observed the dangerous condition and appreciated the risk it entailed. (*Id*. at p. 1471.)

ICW contends there was a triable issue of fact whether the defect was patent. We disagree. The extension of the concrete pad three inches from the front of the distribution panel was

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[2] Likewise, we reject plaintiff's argument relying on the notion that the distribution panel posed an imminent danger. For this assertion, plaintiff cites to the excluded expert declaration. Furthermore, the imminent danger exception is only recognized in cases involving latent defects, and we conclude *post*, that the defect was not latent. (*Sanchez*, *supra*, 47 Cal.App.4th at pp. 1467, 1470 ["latency of the defect remains essential to a contractor's negligent-construction liability after the owner has accepted the structure"].)

obvious and apparent to any reasonably observant person, as was the risk that someone working on the panel might lose footing on such a small clearance and trip into the electrical equipment. "Even if the defect initially could have been considered latent, once it was discovered, it became patent." (*Sanchez*, *supra*, 47 Cal.App.4th at p. 1471.) It is undisputed that plaintiff, an electrician and employee of the owner, was well aware of the defect and the danger it posed. He told Libow and Ronald Kramar, and testified that " 'almost everybody on the job knew' " that the pad needed more clearance. Plaintiff admitted in response to special interrogatories that the foundation's condition and configuration was an "*obvious* safety violation[]." (Italics added.) ICW does not create a dispute about patency by citing Ronald Kramar's declaration that he was never told the concrete pad needed to be extended, because *plaintiff* stated he told Ronald Kramar, and plaintiff was Kramar's electrician and knew about the defect before he was injured. In any event, the failure to bring the defect to the landowner's attention or the failure of others to notice the danger "does not mean this was a latent defect." (*Neiman*, *supra*, 210 Cal.App.4th at p. 971.)

In sum, defendants have established each element of their affirmative defense based on the "completed and accepted" doctrine. In opposition, neither plaintiff nor ICW has demonstrated a triable issue of material fact, or a legal reason not to apply the doctrine. The trial court did not err in summarily adjudicating the negligence cause of action.

6. *Fraud*

" 'The necessary elements of fraud are:
(1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (scienter); (3) intent to

defraud (i.e., to induce reliance); (4) justifiable reliance; and (5) resulting damage.' " (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239.)

"Reliance exists when the misrepresentation or nondisclosure was an immediate cause of the plaintiff's conduct which altered his or her legal relations, and when without such misrepresentation or nondisclosure he or she would not, in all reasonable probability, have entered into the contract or other transaction." (*Alliance Mortgage Co. v. Rothwell*, *supra*, 10 Cal.4th at p. 1239.) To show that the reliance was reasonable, the plaintiff must demonstrate that "the matter was material in the sense that a reasonable person would find it important in determining how he or she would act" and it was reasonable for the plaintiff to have relied on the statement. (*Hoffman v. 162 North Wolfe LLC* (2104) 228 Cal.App.4th 1178, 1194.) "Generally, the question of whether reliance is justifiable is one of fact. [Citations.] But the issue 'may be decided as a matter of law if reasonable minds can come to only one conclusion based on the facts.' [Citations.]" (*Ibid.*)

The alleged fraudulent misrepresentation here was that Keough told plaintiff he "would take care of it" in response to plaintiff's concerns that Mitchell needed to extend the concrete pad. Among the arguments defendants raised in their summary judgment motion was that plaintiff could not establish that he justifiably relied on that statement. Defendants cited the following from plaintiff's deposition testimony: "Q Was his [Douglas Keough's] response always the same or did it vary? [¶] A It was always the same, he'll take care of it . . . . [¶] Q Did you believe that Doug was going to take care of it? [¶] A *I didn't know what was going to happen*. [¶] Q Did you get the sense

that he was just telling you to stop bugging him about it or that he was going to take care of it? [¶] A *I didn't know*. . . . [¶] Q At any point did Doug Keough tell you he was going to pour additional concrete in front of the 480-volt panel? [¶] A He told me he'd take care of it. [¶] Q He told you to take care of it? [¶] A He told me that he would take care of it. [¶] Q Did he get any more specific than that? [¶] A No. [¶] Q Did he ever tell you specifically that he was going to pour additional concrete in front of that 480-volt panel? [¶] A I don't remember." (Italics added.)

We agree that plaintiff's testimony shows he did not rely on Keough's promise to "take care of it." Twice plaintiff testified he did not know what Keough meant by that statement and he stated he did not know what was going to happen. Nor could he have relied on the statement because as noted, plaintiff texted, after his discussions with Keough that KEC's work on the project was done. Plaintiff does not really raise any argument other than to observe that justifiable reliance is a factual question for the jury. Plaintiff has not demonstrated a triable issue and so the trial court properly granted summary adjudication of this cause of action and dismissed the lawsuit.

DISPOSITION

The judgment is affirmed. Each party to bear its costs on appeal.

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ALDRICH, J.

We concur:

EDMON, P. J.

STRATTON, J.*

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