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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ALEJANDRO TEJEDA PEREZ, Plaintiff and Appellant, v. HARBOR VILLAGE HOUSING PARTNERS L.P., et al., Defendants and Respondents.	B285284 (Los Angeles County Super. Ct. No. BC595111)

APPEAL from a judgment of the Superior Court of Los Angeles County, Patricia Nieto, Judge. Affirmed.

Stephen A. Varga for Plaintiff and Appellant.

Trachtman & Trachtman, Benjamin R. Trachtman and Timothy M. Smith for Defendants and Respondents.

INTRODUCTION

Alejandro Tejeda Perez (plaintiff) appeals from a grant of summary judgment in favor of Harbor Village Housing Partners, L.P. and Related Management Company, L.P. (collectively defendants).[1] Plaintiff alleged that he was injured by falling while attempting to ascend the staircase in his apartment because defendants failed to preserve the handrail's special grip finish when they remodeled the apartment.

On summary judgment, the trial court found plaintiff failed to proffer facts or evidence suggesting that defendants could foresee that plaintiff would be injured without a special grip coating. Accordingly, plaintiff could not establish that defendants owed plaintiff a duty to provide special paint on the handrails. For the same reasons, it also found that defendants did not create a dangerous condition. The trial court granted defendants' motion and entered judgment.

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[1] On January 29, 2016, plaintiff voluntarily dismissed defendant Normont Terrace, L.P. without prejudice. Because the judgment left no issues to be determined as to the other two defendants and no agreement for future litigation against Normant Terrace, L.P. exists, the judgment is appealable. (*Ram v. OneWest Bank, FSB* (2015) 234 Cal.App.4th 1, 9 ["the 'one final judgment' rule" does not apply " ' "when the case involves multiple parties and a judgment is entered which leaves no issue to be determined as to one party." ' "]; *Kurwa v. Kislinger* (2013) 57 Cal.4th 1097, 1105 ["a [voluntary] dismissal, unaccompanied by any agreement for future litigation, does create sufficient finality as to that cause of action so as to allow appeal from a judgment disposing of the other counts"].)

On appeal, plaintiff argues that the trial court erred by misconstruing the scope of defendants' duty: Instead of a duty to use a specific type of paint, defendants' duty was to avoid worsening plaintiff's position. Plaintiff's contention lacks merit because nothing in the record suggests that defendants knew or should have known that the handrail's pre-renovation surface was necessary or preferred, or that plaintiff needed a slip-resistant coating at all. Even if defendants' duty were construed more broadly as plaintiff urges, defendants had no notice that plaintiff required a special handrail surface and therefore defendants could not have reasonably foreseen plaintiff's injury.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The following facts are undisputed. Since September 2007, plaintiff lived at an apartment that defendants owned and managed. He had limb-girdle muscular dystrophy, a progressively degenerative illness that attacks muscles. His legs were weak, and he used a wheelchair or scooter.

Plaintiff submitted two formal written accommodation requests to defendants. Plaintiff's first request, dated September 24, 2007, stated, " 'I am requesting an electric garage door with a remote control, handrail for the stairs going up and a handrail for the bathtub/shower and one near the toilet.' " Further, "I have [m]uscular [d]ystrophy which is a permanent impairment of muscle strength. Having the electric garage door will help since I can't lift the garage door when I'm driving by myself and by having the handrails will help keep my balance and helps me try to stand straight." Plaintiff's second request, dated May 12, 2008, stated, "I[']m disable[d.] I can't cl[imb] the stairs because I am in a wheelchair. . . . I need assistance."

Neither request mentioned a need for slip-resistant paint on the staircase handrail, and plaintiff never otherwise mentioned a need for or formally requested slip-resistant paint.

On August 27, 2013, Related Management Company L.P. held a meeting to inform tenants about a prospective remodeling project. At the meeting, plaintiff advised the property manager, Dulce Pineda, that his apartment's staircase had handrails and allegedly asked that the handrails remain in the same condition. More accurately, at his deposition, plaintiff testified that he asked "[w]hat is going to happen to my handrails" and "mentioned that they should take into consideration what I had, which is my handrails . . . ."

Plaintiff did not, however, specify a need to preserve the handrail's surface or for slip-resistant paint. Pineda's handwritten notes of the conversation are silent on the handrail's surface or slip-resistant paint. Defendants never gave plaintiff written confirmation that they would apply slip-resistant paint with the remodel. No document showed that slip-resistant paint was added to or otherwise present on the handrail prior to the remodel.

On September 19, 2013, plaintiff lost his grip on the handrail while attempting to ascend the staircase for the first time following the remodel, fell, and was injured.

Plaintiff sued defendants asserting a sole cause of action for premises liability. He alleged, "[p]rior to the accident, [his] apartment . . . was equipped with handrails with a special grip finish to accommodate his disability . . . . Plaintiff repeatedly

reminded defendants to leave the special grip finish that he needed on the handrails."[2]

Defendants filed a summary judgment motion arguing that they owed plaintiff no duty to apply slip-resistant paint to the handrail and the ordinary paint applied to the handrail was not an unsafe condition.[3] Plaintiff opposed the motion but did not dispute any facts identified in defendants' separate statement: Plaintiff responded "Undisputed" to all of defendants' facts.[4] Among these facts is that plaintiff never requested special grip paint, formally or otherwise, but simply found the pre-renovation paint easier to grip.

No opposing memorandum of points and authorities appears in the record. According to the trial court's case summary, plaintiff filed only evidentiary objections, a volume of evidence, and a responsive separate statement.

Plaintiff's responsive separate statement included six additional facts, three of which are relevant to this appeal. Defendants disputed these facts for lacking reference to the handrail or its surface. First, plaintiff stated that he asked

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[2] Plaintiff's initial and first amended complaints alleged identical facts.

[3] Defendants also argued that the primary assumption of risk doctrine barred plaintiff's claims. The trial court, however, rejected this contention, and it is not raised on this appeal.

[4] In his responsive separate statement, plaintiff noted that he objected to certain portions of a postaccident incident report's admissibility. The trial court sustained the objection. Nevertheless, plaintiff did not actually dispute the facts associated with the incident report. Additionally, no party raises the incident report on appeal.

Pineda "what would happen to his handrails because they were adapted. . . . She said that there was no problem, that they were going to take care of it. She took notes." Second, "Plaintiff wanted the things . . . that had been added to be kept as they were." Finally, "Plaintiff relied on defendants' representation that his special accommodations would be kept as they were." In response, defendants cited the portions of their own separate statement in which plaintiff did not dispute that he never mentioned the existence of or need for special grip paint.

The trial court found the undisputed facts established that defendants could not foresee that plaintiff would be injured without special paint and that defendants did not create a dangerous condition. The trial court reasoned summary judgment was appropriate because plaintiff (1) testified he never requested special paint for the handrail but merely found the pre-renovation paint easier to grip; (2) never mentioned a need for special paint in any of his written or formal accommodation requests to defendants; and (3) did not specify the need for special paint when he requested of Pineda that the stairs be left in their pre-renovation condition. Additionally, Pineda's notes from the latter meeting did not mention special paint.

The trial court issued a minute order granting the motion and entered judgment in defendants' favor. Plaintiff timely appealed.

STANDARD OF REVIEW

"The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings . . . to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843

(*Aguilar*).) "[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Id.* at p. 850.) A defendant satisfies this burden by "present[ing] evidence which, if uncontradicted, would constitute a preponderance of evidence that an essential element of the plaintiff's case cannot be established." (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 879.) "Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to the cause of action . . . ." (Code Civ. Proc., § 437c, subd. (p)(2).) A triable issue of material fact exists when "the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar*, *supra*, 25 Cal.4th at p. 845.)

"We review an order granting summary judgment de novo, 'considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained.' " (*Sakai v. Massco Investments, LLC* (2018) 20 Cal.App.5th 1178, 1183.) " 'In performing our de novo review, we must view the evidence in a light favorable to plaintiff as the losing party [citation], liberally construing [his or] her evidentiary submission while strictly scrutinizing defendants' own showing, and resolving any evidentiary doubts or ambiguities in plaintiff's favor.' " (*Ibid.*)

DISCUSSION

A. Plaintiff Failed To Demonstrate A Triable Issue Over Whether His Injury Was Foreseeable Because No Evidence Suggests That Defendants Knew Or Should Have Known Of Plaintiff's Need For A Particular Handrail Surface

"The elements of . . . a premises liability claim are . . . : a legal duty of care, breach of that duty, and proximate cause resulting in injury." (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1158 (*Kesner*).) "[T]he question of a landlord's duty is not whether a duty exists at all, but rather what is the scope of the landlord's duty given the particular facts of the case?" (*Vasquez v. Residential Investments, Inc.* (2004) 118 Cal.App.4th 269, 280, italics omitted.) "In the context of a premises liability case, the court uses the *Rowland* [*v. Christian* (1968) 69 Cal.2d 108, 113 (*Rowland*)] analysis, weighing the foreseeability of harm with the other criteria and policy considerations in determining whether liability should be imposed given the facts of the specific case." (*Thai v. Stang* (1989) 214 Cal.App.3d 1264, 1271; *Kesner*, *supra*, 1 Cal.5th at pp. 1158-1159.)

"[F]oreseeability is a crucial factor in determining the existence of duty." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 676, disapproved of on other grounds in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 527, fn. 5 [in context of a business landowner's duty to prevent third party crime].) "[I]n any analysis of foreseeability, the emphasis must be on the specific, rather than more general, facts of which a defendant was or should have been aware." (*Pamela W. v. Millsom* (1994) 25 Cal.App.4th 950, 957 (*Pamela W.*).)

The existence and scope of a duty is a legal question to be determined de novo. (*Pamela W.*, *supra*, 25 Cal.App.4th at p. 956.)

Here, plaintiff proffered no evidence suggesting that defendants were aware that plaintiff required or requested a particular handrail surface. Indeed, plaintiff testified at deposition, "I never requested exactly how [the handrail] should be or anything." His written accommodation requests did not mention the need for a handrail with a certain type of surface. His first written formal request articulated a need for a handrail but was silent on particulars. His second written formal request mentioned a need for assistance with the stairs but nothing about a handrail.

Plaintiff proffered no evidence contradicting Pineda's declaration stating that plaintiff never mentioned a need for slip-resistant paint on the handrails at the pre-renovation meeting. Pineda's meeting notes are silent on this point.

Plaintiff asserts that "he advised [defendants] that [the handrail's surface] should remain as before . . . ." At deposition, however, plaintiff did not state that he communicated his desire to defendants:

"Q. Do you remember asking Dulce [Pineda] to make sure that you were—handrails would be kept in your apartment?

"A. The reason we had the conversation was because they said that everything that did not belong to the property, they were going to remove it. This is what I asked. What is going to happen to my handrails, my [tubes]. Because they are adapted. They don't belong to the property. They said that there was no problem, that they were going to take care of it. That's when she took the notes. But I don't know what she wrote down.

"Q. Do you remember if you just talked about the handrails or did you say anything else about the handrails other than that you just wanted the handrails kept as they were?

"A. I never said leave there, take away. I just mentioned that they should take into consideration what I had, which is my handrails and tubes. That's all new."

Plaintiff's testimony does not suggest that he informed defendants that he wanted or needed the handrail's surface preserved. At best, the testimony implies that plaintiff asked defendants not to remove the handrail.

Plaintiff also testified at deposition that he "wanted the things that had been added to [his] apartment . . . [to be] kept as they were." He did not state, however, that he communicated that desire to defendants.

Plaintiff contends defendants' duty included asking him questions, examining his apartment to determine his needs, observing him using the stairs, and becoming educated about maintaining the handrail's functionality. Plaintiff raises these issues for the first time in reply without establishing good cause. Accordingly, the arguments are forfeited and we do not address them. (*In re Marriage of Khera & Sameer* (2012) 206 Cal.App.4th 1467, 1477 [" 'Obvious reasons of fairness militate against consideration of an issue raised initially in the reply brief of an appellant.' "]; *Hurley v. Department of Parks & Recreation* (2018) 20 Cal.App.5th 634, 648, fn. 10; *Holmes v. Petrovich Development Co., LLC* (2011) 191 Cal.App.4th 1047, 1064, fn. 2 [" 'Points raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument.' "].) Additionally, he cites no authority and does not explain how his

general, vague statements to defendants would have prompted defendants to inquire about the handrail's surface specifically.

For the first time in his reply, plaintiff asks rhetorically, "What could happen if handrails do not function properly for a given individual?" This rhetorical question does not obfuscate the absence of a disputed fact as to the lack of notice to defendants about how the handrail functioned specifically for plaintiff.

In sum, the trial court correctly found no disputed facts regarding defendants' being unaware of plaintiff's particular handrail needs and that plaintiff's injury was not reasonably foreseeable. (*Pamela W.*, *supra*, 25 Cal.App.4th at p. 959.)

B. Plaintiff Forfeited Application Of The Other *Rowland* Factors Because He Raises Them For The First Time On Appeal

Plaintiff asserts that the other *Rowland* factors[5] weigh in his favor. Nothing in the record shows that plaintiff raised those factors with the trial court. Additionally, plaintiff merely parrots the language describing the factors without citation to authority

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[5] The other *Rowland* factors include "the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." (*Rowland*, *supra*, 69 Cal.2d at p. 113.)

or the record, and without meaningful legal analysis. Accordingly, plaintiff forfeited this contention and we do not address it. (*Nellie Gail Ranch Owners Assn. v. McMullin* (2016) 4 Cal.App.5th 982, 997 (*Nellie Gail Ranch*) [" 'As a general rule, theories not raised in the trial court cannot be asserted for the first time on appeal; appealing parties must adhere to the theory (or theories) on which their cases were tried.' "].)

C. Plaintiff Forfeited A Negligent Undertaking Theory Because He Raises It For The First Time On Appeal

Plaintiff raises the negligent undertaking theory of liability for the first time on appeal and merely recites the legal principles without applying them to the facts in the record. Accordingly, he has forfeited this argument and we do not address it. (*Nellie Gail Ranch*, *supra*, 4 Cal.App.5th at p. 997 [" 'new theories of liability[ ] may not be asserted for the first time on appeal.' "].)

DISPOSITION

The judgment is affirmed. Defendants are awarded their costs on appeal.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.