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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MARIA GALE, Plaintiff and Appellant, v. MASIH HASHEMI, Defendant and Respondent.	B264708 (Los Angeles County Super. Ct. No. BC505028)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gregory Keosian, Judge. Affirmed.

Law Offices of Steven B. Simon and Lawrence P. Perle for Plaintiff and Appellant.

Masserman & Ducey, Mitchell F. Ducey, Terri L. Masserman and Robert J. Borowski for Defendant and Respondent.

Plaintiff Maria Gale appeals from a judgment entered following an order granting summary judgment. Plaintiff sued her landlord, defendant Masih Hashemi, for negligence. Plaintiff and Richard Seff were defendant's tenants—plaintiff lived in the main house and Seff in the adjacent guest house. Plaintiff was injured as a result of Seff's assault and battery. Plaintiff alleged defendant was responsible for her injuries because defendant knew Seff was dangerous and failed to take any action to prevent him from acting out.

Defendant moved for summary judgment pursuant to Code of Civil Procedure[1] section 437c. Defendant asserted he had no duty to protect plaintiff from unforeseen criminal conduct. We agree with defendant and affirm the judgment.

BACKGROUND

Facts

Defendant owns property located at 4412 Canoga Avenue in Woodland Hills, California. The property consists of a two-bedroom main house with a detached guest house. On or about September 1, 2008, plaintiff entered into a lease agreement with defendant to rent the premises. In September 2009, plaintiff's daughter, who had been living in the detached guest house, moved out.

Richard Seff moved into the guest house in November 2009. Plaintiff and Seff shared the outdoor trash bins, which were kept on the street where Seff parked his vehicle.

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

On April 9, 2011, at approximately 7:00 p.m., plaintiff left the main house and walked toward her vehicle in the driveway. Plaintiff discovered the trash bins were lined up between the passenger side of the vehicle and her storage bin in such a way that she was unable to open the passenger door of the car. Plaintiff set her purse and keys down in order to grab the first bin and move it back to where it belonged.

As plaintiff was pushing the bin toward the corner of the guest house, Seff began to yell from inside his unit. Seff was angry plaintiff was moving the trash bins. Seff exited the front door of the guest house and approached plaintiff. Plaintiff and Seff argued as plaintiff continued to push the bin back to where it belonged. Seff then grabbed plaintiff's left forearm while she held onto the trash bin. Seff threw plaintiff down and shoved the bin toward her. Plaintiff called 911.

This was the first time plaintiff and Seff engaged in such an altercation. Seff had never touched plaintiff, or threatened her with physical harm, prior to this incident.

Plaintiff had permission to contact defendant or his brother (Mori Hashemi) concerning any issues related to the property. But, prior to the incident, plaintiff never complained to either person that she feared Seff. Nor had she ever called the police to complain about Seff.

Although defendant had no knowledge of the dispute that led to the assault and battery, he was present, approximately one to two weeks earlier, when Seff directed profane and vulgar language at plaintiff.

Amended Complaint

On June 24, 2013, plaintiff filed her first amended complaint against defendant and Seff. Plaintiff's first two causes of action were against Seff.[2] Her third cause of action was against defendant for negligence. In pertinent part, the amended complaint alleged as follows.

Defendant was aware plaintiff "had a physical condition that put her in a weakened state and that she could not defend herself in a physical altercation." He "received complaints concerning [Seff's] . . . bizarre and violent behavior and failed to respond appropriately." Plaintiff told defendant that Seff was verbally abusive and she was afraid of him. She requested defendant advise Seff to stay away from her and not harass her or, in the alternative, to evict him.

Seff "attacked, assaulted, and battered" plaintiff. Although defendant knew Seff was dangerous, and had the opportunity to control Seff's conduct, he refused to take plaintiff's requested action. Defendant failed to exercise reasonable care and failed to take reasonable precautions to prevent Seff from harming plaintiff.

Summary Judgment Motion

Defendant argued he had no knowledge of any risk of physical harm to plaintiff prior to the incident and that the assault and battery was unforeseeable. Defendant cited plaintiff's deposition testimony to support his position. In part, defendant pointed out that plaintiff testified: (1) defendant had

[2] Seff is not a party to this appeal.

no knowledge (pre-dating the altercation) of any problems/disputes regarding the trash bins; and (2) plaintiff did not inform defendant prior to the incident that Seff caused her to fear for her physical safety.

Plaintiff argued defendant had prior knowledge of Seff's danger because she made numerous complaints. In her separate statement of disputed/undisputed facts (separate statement), plaintiff cited her deposition testimony that defendant was present during an argument between herself and Seff wherein Seff was swearing at plaintiff.

Plaintiff also relied on deposition testimony that was not cited in her separate statement. That testimony was: she warned defendant that she feared Seff would physically harm visitors to the property (but not herself); and she informed defendant that Seff exhibited "creepy" behavior such as masturbating on his couch in clear view of people passing by his window.

Plaintiff also relied on Exhibit 3 (e-mails between herself and defendant regarding a dispute with Seff about the payment of utility bills), and Seff's laziness when it came to putting the trash bins away. Defendant objected to Exhibit 3 as irrelevant.

The trial court sustained defendant's objection to Exhibit 3 and granted defendant's summary judgment motion. The trial court found, based on the undisputed facts, defendant did not have knowledge of any threat to plaintiff's physical safety. It recognized defendant was privy to the prior verbal altercation between Seff and plaintiff but concluded Seff's insulting language did not put defendant on notice that there was a foreseeable threat of physical harm to plaintiff.

DISCUSSION

Applicable Law

"[F]rom commencement to conclusion, the 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. That is because of the general principle that a party who seeks a court's action in his favor bears the burden of persuasion thereon. [Citation.] There is a triable issue of material fact if, and only if, 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. . . . [¶] [T]he party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact. . . . A prima facie showing is one that is sufficient to support the position of the party in question. [Citation.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850-851 (*Aguilar*), fns. omitted.) We review an order granting summary judgment de novo. (*Coral Construction, Inc. v. City and County of San Francisco* (2010) 50 Cal.4th 315, 336.)

A negligence action requires a showing that: the defendant owed the plaintiff a legal duty; the defendant breached that duty; and the breach was a proximate or legal cause of the plaintiff's injuries. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673, disapproved on other grounds in *Reid v. Google,*

Inc. (2010) 50 Cal.4th 512, 527, fn. 5.) "In the case of a landlord, this general duty of maintenance, which is owed to tenants and patrons, has been held to include the duty to take reasonable steps to secure common areas against foreseeable criminal acts of third parties that are likely to occur in the absence of such precautionary measures. [Citations.]" (*Id.* at p. 674; accord, *Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1213.)

The key to determining the scope of the duty is typically foreseeability of harm. (*Castaneda v. Olsher*, *supra*, 41 Cal.4th at p. 1213.) ""[I]n cases where the burden of preventing future harm is great, a high degree of foreseeability may be required. [Citation.] On the other hand, in cases where there are strong policy reasons for preventing the harm, or the harm can be prevented by simple means, a lesser degree of foreseeability may be required." [Citation.]' [Citation.]" (*Ann M. v. Pacific Plaza Shopping Center*, *supra*, 6 Cal.4th at pp. 678-679; accord, *Castaneda v. Olsher*, *supra*, 41 Cal.4th at p. 1213.)[3]

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[3] A separate theory of negligence proffered by plaintiff is that defendant negligently created a dangerous condition on the property. But, in the amended complaint, plaintiff's stated theory of negligence was as follows: defendant had notice that Seff was dangerous; it was foreseeable that Seff would harm plaintiff; and defendant failed in his duty to protect plaintiff from this foreseeable harm. Because summary judgment is directed to the issues framed by the pleadings (*Turner v. Anheuser-Bush, Inc.* (1994) 7 Cal.4th 1238, 1252), we do not address the issue of whether defendant created a dangerous condition on the property.

Analysis

Defendant Met His Burden of Production

Defendant asserts there is no triable issue of material fact demonstrating he breached any duty of care to plaintiff. In support, defendant cites plaintiff's deposition testimony wherein she admitted she did not inform defendant that Seff posed a threat to her physical safety.[4] Defendant also relies on plaintiff's testimony that Seff had never threatened physical harm or physically touched her prior to the subject incident, and that she had never before reported Seff to the police. Defendant met his burden of demonstrating there is no triable issue of material fact as to the foreseeability of Seff physically assaulting plaintiff. (§ 437c, subd. (p)(2); *Aguilar*, *supra*, 25 Cal.4th at p. 850.)

Plaintiff Has Not Satisfied Her Burden

As stated, once a defendant meets his burden of production, plaintiff must make a prima facie showing that there exists a triable issue of material fact to avoid summary judgment. (§ 437c, subd. (p)(2); *Aguilar*, *supra*, 25 Cal.4th at p. 850.) Plaintiff has not done so.

Plaintiff relies on two key segments of her deposition testimony to support her argument that defendant knew of Seff's propensity for violence. First is her testimony that defendant, on

[4] Plaintiff was asked: ". . . Is it true that you never communicated to [defendant] prior to the date of this incident that you were in fear that Mr. Seff would hurt you physically? Is that a true statement?" Plaintiff replied, "Yes. Yes."

one isolated occasion, heard Seff directing profanity at her. She explained, while Seff was calling her a "liar" and a "bitch," defendant told her to stay away from Seff and stood between her and Seff.

This language, heard by defendant just once, does not raise a triable issue of material fact as to whether it was foreseeable that Seff would assault plaintiff. At most, plaintiff's testimony indicates defendant was aware Seff was verbally abusive. (Compare *Andrews v. Mobile Aire Estates* (2005) 125 Cal.App.4th 578, 596 [battery not foreseeable when prior incidents constituted harassment, verbal insults, and annoyances] with *Madhani v. Cooper* (2003) 106 Cal.App.4th 412, 415-416 [foreseeable physical harm when tenant complained to landlord of repeated prior acts of assault and battery].)

It is true, as plaintiff points out, she testified at her deposition that she told defendant she feared Seff would physically harm "anybody coming to visit [her]." But, plaintiff clarified she did not fear for *her own* safety. Plaintiff is tasked with establishing foreseeability of harm to herself, not her possible visitors.

There is another problem with the deposition testimony addressing plaintiff's concerns about the safety of her visitors. Although plaintiff mentioned this testimony in her opposition to the summary judgment motion, she did not cite it in her separate statement.

Section 437c, subdivision (b)(3) provides: "The opposition papers shall include a separate statement that responds to each of the material facts contended by the moving party to be undisputed, indicating if the opposing party agrees or disagrees that those facts are undisputed. The statement also shall set

forth plainly and concisely any other material facts the opposing party contends are disputed. *Each material fact contended by the opposing party to be disputed shall be followed by a reference to the supporting evidence.* Failure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court's discretion, for granting the motion." (Italics added.)

The statutory mandate for a separate statement is construed as "requiring a party to *specify within that document* any facts he deems to be disputed facts material to the issue presented." (*North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 30; see *United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 337 ["'This is the Golden Rule of Summary Adjudication: if it is not set forth in the separate statement*, it does not exist*.'"].) Because plaintiff did not reference the deposition testimony regarding Seff potentially harming visitors to the property in her separate statement, the trial court had the discretion to disregard it.[5]

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[5] Plaintiff cites Exhibit 3 in support of her position that defendant was aware of Seff's violent tendencies. However, as noted, the trial court sustained defendant's objection to that exhibit. Plaintiff does not challenge that ruling. Thus, we treat Exhibit 3 as properly excluded, and any issue concerning the propriety of the ruling is waived. (*Lopez v. Baca* (2002) 98 Cal.App.4th 1008, 1014-1015; see also *Jessen v. Mentor Corp.* (2008) 158 Cal.App.4th 1480, 1492, fn. 14.)

DISPOSITION

The judgment is affirmed. Defendant Masih Hashemi may recover his costs on appeal from plaintiff Maria Gale.

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KUMAR, J.*

We concur:

TURNER, P. J.

KRIEGLER, 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.