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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

DORIS SLATER-PRENTIS, Plaintiff and Appellant, v. WAL-MART STORES, INC., Defendant and Respondent.	B294369 (Los Angeles County Super. Ct. No. MC027619)

APPEAL from a judgment of the Superior Court of Los Angeles County. Randolph A. Rogers, Judge. Reversed.

Law Office of Louis P. Dell, Louis P. Dell; Barm Law and Rosie Barmakszian for Plaintiff and Appellant.

Pettit Kohn Ingrassia Lutz & Dolin, Jennifer N. Lutz and Bron D'Angelo for Defendant and Respondent.

Plaintiff and appellant Doris Slater-Prentis appeals from a judgment entered following the trial court's order granting defendant and respondent Wal-Mart Stores, Inc.'s motion for summary judgment. We agree with plaintiff that a triable issue of fact exists as to whether a dangerous condition existed, leading to plaintiff's injuries. Accordingly, we reverse the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. *The Incident; the Complaint; and the Answer*

On April 29, 2017, plaintiff and her husband, Keith Prentis, were shopping for a storage cabinet at defendant's Lancaster location (the store) when a furniture box fell on top of her foot. She suffered injuries, prompting her to file the instant complaint against defendant, alleging causes of action for negligence and premises liability. Defendant filed and served an answer.

II. *Defendant's Motion for Summary Judgment*

On August 8, 2018, defendant moved for summary judgment. According to defendant, Mr. Prentis had touched the furniture box while it was on the shelf to move it and inspect the furniture boxes behind it just before the box fell on top of plaintiff's foot. According to his written witness statement, as soon as he touched the subject box, it fell off of the shelf and landed on his wife's foot. Plaintiff also provided a written customer incident report on the date of the incident wherein she stated that as soon as her husband went to pull the box, it just fell off the shelf by itself on to her foot.

Defendant further argued that photographs taken of the shelving unit on the day of the incident showed no defect.

III. *Plaintiff's Opposition*

Plaintiff opposed defendant's motion, claiming that the boxes were not arranged in a safe manner. In support, plaintiff offered deposition testimony from her husband, who stated that "the shelf kind of buckled, and the box started falling." At the time of the incident, Mr. Prentis noticed a "dent or buckle in the shelf." According to plaintiff, photographs taken immediately after the accident corroborate Mr. Prentis's deposition testimony, namely a "dented shelf at the bottom where heavy boxes are stacked."

IV. *Trial Court Order; Judgment; Appeal*

At the hearing on defendant's motion, the trial court entertained oral argument. At one point, the trial court noted that "certainly there is evidence of negligence, I guess, either in the shelf not being strong enough or in the manner of stacking, and so it's kind of where we are." In fact, the trial court added: "I can't ignore [Mr. Prentis's] testimony that the shelf bent."

After taking the matter under submission, the trial court granted defendant's motion. It noted that plaintiff's primary argument appeared to be that the shelf "unexpectedly buckling was the direct and proximate cause" of her injuries. But, there was no evidence or expert opinion in support of this argument. And, because there was no way to remove all dangers to customers when those customers interact with heavy products, plaintiff could not show that defendant breached its duty of care to plaintiff.

Judgment was entered, and plaintiff's timely appeal ensued.

DISCUSSION

I. *Standard of review*

"'An order granting summary judgment is subject to de novo review. [Citation.]' [Citation.] Like the trial court, we employ a three-step analysis: "'First, we identify the issues framed by the pleadings. Next, we determine whether the moving party has established facts justifying judgment in its favor. Finally, if the moving party has carried its initial burden, we decide whether the opposing party has demonstrated the existence of a triable, material fact issue. [Citation.]" [Citation.]' [Citation.]" (*Garcia v. American Golf Corp.* (2017) 11 Cal.App.5th 532, 539.)

In considering the evidence offered by the parties in connection with a summary judgment motion, declarations of the moving party are strictly construed, those of the opposing party are liberally construed, and doubts as to whether a summary judgment should be granted must be resolved in favor of the opposing party. (*ML Direct, Inc. v. TIG Specialty Ins. Co.* (2000) 79 Cal.App.4th 137, 141.) Equally conflicted evidence requires denial of a summary judgment motion and a trial to resolve the dispute. (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 880.)

II. *A triable issue of fact exists as to whether there was a dangerous condition*

A. Relevant law

"The elements of a negligence claim and a premises liability claim are the same: 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; see also *Ortega v. Kmart Corp.*

(2001) 26 Cal.4th 1200, 1205 (*Ortega*); Civ. Code, § 1714, subd. (a).)

A landowner is decidedly not an insurer of the safety of persons on his property. (*Blodgett v. B.H. Dyas Co.* (1935) 4 Cal.2d 511, 512.) The mere fact that a plaintiff sustained injury on the premises of an owner or possessor of land is insufficient on its own to establish negligence. (*Edwards v. California Sports, Inc.* (1988) 206 Cal.App.3d 1284, 1287.) Thus, "[a]n initial and essential element of recovery for premises liability . . . is proof a dangerous condition existed. [Citations.]" (*Stathoulis v. City of Montebello* (2008) 164 Cal.App.4th 559, 566.) In addition, a plaintiff suing for premises liability has the burden of proving that the owner had actual or constructive knowledge of a dangerous condition in time to correct it, or that the owner was "'able by the exercise of ordinary care to discover the condition.'" (*Ortega*, *supra*, 26 Cal.4th at p. 1206.) Where "'the evidence is such that a reasonable inference can be drawn that the condition was created by employees of the [defendant], then [the defendant] is charged with notice of the dangerous condition.' [Citations.]" (*Getchell v. Rogers Jewelry* (2012) 203 Cal.App.4th 381, 385.)

B. Analysis

In the instant case, plaintiff created a triable issue of fact regarding the existence of a dangerous condition. Her husband testified at his deposition that as he was pulling the box out from the shelf, the bottom of the shelf "buckled, it bent, and [the box] started falling." His statement is sufficient to create a triable issue of material fact as to whether a dangerous condition existed, namely whether the shelf was adequate to hold the furniture boxes. Given that the shelves were located in defendant's store and defendant's employees presumably stacked

the boxes on those shelves, we can reasonably infer that defendant knew about the alleged dangerous condition.[1]

In urging us to reject this argument, defendant argues that Mr. Prentis's testimony was based upon speculation and conjecture. We disagree. If he saw the shelf buckle and/or bend, then he has personal knowledge and his testimony is not speculative. (Evid. Code, § 702.)

Defendant's reliance upon *Buehler v. Alpha Beta Co.* (1990) 224 Cal.App.3d 729 (*Buehler*) is misplaced. In *Buehler*, the plaintiff brought a slip and fall claim after she fell in the defendant supermarket; she alleged that she fell "'on an unknown substance or an improperly waxed floor.'" (*Id.* at p. 732.) The trial court granted the supermarket's motion for summary judgment, and the Court of Appeal affirmed. The Court of Appeal found that there was no triable issue of fact as to the alleged dangerous condition because there was no evidence that the floor was slippery. In fact, the plaintiff "had no idea as to what caused her to fall." (*Id.* at p. 734.) Her "[c]onjecture that the floor might have been too slippery at the location where [she] happened to fall [was] mere speculation which is legally insufficient to defeat a summary judgment. [Citations.]" (*Ibid.*) In other words, the plaintiff fell "for some unknown reason," and,

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[1] It follows that we reject defendant's contention that it did not create the dangerous condition. While Mr. Prentis may have been the one to move the box that ultimately fell, he did not build or install or otherwise check the allegedly defective shelves on which the boxes were placed.

under those circumstances, she could not defeat the supermarket's motion for summary judgment. (*Ibid*.)

In contrast, here, we have admissible evidence as to the alleged dangerous condition that caused plaintiff's injuries—Mr. Prentis testified that the box fell off a shelf that was "buckled" or "bent." That evidence is sufficient to compel denial of defendant's motion for summary judgment.[2]

The fact that plaintiff and Mr. Prentis both provided written witness statements to defendant that did not mention a buckle or bend in the shelf does not aid defendant in connection with this motion for summary judgment. It is well-settled that a party or witness cannot manufacture a triable issue of fact by providing contradictory testimony. (See, e.g., *Alvis v. County of Ventura* (2009) 178 Cal.App.4th 536, 549; *Whitmire v. Ingersoll-Rand Co.* (2010) 184 Cal.App.4th 1078, 1087 ["It is well established that 'a party cannot create an issue of fact by a declaration which contradicts his prior discovery responses'"];

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[2] We reject defendant's brief assertion that it is entitled to summary judgment because plaintiff failed to present "evidence that the shelf was improperly designed or manufactured." Because defendant did not argue that the shelf was properly designed and/or manufactured, plaintiff did not have the burden of presenting evidence that it was not. (Cal. Code Civ. Proc., § 437c, subd. (o)(2); *Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 500 ["Until the moving defendant has discharged its summary judgment burden of proof, the opposing plaintiff has no burden to come forward with any evidence"].) Regardless, liberally construing plaintiff's allegations and the evidence presented, we can presume, at least at this stage of the litigation, that if the shelf was bent or broken, it was somehow defective.

Nunez v. R'Bibo (1989) 211 Cal.App.3d 559, 563 [applying this principle to a witness's contradictory statements].) But Mr. Prentis did not provide contradictory *testimony*; certainly it appears that his witness statement differs from his deposition testimony, but that contradiction is for the trier of fact to sort out; the trier of fact must assess Mr. Prentis's credibility. (*Fuentes v. AutoZone, Inc.* (2011) 200 Cal.App.4th 1221, 1233; *Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 878.)

The evidence cited by defendant in its respondent's brief, i.e., plaintiff's customer incident report and the allegedly uncontradicted photographic evidence that the shelf was not bent and did not buckle, merely confirms that there is a triable issue of fact for a jury to decide. No matter how much we may be tempted to do so, we cannot weigh the evidence or judge the credibility of the witnesses. (See *Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 840 ["The trial court may not weigh the evidence in the manner of a fact finder to determine whose version is more likely true. [Citation.]".)

DISPOSITION

The judgment is reversed. Plaintiff is entitled to costs on appeal.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT