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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

SHAOUL AMAR, Plaintiff and Appellant, v. STEVE JOSEPH ROSEN et al, Defendants and Respondents.	B247359 (Los Angeles County Super. Ct. No. LC094030)

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

Leslie Richards & Associates and Leslie Richards for Plaintiff and Appellant.

Bradley & Gmelich, Jonathan A. Ross, Kathryn A. Canale, Mark I. Melo for Defendants and Respondents.

INTRODUCTION

Plaintiff and appellant Shaoul Amar appeals from a summary judgment under Code of Civil Procedure section 437c, in favor of defendants and respondents Steven Joseph Rosen and Eleanore Coutin on plaintiff's claim for premises liability. Plaintiff contends that he was injured when he fell by slipping on water sprayed from one or more of defendants' malfunctioning sprinklers, and defendants had actual or constructive knowledge of the dangerous condition and failed to repair the sprinklers, or in the alternative, defendants are liable for the negligent acts committed by defendants' gardener in failing to repair the sprinklers. We reverse.

FACTUAL BACKGROUND[1]

Defendants were married, and since May, 1997, they have been the owners of a single family home located at 5061 Shirley Avenue, Tarzana, California (premises). The front of the entrance consisted of a single door leading out onto the front porch area, which measured approximately five feet by five feet in area. Immediately in front of the premises, between the house and the paved sidewalk and street, there was a landscaped area with planter areas. The front yard area also contained a permanent irrigation sprinkler system installed in the ground at the front of the house, which could be activated either manually or by use of a timer.

On about November 27, 2010, defendants began renting the premises to Marisela Vakneen pursuant to a written rental agreement that provided Vakneen was obligated to

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[1] Pursuant to the applicable standard of review discussed below, we normally state the facts in the light most favorable to plaintiff as the party against whom summary judgment was entered. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 843.) The record, however, contains limited substantive facts asserted by plaintiff. We therefore base the factual background on defendants' separate statement of undisputed material facts submitted in support of the motion and evidence introduced by defendants that was not contradicted by plaintiff.

provide defendants with a list of items that were damaged or not in operable condition by December 1, 2010. Vakneen did not advise defendants by December 1, 2010, that the sprinkler system at the front of the house was in any way damaged or not in an operable condition.

The written rental agreement also provided in paragraph 11 that, "A. [Vakneen] shall properly use, operate and safeguard Premises, including if applicable, any landscaping, furniture, furnishings and appliances, and all mechanical, electrical, gas and plumbing fixtures, and keep them and the Premises clean, sanitary and well ventilated. . . . [Vakneen] shall immediately notify Landlord, in writing, of any problem, malfunction, or damage. . . . [¶] B. [Vakneen] shall water the garden, landscaping, trees and shrubs . . . . [¶] C. [Defendants] . . . shall maintain the garden, landscaping, trees and shrubs . . . ."

In or before December 2007, defendants retained a landscaping company to maintain the yard areas at the front and back of the house and to advise them of any damages to the grounds, planter areas, fencing, or irrigation fixtures in those areas. Prior to December, 2010, defendants were never advised by this gardening company that there were any problems, damages or malfunctions of the sprinkler system at the front of the house.

On December 21, 2010, plaintiff went to the premises between approximately 9:30 and 10:00 p.m., at which time the front porch area was dry. At approximately 11:30 p.m., while the front porch light was on, plaintiff exited the front entrance of the house and fell. Plaintiff does not know for how long the sprinkler had purportedly been shooting water onto the front porch area prior to the incident. Despite making repeated visits to the premises, the incident was the first time plaintiff had noticed a sprinkler had spayed water into the porch area.

A week before the accident, Vakneen advised the gardener that sprinklers were sprinkling water on the entryway to the house. Plaintiff does not know when, if ever, Vakneen called defendants directly to complain about water from the sprinkler being on the front porch area. Prior to the incident, defendants were never advised by Vakneen of

anyone injuring himself or herself or otherwise having any difficulty walking up or down the steps at the entryway of the house when the steps were wet, whether by water from the sprinkler system or from some other source. Prior to the incident, defendants were not aware, and were not advised by anyone, that any person had ever fallen and/or injured themselves on the premises.

PROCEDURAL BACKGROUND

Plaintiff filed a form complaint against defendants and Vakneen[2] alleging a cause of action for premises liability. Plaintiff alleged that on December 21, 2010, he was injured when, as an invited guest at the premises known as 5061 Shirley Avenue, Tarzana, California, he fell and severely broke his leg requiring several surgeries to repair. Plaintiff alleged that defendants negligently owned, maintained, managed and operated the premises, and they willfully or maliciously failed to guard or warn against a dangerous condition, use, structure, or activity.

Defendants filed a motion for Summary Judgment or in the Alternative Summary Adjudication contending that plaintiff cannot establish defendants' acts or omissions were a substantial factor in causing his injuries, defendants had actual or constructive notice of the allegedly dangerous condition, or defendants failed to exercise reasonable care over the premise. In support of the motion, defendants introduced into evidence plaintiff's response to defendants' interrogatories asking plaintiff for all facts upon which he based his allegation that defendants are in any way responsible for the incident. Plaintiff's response to the discovery stated, "As owner[s] of the property, [defendants have] a duty of care to protect against such accidents."

Plaintiff opposed the motion. In support of the opposition to the motion, plaintiff submitted Vakneen's declaration in which declaration Vakneen stated, "I moved into

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

5601 Shirley Avenue, Encino, California[3] on or about November 30, 2010. [¶] At some point around early/mid-December, 2010, I noticed that 2 of the sprinklers were spraying water on the entry way and on a window. That I then, within that same week, informed the Gardner of this and asked him to fix it. [¶] That, about a week later, Mr. Amar slipped on the water from the sprinkler." Defendants' filed objections to Vakneen's declaration.

The trial court overruled defendants' objections to Vakneen's declaration and granted defendants' motion. The trial court issued a minute order stating, "[T]here exist no triable issues of material fact as to whether [defendants] either caused the alleged dangerous condition, or had actual or constructive notice of it. [Defendants] are entitled to judgment on the Complaint as a matter of law. . . . [¶] . . . . [¶] [Plaintiff] has not established that any conduct by [defendants] was a substantial factor in causing [plaintiff's] alleged injuries. [Plaintiff's] responses to discovery lack specific facts to suggest liability by [defendants], who have presented evidence to show that they did not cause the alleged dangerous condition to exist. . . . [Plaintiff] has not met his burden of production . . . . [¶] [Plaintiff] claims in opposition (but not the Complaint) that [defendants] were on notice because their 'gardener' was on notice of the existence of the broken sprinkler. Under such theory, the gardener's knowledge is imputed to the landlord. However, the complaint does not allege this theory of liability. Summary judgment cannot be denied on a ground not raised by the pleadings." The trial court found that there were no triable issues of material fact as to whether defendants caused the alleged dangerous condition or had actual or constructive notice of the dangerous condition. The trial court also found that plaintiff had not established that any conduct by defendants was a substantial factor in causing plaintiff's alleged injuries, plaintiff's responses to discovery lacked specific facts to suggest liability by defendants, defendants

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3 In plaintiff's responsive separate statement in opposition to motion for summary judgment/adjudication, he states it is "undisputed" that the address of the house defendants rented to Vakneen was 5061 Shirley Avenue, Tarzana, California.

have presented evidence that they did not cause the alleged dangerous condition to exist, and plaintiff did not meet his burden of production.

DISCUSSION

A. Standard of Review

"A defendant moving for summary judgment meets its burden of showing that there is no merit to a cause of action by showing that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. [Citation.] Once the defendant has made such a showing, the burden shifts back to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or as to a defense to the cause of action. [Citation.]" (*Moser v. Ratinoff* (2003) 105 Cal.App.4th 1211, 1216-1217.)

We review the grant of summary judgment de novo. (*Wiener v. Southcoast Childcare Centers, Inc*. (2004) 32 Cal.4th 1138, 1142.) In performing our de novo review, we must consider all of the evidence and all of the inferences reasonably drawn therefrom, and must view such evidence and such inferences in the light most favorable to the party opposing summary judgment. (*Aguilar v. Atlantic Richfield Co*., *supra*, 25 Cal.4th at p. 843.) "We make 'an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law.' [Citation.]" (*Moser v. Ratinoff, supra,* 105 Cal.App.4th at p. 1216.) "'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.' [Citation.]" (*Lidow v. Superior Court* (2012) 206 Cal.App.4th 351, 356.)

B. Applicable Law

Premises liability is "a form of negligence . . . ." (*Brooks v. Eugene Burger Management Corp*. (1989) 215 Cal.App.3d 1611, 1619.) To prevail on a claim for premises liability, plaintiff must prove that defendants owned, leased, occupied, or controlled the property, defendants were negligent in the use or maintenance of the property, plaintiff was harmed, and defendants' negligence was a substantial factor in causing plaintiff's harm. (CACI 1000.)

"The owner of premises is under a duty to exercise ordinary care in the management of such premises in order to avoid exposing persons to an unreasonable risk of harm. A failure to fulfill this duty is negligence. [Citation.]" (*Brooks v. Eugene Burger Management Corp*., *supra*, 215 Cal.App.3d at p. 1619.) The existence and scope of a defendant's duty are questions of law for a court to decide. (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 237.)

"To impose liability for injuries suffered by an invitee due to the defective condition of the premises, the owner or occupier 'must have either actual or constructive knowledge of the dangerous condition or have been able by the exercise of ordinary care to discover the condition, which if known to him, he should realize as involving an unreasonable risk to invitees on his premises. His negligence in such cases is founded upon his failure to exercise ordinary care in remedying the defect after he has discovered it.' [Citations.]" (*Girvetz v. Boys' Market, Inc*. (1949) 91 Cal.App.2d 827, 829.) "'The requirement of actual or constructive knowledge is merely a means of applying the general rule . . . that the [owner] may be liable if he knew or by the exercise of reasonable care could have discovered the dangerous condition, and it does not alter the basic duty to use ordinary care under all the circumstances.' [Citation]" (*Ortega v. Kmart Corp*. (2001) 26 Cal.4th 1200, 1209.) "'[C]onstructive knowledge,' . . . means knowledge 'that one using reasonable care or diligence should have . . . and therefore is attributed by law to a given person' . . . . [Citation.]" (*John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1190.)

"A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm." (CACI 430.) "The substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical. [Citation.] Thus, 'a force which plays only an "infinitesimal" or "theoretical" part in bringing about injury, damage, or loss is not a substantial factor' [citation], but a very minor force that does cause harm is a substantial factor." (*Bockrath v. Aldrich Chemical Co*. (1999) 21 Cal.4th 71, 79.)

C. Analysis

For purposes of defendants' motion, the parties do not dispute that defendants rented the premises to Vakneen and plaintiff was injured on it. "In general, a landlord is not liable for injuries to a tenant or a third party from a dangerous condition on the leased premises which arises after the tenant has taken possession. [Citation.] However, several exceptions to this rule have developed. [Citation.] 'A common element in these exceptions is that either at or after the time possession is given to the tenant the landlord retains or acquires a recognizable degree of control over the dangerous condition with a concomitant right and power to obviate the condition and prevent the injury. In these situations, the law imposes on the landlord a duty to use ordinary care to eliminate the condition with resulting liability for injuries caused by his failure so to act. [Citation.]' [Citation.]" (*Portillo v. Aiassa* (1994) 27 Cal.App.4th 1128, 1133, fn. 4.)

Although defendants were not in possession of the premises because they rented it to Vakneen, they retained control of maintaining the landscaping and sprinklers by retaining a landscaping company to maintain the yard areas at the front and back of the premises, and to advise them of any damages to the grounds, planter areas, fencing, or irrigation fixtures in those areas. Defendants therefore had a duty to ensure the sprinklers did not cause a foreseeable risk to invitees on the premises.

Defendants rely on *Salinas v. Martin* (2008) 166 Cal.App.4th 404, *Stone v. Center Trust Retail Properties, Inc*. (2008) 163 Cal.App.4th 608, and *Chee v. Amanda Goldt*

Property Management (2006) 143 Cal.App.4th 1360, for the proposition that when a tenant has possession of the premises and control of the dangerous condition on the premises, the landlord is not liable for injuries to a person caused by that dangerous condition unless the landlord has actual knowledge of that dangerous condition. Those cases however are distinguishable because, as noted above, defendants retained control of the allegedly dangerous condition—the landscaping and sprinklers—as evidenced by their having retained a gardener. Also, as we discuss, defendants through their agent did have actual knowledge of the dangerous condition.

Plaintiff submitted Vakneen's declaration in support of plaintiff's opposition to the motion, in which declaration Vakneen stated that in early or mid-December 2010, she saw that two of the sprinklers on the premises were spraying water on the entryway to the house and on a window; within that same week she informed defendants' gardener of it and asked him to remedy it; and about a week later plaintiff slipped on the water from the one of the sprinklers. Plaintiff contends that defendants' gardener was defendants' agent, and therefore the gardener's knowledge of the malfunctioning sprinkler was imputed to defendants,[4] or in the alternative, defendants are liable for the negligent acts committed by the gardener in failing to repair the sprinklers.

"As against a principal, both principal and agent are deemed to have notice of whatever either has notice of . . . ." (Civ. Code, § 2332; *In re Marriage of Cloney* (2001) 91 Cal.App.4th 429, 439.) An "agent's knowledge is imputed to the principal even where . . . the agent does not actually communicate with the principal, who thus lacks actual knowledge of the imputed fact." (*Herman v. Los Angeles County Metropolitan Transportation Authority* (1999) 71 Cal.App.4th 819, 828; *Columbia Pictures Corp. v. De Toth* (1948) 87 Cal.App.2d 620, 630.) "The agent's actual or constructive knowledge of a dangerous condition is imputed to his or her principal, the property owner . . . ." (*Hall v. Rockcliff Realtors* (2013) 215 Cal.App.4th 1134, 1141.) In addition, a principal is liable for the negligent and "wrongful" acts committed by the agent in connection with

[4] There is no evidence in the record that defendants had actual knowledge of the malfunctioning sprinkler system prior to the accident.

scope of the agency relationship. (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 297, fn. 2.) The question of whether one is an agent is ordinarily a question of fact. (*Zimmerman v. Superior Court* (2013) 220 Cal.App.4th 389, 401; *Gulf Ins. Co. v. TIG Ins. Co*. (2001) 86 Cal.App.4th 422, 439; *Trane Co. v. Gilbert* (1968) 267 Cal.App.2d 720, 726.)

Defendants do not dispute that their gardener was their agent or attempt to limit the scope of that agency relationship. Defendants instead contend that summary judgment cannot be denied on the ground that the gardener's knowledge of the malfunctioning sprinkler was imputed to defendants because it was not alleged in the complaint. In support of their contention that "the issues to be determined by a motion for summary judgment are framed by the operative pleadings of the case," defendants rely on *Lee v. Bank of America* (1994) 27 Cal.App.4th 197, which court stated, "[O]n summary judgment the question is whether the undisputed facts establish that the moving party is entitled to prevail on the causes of action articulated by the complaint. If the facts will support causes of action not articulated by the complaint, it is incumbent on the pleader to make some request to amend so that the pleading *is* adequate. In the absence of such a request, the court is under no duty to inquire whether there are causes of action or defenses inherent in the facts but not articulated by the pleading. [Citations.]" (*Id*. at p. 216, fns. omitted.) The quoted language of *Lee v. Bank of America* concerns causes of action not asserted in the complaint. Whether the gardener's knowledge of the malfunctioning sprinkler was imputed to defendants is not a separate cause of action asserted against defendants. It merely provides a basis on which defendants purportedly had imputed knowledge of the allegedly dangerous condition supporting plaintiff's premises liability cause of action.

Defendants rely on *Danieley v. Goldmine Ski Associates, Inc*. (1990) 218 Cal.App.3d 111, 119, but that case too is distinguishable. In that case, the plaintiffs alleged in their complaint that the defendant was negligent in failing to warn of dangerous snow conditions and to remove a tree which posed an unreasonable risk of harm to skiers. The court held that the trial court properly ignored the plaintiffs'

assertion in their opposition to the motion for summary judgment, not alleged in the complaint, that the defendant also was negligent in caring for one of the plaintiffs after the collision. Unlike here, the plaintiffs in *Danieley* sought to impose liability on the defendant for a negligent act not pleaded in the complaint.

Defendants also rely on *FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, holding that for purposes of delimiting the scope of the defense issues relevant to a motion for summary judgment, the affirmative defense alleged in the answer to the complaint must "minimally advise the opposing party of the nature of the defense even if defective as conclusory." (*Id*. at pp. 381, 385.) Here, plaintiff pleaded a cause of action for premises liability thereby minimally advising defendants of the nature of that claim even if the allegations were conclusory. As noted above, premises liability requires that defendants must have either actual or constructive knowledge of the dangerous condition or have been able by the exercise of ordinary care to discover the condition. (*Girvetz v. Boys' Market, Inc*., *supra*, 91 Cal.App.2d at p. 829.) Plaintiff contends that as defendants' agent, the gardener had knowledge of the malfunctioning sprinkler, which was imputed to defendants. Plaintiff did not need to specifically plead that defendants' gardener was their agent and that therefore the gardener's knowledge of the malfunctioning sprinkler was imputed to defendants. As an authority has stated, "[I]t is difficult to see why agency and scope of employment must be pleaded in tort actions." (5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 919, p. 333; see *Golceff v. Sugarman* (1950) 36 Cal.2d 152, 154.)

Defendants contend that Vakneen's declaration submitted by plaintiff in opposition to the motion did not identify the sprinklers that were spraying water on the entryway, that the sprinklers referenced in the declaration were the same sprinklers that sprayed water on the area where plaintiff fell, and that plaintiff's deposition testimony establishes that he fell when he made one step below the main portion of the porch. We, however, review plaintiff's evidence in the light most favorable to him as the party opposing summary judgment. (*Aguilar v. Atlantic Richfield Co*., *supra*, 25 Cal.4th at p. 843.) Vakneen declared that she noticed that sprinklers on the premises were spraying

water on the "entry way," later that week she informed the gardener about it, and about a week later plaintiff slipped "on the water from the sprinkler." There also is evidence in the record that Vakneen witnessed plaintiff falling at the premises. It is reasonable to infer that the "entry way" to the house includes the steps below the main portion of the porch. For purposes of our review of the trial court's ruling on the motion for summary judgment, the evidence in the record sufficiently establishes that plaintiff slipped on the water from one or more of the sprinklers that Vakneen had advised the gardener the week before was spraying water on the "entry way" to the premises.

Because the allegedly dangerous condition continued to exist for about one week after Vakneen advised defendants' gardener of it, a trier of fact could reasonably infer that defendants breached their duty of due care by, among other things, not repairing the sprinklers, or causing them to be repaired. Whether defendants breached their duty of due care is a question of fact for the jury. (*Ortega v. Kmart Corp*., *supra*, 26 Cal.4th at p. 1209; *McGarry v. Sax* (2008) 158 Cal.App.4th 983, 994.) Similarly, whether defendants were a substantial factor in causing plaintiff's injuries is a question of fact. (*Hoyem v. Manhattan Beach City Sch. Dist*. (1978) 22 Cal.3d 508, 520; *Landeros v. Flood* (1976) 17 Cal.3d 399, 411; *Chanda v. Federal Home Loans Corp*. (2013) 215 Cal.App.4th 746, 756.)

Plaintiff had established that one or more triable issues of material fact exists as to his cause of action for premises liability. We therefore reverse the summary judgment.

DISPOSITION

The judgment is reversed. Plaintiff is awarded his costs on appeal.

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MOSK, J.

We concur:

TURNER, P. J.

GOODMAN, J.*

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