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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

GEOLIN TRADING, INC., et al., Plaintiffs and Appellants, v. KENNY LUC, Defendant and Respondent.	B237530 (Los Angeles County Super. Ct. No. BC446864)

APPEAL from a judgment of the Superior Court of Los Angeles County, Rolf M. Treu, Judge. Affirmed in part and reversed in part.

Kenner Law Group and Jason J.L. Yang for Plaintiffs and Appellants Geolin Trading, Inc. and Linda Xiang.

Early, Maslach & O'Shea, Thomas J. Conroy; Law Offices of Roxanne Huddleston and Roxanne Huddleston for Defendant and Respondent Kenny Luc.

Plaintiffs Geolin Trading, Inc. (Geolin) and Linda Xiang (Xiang) appeal summary judgment in favor of Kenny Luc, their commercial landlord. Luc leased warehouse premises to plaintiffs which contained a fire sprinkler system that was triggered when the plaintiffs opened a rolling door that hit one of the sprinkler heads, causing extensive flooding of plaintiffs' inventory. Luc obtained summary judgment on the basis that he had no duty to maintain the premises under the terms of the lease. We reverse with respect to plaintiffs' claim for negligence.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

1. Factual Background

In February 2008, plaintiffs rented a warehouse from defendant Luc located at 2604 Chico Avenue, South El Monte. On June 8, 2010, a sprinkler system that was part of the indoor fire safety system discharged, causing extensive water damage to plaintiffs' inventory.

The sprinkler system consisted of pipes hanging from the ceiling, and a portion of it was near a rolling door at a loading dock that retracted to the ceiling. When plaintiffs retracted the door, the door contacted one of the sprinklers, causing it to discharge. Plaintiffs were unable to turn off the sprinkler system because the valve was either locked or sealed. The sprinkler system discharged water into the warehouse for 20 minutes until the fire department turned the valve off. Plaintiffs suffered $422,269.38 in damage to their inventory.

Quining "George" Xu, an employee of Geolin, worked at the warehouse on a regular basis. If Xu observed a maintenance issue, he would report it to Xiang, who would call the landlord. Before the flooding incident in June 2010, Xu did not recall any problems with the sprinkler system, and did not observe anyone come to inspect it. Xu was unaware that anyone ever had a problem with the rolling door hitting the sprinkler system.

However, in late 2008, Xu observed contractors, who had not been hired by plaintiffs, repairing and maintaining the rolling door and dock. The workers repaired the

door brackets and oiled the door's rollers. When the sprinkler system went off on June 8, 2010, Xu attempted to shut it off at the main fire service valve but could not do so because it was sealed.

Luc's predecessor had the fire protection sprinklers installed in 2002. During plaintiffs' tenancy, Luc had the system inspected in April 2009; at the time, no problems were detected. After the sprinkler system flooded the warehouse, Luc had an independent contractor repair the sprinkler heads. Luc disputed that the shut off valve contained a lock that could be keyed, and maintained that it was sealed rather than locked—as Xu's own testimony demonstrated.

After the flooding, plaintiffs had the sprinkler system inspected by an expert. The inspection disclosed that the sprinkler head which the door hit was about one inch away from the door because a bank of fluorescent lights was in direct contact with one of the pipes. There was damage to the sprinkler head consistent with being hit by the door. According to National Fire Protection Association standards, at least one inch must be maintained between a fire sprinkler head and building components, but fire sprinkler heads that are near a rolling door need more clearance. Further, the expert opined that sprinkler valves are normally locked in an open position with a key and padlock, and Luc's failure to provide Geolin with a key was a cause of the damage.

The lease between the parties provided at paragraph 3 that "Lessee acknowledges that the premises are in good order and repair, unless otherwise indicated herein. Lessee shall, at his own expense and at all times, maintain the premises in good and safe condition, including plate glass, electrical wiring, plumbing and heating installations and any other system or equipment upon the premises and shall surrender the same, at termination herein in as good [a] condition as received, normal wear and tear excepted."

Paragraph 11 of the lease provided that, "To the extent of the law, Lessor shall not be liable for any damage or injury to Lessee, or any other person, or to any property, occurring on the demised premises or any part thereof. Lessee agrees to indemnify and

hold Lessor harmless from any claims for damages which arise in connection with any such occurrence."

2. Procedural Background

Plaintiffs' complaint alleged claims for negligence, breach of contract, and professional negligence.[1] Plaintiffs asserted that the sprinkler system was defective and dangerous; defendant had knowledge of its condition; defendant had a duty to disclose the condition of the sprinkler system; and defendant failed to disclose the defects in the sprinkler system.

Defendant moved for summary judgment, arguing he had no duty to maintain the sprinkler system, as set forth in paragraph 3 of the lease; and even if the lease did not exonerate him of any duty to maintain the premises, he had no notice of a dangerous condition. Plaintiffs contended that the defects in the premises occurred before they took possession, and repair of such defects was the responsibility of the defendants. In reply, defendants asserted that the language of the lease controlled, and in the lease plaintiffs acknowledged the premises were in safe condition when they leased them.

The trial court granted the motion, and entered judgment for defendant.

DISCUSSION

Plaintiffs argue that Luc owed them a duty to deliver the premises in a safe condition, and that he peformed that duty negligently because Luc improperly installed the sprinkler system; they further argue that Luc breached the lease agreement by failing to give them access to the sprinkler valve; and they established triable issues of fact with respect to both of these issues. Luc contends he satisfied his duty to inspect the sprinkler system; he cannot be liable for unknown defects in the sprinkler system; the undisputed evidence establishes that the sprinkler discharged because of faulty maintenance, which

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[1] The complaint against Luc alleged negligence and breach of contract. Plaintiffs also sued several insurance companies and their agents, and alleged professional negligence against those entities. Those entities and persons are not parties to this appeal.

was Geolin's duty to perform; and Luc was not required to give plaintiffs a key to the sprinkler valve.

I. STANDARD OF REVIEW

"[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." (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850.) "Once the [movant] has met that burden, the burden shifts to the [other party] to show that a triable issue of one or more material facts exists as to that cause of action." (Code Civ. Proc., § 437c, subd. (p)(1); *Aguilar*, at p. 850.) A triable issue of material fact exists where "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*, at p. 850.) Where summary judgment has been granted, "[w]e review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports." (*Merrill v. Navegar, Inc*. (2001) 26 Cal.4th 465, 476.)

II. DANGEROUS CONDITION OF PREMISES

The rule that a landlord is liable for dangerous conditions of property leased to a tenant generally applies to those conditions that cause personal injury. The law requires a landlord to use ordinary care to eliminate a dangerous condition on its property over which it has control. (*Salinas v. Martin* (2008) 166 Cal.App.4th 404, 412.) "A 'dangerous condition' [of public property] is defined as 'a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property . . . is used with due care in a manner in which it is reasonably foreseeable that it will be used.'" (*Cerna v. City of Oakland* (2008) 161 Cal.App.4th 1340, 1347.) "A dangerous condition exists when public property 'is physically damaged, deteriorated, or defective in such a way as to foreseeably endanger those using

the property itself,' or possesses physical characteristics in its design, location, features or relationship to its surroundings that endanger users. [Citation.]" (*Id*. at pp. 1347–1348.)

Thus, more precisely applicable here is the rule that with respect to a tenant's personal property, absent an express covenant in the lease, a commercial landlord has no duty to maintain or repair the premises, which the exception of those common areas used by public and other tenants, and those areas over which the landlord retains control. As a result, duties to repair and responsibility for damage to personal property are left to the terms of the commercial lease, and may be allocated as the parties see fit. (*Glenn R. Sewell Sheet Metal, Inc. v. Loverde* (1969) 70 Cal.2d 666, 671.) Thus, although landlords have a duty to prevent personal injury in both the residential and commercial context, a commercial landlord has no duty to safeguard the property of his or her tenant (*Royal Neckwear Co. v. Century City, Inc.* (1988) 205 Cal.App.3d 1146, 1151) absent a showing of negligence on the landlord's part (*Shanander v. Western Loan & Bldg. Co.* (1951) 103 Cal.App.2d 507, 511).

Applying these principles, in *Butt v. Bertola* (1952) 110 Cal.App.2d 128, the plaintiff tenant leased a ground floor store for a sandwich and grocery business. The plumbing and sewer system was in poor repair, causing sewage water to leak onto plaintiff's personal property. The defendants, after being informed of the leak, undertook inadequate repairs. As a result, sewage water damaged plaintiff's inventory. (*Id.* at pp. 129–131.) The landlord attempted to rely on an exculpatory clause in the lease that stated, "'It is agreed by the parties hereto, that said Lessor shall not be liable for damages to any goods, property, or effects in or upon said demised premises, caused by gas, water, or other fluid from any source whatsoever.'" (*Id.* at p. 138.) The *Butts* court determined that such language did not exempt the landlord from the consequences of his active negligence in failing to properly fix the leaks. (*Id.* at pp. 138, 140.) Similarly, in *Burnett v. Chimney Sweep* (2004) 123 Cal.App.4th 1057, the plaintiff tenant leased a retail shop from defendant landlord, but soon discovered mold in the property. The plaintiff alleged this constituted a dangerous condition and requested the landlord to repair it, but the

landlord refused. (*Id.* at pp. 1061–1062.) In moving for judgment on the pleadings, the landlord relied on a provision in a lease that exempted him from liability for damage to the tenant's property. (*Id.* at p. 1062.) The *Burnett* court rejected this, finding that given the broad language of the exculpatory clause, the court must make "'an inquiry into the circumstances of the damage or injury and the language of the contract; of necessity, each case will turn on its own facts.'" (*Id.* at p. 1066.) Thus, the landlord was not, as a matter of law, shielded from active negligence. (*Id.* at p. 1068.)

Here, factual issues exist whether the exculpatory clause of the lease shields Luc from his own conduct that may have amounted to negligence. Luc entered onto the premises on two occasions during the term of the lease either to inspect or to make repairs: once to the sprinkler system, and once to the door mechanism. This voluntary assumption of a duty to inspect and repair—performed after execution of the lease and not required by the lease—nonetheless had to be peformed in a non-negligent manner, even in the face of the language of paragraphs 3 and 11 of the lease. "[T]he volunteer who, having no initial duty to do so, undertakes to come to the aid of another . . . is under a duty to exercise due care in performance and is liable if . . . the harm is suffered because of the other's reliance upon the undertaking. [Citation.]" (*Williams v. State of California* (1983) 34 Cal.3d 18, 23.)

As a result, given that the facts establish Luc, although not obligated by the lease, may have undertaken inspection and repair of the sprinkler system and/or rolling door, there was a factual issue concerning what caused the sprinkler system to go off—whether the sprinkler head was dangerously close to the rolling door because it was improperly installed or inspected, or whether the rolling door was repaired negligently causing it to hit the sprinkler head—the trial court erred in granting summary judgment.[2] Further,

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[2] The dissent points out that there is no evidence that Luc did anything to the sprinkler system or to the garage door between the inspection and the accident and even assuming Luc had a duty to maintain the sprinkler system with reasonable care, the undisputed facts show he discharged that duty by conducting an inspection. However, we disagree with the dissent's limited definition of the duty in this case. Luc did not

factual issues exist whether Luc was required to give plaintiffs access to the shut off valve, factual issues exist whether the valve was locked or sealed, and required a key or a tool to open it, or whether such access was impossible because the valve was sealed in accordance with standard fire safety practice. However, these factual issues only extend to plaintiffs' negligence claim, as the duties asserted do not arise from the Lease and hence do not support a claim for breach of contract.

The dissent argues that plaintiffs did not plead the lack of access to the shut-off valve in their complaint, and thus cannot raise this fact to defeat summary judgment. (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 541.) Defendants failed to raise this point in the trial court, thereby waiving the issue. (*Superior Dispatch, Inc. v. Insurance Corp. of New York* (2010) 181 Cal.App.4th 175, 193.) The dissent would counter any finding of waiver by pointing out that the waiver cases involved defendants raising a defense for the first time on summary judgment. This distinction (even if we agree that it is accurate) offers no rationale for confining the rule to defenses as opposed to causes of action. The scope of summary judgment is framed by the issues raised in the pleadings, be it a complaint or an answer. (*Nieto v. Blue Shield of California Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 73.) In any event, even if we were to agree that defendants did not waive the issue, a party may request and be granted leave to amend a pleading at any stage of the proceedings if substantial rights are affected. (*Cruey v. Gannett Co.* (1998) 64 Cal.App.4th 356, 367.) Finally, we note that access to the shut-off valve is not the plaintiffs' main theory of liability because the lack of access did not cause their damages, but only increased them.

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discharge his duties merely by conducting an inspection; as discussed, the duty extended to conducting a non-negligent inspection of both the sprinkler system and the garage door.

DISPOSITION

The judgment is reversed on the cause of action for negligence against Luc. In all other respects, the judgment is affirmed. Appellants are to recover their costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

I concur:

MALLANO, P. J.

Rothschild, J., dissenting:

I believe that the superior court correctly determined that there are no disputed issues of material fact. I therefore respectfully dissent.

The undisputed facts show that Luc cannot be held liable for negligently installing or maintaining the sprinkler system. Luc had the system professionally inspected in 2009. The system passed inspection and was certified for five years. The accident took place in 2010. There is no evidence that Luc did anything to the sprinkler system or to the garage door between the inspection and the accident. There is also no evidence that at any time between the inspection and the accident Luc had any reason to believe that there might be a problem with the system. Thus, assuming for the sake of argument that Luc had a duty to maintain the sprinkler system with reasonable care, the undisputed facts show that he discharged that duty. Defendants raised this argument in their motion for summary judgment, and the argument is sound.

The only remaining issue is plaintiffs' claim about access to the main control valve for the sprinkler system. Plaintiffs did not plead this theory in their complaint, so it cannot be used to defeat summary judgment. Plaintiffs' only response to this procedural point is that Luc waived it by failing to raise it in the trial court. The authorities that plaintiffs cite, however, involved unpleaded defenses that were first raised by defendants in their own motions for summary judgment. Plaintiffs cite no authority for the proposition that a *plaintiff* may defeat a *defense* motion for summary judgment by advancing an unpleaded theory of liability, or that the defense's failure to raise this procedural point in the trial court forfeits the point for purposes of appeal. I am aware of no such authority. The allegations of the operative complaint frame the issues for summary judgment. "A party cannot successfully resist summary judgment on a theory not pleaded." (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 541.)

I also do not believe that plaintiffs introduced sufficient evidence to support their unpleaded theory concerning the main control valve. But we need not reach that issue, because of the procedural bar.

For all of the foregoing reasons, I respectfully dissent.

ROTHSCHILD, J.