1. DELGADILLO v. PICKETT, SC20180081

Order of Examination Hearing

TENTATIVE RULING # 1: THE PERSONAL APPEARANCE OF THE DEBTOR IS REQUIRED, PROVIDED PROOF OF SERVICE OF THE ORDER TO APPEAR FOR EXAMINATION IS FILED PRIOR TO THE HEARING SHOWING THAT PERSONAL SERVICE ON THE DEBTOR WAS EFFECTED NO LATER THAN 10 DAYS PRIOR TO THE HEARING DATE. (CODE OF CIV. PROC. § 708.110(d).) IF THE APPROPRIATE PROOF OF SERVICE IS NOT FILED, NO EXAMINATION WILL TAKE PLACE.

2. HALEY, ET AL. v. BARTEL, ET AL., PC20190009

Defendants' Motion for Summary Judgment

Plaintiffs Terri Haley and Allen Haley commenced this action in January 2019, alleging causes of action against defendants Rita Bartel and Blake Bartel for (1) negligence: personal injury, (2) negligence: contemporaneous observation of injury, and (3) loss of consortium.

Defendants move for summary judgment against the complaint on the following grounds:

1. Plaintiffs are unable to establish the element of duty as against the moving defendants.
2. Defendants owed no duty to plaintiffs because any danger posed by the steps from which plaintiff Terri Haley fell was open and obvious.
3. Defendants owed no duty to plaintiffs because defendants had no notice of any falls or injuries caused by the landscaped stone pool steps.

A. BACKGROUND

This case arises from a "trip and fall" incident on October 13, 2017, at defendants' residence in El Dorado Hills, California. (Separate Stmt. of Undisputed Material Facts ("SSUMF"), ¶ 1.) Defendants purchased this residence in April 2000. (*Id.*, ¶ 2.) In late 2003 or early 2004, defendants hired co-defendant Natural Design Swimming Holes ("NDSH") to design and construct a swimming pool and built-in steps leading up the hillside on defendants' property.[1] (*Id.*, ¶ 3.) NDSH specializes in making its swimming pools blend into the environment and appear as natural swimming holes. (*Id.*, ¶ 4.)

On the day of the incident, plaintiffs were invited to defendants' residence for drinks and appetizers. (*Id.*, ¶ 13.) At the time of plaintiff's fall, there was no water in

[1] The court granted NDSH's motion for summary judgment in November 2020. (Pls. Appendix of Exhibits, Exs. 1, 3.)

defendants' swimming pool or hot tub. (*Id.*, ¶ 11.) After spending some time inside the residence, plaintiffs moved to the back patio, where they sat at a table. (*Id.*, ¶ 15.) After some time, plaintiff Terri Haley and defendant Rita Bartel got up from the table and walked around the pool to a lounge area. (*Id.*, ¶ 18.) Eventually, they decided to walk up the hill to a "lookout point" that overlooks the pool and the Sacramento valley. (*Id.*, ¶ 19.) They walked up the hill from the right side of the pool. (*Ibid.*) After several minutes of "small talk" at the lookout point, they descended via the stairs located on the left side of the pool. (*Id.*, ¶ 20.)

Plaintiff believes she was stepping from the fourth step from the bottom to the third step when she "stepped into the air" with her left foot and fell. (*Id.*, ¶ 22.) From the stairs, plaintiff ultimately fell into the empty hot tub, sustaining injuries to the left side of her body, including her elbow, wrist, shoulder, ribs, and head. (*Id.*, ¶ 25.)

B. STANDARD OF REVIEW

A defendant moving for summary judgment bears the burden of persuasion that one or more elements of the cause of action at issue cannot be established, or that there is a complete defense to the cause of action. (*Aguilar v. Atl. Richfield Co.* (2001) 25 Cal.4th 826, 850.) The moving party bears the initial burden of making a prima facie showing of the nonexistence of a triable issue of material fact, and only if the moving party carries the initial burden does the burden shift to the opposing party to produce a prima facie showing of the existence of a triable issue of material fact. (*Ibid.*)

"A motion for summary judgment must be decided on admissible evidence in the form of affidavits, declarations, admissions, answers to interrogatories, depositions and matters of which judicial notice may be taken. [Citation.] … [¶] 'Personal knowledge and competency must be shown in the supporting and opposing affidavits and declarations. [Citations.] [¶] The affidavits must cite evidentiary facts, not legal conclusions or "ultimate" facts. [Citation.] [¶] Matters which would be excluded under the rules of evidence if proffered by a witness in a trial as hearsay, conclusions or

impermissible opinions, must be disregarded in supporting affidavits. [Citation.]' " (*Guthrey v. State of Cal.* (1998) 63 Cal.App.4th 1108, 1119–1120 [internal quotation marks omitted], quoting *Hayman v. Block* (1986) 176 Cal.App.3d 629, 638.)

"The court focuses on issue finding; it does not resolve issues of fact. The court seeks to find contradictions in the evidence, or inferences reasonably deducible from the evidence, which raise a triable issue of material fact." (*Raven H. v. Gamette* (2007) 157 Cal.App.4th 1017, 1024.) The evidence of the moving party is strictly construed and the evidence of the opposing party liberally construed. Doubts as to the propriety of granting the motion must be resolved in favor of the party opposing the motion. (*Stationers Corp. v. Dun & Bradstreet, Inc.* (1965) 62 Cal.2d 412, 417.)

C. PRELIMINARY MATTERS

1. Plaintiffs' Request for Judicial Notice

Plaintiffs' request that the court take judicial notice of NDSH's memorandum of points and authorities in support of its motion for summary judgment/adjudication is granted. (Evid. Code § 452(d)(1).)

2. Plaintiffs' Objections to Evidence Offered by Defendants

Objection to Fact Nos. 6 and 8: sustained on the basis of misstates testimony and lack of foundation.

Objection to Fact Nos. 9 and 10: sustained on the basis of lack of foundation.

Objection to Fact Nos. 16 and 17: sustained on the basis of misstates testimony and lacks foundation.[2]

Objection to Fact No. 23: sustained on the basis of misstates testimony.

Objection to Fact Nos. 26, 27: sustained on the basis of relevance.

Objection to Fact Nos. 14, 15, 24: overruled.

[2] The objection to Fact Number 17 is duplicative to the objection to Fact Number 16.

3. Defendants' Objections to Evidence Offered by Plaintiffs

Objection Nos. 1–12: sustained on the basis of relevance.

Objection No. 14: sustained on the basis of misstates testimony.

Objection No. 22: sustained on basis that evidence offered does not support the material fact claimed by plaintiffs.

Objection No. 42: sustained on basis that it lacks proper citation to secondary evidence.

Objection Nos. 13, 15–21, 23–41, 43–50: overruled.

D. DISCUSSION

1. Legal Principles Re: Premises Liability

Civil Code § 1714 sets forth the basic policy of this state that "[e]veryone is responsible ... for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person ...." (*Id.*, subd. (a).) The elements of a premises liability claim are the same as for a negligence claim: "a legal duty of care, breach of that duty, and proximate cause resulting in injury. [Citations.]" (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1158.)

A property owner is under a general 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 Mgmt. Corp.* (1989) 215 Cal.App.3d 1611, 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.)

2. Duty to Warn

Defendants first argue they owed no duty to plaintiffs because the danger was open and obvious. "[A] generally recognized exception is that landowners have no duty to warn of open and obvious dangers on their property because such dangers serve as warnings themselves." (*Jones v. Awad* (2019) 39 Cal.App.5th 1200, 1207–1208.)

Here, the question whether the danger was open and obvious presents a question of fact for a jury in this case. (SSUMF, ¶¶ 6, 8–10, 16, 17, 23, 26, 27.) NDSH's owner testified at a deposition that "very few" of the pools NDSH has constructed have design elements that include stairs that go all the way around the back of the pool and then run about 50 feet up a hill, like defendants' pool area does. (Pls. Appendix of Exhibits, Ex. 4, 39:11–40:17.) Most of their pool projects have very short runs of steps to accommodate people getting in and out of the pool, and that defendants' configuration was very unusual. (*Ibid.*) Defendants had input with NDSH's designer about the pool, defendants approved every phase of the construction, and they accepted the pool and stairway as it was completed. (*Id.*, 41:24–42:15.) There is nothing in NDSH's contracts indicating that the stairs they install are safe and compliant with state codes, or any specific language about the relative safety of the stairs. (*Id.*, 43:1–5, 43:11–15.)

Defendants acknowledge that they had final approval of the construction project with NDSH. (*Id.*, Ex. 5, 76:10–13.) They knew that there were different thicknesses, sizes, and shapes to each step constructed by NDSH, and each step was installed with varying space between them. (*Id.*, 109:16–111:25.) Defendants never had a discussion between themselves with respect to the safety of the stairway. (*Id.*, 117:1–20.)

Plaintiff Terri Haley testified at her deposition that, prior to her fall, there was no discussion about the pool being empty and she did not notice it was empty. (Defs. Exhibits in Support of Motion, Ex. G, 148:4–9, 149:23–150:5.) She did not see the stairs while sitting on the back patio because she was turned a different direction. (*Id.*, 153:7–15, 154:16–19.) With regard to the incident, she stated that the stairs are "very steep," and that she was "looking ahead, a little ahead …, just walking down." (*Id.*, 155:1–2.) She did not have difficulty negotiating the steps, "[i]t was a regular just walking down the steps" at a "moderate" pace. (*Id.*, 156:8–12, 157:11–15.) She was not looking down at the stairs, "[j]ust like you have to look ahead going down stairs a little

bit. (*Id.*, 157:16–158:5.) She could not recall if there were any shadows or anything else obscuring her view of the stairs. (*Id.*, 158:6–11.)

Additionally, in support of their opposition to the motion, plaintiffs submitted a declaration from their expert, Brad Avrit. On May 1, 2019, he visited defendants' residence to inspect, photograph, take various measurements of the pool, spa, deck, and the subject stairway, and he personally walked the stairway numerous times, both ascending and descending. (Decl. Avrit, ¶ 13.) He states that "each step is unique from every other step, in dimensions, height, shape, and surface. The steps are not placed a uniform distance from one another, but are located at random distances. Each step surface is uneven, and the grades of each step vary. The riser heights in this system vary from as little as 5 5/8" to as much as 14 and 3/4"." (*Id.*, ¶ 27.)

He measured the three steps plaintiff Terri Haley took immediately prior to her transition to the subject step where the fall occurred. The riser heights of those three steps are as follows: Step 1 = 7 1/4"; Step 2 = 8 1/8"; and Transition Step = 8 3/4". (*Id.*, ¶ 29.) Mr. Avrit stated that these rise heights in the first three steps plaintiff took are similar to each other, and he believes this raised her expectations that the subsequent riser heights would be similar. (*Ibid.*) The height from the Transition Step to the Event Step is 13", an increase of 4 1/4", or approximately 48% greater than the height of the preceding steps. (*Id.*, ¶ 30.) His opinion is that the "abrupt change meant that after she stepped from the Transition Step towards the Event Step, her foot unexpectedly kept going." (*Ibid.*) In support of his opinion he cited to this portion of plaintiff's deposition testimony: "What I remember is just one foot in front of the other. So that makes me think I was taking one foot at a time going down. And then here at the bottom, I just remember that I just stepped and – I just kept stepping. There was air. There was nothing." (*Id.*, ¶ 31 & Ex. 5, 158:17–21.)

Furthermore, it was notable to Mr. Avrit that plaintiff did not ascend the stairway to get to the top of the hill. "This means that Ms. Haley did not have any

opportunity to appreciate or gain prior notice of any changes in riser height between the Event and Transition Step during an *ascent* of the subject stairway. Instead, her first exposure to the significant change in riser height from the Transition to Event Steps was during her *descent*." (*Id.*, ¶ 35 [emphasis in original].) In his opinion, "it is much more difficult to appreciate such changes during a descent than during an ascent, especially absent any warning signs." (*Ibid.*)

Given this evidence, there are questions of fact as to whether the danger was open and obvious. As such, defendants have not established that they owed no duty to plaintiffs on that basis.

In the alternative, defendants also assert that they owed no duty to plaintiffs because the defendants had no notice of any falls or injuries caused by the stairs.

Defendants' assertion is not persuasive. Defendants were involved with the design of the pool and stairway, they gave final approval, and they accepted the pool as completed. They were aware that each step was unique in thickness, size, shape, and were not uniformly spaced. "Where the dangerous or defective condition of the property which causes the injury has been created by reason of the negligence of the owner of the property …, the owner of the property cannot be permitted to assert that he had no notice or knowledge of the defective or dangerous condition in an action by an invitee for injuries suffered by reason of the dangerous condition. *Under such circumstances knowledge thereof is imputed to him*." (*Hatfield v. Levy Bros.* (1941) 18 Cal.2d 798, 806 [emphasis added].) Accordingly, knowledge of the purportedly dangerous condition is imputed to defendants.

Defendants' motion is denied.

TENTATIVE RULING # 2: DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IS DENIED.

3. BLEVINS v. STATELINE HOLDINGS CORP., SC20190068

Motion for Trial Setting Preference (Code of Civ. Proc. § 36)

Defendant filed a notice of non-opposition.

TENTATIVE RULING # 3: PLAINTIFF'S MOTION FOR TRIAL SETTING PREFERENCE PURSUANT TO CODE OF CIVIL PROCEDURE § 36 IS GRANTED. THE TRIAL IN THIS ACTION SET FOR JANUARY 31, 2022, HAS PRIORITY OVER ANY OTHER CASE SET FOR TRIAL ON THAT DATE.

4. WELLS FARGO BANK, N.A. v. INGERSOLL, ET AL., SC20200109

Motion for Order for Substitution of Plaintiff

Because plaintiff Wells Fargo Bank transferred its interest in the deed of trust—which is the subject of this action—to Carrington Mortgage Services, LLC, Wells Fargo seeks substitution of plaintiff on that basis. (See Code of Civ. Proc. § 368.5.) The motion is not opposed.

TENTATIVE RULING # 4: PLAINTIFF'S MOTION IS GRANTED.

5. RURAL COMMUNITIES UNITED v. COUNTY OF EL DORADO, PC20210189

CMC Re: Service, Response, Record, Briefing Schedule

TENTATIVE RULING # 5: AT THE REQUEST OF THE PARTIES, THE CASE MANAGEMENT CONFERENCE IS CONTINUED TO 2:00 P.M., FRIDAY, FEBRUARY 18, 2022, IN DEPARTMENT FOUR. THE DEADLINES FOR PREPARATION OF THE ADMINISTRATIVE RECORD AND HOLDING A SETTLEMENT CONFERENCE ARE CONTINUED TO FEBRUARY 18, 2022.