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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

LYDIA NAGAL, et al.,

Plaintiffs and Appellants,

v.

COUNTY OF NAPA et al.,

Defendants;

DANIEL WALDSCHMITT,

Defendant and Respondent.

A140175

(Napa County
Super. Ct. No. 26-58207)

Plaintiffs Lydia Nagal, Lily Adkins and Elison Nagal (collectively, the Nagals), the heirs of Alexander Nagal, appeal from the trial court’s judgment in favor of defendant Daniel Waldschmitt, which the court entered after granting Waldschmitt’s motion for summary judgment. Waldschmitt was a licensed tree service contractor who was hired by real property owner Lonna Barry to remove one of two trunks of a bifurcated live oak tree after that trunk had fallen on a road in Napa, California. Eight months later, the other trunk fell, striking Alexander Nagal’s sport utility vehicle and killing him. The Nagals sued multiple defendants, including Waldschmitt.

In his motion for summary judgment, Waldschmitt argued he had no duty to the Nagals. The Nagals contended a triable issue of fact existed as to whether he had a duty, whether contractual, voluntarily assumed, or as a part of his licensed contractor duties, to inspect the entire, two-trunked tree and report any hazardous condition to Barry. The

trial court disagreed and the Nagals contend on appeal that it erred in doing so. We agree with the trial court and affirm the judgment.

BACKGROUND

In February 2012, the Nagals filed a complaint for general negligence, premises liability and wrongful death. They named as defendants the County of Napa, City of Napa and Does 1-100.¹ Waldschmitt, after being deposed in October 2012, filed an answer to the complaint in early 2013 denying any liability.

Several months later, Waldschmitt moved for summary judgment.² He contended he had no duty to inspect the tree and report on its condition to Barry; his contractual duties were limited to removing the fallen tree trunk and providing ground-covering bark chips to Barry. Therefore, he could not be held liable for Alexander Nagal's later death. The Nagals contended a trier of fact could find from the evidence that Waldschmitt had assumed and negligently performed a duty to inspect the two-trunked tree based on an express or implied contract between him and Barry, his voluntary assumption of this duty, and/or his duty to exercise due care in his work as a licensed tree service contractor. Waldschmitt made numerous objections to the Nagals' evidence and contended that the Nagals mischaracterized his deposition testimony.

After hearing, the trial court took Waldschmitt's motion under submission. In its subsequent written ruling, it sustained most of his objections to the Nagals' evidence and granted his motion. It concluded that he had met his burden of showing that he had no duty that could make him liable to the Nagals. The undisputed evidence indicated that he contracted with Barry only to remove the already fallen tree trunk and return with bark chips for her. He was not hired to inspect the tree.

¹ Waldschmitt's motion papers indicate that the subject tree was partially on Barry's property and partially on Napa County's property, and that the Nagals settled their claims against Barry and dismissed her from the lawsuit.

² While Waldschmitt's motion was pending, the Nagals filed a first amended complaint. They named Waldschmitt as a defendant and alleged the same causes of action as before. The parties do not distinguish between the original and first amended complaint, so we do not discuss the first amended complaint further.

The court rejected the Nagals' three theories about Waldschmitt's duties. It concluded there was no admissible evidence that Barry hired Waldschmitt to inspect the tree; rather, the undisputed evidence indicated that he had merely looked at it when he was on the property. This did not create an express or implied contract obligating him to inspect the tree for Barry, nor did it mean he had voluntarily assumed a duty to inspect it, formally or informally. Further, plaintiffs had not established that Waldschmitt's licensure as a tree service contractor created a duty that he inspect the tree or warn Barry of a hazardous condition.

The trial court subsequently entered judgment in Waldschmitt's favor. The Nagals filed a timely notice of appeal.

DISCUSSION

The Nagals essentially repeat their contractual, voluntary assumption and licensure theories for why Waldschmitt had a duty to Barry to inspect the still-standing part of the subject tree and to warn Barry of any hazardous conditions, making him ultimately liable for Alexander Nagel's death. None of these theories are persuasive.

I.

Summary Judgment Standards

A trial court properly grants summary judgment if the record establishes no triable issue as to any material fact and the moving party is entitled to a judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A party moving for summary judgment always bears the burden of persuasion that there is no triable issue of material fact. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) Generally, that party also "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." (*Id.* at p. 850.) "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." (*Ibid.*)

“When a defendant moves for summary judgment in a situation in which the plaintiff would have the burden of proof at trial by a preponderance of the evidence, the defendant may, but need not, present evidence that conclusively negates an element of the plaintiff’s cause of action. [Citation.] As an alternative to the difficult task of negating an element, the defendant may present evidence to ‘show[] that one or more elements of the cause of action . . . cannot be established’ by the plaintiff.’ ” (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1301.)

Our standard of review for an order granting or denying summary judgment is de novo. (*Aguilar, supra*, 25 Cal.4th at p. 860.) We consider “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.) We view the evidence in the light most favorable to the Nagals as the parties opposing summary judgment, strictly scrutinizing Waldschmitt’s evidence in order to resolve any evidentiary doubts or ambiguities in the Nagals’ favor. (See *Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 64.)

Along with the other evidence we discuss below, the Nagals’ contractual, voluntary assumption and licensure theories of duty each rests significantly on certain deposition testimony by Waldschmitt and Barry about what was or was not said between them about the still-standing part of the subject tree. Specifically, Waldschmitt said he looked at the fallen and standing parts of the tree and thought the standing part was in hazardous condition because of its heavy weight and might fall. When asked if he normally told his clients if he thought a tree could fall and hurt someone, he responded, “If the tree is hazardous, I’ll make them aware of it, okay. That’s what I did with [Barry].” He could not recall telling her the tree could fall, however. Barry testified that Waldschmitt did not tell her the remaining tree was rotted and might fall.³

³ As does the reasoning of the parties’ arguments, we focus on whether the Nagals met their burden as the party opposing Waldschmitt’s summary judgment motion. We also consider the Nagals’ arguments as presented, although they include references to evidence that was excluded by the trial court. Because we reject the Nagals’ arguments

II.

The Nagals' Express and Implied Contract Theories Do Not Raise any Triable Issue of Material Fact.

The Nagals first argue triable issues of material fact exist regarding whether Waldschmitt assumed the duty to inspect the fallen or still-standing portions of the tree and report to Barry on the tree's condition by express or implied contract. Waldschmitt contends the undisputed evidence shows that he contracted with Barry to only remove the fallen tree trunk and provide bark chips to her. We agree with Waldschmitt.

“[T]he vital elements of a cause of action based on contract are mutual assent (usually accomplished through the medium of an offer and acceptance) and consideration. As to the basic elements, there is no difference between an express and implied contract. While an express contract is defined as one, the terms of which are stated in words (Civ. Code, § 1620), an implied contract is an agreement, the existence and terms of which are manifested by conduct (Civ. Code, § 1621). . . . [B]oth types of contract are identical in that they require a meeting of minds or an agreement [citation]. Thus, it is evident that both the express contract and contract implied in fact are founded upon an ascertained agreement or, in other words, are consensual in nature, the substantial difference being in the mode of proof by which they are established[.]” (*Division of Labor Law Enforcement v. Transpacific Transportation Co.* (1977) 69 Cal.App.3d 268, 275.) With this law in mind, we turn to the Nagals' arguments.

A. The Nagals' Express Contract Arguments

Along with the deposition testimony we have discussed, the Nagals cite three categories of evidence in support of their express contract arguments. First, they cite Waldschmitt's deposition testimony that when he arrived at Barry's property, he visually observed that the fallen tree trunk appeared compromised, its structure seemed weakened and it was the color of damaged wood. According to the Nagals, “[i]mmediately following, [Waldschmitt] testified that ‘Lonna Barry ask[ed] [him] to come perform this

as presented, we do not address their further argument that the trial court improperly excluded certain evidence.

work.’ [Citation omitted.] ‘This work’ could only have referred to the inspection.” Thus, “Waldschmitt admitted at deposition that Barry asked him to inspect the fallen portion of the tree, but he now denies it.”

The Nagals’ argument is unpersuasive because it is based on an inaccurate representation of Waldschmitt’s testimony. Waldschmitt was asked, “Did Lonna Barry ask you to come perform this work on the tree?” Waldschmitt replied, “On the fallen part, yes.” The Nagals neglect to cite Waldschmitt’s testimony immediately following this exchange. He was asked, “What did Lonna Barry tell you to do?” He replied, “She asked for an estimate on cleaning up a fallen tree part. I provided her with an estimate. Shortly thereafter, she contacted me, said come clean it up, and that’s what we did.”

The Nagals also submitted deposition testimony by Barry in support of their motion that is consistent with Waldschmitt’s. Specifically, Barry was asked what she told Waldschmitt’s service when she called them. She replied, “That I needed – a part of the tree had fallen and I needed it cut up and removed.” Asked later what she told Waldschmitt when she first spoke to him, she said, “I asked him to cut up the stuff there, the wood and clean up the leaves, and he was going to leave some of the cut up wood.”

Waldschmitt’s and Barry’s deposition statements are the only evidence of what was expressly said between the two when Waldschmitt contracted for the work. They indicate only that Waldschmitt contracted to perform work on the fallen part of the tree, not that he agreed to inspect, or did inspect, either the fallen or still-standing parts of it.

Second, the Nagals cite testimony by Barry, that she expected Waldschmitt, as part of his removal of the fallen trunk, to tell her if there was something wrong with the fallen trunk and inspect the other portion of the tree. This argument also is unpersuasive because the Nagals cite no evidence that indicates Barry expressed any such expectations to Waldschmitt directly or indirectly (such as, for example, by asking Waldschmitt about the condition of the tree). Barry’s unstated expectations have no relevance to the parties’ contract. (See *Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga* (2009) 175 Cal.App.4th 1306, 1339 [“The courts will not enforce a party’s unexpressed intention.”].) It appears that the Nagals would have us create a term of the contract that was not

intended by the parties. Of course, we cannot do so. “ ‘A contract extends only to those things which it appears the parties intended to contract. Our function is to determine what, in terms and substance, is contained in the contract, not to insert what has been omitted. We do not have the power to create for the parties a contract that they did not make and cannot insert language that one party now wishes were there.’ ” (*Holguin v. Dish Network LLC* (2014) 229 Cal.App.4th 1310, 1323-1324.)

The Nagals also cite testimony by Barry that she asked Waldschmitt to inspect the other trees on her property. They argue the only reasonable inference that can be drawn from this request is that Barry also asked him to inspect the subject tree. However, they neglect to mention that the record contains no indication that Waldschmitt agreed to inspect any other trees, nor any evidence that he observed any trees in a manner suggesting that it was a part of his contractual work. The Nagals’ argument amounts to speculation, which does not raise a triable issue of material fact. (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 163 [“responsive evidence that gives rise to no more than mere speculation cannot be regarded as substantial, and is insufficient to establish a triable issue of material fact”].)

Third, the Nagals argue that Waldschmitt’s conduct regarding the still-standing part of the tree indicates he expressly assumed a contractual duty to inspect it and report to Barry regarding its hazards. They cite Waldschmitt’s deposition testimony that he observed that this portion of the tree appeared decayed, had cavities and discoloration, was heavy and in danger of falling and that he told Barry that it was hazardous.⁴

As the Nagals indicate, when interpreting ambiguously worded contracts, “ ‘[t]he acts of the parties under the contract afford one of the most reliable means of arriving at their intention.’ ” (*Crestview Cemetery Assn. v. Dieden* (1960) 54 Cal.2d 744, 753.) However, nothing in the record suggests there was any relevant express contractual term that was ambiguous. Therefore, this express contract argument also fails.

⁴ The Nagals contend that Waldschmitt testified that he told Barry that her tree was in danger of falling. However, in the testimony they cite, Waldschmitt said he could not recall telling Barry the tree could fall.

B. The Nagals' Implied Contract Arguments

The Nagals also argue that Waldschmitt's and Barry's *conduct* raised triable issues of material fact about Waldschmitt's contractual duties. This is also unpersuasive.

As we have already indicated, “[a]n implied contract is one, the existence and terms of which are manifested by conduct.” (Civ. Code, § 1621.) “Conduct will create a contract if the conduct of both parties is intentional and each knows, or has reason to know, that the other party will interpret the conduct as an agreement to enter into a contract.” (CACI No. 305.)

Based on these principles, the Nagals argue that “[a] jury could reasonably infer from the conduct of the parties and the surrounding circumstances that there was an implied agreement for Waldschmitt to inspect the tree and warn of its conditions.” They repeat some of the factual assertions they make in support of their express contract theory and add some details from the testimony of Waldschmitt and Barry. They contend, for example, that because Barry told Waldschmitt that the tree fell on its own, a jury could reasonably infer from this, as well as from Barry's assumptions about Waldschmitt's work, that an implied contract was formed that he would inspect the tree and report to her on its condition. After all, the Nagals argue, “healthy trees do not simply fall on their own.” The Nagals also cite to Waldschmitt's testimony that, as a licensed tree contractor, he had visually inspected over 1,000 trees and that he normally would tell an owner of any hazards he saw while working on a tree.

We do not see how the conduct cited by the Nagals expanded the contractual scope of Waldschmitt's duties. That Barry and Waldschmitt understood the tree trunk fell on its own and that healthy ones do not do so, and that Waldschmitt was capable of, and sometimes did, observe trees in his work and regularly told owners when he saw hazards, has no bearing on the scope of the specific contract formed between Waldschmitt and Barry. The Nagals ask, “If there was no contract, then why did [Waldschmitt] examine the tree and report his findings to Barry as he claims? More importantly, if there were a contract, what would he have done differently?” These are

questions, not answers, and indicate that the Nagals' implied contract argument is also based on speculation.

III.

The Nagals' Voluntary Assumption of Duty Theory Does Not Raise A Triable Issue of Material Fact.

The Nagals next contend that Waldschmitt's "actual examination of the tree and his warnings to Barry amounted to an undertaking that gave rise to a duty of care." This argument is similarly unpersuasive.

As the Nagals correctly note, according to the so-called "good Samaritan rule," "[a] person not required to perform services for another may sometimes do so in a voluntary or gratuitous undertaking, and in that case, is under a duty to exercise due care in performance." (6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 1060, p. 371.) However, "[t]he foundational requirement of the good Samaritan rule is that in order for liability to be imposed upon the actor, he must specifically have undertaken to perform the task that he is charged with having performed negligently, for without the actual assumption of the undertaking there can be no correlative duty to perform that undertaking carefully." (Artiglio v. Corning Inc. (1998) 18 Cal.4th 604, 614-615.)

The Nagals repeat their factual assertions and conclude, "[o]nce Waldschmitt looked at the tree and proceeded to warn Barry about its hazard, he was under a duty to exercise due care in the performance of those services." The Nagals are incorrect. Nothing in the record indicates Waldschmitt voluntarily assumed a duty to inspect the tree for hazards and report them to Barry. That he looked at the tree and commented to Barry about a hazard that he saw does not mean he voluntarily assumed the undertaking of inspecting the tree according to any standard of care, formally or informally, as the trial court concluded.

A similar "voluntary assumption" of duty argument was rejected in a case cited by Waldschmitt, *Seo v. All-Makes Overhead Doors* (2002) 97 Cal.App.4th 1193 (*Seo*). There, a subtenant of a commercial premises sought to close an electronic sliding gate by reaching through the gate's metal bars to operate a toggle switch. His arm was crushed

when the gate began to close. He contended the gate had a design defect and sued a company the property owner had called in occasionally to repair the gate. He argued, among other things, that the company had a duty to inspect the gate as well.

The company moved for summary judgment. It argued that, because it was hired to perform repairs unrelated to the defect and had not voluntarily undertaken a systematic inspection of the gate, it had no duty to advise the owner about the defect. The trial court agreed. (*Seo, supra*, 97 Cal.App.4th at pp. 1199-1200.)

On appeal, the subtenant argued, among other things,⁵ that the company had “voluntarily assumed a duty to systematically inspect and maintain the gate on which the owner of the property relied.” (*Seo, supra*, 97 Cal.App.4th at pp. 1204-1205.) It cited the frequency of the company’s repair calls and its voluntary inspection of the gate’s electric current regulator (a “potentiometer”) when it made repairs. (*Id.* at p. 1205.) The appellate court concluded this evidence did not establish that the company had voluntarily assumed the duty to systematically inspect the gate or to maintain it in a safe condition. (*Ibid.*)

The Nagals attempt unsuccessfully to distinguish *Seo* on its facts. Among other things, they contend that the repair company, unlike Waldschmitt, did not make a normal practice of inspecting gates it repaired, undertake to communicate its observations to owners, or discover the design defect in the gate at-issue. None of these distinctions are meaningful. Whether the repair company had a normal practice of inspecting gates is not relevant because there is no evidence that Waldschmitt had a normal practice of “inspecting” trees he worked on or that he “inspected” the subject tree for Barry. Rather, when asked if he normally told his clients if he thought a tree could fall and hurt someone, Waldschmitt merely said, “If the tree is hazardous, I’ll make them aware of it,

⁵ The court also rejected the subtenant’s arguments that the company had contractual and independent contractor duties that made it liable to him. (*Seo, supra*, 97 Cal.App.4th at pp. 1204-1206.)

okay. That's what I did with [Barry]." This does not show he voluntarily assumed a duty to inspect the subject tree and inform Barry about its condition.⁶

Also, similar to Waldschmitt's observations of the tree's hazards, the repair company in *Seo* was "aware of the possibility of injury if a person placed an arm between the bars of a sliding gate." (*Seo, supra*, 97 Cal.App.4th at p. 1199.) Contrary to the Nagals' contention, there *was* an apparent triable issue of material fact in *Seo* regarding whether the company knew about the gate's purported design defect. Nonetheless, the court did not conclude that this possible knowledge created a duty on the company's part to inform the property owner of the defect.

The Nagals' remaining relevant distinction between the facts in *Seo* and the present case is that Waldschmitt said he told Barry the tree's condition was hazardous, while Barry said he did not. Thus, the Nagals argue, there is an issue of material fact as to whether Waldschmitt engaged in misfeasance rather than the nonfeasance addressed in *Seo*. However, this argument presumes Waldschmitt had a duty of inspection and reporting in the first place. Again, the record does not so indicate. Like the repairer in *Seo*, Waldschmitt's duties were limited to those for which he contracted. There is no evidence they went beyond removing the fallen trunk and providing bark chips to Barry.

Finally, Waldschmitt cites case law which indicates that "[t]he fact that the actor gratuitously starts in to aid another does not necessarily require him to continue his services. He is not required to continue indefinitely The actor may normally abandon his efforts at any time unless, by giving the aid, he has put the other in a worse position than [s]he was in before the actor attempted to aid [her].'" (*City of Santee v. County of San Diego* (1989) 211 Cal.App.3d 1006, 1015, quoting Rest.2d Torts, § 323, com. c, at p. 137.) The Nagals argue there is a material dispute of fact regarding a voluntary assumption of duty by Waldschmitt in that he testified at deposition that he told

⁶ Indeed, a major distinction between the repair company's conduct and Waldschmitt's undermines, rather than supports, the Nagals' argument. Unlike the repair company, Waldschmitt did not repeatedly work on the subject tree, nor did he have any continuing service relationship with Barry.

Barry the standing part of the tree was hazardous, while Barry testified that he did not tell her the remaining tree was rotted and might fall. The Nagals do not argue that, if Waldschmitt is to be believed, he failed to fulfill a voluntarily assumed duty. Thus, the evidence they present indicates that Waldschmitt either fulfilled any voluntarily assumed duty or abandoned it before talking to Barry, before he put her in a worse position.⁷ This is another, independent reason why the Nagal's voluntary assumption of duty theory is unpersuasive.

IV.

The Nagals' Licensed Contractor Duty Theory Does Not Raise A Triable Issue of Material Fact.

Finally, the Nagals argue that Waldschmitt, as a licensed tree service contractor, had a duty of care to third parties, such as Alexander Nagal, whom Waldschmitt could reasonably expect to have been affected by his work. Since he was a tree-service professional who knew the tree was in a dangerous condition after he finished with the fallen portion of it, he had a duty to take reasonable care to prevent injury to these third parties.

We need not discuss the Nagals' licensed contractor theory in any detail because, as indicated by one of the cases the Nagals rely on, it too is premised on the unsupported factual contention that Waldschmitt's *contractual* duties included inspection of the tree and reporting to Barry on its conditions and any hazards it presented. (See *Roscoe Moss Co. v. Jenkins* (1942) 55 Cal.App.2d 369, 376 [“ ‘Accompanying every contract is a common-law duty to perform with care, skill, reasonable expedience, and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort, as well as a breach of the contract.’ ” (Italics added.)].) There is no support in the record that Waldschmitt assumed such contractual duties.

⁷ While the Nagals also rely on Barry's testimony that she was relying on Waldschmitt to tell her about any hazards, there is no evidence that she formed this expectation based on anything Waldschmitt told her and, therefore, her expectation is not relevant to our analysis here.

The *Seo* court rejected a similar argument that the repair company, as an independent contractor, had a duty to third parties to warn the owner of design defects in the gate. (*Seo, supra*, 97 Cal.App.4th at pp. 1205-1206.) The court concluded that to create such a duty would be poor public policy, as it would cause the cost of simple repairs to increase significantly. A plumber, for example, “could not fix a leaky faucet without inspecting the entire fixture and advising the owner of any ways in which the fixture might be defective.” (*Id.* at p. 1205.) Similarly, here, were we to adopt the Nagals’ argument, we would establish a rule that a licensed service provider assumes a duty of inspection every time he or she observes something while performing services. We decline to do so.

DISPOSITION

The judgment is affirmed. Waldschmitt is awarded costs on appeal.

STEWART, J.

We concur.

KLINE, P.J.

MILLER, J.