Filed 6/27/17 Fernandez v. Spayde CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

BRAYAN FERNANDEZ, Plaintiff and Appellant, v. ROGER SPAYDE et al., Defendants and Respondents; EVEREST NATIONAL INSURANCE COMPANY, Intervener and Appellant.	2d Civ. No. B276173 (Super. Ct. No. 56-2014-00449789-CU-PO-VTA) (Ventura County)

Plaintiff Brayan Fernandez and plaintiff-in-intervention Everest National Insurance Company (ENIC) (plaintiffs) appeal a summary judgment entered in favor of defendants Roger Spayde and Kristin Spayde. Fernandez alleged he suffered injuries while working in the Spayde home as a result of a fall. He alleged causes of action for negligence and premises liability. ENIC, a workers' compensation carrier, filed a

complaint-in-intervention for reimbursement of workers' compensation benefits paid to Fernandez. We conclude, among other things, that the trial court erred by granting summary judgment. Here there are triable issues of fact. We reverse.

FACTS

The Spaydes hired Chuck's Custom Painting (CCP), a licensed contractor, to paint their home. Charles MacQuiddy was the owner of CCP and Fernandez was his employee.

While working on that job, Fernandez and his coworker Antonio Salas were moving a cabinet in an "attic closet" on the second floor of the Spayde home. Fernandez stepped on a raised portion of the floor in the attic closet that was a few inches higher than the floor level. It was covered by a "white" or "beige" colored plastic sheet that was surrounded by a wood frame. The plastic covered an area of approximately 3 feet 9 inches square. It was "held in place by four nails." It was "a quarter inch thick and could not withstand the weight of a person stepping upon it." There was no floor or any supporting structure under the plastic cover. There was only a large hole under it. Its purpose "was to permit light to come in from a skylight on the roof and flow down the shaft to provide light to the ground floor of the residence."

When Fernandez stepped on the plastic cover, it broke. He fell 10 to 12 feet to the floor below. He sustained serious injuries.

Fernandez sued Roger and Kristin Spayde, as owners of the home, for negligence and premises liability. He claimed he believed he was stepping on a floor, but the floor "turned out to be" a "defectively" constructed "concealed skylight" that was "built into the floor."

The Spaydes moved for summary judgment. They claimed the skylight was "readily apparent" and they "had no duty to protect [Fernandez] against a hazard he and his employer . . . should have reasonably discovered."

In opposition, Fernandez claimed he "did not fall through a skylight, he fell through a hole in the second floor attic closet." (Initial capitalization and boldface omitted.) The plaintiffs cited Salas's and MacQuiddy's depositions and Fernandez's declaration to show the Spaydes did not warn Fernandez and Salas about the hole under the plastic and this dangerous condition was not visible. Brad Avrit, a licensed civil engineer, declared that the "area where the subject incident occurred . . . was in an unsafe condition . . . due to the presence of a hidden and unprotected/unguarded floor opening that Plaintiff stepped onto . . . ."

The trial court granted summary judgment in favor of the Spaydes.

DISCUSSION

Summary Judgment

Plaintiffs claim the trial court erred by granting summary judgment because there are triable issues of fact. We agree.

"'We review a summary judgment motion de novo to determine whether there is a triable issue as to any material fact . . . .'" (*Suarez v. Pacific Northstar Mechanical, Inc.* (2009) 180 Cal.App.4th 430, 436.) "'We are not bound by the trial court's stated reasons or rationales.'" (*Ibid.*) "'In practical effect, we assume the role of a trial court . . . .'" (*Ibid.*) "'Summary judgment is a drastic remedy to be used sparingly, and any

doubts about the propriety of summary judgment must be resolved in favor of the opposing party.'" (*Ibid.*)

"'[W]e independently determine the construction and effect of the facts presented to the trial judge as a matter of law.'" (*Suarez v. Pacific Northstar Mechanical, Inc.*, *supra*, 180 Cal.App.4th at p. 436.) "[W]e view the evidence in the light most favorable to the opposing party and accept all inferences reasonably drawn therefrom." (*Hinesley v. Oakshade Town Center* (2005) 135 Cal.App.4th 289, 294.) "The court, construing the moving party's affidavits strictly and the counteraffidavits liberally . . . should reverse the summary judgment if any kind of case is shown." (6 Witkin, Cal. Procedure (5th ed. 2008) § 265, p. 711.)

"[W]hen a landowner hires an independent contractor whose employee is injured by a hazardous condition on the premises," "the hirer generally delegates to the contractor responsibility for supervising the job, including responsibility for looking after employee safety." (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 673.) "However, if the hazard is concealed from the contractor, but known to the landowner, the rule must be different." (*Id.* at p. 674.) "[T]he hirer as landowner may be independently liable to the contractor's employee, even if it does not retain control over the work, if (1) it knows or reasonably should know of a concealed, preexisting hazardous condition on its premises; (2) the contractor does not know and could not reasonably ascertain the condition; and (3) the landowner fails to warn the contractor." (*Id.* at p. 675.)

"Whether a given set of facts and circumstances creates a dangerous condition *is usually a question of fact*."

(*Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 991, italics added.)

Here there was a very thin plastic covering over a large hole in the floor in the Spayde home. The Spaydes knew there was no flooring under the plastic cover. The cover was not strong enough to prevent someone standing on it from falling 10 to 12 feet. The contractor did not know about this, and the Spaydes did not warn him.

There is also evidence that the contractor's employees did not know of this potential hazard. Salas testified, "I didn't know that that *had a hole that went down. I didn't know that we couldn't step there.* Otherwise I would have told them 'Don't step there'. . . . Nobody told us that that was there." (Italics added.) Fernandez said Mr. Spayde directed him to remove the cabinet from the attic without any warning of the potential danger.

MacQuiddy testified that the plastic covering "*looks like the rest of the floor* on that side that's all white everywhere." (Italics added.) He said, "The drywall, everything over there," "[t]he walls, the floor--everything was the same color." Before the accident, he did not go into the attic closet because it was not part of the area to be painted. He did not know there was a skylight in the attic floor. "Ceilings weren't a part of [his] scope of work." In viewing the area after the accident, he thought the raised part of the floor had the appearance of a structure to cover "duct work." Had he known this was a skylight, he would have built something around it, a temporary rail.

There was "no guardrail surrounding" the plastic to prevent someone from walking there. A photograph of the area reflects that there were no signs warning that stepping on the

raised floor area could lead to a fall into a deep open shaft. (*Huffman v. City of Poway*, *supra*, 84 Cal.App.4th at pps. 992-993 [liability may exist where a dangerous condition is "obscured," there were no warnings, or people would be distracted or unaware of it because of "conflicting demands on their attention"].)

The plaintiffs also rely on Avrit's declaration where he concluded the hole in the attic closet floor was a dangerous and concealed latent defect that violated the building code. The Spaydes claim Avrit's expert opinion cannot be used to raise triable issues of fact. We disagree.

"[W]e must take into account that his declaration was submitted by appellant in opposition to the respondent's motion for summary judgment." (*Jennifer C. v. Los Angeles Unified School Dist.* (2008) 168 Cal.App.4th 1320, 1332.) "In these circumstances, the expert's declaration is to be liberally construed." (*Ibid.*) Opposition parties may rely on their experts' opinions to "create triable issues of fact which preclude summary judgment" (*Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 130), and they are "entitled to all favorable inferences that may reasonably be derived from" those declarations (*Hanson v. Grode* (1999) 76 Cal.App.4th 601, 607). Avrit listed the facts upon which he based his conclusions and noted significant concerns about the safety of the hole, the plastic cover, the existence of a hidden hazard and noncompliance with building and safety standards.

This evidence shows triable issues of fact about whether there was a hidden dangerous condition that the owners should have disclosed and whether Fernandez, Salas and MacQuiddy acted reasonably.

The Spaydes claim they delegated to the contractor the duty to protect his employees. But "[a] landowner cannot effectively delegate to the contractor [that] responsibility . . . if it fails to disclose critical information needed to fulfill that responsibility, and therefore the landowner *would be liable to the contractor's employee if the employee's injury is attributable to an undisclosed hazard*." (*Kinsman v. Unocal Corporation*, *supra*, 37 Cal.4th at p. 674, italics added.)

At the summary judgment hearing, the Spaydes' counsel suggested the floor covering was a skylight which should be considered an "obvious" danger. But the trial court noted the unusual location of a skylight *in the floor* could mislead a person to believe it was safe to walk there. The court said, "But how many times do you have a skylight in a mid floor? I think that's what . . . throws me in this case. . . . Because it's so unique, I think the normal person, *the reasonable person, wouldn't expect to be concerned about the situation*" (italics added). (*Huffman v. City of Poway*, *supra*, 84 Cal.App.4th at pps. 992-993.)

The Spaydes cite to a photograph of the attic floor. But it does not resolve the dangerous condition issue. The photograph was taken *after* the accident and it only shows a small remaining broken portion of the plastic cover. Consequently, what it looked like at the time of the incident must be shown by other evidence. (*Lopez v. Superior Court* (1996) 45 Cal.App.4th 705, 716.) The Spaydes claim Fernandez and Salas could see a raised floor area; consequently, they did not have to warn them of a hazard. But the plastic cover was not transparent, it was either "white" or "beige" in color. That and other evidence support an inference that merely looking at it would not reveal: 1) its thickness, 2) the lack of flooring under it,

or 3) the hidden danger that one could break through the plastic and fall 10 to 12 feet. (*Merrill v. Buck* (1962) 58 Cal.2d 552, 558.)

MacQuiddy did not investigate the attic closet before the work began because it appeared to him his crew would not be working there. How far into the attic, if at all, the workers might have to work to paint the door jambs was a triable issue of fact. And this issue is inextricably related to the issue whether MacQuiddy was required to check the condition of the interior of the attic closet before the work began.

DISPOSITION

The judgment is reversed. Costs on appeal are awarded in favor of the appellants.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Rocky Baio, Judge

Superior Court County of Ventura

James S. Link; Law Offices of Daniel Gibalevich, Daniel Andrew Gibalevich; Roberson & Kimball, Blake S. Posner for Plaintiff, Intervener and Appellants.

Grant, Genovese & Baratta, LLP, James M. Baratta, Lance D. Orloff, Thomas J. Moran for Defendants and Respondents.