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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

JENNIFER ALBERA,

Plaintiff and Appellant,

v.

CITY OF SACRAMENTO,

Defendant and Respondent.

C068891

(Super. Ct. No.
34200800022944CUPOGDS)

In the wee hours of an August morning in 2007, plaintiff Jennifer Albera (Albera) walked arm in arm with a friend between house parties. Plaintiff stubbed her toe on a concrete step attached to private property and adjacent to a public sidewalk maintained by defendant City of Sacramento (City). Albera filed suit against City, alleging a dangerous condition of public property. City filed a motion for summary judgment. The trial court granted the motion, finding Albera failed to present a triable issue of fact regarding City's ownership or control of

the step. Albera appeals, challenging the trial court's finding. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In her first amended complaint, Albera states she was walking along the sidewalk on a summer evening when she tripped on the step, fell, and suffered an injury. She alleges the step is the size of a small landing connected to real property owned by Midtown Partners, LLC. The step extends a substantial distance into the public sidewalk, which is owned and controlled by City. According to Albera, the step is made of material similar to that of the sidewalk and is "visually indistinct from the sidewalk for pedestrians." Therefore "as a substantial albeit unobtrusive obstruction on, and built into, the sidewalk as a part of the sidewalk, it foreseeably constitutes a substantial tripping hazard for pedestrians."

City moved for summary judgment. In support, City introduced Albera's deposition testimony regarding the incident. Albera admitted drinking as she walked from house party to house party in downtown Sacramento. Albera walked arm in arm with a friend, part of a larger group, and as she looked back for someone she stubbed her toe and shattered her leg. She had previously walked in the area on at least 10 prior occasions without incident.

City also submitted two declarations in support of its motion. Roy Heavenston, City's supervising surveyor, submitted a declaration stating the step in question was not located within the public right-of-way.

In a second declaration, City's operations general supervisor, Gabriel Morales, stated his review of the records revealed only one prior trip-and-fall accident at the site, in 2000. The sidewalk was subsequently inspected and determined to be in need of repair. The records state that the adjacent property owner requested the sidewalk repair include the construction of a step. City hired a contractor to complete the project. Morales inspected the sidewalk at the site and determined the step was not within the public right-of-way, and according to Morales, "it would not have been [City's] custom or practice to perform any maintenance of the step." Morales could find no records indicating City had "maintained the step." Based on his experience and his review of the records, Morales opined that the step was constructed by a private contractor and not by City employees. Any construction outside City's right-of-way would have been at the property owner's request and maintenance would be the property owner's responsibility.

In opposing the summary judgment motion, Albera submitted a declaration by Kimberly Hawthorne, a safety consultant and expert witness specializing in slip-and-fall and premises liability. Hawthorne examined the scene and found the step protrudes two to three feet into the sidewalk and is constructed of similar material. In Hawthorne's opinion, the lack of conspicuity of the step at night created an unreasonable risk of harm. This danger was not obvious to reasonable users of the

sidewalk, "but it should have been clear to a professional installing the step/landing."¹

The trial court held oral argument on the motion. At argument, Albera claimed Morales's declaration revealed City hired the contractor to repair and construct both the sidewalk and the step. According to Albera, any ambiguity in Morales's declaration should be construed in her favor.

The court disagreed, noting Morales's declaration stated the sidewalk needed repair and the owner of the step requested that the repair include the step. City then hired a contractor, who repaired the sidewalk and constructed the step as requested by the owner. The court found no ambiguity in Morales's declaration.

The court issued a tentative ruling granting City's motion for summary judgment. The court found City established that the step is not part of the public right-of-way and is not maintained by City. The step was constructed during a City-authorized sidewalk repair by a private contractor at the request of the property owner. Albera offered no evidence other than the similarity in appearance of the sidewalk and step to support that City constructed and maintained the step. Instead, City presented evidence that "it hired the independent contractor to *repair the sidewalk*, and that the construction of the step was requested separately by the property owner." The

¹ The record contains several photographs of the step.

court found it undisputed that the step on which Albera injured her foot was not public property because City did not exert ownership or control over it.

The court later adopted its tentative ruling and granted City's motion for summary judgment. Following entry of the order, Albera filed a timely notice of appeal.

DISCUSSION

Standard of Review

A motion for summary judgment must be granted if the submitted papers show there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 844.) The moving party, whether plaintiff or defendant, initially bears the burden of making a "prima facie showing of the nonexistence of any genuine issue of material fact." (*Id.* at p. 845.) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Id.* at p. 851.) "Thus, if a plaintiff who would bear the burden of proof by a preponderance of evidence at trial moves for summary judgment, he must present evidence that would require a reasonable trier of fact to find any underlying material fact more likely than not—otherwise, he would not be entitled to judgment as a matter of law, but would have to present his evidence to a trier of fact." (*Ibid.*, italics omitted.) Once the moving party has met its burden, the burden shifts to the opposing party to show the existence of a triable

issue of material fact. (Code Civ. Proc., § 437c, subds. (a), (p)(2).)

We review de novo the record and the determination of the trial court. First, we identify the issues raised by the pleadings, since it is these allegations to which the motion must respond. Second, we determine whether the moving party's showing has established facts negating the opponent's claims and justifying a judgment in the moving party's favor. When a summary judgment motion prima facie justifies a judgment, the final step is to determine whether the opposition demonstrates the existence of a triable issue of fact. (*Barclay v. Jesse M. Lange Distributor, Inc.* (2005) 129 Cal.App.4th 281, 290.)

Government Code section 830.2 provides the standard of review for claims of a dangerous condition: "A condition is not a dangerous condition within the meaning of this chapter if the trial or appellate court, viewing the evidence most favorably to the plaintiff, determines as a matter of law that the risk created by the condition was of such a minor, trivial or insignificant nature in view of the surrounding circumstances that no reasonable person would conclude that the condition created a substantial risk of injury when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used."²

² All further statutory references are to the Government Code unless otherwise designated.

Statutory Underpinnings

Several provisions of the Government Code explain the liability of a public entity for a dangerous condition of public property. Under section 835, a public entity is liable for an injury caused by a dangerous condition of its property if the plaintiff establishes the property was in a dangerous condition at the time of injury, the dangerous condition proximately caused the injury, and the dangerous condition created a reasonably foreseeable risk of the kind of injury suffered.

In addition, plaintiff must show either: "(a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or [¶] (b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition." (§ 835.)

Actual notice of a dangerous condition is defined as actual knowledge of the existence of the condition, and the entity knew or should have known of its dangerous character. (§ 835.2, subd. (a).) To establish constructive knowledge on the part of a public entity, plaintiff must show the condition existed long enough and was of such an obvious nature that, with due care, the public entity should have discovered the condition and its dangerous character. (§ 835.2, subd. (b).)

Section 830 provides several helpful definitions. Dangerous condition "means a condition of property that creates

a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used." (§ 830, subd. (a).) To "[p]rotect against" includes repairing, remedying or correcting a dangerous condition, providing safeguards against a dangerous condition, or warning of a dangerous condition." (§ 830, subd. (b).) Property of a public entity and public property are defined as "real or personal property owned or controlled by the public entity, but do not include easements, encroachments and other property that are located on the property of the public entity but are not owned or controlled by the public entity." (§ 830, subd. (c).)

Ownership and Control Over Property

Albera argues she presented evidence that City exercised control over a section of sidewalk running from the edge of the adjacent building to the edge of City's right-of-way. According to Albera, the inferences to be drawn from the evidence establish that City built the sidewalk from the curb to the edge of the building, which includes the step she tripped on. The trial court, Albera argues, erroneously ignored this evidence.

To establish a claim based on a dangerous condition, Albera must prove, at the outset, that the property was owned or controlled by City. (§ 835.) If Albera fails to establish a triable issue of fact as to City's ownership or control, her claim fails and the trial court correctly granted summary judgment.

Under Albera's analysis of the evidence, City exercised control "all the way to the edge of the building." In support, Albera points out the similarity between the concrete of the sidewalk and the building, "the seamless and indistinguishable connection of the sidewalk on the building's property with the sidewalk on the city's right-of-way causing pedestrians to walk on the part of the sidewalk leading them right into a tripping hazard which, at night, is essentially invisible." Albera relies on the "visually obvious uniformity of the whole sidewalk" as evidence City built that part of the sidewalk. Therefore, City exercised control of the step outside its right-of-way.

As in the trial court, Albera relies exclusively on the "visually obvious uniformity" of the sidewalk and steps to prove City's ownership of the step. However, City presented evidence that Midtown Partners, LLC, owned the property on which the step is located. The step is not located in the public right-of-way, and City did not maintain the step. Mere similarity between the sidewalk and step does not create a triable issue of fact as to City's ownership or control over the step.

Albera also disputes the trial court's conclusion that while City hired a private contractor to repair the sidewalk, the step construction was requested by the property owner. The record supports the trial court's finding. City hired the private contractor to repair the sidewalk. At the behest of the property owner, the same contractor constructed the step. Morales's declaration and deposition testimony establish that

City selected the contractor who went on to construct the step; there is no evidence City requested or directed the step construction.

Dangerous Condition

A public entity may be liable only for dangerous conditions of its own property. But its own property may be considered dangerous if it creates a substantial risk of injury to adjacent property or to individuals using adjacent property. However, a public entity's own property may be considered dangerous if a condition on the adjacent property exposes those using the public property to a substantial risk of injury. (*Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 148.)

A dangerous condition connotes a substantial, as opposed to minor or insignificant, risk of injury. A condition is not dangerous if no reasonable person would conclude the condition created a substantial risk of injury when the property was used with due care. (*Van Kempen v. Hayward Area Park etc. Dist.* (1972) 23 Cal.App.3d 822, 826; § 830.2.) Part of this analysis requires a consideration of such matters as the size and location of the alleged defect with respect to the surrounding area and lighting conditions and whether it has been the cause of other accidents. (*Antenor v. City of Los Angeles* (1985) 174 Cal.App.3d 477, 483.)

Albera argues the seamless appearance of the sidewalk and step created a dangerous condition and resulted in her injury. The evidence refutes this argument.

Color photos reveal the step, even at night, is not indistinct, but obvious to any pedestrian using due care. City presented evidence that there had been no prior complaints of injury from the step. Albera stated she had walked past the step on at least 10 prior occasions without incident.

Cases Albera cites regarding dangerous conditions on adjacent property concerned far more substantial and egregious nearby defects. Courts have found the following to be dangerous conditions: an unguarded railroad crossing near a school, high voltage lines immediately adjacent to a field for flying model airplanes, a misplaced stop sign obstructed by trees, and a hole in pavement and protruding water pipe. (*Holmes v. Oakland* (1968) 260 Cal.App.2d 378; *Branzel v. Concord* (1966) 247 Cal.App.2d 68; *Bakity v. County of Riverside* (1970) 12 Cal.App.3d 24; *Jordan v. City of Long Beach* (1971) 17 Cal.App.3d 878.) In each case the condition on adjacent property posed a great risk to individuals using public property, justifying the imposition of a duty on the public entity to correct the dangerous condition. An easily seen step adjacent to a public sidewalk does not rise to that level.

In light of Albera's failure to refute City's evidence, it is undisputed that the step on which Albera tripped was not public property since City did not exert ownership or control over it. Nor has Albera established that the adjacent step created a dangerous condition for which City is liable. Because Albera has failed to demonstrate the existence of a triable issue of material fact regarding City's ownership and control of

the property, or the existence of a dangerous condition, the trial court properly granted summary judgment in favor of City.

DISPOSITION

The judgment is affirmed. City shall recover costs on appeal.

_____ RAYE _____, P. J.

We concur:

_____ HULL _____, J.

_____ BUTZ _____, J.