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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MARY BOLLMAN,

Plaintiff and Appellant,

v.

GOLAFROUZ KOKLARI,

Defendant and Respondent.

D059988

(Super. Ct. No. 37-2010-00090866-
CU-PO-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Judith F. Hayes, Judge. Affirmed.

The defendant in this case owns a condominium in a common-interest development. The sidewalks in the development are owned and maintained by the development's homeowners association. The plaintiff slipped and fell on the sidewalk near the defendant's residence and alleges the sidewalk was defective. Contrary to the plaintiff's contention, even though the record contains evidence which suggests the defendant was aware of the defect in the sidewalk, the defendant had no duty to warn the

plaintiff about the defect. The defendant did not have sufficient control over the sidewalk to give rise to either a duty to maintain the sidewalk or warn members of the public of defects in it. Accordingly, the trial court did not err in granting the defendant's motion for summary judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff and appellant Mary Bollman is a spiritualist and was invited by defendant and respondent Golafrouz Koklari to come to Koklari's home to give a spiritual reading. Koklari lives in a condominium complex, Playmor Bernardo. The sidewalks in the complex are owned and maintained by the Playmor Bernardo Homeowners Association.

At some point before the scheduled reading, Koklari noticed that a piece of wood which had been installed in an expansion joint in the sidewalk near her condominium had become dislodged. Koklari put the piece of wood back in the expansion joint because she recognized that its absence created a tripping hazard. Later, Koklari noticed the piece of wood had again become dislodged and was missing.

On the evening of June 6, 2008, Bollman was walking to Koklari's home and tripped on the exposed expansion joint in the sidewalk. Bollman fell to the ground and was injured.

Bollman made claims against both the Playmor Bernardo Homeowners Association and Koklari. Bollman reached a settlement with the homeowners association and filed a complaint against Koklari in which she alleged Koklari was negligent in failing to warn her about the hazard created by the sidewalk near her home.

Koklari filed a motion for summary judgment in which she argued that because she did not own or control the sidewalk where Bollman fell, she had no duty to maintain the sidewalk or warn members of the public about defects in it. The trial court agreed and granted Koklari's motion for summary judgment.

The trial court entered a judgment in Koklari's favor and Bollman filed a timely notice of appeal.

DISCUSSION

I

In reviewing a judgment entered on a motion for summary judgment, our role is familiar: "In practical effect, we assume the role of a trial court and apply the same rules and standards which govern a trial court's determination of a motion for summary judgment." (*Lenane v. Continental Maritime of San Diego, Inc.* (1998) 61 Cal.App.4th 1073, 1079.) Thus, on appeal we determine whether the opposing party has shown the existence of a triable, material factual issue. (*Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 832.) We "liberally construe plaintiffs' evidentiary submissions and strictly scrutinize defendants' own evidence, in order to resolve any evidentiary doubts or ambiguities in plaintiffs' favor." (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.) However, in order to prevail, the party opposing the motion must set forth "specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto." (Code Civ. Proc., § 437c, subd. (p)(1).)

II

Ordinarily, "A defendant cannot be held liable for the defective or dangerous condition of property which it [does] not own, possess, or control." (*Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 134; see also *Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1162 (*Alcaraz*), *Contreras v. Anderson* (1997) 59 Cal.App.4th 188, 197 (*Contreras*).) In *Alcaraz, supra*, 14 Cal.4th 1149, our Supreme Court held that a defendant who exercised physical control over a strip of land adjacent to his own land, but did not own it, had a duty to protect or warn others entering the adjacent strip of a known hazard there. (*Id.* at pp. 1170-1171.) Here, Bollman contends that in replacing the piece of wood in the expansion joint in the sidewalk Koklari exercised enough control over the sidewalk to give rise to a duty to warn when Koklari later noticed the piece of wood was again missing. We disagree.

At most, Koklari's conduct was no more than the kind of "neighborly maintenance" which will not give rise to a duty to repair or warn of a hazard. In this regard, Koklari's conduct is indistinguishable from the maintenance performed by the defendants in *Contreras*, who regularly trimmed a tree and swept leaves which were in a brick path in front of their home. Although the defendants in *Contreras* maintained the path, it was in fact owned by the City of Berkeley. In holding that the defendants had no duty to warn of any hazard posed by the slope of the brick pathway or the presence of slippery leaves, the court in *Contreras* carefully distinguished the facts and holding in *Alcaraz*:

"[I]t is clear from *Alcaraz* that simple maintenance of an adjoining strip of land owned by another does not constitute an exercise of control over that property. Although evidence of maintenance is considered 'relevant on the issue of control,' the court in [*Alcaraz*] limited its holding by stating that 'the simple act of mowing a lawn on adjacent property (or otherwise performing minimal, neighborly maintenance of property owned by another) generally will [not], standing alone, constitute an exercise of control over [the] property' ([*Alcaraz, supra*] 14 Cal.4th at p. 1167.) Besides maintaining the adjacent lawn owned by the city, the defendants in *Alcaraz* constructed a fence enclosing this narrow strip of land after the plaintiff's alleged injury. (*Id.* at p. 1154.) The court considered such enclosure 'highly relevant' because '[i]t is obvious that the act of enclosing property with a fence constitutes an exercise of control over that property.' (*Id.* at p. 1167.) The court concluded that the evidence went beyond simple neighborly maintenance and, thus, was sufficient to raise a triable issue of fact as to control. (*Id.* at p. 1170.)" (*Contreras, supra*, 59 Cal.App.4th at pp. 198-199, fn.omitted.)

"In the present case, there is no such 'dramatic assertion of a right normally associated with ownership or . . . possession' of the land on which Contreras was allegedly injured. Although respondents denied 'maintaining' the tree in the city-owned planting strip, they admitted their regular trimming of the tree and sweeping of fallen leaves on the brick path. There was also undisputed evidence that respondent Boehler did some 'gardening' in the planting strip. But this evidence by itself suggests nothing more than 'neighborly maintenance' of the city-owned planting strip. (*Alcaraz, supra*, 14

Cal.4th at pp. 1167, 1170.) Standing alone, such evidence cannot support a finding of control over that property. (*Ibid.*) [¶] . . . [¶]

"In this case, by contrast, the brick walkway on which Contreras was allegedly injured was located in a parking strip that was separated from respondents' property both by the fence that enclosed their front yard and the public sidewalk. In addition, there is no evidence the respondents knew of the hazard allegedly posed by the brick walkway. Most fundamentally, however, there was no showing of any assertive, controlling conduct equivalent to the fencing of the city-owned property in *Alcaraz* Instead, the evidence in this case suggests nothing more than 'minimal, neighborly maintenance' of the city-owned parking strip adjacent to respondents' property. (*Alcaraz, supra*, 14 Cal.4th at p. 1167.) Without more, the evidence here is insufficient to raise a triable issue of fact whether respondents controlled the property. (*Id.* at pp. 1167, 1170.) Thus, we hold as a matter of law that the respondents did not owe a duty to warn or prevent harm to Contreras under the rule of *Alcaraz*." (*Contreras, supra*, 59 Cal.App.4th at pp. 200-201, fn. omitted.)

As we indicated, the facts here are indistinguishable from those considered in *Contreras*. Koklari's replacement of the wood in the expansion joint was not an act of control over the sidewalk but instead was nothing more than an act of neighborly maintenance. As such it did not give rise to any duty to continue to repair the defect or provide the public with a warning. (See *Contreras, supra*, 59 Cal.App.4th at pp. 198-201.) Koklari's conduct was in no sense " 'a notorious and open public display of control' over adjacent property, such that members of the general public might reasonably rely on

the *apparent* owner to warn or protect them from known hazards thereon." (*Id.* at p. 200.)

Thus, the trial court acted properly in granting Koklari's motion for summary judgment.

DISPOSITION

The judgment is affirmed. Koklari to recover her costs of appeal.

BENKE, Acting P. J.

WE CONCUR:

HALLER, J.

AARON, J.