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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ARMANDO M. VAZQUEZ,

Plaintiff and Appellant,

v.

CITY OF SAN DIEGO,

Defendant and Respondent.

D062189

(Super. Ct. No. 37-2011-00095445-
CU-PO-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Ronald S. Prager, Judge. Affirmed.

Armando M. Vazquez, in pro. per., for Plaintiff and Appellant.

Jan I. Goldsmith, City Attorney, Andrew Jones, Executive City Attorney, Kathy J. Steinman, Deputy City Attorney, for Defendant and Respondent.

Armando Vazquez sued the City of San Diego (City) claiming he suffered injuries caused by a dangerous condition (a sinkhole) on a public road. (Gov. Code, § 835, subd.

(b.)¹ The City successfully moved for summary judgment on the ground that the undisputed facts show it had no prior notice of the alleged dangerous condition. On appeal, Vazquez contends there are triable factual issues on the notice issue. We reject this contention and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Vazquez filed a complaint alleging that, on May 27, 2010, he drove over a sinkhole on Smythe Avenue near the Interstate 905 off-ramp. Vazquez alleged the incident caused him to suffer personal injuries, economic losses, and property damage. Vazquez claimed the City was "aware" of the dangerous condition and "could have—but did not—take any action to prevent injury to the public."

The City moved for summary judgment, arguing the undisputed facts show the City had no actual or constructive notice of the alleged dangerous condition. In support, the City submitted a declaration by Aaron Snelling, a City public works supervisor. Snelling stated that his department first received an emergency call about a "localized settlement of compacted soil" (a sinkhole) on May 28, 2010, the day *after* Vazquez allegedly sustained his injuries. Snelling explained the cause of this condition as follows: "[A] piece of plywood was deteriorated which caused the soil underneath Smythe Ave to be pushed through a pre-cut hole in the concrete wall of the [sewer line] clean out. This led to a localized settlement of compacted soil and a dip in the asphalt." Snelling also said: "The City did not know the plywood was deteriorated and did not create the

¹ All statutory references are to the Government Code unless otherwise specified.

condition. The City only learned about the localized settlement of compacted soil because of the emergency reported" after Vazquez's claimed incident. Based on his training and experience, Snelling opined that "the condition that Plaintiff complains about occurred suddenly and unexpectedly."

The City additionally submitted the declaration of Gus Brown, an assistant deputy director of the City's storm water division. Brown said that three months before Vazquez's claimed injury, on February 17, 2010, his department cleaned out a storm drain "adjacent" to the location of Vazquez's incident. He said: "At the time of the cleanout we did not notice any localized settlement of compacted soil at the location. . . . During the time of this inspection we did not notice anything wrong with the road or the storm drain which is the subject matter of this action."

The City also submitted declarations from two employees who reviewed reports of public street maintenance complaints by citizens and City employees. Both employees declared that the City did not receive any prior complaints about a possible sinkhole or other defect in the area where Vazquez claims the incident occurred.

In opposition to the summary judgment motion, Vazquez argued there are triable factual issues regarding whether the "deteriorated" condition of the plywood "existed for such a period of time and was of such an obvious nature that the [City] . . . should have discovered the condition and its dangerous character."

Vazquez proffered several exhibits to support his arguments. Of relevance here, Exhibit 2 was a City document entitled "Catch Basin Cleanout Summary." The document contains a chart with "Catch Basin" numbers and identifies various substances

found in each basin (such as plastic, paper, vegetation, and soil). An attached map shows the location of each Catch Basin.

Vazquez also submitted Exhibits 3 and 4, which are City documents pertaining to the City's maintenance work in the Smythe Avenue/Interstate 905 area. According to these documents, on May 28, 2010 (the day after Vazquez's incident), the City received a report regarding a "large sinkhole" that was "growing in [depth]" at the Smythe Avenue/Interstate 905 intersection. (Capitalization omitted.) The police department immediately blocked off the street and City workers completed the repair work later that day. These documents also show that the City was notified of a clogged storm drain near this same intersection about three months earlier (on February 16, 2010) and repair work was performed the next day (February 17, 2010) and in late February and early March 2010.²

In its reply, the City urged the court to grant the motion based on Vazquez's failure to file a response to the City's separate statement of undisputed facts. (See Code Civ. Proc., § 437c, subd. (b)(3).) The City alternatively argued that Vazquez's evidence did not create a triable issue of fact, and instead the evidence was consistent with the City's argument that it did not know of the claimed defective condition before it manifested as a sinkhole.

² Vazquez's remaining exhibits are City documents pertaining to the City's storm drain maintenance standards. The court sustained the City's evidentiary objection to these documents, and Vazquez does not challenge that ruling on appeal.

At the hearing, Vazquez conceded the City did not have actual notice of the sinkhole, but argued the City could be held liable on a constructive notice theory because the City should have discovered the defective plywood.

After taking the matter under submission, the court granted the City's summary judgment motion. The court found the City met its burden by submitting evidence showing it did not have actual or constructive notice of the alleged dangerous condition, and Vazquez did not produce evidence creating a triable issue of fact on the notice element.

DISCUSSION

I. *Standard of Review*

A summary judgment motion "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) A triable issue of material fact exists 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." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).

A defendant moving for summary judgment "bears the burden of persuasion that there is no triable issue of material fact and that [the defendant] is entitled to judgment as a matter of law." (*Aguilar, supra*, 25 Cal.4th at p. 850.) To meet this burden, the defendant must show one or more elements of the cause of action cannot be established, or that there is a complete defense to that cause of action. (*Ibid.*) Once the defendant

satisfies its burden, " 'the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto.' " (*Id.* at p. 849.) The plaintiff must proffer competent and admissible evidence and may not rely upon the pleading allegations to show a triable issue of material fact. (*Trujillo v. First American Registry, Inc.* (2007) 157 Cal.App.4th 628, 635.)

We review a summary judgment de novo. (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 60.) We assume the role of the trial court and redetermine the merits of the motion. In doing so, we strictly scrutinize the moving party's papers and resolve all doubts in favor of the opposing party. (*Barber v. Marina Sailing, Inc.* (1995) 36 Cal.App.4th 558, 562.) We consider all of the evidence and inferences reasonably drawn from the evidence, and view the evidence in the light most favorable to the opposing party. (*Aguilar, supra*, 25 Cal.4th at p. 843.)

II. *Applicable Legal Principles*

A governmental entity is not liable for an injury unless liability is specifically permitted by a statute. (§ 815.) Section 835 provides that a public entity may be held liable for a dangerous condition of public property under certain circumstances. (See *Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 68.) To establish liability, the plaintiff must show, among other things, the public entity had "actual or constructive notice of the dangerous condition . . . a sufficient time prior to the injury to have taken measures to protect against the dangerous condition." (§ 835, subd. (b).)

Section 835.2, subdivision (b) defines the meaning of "constructive notice" for purposes of section 835, subdivision (b):

"A public entity had constructive notice of a dangerous condition . . . only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character. On the issue of due care, admissible evidence includes but is not limited to evidence as to:

"(1) Whether the existence of the condition and its dangerous character would have been discovered by an inspection system that was reasonably adequate (considering the practicability and cost of inspection weighed against the likelihood and magnitude of the potential danger to which failure to inspect would give rise) to inform the public entity whether the property was safe for the use or uses for which the public entity used or intended others to use the public property and for uses that the public entity actually knew others were making of the public property or adjacent property.

"(2) Whether the public entity maintained and operated such an inspection system with due care and did not discover the condition."³

III. *Analysis*

In moving for summary judgment, the City presented evidence that it had no actual or constructive knowledge of the sinkhole before Vazquez allegedly drove over the sinkhole near the Smythe Avenue/Interstate 905 area and suffered his claimed injuries. This evidence showed the City had not received any prior report of a problem at this location, and that the City first received notice of the condition in the morning of May 28, 2010, the day *after* Vazquez's claimed accident. City police officers immediately blocked the intersection and City workers then repaired the road. The evidence additionally showed the City had performed work on an adjacent storm drain in February

³ On the notice element, the plaintiff may alternatively prove the injury was caused by a negligent or wrongful act of the public entity's employee. (§ 835, subd. (a).) Vazquez does not rely on this alternative theory for support of his claim.

and March 2010, and the workers did not notice anything wrong at the site, including with the adjacent storm drain. A City public works supervisor also submitted a declaration opining that "the condition that Plaintiff complains about occurred suddenly and unexpectedly."

This evidence satisfied the City's burden to show it had no actual or constructive notice of the sinkhole or the conditions creating the sinkhole before the claimed accident, and therefore that the City had a complete defense to Vazquez's tort claim. (See §§ 835, subd. (b), 835.2, subd. (b).)

The burden thus shifted to Vazquez to demonstrate a triable issue of fact on the issue of actual or constructive notice. In attempting to meet this burden, Vazquez acknowledged there was no evidence the City had actual notice of the sinkhole, but argued the City had constructive notice because the facts showed it failed to properly inspect the plywood located underneath the street. The court found Vazquez did not produce evidence supporting this theory and therefore granted summary judgment.

On appeal, Vazquez argues the court erred because the City's Cleanout Summary (Exhibit 2) showed the City did not have an adequate inspection program. This document does not support Vazquez's contention. Vazquez submitted this document without any foundation or explanation of its meaning. But even if the document is admissible, the document shows at most that certain materials were found during cleanouts of certain sewer line catch basins. This information does not support a reasonable inference that the City did not properly maintain the relevant catch basin or the sewer line or that it did not properly inspect the relevant areas.

Vazquez alternatively argues that under the applicable statutes the City had the burden to show it had a reasonable inspection program to ensure the continuing integrity of the underground plywood. Section 835.2, subdivision (b)(1) requires a public entity to exercise reasonable diligence in maintaining an inspection system to discover unsafe or defective conditions. However, the City presented evidence that several months before the incident it did inspect the area of the sewer line and did not find any problems. It additionally presented evidence that the sinkhole resulted from a "sudden[] and unexpected[]" occurrence, and therefore that it could not have been detected through a prior inspection.

This evidence satisfied the City's summary judgment burden and thus placed the burden on Vazquez to show: (1) a more frequent inspection was reasonable; and (2) such additional inspection would have uncovered the problem. Vazquez did not proffer evidence to support these theories.

Vazquez argues that the City admitted the sinkhole problem was caused by "deteriorated" plywood and that a court can infer from the word "deteriorated" that the problem with the plywood must have existed for a lengthy period. However, the mere fact that materials have "deteriorated" does not mean a public entity is charged with knowledge of this condition, particularly when those materials are underground. A public entity is not an insurer of the safety of its roads. (*Drummond v. City of Redondo Beach* (1967) 255 Cal.App.2d 715, 720.) Instead, where as here, the public entity is not alleged to be affirmatively responsible for creating an alleged dangerous condition, the

entity is liable only if it knew or should have known of the problem within a reasonable time to allow repair before the injuries occurred. (§ 835.2, subd. (b).)

The fact that certain underground materials may "deteriorate" over time does not mean a public entity has the burden to inspect such materials on a regular basis and that an inspection would have detected the problem. Without *evidence* showing that a more frequent inspection program of underground plywood materials was reasonable and would have discovered the problem, Vazquez has not established a triable material issue of fact.⁴ Under well-settled summary judgment law, "[a]n issue of fact . . . is not created by 'speculation, conjecture, imagination or guess work.' [Citation.]" (*Sinai Memorial Chapel v. Dudler* (1991) 231 Cal.App.3d 190, 196.) A court must consider only competent and admissible evidence in determining whether a triable issue of fact exists. (*LaChapelle v. Toyota Motor Credit Corp.* (2002) 102 Cal.App.4th 977, 981.)

In this regard, Vazquez's reliance on several decisions holding a public entity had constructive notice of a condition is misplaced. (See, e.g., *Fackrell v. City of San Diego* (1945) 26 Cal.2d 196, 200-202; *Rafferty v. City of Marysville* (1929) 207 Cal. 657, 663.) In each of those cases, there were facts showing the public entity was or should have been aware of a specific condition that was dangerous to the public, and had a reasonable time to repair or protect against that condition before the claimed injury occurred. In contrast, Vazquez has not produced any evidence establishing the City had a reason to

⁴ At oral argument, Vazquez maintained that had the City employees climbed into the manholes, the condition of the plywood would have been apparent. However, he candidly conceded there was no evidence in the record to support this contention.

expect a dangerous condition would be created on Smythe Avenue. Instead, the undisputed evidence shows the sinkhole was a "sudden[] and accidental[]" occurrence and that the City had no reasonable basis to learn of the condition until it received a citizen's report after Vazquez suffered his claimed injuries.

DISPOSITION

Judgment affirmed. The parties to bear their own costs on appeal.

HALLER, J.

WE CONCUR:

BENKE, Acting P. J.

McDONALD, J.