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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

ADMAR MANAGEMENT CO. et al.,

Cross-complainants and Appellants,

v.

C.P. CONSTRUCTION COMPANY,  
INC.,

Cross-defendant and Respondent.

E052207

(Super.Ct.No. CIVRS800323)

O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Keith D. Davis,  
Judge. Affirmed.

Hosp, Gilbert, Bergsten & Hough, Monte D. Richard, Robert B. de Spelder, and  
Paal Hjalmar Bakstad for Cross-complainants and Appellants.

Acker & Whipple, Jerri L. Johnson and Laurie N. Stayton for Cross-defendant and  
Respondent.

## I. INTRODUCTION

Cross-complainant and appellant Admar Management Co. (Admar) is the owner of certain land in Colton. Admar hired cross-complainant and appellant Northwoods Construction Co., Inc. (Northwoods) as a general contractor for a residential development on the Colton property known as Crystal Ridge. Admar and Northwoods hired George Stryker to design a storm drain system for the development. Northwoods hired cross-defendant and respondent, C.P. Construction Company, Inc. (C.P.) to construct the storm drain system according to Stryker's plan.

The subcontract between Northwoods and C.P. includes an indemnity provision under which C.P. agrees to indemnify Admar and Northwoods for damages arising from the construction of the storm drain system. By statute, this duty of indemnity does not extend to damages arising from the sole negligence of Admar, Northwoods, or their subcontractors, or for damages for defects in design furnished by such persons. (Civ. Code, § 2782, subd. (a).)

Plaintiffs Buster and Marilyn Burris own property downhill from Crystal Ridge. In 2008 they sued Admar, Northwoods, and Stryker, among others (but not C.P.). They alleged that the storm drain system was negligently designed and constructed so as to increase the water runoff onto their property, which caused damages. Admar and Northwoods then cross-complained against C.P. for indemnity.

C.P. moved for summary judgment on the cross-complaint. C.P. argued that it did not have a duty to indemnify Admar or Northwoods because it followed Stryker's storm

drain plan in constructing the storm drain system and the Burrises' damages, if any, are the result of defects in the plan, not the construction. Following a hearing, the trial court granted the motion. Admar and Northwoods appealed.

For the reasons that follow, we affirm the judgment.

## II. FACTUAL SUMMARY AND PROCEDURAL BACKGROUND

### A. *The Pleadings*

According to the Burrises' complaint, they own a 15-acre parcel of land in Colton. Admar and/or Northwoods owned and developed nearby property known as Crystal Ridge. In connection with the Crystal Ridge development, Admar and/or Northwoods hired Stryker to prepare a hydrology report and hydraulic calculations for the development. Admar and/or Northwoods then constructed and installed storm drains and other water removal systems to divert water away from the development and toward the Burrises' property. Water runoff from Admar's property subsequently carved an erosion ditch into the Burrises' property, causing damages.

The Burrises alleged that the hydrology report and hydraulic calculations were negligently prepared, and that the storm drain and other water removal systems were negligently constructed. In addition to seeking damages under the theory of negligence, the Burrises alleged that the water runoff onto their property constituted a trespass and a nuisance.

Admar and Northwoods cross-complained against C.P. and Stryker, among others. According to the cross-complaint, Admar is the owner of property that is the subject of

the Burrises' complaint, and Northwoods was the general contractor of the Crystal Ridge project.

C.P. was a subcontractor of Northwoods. Their written agreement includes the following: "To the fullest extent permitted by law, Subcontractor shall indemnify, defend . . . , protect and hold harmless [Northwoods and Admar] . . . from and against any and all claims (including claims for bodily injury, death or damage to property), demands, obligations, damages, actions, causes of action, suits, losses, judgments . . . liabilities, costs and expenses . . . of every kind and nature whatsoever . . . which may arise from or in any manner relate (directly or indirectly) to the Work (including defects in workmanship or materials and/or design defects [if the design was that of Subcontractor or its agents]) or Subcontractor's presence or activities conducted on the Project (including, without limitation, the negligent and/or willful acts, errors and/or omissions of Subcontractor . . .) regardless of any active or passive negligence or strict liability of an indemnified Party. . . ." The "Work" is defined, in part, by reference to a schedule of prices for "Storm Drain Construction" pursuant to a certain storm drain plan. The schedule indicates the work includes the installation of three "Rip Rap apron[s]."

Admar and Northwoods asserted claims against C.P. based on express contractual indemnity, implied indemnity, comparative equitable indemnity, and declaratory relief.

## *B. Motion for Summary Judgment*

C.P. moved for summary judgment on the cross-complaint. The following summarizes the undisputed and disputed facts as set forth in C.P.'s separate statement of undisputed material facts and Admar and Northwoods's opposing separate statement.

Historically, storm water from a portion of Admar's property drained via two main canyons, which join together at a point just south of the Burrises' property. Prior to the development of Crystal Ridge, runoff water drained in a northerly direction onto and across the Burrises' property via this natural watercourse.

Admar and Northwoods retained Stryker to prepare a hydrology study and hydraulic report and to design a storm drain system for the specific purpose of reducing the potential for increased drainage onto lower lying properties, including the Burrises' property.

Stryker's storm drain design plan (Stryker's plan) called for the installation of riprap aprons at storm outlets, including those designated "A" and "B," in the plan.<sup>1</sup> The riprap aprons were to be constructed using rocks of various sizes.<sup>2</sup> Stryker's plan and reports were preapproved by the City of Colton. Stryker neither drew up plans, nor

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<sup>1</sup> Although the Stryker plan was purportedly included in the materials submitted to the trial court, it is not included in our record on appeal. Admar and Northwoods note that Stryker's plan also called for the installation of a riprap apron at storm outlet "D."

<sup>2</sup> The nature of a riprap apron is not clear from the separate statements or the evidence. On appeal, Admar and Northwoods note that it "is a device used to dissipate and protect against the forces of running water."

approved of plans, that called for the installation of concrete swales instead of riprap aprons.

Northwoods hired C.P. to install the storm drainage system in accordance with Stryker's plan. The parties disagree as to whether C.P. followed Stryker's plan and installed the riprap aprons as called for in the plan. The issues regarding this dispute will be discussed below.

After C.P. completed its work, someone (other than Stryker) prepared, at Admar's and/or Northwoods's request, a revised storm drain plan that called for the construction of concrete swales at outlets A and B.<sup>3</sup> Someone other than C.P. subsequently constructed concrete swales at storm outlets A and B.

### III. STANDARD OF REVIEW

A trial court properly grants summary judgment when there are no triable issues of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).)<sup>4</sup> “The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute. [Citation.]” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).

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<sup>3</sup> Although Admar and Northwoods state they dispute this fact, they explain their dispute by clarifying that Stryker did not draw up plans for, nor approve of, the installation of concrete swales. They offer no evidence to dispute that a third party, *other than Stryker*, prepared such plans.

<sup>4</sup> All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

A moving party defendant is entitled to summary judgment if it establishes a complete defense to the plaintiff's causes of action, or shows that one or more elements of each cause of action cannot be established. (§ 437c, subd. (o); *Aguilar, supra*, 25 Cal.4th at p. 849.) A moving party defendant bears the initial burden of production to make a prima facie showing that no triable issue of material fact exists.

Once the initial burden of production is met, the burden shifts to the responding party plaintiff to demonstrate the existence of a triable issue of material fact. (§ 437c, subd. (p)(2); *Aguilar, supra*, 25 Cal.4th at pp. 850-851.) The plaintiff may not rely upon the mere allegations in its complaint, but must set forth "specific facts" showing that a triable issue exists. (§ 437c, subd. (p)(2).)

From commencement to conclusion, the moving party defendant 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.) Summary judgment shall be granted if all the papers submitted show there is no triable issue of material fact in the action, thereby entitling the moving party to judgment as a matter of law. (§ 437c, subd. (c).)

"On appeal, we exercise 'an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law.' [Citation.] '... Moreover, we construe the moving party's affidavits strictly, construe the opponent's affidavits liberally, and resolve doubts about

the propriety of granting the motion in favor of the party opposing it.’ [Citations.]” (*Seo v. All-Makes Overhead Doors* (2002) 97 Cal.App.4th 1193, 1201-1202.)

#### IV. ANALYSIS

Under their agreement with Northwoods, C.P., as “Subcontractor,” agreed to indemnify and defend Admar and Northwoods from and against any claims and damages “which may arise from or in any manner relate (directly or indirectly) to the Work (including defects in workmanship or materials and/or design defects [if the design was that of Subcontractor or its agents]) or Subcontractor’s presence or activities conducted on the Project . . . .” The parties agree that the work called for under the agreement is the installation of the storm drainage system in accordance with Stryker’s plan.

The contractual indemnity provision must be read in light of Civil Code section 2782, subdivision (a), which provides, in relevant part: “. . . provisions, clauses, covenants, or agreements contained in . . . any construction contract and that purport to indemnify the promisee against liability for damages for . . . injury to property, or any other loss, damage or expense arising from the sole negligence or willful misconduct of the promisee or the promisee’s agents, servants, or independent contractors who are directly responsible to the promisee, or for defects in design furnished by those persons, are against public policy and are void and unenforceable . . . .”

Reading the contract and the statute together in the context of the facts in this case, C.P. has a contractual duty to indemnify Admar and Northwoods if it is liable for damages that arise from or relate to the storm drain construction or C.P.’s presence or

activity on the project, provided Admar and Northwoods's liability for damages: (1) does not arise from the "sole negligence or willful misconduct" of Admar and Northwoods or their independent contractors (e.g., Stryker); or (2) is not due to defects in designs furnished by Admar, Northwoods, Stryker, or Admar and Northwoods's other independent contractors.

It follows from the foregoing that if C.P. was hired to construct a storm drain system according to Stryker's plan, and C.P. constructs such a system in accordance with Stryker's plan (and without deviating from it), and the storm drain system causes damages to the Burris, the damages must necessarily be due to a defect in Stryker's plan (or from subsequent plans and construction of concrete swales) and C.P.'s indemnity duty would not be triggered.

Here, there is no dispute that C.P. was hired to construct a storm drain system according to Stryker's plan or that the Burris's alleged damages were caused by the storm drain system. The critical issue, therefore, is whether C.P. constructed the storm drain system in accordance with Stryker's plan.<sup>5</sup>

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<sup>5</sup> In their memorandum of points and authorities filed in the trial court and in their brief on appeal, C.P. relies heavily on the deposition testimony of Bernhard Mayer. According to C.P., Mayer is a civil engineer and the Burris's expert. Mayer states that Stryker's plan "did not incorporate enough mitigation measures to prevent downstream erosion." He further opines that Stryker's plan fell below the standard of care by failing to include a retention basin and for misstating the predevelopment runoff. C.P. offers Mayer's opinions as evidence that the Burris are claiming that the storm drain system was defectively designed and are *not* claiming that the storm drain system was improperly or negligently constructed.

Admar and Northwoods argue that the trial court should not have considered, and we should not consider, Mayer's testimony, because there is no fact set forth in C.P.'s

*[footnote continued on next page]*

In support of C.P.’s assertion that it did not deviate from Stryker’s storm drain design, C.P. offers Stryker’s responses to its request for admissions. Specifically, Stryker admitted that C.P. “did not deviate from any plan designed or approved by [Stryker] in the construction of the sewer, water, and drainage systems in the Crystal Ridge project.” C.P. also cited to Northwoods’s response to a similar request for admission in which Northwoods stated that it lacked sufficient information to admit or deny the request. This is sufficient to satisfy C.P.’s initial burden of production in support of its summary judgment motion and to shift to Admar and Northwoods the burden of creating a triable issue of material fact.

Admar and Northwoods dispute C.P.’s assertion that C.P. did not deviate from Stryker’s plan by pointing to two excerpts of deposition testimony of Charles Pfister, the

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*[footnote continued from previous page]*

separate statement for which the testimony is offered. We agree. In the summary judgment context, there is a critical difference between (1) evidence that is not cited in the separate statement in support of a specified undisputed fact, and (2) evidence pertaining to a fact that is not specified in the separate statement. A court may (but is not required) to consider evidence of the former type. (See, e.g., *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 316 [“Whether to consider evidence not referenced in the moving party’s separate statement rests with the sound discretion of the trial court”].) It may not, however, consider a *fact* not set forth in the separate statement. As stated in *Y.K.A. Industries, Inc. v. Redevelopment Agency of City of San Jose* (2009) 174 Cal.App.4th 339, the court’s consideration of a summary judgment motion is limited “to facts set out in the separate statement, regardless of whether other facts are established as undisputed by evidence submitted with the moving papers—if the fact is not set out in the separate statement, it does not exist.” (*Id.* at pp. 363-364, fn. 28.) Here, C.P. does not identify any fact in its separate statement for which Mayer’s opinions are offered. Indeed, it is clear that Mayer’s deposition testimony is offered to show what the Burris are and are not claiming. These facts are not mentioned in their separate statement and, therefore, do not exist. (*Ibid.*)

person at C.P. designated the most knowledgeable as to the scope of C.P.'s work on the project. In the first excerpt, Pfister is asked about the quantity of rocks used in the riprap aprons and replies that C.P. "may have done two different approaches with these things." The first approach involves the use of rocks in the construction of the riprap apron. The second approach is "to form it out of concrete with blocks, or just less rock to pour these pads out of concrete, these [riprap] pads." We agree with the trial court that this does not create a triable issue of fact as to C.P.'s compliance with Stryker's plan.<sup>6</sup> Pfister appears to be testifying that two different approaches can be used to create riprap aprons; the excerpt does not indicate that the approach used in this project deviated from Stryker's plan.

In the second deposition excerpt, Pfister is asked whether C.P. measured out the size of the apron as called for in the plans by putting stakes in the ground. The following colloquy then takes place:

"A. I don't—I don't think it is that scientific.

"Q. I mean, . . . would they do some measurement at all?

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<sup>6</sup> Regarding this testimony, the trial court stated: "I didn't see anything in even the portion of the testimony you directed me to that specifies or demonstrates that Mr. Pfister testified with certainty words to the effect of, you know, the [Burris] called for us to do 'A.' We didn't do 'A,' we did 'B.' Here's how we did 'B,' here's why we did 'B.' [¶] What I get from Mr. Pfister is these are different approaches that can be used, they are occasionally used, but I didn't read anything . . . that essentially is a definitive statement that Mr. Pfister has personal knowledge that, in fact, something different was done with regard to the riprap on this project than what had been specifically called for in Stryker's design plans."

“A. I don’t know. It would be, you know, wider than the structure, but, you know, other than that, I don’t know.

“Q. It could have been smaller; it could have been bigger?”

“A. Yeah.”

This testimony indicates that the actual sizing of the riprap apron is generally an imprecise matter. The excerpt is not, however, evidence that the size of the riprap apron *in this case* was different from the size called for in Stryker’s plan.

These excerpts from Pfister’s deposition are the only evidence Admar and Northwoods offer to create a triable fact on the issue of whether C.P. deviated from Stryker’s plan. However, on a related fact—that “C.P. installed rip rap aprons pursuant to the approved Stryker design at storm outlets A and B”—Admar and Northwoods cite to two paragraphs in a declaration from Stryker. In the first paragraph, Stryker states that he “never drew up plans for, nor approved of, the installation of concrete swales instead of the riprap aprons.” This does not create a triable issue because there is no evidence that C.P. installed concrete swales instead of riprap aprons. Indeed, it is not disputed that after C.P. completed its work at storm outlets A and B, someone (other than Stryker) prepared a revised storm drain plan at Admar and Northwoods’s request that called for the construction of concrete swales at outlets A and B, and that someone (other than C.P.) installed the concrete swales. The fact that Stryker did not draw up such plans has no bearing on whether C.P. installed the riprap aprons pursuant to Stryker’s plans.

In the second part of Stryker's declaration that Admar and Northwoods rely upon, Stryker states he "visited the subject property, sometime after November 2005, and observed no evidence that the riprap aprons at the ends of the storm drain outlet structures . . . were installed as shown on the approved storm drain plans." C.P. objected to this statement as a "sham affidavit" that contradicts his prior sworn statement that C.P. did not deviate from Stryker's plan. The trial court agreed with C.P., stating that it was "disregarding Mr. Stryker's declaration and giving it no weight whatsoever and no consideration."

Admar and Northwoods argue that the court abused its discretion in disregarding Stryker's declaration. We do not need to address that question because we conclude that Stryker's declaration, even if admissible, does not create a triable issue of fact.

Stryker does not state in his declaration that C.P. deviated from his plan, that C.P. did not install the riprap aprons according to his plan, or that C.P. installed concrete swales. Any of these statements would be simple enough to make if they were true. Instead, Stryker states in his declaration dated July 26, 2010, only that "sometime after November 2005" he "observed no evidence that the riprap aprons" were installed as shown on the plans. He does not state when he visited the property. It could have been anytime between November 2005 and July 2010—and long after C.P.'s riprap aprons were replaced by concrete swales. Stryker's failure to observe evidence of the riprap aprons is not in conflict with the facts asserted by C.P. that it installed riprap aprons that

were later replaced with concrete swales. The statement does not create a triable issue of fact.

Admar and Northwoods point to other facts they assert are disputed. The purported disputes are either nonexistent or immaterial. They assert, for example, that there is a triable issue as to whether C.P. installed the required riprap apron at each storm outlet. In response to C.P.'s evidence indicating that C.P. constructed riprap in accordance with the subcontract, Admar and Northwoods point to Pfister's deposition testimony where he was asked, "So you can't be sure if Rip Rap has ever been installed?," and answered, "No. That is correct." Not being sure whether riprap was installed is not evidence that riprap was *not* installed. Admar and Northwoods's attempt to create disputed issues of material facts fails.

Under the indemnity provision in the parties' subcontract and Civil Code section 2782, C.P. has no duty to indemnify Admar and Northwoods if the Burris's damages are due to defects in designs furnished by others, i.e., Stryker and/or the designer of the concrete swales. C.P. produced evidence sufficient to establish that it performed its work on the project without deviating from Stryker's plans and was not involved in the design or construction of the concrete swales. As such, any damages to the Burris's due to the storm drainage system must be due to Stryker's plans and/or the concrete swales. Admar and Northwoods failed to produce evidence creating a triable material issue as to these facts. Accordingly, C.P. is entitled to judgment as a matter of law.

V. DISPOSITION

The judgment is affirmed. C.P. shall recover its costs on appeal.

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KING  
J.

We concur:

RAMIREZ  
P.J.

HOLLENHORST  
J.