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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

ALICIA NORTON,

Plaintiff and Appellant,

v.

CITY OF MORENO VALLEY,

Defendant and Respondent.

E056684

(Super.Ct.No. RIC533180)

OPINION

APPEAL from the Superior Court of Riverside County. Paulette Durand-Barkley, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Law Office of Mansfield Collins, and Mansfield Collins for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith, Lawrence S. Rookhuyzen and Manuel U. Sarmiento, for Defendant and Respondent.

Plaintiff and appellant Alicia Norton was injured in a fall suffered while crossing a public street in Moreno Valley, California. She brought suit seeking to hold defendant and respondent City of Moreno Valley (City) liable for her injuries. This appeal follows

the trial court's grant of summary judgment in favor of the City. Plaintiff fails to show any evidence City either created the allegedly dangerous condition, or had notice of it. We therefore affirm.

I. FACTS AND PROCEDURAL BACKGROUND

On September 6, 2008, at approximately noon, plaintiff was crossing a street in Moreno Valley—not in a crosswalk—when she was injured in a fall. She testified at her deposition that she saw nothing unusual in the road or any other sign of danger prior to falling: she was walking normally when all of a sudden “[t]he ground gave in, and [she] went down.” Her left leg went down into what she describes as a “hole” in the street, deep enough to reach approximately to her knee, while her right leg went out in a “split.” There is some evidence that the hole plaintiff fell into was a “subterranean monument marker well,” approximately two and a half feet deep, the cap for which had been removed.

Plaintiff's complaint, filed August 7, 2009, asserts causes of action for negligence and premises liability against the City. The City filed cross-complaints against two entities, Moreno Valley Properties LP and Mesa Contracting Corporation, but those cross-complaints were dismissed by the City voluntarily.

The City's motion for summary judgment or in the alternative summary adjudication was filed on July 15, 2011. Plaintiff filed her opposition on March 28, 2012. The matter was heard by the trial court on April 11, 2012, after which the court took the matter under submission. On April 17, the court issued a written “Subsequent Ruling on

Submitted Matter,” granting summary judgment in favor of the City. Judgment was entered in favor of the City on May 9, 2012.

II. DISCUSSION

A. Standard of Review

The well-known principles generally governing appellate review of an order granting a motion for summary judgment are as follows: “A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. [Citation.] We review the trial court’s decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports. [Citation.] In the trial court, once a moving defendant has ‘shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established,’ the burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff ‘may not rely upon the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action’” (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476-477; Code Civ. Proc., §437c, subd. (p)(2).) “In reviewing whether these burdens have been met, we strictly scrutinize the moving party’s papers and construe all facts and resolve all doubts in favor of the party opposing the motion.” (*Innovative Business Partnerships, Inc. v. Inland Counties Regional Center, Inc.* (2011) 194 Cal.App.4th 623, 628 (*Innovative Business Partnerships*) [Fourth Dist., Div. Two].)

B. Analysis

Plaintiff has not disputed that the City met its initial burden of production with respect to whether the hole in the street that she fell into was created by a negligent or wrongful act or omission of an employee of the City, or the City had actual or constructive notice of the dangerous condition that injured her—an essential element of her claims. She contends, however, that she presented evidence sufficient to show a triable issue of fact on the issue. We disagree.

“The Government Claims Act [citations] establishes the limits of common law liability for public entities”¹ (*Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 899.) These limits include imposing liability for injury caused by a dangerous condition of the entity’s property only where “[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 “[t]he 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.” (Gov. Code, § 835.)

“Actual notice” is established under the Act if the public entity “had actual knowledge of the existence of the condition and knew or should have known of its dangerous character.” (Gov. Code, § 835.2, subd. (a).) “Constructive notice” requires a

¹ The traditional, informal short title of this act is the “Tort Claims Act.” However, because the Act applies to claims for breach of contract as well as to tort claims, the California Supreme Court and the Legislature have elected to refer to it as the “Government Claims Act.” (*City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 741-742; Gov. Code, § 810, subd. (b).) We do likewise. We also refer to it sometimes as simply “the Act.”

plaintiff to establish that the dangerous 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.” (*Id.*, subd. (b).)

We find no evidence in the record that the dangerous condition that injured plaintiff—apparently an uncovered, or at least insufficiently covered, hole in the street, two and a half feet deep and wide enough for her foot and leg to fit into—was created by a negligent or wrongful act or omission of an employee of the City. A tract map dated 1987 shows a surveyor’s monument was previously two and a half feet down, at approximately the location at issue. We may infer, at least for present purposes, that a well created to recover the surveyor’s monument is the hole into which plaintiff fell. There is nothing in the record, however, tending to show a City employee caused the well to be in an unsafe condition. Plaintiff’s notion, advanced in passing, that the well was “negligently covered” by the City in the first instance is pure speculation, unsupported as it is by any evidence tending to support that conclusion. Neither is there any evidence of recent street improvements, which might have damaged the covering. The City’s risk manager, Mel Alonzo, averred in his declaration that “no [City] work was being performed and no permits had been issued to others to do work there.” There were permits for several construction projects by private developers in the area, including one project bordering on the street where plaintiff fell, but no work was being performed in the area from January 2007 through September 2008, other than minor maintenance projects, like cutting down weeds. There is no evidence of any specific work being done to the street itself, or any street in the area, so authority cited by plaintiff regarding

recently improved streets or sidewalks is inapposite. In short, there is no *evidence*—only speculation advanced by plaintiff—that the City caused the hole to be either uncovered or inadequately covered when plaintiff fell.

Plaintiff makes much of Mr. Alonzo’s description of the hole in his declaration, derived from his examination of photographs taken after plaintiff’s fall, as “freshly cut.” In context, however, it is apparent Mr. Alonzo does not opine that the hole was newly made, let alone newly made by a City employee. The Alonzo declaration states flatly that the City “did not create and was not on notice of any defect, hazard or dangerous condition” at the relevant location. Mr. Alonzo observes that the hole appears “freshly cut, symmetrical and the edges undisturbed.” This description of the nature of the hole, however—apparently to distinguish it from, say, a sinkhole caused by erosion—is hardly evidence that an employee of the City created a dangerous condition, as plaintiff would have it.

We also find no evidence in the record that the City had actual notice of a dangerous condition. Mr. Alonzo’s declaration states the City has a telephone “Hot Line” number for receiving reports of dangerous conditions on public streets and sidewalks, as well as a policy requiring street sweepers and street maintenance personnel to report such dangerous conditions. Mr. Alonzo researched the records of the telephone complaint line and maintenance records, and found no report of a dangerous condition at the location where plaintiff fell. The City also had never previously received a tort claim regarding the location, according to Mr. Alonzo. Mr. Alonzo’s testimony is consistent with the deposition testimony of Mr. McDonel, who testified as the person most

knowledgeable for the City regarding street maintenance, that he was aware of no written record of any prior injuries arising from potholes or cracks near where plaintiff was injured.

Neither does examination of the record reveal sufficient evidence to conclude the City was on constructive notice of a dangerous condition. The record evidence regarding whether the alleged dangerous condition was obvious is mixed. An open hole wide enough to fit a leg into, and two and a half feet deep, would seem likely to be obvious, but there is at least some evidence pointing to the opposite conclusion. Plaintiff's own testimony that the "ground gave in" may suggest the hole was in fact covered and invisible, but the cover could not bear her weight. The circumstance that she did not notice the hole prior to stepping into it also suggests it may not have been obvious. Even assuming that the hole was open, however, and that this constituted an obvious dangerous condition, there is no evidence in the record regarding how long the condition had existed. This lack of evidence is fatal to plaintiff's claim of constructive notice. (Gov. Code, § 835.2, subd. (b); *State v. Superior Court of San Mateo County (Rodenhuis)* (1968) 263 Cal.App.2d 396, 400 (*Rodenhuis*) ["The primary and indispensable element of constructive notice is a showing that the *obvious condition existed a sufficient period of time before the accident.*" (Original italics.)].)

We note plaintiff's arguments regarding the adequacy of the City's inspection system, but these arguments are ultimately unavailing. Government Code section 835.2 provides that evidence regarding the adequacy of a public entity's inspection system is admissible evidence regarding whether a dangerous condition would have been discovered in the exercise of due care. (Gov. Code, § 835.2, subd. (b).) But no matter how inadequate a public entity's inspection system, where there is no evidence the dangerous condition had existed for any particular length of time before the accident, the requirements of constructive notice have not been met as a matter of law. (*Rodenhuis, supra*, 263 Cal.App.2d at p. 400.)

Finally, we note that plaintiff's arguments are based in part on purported facts that are simply not supported by the record. Plaintiff asserts, for example, that Mr. McDonel "admitted that no city employee performed any inspection [on the street where plaintiff was injured] from January 2005 to December 31, 2008." Mr. McDonel admitted no such thing: plaintiff's sole citation is to deposition testimony in which Mr. McDonel states he is not aware of any *writings* describing inspections during this period. The only way plaintiff's representation regarding Mr. McDonel's statement could be true is if it were established that any inspection of the street would necessarily have been documented in writing. But there is no evidence in support of that proposition in our record. Similarly, plaintiff's assertion that "Mel Alonzo and Mr. McDonel . . . take opposite views on the existence of an inspection program. . . . One says an inspection program exist [*sic*] while the other denies it" is unsupported by any reasonable reading of the declaration of Mr.

Alonzo or the deposition testimony of Mr. McDonel.² It is a fundamental rule of appellate practice that each brief must accurately reflect the appellate record. (Cal. Rules of Court, rule 8.204(a)(1)(C), (a)(2)(C).) Plaintiff's failure to adhere to this principle does nothing to advance her cause, and risks sanctions against her and her counsel. (See *id.*, rule 8.276(a)(4); *Pierotti v. Torian* (2000) 81 Cal.App.4th 17, 29.)

In short: we must make all reasonable inferences in favor of plaintiff in the present procedural posture. (*Innovative Business Partnerships, supra*, 194 Cal.App.4th at p. 628.) To be reasonable, however, inferences must be “a product of logic and reason” and “must rest on evidence.” (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633.) Plaintiff has not produced sufficient evidence to support a reasonable inference that the City either created the dangerous condition that injured her, or had notice of it. As such, she failed to meet her burden of production with respect to an essential element of her claims, and summary judgment in favor of the City was properly granted.

² It is unreasonable, for example, to base an argument on a deponent's answer to a question that is so vague as to be effectively meaningless, and where both question and answer were immediately thereafter withdrawn, with an apology and explicit acknowledgement by the questioner that the question needs to be rephrased. Thus, plaintiff's arguments regarding “consciousness of liability” inferred from false exculpatory statements, which rest on the notion that Mr. Alonzo was lying about the existence of an inspection program, are without merit.

III. DISPOSITION

The judgment appealed from is affirmed. Defendant City of Moreno Valley shall recover its costs on appeal.

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HOLLENHORST

Acting P. J.

We concur:

KING

J.

MILLER

J.