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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

TOMRA PACIFIC, INC. et al.,

Petitioners,

v.

THE SUPERIOR COURT OF
SAN BERNARDINO COUNTY,

Respondent;

MOISES RAMIREZ,

Real Party in Interest.

E058906

(Super.Ct.No. CIVRS902854)

OPINION

ORIGINAL PROCEEDINGS; petition for writ of mandate. Keith D. Davis,
Judge. Petition granted.

Wilson, Elser, Moskowitz, Edelman & Dicker, Steven R. Parminter; Jackson
Lewis, David G. Hoiles, Jr., Sherry L. Swieca, and Debra N. Barsom, for Petitioners.

No appearance for Respondent

Excelus Law Group, William W. Bloch; Equality Lawyers, Barbara E. Figari and Lawrence A. Organ, for Real Party in Interest.

DISCUSSION

In this matter we have reviewed the petition and the opposition filed by real party in interest. We have determined that resolution of the matter involves the application of settled principles of law, and that issuance of a peremptory writ in the first instance is therefore appropriate. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 178.)

The simple legal fact is that the tort of assault requires *more than* “[m]ere” words. There must be an attempt to touch the victim/plaintiff. (*Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1604 (italics added); see also 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 383, pp. 599-600.) Real party’s reliance on the “pointed” gun line of cases (e.g., *Lowry v. Standard Oil Co.* (1944) 63 Cal.App.2d 1, 7) is misplaced; those cases hold that having a gun pointed at one is analogous to a raised fist insofar as it induces a reasonable fear of immediate harmful physical contact.

Nor is *Ritschel v. City of Fountain Valley* (2006) 137 Cal.App.4th 107 helpful to real party because it involves an undisputed and unwanted touching by the defendants. As for real party’s citation of Penal Code section 422 (criminal/terrorist threats), while it may conceivably bear on a claim for the intentional infliction of emotional distress, it is

not relevant to the current legal definition of the tort of assault. Without a threatening gesture, there is no assault. As real party admitted that petitioner Garcia made no physical threatening gesture toward him, petitioners were entitled to summary adjudication of the assault claim.

Finally, petitioners were entitled to seek writ review of the order denying their motion for summary adjudication (Code Civ. Proc., § 437c, subd. (m)), and the possibility that real party may attempt to amend his pleading to add new legal theories does not affect petitioners' right to have the issue before us decided at this time.

Our order requesting an informal response was expressly limited to the issue of whether there was sufficient evidence of an assault to defeat summary adjudication. As we resolve that question in the negative, we have no need to consider the issue of workers' compensation exclusivity with respect to the assault claim.

DISPOSITION

Accordingly, the petition for writ of mandate is granted. Let a peremptory writ of mandate issue directing the Superior Court of San Bernardino County to vacate its order denying petitioners' motion for summary adjudication of the assault cause of action and to enter a new order granting the motion.

Petitioners are directed to prepare and have the peremptory writ of mandate issued, copies served, and the original filed with the clerk of this court, together with proof of service on all parties. Petitioners are to recover their costs.

The previously ordered stay is lifted.

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RAMIREZ
P.J.

We concur:

RICHLI
J.

CODRINGTON
J.