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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

WILLIAM HAGERMAN,

Plaintiff and Appellant,

v.

COUNTY OF SAN BERNARDINO,

Defendant and Respondent.

E061481

(Super.Ct.No. CIVDS1111275)

OPINION

APPEAL from the Superior Court of San Bernardino County. Donna G. Garza, Judge. Affirmed.

Jay S. Bloom for Plaintiff and Appellant.

Smith Law offices, Douglas C. Smith and Paul J. Burkhart for Defendant and Respondent.

Plaintiff William Hagerman is a teacher, was employed by the San Bernardino Superintendent of Schools (superintendent of schools), and taught at the San Bernardino County Central Juvenile Detention Center (detention center). While teaching his class

one day, a student attacked him and he sustained severe injuries. He filed a complaint against the County of San Bernardino (the County), pleading causes of action for negligence, failure to provide a safe workplace, dangerous condition of property, and violation of his civil rights. The first cause of action was dismissed against the County, and the trial court granted summary adjudication in favor of the County for the second, third, and fourth causes of action.

Plaintiff appeals, arguing that defendants were not entitled to summary adjudication as to (1) the second cause of action for failure to provide a safe workplace, (2) the third cause of action for maintaining dangerous condition of property, and (3) the fourth cause of action for violation of Federal Constitutional rights was not subject to summary adjudication. We affirm.

BACKGROUND

Plaintiff is a teacher employed by the San Bernardino County Superintendent of Schools. He was assigned to teach the Special Day Class at the Central Juvenile Detention Center. The Special Day Class is designed to facilitate minors with special educational needs and comprises minors from multiple housing units in the Detention Center. On October 28, 2010, Minor C was disruptive and refused to do his schoolwork. Plaintiff called a Probation Corrections Officer (PCO) from Minor C's housing unit to remove the student, but the officer told plaintiff to wait until another officer could come by and relieve the post. The PCO instructed plaintiff to call a "Code Red" if things got

out of hand. A “Code Red” means a minor is acting out in a way that is potentially violent and assistance from a nearby PCO is needed.

As plaintiff hung up the phone, Minor C rushed his desk and tried to tip it over. Plaintiff braced himself against the desk as the minor upended it, knocking plaintiff out of his chair and pinning him against the wall. Minor C then tried to push the contents of plaintiff’s desk onto the ground. A teacher’s aide grabbed Minor C and pinned him against the wall, allowing plaintiff to call a “Code Red.” PCOs arrived shortly thereafter and escorted Minor C from the room. Plaintiff sustained severe injuries to his back and shoulder from bracing against his desk.

Plaintiff sued the County for negligence, failure to provide a safe workplace, dangerous condition of property, and violation of his civil rights. The County’s original motion for summary judgment as to all causes of action was made on the grounds that (1) defendant, as guardian, was not liable for the acts of a ward, (2) defendants were immune from liability pursuant to the doctrine of governmental immunity for discretionary acts and omissions, and (3) defendant, a public entity, is not liable for injury caused by a prisoner pursuant to Government Code, section 844.6. The trial court denied this motion without a written ruling.

Some time later, the County filed a second motion for summary judgment. This second motion alleged, among other things, that plaintiff was not employed by the county, and failing to provide police protection did not qualify as a “condition of

property.” The trial court granted summary adjudication for the second, third, and fourth causes of action.¹

DISCUSSION

A. *General Principles and Standard of Review Relating to Summary*

Judgments

The purpose of a motion for summary judgment is to discover whether the parties possess evidence which requires the fact-weighting procedures of a trial. (*Gramercy Investment Trust v. Lakemont Homes Nevada, Inc.* (2011) 198 Cal.App.4th 903, 909.) A trial court properly grants a motion for summary judgment where there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) Once a moving defendant has shown that “one or more elements to the cause of action, even if not separately pleaded, cannot be established,” the burden shifts to the plaintiff to show a triable issue. (*Id.* at subd. (p)(2).) In showing a triable issue of fact, a plaintiff “may not rely upon the mere allegations or denials of its pleadings,” but must point to “specific facts showing that a triable issue of material fact exists.” (*Ibid.*) The grant or denial of summary judgment is an appealable judgment. (*Id.* at subd. (m)(1).)

¹ The minute order and the transcripts from the summary judgment hearing held on October 10, 2013, state that the Court *denies* summary adjudication as to issue 1 (whether the County was plaintiff’s employer). However, the written order *grants* summary adjudication as to issue 1. We resolve this internal inconsistency based on the trial court’s stated reasoning at the hearing, as well as the written order, and determine that the court intended to grant summary judgment as to issue 1.

We review the trial court’s grant of summary judgment de novo. (*Leber v. DKD of Davis, Inc.* (2015) 237 Cal.App.4th 402, 406.) In reviewing the motion, we apply the same three-step analysis used by the trial court, “that is, we (1) identify the pleaded issues, (2) determine if the defense has negated an element of plaintiff’s case or established a complete defense, and if and only if so, (3) determine if the plaintiff raised a triable issue of material fact.” (*Id.* at pp.405-406.) We consider all evidence in connection with the motion except that which was properly excluded, “liberally construing” plaintiff’s evidence and “strictly scrutinizing” defendant’s evidence, and resolving ambiguities in plaintiff’s favor. (*Id.* at p. 406.) Because we review independently, the trial court’s reasons for granting summary judgment are not binding on us; we review the ruling, not the rationale. (*Gramercy Investment Trust v. Lakemont Homes Nevada, Inc., supra*, 198 Cal.App.4th at p. 909.)

B. The Trial Court Properly Considered the Second Summary Judgment Motion Because the First Motion Addressed Different Grounds.

Plaintiff argued in his opposition to the motion for summary judgment that it was an improperly refiled motion that had been previously denied. In reply the County pointed out that the first motion was not based on the same issues. At the hearing, the court indicated it would review the original motion and the minute order relating to it and rule on the issue. However, the court did not rule on the issue of whether the second motion was improperly filed, although it impliedly ruled against plaintiff on the issue

because it went on to reach the merits of the County's second motion for summary judgment.

Code of Civil Procedure, section 437c, subdivision (f)(2) provides that a party may not move for summary judgment based on issues asserted in a prior motion for summary adjudication and denied by the court, unless that party establishes to the satisfaction of the court, newly discovered fact or circumstance or a change of law supporting the issues reasserted in the summary judgment motion. A trial court's decision to allow a party to file a renewed or subsequent motion for summary judgment is reviewed for abuse of discretion. (*Nieto v. Blue Shield of California Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 72.) Where the subsequent (operative) summary judgment motion is not identical to the prior motion, the trial court may properly consider it. (*Id.*, at pp. 72-73; *Patterson v. Sacramento City Unified School Dist.* (2007) 155 Cal.App.4th 821, 827.)

Here, the two motions asserted distinct legal theories. As to the first motion, the minute order reflecting the trial court's ruling refers to certain factual determinations made by the court, which sustained plaintiff's objection to the declaration of Stephanie Roque for noncompliance with the Code of Civil Procedure. It goes on to state that the "County of San Bernardino's Motion for Summary Judgment is Denied." The actual motion, which plaintiff attached to his papers in opposition to the second motion, shows that the legal bases for the first motion were different from the grounds raised in the later motion.

On this record, the trial court properly considered the second motion for summary judgment on its merits.

C. *The Trial Court Properly Determined That Plaintiff Was Not an Employee of the County.*

Plaintiff's second cause of action alleged that defendant failed to provide a safe workplace in violation of Labor Code section 6400, subdivision (a). The trial court granted summary adjudication as to that cause of action finding that the County had no duty to provide plaintiff a safe workplace because it was not plaintiff's employer.

Plaintiff argues he was an employee of the County, which owed a duty to provide him a safe workplace. We disagree.

Labor Code section 6400, subdivision (a), states that employers "shall furnish a place of employment that is safe and healthful for the employees therein." The Labor Code in part defines an employer as "every person which has any natural person in service." (Lab. Code, § 3300, subd. (c).) Determination of an employment relationship hinges on how much control the alleged employer has over the employee. (*S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 350, 355.) Significantly, what matters is how much control the alleged employer "retains the right to exercise" rather than how much control he actually exercises. (*Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 533.)

One way an employer retains the right to exercise control is through a special employment relationship. A special employment relationship exists "[w]here an

employer sends an employee to do work for another person,”””” and both employers
““““have the right to exercise certain powers of control over the employee.””””

(*Brassinga v. City of Mountain View* (1998) 66 Cal.App.4th 195, 209 (*Brassinga*)). In addition to control, there are other factors that may support the existence of a special employment relationship, including the payment of wages, the power to discharge the employee, unskilled work by the employee, and a belief and consent to the creation of a special employment relationship. (*Id.* at p. 217; see *Sully-Miller Contracting Co. v. California Occupational Safety & Health Appeals Bd.* (2006) 138 Cal.App.4th 684, 693.)

Throughout the proceedings in the trial court, plaintiff maintained that he was employed by the superintendent of schools.² He did not assert or prove he was an employee of the County, fatal to his argument, and he did not allege or submit evidence to establish a special employment relationship with defendant County. Aside from the fact that plaintiff’s classroom was physically located in a county-run juvenile detention facility, there is no evidence that the County had the right to exercise any kind of control over plaintiff’s hours, the material taught, or whether to retain him as a special education teacher. Additionally, none of the special employment factors outlined in *Brassinga* are present, compelling the conclusion there was no special employment relationship. As a teacher, plaintiff was engaged in skilled labor, there was no express or implied consent by

² At oral argument, plaintiff’s counsel reasserted he was employed by the superintendent of schools, but asserted the County was liable despite the fact he was not an employee of the County.

the parties to form a special employment relationship, and no evidence that either party believed they were creating such a relationship.

In his deposition, plaintiff said he only “[has] one employer, and that [is] the Superintendent of Schools.” In his opposition to the County’s summary judgment motion, plaintiff stated he “was actually employed by the San Bernardino County Superintendent of Schools,” so his civil action would not be barred by worker’s compensation law. In the statement of undisputed facts, plaintiff did not dispute that he was employed by the superintendent of schools, not the County. Plaintiff neither alleged nor presented evidence to establish that the County was his employer, or that there existed a special employment relationship.

At oral argument, plaintiff emphasized the holding of *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 202, that a hirer is liable to an employee of a contractor insofar as a hirer’s exercise of retained control affirmatively contributed to the employee’s injuries. However, plaintiff did not allege this theory of liability in his complaint, did not allege he was an independent contractor hired by the County, and did not produce any evidence to support this new theory. Instead, he relied on theories establishing liability on the part of an employer for failure to provide a safe workplace, and for injuries caused by a dangerous condition of property. As such, the liability of a hirer to an employee of a contractor was not presented or adjudicated in the trial court, and may not form the basis for our decision.

Because we agree that the County was not plaintiff's employer, there was no duty to provide a safe workplace within the meaning of Labor Code section 6400. We do not need to reach defendant's arguments relating to governmental immunities from liability.

D. *The Trial Court Properly Granted Summary Adjudication as to the Third Cause of Action.*

Plaintiff argues in the third cause of action that the County negligently maintained a dangerous condition of property, in violation of Government Code section 835, subdivision (a). Plaintiff contends that the fact a PCO was not present in the classroom constitutes a "condition of property" under the relevant Government Code sections. We disagree.

A public entity is liable for injuries caused by a dangerous condition of property. (*Public Utilities Com. v. Superior Court* (2010) 181 Cal.App.4th 364, 372.) To prove liability for a public entity, a plaintiff must establish that (1) "the property was in a dangerous condition at the time of the injury," (2) "the injury was proximately caused by the dangerous condition," (3) "the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred," and (4) either (a) "[a] negligent or wrongful act or omission of an public employee within the scope of his employment created the dangerous condition," or (b) "[t]he public entity had actual or constructive notice of the dangerous condition." (Govt. Code § 835, subs. (a) & (b); see *Ceja v. Department of Transportation* (2011) 201 Cal.App.4th 1475, 1481.)

A claim under Government Code section 835 ““may not rely on generalized allegations [citations] but must specify in what manner the condition constituted a dangerous condition.”” (Mixon v. Pacific Gas & Electric Co. (2012) 207 Cal.App.4th 124, 131.) The question of whether a dangerous condition exists is “ordinarily a question of fact but “can be decided as a matter of law if reasonable minds can only come to one conclusion.”” (Ibid.; see Salas v. Department of Transportation (2011) 198 Cal.App.4th 1058, 1070 (Salas).)

A dangerous condition of property is one that creates a substantial risk of injury when the property is used with due care. (Govt. Code, § 830, subd. (a).) A dangerous condition may arise from the property’s “damaged or deteriorated condition, from the “interrelationship of its structural or natural features, or presence of latent hazards associated with its normal use.”” (Salas, supra, 198 Cal.App.4th at p. 1069.)

However, a plaintiff must be able to “point to at least one “physical characteristic” of the property” for it to qualify as having a dangerous condition. (Cole v. Town of Los Gatos (2012) 205 Cal.App.4th 749, 759.) The property must possess “physical characteristics in its design, location, features, or relationship to its surroundings that endanger users,” or must be damaged “in a way that would foreseeably endanger those using the property.” (Mixon, supra, 207 Cal.App.4th at p. 131, italics added.) Third party conduct by itself cannot establish dangerous condition; there must be

a causal link between some physical condition and the third party conduct.³ (*Salas, supra*, 198 Cal.App.4th at p. 1070.) For example, a shooting that occurs in a courthouse hallway that is not causally linked to the design, location, or any other purely physical characteristic of the property, does not establish a dangerous condition. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1140 (*Zelig*).

Here, plaintiff did not allege any physical characteristic of the property that made it a dangerous condition. Much like the shooting in *Zelig*, the attack on plaintiff in this case was caused entirely by third party conduct.

Plaintiff has cited many authorities in support of his position, but in each one there was a physical characteristic of the property that gave rise to liability. For instance, in *Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, a bus stop was deemed a dangerous condition by virtue of its design, location, features, or relationship to its surroundings that increase the risk of danger. (*Id.* at pp. 148-149.)

Plaintiff also relies on *Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799, where the court held that intervening criminal conduct does not absolve the defendants of liability where the plaintiff alleges the defendants maintained the property in such a way as to increase the risk of criminal activity. (*Id.* at p. 812.)

³ ““There must be a defect in the physical condition of the property and that defect must have some casual relationship to the third party conduct that injures the plaintiff. [Citation.]”” (*Salas, supra*, 198 Cal.App.4th at p. 1070, quoting *Cerner v. City of Oakland* (2008) 161 Cal.App.4th 1340, 1348.)

However, in that case, the presence of thick and untrimmed foliage and trees around the parking lot and stairway of the premises permitted an assailant to assault plaintiff.

Here, the complaint merely alleges that “the classroom where plaintiff was attacked, in the Juvenile Detention Center, located at 900 E. Gilbert Street, San Bernardino, California, was in a dangerous condition that created a reasonably foreseeable risk of the kind of injury which was incurred by plaintiff on October 28, 2010, when plaintiff was attacked and injured.” Plaintiff did not allege that any physical characteristic of the property constituted a dangerous condition.

Further, in his opposition to the motion for summary adjudication, plaintiff sought to establish that the location of the classroom away from security, and the absence of a PCO in the classroom, created the dangerous condition. However, such allegations were not contained in the complaint and there was no evidence presented that the particular location of the classroom actually increased the risk of a student assault, so the trial court correctly determined the location of the classroom was not a dangerous condition of property.⁴ Inadequate or missing staff does not qualify as a dangerous condition of property. Therefore, the County was not liable under Government Code, section 835 for maintaining a dangerous condition of property.

⁴ “‘The pleadings delimit the issues to be considered on a motion for summary judgment.’ [Citations.] Thus a ‘defendant moving for summary judgment need address only the issues raised by the complaint; the plaintiff cannot bring up new, unpleaded issues in his or her opposing papers.’ [Citation.]” (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1253.

E. The Trial Court Properly Granted Summary Adjudication on the Fourth Cause of Action.

Plaintiff's fourth cause of action alleged that defendants violated his Fifth Amendment Due Process rights when they removed the PCO from plaintiff's classroom. On appeal, he challenges the trial court's finding that defendant did not act with "deliberate indifference." We disagree.

The due process clause of the Fourteenth Amendment provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law" (U.S. Const., 14th Amend.) The purpose of the due process clause is to protect people from the state and state actors; it is not a guarantee of safety and security from private actors. (*Deshaney v. Winnebago County Dep't of Social Services* (1989) 489 U.S. 189, 195-196.) In *Deshaney*, the Supreme Court held that a state's failure to protect an individual against private violence did not constitute a violation of the due process clause. (*Id.* at p. 197.)

The *Deshaney* rule of nonliability is subject to two exceptions. The first exception applies when the state assumes some responsibility for a person's safety and general well-being, as when it "takes a person into its custody and holds him there against his will." (*Deshaney, supra*, 489 U.S. at pp. 199-200.) In this "special relationship" situation, the state's affirmative duty to protect arises from the limitation the state has

imposed on the person's freedom to act for himself "through incarceration, institutionalization, or other similar restraint of personal liberty." (*Id.* at p. 200.)

The second *Deshaney* exception applies when the state "affirmatively places the [person] in a dangerous situation." (*Huffman v. County of Los Angeles* (9th Cir. 1998) 147 F.3d 1054, 1059; see *Deshaney, supra* 489 U.S. at p. 201.) The "state created danger" exception requires proof of "deliberate indifference to a known or obvious danger." (*Campbell v. State Dep't of Soc. & Health Servs.* (9th Cir. 2011) 671 F.3d 837, 845.) Deliberate indifference means that "the state actor must recognize an unreasonable risk and actually intends to expose the plaintiff to such risks without regard to the consequences to the plaintiff." (*Id.* at p. 846.)

A state created danger "involves affirmative conduct on the part of the state," meaning the state action must have either created the danger or rendered the person more vulnerable to an existing danger. (*Zelig, supra*, 27 Cal.4th at p. 1149.) If the state puts a person in a position of danger from private persons and then fails to protect him or her, it is as much an active tortfeasor as if it had thrown him or her into a snake pit. (*O'Dea v. Bunnell* (2007) 151 Cal.App.4th 214, 221.) However, existence of a state created danger within the meaning of the exception "does not dispense with the requirement that state action restrain the individual's freedom to act." (*Id.* at p. 225.) It is the state's affirmative act of restraining an individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraining of person liberty—which is

the deprivation of liberty triggering the protections of the due process clause. (*Id.* at p. 222.)

Here, neither the County nor Ricketts involuntarily held plaintiff in the detention facility, or engaged in affirmative conduct that restrained his freedom to act on his own behalf, or rendered him vulnerable to an existing danger with deliberate indifference. Thus, the injuries plaintiff sustained are not attributable to a violation of his due process rights.

Nor did the County or Ricketts owe a duty to protect plaintiff against injury caused by private violence. Section 1983 of title 42 of the United States code applies to persons acting ““under color of”” state law, and normally does not apply to private actors. (*Dwight R. v. Christy B.* (2013) 212 Cal.App.4th 697, 714 [Fourth Dist, Div. Two], citing *Flagg Bros. v. Brooks* (1978) 436 U.S. 149, 155-156.) The protections of the Fourteenth Amendment do not extend to “private conduct abridging individual rights.” (*Nat’l Collegiate Ath. Ass’n v. Tarkanian* (1988) 488 U.S. 179, 191.) Even though Minor C was in state custody when he attacked plaintiff, Minor C was by no means a state actor. Thus, the exceptions to the *Deshaney* rule of nonliability do not apply here. Plaintiff was not incarcerated or institutionalized, nor was his personal liberty restrained in any way by the County. He was required to work at the detention center, but working at a state facility is not the same as being in state custody. Therefore, the special relationship exception to the *Deshaney* rule does not apply.

The state created danger exception is inapplicable to the present case. There is no evidence that the County had involuntarily restrained plaintiff in the juvenile facility or that Ricketts acted with the requisite “deliberate indifference” that triggers the state created danger exception.

DISPOSITION

The judgment is affirmed. Defendant is entitled to costs.

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RAMIREZ

P. J.

We concur:

HOLLENHORST

J.

KING

J.