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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

DONALD J. ACKLEY,

Plaintiff and Appellant,

v.

JENNIFER JONES et al.,

Defendants and Respondents.

F062463

(Super. Ct. No. 07C0406)

OPINION

APPEAL from a judgment of the Superior Court of Kings County. Thomas DeSantos, Judge.

Donald J. Ackley, in pro. per., for Plaintiff and Appellant.

Williams & Associates and Martha M. Stringer for Defendants and Respondents.

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Donald J. Ackley appeals from the judgment entered after the trial court granted the summary judgment motion of defendants Jennifer Jones, Steve McLaughlin, and Thomas M. Avila. We affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

To summarize the proceedings in this case is difficult because the record is incomplete. For example, no copy of the complaint is included in the record. The only documents in the record are the papers related to the motion for summary judgment at issue in this appeal, and even that portion of the record is incomplete.¹

Ackley named numerous individuals as defendants in his complaint, including the State of California. Only three defendants, Jones, McLaughlin, and Avila (collectively, defendants), were parties to the motion for summary judgment.

Ackley was an inmate at Corcoran State Prison (the prison). Defendants worked at the prison as employees of the California Department of Corrections and Rehabilitation (CDCR).

Ackley slipped and fell in the shower area after completing his shower. He apparently sustained significant injuries to his back. He filed his action seeking to recover damages for these injuries, alleging that had a shower curtain been installed, or had the specific shower in the area been turned off, the accumulation of water in which he slipped would not have occurred.

Ackley's complaint contains five causes of action. Only the first three causes are directed at Jones, McLaughlin and Avila. The first cause of action is titled "Intentional Tort," the second cause of action is titled "General Negligence," and the third cause of action is titled "Premises Liability." The complaint makes numerous allegations, most of which pertain to events that occurred after the accident.

¹Defendants filed a request in the trial court requesting the court take judicial notice of the complaint filed on August 30, 2007, and a declaration filed by McLaughlin in support of defendants' opposition to Ackley's motion for summary judgment. While the request for judicial notice is in the record, the documents are not. We have obtained a copy of those documents from the Kings County Superior Court Clerk's Office and, on our own motion, will take judicial notice of them. (Evid. Code, § 452, subd. (d).)

In their motion defendants raised numerous arguments to support their claim that they, as employees of CDCR, were not liable for any injuries Ackley may have sustained. Ackley opposed the motion.

The trial court concluded there was no triable issue of fact, and defendants were entitled to judgment because they did not have the authority to remedy the conditions that led to Ackley's accident as required by Government Code section 840.2.² The trial court also concluded that neither Jones nor McLaughlin had any notice of the dangerous condition prior to Ackley's accident. Judgment was entered for defendants.

DISCUSSION

Standard of review

A successful motion for summary judgment permits a party to obtain a judgment without the necessity of a trial. The purpose of the summary judgment procedure is to provide the courts with a mechanism that looks beyond the pleadings to determine if the parties possess evidence that would require the fact-weighting procedures of a trial to resolve the dispute. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*); *City of Oceanside v. Superior Court* (2000) 81 Cal.App.4th 269, 273 (*City of Oceanside*)).

A trial court must grant a motion for summary judgment when it determines there is no triable issue of material fact, and these undisputed facts entitle the moving party to judgment as a matter of law. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476 (*Merrill*); *Artiglio v. Corning, Inc.* (1998) 18 Cal.4th 604, 612 (*Artiglio*)). The trial court's function is to determine if issues of fact exist, not to decide those issues. (*Furla v. Jon Douglas Co.* (1998) 65 Cal.App.4th 1069, 1076-1077.) The question of whether an issue is material is answered by referring to the pleadings, the rules of pleading, and the

²All further statutory references are to the Government Code unless otherwise stated.

substantive law applicable to the case. (*Waschek v. Department of Motor Vehicles* (1997) 59 Cal.App.4th 640, 644.) “To be ‘material’ for purposes of a summary judgment proceeding, a fact must relate to some claim or defense in issue under the pleadings, and it must also be essential to the judgment in some way. [Citation.]” (*Riverside County Community Facilities Dist. v. Bainbridge 17* (1999) 77 Cal.App.4th 644, 653.)

A defendant moving for summary judgment must demonstrate that as a matter of law the plaintiff cannot prevail on any of the pled causes of action. (*City of Oceanside, supra*, 81 Cal.App.4th at p. 274.) A defendant does this by proving the plaintiff cannot establish one or more element of each cause of action and/or that the defendant has a complete defense to each cause of action. (*Gaggero v. Yura* (2003) 108 Cal.App.4th 884, 889; *O’Byrne v. Santa Monica-UCLA Medical Center* (2001) 94 Cal.App.4th 797, 804 (*O’Byrne*)). The defendant’s burden is to establish that under no “hypothesis” does a material issue of fact exist that would require the process of a trial. (*Artiglio, supra*, 18 Cal.4th at p. 612.)

Once a defendant has met his or her burden, the plaintiff must show an issue of material fact exists. (*Merrill, supra*, 26 Cal.4th at p. 476.) The plaintiff may not rely on “‘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’ [Citations.]” (*Id.* at pp. 476-477.) If the plaintiff’s evidence does no more than give rise to mere speculation, it is not substantial and does not establish a triable issue of material fact. (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 163 (*Sangster*)).

We review an order granting a summary judgment de novo. (*Artiglio, supra*, 18 Cal.4th at p. 612; *Spears v. Kajima Engineering & Construction, Inc.* (2002) 101 Cal.App.4th 466, 473.) We review the ruling, not the trial court’s rationale. (*Reliance Nat. Indemnity Co. v. General Star Indemnity Co.* (1999) 72 Cal.App.4th 1063, 1074.) We will uphold the judgment if it is correct on any grounds, regardless of the trial court’s reasoning. (*O’Byrne, supra*, 94 Cal.App.4th at pp. 804-805.)

Our review requires us to assume the role of the trial court and redetermine the merits of the motion. (*Cochran v. Cochran* (2001) 89 Cal.App.4th 283, 287.) In doing so, we apply the same three-step analysis as the trial court. (*Inter Mountain Mortgage, Inc. v. Sulimen* (2000) 78 Cal.App.4th 1434, 1439.) “The first step of the review begins with an analysis of the pleadings, because ‘[t]he pleadings define the issues to be considered on a motion for summary judgment.’ [Citation.] We next evaluate the moving defendant’s effort to meet its burden of showing that plaintiff’s cause of action has no merit or that there is a complete defense to it. Once the defendant has met that burden, the burden shifts to the plaintiff to show that a triable issue of material fact exists as to its complaint. If the filings in opposition raise triable issues of material fact the motions must be denied; if they do not, the motion must be granted. [Citations].” (*Miscione v. Barton Development Co.* (1997) 52 Cal.App.4th 1320, 1325.)

In performing this analysis, we consider all of the *competent* evidence presented by the parties (declarations, judicial admissions, responses to discovery, deposition testimony, and items of which judicial notice may be taken) and the uncontradicted inferences supported by the evidence. (*Merrill, supra*, 26 Cal.4th at p. 476; *Aguilar, supra*, 25 Cal.4th at p. 843; *Sangster, supra*, 68 Cal.App.4th at p. 162.)

Merits of defendants’ motion

The first step in determining the merits of defendants’ motion, as stated above, is an analysis of the pleadings. We have reviewed Ackley’s complaint and find it incomprehensible. Ackley, however, made clear in his opposition to this motion that his claim against defendants was for negligence. Accordingly, we will focus on Ackley’s claim of negligence.

We understand Ackley to be alleging two theories on which defendants could be found negligent. The first is failure to repair a dangerous condition on the premises. It appears from Ackley’s opposition that notice of the dangerous condition was provided before Ackley’s accident. The second is a failure to warn of the dangerous area.

The difficulty with Ackley's argument is that he has to establish defendants, who did not own the property, had a duty to him. Section 835 provides, in part, that a *public entity* is liable for injury caused by a dangerous condition on its property that causes injury if the injury was reasonably foreseeable and the public entity had actual or constructive notice of the dangerous condition. Ackley's arguments appear to fit within the parameters of this statute, but the statute subjects only the public entity to liability, not employees of the public entity.

Section 840 addresses the liability of public employees for injuries caused by a condition of public property. This section states that a public employee "is not liable for injury caused by a condition of public property where such condition exists because of any act or omission of such employee within the scope of his employment." This exemption from liability is subject to certain exceptions.

The applicable exception is found in section 840.2, which provides that an employee of a public entity is liable for an injury proximately caused by a dangerous condition of public property if the injury was foreseeable and either (a) "The dangerous condition was directly attributable wholly or in substantial part to a negligent ... act of the employee and the employee had the authority and the funds and other means immediately available to take alternative action which would not have created the dangerous condition," or (b) "The employee had the authority and it was his responsibility to take adequate measures to protect against the dangerous condition at the expense of the public entity and the funds and other means for doing so were immediately available to him, and he 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."

Since Ackley's claim is one for a dangerous condition of public property, his ability to recover is premised on bringing his case within the parameters of these code

sections. Defendants submitted declarations that established (1) they were public employees, and (2) they did not have authority to “fix or maintain prison property.”

The facts as alleged by Ackley and these declarations established that the dangerous condition (water accumulating on the floor) was not *attributable wholly or in substantial part* to the negligence of defendants and also established that defendants had neither the authority nor the responsibility *to protect against the dangerous condition*. Since defendants established with admissible evidence that their conduct did not fall within the parameters of section 840.2, and therefore were entitled to judgment as a matter of law, the burden shifted to Ackley to establish a triable issue of fact existed that precluded entry of judgment.

As we shall explain, Ackley failed to submit admissible evidence that could contradict the facts established by defendants. Ackley attacked the motion on a procedural basis and on a substantive basis. The procedural arguments related to service of the motion and are discussed below.

The substantive issue related to an argument that correctional officers have a general duty to protect prisoners from harm. While we do not disagree with such a general statement, none of the cases or regulations cited by Ackley supports the specific proposition he espouses -- that correctional officers should be liable whenever a prisoner suffers an accidental injury. Moreover, Ackley failed to present any evidence that would overcome the bar of section 840.2. Because Ackley’s opposition failed to raise a triable issue of material fact, judgment properly was entered in favor of defendants.

Ackley’s arguments

Many of Ackley’s claims can be rejected simply because he failed to provide admissible evidence to support his arguments. We will address the issues we can identify where admissible evidence supported the claims.

Untimely service

Ackley argues that service was untimely. There are two prongs to this argument. First, he argues he was served by facsimile transmission without an agreement to do so between the parties. Second, he argues the service was untimely because it failed to comply with Code of Civil Procedure section 437c, subdivision (a).

Ackley's first argument is based on California Rules of Court, rule 2.306(a)(1), which provides that "Service by fax transmission is permitted only if the parties agree and a written confirmation of that agreement is made." Ackley asserts there was no such agreement; therefore, the attempt to serve him by facsimile was defective.

Ackley's opposition papers establish his error. Ackley states in his opposition that "On October 8, 2010, a prison staff member handed plaintiff a copy of the defendant's [*sic*] motion for Summary Judgment." Ackley's opposition also explains that the document was faxed to the prison's staff, who then personally served the document on Ackley. That the copy of the motion was a facsimile copy is of no moment. The operative fact is that the motion was handed directly to Ackley. This constitutes personal service, not facsimile service. Ackley's arguments based on the theory of facsimile service are rejected.

Ackley's second argument is that Code of Civil Procedure section 437c, subdivision (a) requires a motion for summary judgment be served at least 75 days before the hearing. If the motion is served by mail, then it must be served at least 80 days before the hearing.

As explained, Ackley was served personally with the motion, so it was required to be served 75 days before the hearing. There are 75 days between October 8, 2010, the date of service, and December 22, 2010, the date of the hearing. (See Code of Civ. Proc., § 12.) Therefore, the service complied with the requirements of Code of Civil Procedure section 437c, subdivision (a).

Issuance of a purchase order

Ackley places great reliance on the assertion that defendants failed to issue a purchase order to remedy the alleged defect. As we understand the argument, Ackley is asserting that after he fell, no efforts were made to correct the identified defect. While there does not appear to be any admissible evidence to support this contention, defendants' actions, or failure to act, after the accident are irrelevant to the issue of liability. (Evid. Code, § 1151.) Moreover, defendants' assertion that they did not have the authority to repair the allegedly dangerous condition also demonstrates the failure of this argument. Ackley presented no evidence to suggest defendants had such authority.

The facts submitted by Ackley also support defendants' argument. Ackley submitted evidence that the state knew of the dangerous condition several years before he fell. Defendants submitted evidence that they had done everything they could to have the condition rectified, but, because they lacked authority to make the necessary repairs or modifications, the issue was never resolved.

Related to this argument are Ackley's assertions that defendants merely "passed the buck" and were transferred without rectifying the dangerous condition. This argument reflects frustration with the bureaucracy. That defendants were unable to rectify the condition that led to Ackley's accident as quickly as Ackley would like is not relevant, nor does it establish a basis for imposing liability on defendants.

For each of these reasons, the lack of a purchase order is irrelevant.

Jones's failure to respond to second level of review

Ackley alleges that Jones failed to respond to the second level of review. Jones provided evidence to dispute this fact. Even if Ackley were correct, this fact does not create a basis for imposing liability on defendants. The review process occurred after Ackley's accident. As stated above, failure to act after an accident is irrelevant to the question of whether a defendant is liable to a plaintiff.

Failure to order water turned off

Ackley alleges that neither Jones nor McLaughlin ordered the control booth officer to turn off the water in the shower that caused the water accumulation. Once again, this appears to refer to acts that Jones or McLaughlin could have taken after the accident, which are irrelevant to the issue of liability. Moreover, Ackley fails to establish through admissible evidence that Jones or McLaughlin was aware of the water accumulation problem before the accident. Therefore, they could not possibly have a duty to correct a problem of which they were not aware.

Failure to warn

Ackley argues that Avila and McLaughlin are liable for the failure to warn him of the dangerous condition. The duty to warn of a dangerous condition is one borne by the landowner. (*Rowland v. Christian* (1968) 69 Cal.2d 108, 119.) Thus, if there was negligence as a result of the failure to warn, the state would bear responsibility, not Avila or McLaughlin.

Staff training

Ackley next asserts that since the state generally provides 40 hours of training on accident prevention to its employees, defendants should have recognized the dangerous condition. This argument fails for two reasons. First, Ackley did not present any evidence of the type of training received by defendants. Therefore, there is no basis for attempting to tie the training to recognition of the allegedly dangerous condition.

Second, even if defendants should have recognized the dangerous condition, that fact does not lead to any direct liability. As explained above, it is the owner of land who is responsible for dangerous conditions of the property. Merely being aware that a dangerous condition exists on property owned by another person or entity does not create liability for defendants.

Amended complaint filed

Ackley apparently attempted to file a first amended complaint after defendants' motion for summary judgment was filed. The trial court rejected the complaint. The record does not contain the document or the trial court's order, so it is impossible for us to determine whether there is any merit to this contention. It is the party asserting an argument that is responsible for ensuring the record on appeal is adequate to review the claim. (*Bennett v. McCall* (1993) 19 Cal.App.4th 122, 127.) Failure to provide an adequate record requires the issue be resolved against the appellant. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296.)

Miscellaneous arguments

Ackley contends the trial court "granted" his undisputed facts and therefore he should prevail. We are not sure to what he refers, but simply establishing some facts are true does not require denial of a motion for summary judgment. Ackley was required to establish either (1) the facts presented did not entitle defendants to judgment or (2) there was a triable issue of material fact that prevented entry of judgment. This statement does not meet either requirement.

Ackley claims the trial court was biased against him. We have reviewed the record and find nothing to support such a claim.

Ackley asserts he could not hear the proceedings at the last hearing. We do not know to what hearing Ackley is referring. It is sufficient that Ackley has not established any prejudice as a result of this alleged inability to hear the proceedings.

Finally, Ackley argues defendants lied to the trial court. Once again, there is nothing in the record to support this assertion. Merely making such an assertion in a brief filed here does not make it so. Accordingly, this claim does not provide any grounds for relief.

DISPOSITION

The judgment is affirmed.

CORNELL, Acting P.J.

WE CONCUR:

GOMES, J.

DETJEN, J.