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

MARIA GARCIA et al.,

Plaintiffs and Appellants,

v.

ARIAS LATINO MARKET, INC., et al.,

Defendants and Respondents.

F062504

(Super. Ct. No. CV263228)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. William D. Palmer, Judge.

Rodriguez & Associates, Daniel Rodriguez and Joel T. Andressen; Esner, Chang & Boyer, Stuart B. Esner and Holly N. Boyer for Plaintiffs and Appellants.

Daley & Heft, Lee H. Roistacher and Robert H. Quayle IV for Defendant and Respondent Arias Latino Market, Inc.

Manning & Kass, Ellrod, Ramirez, Trester, Anthony J. Ellrod and Darin L. Wessel for Defendant and Respondent National Farm Workers Service Center, Inc.

Murphy, Pearson, Bradley & Feeney, Mark S. Perelman and Matthew A. Cebrian for Defendant and Respondent Independence Private Patrol, Inc.

This is an appeal from summary judgment entered against plaintiff Maria Garcia and her children (collectively, plaintiffs), survivors of Luis Garcia, Sr. (Garcia). Plaintiffs contend the trial court erred when it concluded there was no triable issue of fact by which plaintiffs could establish defendants' acts or omissions were a substantial cause of Garcia's death. We affirm the judgment.

FACTS AND PROCEDURAL HISTORY

For approximately a dozen years prior to 2007, defendant Arias Latino Market, Inc. (Arias), had permitted outdoor festivals in the plaza area of its Mercado Latino in Bakersfield. On May 6, 2007, defendant National Farm Workers Service Center, Inc. (NFWSC), which operated Radio Campesina, hosted a festival at Mercado Latino, with the permission of Arias. NFWSC hired defendant Independence Private Patrol, Inc. (Independence) to provide 16 security guards for the event.

Garcia and his extended family went to the festival in the evening. The festival was confined to a fenced-in area, which the Garcia family entered through one of two open gates. There were no security guards at the gate when the Garcias entered. The festival was very crowded and the music was loud. Soon after the family arrived at the festival, Garcia's brother, Carlos¹, asked a woman to dance. She declined and people in her group began to mock Carlos and shout obscenities at him. Carlos' brother Antonio attempted to intervene. One of the men in the group threw a drink in Antonio's girlfriend's face. A fistfight broke out. Garcia intervened and fought with "about four men." Security guards attempted to break up the dispute. One of Garcia's brothers punched one of the guards. Six or seven shots were fired and Garcia was hit. He died as a result of his injuries. The killer was not identified or apprehended. The gun was never recovered. The manner in which the killer and the gun entered the festival was unknown.

¹ We use the first names of Garcia's brothers for ease of reference; no disrespect is intended.

The chain link fence surrounding the festival area was temporary perimeter fencing that contained gaps large enough to allow an object to be passed through it. Part of the festival area was enclosed by a stone wall that was short enough to allow a person to jump, or an object to be passed, over it.

Plaintiffs sued Arias, Independence, and NFWSC for premises liability and negligence.² After answering the complaint and conducting discovery, defendants moved for summary judgment or summary adjudication. (Independence moved only for summary judgment.) The motions contended there was no triable issue of material fact concerning either defendants' duty to protect Garcia from criminal acts of third parties or causation. (Independence asserted only the causation issue.) The trial court denied the motions on the grounds of duty and granted the motion on the grounds of causation.

DISCUSSION

The trial court granted summary judgment on the basis that plaintiffs "cannot meet their burden of showing that any breach by any of the Defendants was a cause of the resulting shooting." The court cited and relied upon *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763 (*Saelzler*). On appeal, plaintiffs contend *Saelzler* is distinguishable, that plaintiffs have established triable issues concerning causation, and that, in any event, defendants never met their initial burden on a motion for summary judgment, so the burden to show evidence of causation never shifted to plaintiffs. We conclude the motion was sufficient and *Saelzler* requires the result reached by the trial court.³

² Only Arias and Independence are named in the original complaint. NFWSC apparently was added as a Doe defendant in pleadings not contained in the record on appeal.

³ The trial court concluded plaintiffs had raised material issues of fact concerning defendants' duty to those attending the festival. Because we resolve the appeal against plaintiffs on the issue of causation, we are not required to resolve the issues about defendants' duty. (See *Saelzler, supra*, 25 Cal.4th at p. 772.) Consequently, we do not

Plaintiffs incorrectly assert that *Saelzler, supra*, 25 Cal.4th 763, was decided under the standard of review for summary judgment prevailing prior to the Supreme Court’s elucidation of the present standard of review in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854-855. Thus, in both *Aguilar* and *Saelzler*, according to plaintiffs, the court recognized the burden on a defendant moving for summary judgment to show that the plaintiff does not possess and cannot reasonably obtain evidence needed to establish a cause of action, but in *Aguilar, supra*, at page 855, the court required that the defendant make this showing by means of evidence, not by mere assertion. According to plaintiffs, *Saelzler* permitted a defendant to meet this initial burden merely by pointing out the absence of evidence to support the plaintiff’s case. (See *Saelzler, supra*, 25 Cal.4th at pp. 780-781.) In the passage cited by plaintiffs, the *Saelzler* court does, in fact, quote language from *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 482, that uses the “point to” formulation, but the quotation is used to illustrate cases applying the defendant’s burden of proof under the summary judgment statute, Code of Civil Procedure section 437c, not to address the *method* by which the defendant satisfies this burden. (See *Saelzler, supra*, 25 Cal.4th at pp. 780-781.) Earlier in the *Saelzler* opinion, however, the court did address the issue of the method of meeting the defendant’s burden of proof: “Therefore, we must determine whether defendants in the present case have shown, *through the evidence adduced in this case*, including security records and deposition testimony, that plaintiff Saelzler has not established, and cannot reasonably expect to establish, a prima facie case of causation” (*Id.* at p. 768, italics added.) This statement of the issue reflects exactly the same requirements further considered in

address the arguments in plaintiffs’ opening brief concerning foreseeability of criminal acts and defendants’ duty, if any, to prevent such acts. (See, e.g., *Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1150 [no duty to plaintiff where evidence showed no similar criminal conduct at defendant’s premises or at “similar business establishment”].)

more detail in *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at pages 854-855, which was filed two weeks after the court’s opinion in *Saelzler*. Accordingly, we conclude *Saelzler* cannot be distinguished from the present case on the basis *Saelzler* applied a different standard of review than the standard presently applicable.

We now turn to the question whether “all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law” (Code Civ. Proc., § 437c, subd. (c)), which we review *de novo*. (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 860.) In this premises liability case, defendants met their initial burden of proof under Code of Civil Procedure section 437c, subdivision (c), by establishing (through uncontradicted evidence) that there is no evidence how the gun came to be in the possession of someone inside the fence at the festival. Thus, as in *Saelzler*, *supra*, 25 Cal.4th at page 776, the burden shifts to plaintiffs to establish causation. In the absence of evidence of how the gun and its shooter came to be at the location, plaintiffs are unable to establish that any breach of duty by any of the defendants was a substantial cause of Garcia’s death. (*Id.* at pp. 775-776.) “No matter how inexcusable a defendant’s act or omission might appear, the plaintiff must nonetheless show the act or omission caused, or substantially contributed to, [the plaintiff’s] injury. Otherwise, defendants might be held liable for conduct which actually caused no harm, contrary to the recognized policy against making landowners the insurer of the absolute safety of anyone entering their premises.” (*Id.* at p. 780, italics omitted; see generally *Huitt v. Southern California Gas Co.* (2010) 188 Cal.App.4th 1586, 1596 [summarizing causation principles].)

Plaintiffs rely primarily on two cases in an attempt to distinguish *Saelzler*, *supra*, 25 Cal.4th 763. Both cases share a significant feature that makes them inapposite here: reasonable inferences from the evidence linked the third party’s opportunity to commit the criminal act to the lapse in security, thereby providing a basis upon which a jury could conclude that the defendant’s negligence was a substantial cause of the plaintiff’s

injury. In *Mukthar v. Latin American Security Service* (2006) 139 Cal.App.4th 284, 291, the security measure, an armed guard, was absent from his post; a post that was located where the plaintiff was standing when he was assaulted. In *Ambriz v. Kelegian* (2007) 146 Cal.App.4th 1519, 1524, the assailant was a transient who had been seen around the complex being aggressive and frightening the tenants. *Ambriz* specifically distinguished its facts from those in *Saelzler* on the basis that it was clear the third party criminal was not a tenant of the complex or otherwise authorized to enter or be on the premises, and that it was “more likely than not ... [the] attacker used the same method of entry on the day of the [attack] that he and others had been using over an extended period of time ..., entry through the malfunctioning doors” (*Ambriz, supra*, at p. 1538.)

In the present case, there was no evidence whatsoever that the killer would have been prevented by increased security from being inside the fenced area of the festival in possession of a gun. Not only was there evidence that there was an alternative way to enter the fenced area without going through the main gates, but there was evidence that a gun could be passed through or over the perimeter fencing from the outside. On appeal, plaintiffs reject these alternatives as “far-fetched,” but in their opposition to the motion for summary judgment, plaintiffs expressly contended the gun could have entered the premises through these alternative methods. Plaintiffs’ expert witness, in fact, cited the gaps in the fence as a breach of defendants’ duty to provide security at the festival, a claim plaintiffs do not renew on appeal. As stated in *Saelzler, supra*, 25 Cal.4th at page 779, “in a given case, direct or circumstantial evidence may show the assailant took advantage of the defendant’s lapse (such as a failure to keep a security gate in repair) in the course of committing his attack, and that the omission was a substantial factor in causing the injury. Eyewitnesses, security cameras, even fingerprints or recent signs of break-in or unauthorized entry, may show what likely transpired at the scene. In the present case no such evidence was presented” In the case before us, not only is there no evidence the gun was taken into the festival area through an unmanned gate, but the

evidence showed there were alternative means of access that could have been used by persons determined to bring a gun onto the premises even if security was in full force at the gates. (See *Padilla v. Rodas* (2008) 160 Cal.App.4th 742, 752-753 [child drowned in swimming pool with defective gate; evidence showed other means of entry into pool area even if gate had proper latch].)⁴ Accordingly, plaintiffs failed to establish a triable issue of fact concerning causation; the trial court properly granted summary judgment for defendants.

DISPOSITION

The judgment is affirmed. Defendants are awarded costs on appeal.

DETJEN, J.

WE CONCUR:

CORNELL, Acting P.J.

KANE, J.

⁴ This is not a case like *Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, in which security guards had an opportunity to intervene in a disturbance before the assault occurred and their failure to do so constituted the relevant breach of duty. (*Id.* at p. 245.) Nor is this case similar to *Raven H. v. Gamette* (2007) 157 Cal.App.4th 1017, 1028, in which a landlord recognized a danger to tenants and provided additional security for other tenants, but not for the plaintiff. In the present case, the same level of security was provided for all those attending the festival.