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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MELANIE BULL,

Plaintiff and Appellant,

v.

ROBERT W. CLIPPINGER et al.,

Defendants and Respondents.

G048338

(Super. Ct. No. 30-2011-00479127)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James Di Cesare, Judge. Affirmed.

Wentworth, Paoli & Purdy and William M. Delli Paoli for Plaintiff and Appellant.

Veatch Carlson and Peter H. Crossin for Defendants and Respondents.

* * *

According to plaintiff Melanie Bull, someone tossed an industrial hose with a six-inch metal nozzle over a 12-foot high wall, striking plaintiff in the face and causing her to suffer physical injuries. The court granted summary judgment in favor of the owners of the real property on which this incident occurred (collectively, respondents), concluding they were not vicariously liable for the negligent conduct of an independent contractor providing landscaping services. We affirm.

FACTS¹

On June 22, 2009, plaintiff was sitting near an exterior wall at 27611 La Paz Road in Laguna Niguel, California (the Property). Plaintiff and her boyfriend were taking a cigarette break. Plaintiff was suddenly hit in the face by a metal object. Plaintiff's boyfriend looked over the wall immediately after plaintiff was struck. He saw a man with an industrial hose on the ground next to him; the man repeatedly apologized. A portion of the hose, with a metal nozzle attached to it, was still hanging over the wall where plaintiff had been sitting. Plaintiff believes she was hit by the metal nozzle. Plaintiff suffered permanent nerve and vision damage as a result of the impact.

Plaintiff's complaint alleged a single cause of action, negligence, against six defendants: (1) 27611 La Paz Road, LLC (La Paz); (2) Clippinger Investment Properties, Inc. (CIP); (3) Robert W. Clippinger; (4) Well Done Property Maintenance Service, Inc. (Well Done); (5) Pedro Sanchez — Well Done's owner and operator; and (6) Pacific Cutting Edge Landscape Company, Inc. (Pacific). Only the first three defendants, who successfully moved for summary judgment, are respondents to this appeal.

¹ For purposes of the summary judgment motion, the following facts are undisputed.

La Paz has owned the Property since February 2004; Clippinger has an ownership share in La Paz. CIP provides property management services for the Property; Clippinger is the president and sole owner of CIP.

Pacific was already providing landscaping services at the Property when the Property was purchased by La Paz. La Paz continued to utilize Pacific's landscaping services via a monthly contract. The landscape maintenance agreement (which appears to be a form contract originating with Pacific) was signed in February 2004 by La Paz and Pacific, providing for a monthly fee of \$1,325 to Pacific in exchange for a variety of specified landscaping services. Pacific's duties included routine landscape maintenance, irrigation services, and specified tree trimming (e.g., under 12 ft. in height). The landscape maintenance agreement recited the following: "It is the intent of this agreement that the project's landscape be effectively maintained at all times. [Pacific] agrees to furnish all management and supervision, labor, materials, tools and transportation necessary to accomplish the maintenance of [La Paz's] landscape." Pacific agreed it would "possess all insurance, licenses and permits required to perform all landscape services." Respondents did not supply any equipment to Pacific; the hose that injured plaintiff did not belong to respondents.

Pacific's employees were on the Property on June 22, 2009. All landscape service personnel were employees of Pacific, not respondents. There were no employees of respondents on the Property on June 22, 2009. At this point in the litigation, plaintiff contends the man who threw the hose was an employee of Pacific, not respondents or Well Done.²

² Well Done provides janitorial services at the Property, such as cleaning the offices, emptying trash cans, and dusting. Well Done is an independent contractor; none of its employees are employed by respondents. Well Done did not use utility or irrigation hoses, and was not responsible for spraying or watering the Property.

The court granted summary judgment in favor of respondents, reasoning that respondents established Pacific’s status as an independent contractor, for whose negligence respondents were not liable. The court entered a judgment in favor of respondents.

DISCUSSION

A “motion for summary judgment shall be granted if 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).) “We review a grant of summary judgment de novo. [Citation.] We assume the role of the trial court and redetermine the merits of the motion.” (*Calemine v. Samuelson* (2009) 171 Cal.App.4th 153, 160-161.)³

Clearly, there is a triable issue of fact as to the negligence of *Pacific*. A jury could reasonably conclude that a Pacific employee negligently tossed an industrial hose over the wall, physically injuring plaintiff. The issue framed by plaintiff’s complaint and respondents’ motion for summary judgment is whether respondents may be held liable for the damages caused by Pacific’s employee.

More specifically, the question presented is whether respondents may be held *vicariously* liable for Pacific’s negligence. Plaintiff has not advanced the position (either below or in her appellate briefs) that respondents are *directly* liable for her

³ Plaintiff takes issue with language in the trial court’s minute order explaining its ruling (i.e., a reference to the “duty to provide habitable residence”), noting that this case involves commercial rather than residential property. Plaintiff also argues that this error was not “harmless.” But we are tasked with determining, de novo, whether respondents are entitled to summary judgment, not whether the trial court made any mistakes or misstatements in its minute order. Thus, there is no need to parse the meaning of the court’s ruling.

damages, either as a result of negligently hiring or supervising Pacific. There is no allegation or evidence in the record that Pacific had a lack of landscaping expertise, a history of harming bystanders, or any other negative attribute that would counsel against it being selected to provide landscaping services at the Property. (See *Gettemy v. Star House Movers* (1964) 225 Cal.App.2d 636, 643-645, disapproved on other grounds in *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235, 1242-1245 [duty to hire independent contractor with qualifications and knowledge to safely remove palm tree].) Nor is there evidence for the proposition that respondents retained control over the landscaping work and negligently exercised such control. (See *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 206.) Pacific had control over the means of performing the landscaping services specified in the contract. Pacific provided its own tools, including the hose that inflicted plaintiff's injury. Plaintiff feebly speculated in her responsive separate statement that respondents had control over which services they selected in the landscape agreement with Pacific, but this does not mean respondents retained control over the performance of the work selected. Plaintiff also cryptically claimed in her responsive separate statement that, "people on the premise[s] had knowledge that the hose was being thrown over in this manner." But there is no evidentiary support cited for this statement or any attempt to tie this statement into a theory of direct liability.

Vicarious Liability for Negligence of Independent Contractor

"At common law, a person who hired an independent contractor generally was not liable to third parties for injuries caused by the contractor's negligence in performing the work. [Citations.] Central to this rule of nonliability was the recognition that a person who hired an independent contractor had "no right of control as to the mode of doing the work contracted for." [Citations.] The reasoning was that the work performed was the enterprise of the contractor, who, as a matter of business convenience, would be better able than the person employing the contractor to absorb accident losses

incurred in the course of the contracted work. This could be done, for instance, by indirectly including the cost of safety precautions and insurance coverage in the contract price.” (*Privette v. Superior Court* (1993) 5 Cal.4th 689, 693 (*Privette*).

“Over time, the courts have, for policy reasons, created so many exceptions to this general rule of nonliability that ““the rule is now primarily important as a preamble to the catalog of its exceptions.””” (*Privette, supra*, 5 Cal.4th at p. 693.) Of note here are two such exceptions, “the nondelegable duty and peculiar risk doctrines.” (*Johnson v. Ralphs Grocery Co.* (2012) 204 Cal.App.4th 1097, 1107.) Plaintiff specifically contends that the nondelegable duty doctrine applies to preclude a grant of summary judgment to respondents.

Property Owner’s Nondelegable Duty to Maintain Property in Safe Condition

“The nondelegable duty doctrine prevents a party that owes a duty to others from evading responsibility by claiming to have delegated that duty to an independent contractor hired to do the necessary work. The doctrine applies when the duty preexists and does not arise from the contract with the independent contractor.” (*SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, 600-601.) Of pertinence here, landowners have a nondelegable duty to maintain their property in a reasonably safe condition. (*Knell v. Morris* (1952) 39 Cal.2d 450, 456.) ““If an independent contractor, no matter how carefully selected, is employed to [maintain property], the possessor is answerable for harm caused by the negligent failure of his contractor to put or maintain the buildings and structures in reasonably safe condition[.]”” (*Srithong v. Total Investment Co.* (1994) 23 Cal.App.4th 721, 726 (*Srithong*).

The maintenance of an elevator in safe working order is the paradigmatic application of the nondelegable duty doctrine to a real property owner. (*Brown v. George Pepperdine Foundation* (1943) 23 Cal.2d 256, 259-260 (*Brown*)). In *Brown*, a child fell down an elevator shaft after she opened the door of the elevator. (*Id.* at pp. 258-259.)

The trial court erred by instructing the jury that the negligence of the elevator maintenance contractor could not be imputed to the landlord. (*Id.* at p. 259.) “A landlord cannot escape liability for failure to maintain elevators in a safe condition by delegating such duty to an independent contractor.” (*Ibid.*; see also *Koepnick v. Kashiwa Fudosan America, Inc.* (2009) 173 Cal.App.4th 32, 35-37 [following *Brown* in another elevator injury case].)

Cases following *Brown* similarly focused on the safety of structures or fixtures on the landowner’s real property. (E.g., *Knell v. Morris* (1952) 39 Cal.2d 450, 452-453, 455-456 [water leaked from defective water heater, damaging plaintiffs’ property; possessor of land’s duty to maintain water heater in safe condition not delegable to plumbing contractor]; *Srithong, supra*, 23 Cal.App.4th at pp. 724-727 [commercial tenant at mini-mall injured by tar leaking through roof; duty to maintain roof in safe condition not delegable to contractor]; cf. *Affan v. Portofino Cove Homeowners Assn.* (2010) 189 Cal.App.4th 930, 932-933 [plumbing disaster causes property damage to units in condominium complex; discussion of asserted nondelegable “duty to maintain and repair the common area plumbing”]; *id.* at p. 945.)

Plaintiff argues that respondents hired Pacific to maintain the Property in a safe condition. Plaintiff reasons that ultimate responsibility for maintaining the Property in a safe condition lies with respondents due to their nondelegable duty. Plaintiff concludes that respondents are liable for Pacific’s negligent acts committed in the course of performing their landscaping duties.

Plaintiff misapprehends the nondelegable duty doctrine’s applicability to property owners, which is dependent on a preexisting duty to maintain buildings, structures, and other aspects of real property in a safe condition. The nondelegable duty doctrine does not operate to impose vicarious liability for every negligent act of an independent contractor present at the Property. There is no equivalent in this case for the elevators, roofs, and water heaters at the crux of the major nondelegable duty cases

mentioned above. The wall against which plaintiff was sitting did not fall over on top of her. This is not to say the doctrine is logically inapplicable to cases involving landscaping services. For instance, what if a tree branch from a dead tree had fallen, striking plaintiff on the head as she sat in an area regularly used for cigarette breaks? One could plausibly posit in this hypothetical case that respondents had a preexisting duty to exercise reasonable care with regard to the danger of tree branches harming persons present at the Property. Respondents could not then avoid liability by claiming they had hired independent contractors to monitor and prune the trees. The duty to maintain the Property in a reasonably safe condition is nondelegable, and the relevant question would be whether due care was exercised under all the circumstances by the independent contractor tasked with maintaining the trees in a safe condition.

Here, however, plaintiff suffered an injury as a result of a hose being thrown over a wall by an employee of the landscaping independent contractor. The hose was brought onto the Property by Pacific as a tool to be utilized in its landscaping services (presumably to water flora, but the record is silent as to precisely what the gardener was doing). The hose was not a dangerous condition or structure of the Property. Pacific's employee was not a dangerous condition or structure of the Property. Instead, this occurrence was a careless act by an individual worker without any logical connection to the structures or condition of the Property. We reject plaintiff's claim that a landowner's nondelegable duty to maintain its property in a safe condition precludes summary judgment under the circumstances of this case.

Doctrine of Peculiar Risk

It appears plaintiff has conflated a property owner's nondelegable duty to maintain real property in a reasonably safe condition with the peculiar risk doctrine.⁴ We

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To be fair, it is sometimes difficult to determine which doctrine applies. (See, e.g., *Srithong, supra*, 23 Cal.App.4th at pp. 724-727 [discussing both doctrines in

therefore discuss the latter doctrine (which has also been described as a nondelegable duty) to clarify precisely what went wrong with plaintiff's theory.

The doctrine of peculiar risk "pertains to contracted work that poses some inherent risk of injury to others." (*Privette, supra*, 5 Cal.4th at p. 693.) "The courts adopted the peculiar risk exception to the general rule of nonliability to ensure that innocent third parties injured by the negligence of an independent contractor hired by a landowner to do inherently dangerous work on the land would not have to depend on the contractor's solvency in order to receive compensation for the injuries." (*Id.* at p. 694.) Examples of inherently dangerous work include demolition operations (*Aceves v. Regal Pale Brewing Co.* (1979) 24 Cal.3d 502, 508, overruled on other grounds in *Privette, supra*, 5 Cal.4th at pp. 700-702 & fn. 4.) and the application of hot tar to a roof (*Privette, supra*, 5 Cal.4th at pp. 692-693).

"A critical inquiry in determining the applicability of the doctrine of peculiar risk is whether the work for which the contractor was hired involves a risk that is 'peculiar to the work to be done,' arising either from the nature or the location of the work and "against which a reasonable person would recognize the necessity of taking special precautions." [Citations.] The term 'peculiar risk' means neither a risk that is abnormal to the type of work done, nor a risk that is abnormally great; it simply means "a special, recognizable danger arising out of the work itself." (*Privette, supra*, 5 Cal.4th at p. 695.) "Even when work performed by an independent contractor poses a special or peculiar risk of harm, however, the person who hired the contractor will not be liable for injury to others if the injury results from the contractor's 'collateral' or 'casual' negligence. [Citations.] An independent contractor's negligence is collateral . . . when the negligence involves an 'operative detail of the work, as distinguished from the general plan or method to be followed.' [Citation.] But . . . it is often difficult to

context of roofing contractor applying hot tar to roof].)

distinguish those risks that are inherent in the work from those that are collateral, and the line to be drawn between the two types of risks is ‘shadowy.’” (*Id.* at p. 696.)

Understandably, plaintiff does not explicitly argue the applicability of the peculiar risk doctrine. Watering with a hose does not strike us as inherently dangerous. And any expected risks that might be posited (e.g., someone slipping on a wet walkway, damaging adjacent property by overwatering) have nothing to do with the injuries in this case. Even if the peculiar risk doctrine applies, the actions of the Pacific employee fall squarely within the realm of collateral or casual negligence. There is nothing inherent in the work of watering plants that requires an employee to blindly throw a metal-tipped hose over a 12-foot wall.

Nonetheless, plaintiff tries to incorporate aspects of the peculiar risk doctrine into her claim that respondents’ nondelegable duty to maintain the Property in a safe condition precludes summary judgment. To wit, plaintiff focuses on the *activity* in which Pacific was engaged (broadly defined by plaintiff to be maintaining the Property in a safe condition) rather than focusing on the *particular condition or structure* on the Property that caused her injury. Plaintiff’s position suggests that so long as the activity can be characterized as one done for the purpose of maintaining the safe condition of the Property, it need not present a peculiar risk of harm for vicarious liability to be imposed on the landowner. Nor, apparently, would considerations of whether the negligent conduct was collateral or casual limit the landowner’s liability. Plaintiff attempts to skirt the limits of both doctrines by combining them into a single exception to the general rule that parties are not liable for the negligent acts of independent contractors.

It is certainly true that exceptions have largely swallowed the rule of nonliability. (*Van Arsdale v. Hollinger* (1968) 68 Cal.2d 245, 252, disapproved on a different point in *Privette, supra*, 5 Cal.4th 689 [“the exceptions ‘are so numerous, and they have so far eroded the “general rule,” that it can now be said to be “general” only in the sense that it is applied where no good reason is found for departing from it”].) But

we are unaware of any authority for the proposition that California has completely abandoned the general rule, even in the specific context of a landowner hiring an independent contractor to perform services on his or her property. The instant fact pattern is one that logically must result in nonliability if the general rule indeed has survived its gradual winnowing. The independent contractor was engaged in an innocuous activity and an individual worker committed a careless, unnecessary act. There is no good reason to depart from the general rule of nonliability in this case.

DISPOSITION

The judgment is affirmed. Respondents shall recover costs incurred on appeal.

IKOLA, J.

WE CONCUR:

FYBEL, ACTING P. J.

THOMPSON, J.