

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

RAPHAEL NUNEZ,

Plaintiff and Appellant,

v.

BARGAIN SUPPLY COMPANY, INC.,

Defendant and Respondent.

G049214

(Super. Ct. No. 30-2012-00545536)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John C. Gastelum, Judge. Affirmed.

Law Offices of Corsino and Sutherland and John M. Sutherland for Plaintiff and Appellant.

Veatch Carlson, David A. Austin and James C. Galloway for Defendant and Respondent.

*

*

*

Plaintiff Raphael Nunez appeals from a judgment following summary judgment/adjudication in favor of defendant Bargain Supply, Inc. (Bargain Supply). Bargain Supply moved for summary judgment/adjudication in this products liability case on the ground that it was not in the product's stream of commerce. Nunez argued Bargain Supply held the NorthTech trademark and was in the stream of commerce. The trial court concluded Nunez failed to raise a material issue of triable fact on these points, particularly that Bargain Supply had enough involvement with the licensee to subject it to liability when the evidence demonstrated it was outside the stream of commerce. We agree and therefore affirm.

I FACTS

On November 17, 2010, Nunez was injured while using a NorthTech brand saw, model number CS18-10. Bargain Supply owned the trademark "NorthTech" and used the trademark on its own products from 1994 through 2001. It renewed the trademark in 2006. Bargain Supply and NorthTech shared a building.

Bargain Supply did not manufacture the saw or any of its component parts. According to NorthTech, the saw was designed and manufactured by Yuh Farn Machinery Industrial Co. (Yuh Farn). The saw was sold by NorthTech to California Woodworking Machine Company (California Woodworking) in October 2004, which then sold it to Nunez's employer.

On February 16, 2012, Nunez filed his second amended complaint (the complaint) against Bargain Supply, NorthTech, California Woodworking, and Yuh Farn, alleging causes of action for negligence, strict liability, and breach of warranty. Nunez alleged Bargain Supply, along with the other defendants, was in the vertical chain of distribution. The complaint did not include an alter ego allegation as to NorthTech and Bargain Supply.

Bargain Supply moved for summary judgment in April 2013, arguing it did not design, manufacture, or distribute the saw. It was supported by the declaration of Brad Ogden, Bargain Supply's president, which stated Bargain Supply was not the designer, manufacturer, or distributor of the saw or any of its component parts.

In his opposition, Nunez argued the saw was branded with Bargain Supply's trademark, "NorthTech." He claimed Bargain Supply derived advantage from using the trademark on goods, including saws and sanders. He also asserted there was evidence that Bargain Supply participated in the import and sale of the saw and its liability was a triable issue of fact. In support of the opposition, Nunez submitted NorthTech's discovery responses, a 2001 Combined Declaration of Use in Commerce and other relevant correspondence from the Patent and Trademark Office (PTO), a 2006 Notice of Acceptance of Renewal Application, and other documents submitted to the PTO. Nunez argued this evidence established Bargain Supply's ownership of the trademark and the relevant dates of application and renewal, and evidenced that Bargain Supply used the mark in commerce. None of the documents submitted, however, established Bargain Supply had ever represented the specific saw at issue was manufactured or distributed by Bargain Supply.

In due course, the trial court, in a four-page, single-spaced ruling, granted the motion. In sum, the court concluded Nunez had not met his burden to establish that Bargain Supply, as a mere trademark holder, met the requirements for strict liability. Judgment was entered in Bargain Supply's favor, and Nunez now appeals.

II

DISCUSSION

A. Standard of Review and Relevant Law

“On appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained.

[Citation.]’ [Citation.] A motion for summary judgment is properly 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.’ [Citation.]” (*Biancalana v. T.D. Service Co.* (2013) 56 Cal.4th 807, 813.)

““A defendant moving for summary judgment has the burden of producing evidence showing that one or more elements of the plaintiff’s cause of action cannot be established, or that there is a complete defense to that cause of action. [Citations.] The burden then shifts to the plaintiff to produce specific facts showing a triable issue as to the cause of action or the defense. [Citations.] Despite the shifting burdens of production, the defendant, as the moving party, always bears the ultimate burden of persuasion as to whether summary judgment is warranted. [Citation.]” [Citation.]’ [Citation.]” (*Multani v. Witkin & Neal* (2013) 215 Cal.App.4th 1428, 1443.)

“Appellate courts (1) take the facts from the record that was before the superior court when it ruled on the motion; (2) consider all the evidence set forth in the moving and opposing papers, unless the superior court sustained objections to that evidence; and (3) resolve doubts concerning the evidence in favor of the party opposing the motion. [Citation.]” (*Robinson v. City of Chowchilla* (2011) 202 Cal.App.4th 368, 374.)

B. Defendant’s Initial Burden

The party moving for summary judgment has the “initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) In order to make this determination, we review the evidence relevant to the cause of action. Here, the only determination Nunez is challenging is the court’s decision to grant summary adjudication on the strict liability claim.

Nunez’s complaint, as we discussed above, alleged Bargain Supply was “engaged in the business of designing, manufacturing, testing, servicing, distributing, wholesaling, importing, and retailing, certain industrial machines known generally as ‘industrial saws’ and the component parts of such machines” Nunez did not allege Bargain Supply was the alter ego of NorthTech or any other defendant, and further failed to allege Bargain Supply was liable because it held the NorthTech trademark. The complaint alleged liability only as part of the supply chain.

Strict products liability is a doctrine “imposed . . . against the manufacturer and in favor of the user or consumer in order to relieve injured consumers ‘from problems of proof inherent in pursuing negligence . . . and warranty . . . remedies, . . .’ [Citations.] As we have noted, we sought to place the burden of loss on manufacturers rather than ‘. . . injured persons who are powerless to protect themselves’ [Citations.]” (*Daly v. General Motors Corp.* (1978) 20 Cal.3d 725, 736, italics omitted.) Strict liability applies to those involved in the “production, design, or dissemination of the article in question.” (*Id.* at pp. 736-737.)

Here, Bargain Supply presented evidence, through Ogden’s testimony, that it did not design, manufacture, or distribute the saw at issue here or any of its subject parts. Thus, it met its initial burden to establish Nunez could not prevail on his strict liability claim.

C. Plaintiff’s Evidence Supporting a Triable Issue of Material Fact

The burden then shifted to Nunez to demonstrate a triable issue of material fact. (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 850.) Nearly Nunez’s entire argument on strict liability was focused on Bargain Supply’s role as a trademark holder. He has framed his argument in two parts — first, “there is evidence that Bargain Supply participated in the sale/importation of the saw,” and second, that Bargain Supply was liable as trademark owner. But his evidence on the first point was NorthTech’s

discovery responses, which he cites for the proposition that *NorthTech*, not Bargain Supply, “was a key player in the distribution of the saw, and deeply involved in putting it into the stream of commerce.” NorthTech and Bargain Supply shared an address, and sold the saw using the NorthTech name owned by Bargain Supply. Bargain Supply represented to the PTO it was using the NorthTech name on goods. But all this established was that NorthTech was using a trademark owned by Bargain Supply, and therefore this is not truly any different from Nunez’s second argument regarding the liability of trademark holders.

1. Unpled Theories of Liability

Bargain Supply argues the trademark holder theory of liability was never pled. It is difficult to overstate the importance of the pleadings in a motion for summary judgment. They ““set the boundaries of the issues to be resolved at summary judgment.”” (*Nativi v. Deutsche Bank National Trust Co.* (2014) 223 Cal.App.4th 261, 289.) “[T]he scope of the issues to be properly addressed in [a] summary judgment motion” is generally “limited to the claims framed by the pleadings. [Citation.] A moving party seeking summary judgment or adjudication is not required to go beyond the allegations of the pleading, with respect to new theories that could have been pled, but for which no motion to amend or supplement the pleading was brought, prior to the hearing on the dispositive motion. [Citations.]” (*Howard v. Omni Hotels Management Corp.* (2012) 203 Cal.App.4th 403, 421.)

“Moving defendants have ‘the burden on summary judgment of negating only those ““theories of liability *as alleged in the complaint*”” and [are] not obliged to “““refute liability on some theoretical possibility not included in the pleadings,””” simply because such a claim was raised in plaintiff’s declaration in opposition to the motion for summary judgment. [Citation.]’ [Citation.] Declarations in opposition to a motion for summary judgment are not a substitute for amending the pleadings to raise

additional theories of liability. [Citation.] ‘[S]ummary judgment cannot be *denied* on a ground not raised by the pleadings. [Citations.]’ [Citation.]” (*Nativi v. Deutsche Bank National Trust Co.*, *supra*, 223 Cal.App.4th at p. 290.) “A party may not oppose a summary judgment motion based on a claim, theory, or defense that is not alleged in the pleadings,” and “[e]vidence offered on an unpleaded claim, theory, or defense is irrelevant because it is outside the scope of the pleadings.” (*California Bank & Trust v. Lawlor* (2013) 222 Cal.App.4th 625, 637, fn. 3.)

We agree there is no fair reading of the complaint which would put Bargain Supply on notice that Nunez was attempting to hold it liable strictly on the basis it owned the NorthTech trademark, or as an alter ego of NorthTech. There is no evidence in the record Nunez attempted to amend his complaint even after Bargain Supply filed for summary judgment. His failure to do so precluded him from defeating Bargain Supply’s motion on this unpled theory of liability. (*Hutton v. Fidelity National Title Co.* (2013) 213 Cal.App.4th 486, 499 [“[i]t was not incumbent on defendant to refute liability on some theoretical possibilities not included in the pleadings.”].) Summary judgment or adjudication was therefore proper for this reason alone.

2. *Liability as Trademark Holder*

Alternatively, it was proper for the trial court to conclude Nunez had failed to offer evidence demonstrating a triable issue with respect to Bargain Supply’s status as trademark holder. The use of a trademark alone is not sufficient to establish strict liability. In order to establish liability, the licensor must have ““participate[d] in the overall process by which the product reach[ed] [the] consumers, and . . . [had] the right to control the incidents of manufacture or distribution” [Citations.]” (*Bay Summit Community Assn. v. Shell Oil Co.* (1996) 51 Cal.App.4th 762, 775 (*Bay Summit*)). “[C]ourts have reasoned that where a licensor maintains significant involvement in the distribution or manufacturing process, the policies underlying the doctrine are implicated,

including that the defendant is in a position to deter unsafe products and to spread the risk of loss. [Citations.]” (*Ibid.*)

“The imposition of strict liability depends on whether the facts establish a sufficient causative relationship or connection between the defendant and the product so as to establish that the policies underlying the strict liability doctrine are satisfied. Specifically, a defendant involved in the marketing/distribution process has been held strictly liable if three factors are present: (1) the defendant received a direct financial benefit from its activities and from the sale of the product; (2) the defendant’s role was integral to the business enterprise such that the defendant’s conduct was a necessary factor in bringing the product to the initial consumer market; and (3) the defendant had control over, or a substantial ability to influence, the manufacturing or distribution process. [Citation.]” (*Bay Summit, supra*, 51 Cal.App.4th at p. 776.)

In light of these factors, we examine the evidence pointed to by Nunez. He argues “Bargain Supply ow[n]ed the Northtech trademark at the time the saw was sold, made commercial use of the trademark, claimed generally that products bearing the Northtech name were its own goods, and claimed specifically that Northtech industrial woodworking machines and saws were its goods.” The first two propositions are undisputed — Bargain Supply did own the trademark and made commercial use of it. But Nunez offers no evidence Bargain Supply claimed generally that *all* products bearing the NorthTech name were its products, nor any specific evidence it claimed the saw that caused Nunez’s injury was its product. It is beyond argument that the owner of a trademark can manufacture some goods itself, and license others to use it at the same time. He offers no authority that using the trademark on some items made Bargain Supply liable for *all* products bearing the trademark, regardless of its connection to those products.

Nunez further argues he “presented evidence of a close connection between . . . Northtech . . . and Bargain Supply.” In fact, the only evidence we can find in the

record is NorthTech's use of Bargain Supply's trademark, and the fact the two companies shared an address. None of this evidence supports the three factors set forth in *Bay Summit*. Indeed, there is no evidence at all of Bargain Supply's direct financial benefit, integral role, or control or influence over the manufacturing or distributing process. (*Bay Summit, supra*, 51 Cal.App.4th at p. 776.) Based on the evidence Nunez submitted, such connections would be pure speculation.

The other cases on which Nunez relies are also unhelpful. He claims, for example, that *Kasel v. Remington Arms Co.* (1972) 24 Cal.App.3d 711, stands for the proposition that a trademark licensor is subject to strict liability where the licensor is "a link in the marketing enterprise." (*Id.* at p. 725.) But Nunez fails to provide evidence of such a link sufficient to create a triable issue of fact, and *Kasel* does not stand for the proposition that merely owning the trademark is sufficient. The court in *Kasel* found the trademark owner had substantial control over the manufacturing and organizational process. Indeed, it had "more involvement in the enterprise which produced the defective shell than the typical retailer, distributor or wholesaler upon whom the courts have had no trouble imposing strict liability." (*Id.* at p. 727.) Thus, it is not merely the status as trademark holder, but "defendant's participatory connection, for his personal profit or other benefit, with the injury-producing product and with the enterprise that created consumer demand for and reliance upon the product . . . with the manufacturer or other entities involved in the manufacturing-market system which calls for imposition of strict liability." (*Id.* at p. 725.)

Similarly, Nunez cites *Taylor v. Elliott Turbomachinery Co. Inc.* (2009) 171 Cal.App.4th 564. But that case used the *Bay Summit* factors to determine whether strict liability was appropriate. (*Id.* at p. 576.) It does not hold ownership of a trademark alone as sufficient for strict liability. Indeed, that court noted it "is a plaintiff's burden to produce evidence of these factors linking the injury-producing product with a particular entity in the stream of commerce of that product." (*Ibid.*)

Nunez has simply not offered the facts to demonstrate such a connection. The only evidence he offered in opposition to Bargain Supply's motion was NorthTech's interrogatory responses, none of which even mentioned the name Bargain Supply, and documents relating to PTO filings regarding the NorthTech trademark. None of this evidence is sufficient to raise a triable issue of material fact under the standard set forth in *Bay Summit*.

Finally, we reject Nunez's contention that the court disregarded the established rules regarding summary judgments. While the evidence must be liberally construed in favor of the nonmoving party, even the most generous interpretation of the evidence was insufficient to help Nunez here. His proffered facts came nowhere close to meeting the *Bay Summit* standards for holding a trademark owner strictly liable. He simply failed to produce evidence demonstrating a triable issue of material fact.

III

DISPOSITION

The judgment is affirmed. In the interests of justice, each party shall bear its own costs on appeal.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.