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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

ESSY MOTTAHEDI,

Plaintiff and Appellant,

v.

MOOSE HOLDING COMPANY,

Defendant and Respondent.

B228319

(Los Angeles County  
Super. Ct. No. LC086691)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Bert Glennon, Judge. Affirmed.

Law Office of Steven P. Scandura and Howard Posner for Plaintiff and Appellant.

Pauline White for Defendant and Respondent.

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## PROCEDURAL SUMMARY

In 2008, Essy Mottahedi was employed by 99¢ Only Stores (Stores). She was an assistant manager of Stores' Reseda facility, which was located in the Reseda Plaza, a shopping mall in Los Angeles. Stores leased the building from the mall landlord, Moose Holding Company (Moose). Ms. Mottahedi had been working for Stores at the Reseda location for some five years when she suffered an accident in June 2008. She was standing outside the gate to the store's loading dock, trying to close the gate, when the gate fell on her. She suffered injuries from this accident. At some point she commenced a workers compensation proceeding against Stores.

Ms. Mottahedi filed a personal injury tort action in the Los Angeles County Superior Court against Moose and others in August 2009. Shortly after the suit was filed the court set a status conference for December 2009, which was postponed to January 2010. The court also set a final status conference for July 16, 2010. Moose answered the complaint and filed a cross-complaint against Stores, for breach of contract and indemnity. The record reflects little discovery until Moose filed its summary judgment motion. By that time, Ms. Mottahedi had served interrogatories on Moose, which Moose answered, and Moose had deposed Morris Rhone, identified by Stores as its most knowledgeable person with respect to its property and, in particular, the store at Reseda Plaza. Shortly after the summary judgment motion was filed, Ms. Mottahedi noticed several depositions and served interrogatories, requests for production of documents and other discovery. Moose responded, and Ms. Mottahedi filed motions to compel, which were calendared for hearing at a date subsequent to the previously set trial date. Relying on Code of Civil Procedure section 437c, subdivision (h), Ms. Mottahedi moved the court to continue the summary judgment hearing until after the pending motion to compel discovery had been heard. After a lengthy court hearing the court took the motions to continue and for summary judgment under submission. It then denied the motion to continue and granted the motion for summary judgment. Judgment was duly entered in favor of Moose, from which Ms. Mottahedi (hereafter, appellant) filed a timely notice of appeal.

On appeal, appellant argues the trial court abused its discretion in denying the motion to continue, and that she had established triable issues of material fact which should have prevented the grant of summary judgment. We conclude the trial court did not abuse its discretion in denying the motion to continue the summary judgment hearing, and that summary judgment was properly granted.

## **FACTUAL SUMMARY**

### *1. Lease Provisions*

The following provisions of the lease are pertinent to this litigation.

The lease was for a term of 10 years, beginning in 1995 with an option for Stores to renew for an additional five years. (Par. 1.04, 2.02.) The lease defined “Common Areas” as property not leased or held in the exclusive possession of any tenant, “including, but not limited to, parking areas, driveways, sidewalks, loading areas, access roads, lobby areas, elevators, corridors, landscaping and planted areas as depicted on Exhibit A.” Moose, as landlord, was prohibited from changing or permitting others to change the size, location, nature and use of Common Areas without the tenants’ consent. (Par. 4.05 (a).) Stores, and other tenants, were given nonexclusive use of the Common Areas, subject to reasonable rules and regulations by Moose. Moose was to keep, maintain and operate the Common Areas in good order, and the tenants were to pay their pro rata share of out-of-pocket costs. (Par. 4.05 (d).)

Another paragraph of the lease provided that Stores (and other tenants) were permitted to use portions of the Common Areas, labeled and depicted as “Tenant’s Loading Areas” on Exhibit A, as necessary for making deliveries of merchandise, storing shopping carts, operating vending machines, and otherwise for the smooth and ordinary operation of its business. (Par. 4.05(e).) The page labeled “Exhibit A” is blank.

Paragraph 3.06 of the lease provided for a Work Letter, to be attached as Exhibit B, which was to set forth certain work and improvements Stores may construct with respect to the property, which were to be done at Stores’ expense. The paragraph also provided for Landlord’s Work, to be paid for by Moose. Exhibit B, attached to the lease,

described Tenant's Work to include "Loading facilities for Tenant's regular deliveries via 45 and 48 foot semi-trucks, which may include new loading door(s), loading zone, locking dock, tire well, scissor lift and/or ramp."

Paragraph 5.05 provided that Moose and its agents may enter the property at reasonable times to inspect or for any other purpose the landlord deemed reasonably necessary, and that Moose was to give prior notice of such entry, except in case of emergency.

## *2. The Structure*

As contemplated by the Tenant's Work provision of the lease, the loading dock area was built out with an enclosure at the expense and under the direction of Stores. Morris Rhone testified at deposition that he is the building and property services manager for Stores properties, and had been with the firm for five years. Before that he had held similar positions with two other firms during the previous 10 years. He is the property manager for all of the Stores' some 292 locations, and he is familiar with the store at Reseda Plaza, including its loading dock enclosure. The loading dock enclosure was built out by Stores; neither Moose nor Vons Company (which also had ownership rights over the Common Areas) was asked to construct the enclosure or to make repairs there. The enclosure is within the area for which Stores paid rent, and Stores was entitled to and had exclusive possession of the area. It was gated and locked, and was used for the store. Only the store manager had a key to the enclosure. The enclosure is rectangular with a sliding gate. It was Stores' custom and practice to keep the enclosed area locked in order to protect merchandise and equipment. No other tenant keeps merchandise or equipment there. Stores employees cleaned the area. After the enclosure gate fell on appellant, Stores made repairs, including replacement of the gate.

The motion for summary judgment was supported by the declaration of Frank Wurtzel, the authorized representative of Moose, a position he had held for the previous 15 years. He declared that, as permitted by the lease, Stores, not Moose, constructed and paid for the enclosure at the loading dock area. Moose did not inspect it when it was

built, and Moose considers the enclosed area to be under the exclusive possession and control of Stores. The area is kept locked and Moose does not have a key. No other tenant of the shopping center was affected by the enclosure, and none has complained about it. Wurtzel also declared that he inspected the property when Stores exercised its option to renew for five years and again for a recent 10-year extension, and he saw nothing that appeared dangerous on the property. He knew Stores employees were using the enclosed area, and Moose had received no complaints about the area.

Photographs of the enclosed area show it to be attached to the building, generally rectangular in shape. It appears to be about 15 feet by 10 feet. At argument, counsel for appellant described it as 15 feet by 10 feet. In any case, it encloses a relatively small area.

Appellant's expert, Brad P. Avrit, reviewed documentation concerning the case and the facility, and personally inspected the structure on January 18, 2010. He concluded that the gate was in an unsafe condition at the time of the accident due to lack of stopper devices to prevent it from coming off the track; that this constituted a violation of the Los Angeles Building Code; that the unsafe condition "was exacerbated by the foreseeability of persons in the area and the likely magnitude of harm should the relatively heavy gate tip over onto a person"; and that the gate was constructed in violation of the Building Code.

### *3. Department of Building and Safety Notification*

In April 2004 the Los Angeles Department of Building and Safety issued an order to comply to Moose. The cited violations referred to the enclosed area at the Stores location at issue here. The construction of the enclosure was stated to have been done without the required permit and approvals. The order called on Moose to demolish the structure and restore the area to its original state or submit plans and obtain permits as required, and to remove rubbish and related materials from the site and to maintain the premises in a clean and sanitary condition. A Case Clearance Report of the Department

dated in December 2004 states, “Case resolution: compliance obtained,” and that the case was closed.

#### 4. *Control*

The foregoing evidence established that Stores had exclusive possession and control of the loading dock structure, including the gate. Appellant argues that Moose also had control over the area. Other than Wurtzel’s inspections at the times the lease was renewed and later extended, no evidence was presented that Moose exercised any control over the enclosure. Nevertheless, appellant argues that Moose was responsible for exercising control as demonstrated by two provisions of the lease.

The first of these is the provision defining Common Areas, over which Moose retained control. The term is defined as property not leased or held in the exclusive possession of a tenant, including loading areas as depicted in Exhibit A. Nothing is depicted in Exhibit A (it is blank). Moose argues this is because the area, once enclosed as specifically permitted by the lease, was not a “Common Area.”

The second is the provision allowing Moose, as landlord, to enter the leased premises for inspection or any other purpose. In light of this provision, Moose had the right to inspect the leased property for any legitimate purpose. But the provision does not impose a duty upon Moose to do so, absent something that would place a reasonable landlord on notice that an inspection should be made. Aside from the 2004 notice of violation from the Department of Building and Safety, which was resolved the same year, there is nothing in the summary judgment papers suggesting that Moose was on notice of the dangerous condition of the enclosure, including the gate.

We treat the issue of control further in the Discussion portion of this opinion.

## **DISCUSSION**

### **I**

Appellant moved the court to continue the hearing on Moose’s motion for summary judgment. Counsel for Moose argued against the postponement. The court’s

tentative ruling was to grant the motion to continue under Code of Civil Procedure section 437c, subdivision (h). Appellant's counsel argued that he had served discovery, which was met largely with evidentiary objections, and that he had filed a motion to compel further responses. The motion, however, was scheduled to be heard on a date considerably after the date set for trial. Counsel for respondent Moose argued that appellant did not seek the discovery until after the motion for summary judgment was filed and set for argument, and that the statutory requisites for postponement had not been met. In particular, she argued, appellant had not shown diligence in seeking discovery and that the only person who had been deposed, Rhone, testified at a deposition noticed by Moose, not appellant. At the conclusion of the hearing the court announced that it would "look at it again," and took both the motion to continue and the summary judgment motion under submission. Later the same day the court announced its decisions: the motion to continue was denied, and the motion for summary judgment was granted. Appellant moved for reconsideration of the summary judgment motion; this motion also was denied.

The oral argument on the motion to continue and for summary judgment was "extensive," and occupies 41 pages of the reporter's transcript. In its minute order the court explained its reasons for denying the motion to continue in detail:

Plaintiff's request for a continuance is denied as failing to conform to Code of Civil Procedure section 437c, subd. (h). Plaintiff's declaration failed to show that essential evidence may exist. Plaintiff's declaration further failed to show facts establishing a likelihood that controverting evidence may exist and why the information sought was essential to opposing the motion; plaintiff failed to show the specific reasons why such evidence could not [be] presented at the present time; plaintiff failed to provide an estimate of the time necessary to obtain such evidence; and plaintiff failed to show the specific steps or procedures she intended to utilize to obtain such evidence. (Code Civ. Proc., § 437c, subd. (h).)

Plaintiff made no showing of good cause for continuance of the Motion for Summary Judgment. This case has been

pending since August 25, 2009. Plaintiff had seventy-five days notice of the Motion for Summary Judgment. The Motion for Summary Judgment was set approximately six weeks before trial, and approximately two weeks before discovery cut-off. Plaintiff did not make a motion for a continuance earlier than when she filed her opposition, and did not make any ex parte applications to continue the Motion for Summary Judgment. Plaintiff claimed the need to depose only representatives of defendants (persons most knowledgeable); not third parties. The defendants supplied declarations in support of the Motion for Summary Judgment, which were filed and served with the moving papers. Plaintiff made no showing of how depositions of defendants would show facts establishing a likelihood that controverting evidence may exist or why the information sought was essential to opposing the motion for summary judgment.

The record supports these conclusions. The discovery requests were late and there was no showing why they could not have been propounded earlier, or why the motion to continue could not have been filed earlier than it was. Nor did appellant demonstrate that the noticed depositions of Moose's most knowledgeable person and other discovery were likely to show facts establishing triable issues of material fact. (See *Andrews v. Mobile Aire Estates* (2005) 125 Cal.App.4th 578, 596 [decision whether to grant continuance under Code of Civ. Proc., § 473c, subd. (h) is reviewed for abuse of discretion; none found where request was served along with new discovery shortly before discovery cut-off date with trial already scheduled].) We find no abuse of discretion in the trial court's denial of the motion to continue the hearing on the motion for summary judgment.

## II

The standards for review on a defendant's summary judgment motion are well established, and require no detailed reprise here. Briefly, the moving party defendant must demonstrate that the plaintiff has failed to present evidence to support at least one element of its cause of action or that there is a complete defense to the claim; if defendant satisfies that burden of production, plaintiff has the burden of raising a triable issue of material fact as to defendant's showing. Failing that, defendant is entitled to an order

granting the motion. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850; *Iverson v. Muroc Unified School District* (1995) 32 Cal.App.4th 218, 222.) We review the merits here with these standards in mind.

For purposes of tort liability due to a dangerous condition on the land, “[t]he crucial element is control.’ [Citation.]” (*Low v. City of Sacramento* (1970) 7 Cal.App.3d 826, 831, quoted with approval in *Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1159 (*Alcaraz*)). So it is in this case.

The evidence demonstrates overwhelmingly that Stores, not Moose, controlled the enclosed loading dock area at the Stores premises. The lease gave Stores the right to erect the enclosed area, and Stores exercised that right, at its own expense and without approval (beyond the lease itself) by Moose. The enclosed area was not a “Common Area” because it was under the exclusive control of Stores. The area was fenced with a locked gate, and Moose did not have a key to the lock; only the Stores manager had a key. The trial court correctly determined that Stores had as much authority over the area as it did in its store premises open to the public. Moose considered the structure to be under the exclusive possession and control of Stores, just like the interior of the store. The enclosure was secured so that no one other than a Stores employee could access it (except Moose in case of an emergency or by a noticed request). It existed to secure the Stores’ property which it enclosed. Indeed, appellant herself had access because she was the assistant manager of the Stores facility at this location. And while appellant’s expert offered an opinion about what was wrong with the gate at the time of the accident, he viewed a different gate than the one that had been in place at the time of the accident, four years before.

It is true that a possessor of land may be liable for a dangerous condition even where that condition is caused by an instrumentality the landowner does not own or control, such as a crane near overhead electrical lines, presenting a danger about which the landowner fails to warn. (*Alcaraz, supra*, 14 Cal.4th 1149, 1156.) Or the situation in *Alcaraz* itself, where a broken or open meter box was in place on the publicly-owned median strip between the sidewalk fronting defendant’s apartment building and the street,

constituting a dangerous condition; the court found a triable issue of material fact whether the apartment owner controlled that dangerous condition. Thus, to use the court's hypothetical, where a live power transmission line falls on defendant's property, defendant cannot escape liability simply because someone else owns the power line; the land possessor knowing of the hazard would have a duty to erect a barrier or warn persons entering the land about the danger. (*Ibid.*) Here, so far as the record shows, there was no knowledge or notice to or on the part of Moose of anything dangerous about the structure Stores had built, nor any contractual assumption of liability. Under these circumstances, Moose was entitled to summary judgment.

#### **DISPOSITION**

The judgment is affirmed. Respondent to have its costs on appeal.

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EPSTEIN, P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.