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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

JOSE LUIS ESCALERA, Plaintiff and Appellant, v. YEH JUIN TUNG, Defendant and Respondent.	H038765 (Santa Clara County Super. Ct. No. 1-09-CV158837)

After he was injured while trimming a tree at the home of defendant Yeh Juin Tung, plaintiff Jose Luis Escalera sued both his employer, Michael Waller, and Tung for negligence. The superior court granted summary judgment to Tung. Plaintiff appeals, contending for the first time that Tung was vicariously liable under Labor Code section 2750.5[1] as the employer of both Waller and plaintiff. We will affirm the judgment.

Background

The events giving rise to plaintiff's lawsuit were undisputed in the summary judgment proceedings. On September 16, 2008, Tung hired Michael Waller, who owned Waller Tree Care, to perform services that included removing one tree and trimming four others. The price for the work was $400. Tung was unaware that Waller was not

[1] All further statutory references are to the Labor Code unless otherwise indicated.

licensed; he knew only that Waller had advertised on Yelp.com as being bonded and insured. Waller did not have workers' compensation insurance at that time.

On October 6, 2008, Waller appeared at Tung's property to do the work. He was accompanied by plaintiff, although Tung did not know that plaintiff was there. Plaintiff leaned a ladder against a tree and climbed up about 10 feet. As he began to cut branches with a handsaw, he fell. He did not know why he fell; as he stated in his deposition, "All I know is that the ladder went to one side and I wasn't able to hold on."

Plaintiff initiated this action in December 2009, alleging negligence against both Waller and Tung. In the first cause of action he alleged that "defendants negligently, [*sic*] instructed, trained, controlled, managed and supervised the Complex [*sic*] in such a way so [*sic*] as to cause plaintiff's injury as a result of falling from a ladder while cutting the limb of [a] tree at the request of defendants. At said time and place defendants negligently instructed, controlled and supervised the plaintiff in the conduct of trimming of trees, thereby resulting in injury to plaintiff as alleged herein. On said time and place, defendants negligently instructed the plaintiff to perform the tree trimming under unsafe conditions, without regard to the safety of the conditions, and in a negligent and unsafe manner." In the second cause of action plaintiff repeated his negligence allegations but also noted that "Defendants did not have worker's compensation insurance at the time of the incident as required by California State law."

Tung moved for summary judgment, contending that plaintiff was not his employee but an employee of Waller, an independent contractor. He also disputed plaintiff's negligence claim "because there is no evidence of any breach of any duty or any causation by Mr. Tung." In his opposition, plaintiff agreed that Waller was an independent contractor, but he raised the "peculiar risk" doctrine to argue that Tung was liable whether or not he was personally negligent, because plaintiff was performing "inherently dangerous work," and Tung must bear responsibility for all risks of injury to

a worker, "regardless of fault." The parties debated the applicability of the exception to the peculiar-risk doctrine expressed in *Privette v. Superior Court* (1993) 5 Cal.4th 689.

The superior court ruled in Tung's favor. Addressing plaintiff's assertion that Tung was vicariously liable because Waller had not procured workers' compensation insurance, the court reasoned that "an employee of a negligent contractor *can* recover under the workers' compensation system even if the contractor is uninsured." As plaintiff had not established a triable issue under the peculiar risk doctrine or supported a theory of direct liability, Tung was entitled to summary judgment.[2] From the ensuing judgment on July 13, 2012, plaintiff brought this appeal.[3]

Discussion

1. Standard of review

In reviewing the superior court's ruling, we adhere to established principles of review. Summary judgment is proper 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).) A triable issue of material fact exists "if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).)

A defendant who moves for summary judgment bears the initial burden of showing that the action or cause of action has no merit—that is, "that one or more

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[2] The court also granted Tung's summary judgment motion directed at a cross-complaint filed by Waller against Tung. Waller's pleading is not in the appellate record and is not at issue in this appeal.

[3] The case against Waller thereafter proceeded to trial, resulting in a verdict for Waller. That outcome is the subject of plaintiff's appeal in H039099, which we discuss in a separate opinion.

elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action." (Code Civ. Proc., § 437c, subds. (a), (p)(2).) If the defendant makes a prima facie showing that justifies a judgment in its favor, the burden then shifts to the plaintiff to show that there exists a triable issue of material fact. (*Aguilar*, *supra*, 25 Cal.4th at p. 850.) On appeal, we review the record de novo to "determine with respect to each cause of action whether the defendant seeking summary judgment has conclusively negated a necessary element of the plaintiff's case, or has demonstrated that under no hypothesis is there a material issue of fact that requires the process of trial, such that the defendant is entitled to judgment as a matter of law." (*Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 334; *Daly v. Yessne* (2005) 131 Cal.App.4th 52, 58.)

On appeal, plaintiff does not suggest that he was Tung's employee under the workers' compensation system; he acknowledges that the Workers' Compensation Act (§ 3200 et seq.) is inapplicable because he worked less than 52 hours on Tung's property. Plaintiff does, however, assert that Tung was his employer for purposes of civil tort liability under section 2750.5.

Tung points out, that plaintiff's theory of liability under section 2750.5 was never raised below. In the superior court plaintiff had framed the issue as "whether a homeowner who hires an independent contractor to perform work that involves a certain inherent risk of physical injury, can be held vicariously liable when a worker hired by the independent contractor is injured on the job." In asserting the peculiar-risk doctrine below, plaintiff repeatedly cast Waller as an independent contractor without referring to section 2750.5. On appeal, however, plaintiff contends that both he *and* Waller were Tung's employees under section 2750.5, making Tung liable for plaintiff's alleged injuries. Thus, plaintiff now argues, "the trial court clearly erred in its determinations that Waller was an 'independent contractor' and that [plaintiff] was 'an employee of an independent contractor.' "

Plaintiff acknowledges that "[t]his issue was never raised or tested through the summary judgment proceedings." He apparently believes it was Tung's responsibility to invoke the theory and then negate it. He is mistaken. "[Tung's] burden on [his] motion for summary judgment was only to negate the existence of triable issues of fact in a fashion that entitled him to judgment on the issues raised by the pleadings. [Citation.] [He] was not required to refute liability on some theoretical possibility not included in the pleadings." (*IT Corp. v. Superior Court* (1978) 83 Cal.App.3d 443, 451-452; accord, *American Continental Ins. Co. v. C & Z Timber Co.* (1987) 195 Cal.App.3d 1271, 1281.)

Tung urges this court to reject the new theory as forfeited, while plaintiff points out that a new theory may be considered on appeal if it involves a question of law on undisputed facts. Plaintiff cites the undisputed facts that "Waller was a contractor who did not have a contractor's license," that "Waller advertized [*sic*] his tree care business on Yelp, and that he did not state in his advertisement that he was not licensed under the contractors' licensing law." From those facts plaintiff asserts that Waller is "conclusively presumed to be Tung's employee" under section 2750.5.

That Waller was unlicensed and that he failed to acknowledge that status in his Yelp advertisement were indeed undisputed below. These facts do not, however, lead to the conclusive presumption plaintiff seeks. First, plaintiff's new theory depends on the additional factual assertion that Waller was not an independent contractor, contrary to the very foundation of his opposition to the summary judgment motion. As plaintiff's reliance on the new statutory theory is premised on a different *factual* basis of liability, it has been forfeited on appeal. (See *North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 30; accord, *Winchester Mystery House, LLC v. Global Asylum, Inc.* (2012) 210 Cal.App.4th 579, 594.)[4] "Though this court is bound to

[4] *Mendoza v. Brodeur* (2006) 142 Cal.App.4th 72, 81, cited by plaintiff, does not hold to the contrary. Unlike this case, there section 2750.5 *was* raised in the summary judgment (continued)

determine whether defendants met their threshold summary judgment burden independently from the moving and opposing papers, we are not obliged to consider arguments or theories, including assertions as to deficiencies in defendants' evidence, that were not advanced by plaintiffs in the trial court. 'Generally, the rules relating to the scope of appellate review apply to appellate review of summary judgments. [Citation.] An argument or theory will . . . not be considered if it is raised for the first time on appeal. [Citation.] Specifically, in reviewing a summary judgment, the appellate court must consider only those facts before the trial court, disregarding any new allegations on appeal. [Citation.] Thus, possible theories that were not fully developed or factually presented to the trial court cannot create a "triable issue" on appeal.' (*American Continental Ins. Co. v. C & Z Timber Co.*[, *supra*, 195 Cal.App.3d at p. 1281.])" (*DiCola v. White Bros. Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 676 (*DiCola*).)

Plaintiff's reliance on section 2750.5 does not advance his theory in any event. Under this statute Waller would be presumed to be an employee of Tung by performing a service for which a license was required, and plaintiff, by working for Waller, would then also be deemed an employee of Tung.[5] A license is not required, however, for small jobs

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proceedings. Reversal was required because defendant had not met its initial burden to show that the plaintiff was not an employee under the statute.

[5] Section 2750.5 states, as pertinent here: "There is a rebuttable presumption affecting the burden of proof that a worker performing services for which a license is required pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, or who is performing such services for a person who is required to obtain such a license is an employee rather than an independent contractor. Proof of independent contractor status includes satisfactory proof of these factors: [¶] (a) That the individual has the right to control and discretion as to the manner of performance of the contract for services in that the result of the work and not the means by which it is accomplished is the primary factor bargained for. [¶] (b) That the individual is customarily engaged in an independently established business. [¶] (c) That the individual's independent contractor status is bona fide and not a subterfuge to avoid employee status. A bona fide independent contractor status is further evidenced by the presence of cumulative factors such as substantial investment other than personal services (continued)

costing the hirer less than $500. (Bus. & Prof. Code, § 7048.) It was undisputed that the contract price for the tree trimming was $400; accordingly, the presumption would not have applied.[6] In the summary judgment proceedings plaintiff did not attempt to argue that any exceptions to the $500 threshold applied here, as described in Business and Professions Code section 7048;[7] indeed, he never even mentioned the factual conditions for applying those exceptions. Plaintiff did not, for example, argue that Waller was charging Tung less than $500 in order to evade the licensing requirement. Nor did

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in the business, holding out to be in business for oneself, bargaining for a contract to complete a specific project for compensation by project rather than by time, control over the time and place the work is performed, supplying the tools or instrumentalities used in the work other than tools and instrumentalities normally and customarily provided by employees, hiring employees, performing work that is not ordinarily in the course of the principal's work, performing work that requires a particular skill, holding a license pursuant to the Business and Professions Code, the intent by the parties that the work relationship is of an independent contractor status, or that the relationship is not severable or terminable at will by the principal but gives rise to an action for breach of contract. [¶] In addition to the factors contained in subdivisions (a), (b), and (c), any person performing any function or activity for which a license is required pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code shall hold a valid contractors' license as a condition of having independent contractor status."

[6] This fact alone distinguishes plaintiff's case from *Zellers v. Playa Pacifica, Ltd.* (1998) 61 Cal.App.4th 129, where it was undisputed that the work in question required a contractor's license and the contractor's license had expired by the time the plaintiff was injured.

[7] The statutory exemption for small jobs applies if "the aggregate contract price which for labor, materials, and all other items, is less than five hundred dollars ($500), that work or operations being considered of casual, minor, or inconsequential nature." (Bus. & Prof. Code, § 7048.) The exemption does not apply, however, "in any case wherein the work of construction is only a part of a larger or major operation, whether undertaken by the same or a different contractor, or in which a division of the operation is made in contracts of amounts less than five hundred dollars ($500) for the purpose of evasion of this chapter or otherwise. [¶] This exemption does not apply to a person who advertises or puts out any sign or card or other device which might indicate to the public that he or she is a contractor or that he or she is qualified to engage in the business of a contractor." (*Ibid.*)

plaintiff argue that Waller's representation of himself in his Yelp advertisement defeated the small-jobs exemption and thus compelled a finding that both he and Waller were Tung's employees. At most plaintiff argued, through counsel, that Tung was "irresponsible" for not asking Waller if he held a license and workers' compensation insurance. Plaintiff's focus was clearly and unequivocally on the peculiar risk doctrine, a theory he has apparently abandoned by declining to discuss it in his appellate briefs.

On appeal, however, plaintiff attempts to inject additional factual issues into his position to support his belated reliance on section 2750.5. He now asserts, for example, that the "small jobs" exemption is inapplicable because Waller's advertisement *may have* indicated to the public that he was a contractor. Plaintiff concedes that this scenario presents a factual dispute which was raised in neither his separate statement or his opposing argument below. He thus cannot avoid a determination of forfeiture here. (Cf. *City of San Diego v. Rider* (1996) 47 Cal.App.4th 1473, 1493.)

In determining the summary judgment motion, the superior court properly considered the issues defined by the pleadings and invoked by the moving and opposing papers. The court was not required to conceive of alternative theories for plaintiff that contradicted plaintiff's own theory, which was based on Waller's status as an independent contractor. " 'The principles of "theory of the trial" apply to motions [citation], including summary judgment motions. [Citation.] . . . It would be manifestly unjust to the opposing part[y], unfair to the trial court, and contrary to judicial economy to permit a change of theory on appeal.' " (*Saville v. Sierra College* (2005) 133 Cal.App.4th 857, 873, quoting *North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 28-29; accord, *DiCola*, *supra*, 158 Cal.App.4th at p. 676.)

Because plaintiff failed to assert Tung's liability based on Waller's (as well as plaintiff's) status as Tung's employee under section 2750.5, under Business and Professions Code section 7048, or under any other statute, he offered the court no basis on which to conclude that there was a triable issue of fact material to the issue of Tung's

vicarious liability for the alleged negligence of Waller. Plaintiff's further argument that Tung failed to negate plaintiff's negligence claim against Waller does not help him; if, as we have concluded here, Tung was not vicariously liable as Waller's employer, it makes no difference that Waller may have been negligent.[8] Summary judgment was properly granted.

Disposition

The judgment is affirmed.

[8] Plaintiff has not attempted to argue that Tung himself was directly negligent. He emphasized below that he did not need to make this argument, as his position was based on vicarious liability under the peculiar risk doctrine.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.