Filed 6/30/20 Mora v. Cem CA5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

ROMAN MORA, Plaintiff and Appellant, v. KITCHELL CEM, Defendant and Respondent.	F078587 (Super. Ct. No. CV60299) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Tuolumne County. Kevin Siebert, Judge.

Arata, Swingle, Van Egmond & Goodwin, George S. Arata and Amanda J. Heitlinger for Plaintiff and Appellant.

Gordon Rees Scully Mansukhani, Sandy M. Kaplan and Don Willenburg for Defendants and Respondents.

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Plaintiff appeals from a judgment of dismissal after an order sustaining a demurrer was entered. Plaintiff, an employee of a roofing subcontractor, was working on a roof

[*] Before Levy, Acting P.J., Franson, J. and Meehan, J.

when he fell 20 feet and was injured. He originally filed suit against the building's owner but amended the complaint to name the general contractor as a defendant. The general contractor filed a demurrer and the trial court sustained the demurrer without leave to amend.

On appeal, four issues are presented. First, does the worker's compensation exclusive remedy rule bar plaintiff's claims against the general contractor? Second, does the *Privette*[1] doctrine at the pleading stage bar plaintiff's claims against the general contractor? Third, did plaintiff allege facts sufficient to state a cause of action for negligent undertaking? Fourth, did plaintiff allege facts sufficient to state a cause of action for premises liability? This court resolves all four issues in favor of plaintiff. We therefore reverse the judgment.

FACTS[2]

Yosemite Community College District (Owner) owns and operates the Columbia College campus located in Tuolumne County. Owner hired contractors to complete a remodeling project at the campus. The project included roof repair and replacement on several buildings.

Kitchell CEM (General Contractor) entered into an agreement with Owner to act as the general contractor or program manager for Owner's remodeling project. It had responsibility for oversight and management of the project including developing and implementing a program-wide safety program.

Western Single Ply-Nevada (Roofing Subcontractor) was hired as a subcontractor to perform reroofing services. Ramon Mora (plaintiff), at all relevant times, was an employee of Roofing Subcontractor, not General Contractor or Owner.

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1 *Privette v. Superior Court* (1993) 5 Cal.4th 689 (*Privette*).

2 The facts are drawn from the allegations in the operative, sixth amended complaint, which are assumed to be true for purposes of evaluating the demurrer on appeal. (*Shaeffer v. Califia Farms, LLC* (2020) 44 Cal.App.5th 1125, 1132, fn.1.)

On July 6, 2015, plaintiff was working on the Redbud building at the Columbia College campus as part of the reroofing project. He and other coworkers were running out of materials for that day. A 2x4, without the typical accompanying 2x6, was anchored to the edge of the roof to use as scaffolding. While plaintiff was on the 2x4 anchor board without a safety harness, the board gave way and he fell over 20 feet off the unprotected roof edge. As a result of the fall, plaintiff suffered physical injury, pain and suffering, medical expenses, and a loss of earnings.

PROCEEDINGS

In August 2016, plaintiff initiated this litigation.

In January 2018, plaintiff filed a sixth amended complaint (complaint) naming for the first time General Contractor as a defendant. The complaint is the operative pleading in this appeal and contains causes of action for premises liability and negligence. Plaintiff alleged General Contractor occupied and controlled the site and was responsible for safety on the site while the project was under construction. Plaintiff also alleged General Contractor owed him a duty of care and breached that duty by failing to develop and implement a safety program that included fall prevention and protection measures.

General Contractor filed a demurrer to plaintiff's sixth amended complaint, asserting (1) the pleading failed to allege facts sufficient to state a cause of action and (2) any cause of action was barred by the workers' compensation exclusive remedy rule. (See Lab. Code, §§ 3600-3602; *Privette, supra*, 5 Cal.4th at p. 692.) General Contractor supported its demurrer by filing (1) a request for judicial notice of case detail information from plaintiff's workers' compensation proceeding and (2) a lien by Redwood Fire and Casualty Insurance Company, the company that provided workers' compensation insurance to Roofing Subcontractor and paid benefits to plaintiff.

Plaintiff opposed the demurrer, arguing his claims against General Contractor were not barred because he and his employer, Roofing Subcontractor, had not been hired by General Contractor. In addition, plaintiff argued Labor Code section 3852 expressly

allows him to pursue his injury claim "against any person other than the employer." Plaintiff also requested leave to amend based on interrogatory responses stating that Owner was the hirer of Roofing Subcontractor, not General Contractor.

On June 1, 2018, the trial court heard argument on the demurrer. In August 2018, the court filed an order sustaining the demurrer without leave to amend. The order stated (1) workers' compensation was "the sole and exclusive remedy for employees who sustain injuries while performing work in the scope of their employment"; (2) General Contractor "did not have the requisite degree of control over the property to support a claim for Premises Liability"; and (3) the negligence allegations were insufficient to state a cause of action against General Contractor.

In November 2018, the trial court filed a judgment of dismissal stating the entire action was dismissed with prejudice as to General Contractor. Plaintiff timely appealed.

DISCUSSION

I. STANDARD OF REVIEW

On appeal from a judgment dismissing an action after sustaining a general demurrer, appellate courts independently determine whether the complaint states facts sufficient to constitute a cause of action under any legal theory. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415; see Code Civ. Proc., § 430.10, subd. (e).) "We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] Further, we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law." (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.) We also consider matters which may be judicially noticed. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The allegations are liberally construed in favor of the plaintiff and the court gives reasonable inference to (1) the facts pled, (2) the exhibits of the pleading, and (3) judicially noticed facts. (*Mendoza v. Continental Sales Co.* (2006) 140 Cal.App.4th

1395, 1401–1402; see Code Civ. Proc., § 452 [pleading "must be liberally construed, with a view to substantial justice between the parties"].)

In addition, if the demurrer raises a bar to the cause of action in the pleading, "the defect must clearly and affirmatively appear on the face of the complaint," exhibits to the pleading, or matters subject to judicial notice. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42 (*Committee for Green Foothills*); see Code Civ. Proc., § 430.30, subd. (a).)

II. MERITS OF THE APPEAL

A. Workers' Compensation Exclusivity Rule

General Contractor asserts the claim is barred through the workers' compensation exclusive remedy rule. (See Lab. Code, §§ 3600–3602.) The exclusive remedy rule is contained in Labor Code section 3602, subdivision (a):

> "Where the conditions of compensation set forth in Section 3600 concur, the right to recover compensation is, except as specifically provided in this section and Sections 3706 and 4558, *the sole and exclusive remedy of the employee or his or her dependents against the employer.* The fact that either the employee or the employer also occupied another or dual capacity prior to, or at the time of, the employee's industrial injury shall not permit the employee or his or her dependents to bring an action at law for damages against the employer." (Italics added.)

Plaintiff asserts his claims against General Contractor are allowed by Labor Code section 3852, which provides in part: "The claim of an employee … for [workers'] compensation does not affect his or her claim or right of action for all damages proximately resulting from the injury … *against any person other than the employer*." (Italics added.) Plaintiff contends General Contractor qualifies as a "person other than the employer" for purposes of section 3852 and, therefore, he may pursue his claims against it.

This court must determine if it appears on the face of the complaint that the worker's compensation exclusivity rule bars plaintiff's claim against General Contractor.

(Code Civ. Proc., § 430.30, subd. (a).) For the exclusivity rule to apply, General Contractor must be plaintiff's "employer." (Lab. Code, §§ 3602, 3852.) Thus, we consider whether plaintiff's allegations clearly and affirmatively show General Contractor was plaintiff's employer. (See *Committee for Green Foothills, supra*, 48 Cal.4th at p. 42.)

Plaintiff alleged that Roofing Subcontractor was his employer at all relevant times during the incident. Plaintiff also alleged he "was not at any time mentioned herein an employee of [Owner], defendant [General Contractor], or DOES 1-50." Thus, on the face of the complaint, it does not clearly and affirmatively appear General Contractor was plaintiff's employer. Consequently, the demurrer cannot be sustained on the ground General Contractor is protected from liability by the worker's compensation exclusive remedy rule.

B. *Privette* Doctrine and Non-negligent Hirers

The court in *Privette, supra*, 5 Cal.4th at p. 731 stated an entity that hires an independent contractor whose employee is injured during performance is not liable to the employee for common law tort damages when the hirer did not proximately cause the injuries to the contractor's employee. In other words, the *Privette* doctrine will bar causes of action by an independent contractor's employee against a non-negligent hirer that did not affirmatively act. A hirer can be a landowner, general contractor, or any other entity that hires an independent contractor. (*Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253, 269–270; *Michael v. Denbeste Transportation, Inc.* (2006) 137 Cal.App.4th 1082, 1097.)

Here, we consider whether it appears on the face of the complaint that the *Privette* doctrine bars plaintiff's claims against General Contractor. (Code Civ. Proc., § 430.30, subd. (a).) For the *Privette* doctrine to apply, plaintiff's allegations must clearly and

affirmatively show General Contractor hired Roofing Subcontractor to perform the reroofing services. (See *Committee for Green Foothills, supra*, 48 Cal.4th at p. 42.)

Plaintiff's complaint alleges that Roofing Subcontractor "was a subcontractor hired to perform reroofing work at the SUBJECT PREMISES." The complaint does not state who hired Roofing Subcontractor "to perform reroofing work." Thus, on the face of the complaint, the hirer of Roofing Subcontractor is not clearly and affirmatively shown. Consequently, at the pleading stage, the *Privette* doctrine cannot be a bar to the complaint because the hirer is not identified.[3]

C. Negligent Undertaking Cause of Action

1. *Parties' Contentions*

Plaintiff contends his claim was sufficiently alleged against General Contractor under the "negligent undertaking" doctrine. (See Rest.2d Torts, § 324A (section 324A).) Plaintiff claims General Contractor undertook a duty to develop and implement a safety program and the failure to do such resulted in his injury.

General Contractor contends the negligence claim is barred by the *Privette* doctrine as it applies to general supervisory control over safety. Additionally, General Contractor argues that the "negligent undertaking" doctrine does not apply to plaintiff because he is an incidental beneficiary to the agreement between General Contractor and Owner. General Contractor did not identify the five elements of a "negligent undertaking" cause of action recognized in California case law and explain how one or more of those elements was not adequately alleged.

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[3] Plaintiff's opening brief asserts that, if given leave to amend, he could allege Owner, not General Contractor, hired his employer, Roofing Subcontractor. Plaintiff relies on General Contractor's responses to his special interrogatory Nos. 12 and 13, which asked who was responsible for hiring subcontractors to perform work on the project and who engaged Roofing Subcontractor to perform roofing work on the project, respectively. Both of General Contractor's responses stated: "The Yosemite Community College District"—that is, Owner. An amendment to specifically allege who hired Roofing Subcontractor is not needed in the circumstances presented.

2. *Applicable Legal Principles*

"The elements of any negligence cause of action are duty, breach of duty, proximate cause, and damages." (*Peredia v. HR Mobile Services, Inc.* (2018) 25 Cal.App.5th 680, 687.) "California recognizes a legal duty of care in certain circumstances where the defendant undertakes to render services to someone other than the plaintiff. This 'negligent undertaking' theory of liability is set forth in section 324A [of the Restatement Second of Torts]." (*Ibid.*; see *Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 607–608 (*Artiglio*); *Paz v. State of California* (2000) 22 Cal.4th 550, 559; CACI No. 450C [negligent undertaking].)

"In its entirety, section 324A reads: 'One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to [perform] his undertaking, if [¶] (a) his failure to exercise reasonable care increases the risk of such harm, or [¶] (b) he has undertaken to perform a duty owed by the other to the third person, or [¶] (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.'" (*Artiglio, supra*, 18 Cal.4th at pp. 612–613, fn. omitted.)

"Thus, as the traditional theory is articulated in the Restatement ... a negligent undertaking claim of liability to third parties requires evidence that: (1) the actor undertook, gratuitously or for consideration, to render services to another; (2) the services rendered were of a kind the actor should have recognized as necessary for the protection of third persons; (3) the actor failed to exercise reasonable care in the performance of the undertaking; (4) the actor's failure to exercise reasonable care resulted in physical harm to the third persons; and (5) *either* (a) the actor's carelessness increased the risk of such harm, or (b) the actor undertook to perform a duty that the other owed to the third persons, or (c) the harm was suffered because either the other or the third persons relied

on the actor's undertaking. (*Artiglio, supra,* 18 Cal.4th at pp. 613–614.)" (*Paz v. State of California, supra,* 22 Cal.4th at p. 559.)

Therefore, to be successful in stating a claim based upon section 324A's negligent undertaking theory, plaintiff's allegations must sufficiently establish that: "(1) [General Contractor] undertook, gratuitously or for consideration, to render services to another; (2) the services rendered were of a kind [General Contractor] should have recognized as necessary for the protection of third persons; (3) [General Contractor] failed to exercise reasonable care in the performance of the undertaking; (4) [General Contractor's] failure to exercise reasonable care resulted in physical harm to third persons; and (5) *either* (a) [General Contractor's] carelessness increased the risk of such harm, or (b) [General Contractor] undertook to perform a duty that the other owed to the third persons, or (c) the harm was suffered because either the other or the third persons relied on [General Contractor's] undertaking." (*Paz v. State of California, supra,* 22 Cal.4th at p. 559.)

3. *Sufficiency of Allegations for Negligent Undertaking*

As to element one, did General Contractor undertake to render services to another? Yes, it did. The complaint alleges an agreement between General Contractor and Owner. Owner classifies as another. General Contractor agreed to render services by acting "as the program manager for a remodeling project." The services included maintaining the premises in a reasonably safe manner free from unsafe conditions and risk of injury. Therefore, the complaint satisfies the first element.

As to element two, were the services of a kind General Contractor should have recognized as necessary for the protection of plaintiff? Yes, General Contractor should have recognized the services as necessary for the protection of plaintiff. The complaint alleges General Contractor agreed to create and implement a safety program to increase safety and protect workers on the roofing project. Plaintiff was a worker on the roofing project so the safety program would include protecting plaintiff. The second element is satisfied.

As to element three, did General Contractor fail to exercise reasonable care in performing the undertaking? Yes, the complaint states repeatedly that General Contractor failed to develop and implement safety programs for the reroofing project which would have included fall prevention and the use of safety harnesses. General Contractor could not exercise reasonable care "to maintain the premises in a reasonably safe manner free from unsafe conditions and risk of injury" if it failed to implement procedures to guide Roofing Subcontractor and its employees to eliminate, or at least minimize, the risk of falling from the roof. The third element is satisfied. (*Rannard v. Lockheed Aircraft Corp.* (1945) 26 Cal.2d 149, 155 [" 'it is sufficient to allege the negligence in general terms, specifying, however, the particular act alleged to have been negligently done' "].)

As to element four, did General Contractor's failure to exercise reasonable care result in physical harm to plaintiff? Yes, the complaint alleges the failure to exercise reasonable care caused plaintiff to fall from the roof and suffer injuries. Thus, the failure to exercise reasonable care is the direct and proximate result of plaintiff's injuries. The fourth element is satisfied. (*Guilliams v. Hollywood Hospital* (1941) 18 Cal.2d 97, 103 [causation may be generally rather than specifically pleaded].)

As to element five, we consider whether the allegations show General Contractor's failure to exercise reasonable care increased the risk of the physical harm suffered by plaintiff. As discussed above, General Contractor failed to exercise reasonable care in developing and implementing safety programs. The complaint alleges that there were no policies or procedures for the use of safety harnesses and plaintiff was not wearing one when the injury occurred. The court can reasonably infer that a safety program or the use of a safety harness would have decreased the risk of physical harm. (See *Mendoza, supra*, 140 Cal.App.4th at pp. 1401-1402 [when reviewing a demurrer, a court may make reasonable inferences based upon the facts pled].) Thus, the allegations are sufficient to establish that General Contractor's failure to exercise reasonable care increased the risk

of physical harm suffered by plaintiff. Because only one sub-element of element five needs to be satisfied, the fifth element is met.

As all five elements of the Restatement's theory of negligent undertaking are met, plaintiff has sufficiently alleged a cause of action for negligent undertaking. (*Paz v. State of California, supra,* 22 Cal.4th at p. 559.)

D. Premises Liability Theory

1. *Applicable Legal Principles*

" 'The elements of a cause of action for premises liability are the same as those for negligence.' [Citations.] Accordingly, the plaintiff must prove, ' "a legal duty to use due care, a breach of such legal duty, and the breach as the proximate or legal cause of the resulting injury." ' [Citations.]" (*Jones v. Awad* (2019) 39 Cal.App.5th 1200, 1207.)

" '[P]roperty owners are liable for injuries on land they own, possess, or control.' But ... the phrase 'own, possess, *or* control' is stated in the alternative. A defendant need not own, possess and control property in order to be held liable; control alone is sufficient." (*Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1162, original italics; see CACI No. 1000.) "Premises liability ' "is grounded in the possession of the premises and the attendant right to control and manage the premises" '; accordingly, ' "mere possession with its attendant right to control conditions on the premises is a sufficient basis for the imposition of an affirmative duty to act." ' [Citations.]" (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1158.)

2. *Parties Contentions*

Plaintiff contends the trial court made a factual determination regarding General Contractor's degree of control over the premises when it sustained the demurrer. Plaintiff argues that if the trial court construed in his favor all the facts pled then the complaint sufficiently alleged General Contractor's control over the premises.

General Contractor contends that it cannot be found liable for premises liability as it is not the landowner. Also, it argues that there are no allegations to support that General Contractor had knowledge of concealed preexisting hazardous conditions, a disregard of safety, or exercised affirmative control over Roofing Subcontractor's performance.

3. *Sufficiency of Allegations for Premises Liability*

As discussed above, plaintiff has sufficiently alleged facts to state the elements of a negligence cause of action. Therefore, we limit our inquiry to whether the complaint sufficiently alleged General Contractor had possession and control over the premises to support a theory for premises liability.

The complaint alleges that General Contractor "controlled and occupied the subject premises as the program manager." As part of this control, General Contractor was responsible for the safety of the site during the construction project. General Contractor's negligent use and maintenance of the property caused the injury to plaintiff.

It is sufficiently alleged that General Contractor had possession of the premises in order to occupy and control it for the remodeling project. From the allegations of the complaint, it can be reasonably inferred that General Contractor as program manager or general contractor for the project would be able to control the conditions of the premises by directing Roofing Subcontractor, and other subcontractors, to work in specified areas to ensure safety and efficiency to complete the project. (See *Mendoza, supra*, 140 Cal.App.4th at pp. 1401–1402 [when reviewing a demurrer, a court may make reasonable inferences based upon the facts pled].) Thus, plaintiff has sufficiently alleged a claim for premises liability.

DISPOSITION

The judgment is reversed. The trial court is directed to vacate its order sustaining the demurrer without leave to amend and to enter a new order overruling the demurrer. Plaintiff shall recover his costs on appeal.