Filed 12/19/08 DiMartino v. Ostrander CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

LEE DIMARTINO, Plaintiff and Appellant, v. PATRICIA OSTRANDER et al., Defendants and Respondents.	B197830 (Los Angeles County Super. Ct. No. LC 068731)

APPEAL from a judgment of the Superior Court of Los Angeles County, James A. Kaddo, Judge. Affirmed.

Law Offices of John E. Sweeney & Associates, John E. Sweeney and Darryl O. Dickey for Plaintiff and Appellant.

Law Offices of Marshall C. Sanders and Marshall C. Sanders for Defendants and Respondents.

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Appellant Lee DiMartino brought an action against multiple defendants, including the two respondents in this appeal, arising from a collision between a vehicle operated by appellant and three other cars. The vehicle operated by appellant had been rented by respondent Cheryl Ostrander-Burr (hereafter Cheryl)[1] and had been taken by defendant James Burr (not a party to this appeal) allegedly without Cheryl's permission. Cheryl and respondent Patricia Ostrander (hereafter Patricia) moved for summary judgment. We affirm the trial court's order granting summary judgment as to both respondents.

FACTS

Cheryl is the wife of James Burr; Patricia is Burr's mother-in-law.

Cheryl rented the vehicle, a Nissan Altima, that was involved in the accident from Enterprise Rent-A-Car. Under the rental agreement, only Cheryl was authorized to drive the car.

On June 18, 2006, Burr took the Nissan and drove it to Jack's restaurant where he met with appellant. Both Burr and appellant became intoxicated. Because Burr believed that he was too drunk to drive, he asked appellant to drive the Nissan. Appellant and Burr left the restaurant with appellant driving the Nissan.

According to Cheryl's declaration, she has "no use" for appellant and has forbidden him to come over to her house for several years. "If I [Cheryl] had been made aware that [appellant] would be driving any vehicle in my possession I would have strenuously objected and hidden the keys." Cheryl's dislike of appellant was based on a physical altercation appellant had with her sister when he tried to give marijuana to Cheryl's children; Cheryl thinks appellant is a leech who has been scamming the social security system. Cheryl's and Patricia's dislike of appellant was corroborated by Burr who stated that neither woman would have given appellant permission to drive a car.

According to appellant's declaration, while he was driving Burr home, Burr first demanded to be taken to a friend's house, a request that appellant refused, and then asked

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[1] We refer to respondents by their first names to avoid confusion and not out of a lack of respect.

appellant to stop so Burr could buy some wine. Appellant again refused and Burr became very angry. That is the last thing appellant remembers before waking up in the back of a police cruiser. In the past, Burr had on two occasions struck appellant while he was driving Burr home. The inference was that Burr had attacked appellant while he was driving the Nissan and that this caused the accident.

The evidence was that around 5:30 p.m., while the car was being driven by appellant, the vehicle collided with three other cars and a traffic signal pole.

Appellant based his case against respondents on the theory that respondents negligently entrusted the Nissan to Burr, whom they knew to be an alcoholic, and that Cheryl actually rented the Nissan for Burr to use.

In opposing respondent's motion for summary judgment, appellant relied on the following combination of circumstances: (1) Burr was an alcoholic with a long history of DUI (driving under the influence) convictions, which had resulted in the loss of his driver's license;[2] (2) Patricia bought three vehicles over time and was the only named insured on all three vehicles; (3) she made one of these vehicles, a Chevrolet Tahoe, available to Burr even though she knew that he was an alcoholic and in the habit of driving while intoxicated; (4) Cheryl and Patricia enabled Burr to continue with his dangerous habit of driving while intoxicated; (5) Burr told appellant that it was he, Burr, who had rented the Nissan vehicle; and (6) the Nissan was a replacement vehicle for the Chevrolet Tahoe that was stolen in May 2003.

In addition to the foregoing, appellant also contends that Cheryl and Patricia are not credible and that it can be inferred from various facts that Cheryl actually rented the car for Burr.

In moving for summary judgment, respondents relied in relevant part on the declarations of Burr and Cheryl.

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[2] We find it unnecessary to set forth the long and involved history of Burr's alcoholism, his DUI convictions and his lengthy relationship with appellant. During that relationship, appellant frequently functioned as Burr's driver since Burr tended to start the day inebriated.

Burr's declaration states that "[m]y wife [Cheryl] did not give me permission to take the vehicle"; that the Nissan was not a replacement vehicle for any other vehicle owned by Patricia; that Burr erroneously stated in his deposition that he had rented the Nissan from Enterprise; that it was Cheryl and not he, Burr, who had rented the Nissan, as shown in the rental agreement.

Cheryl's declaration states in relevant part: "I did not give my husband permission to drive the Nissan Altima that I rented from Enterprise. He simply took it without my permission. When I rented the vehicle from Enterprise, I did not have him listed as an alternative user. When I got home I reminded my husband that I was the only driver authorized to drive the vehicle and that he was not to drive the vehicle. Nevertheless, my husband took the vehicle on the date in question, without my permission or that of Enterprise."

THE MOTION FOR SUMMARY JUDGMENT AND THE COURT'S RULING

The motion for summary judgment was based on two grounds. First, the claim was that there was no evidence that the Nissan was rented for Burr. Second, the motion contended that it was not foreseeable, from Cheryl's and Particia's point of view, that Burr would ask appellant to drive the Nissan, that Burr would assault appellant while he was driving the Nissan and that this would bring about the accident.

The trial court granted the motion on the first ground, i.e., it found that there was no evidence that Cheryl gave Burr permission to drive the Nissan.

Because the original briefs were largely limited to the ground addressed by the trial court, we requested that the parties specifically brief the question of whether the injuries and damages were foreseeable as far as Cheryl and Patricia were concerned. This complied with Code of Civil Procedure section 437c, subdivision (m)(2).[3]

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[3] "Before a reviewing court affirms an order granting summary judgment or summary adjudication on a ground not relied upon by the trial court, the reviewing court shall afford the parties an opportunity to present their views on the issue by submitting supplemental briefs." (Code Civ. Proc., § 437c, subd. (m)(2).)

DISCUSSION

1. Cheryl and Patricia Had No Reason to Anticipate That Burr Would (1) Meet Appellant, (2) Ask Appellant to Drive the Nissan and (3) Assault Appellant, Causing the Accident; This Sequence of Events Was a Superseding Cause That Is a Complete Defense to the Action

For the purposes of this discussion, we will assume that Cheryl actually rented the Nissan for Burr. Having stated this premise, we note that the only item of direct evidence that supports this assumption is Burr's *deposition* testimony to the foregoing effect. Most of the remaining evidence, including Burr's repudiation of this deposition testimony, is on the other side of the ledger. All the same, admissions made in the course of a deposition govern and control contrary declarations made in declarations submitted in the motion for summary judgment. (*Visueta v. General Motors Corp.* (1991) 234 Cal.App.3d 1609, 1613.) The weight of the evidence is not a relevant matter in a motion for summary judgment. (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 840.)

The court is required to draw inferences in the light most favorable to the party opposing the motion for summary judgment. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) It appears that Cheryl had the use of at least one car and that she had in the past allowed Burr to use the family Chevrolet Tahoe, which the Nissan replaced. Thus, it could be reasonably inferred that the Nissan was rented for Burr. There is evidence therefore to controvert Cheryl's claim that the Nissan was not rented for Burr. This is enough to deny summary judgment that is based on the theory that the Nissan was rented only for Cheryl's use and that Burr did not have permission to take this car.

Given the original negligent act of renting the Nissan for Burr,[4] the question is whether the series of events composed of Burr's decision to meet with appellant that day, his ensuing request that appellant drive the Nissan and the accident itself constitute independent intervening acts.

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[4] This is only an operating assumption for purposes of summary judgment; it is not a finding of fact on our part.

This is one of the somewhat unusual cases that is governed by the principles set forth in clause (b) of the Restatement Second of Torts section 447 (hereafter section 447). As Witkin notes (6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 1216, p. 593), in nearly all of California opinions dealing with intervening negligent acts, the test of superseding cause is foreseeability, i.e., the test set forth in clause (a) of section 447.

Section 447 and clauses (a) and (b) thereof provide:

"The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if [¶] (a) the actor at the time of his negligent conduct should have realized that a third person might so act, or [¶] (b) a reasonable man *knowing the situation existing when the act of the third person was done* would not regard it as highly extraordinary that the third person had so acted." We have italicized the portion of clause (b) that is dispositive of the issue of causation in this case.

The Restatement gives the following illustration to explain clause (a): "Illustration: [¶] 1. A loads his truck so carelessly that a slight jolt might cause its heavy contents to fall from it. He parks it in a street where to his knowledge small boys congregate for play. B, one of these boys, tries to climb on the truck. In so doing he so disturbs the load as to cause a heavy article to fall upon and hurt C, a comrade standing close by. B's act is not a superseding cause of C's harm."

The comment on clause (b) (comment b) explains the workings of clause (b) of section 447:

"The actor at the time of his negligence may have no reason to realize that a third person might act in the particular negligent manner in which the particular third person acts, because his mind is not centered upon the sequence of events which may result from his act and therefore he has no reason to realize that it will create the situation which the third person's intervening act makes harmful. However, when the situation is known to exist, the likelihood that some negligent act may make it dangerous may be easily realizable or even obvious." The illustration for comment b follows: "The same facts as in Illustration 1, except that A does not intentionally park his car in the street frequented by the boys, but his

car through no fault of his is blocked in a traffic congestion at this point. B's act in meddling with the truck is not a superseding cause of C's harm."

In *Ewart v. Southern Cal. Gas Co.* (1965) 237 Cal.App.2d 163 (*Ewart*), the appellate court concluded that it was error not to have instructed the jury both in terms of clauses (a) and (b) of section 447. This decision specifically recognizes that clause (b) of section 447 is part of California law and it also serves as a useful contrast with the case before us.[5]

In *Ewart*, a wrongful death action, the decedent was killed while working in a water pipeline for his employer, Macco Corporation. The pipeline crossed utility lines of the Gas Company. A subcontractor working on the pipeline project, Emsco, damaged the utility gas lines with the result that a considerable amount of odorless methane gas filtered through the earth and through a manhole into the pipeline where the decedent was working. In time, the accumulated methane gas exploded and the decedent was killed by carbon monoxide poisoning, a product of the explosion. (*Ewart*, *supra*, 237 Cal.App.2d at pp. 166-168.) The jury returned verdicts in favor of the defendants, the Gas Company and Emsco; Macco, the decedent's employer, was not a named defendant. The appellate court reversed, based on the error in instructions that we discuss below.

The nub of the matter was that Macco was chargeable with a panoply of negligent acts and omissions that could easily account for the decedent's death.[6] The case against the Gas Company was that, while it had notified Macco of the leak, no warning was given about the large quantity of gas that had escaped and no investigation was conducted into where the gas had escaped, including the pipeline area. The appellate court concluded that "if the jury had been permitted to apply both applicable tests of the Restatement, that is to say,

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[5] Writing for the court in *Ewart* was Justice Kaus with Justice Ford concurring. Justice Ashburn (ret.) dissented.

[6] "1. Macco permitted its men to smoke inside of the pipe even after it was aware of the leak. 2. Macco made no tests to determine the presence of gas. 3. Macco published no safety regulations. 4. Macco held no safety meetings. 5. Macco's employees were not instructed concerning precautions on the job; in particular no instructions against lighting matches were given. 6. No blowers were installed to ventilate the pipe." (*Ewart*, *supra*, 237 Cal.App.2d at p. 168.)

foreseeability of the intervening negligence (Rest., Torts, § 447(a)) and the test of section 447(b), namely whether a reasonable man knowing the situation existing when the act of the third person was done would regard it as highly extraordinary that the third person had so acted, a different result might well have been reached." (*Ewart*, *supra*, 237 Cal.App.2d at pp. 172-173.) In finding clause (b) of section 447 to be declarative of California law, the court in *Ewart* relied on *Stewart v. Cox* (1961) 55 Cal.2d 857 when the court broadly held that sections 442-453 of the Restatement Second of Torts dealing with intervening acts are the law in California.[7]

In the case before us, the comment b of section 447 is particularly apropos. Paraphrasing comment b, neither Cheryl nor Patricia had any reason to think that Burr would go to meet appellant, that both men would drink enough to become intoxicated, that Burr would then ask appellant to drive him in the Nissan, that Burr would become angry at appellant and eventually assault him, bringing about the accident. Neither Cheryl nor Patricia were "centered," to use comment b's term, upon this particular sequence of events and they therefore had no reason to realize that renting the car for Burr's use would ultimately result in the accident with appellant driving the Nissan. Or, to use the words of clause (b) of section 447, neither Cheryl nor Patricia knew of the "situation existing," i.e., Burr going to meet appellant, drinking with him, asking appellant to drive the Nissan and then assaulting appellant, causing the accident.

For the purposes of the summary judgment motion, there is no evidence that Cheryl or Patricia had any reason to think that this sequence of events would come about. In fact, the only evidence that speaks to Cheryl's and Patricia's possible reaction to these events is that Cheryl would have adamantly refused to allow appellant to drive the Nissan.

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[7] "The rules set forth in sections 442-453 of the Restatement of Torts for determining whether an intervening act of a third person constitutes a superseding cause which prevents antecedent negligence of the defendant from being a proximate cause of the harm complained of have been accepted in California." (*Stewart v. Cox*, *supra*, 55 Cal.2d at pp. 863-864.)

According to Burr, neither Cheryl nor Patricia would have allowed appellant to drive the Nissan.

In *Ewart*, on the other hand, the appellate court appears to conclude that it was possible that the Gas Company knew of the many shortcomings in Macco's safety standards and that the jury could also conclude that Macco's derelictions were not "highly extraordinary." (This brought the case within clause (b) of section 447 on which there should have been an instruction, according to *Ewart*.) If both of these things were true, Macco's conduct was not an intervening cause and the Gas Company was liable. In our case, we do not reach the question whether the sequence of events was "highly extraordinary" because there is no evidence that Cheryl or Patricia knew of, or had reason to anticipate, the sequence of events. We note, however, that the rather bizarre series of events following Burr's decision to drive off in the Nissan would qualify as highly extraordinary, if this issue would have to be decided.

We note that the motion for summary judgment raised precisely the issue that we have addressed.[8] We do not agree with appellant that this defense was not pleaded in the answer; the third affirmative defense alleges that the damages were caused by "persons other than this answering defendant."

In his supplemental brief, appellant contends that all that is required is that the defendant's, i.e., Cheryl's, negligence is a substantial factor in bringing about the harm. This is, of course, true as a general proposition. But the entire jurisprudence of a superseding cause is predicated on the rule that if the cause is in fact superseding, the actual cause of the injury is the superseding cause and not the original act.

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8 The motion contended: "Unless [appellant] can produce evidence that it was foreseeable that [Burr] would, without the permission of [Cheryl], take the keys to the rented automobile, despite being told not to do so, become intoxicated, allow [appellant], who himself was intoxicated, to drive the rental automobile, and then assault [appellant] while he was operating the vehicle, there is simply no liability on the part of [Cheryl] or [Patricia] for the alleged injuries and damages sustained by [appellant]."

Appellant also states that "[e]ven if the Respondents did not anticipate that Burr would again assault [appellant] on the freeway, the accident and the injury sustained was precisely the result to be expected when giving a motor vehicle to an alcoholic with a history of alcohol-related incidents." This concedes the most important aspect of the case, the unanticipated assault that caused the accident, and it ignores the other improbabilities in the case. That is, assuming that Cheryl rented the Nissan for Burr, she would have had to anticipate that Burr would ask appellant to drive the Nissan when the evidence was that Burr knew she would never let appellant near the car and it also assumes that Cheryl would have had to anticipate that the Nissan, operated by appellant, would be involved in an accident as a result of an altercation between Burr and appellant. Be that as it may, the concession that Cheryl and Patricia could not have anticipated Burr's assault on appellant in the Nissan is, standing alone, enough to establish the superseding cause for the accident.

In sum, we conclude that *all* of the evidence shows, without contradiction, that the sequence of events that we have described was a superseding cause that relieved Cheryl and Patricia of liability. This is a complete defense to the action that stands unrebutted. Accordingly, Cheryl and Patricia were entitled to summary judgment. (Code Civ. Proc., § 437c, subd. (p)(2).)

2. Summary Judgment Is Not To Be Denied on the Ground of Credibility

Appellant contends at some length that neither Cheryl nor Patricia is credible or truthful. In presenting this contention, appellant also relies on evidence that is extraneous to this lawsuit, such as that Patricia lied about the ownership of the Burr residence. In substance, appellant contends that since it is possible that Cheryl and Patricia will not be believed by the trier of fact, summary judgment should have been denied.

This contention relates in substance to the question whether Cheryl should be believed when she disclaimed renting the Nissan for Burr. Because we do not affirm the judgment on that ground, this contention is largely immaterial. But, to the extent this contention can be read to relate to the issue of a superseding cause, we address and dispose of it.

Code of Civil Procedure section 437c, subdivision (e) squarely addresses appellant's contention. In relevant part, subdivision (e) provides that "[i]f a party is otherwise entitled to a summary judgment pursuant to this section, summary judgment may not be denied on grounds of credibility." This provision was enacted to legislatively overrule *Frye v. Felder* (1966) 246 Cal.App.2d 136, 139-140[9] and similar decisions, that held that summary judgment could be denied based on the mere possibility that the trier of fact could disbelieve otherwise uncontradicted evidence propounded by the party moving for summary judgment. This change in summary judgment law conformed to a parallel rule applicable to motions for directed verdict. (*Blank v. Coffin* (1942) 20 Cal.2d 457, 461.)

Thus, summary judgment could not be denied solely on the chance that the trier of fact could disbelieve Cheryl and Patricia.

3. The Court's Order Granting Summary Judgment Complied with Code of Civil Procedure Section 437c, Subdivision (g).

Subdivision (g) of Code of Civil Procedure section 437c provides in relevant part: "Upon the grant of a motion for summary judgment, on the ground that there is no triable issue of material fact, the court shall, by written or oral order, specify the reasons for its determination. The order shall specifically refer to the evidence proffered in support of, and if applicable in opposition to, the motion which indicates that no triable issue exists."

Appellant contends that the trial court did not comply with the foregoing provision.

In relevant part, the trial court's order states that the motion for summary judgment is granted "because there does not exist triable issues of material fact as to whether Cheryl . . . gave permission to . . . Burr to drive the rented Nissan Altima." The order then refers to Cheryl's and Patricia's depositions and to appellant's declaration.

The court's order complied with subdivision (g) of Code of Civil Procedure section 437c in that it gave the reason for the order, i.e., that there was no triable issue of fact whether Cheryl gave permission. The court's order also refers to the evidence, although it

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9 This amendment to Code of Civil Procedure section 437c was enacted by Statutes 1973, chapter 366, section 2, pages 807-808.

appears that the reference to appellant's, rather than Burr's, declaration may be in error. This minor error, if it was error, is of no moment as the court's order complies with an important part of the rule, which is to give the reason for the order.

In any event, because we affirm the judgment on grounds other than that set forth in the trial court's order, any error in the trial court's order was not prejudicial.

4. Independently from the Foregoing, Appellant Has Not Made Out a Case Against Patricia

Appellant's case against Patricia is that in the past she has made her cars available for Burr's use, even though she knew that he was an alcoholic and drove while intoxicated.

This simply does not amount to a legally cognizable claim. Patricia's past conduct with other vehicles is not material. The point is that Patricia had no connection with the Nissan -- she did not rent or own it; there isn't any evidence that she even knew about it.

For simplicity's sake, our analysis of the causation issue made no distinction between Cheryl and Patricia. In fact, there is a substantial distinction. Aside from generalities about the past, appellant has not pointed to any fact or facts that connect Patricia to the Nissan. Thus, appellant has not made out a case against Patricia under any theory or theories.

DISPOSITION

The judgment is affirmed. Respondents are to recover their costs on appeal.

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FLIER, J.

We concur:

COOPER, P. J.

RUBIN, J.