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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

MARIA DE LA PAZ PULIDO et al., Plaintiffs and Appellants, v. TRIAD PROPERTY MANAGEMENT et al., Defendants and Respondents.	B169088 (Los Angeles County Super. Ct. No. BC271857)

APPEAL from a judgment of the Superior Court of Los Angeles County, William F. Highberger, Judge. Affirmed.

Law Offices of Eric Bryan Seuthe & Associates and Eric Bryan Seuthe for Plaintiffs and Appellants.

Cooper, Phillips & Peterson, Brand L. Cooper and Robert M. Bruning for Defendants and Respondents Triad Property Management, Jack White and Janice Campagnolo.

INTRODUCTION

Plaintiffs appeal from a judgment for defendants in plaintiffs' wrongful death suit against the owners and manager of an apartment building on whose premises a criminal assailant killed plaintiffs' husband and father. Plaintiffs rely on evidence that defendants failed to provide security, fencing, lighting, and repairs, failed to hire, train, and supervise on-site managers to prevent crime on defendants' property, and failed to exclude vagrants, vandals, transients, gang members, and criminals from the premises. Because the identity of the decedent's assailant is unknown, plaintiffs' evidence is speculative as to causation and does not provide substantial evidence that defendants' omissions caused the decedent's death. We affirm the grant of summary judgment for defendants.

PROCEDURAL HISTORY

Plaintiffs are Maria de la Paz Pulido, Israel Pulido, Maricruz Pulido, and Reyna Belen Pulido, the surviving spouse and children of Jose Armando Pulido, whom an unidentified criminal assailant killed on premises owned and managed by defendants. The operative complaint alleged a wrongful death cause of action defendants Triad Property Management, Jack R. White, and Janice Campagnolo, alleging that defendants negligently maintained their property in a dangerous condition.[1]

Defendants filed a motion for summary judgment motion. Plaintiffs filed opposition.

The trial court granted summary judgment for defendants and entered judgment on July 15, 2003. Plaintiffs filed a timely notice of appeal.

FACTS

Triad Property Management, Jack R. White, and Janice Campagnolo own and manage an apartment building at 527 North Coronado Street in Los Angeles. The 16-unit

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[1] The complaint alleged a second cause of action against the City of Los Angeles and the California Department of Transportation. This appeal does not involve the second cause of action or the defendants named therein.

apartment building was located next to the Hollywood Freeway between Alvarado Street and Rampart Boulevard. The complaint alleged that defendants owned and operated this property in a negligent and reckless manner, which allowed criminal assailants to enter the property on August 22, 2001, and to attack and murder decedent Jose Pulido, who died of gunshot wounds.

Defendants relied on a declaration by Sharon Schiff, employed by Triad Property Management from September 1999 to June 2002 as an offsite property supervisor of the 527 North Coronado apartment. Schiff stated she hired Fitzgerald and Caron Boggess as on-site property managers shortly after taking over supervision of the 527 North Coronado property. No known gang members lived in the building. Some criminal activity occurred on the premises, including domestic violence, two car break-ins or attempted break-ins, and vandalizing Fitzgerald Boggess's automobile on two occasions. Schiff described "general criminal gang activity" in the vicinity, but except for Pulido's murder, no criminal assaults occurred at 527 North Coronado by intruders or gang members. Pulido's assailant was unknown.

Plaintiffs cited Schiff's deposition testimony to dispute statements in her declaration about criminal activity before Pulido's murder. Schiff testified she knew someone tried to break into the apartment of the manager who preceded the Boggesses and knew of three or four car break-ins. Fitzgerald Boggess told Schiff the police were called about a domestic dispute in a downstairs apartment unit, and reported four or five car break-ins, one of which was Boggess's car. Schiff thought the police were called to 527 North Coronado two or three times between August 2000 and August 2001, for car break-ins. Schiff knew of no drug sales on the 527 North Coronado property before August 2001. Schiff testified she was not trained to prevent criminal assaults on tenants of property she managed. She knew of no tenants being battered or assaulted. Fitzgerald Boggess was beaten and his leather jacket stolen, But Schiff could not remember the date that occurred. Boggess had reported to Schiff that vagrants or homeless people gained access to the street by jumping a short fence on the freeway side of the 527 North

Coronado property. Schiff testified that no tenants complained to her about their safety, but she agreed that it was not a safe neighborhood.

Schiff testified that before Pulido's murder, she asked Mrs. White about having the 527 North Coronado property gated, but Mrs. White was not interested. After Pulido's murder, Schiff retained security for the property as a calming measure for the residents. After Pulido's killing, Fitzgerald Boggess told Schiff word was given to him that he was next. Schiff told him to call the police.

Schiff testified that when she hired Boggess as apartment manager, she had no knowledge of his background regarding preventing criminal conduct on properties he managed, and gave him no training on this subject.

Schiff's declaration stated that besides hiring the Boggesses as on-site manager, she upgraded the 527 North Coronado premises by improving outside lighting and installing a five-foot high wooden privacy fence on the northern perimeter. Chain link or wrought-iron fencing enclosed the rest of the property. Between the southern perimeter of the 527 North Coronado property and a vacant lot maintained by the California Department of Transportation, the State of California built a five-foot chain link fence, which Schiff described as "not intended nor designed to attempt to keep out a criminal who had the mind set to enter on to the Coronado Apartments premises." Schiff's declaration admitted that fences at the 527 North Coronado Apartment would be only a "slight deterrent" for a criminal determined to enter onto such a residential apartment property.

Plaintiffs disputed Schiff's statements about providing and upgrading security at 527 North Coronado. Schiff talked to the owner about fencing the southern, freeway side of the property, because people climbed over and damaged the existing fence. The owner, Mrs. Jack White, did not want to replace the fence, and did not say why.

Plaintiffs also cited the termination of Fitzgerald Boggess as manager of the 527 North Coronado apartment after Pulido's killing. Patrick K. Prinster terminated Boggess because he did not collect rent on time, pick up around the building, or notify property

management of maintenance issues or problems with tenants. Prinster did not testify that he terminated Boggess because Boggess provided defective security.

In early 2002, after Pulido's August 2001 killing, Prinster discussed upgrading the property with Jack White, to participate in the positive change in the neighborhood, which was "in transition." White authorized lighting improvements and repairs on some units. Prinster wanted to install vandal-proof or less easily vandalized lighting. Although tenants had not made specific complaints, Fitzgerald Boggess had communicated that lighting was an issue.

Plaintiffs cited Schiff's testimony that Fitzgerald Boggess told her decedent Pulido was "very confrontational to people on the property that he felt didn't belong there, whoever they were, gang members, non-gang members." Schiff's opinion was that Pulido probably said the wrong thing to the wrong person.

Plaintiffs cited a Los Angeles Police Department record of police activity at the 527 North Coronado apartment.

Plaintiffs also cited declarations by plaintiff Maria de la Paz Pulido and Rosa Maria Castro (a tenant) about 527 North Coronado. These declarations stated that the apartment building was in a depressed neighborhood. The deteriorated, dilapidated fence separating the apartment building from the Hollywood Freeway did not keep trespassers off the premises. Vagrants and homeless persons trespassed by cutting through or jumping over the fence, and slept or hung out in the building parking area. Although Castro and decedent Pulido requested the building's property managers take action against the homeless and trespassing problem and build a new or higher fence, no action was taken. Trespassing outsiders, gang members or vagrants vandalized the apartment building and broke exterior light bulbs, making the exterior dark at night and causing the declarants to be fearful of walking outside at night. Before Pulido's murder, the on-site manager advised them that the bulbs were not replaced because the owners refused to reimburse the manager. Castro and decedent Pulido requested security gates and controlled access, and told the managers they were fearful for their safety. Management

took no action, and the on-site manager advised declarants that the owners did not want to spend money even though they knew of safety issues and trespassers. Castro and decedent Pulido told the on-site manager that crimes occurred on the 527 North Coronado property, including stolen vehicles, battery, vandalism, and lewd conduct, but the owners took no action. Castro and decedent Pulido advised outside property manager Schiff of these problems, but Schiff advised them the owners were not willing to spend money for security improvements.

After the Boggesses became on-site managers in March 2000, non-residents parked in tenants' spaces, creating severe parking problems. Mr. Boggess ignored complaints from Castro and decedent Pulido, so they reported problems to Schiff, who referred them to the on-site manager. Castro and de la Paz Pulido stated that before decedent Pulido's murder, Boggess invited outsiders onto the premises, who smoked marijuana in the courtyard area; Boggess sold marijuana from his apartment to people off the street and smoked marijuana with other tenants. Boggess ignored their request not to smoke or sell marijuana. When they reported Boggess's activities, Schiff told them to mind their own business.

Castro's declaration stated that she repeatedly asked Schiff if she had conducted a background check on Boggess, and Schiff always replied that she had not done it yet but would take care of it. Before Pulido's murder, Castro stated she repeatedly saw Boggess sell weapons or firearms from his apartment to outsiders. When she reported this activity to Schiff, she told Castro to mind her own business. Neither Schiff nor the building owner took action to terminate Boggess or evict him. Before Pulido's murder, no action was taken to upgrade lighting, rid the building of vagrants and homeless persons sleeping on the premises, or to install a controlled access security gate or a sufficient fence around the building. Schiff and the building owners failed to make repairs to the apartment building, and the physical condition of the premises deteriorated before Pulido's murder.

The opposition to the summary judgment motion also relied on expert testimony by Robert Feliciano about measures to increase security at the 527 North Coronado

apartment and why defendants' failure to take such measures increased the likelihood that a crime such as the one which killed decedent Pulido would occur.

ISSUES

The primary issue on appeal is whether plaintiffs' evidence created a triable issue of fact on the issue of causation.

DISCUSSION

To prevail in a negligence action, plaintiffs must show that defendants owed them a legal duty, that they breached that duty, and that the breach was a proximate or legal cause of their injuries. (*Merrill v. Navegar, Inc*. (2001) 26 Cal.4th 465, 477.) In an appeal from summary judgment in favor of defendants, this court reviews "the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports." (*Id*. at p. 476.) In the trial court, when a moving defendant shows that plaintiff cannot establish one or more elements of a cause of action, the burden shifts to the plaintiff to show that a triable issue exists. (*Ibid*.)

Plaintiffs incorrectly argue that a defendant must present evidence, rather than merely argue, that plaintiffs cannot produce and cannot reasonably obtain evidence proving a necessary element of their cause of action. " 'Under the current version of the summary judgment statute, a moving defendant need not support his motion with affirmative evidence negating an essential element of the responding party's case. Instead, the moving defendant may . . . point to the absence of evidence to support the plaintiff's case. When that is done, the burden shifts to the plaintiff to present evidence showing there is a triable issue of material fact. If the plaintiff is unable to meet her burden of proof regarding an essential element of her case, all other facts are rendered immaterial. [Citations.]' " (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 780-781 (italics omitted), quoting *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 482.)

Defendants' summary judgment motion argued that defendants owed no duty to plaintiffs regarding the violent criminal homicide of decedent Pulido, and even assuming they owed that duty, there was no proof of and no triable issue of fact regarding a causal connection between defendants' breach of their duty and plaintiffs' injuries arising from an unknown assailant's murder of decedent Pulido. The trial court granted summary judgment on both grounds. The issue of proximate causation is dispositive of this appeal.

Plaintiffs purport to provide evidence of a series of steps which they allege defendants should have taken to improve security, provide background checks for and greater supervision of the on-site manager or terminate the on-site manager, prevent gang activity on the property and in the neighborhood, upgrade and repair fencing, lighting, and other property defects, solve parking problems, and rid the property of outsiders. Because the identity of decedent Pulido's murderer is unknown, however, it is not possible to say whether taking any of these steps would have prevented the crime against Pulido. (*Leslie G. v. Perry & Associates, supra*, 43 Cal.App.4th at pp. 483-484.) "In short, there simply is no evidence from which to infer causation." (*Id*. at p. 484.)

Proof of causation may be direct or circumstantial evidence, but that evidence must be "substantial" and cannot be left to the realm of speculation or conjecture. (*Leslie G. v. Perry & Associates, supra*, 43 Cal.App.4th at p. 484.) Plaintiffs provide no evidence that is "substantial" regarding causation; their evidence raises only the mere possibility of a causal connection between the defendants' omissions regarding the condition of their property and the killing of Pulido. This " 'mere possibility of a causal connection' " cannot provide a basis for a factual inference of causation. (*Id*. at p. 486; see also *Saelzler v. Advanced Group 400, supra*, 25 Cal.4th at p. 774.)

Plaintiffs urge a "common sense causation" theory, based on their expert witness's testimony that if defendants had adopted security measures at the 527 North Coronado property, common sense would allow a trier of fact to find that those reasonable security measures would reduce the probability of crime at this location. Our Supreme Court, however, has rejected "common sense causation:" "to demonstrate actual or legal

causation, the plaintiff must show that the defendant's act or omission was a 'substantial factor' in bringing about the injury. [Citations.] In other words, plaintiff must show some substantial link or nexus between omission and injury. Under the Court of Appeal's 'common sense' rule, the defendants' omission itself would constitute the missing link." (*Saelzler v. Advanced Group 400, supra*, 25 Cal.4th 763, 778.)

Plaintiffs expert witness, Robert Feliciano, described defendants' omissions regarding the 527 North Coronado property: insufficient; poor lighting; vandalizing of the property; vagrants and transients sleeping and hanging around the parking garage; lack of controlled access or security gates; non-residents parking in tenants' spaces; sales of narcotics and weapons by the on-site manager; numerous prior violent crimes; location in an economically and socially depressed neighborhood; no training of managers to prevent criminal assaults; and the lack of a security guard to patrol the building. Feliciano's declaration concluded that defendants' omissions were a substantial factor in causing the murder of Pulido, and that if defendants had undertaken these measures, the murder would not have taken place.

Expert testimony can create a triable issue of fact as to causation " 'only if it establishes a reasonably probable causal connection between an act and a present injury.' " (*Leslie G., v. Perry & Associates, supra*, 43 Cal.App.4th at p. 487 (italics omitted), quoting *Jones v. Ortho Pharmaceutical Corp*. (1985) 163 Cal.App.3d 396, 403.) This expert cannot provide evidence that a security guard, managers trained to prevent crime, better fencing, controlled access, security gates, better lighting, or lack of vandalization would have kept Pulido's killer out of the property or would have prevented the killing. Because the killer's identity is unknown, there is no evidence that a vagrant or transient in the parking garage, a non-resident who parked in a tenant's parking space, or a narcotics or weapons customer of the on-site manager killed Pulido. The existence of prior violent crimes and the location of 527 North Coronado in an economically and socially depressed neighborhood likewise do not provide the required proximate causation of Pulido's killing. The expert testimony does not prove it was

" 'more probable than not' " that the improvements to tenant security and building management would have prevented the attack. (*Saelzler v. Advanced Group 400, supra*, 25 Cal.4th at p. 776.) Despite providing no evidence of defendants' ability to do so, expert witness Feliciano assumes defendants had the power to control gangs in the area, to prevent violent crimes, and to revive an economically depressed neighborhood. Besides imposing an unrealistic financial burden on the owner of a 16-unit apartment building (and consequently on its tenants), this assumption makes a landowner who fails to remedy these problems the insurer of the absolute safety of everyone on the property. (*Id*. at p. 777.)

Plaintiffs also argue that Feliciano provided expert testimony concerning factors that influence human behavior, which resemble topics the courts have found proper subjects for expert testimony. Neither case cited to support this proposition involves a claim of negligence because of a property owner's failure to provide security. *People v. Gardeley* (1996) 14 Cal.4th 605 held that expert testimony could provide a basis for a jury finding that the Family Crip gang was a "criminal street gang" pursuant to Penal Code section 186.22. (14 Cal.4th at p. 620.) *People v. Valdez* (1997) 58 Cal.App.4th 494 held that expert testimony was admissible on whether individuals who committed crimes acted for the benefit of a street gang on the issue of a jury's determination whether the prosecution proved a street gang enhancement allegation. (*Id*. at pp. 508-509.) These issues are not present in this appeal and have no relevance to it.

We conclude that plaintiffs' evidence has not created a triable issue of fact as to causation, and therefore the trial court correctly granted summary judgment in favor of defendants. We affirm that order.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to defendants Triad Property Management, Jack R. White, and Janice Campagnolo.

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KITCHING, J.

We concur:

CROSKEY, Acting P.J.

ALDRICH, J.