Botwinis v. Fleming **Case No. CU0000657**

Tentative Ruling

Defendants' Coldwell Banker Real Estate, LLC; NRT West Inc.; Alan Nicholls; Kirstin Wilson; and Pilar Zolezzi Rioja ("CB Defendants") motion for summary adjudication as to the claim for punitive damages and the cause of action for intentional tort (battery) against the CB Defendants is denied.

Legal Standard

Code of Civil Procedure 437c(f)(1) provides, "A party may move for summary adjudication as to one or more causes of action within an action." Such "[a] motion for summary adjudication shall be granted only if it completely disposes of a cause of action…." Code Civ. Proc. §437c(f)(1). The function of a motion for summary judgment or adjudication is to allow a determination as to whether an opposing party cannot show evidentiary support for a pleading or claim and to enable an order of summary dismissal without the need for trial. *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843). In analyzing such motions, courts must apply a three-step analysis: "(1) identify the issues framed by the pleadings; (2) determine whether the moving party has negated the opponent's claims; and (3) determine whether the opposition has demonstrated the existence of a triable, material factual issue." *Hinesley v. Oakshade Town Center* (2005) 135 Cal.App.4th 289, 294. Thus, summary judgment or summary adjudication is granted when, after the court's consideration of the evidence set forth in the papers and all reasonable inferences accordingly, no triable issues of fact exist and the moving party is entitled to judgment as a matter of law. Code Civ. Proc. § 437c(c); *Villa v. McFarren* (1995) 35 Cal.App.4th 733, 741.

A defendant moving for summary judgment has the initial burden of showing that a cause of action lacks merit because one or more elements of the cause of action cannot be established or there is an affirmative defense to that cause of action. Code Civ. Proc. § 437c, subd. (o)(1), (2); *Aguilar*, 25 Cal. 4th at 850. As to each claim as framed by the complaint, the party moving for summary judgment or summary adjudication must satisfy the initial burden of proof by presenting facts to negate an essential element. *Scalf v. D. B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510, 1520. Once the moving party has met the burden, the burden shifts to the opposing party to show, via specific facts, that a triable issue of material facts exists as to a cause of action or a defense thereto. Code Civ. Proc. § 437c(o)(2). When a party cannot establish an essential element or defense, a court must grant a motion for summary adjudication. Code Civ. Proc. § 437c(o)(1)-(2).

In determining whether any triable issues of material fact exist, the court must strictly construe the moving papers and liberally construe the declarations of the party opposing summary judgment. Any doubts as to whether a triable issue of material fact exists are to be resolved in favor of the party opposing summary judgment. *Barber v. Marina Sailing, Inc.* (1995) 36 Cal.App.4th 558, 562; see also *See's Candy Shops, Inc. v. Superior Court* (2012) 210 Cal.App.4th 889, 900 ("Summary adjudication is a drastic remedy and any

doubts about the propriety of summary adjudication must be resolved in favor of the party opposing the motion.").

Negligence – Premises Liability

Defendants move for summary adjudication as to the prayer for punitive damages. Defendants argue: (1) the CB Defendants were retained by the property owner to list the property for sale and assist in selling the premises, SSUMF #2; (2) none of the CB Defendants created or placed the bear mat at the front entrance to the premises, SSUMF ##3, 5-7; (3) the owners of the premises created the bear mat and installed it in front of the premises front door prior to the incident at issue, SSUMF #9; (4) on April 6, 2021, Ms. Wilson asked Ms. Rioja to contact Plaintiff to clean the carpets but, despite knowledge of the bear mat's existence and placement, did not advise Ms. Rioja about the bear mat located at the premises, SSUMF # 10; (5) Ms. Rioja emailed Plaintiff to go to the premises to clean the carpets and did not mention the bear mat, SSUMF # 12.

The basic elements of a cause of action for negligence and for premises liability are the same: (1) the existence of a legal duty; (2) breach of that duty; (3) causation; and (4) resulting damages. *Brown v. USA Taekwondo* (2021) 11 Cal.5th 204, 213; *Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1158; *Romero v. Los Angeles Rams* (2023) 91 Cal.App.5th 562, 567; *Castellon v. U.S. Bancorp* (2013) 220 Cal.App.4th 994, 998.

"Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself." Civ. Code, § 1714(a). This establishes what the California Supreme Court has described as the "default rule" that every person has a legal duty "to exercise, in his or her activities, reasonable care for the safety of others." *Brown, supra,* 11 Cal.5th at 214. Those who own, possess, or control property generally have a duty to exercise ordinary care in managing the property to avoid exposing others to an unreasonable risk of harm. *Annocki v. Peterson Enterprises, LLC* (2014) 232 Cal.App.4th 32, 37.

Gross Negligence

Gross negligence is not a tort separate from ordinary negligence. A cause of action for negligence in a pleading is sufficient to cover claims for either ordinary negligence, gross negligence, or both. Gross negligence falls short of a reckless disregard of consequences and differs from ordinary negligence only in degree, and not in kind. *Gore v. Board of Medical Quality Assurance* (1980) 110 Cal.App.3d 184,197. Mere nonfeasance, such as the failure to discover a dangerous condition or to perform a duty amounts to ordinary negligence. *Frittelli, supra,* 202 Cal.App.4th at p. 48. Gross negligence, in contrast to ordinary negligence, is defined as either "want of even scant care or an extreme departure from the ordinary standard of conduct." *City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 753–754. "Gross negligence connotes such a lack of care as may be presumed to indicate a passive and indifferent attitude

toward results ...." *Chavez v. 24 Hour Fitness USA, Inc.* (2015) 238 Cal.App.4th 632, 640.) **Gross negligence is generally a question of fact**. *Ibid*.

Duty of Care

"Foreseeability of harm is typically absent when a dangerous condition is open and obvious. 'Generally, if a danger is so obvious that a person could reasonably be expected to see it, the condition itself serves as a warning, and the landowner is under no further duty to remedy or warn of the condition.' In that situation, owners and possessors of land are entitled to assume others will 'perceive the obvious' and take action to avoid the dangerous condition." *Jacobs v. Coldwell Banker Residential Brokerage Co.* (2017) 14 Cal.App.5th 438, 447 (citations omitted.)

Nevertheless, "[t]here may be a duty of care owed even where a dangerous condition is open and obvious, when 'it is foreseeable that the danger may cause injury despite the fact that it is obvious (*e.g.*, when necessity requires persons to encounter it).' In other words, 'the obviousness of the condition and its dangerousness … will not negate a duty of care when it is foreseeable that, *because of necessity or other circumstances, a person may choose to encounter the condition*.' " *Montes v. Young Men's Christian Assn. of Glendale, California* (2022) 81 Cal.App.5th 1134, 1140 (citations omitted, emphasis in original); *see Johnson v. The Raytheon Co., Inc.* (2019) 33 Cal.App.5th 617, 632 ("there may be situations in which an obvious hazard, for which no warning is necessary, nonetheless gives rise to a duty on a landowner's part to remedy the hazard because knowledge of the hazard is inadequate to prevent injury. This is so when, for example, the practical necessity of encountering the danger, when weighed against the apparent risk involved, is such that, under the circumstances, a person might choose to encounter the danger."); *Osborn v. Mission Ready Mix* (1990) 224 Cal.App.3d 104, 122 ("[A]lthough the obviousness of a danger may obviate the duty to *warn* of its existence, if it is *foreseeable* that the danger may cause injury despite the fact that it is obvious (for example, when necessity requires persons to encounter it), there may be a duty to *remedy* the danger, and the breach of that duty may in turn form the basis for liability, if the breach of duty was a proximate cause of any injury.").

Judicial Council of California Civil Jury Instruction (CACI) No. 1004 tracks this well-established law related to the no-duty exception for open and obvious conditions of danger. It explains:

> If an unsafe condition of the property is so obvious that a person could reasonably be expected to observe it, then the [owner/lessor/occupier/one who controls the property] does not have to warn others about the dangerous condition.
>
> However, the [owner/lessor/occupier/one who controls the property] still must use reasonable care to protect against the risk of harm if it is foreseeable that the condition may cause injury to someone who because of necessity encounters the condition.

CACI 1004.

At bar, Defendants seem to argue any failure to warn Plaintiff about the bear mat does not rise to the level of gross negligence warranting punitive damages. Defendants assert Plaintiff has failed to establish by clear and convincing evidence any malice, oppression, or fraud on the part of the CB Defendants. The Court cannot conclude Defendants met their initial burden of showing no duty to warn Plaintiff of the hazard and/or no duty to remedy the hazardous condition. As the moving party, Defendants had to establish by evidence supported by argument it was *not foreseeable* the bear mat in front of the front door to a premises may cause injury to someone who was instructed to enter the premises to clean the carpets. Defendants' moving papers assert "Ms. Wilson simply did not advise Ms. Rioja of the bear mat because it was clearly visible and did not impede her ability to enter the Premises." Mot., 9:22-23. However, such statement is not asserted as an undisputed material fact with supporting evidence, so Defendant has not met its burden to establish by evidence it was not foreseeable the bear mat may cause injury to a person instructed to enter the premises.[1]

Malice

Defendants next argue any underlying negligence is ordinary negligence, and Plaintiff cannot establish malice by clear and convincing evidence as a matter of law.

Malice means conduct which is intended by the defendant to cause injury to the plaintiff *or* despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others. Code Civ. Proc. § 3294(c)(1). Under the statute, malice does not require actual intent to harm. *Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1299. Therefore, an allegation that a defendant intended to injure a plaintiff or acted in conscious disregard of her safety will suffice. *G.D. Searle & Co. v. Superior Court* (1975) 49 Cal.App.3d 22, 32-33. Conscious disregard for the safety of another may be sufficient where the defendant is aware of the probable dangerous consequences of her conduct, and she willfully fails to avoid such consequences. *Pfeifer*, 220 Cal.App.4th at 1299. Malice may be proved either expressly through direct evidence or by implication through indirect evidence from which the jury draws inferences. *Id*.

[1] "Code of Civil Procedure section 437c(b)(1), requires each motion for summary judgment to be accompanied by a separate statement " 'setting forth plainly and concisely all *material facts* that the moving party contends are undisputed. Each of the material facts stated shall be followed by a reference to the supporting evidence.' " California Rules of Court, rule 3.1350(d)(2)4 states: " 'The separate statement should include only material facts and not any facts that are not pertinent to the disposition of the motion.' " Under the Rules of Court, " ' "Material facts' " are facts that relate to the cause of action, claim for damages, issue of duty, or affirmative defense that is the subject of the motion and that could make a difference in the disposition of the motion.' " Rule 3.1350(a)(2). *Beltran v. Hard Rock Hotel Licensing, Inc.* (2023) 97 Cal.App.5th 865, 850-851.

"The point of the separate statement is not to craft a narrative, but to be a concise list of the material facts and the evidence that supports them. " 'The separate statement serves two important functions in a summary judgment proceeding: It notifies the parties which material facts are at issue, and it provides a convenient and expeditious vehicle permitting the trial court to hone in on the truly disputed facts.' " [Citation.]" *Ibid*.

At bar, Defendants argue there is not clear and convincing evidence they were aware of the probable dangerous consequences of their failure to warn of the bear mat, and willfully failed to avoid such consequences. Again, the Court cannot conclude Defendants met their initial burden of showing no evidence of conduct carried on by Defendants with a willful and conscious disregard of the rights or safety of others. Defendants' Separate Statement of Undisputed Material Facts only asserts Plaintiff stepped on a bear mat constructed and installed by the owners of the property in front of the front door of the premises, Ms. Wilson asked Ms. Rioja to contact Plaintiff to clean the carpets but did not advise Ms. Rioja about the bear mat. SSUMF ## 1, 10. As the moving party, Defendants had to establish by evidence supported by argument such failure to warn to avoid Plaintiff's injury was not done with a willful and conscious disregard of the safety of Plaintiff. These statements coupled with a statement Ms. Wilson's failure to warn was not intentional are insufficient. Therefore, the burden does not shift to Plaintiff to make a prima facie showing a triable issue of fact exists as to the issue of punitive damages.

In sum, Defendants failed to meet their initial burden, and therefore summary adjudication as to the prayer for punitive damages are not warranted.

Intentional Tort (Battery)

"The essential elements of a cause of action for battery are: (1) defendant touched plaintiff, or caused plaintiff to be touched, with the intent to harm or offend plaintiff; (2) plaintiff did not consent to the touching; (3) plaintiff was harmed or offended by defendant's conduct; and (4) a reasonable person in plaintiff's position would have been offended by the touching." *So v. Shin* (2013) 212 Cal.App.4th 652, 669. "The crimes of assault and battery are intentional torts. In the perpetration of such crimes negligence is not involved." *Bartosh v. Banning* (1967) 251 Cal.App.2d 378, 385. "[Force against the person is enough; it need not be violent or severe." *People v. Mansfield* (1988) 200 Cal.App.3d 82, 88 (internal quotations and citations omitted). Moreover, "the tort of battery generally is not limited to direct body-to-body contact….[C]ontact with another's person…does not require that one should bring any party of his own body in contact with another's person." *Mount Vernon Fire Ins. Co. v. Busby* (2013) 219 Cal.App.4th 876, 881 (internal quotations and citations omitted).

In support of summary adjudication, Defendants argue Plaintiff cannot produce any admissible evidence the CB Defendants intentionally caused Plaintiff to be touched or harmed.

> As a general rule, California law recognizes that '. . . every person is presumed to intend the natural and probable consequences of his acts.' Thus, a person who acts willfully may be said to intend ' " 'those consequences which (a) represent the very purpose for which an act is done (regardless of the likelihood of occurrence), or (b) are known to be

> substantially certain to result (regardless of desire).' " ' The same definition is applied to many intentional torts.

Gomez v. Acquistapace (1996) 50 Cal.App.4th 740, 746.

"In an action for civil battery the element of intent is satisfied if the evidence shows defendant acted with a 'willful disregard' of the plaintiff's rights." *Ashcraft v. King* (1991) 228 Cal.App.3d 604, 613 (internal citation omitted).

As discussed above, as the moving party, Defendants had to establish by evidence supported by argument Defendants' failure to take any action to prevent harm to Plaintiff by the bear mat was not done with a willful and conscious disregard of the safety of Plaintiff. Because Defendants did not meet their threshold burden on this issue, the burden does not shift to Plaintiff to make a prima facie showing a triable issue of fact exists. Therefore, on this record, Defendants are not entitled to summary adjudication as a matter of law.

Conclusion

Defendants' motion for summary adjudication is denied in its entirety. Given the disposition herein, the Court need not address the various objections and statements of undisputed facts interposed by the parties.

In light of the late posting of this tentative ruling, parties shall have until 4:45pm to notice an objection and intent to appear.