CASENOTE

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Filed 12/8/11 Yang v. Pacific Castle Colima CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

SUMMARY JUDGMENT IN FAVOR OF SHOPPING CENTER WHEN VEHICLE JUMPS THE CURB AND STRIKES PEDESTRIAN REVERSED. CONFLICTING OPINIONS FROM EXPERTS AND TWO PRIOR INSTANCES OF CARS JUMPING WAS BASIS FOR REVERSING ORDER GRANTING MSJ. FURTHER, TRIABLE ISSUE OF FACT AS TO SUFFICIENCY OF CURB HEIGHT AND COMPLIANCE WITH BUILDING CODE DOES NOT ESTABLISH ABSENCE OF NEGLIGENCE

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

SHUWEN YANG, Plaintiff and Appellant, v. PACIFIC CASTLE COLIMA, LP, et al., Defendants and Respondents.	B227555 (Los Angeles County Super. Ct. No. KC055146)

APPEAL from a judgment of the Los Angeles Superior Court. Peter J. Meeka, Judge. Reversed.

Law Offices of Telleria, Telleria & Levy and Anthony F. Telleria for Plaintiff and Appellant.

Murchison & Cumming, Edmund G. Farrell III; Bragg & Kuluva and Lori D. Serota for Defendants and Respondents.

Appellant Shuwen Yang was severely injured when a car jumped the curb separating the parking lot from a pedestrian walkway in front of a store in the defendants' shopping center. His appeal challenges the summary judgment entered in favor of the defendants, based on the trial court's ruling that he would be unable to establish breach of the defendants' duty of care and foreseeability of his injury, essential elements of his cause of action. The determinative issue here is whether triable issues of fact remain as to these issues. Because we conclude that they do, the resulting judgment must be reversed.

[1]

Facts

The defendants (collectively "Pacific Castle") owned and operated a shopping center on Azusa Avenue in Hacienda Heights. A market in the shopping center had along its front a row of newspaper vending racks and a pedestrian walkway, faced by automobile parking spaces perpendicular to the storefront and separated from the parking lot by a curb.

On March 13, 2008, Yang, an employee of the market, was sitting during his lunch break on a step next to the newspaper racks when a car jumped the curb from a parking space, crossed the walkway, and hit the storefront wall. Yang suffered catastrophic injuries in the process.

On March 9, 2009, Yang filed a complaint seeking damages from Pacific Castle based on theories of negligence and premises liability. Yang alleged he was injured because "defendants did not have proper barriers in the parking lot to prevent automobiles from going up on pedestrian areas," and that "if a person hit the gas instead of the brake in coming to a stop in parking there was very little obstruction to their going up into the buildings."

Pacific Castle eventually moved for summary judgment, presenting evidence in the form of an expert declaration that the parking lot had a 5-1/2 inch curb fronting the sidewalk, that section 1129B.3(3) of the California Building Code requires that in commercial parking lots "a bumper or curb shall be provided and located to prevent encroachment of cars over the required width of walkways," and that the curb in Pacific Castle's parking lot complied with that code provision. That evidence, Pacific Castle argued, precluded a determination that Pacific Castle had notice that the curb's size and placement created an unreasonably dangerous condition, and thus that it failed to satisfy Pacific Castle's duty of care to Yang.

Yang's expert's responsive declaration opined that the 5-1/2 inch curb did not comply with the code requirements of a curb or other barrier to prevent cars from encroaching on the walkway, in light of two previous incidents in which cars had jumped the parking lot curb, which

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[1] We view the appellate record in light of the de novo standard of review for summary judgments, construing the moving party's evidence strictly and the opposing party's evidence liberally (*Stationers Corp.* v. *Dun Bradstreet* (1965) 62 Cal.2d 412, 417), and resolving any doubts in favor of the party opposing the motion. (§ 437c; *Molko v. Holy Spirit Assn*. (1988) 46 Cal.3d 1092, 1107.)

provided Pacific Castle with notice that the existing curb was not adequate to accomplish the code provision's purpose.[2]

The trial court granted summary judgment, concluding that Yang "cannot establish that Plaintiff's injuries were occasioned by Defendants' want of ordinary care or skill in the management of their property, nor that Plaintiff's injury was foreseeable." The court held that the existence of a clearly visible 5-1/2 inch curb separating the walkway from the parking lot, undisputed by Yang, and evidence that the curb complied with the applicable building code, precluded Yang from establishing that his injuries resulted from a want of ordinary care or skill by Pacific Castle in the management of its shopping center. Nor could the undisputed evidence of the two previous curb-jump accidents in the parking lot establish that Pacific Castle had notice that the curb was inadequate or that the accident in this case was foreseeable, the trial court held,

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[2] On April 4, 2011, Yang's counsel moved in this court to augment the record on appeal "to include pleadings in the case that were not included in the Clerk's Transcript," attaching unindexed documents comprising some hundreds of (unnumbered) pages, consisting of the parties' respective statements of undisputed facts, accompanying exhibits, and Pacific Castle's objections to Yang's evidence. We granted that unopposed motion.

For some unexplained reason, that augmented record did not include the declaration of Yang's expert, John K. Tyson, filed in opposition to summary judgment. Yang's counsel apparently discovered that omission while preparing his brief, because on May 11, 2011—the day before filing the opening brief—he again moved to augment the record, this time to include (without further identification) "pleadings in the case that were not included in the Clerk's Transcript or in Appellant's first motion." The only attached document was the declaration of Yang's expert, John K. Tyson. This motion, too, was unopposed by Pacific Castle, and was granted by this court.

Despite the May 11 augmentation, however, the opening brief's citations to the Tyson declaration referenced only "Exhibit to May 9, 2011 Motion," without identification of where in the record it might be found. In its respondent's brief Pacific Castle contended that the declaration appeared nowhere in the appellate record. Yang's reply brief left the mistake uncorrected, never mentioning the declaration or the record augmentation that had added it to the appellate record.

At oral argument, this Court therefore wrongly believed (as apparently did Pacific Castle) that the Tyson declaration was not part of the record on appeal. Despite the Court's inquiry about the omission, however, Yang's counsel (inexplicably) did not mention the record's augmentation that had added the declaration to the record on appeal. We have since (on our own initiative) nevertheless located the Tyson declaration in the record.

because the evidence did not show exactly where or under what conditions those accidents had occurred.[3]

The engineering experts' conflicting declarations created no triable issue of fact, the court also held, because "neither declaration provides any opinions that are beyond the understanding of lay persons and which are helpful to deciding the issues presented."

The judgment concludes that the fact the car jumped the curb in this case does not indicate that the curb failed to comply with the code's requirement for a curb or bumper "to prevent encroachment of cars" over walkways, because a 5-1/2 inch curb should "normally" be sufficient to prevent the encroachment of cars "when they are driven with reasonable care." A contrary interpretation of the building code requirement, the judgment concludes, would effectively make property owners "insurer[s] of public safety." It relied also on its review of cases from this and other jurisdictions considering summary judgment rulings under similar facts, concluding that in a majority of such cases courts have found that it is not foreseeable that a car would jump the curb.

Judgment was entered in Pacific Castle's favor on July 26, 2010. Yang timely filed this appeal on September 22, 2010. (Cal. Rules of Court, rule 8.104.)

Discussion

1. **Standard of Review**

A defendant may establish its right to summary judgment by demonstrating that a claim against it has no merit by showing that "[o]ne or more elements of the [plaintiff's] cause of action . . . cannot be established . . . ." (Code Civ. Proc., § 437c, subd. (o)(1);[4] *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 585.) Once the moving defendant has satisfied this obligation, the burden shifts to the plaintiff to demonstrate a triable issue of material fact as to the existence of the challenged element. (§ 437c, subd. (p)(2); *Union Bank v. Superior Court*, *supra*, 31 Cal.App.4th at pp. 583, 590.)

As a reviewing court, we consider the facts before the trial court when it ruled on the motion. (*North Coast Business Park v. Nielsen Construction Co*. (1993) 17 Cal.App.4th 22, 30.) After the moving party has demonstrated evidence sufficient to justify judgment in its favor, we determine de novo whether an issue of material fact exists and thus whether the moving party was entitled to the summary judgment entered in its favor. (*Redevelopment Agency v. International House of Pancakes, Inc*. (1992) 9 Cal.App.4th 1343, 1348; *Zuckerman v. Pacific Savings Bank* (1986) 187 Cal.App.3d 1394, 1400-1401.) If any triable issue of fact exists, the

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[3] The trial court sustained Pacific Castle's objections to Yang's evidence relating to the previous incidents "to the extent the evidence is offered to prove the truth of the matter asserted," but overruled them to the extent the evidence was offered to show that Pacific Castle had notice of the incidents. The remainder of Pacific Castle's objections—including its objections to the declaration testimony of Yang's engineering expert—it overruled. Neither party challenges these rulings.

[4] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

trial court's grant of summary judgment was error. (*Bigbee v. Pacific Tel. & Tel. Co.* (1983) 34 Cal.3d 49, 56.)

2. **Yang's Opposition Demonstrates The Existence Of Triable Issues Of Fact.**

Property owners have a duty to use ordinary care in the management of their property—a duty to act reasonably under the circumstances in order to prevent injuries to others on their property. Their failure to do so may subject them to tort liability. (Civ. Code, § 1714, subd. (a); *Rowland v. Christian* (1968) 69 Cal.2d 108, 119; *Jefferson v. Qwik Korner Market, Inc.* (1994) 28 Cal.App.4th 990, 992-993.)

A property owner's duty to act affirmatively to prevent injuries resulting from the acts of others is imposed only when the property owner had notice sufficient to justify its reasonable anticipation of the others' conduct. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 676.)

"'If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby.'" (*Bigbee v. Pacific Tel. & Tel. Co.*, *supra*, 34 Cal.3d 58-59, quoting Rest.2d Torts, § 449 and other authorities.)

Yang's complaint charged that Pacific Castle failed to place a curb or other barrier sufficient to prevent cars from encroaching on those walkways, as the building code requires it to do, and thereby failed to act reasonably to prevent third persons using its shopping center's parking lot from injuring those on its walkways, such as Yang. In granting the summary judgment motion, the trial court necessarily ruled that one or more elements of Yang's cause of action could not be established. (§437c, subd. (o)(1); *Union Bank v. Superior Court*, *supra*, 31 Cal.App.4th at p. 585.) It apparently concluded that by separating the parking lot from the walkway with a 5-1/2 inch curb that would "normally" be sufficient to prevent the encroachment of cars "when they are driven with reasonable care," and by presenting evidence that the curb complied with the building code, Pacific Castle had shown that Yang would be unable to establish Pacific Castle's breach of its duty of care.[5]

Yang's appeal rests on his contention that his evidence showed the curb's placement did not satisfy Pacific Castle's duty of care to occupants of the shopping center walkways, thereby raising an issue of material fact. His expert's declaration opined that a 5- or 6-inch curb is "only minimally effective" in stopping even slow-moving cars, a defect easily remedied with other proposed solutions; the curb's failure to prevent the car from encroaching on the walkway, together with Pacific Castle's knowledge of earlier similar curb-

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[5] The trial court did not articulate that the showing made by Pacific Castle's summary judgment motion was sufficient to shift to Yang the burden of demonstrating the existence of triable issues of fact (§ 437c, subd. (p)(2)), nor did the court articulate the basis for that implied determination. (§ 437c, subd. (g) [court is required upon granting summary judgment to articulate factual bases for ruling].) However, Yang's appeal makes no contention that such a determination was unfounded, or that the trial court's failure to articulate its grounds was prejudicial. (*Federal Deposit Ins. Corp. v. Dintino* (2008) 167 Cal.App.4th 333, 343 [no reversal for trial court's failure to articulate grounds for summary judgment ruling unless prejudice is shown].)

jumping incidents, demonstrate that Pacific Castle had notice of the curb's failure to satisfy the building-code requirement for a barrier sufficient to prevent cars from encroaching on the walkways, and thus that it did not satisfy its duty of care.

Pacific Castle contends, on the other hand, that the trial court's conclusion was correct; that Pacific Castle's performance of its duty of care—the fact that it acted reasonably in protecting Yang from injuries resulting from the conduct of third parties—is demonstrated by the curb's compliance with the building code's requirements, as its expert's declaration said it did.

Although the declaration of Pacific Castle's expert constituted a prima facie showing that Pacific Castle's placement of the curb had complied with the building code's requirements, however, that evidence could not alone establish that Pacific Castle satisfied its duty of care to Yang and other users of the shopping center walkways.

Pacific Castle's evidence was that the applicable code provision when Yang was injured required that "a bumper or curb shall be provided and located to prevent encroachment of cars over the required width of walkways." Its expert, Mack Quan, Ph.D., testified that section 1129B.3(3) of the California Building Code, requires that in commercial parking lots, "a bumper or curb shall be provided and located to prevent encroachment of cars over the required width of walkways." He testified that the 5-1/2 inch curb that Pacific Castle had placed to separate the parking lot from the adjoining walkway was a "standard height and sufficient to prevent encroachment of cars onto the pedestrian walkway under normal circumstances." He testified that the building code did not require placement of either a wheelstop or "a bollard or any other type of pole," in addition to the curb, to prevent such encroachments. He concluded that the parking lot complied with the code requirements, and did not present an unreasonably dangerous condition of the property.

A property owner's compliance with minimum building code requirements may constitute some evidence that its conduct satisfied its duty of care, but it does not establish satisfaction of that duty as a matter of law. (*Myrick v. Mastagni* (2010) 185 Cal.App.4th 1082, 1087.) An ordinance, regulation, or code requirement may fix the minimum standard of conduct, but it ordinarily does not preclude a finding that under the circumstances a reasonable person would have taken greater precautions to prevent injuries. (*Ramirez v. Plough, Inc.* (1993) 6 Cal. 4th 539, 547-548; *Myrick v. Mastagni*, *supra*, 185 Cal.App.4th at p. 1087.)[6]

The evidence of Pacific Castle's compliance with the building code thus could at most constitute a prima facie showing that Pacific Castle had acted reasonably in protecting occupants of its shopping center's walkways, but could not establish as a matter of law that Yang would be unable to show a breach of its duty of care under the circumstances. It could do no more than to shift to Yang the burden of showing his ability to produce evidence sufficient to establish his cause of action. (§ 437c, subd. (p)(2).)

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[6] A defendant's violation of a statutory standard of conduct may raise a rebuttable presumption that the defendant breached its duty of care. (Evid. Code, § 669, subd. (a); *Ramirez v. Plough, Inc.* (1993) 6 Cal.4th 539, 547.) A building code provision that is intended to protect the safety of persons comes within this rule. (*Huang v. Garner* (1984) 157 Cal.App.3d 404, 413-414 [disapproved on another ground in *Aas v. Superior Court* (2000) 24 Cal.4th 627, 648-649]; see *Short v. State Compensation Ins. Fund* (1975) 52 Cal.App.3d 104.)

Yang's contrary evidence satisfied that burden by disputing Pacific Castle's claim. His expert's declaration opined that the 5-1/2 inch curb did not comply with the building code's requirements.

And according to Yang's evidence of two previous walkway-encroachment accidents at the shopping center, Pacific Castle could in any event be found to have been on notice that such curb-jumping accidents were foreseeable, triggering "the need for additional protection beyond the minimum mandated by code." Construed liberally, as we must (see fn. 1, above), this evidence raises issues of fact as to whether the 5-1/2 inch curb alone did or did not comply with the code requirement for a barrier to prevent walkway encroachments, and—even if it did—[7] whether it fully satisfied Pacific Castle's duty of care under the circumstances of this case.

We are mindful of the trial court's legitimate concern that owners of commercial property cannot be required to erect barriers sufficient to guarantee that vehicles can never encroach upon a shopping center walkway, without regard to cost, accessibility, and other factors. As the trial court's judgment warned, property owners cannot be held to be "insurers of public safety." But the converse is also true: the law does not specify that a 5-1/2 inch curb is the most that is required of shopping center owners in order to satisfy their duty of care to pedestrians adjacent to their parking lots.

We are aware of no principle in our law, and the parties have cited none, that permits a court to treat either such standard as a matter of law rather than an issue of fact to be determined in light of the circumstances of the case. For these reasons we decline to engage in a review or critique of other cases in which courts have concluded that the barriers in those cases either are or are not sufficient to satisfy property owners' duty of care to pedestrians.[8]

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[7] The trial court erred by disregarding the "conflicting expert declarations" of the parties' experts simply because it found the opinions in them to be not "beyond the understanding of lay persons" or "helpful in deciding the issues presented." The test is not whether the trial court finds the evidence "helpful" in deciding the factual issues; it is whether the evidence raises factual issues at all. Having ruled that the expert's declarations were admissible, the trial court could not disregard that evidence. (§437c, subd. (c) [in ruling on summary judgment motion, court "shall consider all of the evidence set forth in the papers, except that to which objections have been . . . sustained"].) Moreover, unless the opinion of Pacific Castle's expert was credited, the motion failed to make even a prima facie showing that Pacific Castle had complied with its duty of care.

[8] We note that in *Jefferson v. Quik Korner Market, Inc.*, *supra*, 28 Cal.App.4th 990, a decision relied upon by the trial court to find that the accident in this case was not foreseeable as a matter of law, the evidence was very different from that before us in this case. Unlike here, in *Jefferson* there had been no previous curb-jumping incidents that might have made such accidents foreseeable at the location; and the walkway was protected by both a curb of more than six inches in height and a separate six-inch-high wheelstop. (*Id.* at p. 992.) These facts distinguish it from this case.

Our decision that the summary judgment was improperly granted is based entirely on the record before us in this case, without any implication that Yang's claim can or should prevail upon trial of its merits.

Disposition

The judgment is reversed, and the matter is remanded to the superior court with directions to deny the motion of Pacific Castle for summary judgment. Appellant to recover costs.

NOT TO BE PUBLISHED.

CHANEY, J We concur: MALLANO, P. J., JOHNSON, J.