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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

COURT OF APPEAL – SECOND DIST.

FILED

Dec 12, 2019

DANIEL P. POTTER, Clerk

Derrick Sanders Deputy Clerk

REINA CASTRO,

Plaintiff and Appellant,

v.

ABC STUDIOS, INC.,

Defendant and Respondent.

B283408

(Los Angeles County
Super. Ct. No. BC540307)

APPEAL from a judgment of the Superior Court of Los Angeles County, H. Chester Horn, Jr., Judge. Affirmed.

The Dominguez Firm, Olivier A. Taillieu, Judd R. Allen, Maura Gerwitz; Esner, Chang & Boyer, Stuart B. Esner and Shea S. Murphy for Plaintiff and Appellant.

Horvitz & Levy, Stephen E. Norris, Stanley H. Chen; Murchison & Cumming, Guy R. Gruppie, Gina E. Och and Richard E. McCain for Defendant and Respondent.

Reina Castro sued ABC Studios, Inc. (ABC) to recover for personal injuries she suffered after a 900-pound rolling metal gate fell on her at a film site. The trial court granted ABC's motion for nonsuit under *Privette v. Superior Court* (1993) 5 Cal.4th 689 (*Privette*) and its progeny, ruling that Castro had presented no evidence that ABC controlled the manner or mode by which its independent contractor's employees, such as Castro, performed their work. Castro appeals. We conclude that the *Privette* doctrine applies to this case and that Castro failed to adduce evidence of an exception. Accordingly, we affirm the judgment.

BACKGROUND

I. The property

Viewing the evidence according to the usual rules (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291), it shows that ABC contracted with the landowners to use a gas station/food mart and car wash (the property) for two days to film an episode of a television show. The contract gave ABC "the right to use both the real and personal property . . . together with access to and egress from the Property with its personnel and equipment."

The property sits on the corner of Foothill Boulevard and Terra Bella Street in Sylmar, California and is surrounded by an eight-foot high metal fence. ABC planned to close the property to the public during filming and needed access through three gates to the interior food mart and the parking areas.

On the side of the property along Terra Bella Street was a parking lot, a wall, and a metal rolling gate (the Terra Bella gate) measuring eight by 21 feet, and weighing approximately

900 pounds. The gate slid along a track that ran through containment towers to keep it upright. California Occupational Safety and Health Act of 1973 (Cal-OSHA) standards require that “[a]ll horizontal sliding gates . . . be equipped with positive stops or devices that limit the gate travel to the designed fully open and closed positions” (Cal. Code Regs., tit. 8, § 3324, subd. (a)), to prevent the gates from rolling beyond the containment towers and, unsupported, tipping over. Without stops, the gates are unsafe. The Terra Bella gate was located on a slope, but lacked stops. If the gate had remained closed, the accident would not have occurred.

ABC’s location scout, Gary Watt, visited the premises multiple times but did not inspect the gates. Watt never asked the landowners whether there were “hidden dangers” on the property and the landowners never volunteered that there were non-obvious dangers there. During his visits, Watt looked for clearly observable problems, “what they call bear traps, anything that could be a safety hazard or anything that might present a danger to cast, crew, [or] the public.” He would walk around the location, looking for hanging electrical wires or chemicals or other things could cause trouble. Watt did not make official note that the gate was in any particular state of disrepair. He saw that it was cemented into the ground along the posts and that it looked heavy-duty and solid.

ABC hired Castro’s employer, Executive Assurance (EA), to provide security for the property during filming. Their agreement provided in part that EA personnel would “be solely employees of [EA], *under the direction and supervision of [EA].*” (Italics added.) According to EA’s president and CEO at the time, Michael Wachtel, EA’s contract with ABC did not specify that EA

was to inspect the premises for safety conditions. Exhibit A to the contract, “Services and Fees,” specified only wages and hours, holidays, and charges for transportation. It was ABC’s location and ABC would tell EA where to go and what needed to be protected.

EA’s safety advisory, provided to its employees, stated “Never position yourself OR stand in the middle of any rolling gates while in operation. [¶] Please position yourself at the ends of the gates when operating. *There is a potential of gates coming off tracks and falling which could result in injury or damage.*” (Italics added.)

Wachtel testified that it is not his “employee’s responsibility to protect [EA’s] client’s equipment from damage not caused by the public, for example, a gate or a fence damaging a client’s vehicle.” Also, he testified that companies using his security services do not typically inform EA of existing location safety hazards.

EA supervisor Juan Macias explained that his boss on the set was ABC’s location department. If they told him to do something, he had to do it. The location department controlled the site. For example, if the location department did not like Castro, they could prevent her from coming to the set. *If* they wanted to conduct a safety inspection, they could tell Macias to do it.

II. Filming day

Watt was present on the day of filming and observed the area at all times for safety hazards. No one from ABC’s production safety coordinator’s office attended the tech scout meeting at the site. ABC would only assign someone to inspect the property if Watt saw something that required attention. On

the day of filming, Watt knew that the Terra Bella gate was going to be open so that personnel and equipment could pass through it. Watt saw that the gate was open. He did not try to slide the gate to make sure it was operating safely. No one at ABC inspected the gate for safety hazards until after the accident.

Macias arrived at the property around 6:00 a.m. The gate was closed and locked. There was no security meeting before the property was opened. Watt had told Macias that the gates would be open for crew members and gave Macias to understand that the owner would open the gate.

Around 7:30 a.m. or 8:00 a.m., per the landowners' instructions, Surjit Singh, who worked at the food mart on the property, gave ABC the keys to all of the property's gates. Singh did not open the gates on the day of the accident.

ABC's location manager safety-inspection sheet provided that "if services of security officers have been obtained, brief them regarding instructions about this shoot." Around 7:30 a.m., after the other guards arrived, Watt told the EA employees "what needed to be done." Watt did not instruct Castro about the safe ways to open the gate if needed.

EA's Macias assigned Castro to the Terra Bella gate. He instructed her to watch the entrance to the gate, to watch the cable that the film crew laid, and once the gate was opened, to make sure that nobody took production property and to let no unauthorized people through.

Macias would look out for safety concerns such as cables that were not taped down, and for trees or signs that might be loose. Macias never discussed the gate or how it functioned with Castro. Macias gave Castro no instruction about whether to open

or close the gate. He believed it was the landowner's responsibility to open the gate. He told Castro that "once *they* open" the gate, she was to make sure that only authorized people could park on the site. (Italics added.)

III. The accident

Around 5:00 p.m., Castro, a licensed security guard with sufficient skill to perform her job, was inside the property facing the gate. A truck went through the gate and two minutes later started backing out. Castro noticed that the gate had begun to slide downhill toward the truck. Thinking that the gate was going to hit the truck, Castro grabbed the gate and opened it. The gate fell on her with between 9,000 and 13,000 pounds of force. Castro suffered a broken leg, multiple fractures to her left shoulder, and torn ligaments and degenerative arthritis in her knee.

IV. The lawsuit

Castro filed her complaint for premises liability and negligence against the landowners and ABC. At the close of Castro's case, ABC moved for nonsuit (Code Civ. Proc., § 581c, subd. (a)) based on *Privette* and its progeny. Both Castro and the landowners opposed the motion. Castro argued that *Privette* did not apply and the landowners argued that ABC retained control over the property. The trial court granted ABC's motion and entered a judgment of nonsuit. The court found no evidence in the record to "support the inference that ABC directed anybody to do anything that related to the mode of performance of Ms. Castro's work as an employee of" EA. Castro timely appealed.

After ABC was dismissed from the action, the jury entered a verdict finding that Castro sustained damages of \$2,534,613. The jury allocated 72.5 percent of fault to the landowners, 27.5 percent of fault to EA, and zero percent fault to Castro.

DISCUSSION

I. Standard of review

“A defendant is entitled to a nonsuit if the trial court determines that, as a matter of law, the evidence presented by plaintiff is insufficient to permit a jury to find in his favor. [Citation.] ‘In determining whether plaintiff’s evidence is sufficient, the court may not weigh the evidence or consider the credibility of witnesses. Instead, the evidence most favorable to plaintiff must be accepted as true and conflicting evidence must be disregarded. The court must give “to the plaintiff[s] evidence all the value to which it is legally entitled, . . . indulging every legitimate inference which may be drawn from the evidence in plaintiff[s] favor.”’ [Citation.] A mere ‘scintilla of evidence’ does not create a conflict for the jury’s resolution; ‘there must be *substantial evidence* to create the necessary conflict.’” (*Nally v. Grace Community Church, supra*, 47 Cal.3d at p. 291.)

II. The trial court properly granted ABC’s nonsuit motion

A. *The Privette doctrine applies*

Subject to certain exceptions, the *Privette* doctrine bars employees of independent contractors from recovering damages from the hirer of the contractor for workplace injuries. (*SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, 594 (*SeaBright*).) The rationale is twofold. First, because workers’ compensation insurance generally provides the exclusive remedy

for employees who are injured on the job, allowing the employee to recover from the contractor's hirer, who did not cause the injury, would unfairly subject the hirer to greater liability than that faced by the contractor who was negligent. (*Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 204 (*Hooker*).) Second, "[b]y hiring an independent contractor, the hirer *implicitly delegates* to the contractor any tort law duty it owes to the contractor's employees to ensure the safety of the specific workplace that is the subject of the contract." (*SeaBright*, at p. 594, italics added, italics omitted.) Such delegation includes any "duty the hirer owes to the contractor's employees to comply with applicable statutory or regulatory safety requirements," such as those mandated by Cal-OSHA. (*Ibid.*)

Castro contends that the *Privette* doctrine does not apply to her case to preclude recovery from EA's hirer because the responsibility for inspecting the gate and ensuring its safety was never delegated to EA. She observes that ABC hired EA to provide security at the film site, delegating to EA the responsibility of watching ABC's production equipment, and ensuring it was not stolen and that members of the public were kept off the site, while permitting ABC employees to enter the premises. Hence, she argues, EA was not retained to inspect, repair, or even to use the Terra Bella gate, and so the gate could not reasonably be implied to be within the scope of EA's work.

Castro quotes from *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659 (*Kinsman*) that, for example, "an employee of a roofing contractor sent to repair a defective roof would generally not be able to sue the hirer if injured when he fell through the same roof due to a structural defect, inasmuch as inspection for such *defects could reasonably be implied to be within the scope of*

the contractor's employment. On the other hand, if the same employee fell from a ladder because the wall on which the ladder was propped collapsed, *assuming that this defect was not related to the roof under repair*, the employee may be able to sustain a suit against the hirer. Put in other terms, the contractor was not being paid to inspect the premises *generally*, and therefore the duty of general inspection could not be said to have been delegated to it. Under those circumstances, the landowner's failure to reasonably inspect the premises, when a hidden hazard leads directly to the employee's injury, may well result in liability." (*Id.* at pp. 677–678, italics added.)

The scope of delegated work is not as narrowly defined as Castro perceives. *Privette* and its progeny "recognize a presumptive delegation of responsibility for *workplace* safety from the hirer to the independent contractor, and a concomitant delegation of duty." (*SeaBright, supra*, 52 Cal.4th at p. 597, italics added.) As noted in *Kinsman, supra*, 37 Cal.4th at page 671, the "policy reasons for limiting delegation do not apply to the hirer's ability to delegate to an independent contractor the duty to provide the contractor's employees with a *safe working environment*." (Italics added.) Rather, a hirer is presumed to delegate that duty to the contractor.

This concept is best illustrated by *Tverberg v. Fillner Construction, Inc.* (2010) 49 Cal.4th 518 (*Tverberg I*). In *Tverberg I*, the plaintiff Tverberg, independently hired as the foreperson of a crew constructing a metal canopy over some fuel-pumping units, was injured when he fell into holes where another contractor was installing concrete bollards or posts to prevent vehicles from colliding with the fuel dispensers. The holes "were *next to the area* where Tverberg was to erect the metal canopy,"

“the bollards had *no connection to the building of the metal canopy*, and Tverberg had never before seen bollard holes at a canopy installation.” (*Id.* at p. 523, italics added.) Nonetheless, the Supreme Court held that Tverberg, the independent contractor himself—rather than a contractor’s employee—who was injured on the job, could not hold the general contractor liable for injuries arising from risks “inherent in the nature or *the location of the hired work* over which the independent contractor has, through the chain of delegation, been granted control. Because the [posts’] holes were located next to the area where Tverberg was to erect the metal canopy, the possibility of falling into one of those holes constituted an inherent risk of the canopy work.” (*Id.* at pp. 528–529, italics added.)

Likewise here, Macias instructed Castro to “watch[] one of the entrances to the gates,” to ensure that nobody took production property, and to prevent unauthorized people from gaining entrance through the gate. Thus, although ABC did not ask EA to operate it, the gate was at the core of what Castro was assigned to watch, and so the possibility that she would be hit by the gate when it fell over “constituted an inherent risk of the [security] work” (see *Tverberg I, supra*, 49 Cal.4th at p. 529). That the gate and the duty to inspect it were implicitly delegated to EA as part of its contract workplace is further evinced by the testimony of Wachtel that hirers typically do not inform him of safety hazards, and by the EA safety advisory reminding its employees that “[t]here is a potential of gates coming off tracks and falling which could result in injury or damage.”¹ (Italics

¹ Although Castro testified that she had never seen the safety advisory before her accident and that no one at EA had taught her how to work a rolling metal gate, that fact does not

added.) Therefore, the example in *Kinsman*, *supra*, 37 Cal.4th at page 678, in which the independent contractor's employee might have been able to sustain a suit against the hirer is distinguished. *Kinsman* assumed that the defect in the wall was *not related* to the roofer's workplace. Here, the Terra Bella gate was part of Castro's workplace and implicitly delegated to EA. Accordingly, *Privette* applies to preclude Castro's recovery against ABC for her injuries.

B. *The retained control exception to Privette does not apply.*

Castro argues, even if the *Privette* doctrine applies, that she produced evidence that ABC retained control over her workplace by directing EA to station guards at the Terra Bella gate.

The retained-control exception to *Privette* subjects the hirer of an independent contractor to liability "if the hirer retained control over the contractor's work *and* exercised that control in a way that 'affirmatively contribute[d]' to the employee's workplace injury." (*SeaBright*, *supra*, 52 Cal.4th at p. 595, italics added.) To establish the retained-control exception, Castro must show: (1) ABC retained control over any part of the work; (2) ABC negligently exercised that control; and (3) ABC did so in

logically mean that the gate fell outside the scope of Castro's workplace. "Tverberg had never before seen bollard holes at a canopy installation" (*Tverberg I*, *supra*, 49 Cal.4th at p. 523) and yet the Supreme Court held the holes constituted an inherent risk of his canopy work (*id.* at p. 529). Likewise, although Wachtel testified that his employees were not responsible for protecting EA's client's vehicles from damage caused by a fence, the gate still constitutes part of Castro's workplace, just as in *Tverberg I*, even though Tverberg was not responsible for installing the bollards. (*Ibid.*)

a manner that affirmatively contributed to Castro's injuries. (See *Khosh v. Staples Construction Co., Inc.* (2016) 4 Cal.App.5th 712, 717.)

However, injured workers may only recover on a retained-control theory when the hirer “ ‘is actively involved in, or asserts control over, the manner of performance of the contracted work. [Citation.] Such an assertion of control occurs, for example, when the principal employer *directs* that the contracted work be done by use of a certain mode or otherwise interferes with the means and methods by which the work is to be accomplished.’ ” (*Hooker, supra*, 27 Cal.4th at p. 215.)

Castro quotes from *Tverberg v. Fillner Construction, Inc.* (2012) 202 Cal.App.4th 1439, at page 1448 (*Tverberg II*), that “[w]hile the passive permitting of an unsafe condition to occur is not an affirmative contribution, *the act of directing that it occur is active participation.*” (Italics added.) She argues that ABC “direct[ed] [EA] to operate the gate,” and “instruct[ed] [EA] to position a security guard next to the gate *and keep the gate open* for workers and employees of ABC.” (Italics added.) But the evidence Castro cites does not support her inferences. She cites Watt’s statement that “we had the gate open for transportation or equipment to be stored there” and that “the side gate would remain open.” Castro also cites Macias’ testimony that Watt told him “what needed to be done” and that “all three gates *would be open* for crew members to come in.” (Italics added.) Castro also relies on Macias’s testimony that Macias assigned EA employees to particular spots and assigned Castro to watch the cable and property “[o]nce the gates were opened.” Contrary to Castro’s assertions, the inference from this evidence most favorable to her

is that the Terra Bella gate was opened by ABC to remain open to enable ABC's crew to enter and exit the property.

Yet, “‘[t]he general supervisory right to control the work so as to insure its satisfactory completion in accordance with the terms of the contract does not make the hirer of the independent contractor liable for the latter's negligent acts in performing the details of the work. [Citation.] . . . [citation] . . . *unless he exercises active control over the men employed.*’” (*McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219, 225, italics added.) Although ABC wanted the gate open to enable its crew to pass through, and although ABC could have directed EA to inspect the site, no one at ABC exercised active control over Castro in that ABC did not direct EA to open or not to open, to close or not to close the gate. Watt did not instruct Castro about the safe ways to open the gate. ABC never prevented EA from inspecting the Terra Bella gate before commencing work and following its own safety advisory. That ABC opened the gate and wanted it to remain open does not support a finding that ABC retained or asserted control over the manner of performance of Castro's work, instructed Castro how to keep the gate open, or directed that EA open or close the gate at all, let alone in a particular manner or by certain means. (*Hooker, supra*, 27 Cal.4th at p. 215.)

C. *Providing the Terra Bella gate did not contribute to Castro's injuries.*

The same result obtains to the next exception to implicit delegation relied on by Castro. *Privette* does not apply when the hirer *supplies* unsafe equipment for the employee's use if the hirer's provision of unsafe equipment affirmatively contributes to the employee's injury. In that situation, the hirer's own

negligence, not that of the contractor, renders the hirer liable. (*McKown v. Wal-Mart Stores, Inc.*, *supra*, 27 Cal.4th at p. 225.)

Here, even if ABC, as opposed to the landowners, arguably supplied a defective gate to EA, ABC did not request that EA open or close it, let alone suggest that EA keep the gate open in a manner that would have affirmatively contributed to Castro's injuries. (See *Delgadillo v. Television Center, Inc.* (2018) 20 Cal.App.5th 1078, 1093.)

D. *Landowner liability does not apply because ABC was not the landowner*

Castro cites *Kinsman*, *supra*, 37 Cal.4th 659 to argue that ABC could not delegate to EA the responsibility of ensuring the safety of its employees when ABC, as hirer, failed to provide EA with information about the existence of a latent hazard. The problem with Castro's argument is that the rule stated in *Kinsman* at page 674 is: "when the *landowner* knows or should know of a concealed hazard on *its premises*, then under ordinary premises liability principles, the landowner may be liable for a resultant injury to those employees." (Italics added.) The cases *Kinsman* relied on likewise involved *landowner* liability. (See, e.g., *Markley v. Beagle* (1967) 66 Cal.2d 951 [injury at hirer's own building]; *Abrons v. Richfield Oil Corp.* (1961) 190 Cal.App.2d 640 [injury from ditch on hirer's own property].) ABC was not the landowner here and the jury awarded Castro damages against the landowners. Nor did ABC know that EA would operate the gate because ABC undertook the responsibility of opening it in the morning and did not otherwise direct that EA operate the gate.

We conclude, therefore, that the trial court properly granted ABC's motion for nonsuit and entered judgment in its

favor. This case falls squarely within the ambit of the *Privette* doctrine, and Castro presented no evidence at trial to support any of the cited exceptions to *Privette*.

DISPOSITION

The judgment is affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

LAVIN, Acting P. J.

EGERTON, J.