IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

EPHRAIM DABUSH, et al., *Plaintiffs/Appellants*,

v.

SEACRET DIRECT LLC, et al., *Defendants/Appellees*.

No. 1 CA-CV 18-0288
FILED 6-27-2019

Appeal from the Superior Court in Maricopa County
No. CV2015-003804
The Honorable Randall H. Warner, Judge

AFFIRMED IN PART; REVERSED IN PART

COUNSEL

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MEMORANDUM DECISION

Judge Randall M. Howe delivered the decision of the Court, in which Presiding Judge Paul J. McMurdie and Judge Jennifer B. Campbell joined.

H O W E, Judge:

¶1 Ephraim and Rachel Dabush (collectively, the "Dabushes") challenge the trial court's granting of summary judgment in favor of Seacret Direct LLC ("Direct") and Prizma Capital, LLC ("Prizma"). For the following reasons, we affirm in part, reverse in part, and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

¶2 Ephraim Dabush suffered injuries after falling through a warehouse skylight. The warehouse was owned by 2619 E. Chambers, LLC ("Chambers"), who had leased it to Seacret Spa, LLC ("Spa"). Spa, in turn, subleased undesignated portions of the warehouse to Prizma and Direct. Spa is a wholesaler of Seacret brand beauty products and Direct is a distributor of those products. Prizma is a real estate investment company that purchases and remodels residential properties. Spa, Direct, and Prizma had connected shareholders and generally operated as an interconnected family business.

¶3 At the time of Ephraim's injury, David Ben-Shabat ("David") ran Direct and Elad Gotlib, a Spa shareholder, ran Prizma and managed the warehouse for Spa. In 2013, the warehouse roof began leaking over space Direct used. Gotlib hired Prizma to repair the roof, as he had done for past maintenance projects. On the morning of Ephraim's injury, Omar Unzueta and Valentin Nevarez, who worked for Prizma,[1] came to the warehouse to perform repairs. David asked Ephraim, who had construction experience, to go up on the roof, take pictures of what Unzueta and Nevarez were doing, and provide his professional opinion on the work.

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[1] The parties dispute whether Unzueta and Nevarez were Prizma employees. We assume they were employees for purposes of this appeal.

¶4 Ephraim went up on the roof and asked Nevarez to push on the skylight they were working on at that time. Ephraim took photographs of cracking in that skylight and walked over to another skylight. He then placed his foot on that skylight and fell through, suffering injury.

¶5 The Dabushes sued Chambers, Spa, Direct, and Prizma, alleging that each was negligent. Relevant to this appeal, they alleged Direct and Prizma were liable because each "had direct control and/or the authority to control the Warehouse where . . . [Ephraim] fell." Direct and Prizma moved for summary judgment, contending that they did not owe Ephraim a duty of care because neither "possessed the premises" at the time of Ephraim's fall. The trial court agreed and granted the motion. The Dabushes settled their claims against Chambers and Spa and timely appealed the court's rulings with respect to Direct and Prizma.

DISCUSSION

¶6 On review of a grant of summary judgment, we determine de novo whether any genuine issues of material fact exist and whether the trial court properly applied the law. *Dreamland Villa Community Club, Inc. v. Raimey*, 224 Ariz. 42, 46 ¶ 16 (App. 2010). We view the facts and reasonable inferences in the light most favorable to the Dabushes, the non-prevailing parties. *See Rasor v. Northwest Hospital, LLC*, 243 Ariz. 160, 163 ¶ 11 (2017). Summary judgment should be granted only "if the facts produced in support of [a] claim . . . have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim[.]" *Orme School v. Reeves,* 166 Ariz. 301, 309 (1990).

¶7 The Dabushes contend that the trial court erred in concluding that neither Direct nor Prizma owed Ephraim a duty of care. We review duty determinations de novo. *Quiroz v. ALCOA Inc*., 243 Ariz. 560, 564 ¶ 7 (2018). We must determine whether a duty exists as a matter of law before considering the case-specific facts. *Id*. Duties arise from either recognized common law special relationships or relationships created by public policy. *Id*. at 565 ¶ 14. Duties based on special relationships come from several sources, including those recognized under common law, contracts, or conduct undertaken by the defendant. *Id*. Included are various categorical relationships such as landowner-invitee. *Gipson v. Kasey*, 214 Ariz. 141, 145 ¶ 19 (2007). The fact that a duty exists does not imply, however, that liability necessarily exists. *Johnson v. Almida Land & Cattle Co., LLC*, 241 Ariz. 30, 31 ¶ 4 (App. 2016).

1. Direct

¶8 The Dabushes contend that Direct owed Ephraim a duty of care because it occupied the roof "with intent to control it." A possessor of land generally owes a duty to inspect and make safe areas over which it retains control. *Siddons v. Bus. Props. Dev. Co.*, 191 Ariz. 158, 159 (1998) (citing Restatement (Second) of Torts § 360). The element of control is thus essential to a finding of duty. *Martinez v. Woodmar IV Condominiums Homeowners Ass'n, Inc.*, 189 Ariz. 206, 209 (1997). And the issue of who controls certain property normally presents questions of fact. *Sanchez v. City of Tucson*, 191 Ariz. 128, 130 ¶ 10 (1998). The record here provides enough factual evidence to defeat summary judgment on the issue of control.

¶9 Schmuel Ben-Shabat testified that David often interjected himself into problems that arose throughout the warehouse. David testified he was responsible for maintenance of the portion of the warehouse dedicated to Direct, including the roof. Other witnesses corroborated David's testimony and confirmed that Spa did not exercise control over Direct's portion of the warehouse.

¶10 Direct responds that its sublease with Spa did not grant it control of the roof. But the sublease is silent on that issue, granting Direct use of "[t]hat certain portion of the premises (as defined below)" without defining what portion of the warehouse was granted. Further, although Direct presented evidence that its portion of the warehouse floor was set apart by a chain link fence, it did not offer any evidence to show the roof was similarly marked or that Spa assumed exclusive control of the roof at any time during its sublease. Genuine issues of material fact thus remain about whether Direct exerted control over the roof covering its portion of the warehouse at the time of Ephraim's injury. *See Tostado v. City of Lake Havasu*, 220 Ariz. 195, 201–02 ¶¶ 27–29 (App. 2008) (reversing summary judgment because a triable issue of fact remained as to "whether the City was a possessor of the [c]hannel").[2]

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[2] We need not address the Dabushes' arguments under Restatement (Third) of Torts: Liability for Physical and Emotional Harm ("Restatement (Third)") § 49. We note, however, that our supreme court rejected the Restatement (Third)'s duty framework. *Compare Quiroz*, 243 Ariz. at 578–79, ¶¶ 85–89 (rejecting Restatement (Third)'s "limitless duty") *with* Restatement (Third) § 51, cmt. b ("[A] default duty of reasonable care for risks created by the land possessor is provided in this Section, as well as an

2. Prizma

¶11 Citing Restatement (Second) of Torts § 383, the Dabushes contend Prizma owed Ephraim a duty of care because it was responsible for the roof repairs**.** *See Nguyen v. Nguyen*, 155 Ariz. 290, 291 (App. 1987) (applying § 383). That section imposes liability on "[o]ne who does an act or carries on an activity upon land on behalf of the possessor . . . for physical harm caused thereby to others upon and outside of the land as though he were the possessor of the land." Restatement (Second) of Torts § 383.

¶12 The Dabushes do not contend that Prizma's repair work caused Ephraim's injury, nor do they present any evidence reflecting that Prizma or its employees engaged in an act or activity that subjected Ephraim to a risk of falling through the skylight at issue.[3] They contend instead that Prizma assumed a duty under § 383 because the entire roof was an "active work zone" under Prizma's control since it intended to repair or replace all eighteen skylights. Nothing in the record supports this contention, however. In fact, contrary to the Dabushes' position, the record reflects that Unzueta offered undisputed testimony that the repairs might have taken six or seven days to complete, suggesting the entire roof was not an "active work zone" on the day Ephraim fell. Moreover, the Dabushes did not dispute that no work was being performed on the skylight at issue when Ephraim fell.

¶13 The Dabushes also contend Prizma owed Ephraim a duty of care as the "general contractor" on site. For support, they rely on *Gonzalez v. MAT Construction*, Case No. 1 CA-CV 16-0064, 2017 WL 4543638 (App. Oct. 12, 2017) (mem. decision). That decision is inapposite to the case before us, however. *Gonzalez* addressed a general contractor's duty of care to a

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affirmative duty for natural conditions, reflecting policies expressed in the affirmative duties in Chapter 7.").

[3] At oral argument in this Court, the Dabushes asserted for the first time that Prizma applied tar to the skylight through which Ephraim fell, suggesting that its conduct created a risk of falling through that skylight. We do not consider arguments raised for the first time at oral argument on appeal, however. *See Mitchell v. Gamble*, 207 Ariz. 364, 369–70 ¶ 16 (App. 2001). Moreover, we generally do not consider assertions that are not supported by appropriate citations to the record as ARCAP 13 requires, and our review of the record does not reveal any evidence indicating that tar was applied to the skylight at issue or any other facts supporting the Dabushes' assertion.

subcontractor's employee, which Ephraim was not. *Id*. at *2 ¶ 12. Indeed, the Dabushes do not identify a single subcontractor on site when he fell. Moreover, the general contractor in *Gonzalez* had allegedly created an unsafe condition on site by failing to properly fill in a cavity it made, causing the ground to become unstable. *Id*. at *3 ¶¶ 13–14. Again, the Dabushes cite no evidence suggesting Prizma had performed any work on or around the skylight through which Ephraim fell.

CONCLUSION

¶14 For the foregoing reasons, we affirm summary judgment for Prizma, reverse the entry of summary judgment in favor of Direct, and remand for further proceedings. The Dabushes may recover their costs on appeal as against Direct, and Prizma may recover its costs on appeal as against the Dabushes, contingent upon their compliance with ARCAP 21. *See Henry v. Cook*, 189 Ariz. 42, 43 (App. 1996) ("[A] party who succeeds on less than all claims is sufficiently successful to recover costs under the statute.").

AMY M. WOOD • Clerk of the Court
FILED: AA