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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

EUGENE SPENCER, Plaintiff and Appellant, v. SECURITAS SECURITY SERVICES, USA, INC., et al., Defendants and Respondents.	A152336 (Contra Costa County Super. Ct. No. MSC15-01614)

Plaintiff Eugene Spencer is in the business of helping to clear out foreclosed residential properties. In the instant case, he was asked to assist with an eviction and "trash-out" at a residence in a gated community. As the locksmith was in the process of drilling out the lock on the front door, the former owner shot through the door, hitting Spencer. He sued numerous individuals and entities, including the homeowners association, defendant Norris Canyon Estates Owners Association, and the security company the association hired to control access to the neighborhood, defendant Securitas Security Services USA, Inc. Spencer claims that when he passed through the security gate, the guard told him the former owners had moved out and he relied on that statement to his detriment. The trial court granted the homeowners association and security company's motions for summary judgment, concluding there was no triable issue as to reliance. We affirm.

BACKGROUND

Spencer alleged that Safeguard Properties Management, LLC (also a named defendant but not a party to this appeal) is retained by lenders to "facilitate eviction and conduct 'trash out' proceedings" at repossessed properties. He further alleged that he performed trash-outs "during and immediately following property evictions," and Safeguard routinely hired him to perform this work.

At his deposition, Spencer explained that "trash-out" work involves removing personal property left by the prior owner and requires that the property be unoccupied. An "eviction," as Spencer described it, contemplates that the property may be occupied, and always involves law enforcement officers, who knock and announce their presence. If they cannot achieve entry through an unlocked door or on being admitted by the occupants, the officers direct Spencer to instruct the locksmith (there at Spencer's request) to drill out the lock. Only after the officers clear the residence, do they permit Spencer and the trash-out crew to enter it.

Safeguard apparently hired Spencer, who either works for or with an entity called Rock Bottom, to work at the foreclosed property in question on two occasions.

The first time, Spencer received "an order for a trash-out." At the entry to the subdivision, he showed the security guard a work order and was let through. Spencer did not testify to any verbal exchange with the guard. After he and his crew arrived at the property, Spencer began to suspect it was occupied when he saw a "very substantial" amount of personal property in the garage and observed a car in the driveway. He then went to the front door and several times "profusely" rang the bell, then pounded on the door with his fist. At that point, he spotted two women walking along the street, walked over to them and asked if the house was occupied. They were " 'pretty sure' " it was, because the car parked in front of the garage belonged to the former owners. At that point, Spencer reported to Rock Bottom that he would not continue with the work because the property appeared to be occupied. Had the property not been occupied, he and the crew would have entered and inspected the house and garage to determine whether personal property had been left. If so, he would have taken "extensive"

photographs, which he would have provided to Rock Bottom. Rock Bottom, in turn, would have forwarded them to Safeguard. The trash-out crew would not have removed any property that day, but would have returned on a later date to do so on further direction by Safeguard.

The second time, later in the year, Spencer received a work order, forwarded from Rock Bottom, for what he characterized as a "rush emergency eviction" the following day. When asked to describe the "standard procedure for what was supposed to occur," Spencer testified to the following: He and his crew would arrive "15 to 20 minutes early." They "will not approach the house," but "wait for the sheriff." If the "sheriff" does not arrive within half an hour, "we tell" an individual at Rock Bottom, who, in turn, "tells Safeguard." When the "sheriff" arrives, "they" (Spencer and his crew) "introduce" themselves. The "sheriff" then "does their [*sic*] legal proceedings. "[A]t that juncture, the sheriff will either clear the house if they gain [*sic*] access by an unlocked door or by an occupant letting them in." "If they [the officers] cannot gain access at that point, we facilitate access." "If the house is occupied, the occupants are given approximately 15 minutes to get some personal belongings." After that, Spencer and his crew "secure the house by changing door knobs, deadbolts and making sure all windows and all access points are secured." Spencer and his crew "do not go into the house until after the sheriff has instructed [them] to go into the house." Once they enter, "[i]f there is a lot of personal property," Spencer and his crew "take extensive photos to document what is in the house and garage. . . . Those photos are then forwarded to the generating facility, Safeguard, FAS, Cyprex, whomever."[1]

Spencer then testified that this was, in fact, the procedure that took place the next day. As before, he entered the subdivision through the security gate. This time he told the guard he was there for an "eviction" at a specified address. According to Spencer, the

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[1] Thus, contrary to counsel's assertion at oral argument, Spencer did not testify that this procedure—for a trash-out in conjunction with an eviction—was solely that of Rock Bottom and that he had a "different" procedure, which was to leave the property if he became aware it was occupied.

guard responded, " 'Oh, they are gone. They moved out. I saw moving trucks going.' " The guard then asked if Spencer wanted her to call the property "to inform them that [he was] on the way up." He did not ask her to call, replying instead that she "has to do whatever her guidelines are." As far as he knows, the guard made no call.

Spencer then proceeded to the property, parked some distance away, behind the locksmith, and waited for law enforcement. Two deputy sheriffs subsequently arrived. Spencer introduced himself and introduced the locksmith, who was there at Spencer's request. The officers then "did their job," and attempted to gain access by knocking and pounding on the front door. Spencer, in the meantime, walked around to the garage (and thus, could not see the deputies) and was "trying to determine if, in fact, the occupant had moved out." At first, the garage looked empty and "pitch black," but then he realized the windows had been covered with black plastic. One of the officers then "instructed [him] to have the door drilled out," and Spencer told the locksmith to drill out the lock.[2]

As the locksmith commenced work, Spencer stood behind him. Spencer then saw another car pull up and a woman get out, and walked down the front path to meet her. She "turned out" to be the realtor (also a named defendant but not a party to this appeal). They "had [a] conversation" about "the negativity of the owner and she [the realtor] can't believe she's going to get the house." Spencer then walked back along the path to the front door "with the intent of telling" the locksmith what the agent had said and to " 'be mindful.' " Before Spencer could say anything, gun shots were fired from inside the house. The bullets penetrated the front door, and two struck Spencer. The locksmith fled; Spencer fell to the ground. One of the officers drew his weapon, and Spencer was able to drag himself behind a fire hydrant. The officer then dragged him to a neighbor's house, where he remained until emergency personnel arrived.

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[2] The locksmith testified Spencer had trained him on the protocol for drilling out locks in evictions. He further testified that when he entered the subdivision, he told the security guard he had a work order for an "eviction" and had asked if the occupants had moved. She replied she "thought that they did" because she had "seen a moving van a couple days ago that was moving out or something like that."

Spencer subsequently sued numerous individuals and entities, including the homeowners association and security company. He claimed these two defendants were liable for, among other things, negligent misrepresentation based on the statement by the security guard when he entered the gated community.[3] He asserted the statement was a false representation that led him to believe the residence was safe and unoccupied.

The homeowners association and security company moved for summary judgment on several grounds, including that Spencer did not rely on the security employee's statement, but rather continued to follow his "standard procedure" for an "eviction."[4] In opposition, Spencer claimed he did rely on the statement, and but for the misrepresentation, he would not have proceeded with the work and would have left the scene. The trial court granted the motion, concluding the undisputed evidence, consisting largely of Spencer's deposition testimony, established that he "followed the standard procedure on the day of the incident and thus, [] did not rely on the statement from the security guard."

DISCUSSION

We review the grant of summary judgment de novo. (See *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) "Summary judgment must be granted if all the papers and affidavits submitted, together with 'all inferences reasonably deducible from the evidence' and uncontradicted by other inferences or evidence, show 'there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' (Code Civ. Proc., § 437c, subd. (c).) Where, as here, the defendant is the moving party, he or she may meet the burden of showing a cause of action has no merit by proving one or more elements of the cause of action cannot be established. . . . Once the defendant has met that burden, the burden shifts to the plaintiff to show the

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[3] Spencer also alleged causes of action for negligence and premises liability, as to which the trial court granted judgment on the pleadings. Spencer has not appealed from that judgment.

[4] We discuss the evidentiary showing made in connection with the motion in detail in the next section of the opinion.

existence of a triable issue of material fact as to that cause of action." (*Henson v. C. Overaa & Co.* (2015) 238 Cal.App.4th 184, 192.) A plaintiff cannot create a triable issue merely by pointing to the allegations of the complaint; rather, the opposing party must come forward with admissible evidence contradicting or rebutting the moving party's evidentiary showing. (See *Jameson v. Pacific Gas & Electric Co.* (2017) 16 Cal.App.5th 901, 908–909.)

The elements of negligent misrepresentation are: " '[M]isrepresentation of a past or existing material fact, without reasonable ground for believing it to be true, and with intent to induce another's reliance on the fact misrepresented; ignorance of the truth and justifiable reliance on the misrepresentation by the party to whom it was directed; and resulting damage.' " (*Shamsian v. Atlantic Richfield Co.* (2003) 107 Cal.App.4th 967, 983.) Actual reliance is an essential element of negligent misrepresentation, and it occurs when the misrepresentation is " ' "an immediate cause of [a plaintiff's] conduct." ' " (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1256.) " 'It is not . . . necessary that [a plaintiff's] reliance . . . be the sole or even the predominant or decisive factor in influencing his conduct. . . . It is enough that the representation has played a substantial part, and so has been a substantial factor, in influencing his decision.' " (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 976–977.)

For at least two separate reasons, Spencer failed to raise a triable issue that he relied on the comment by the security guard.

First, Spencer's deposition testimony establishes that he not only did not know the occupational status of property when he agreed to perform the work and when he traveled to the subdivision, but that on arriving at the property, he investigated for himself whether or not the property was occupied. After the security guard told him she thought the prior owners had moved out because she had seen a moving van, the guard asked Spencer if she should "call the property to inform them that [he was] on the way up." Spencer declined this offer, instead telling the guard she should follow whatever procedures she had. Spencer then proceeded to the property. *Before* the shooting

occurred, while the deputy sheriffs were "doing their job" at the front door, Spencer looked into the garage through several windows, "trying to ascertain if all the material was out of the house, *if, in fact,* the occupants had moved out." (Italics added.) In fact, Spencer reiterated he "was focused on trying to determine *if, in fact,* the occupant had moved out." (Italics added.) While on first glance the garage appeared to be "pitch black" and "empty," he soon realized it "wasn't pitch black" and the former owners had covered the windows with "black plastic tarps."

Thus, Spencer's own deposition testimony establishes that he did *not* rely on the security guard's statement that the owners had moved out. Rather, once he arrived at the property, he undertook to determine, for himself, whether the property was, in fact, unoccupied. His doing so conclusively establishes that he did not rely on the guard's statement.[5] (See *Doctor v. Lakeridge Construction Co.* (1967) 252 Cal.App.2d 715, 720 [" 'If it fairly appears from the evidence that the [plaintiff] undertook to investigate for himself the matters as to which representations had been made, he cannot be allowed to later claim that he acted upon the representations.' "].)

Second, Spencer's deposition testimony establishes that he did not change his conduct in light of the security guard's statement. While Spencer claimed in the trial court, and continues to claim on appeal, that he had a "policy" of not working on occupied property and, specifically, of "suspending a trash out proceeding upon learning of a property being occupied," his deposition testimony was squarely to the contrary. Spencer discussed two procedures—the one he followed when he went to the property the first time solely to perform a trash-out, and the one he followed the second time when he went to the property to assist in an eviction followed by a trash-out. As he explained in detail, when a trash-out is scheduled in conjunction with an eviction, the procedure is to arrive early, "not approach the property," and wait for law enforcement to arrive. Once the officers arrive, they do "their legal proceedings." The officers then "will either

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[5] In fact, that he admittedly did not know whether or not the properly was occupied *as he traveled to* the subdivision reflects that occupancy status was *not* material to his presence at a trash-out in conjunction with an eviction.

clear the house if they gain access by an unlocked door or by an occupant letting them in," or ask Spencer's assistance to "facilitate access." Spencer never enters a house without direction to do so from an officer. If the property is occupied, "the occupants are given approximately fifteen minutes to get some personal belongings." Spencer then "secure[s] the house by changing door knobs, deadbolts and making sure all windows and all access points are secured." If there is a lot of personal property in the house, Spencer takes "extensive photos to document what is in the garage [and] what is in the house."

Spencer further testified that he followed *this* procedure on the day in question, even on hearing the security guard's statement that the occupants had moved—he arrived early, parked away from the property, and waited for the deputy sheriffs. When the deputies arrived, they tried to gain access to the house by knocking on the door, action that *presumes the property might be occupied.* When there was no response, the officers directed Spencer to tell the locksmith to start drilling out the lock. In short, both prior to entering the gated community and after passing through the guarded entry, Spencer acted in accordance with the procedures applicable to a trash-out in conjunction with an eviction. Thus, according to his own testimony, he did not alter his conduct based on anything the security guard said.[6]

At oral argument, Spencer's attorney argued strenuously that the record permitted an "inference" that Spencer actually had a different "policy" and that regardless of what the policy of Rock Bottom or Safeguard might be, Spencer's own policy was to not work on, and to leave, any property he thought was occupied. As we have discussed, Spencer did not, at any time during his deposition, ever suggest the eviction procedure he discussed in detail was germane only to Rock Bottom or Safeguard and that he had a different policy. While we must, in reviewing a summary judgment, draw all reasonable inferences in favor of the opposing party, any inference must be based on *evidence.* And

[6] Given our conclusion that summary judgment was properly granted on the basis of reliance, we need not, and do not, consider the other grounds, including no duty and no causation, on which the homeowners association and security company moved for summary judgment.

there is *no* evidence that supports the inference counsel asserts can and should be drawn in Spencer's favor.

On the contrary, the *sole* basis for the inference counsel asks us to draw is the fact that the first time Spencer went to the property—to conduct only a trash-out—he left when he concluded the property was still occupied. But Spencer, himself, explained in detail the *difference* between the job he was first asked to do—to conduct a trash-out—and the job he was asked to do later—to assist with an emergency eviction, followed immediately by a trash-out. Furthermore, as we have discussed at length, Spencer's own deposition testimony squarely and unequivocally *refutes* the inference his attorney has asked us to draw. Spencer testified in detail about the procedure he both expected, and followed when he went to the property the second time to assist with an eviction, and this procedure *assumed the property might be occupied*. Further, he admittedly investigated for himself whether or not the property had, in fact, been vacated. And even when he realized the garage windows had been covered to hide what was in the garage, he *remained* at the property and, at the deputies' request, directed the locksmith to proceed to help the officers enter the residence. In sum, there is simply no evidence that supports an inference that Spencer had a "policy" of never working on, and promptly leaving, any property that was occupied.

DISPOSITION

The judgment is affirmed. Respondents to recover costs on appeal.

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Banke, J.

We concur:

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Humes, P.J.

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Dondero, J.