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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

DONNELL GILBREATH, Plaintiff and Appellant, v. HOLLAND RESIDENTIAL, LLC, Defendant and Respondent.	B216102 (Los Angeles County Super. Ct. No. GC038856)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joseph F. DeVanon, Jr., Judge. Affirmed.

Law Offices of Fred J. Knez and Fred J. Knez for Plaintiff and Appellant.

Early, Maslach & Van Dueck, John A. Peterson, James Grafton Randall; Law Office of Priscilla Slocum and Priscilla Slocum for Defendant and Respondent.

Plaintiff and appellant Donnell Gilbreath appeals from a judgment following an order granting summary judgment in favor of defendant and respondent Holland Residential, LLC (HR) in this action for premises liability.[1] Gilbreath contends: 1) triable issues of fact exist as to whether she abandoned her claim for workers' compensation benefits; 2) the doctrine of judicial estoppel precludes HR from raising the exclusive remedy of workers' compensation as a defense; and 3) public policy should preclude HR from relying on the defense. We find that at the time of her injury, Gilbreath was acting in the course and scope of her employment as a matter of law and HR is not precluded from raising the exclusive remedy rule as a defense. Therefore, we affirm.

FACTS

SI VII, LLC owns the CitiPlace condominium complex.[2] SI VII contracted with HR for property management services. In August 2004, HR hired Gilbreath as the vice-president partner for the Southern California division. As part of her compensation package, she received a unit at the CitiPlace condominium complex at a reduced rent. She was expected to work out of her condominium as her base of operations throughout Southern California. Gilbreath was responsible for several portfolios, which included CitiPlace and five other properties.

SI VII contracted with Thyssenkrupp Elevator Corporation for periodic inspection and maintenance of the elevators in the complex. Between 6:00 p.m. and 8:00 p.m. on August 30, 2005, one of the CitiPlace elevators stopped between floors. A tenant trapped in the elevator used the elevator phone to call Thyssenkrupp for assistance. The tenant also pushed the alarm in the elevator. The fire department responded, pried open the doors, and released the trapped occupants.

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1 Holland was erroneously named in the complaint as The Holland Partner Group.

2 SI VII was erroneously named in the complaint as Sobrato Corporation.

Gilbreath took her dog for a walk every morning as part of her daily routine and noted anything about the property that needed attention. While walking her dog at 6:00 a.m. on August 31, 2005, Gilbreath noticed the door to the elevator was open. She assumed someone had been stuck in the elevator the night before. She knew from her training and experience that the elevator was in a locked position and the fire department had not reset it. She did not know why Thyssenkrupp had not come to reset it, but she knew the CitiPlace management had an override key. She decided to step in, take a look at it, and make a phone call, so the residents could use it and would not be angry with the management. Gilbreath did not realize that the elevator car was substantially below the level of the doorway, so when she stepped in, she fell to the floor of the elevator car on her back and sustained serious injuries. She contacted the office manager to call maintenance. Gilbreath's injuries became progressively worse and required several surgeries.

In October 2005, Gilbreath prepared a handwritten summary of the events. She wrote that she oversaw and managed the five-story property where she was injured. She was walking to the elevator to the garage in early October and the elevator door was standing open. She wrote, "I knew that meant someone had been stuck in the elevator sometime the evening prior [and] it needed to be set to close the door. I made the decision that I would step in [and] reset the system so the door could close [and] the elevator would be operable for the residents that morning for work. When I put my left foot in[,] the elevator floor had not been returned to the ground level [and] was about [one] foot below[, causing] me to fall flat on my back onto the floor of the elevator."

On February 1, 2006, Gilbreath prepared a workers' compensation claim form which stated that she was injured at 6:00 a.m. on August 31, 2005, when she stepped into an elevator with the door standing open, but the floor had slipped and she fell on her back. She gave the form to HR, which completed the employer section of the form by stating that it first knew of the injury on January 16, 2006, and had provided the claim form to Gilbreath on January 31, 2006. Gilbreath also signed a claims authorization form

allowing the insurance company to obtain information from a variety of medical providers to investigate her claim.

In connection with her claim for benefits, Gilbreath prepared and submitted a typed summary of the injury in the elevator on August 31, 2005. She wrote in pertinent part, "It was early Wednesday morning, a normal work day for me in my local home business office. . . . I went out early to walk the dog and walk property as I do every morning making note of anything needing address, repair or attention since I oversee the asset. I walked to [the elevator] and the elevator door was standing open. I knew this meant that someone had been stuck in the elevator sometime the evening prior for the door to be ajar . . . . I decided to step in and close the door so that [the] residents could have use of it[,] so I placed my left foot in to try to reset it and when I did, there was no floor. The carriage had not been returned to the ground floor for some reason and was quite a drop from the ground level. I fell flat on my back into the elevator floor without a chance to break my fall. Upon recovery of the fall, I did not think I was injured but pretty shaken up and went back to the apartment to call the office Manager on her cell phone to page maintenance." She also stated that she immediately contacted the leasing center and requested that the person on call bar the elevator with yellow tape or reset it so that no one else would get injured stepping into the carriage. The lead maintenance technician called the elevator contractor to fix the elevator at 7:00 a.m. The incident was reported by e-mail to the office and to Gilbreath's district manager, Robynn Hall, early the same morning. Gilbreath also wrote that a former property manager was aware of Gilbreath's complaint of her injuries and her current condition. Gilbreath provided contact information for the district manager and the former property manager.

On May 2, 2006, the insurance company sent Gilbreath a "Notice of Denial of Claim for Workers' Compensation Benefits." The claims manager marked a box on the form that stated, "After careful consideration of all available information, we are denying all liability for your claim of injury because: there is no medical evidence to substantiate your claim and no other evidence to support that you sustained an injury during the course and/or scope of your employment. Once these records are received we will

reevaluate our decision." The denial notice stated that Gilbreath could consult an information and assistance officer, consult an attorney, and/or apply to have her case heard by the Workers' Compensation Appeals Board.

PROCEDURAL BACKGROUND

On April 17, 2007, Gilbreath filed a complaint against Thyssenkrupp, HR, and SI VII for premises liability. The defendants cross-complained against each other for indemnity and contribution. HR filed a motion for summary judgment on the ground that Gilbreath's exclusive remedy was workers' compensation, because she was acting in the course and scope of her employment at the time of her injury. HR also argued that combining the personal act of walking her dog with the performance of acts in furtherance of business outside regular working hours did not prevent finding that she was acting in the course of her employment.

In support of the motion for summary judgment, HR submitted Gilbreath's typed and handwritten summaries of the elevator injury. HR also submitted Gilbreath's deposition testimony that she was employed by HR as the vice-president partner for the Southern California division at the time of the injury. On the morning of the injury, when she saw the doors open and lights on inside the elevator, she knew immediately that there had been a problem with the elevator. It was common for the lights to be on and the doors open after an entrapment. The doors were open, because the fire department had left the elevator in a locked position.

HR submitted the declaration of Clyde Holland, who is the chairman of HR's parent company. Holland declared that senior managers sometimes have the title "partner" and participate as equity partners in investments. As a senior manager, Gilbreath was expected to comprehensively manage the CitiPlace property, including personnel matters, property management, property maintenance, vendor contracts, and leasing issues. At the time that Gilbreath was injured, she was acting in the course and scope of her employment with HR. The tasks described in her typed summary were part

of, incidental to, and consistent with her job assignment, to oversee and manage the property. HR had a workers' compensation insurance policy which provided coverage for employee's injuries. He declared that Gilbreath initiated a claim for workers' compensation benefits under the policy, but did not pursue it. In addition to Holland's declaration, HR submitted Gilbreath's workers' compensation claim form and the insurance company's notice denying the claim.

Gilbreath filed an opposition to the motion for summary judgment on the grounds that the insurance company, as HR's agent, had previously taken the position that Gilbreath was not acting in the course and scope of her employment at the time of the accident, and therefore, HR was judicially estopped from taking a contrary position based on the same information. Gilbreath emphasized that the summary judgment motion was based on the same documents submitted in support of the workers' compensation claim and the facts were known to HR when the claim was denied. In Gilbreath's statement of undisputed facts, she did not dispute that she was in the course and scope of her employment at the time of the injury and had pursued a claim for workers' compensation benefits until the claim was denied.

In support of her opposition, Gilbreath submitted her declaration stating that after she reviewed the notice of denial from the insurance company, she concluded that challenging the denial of the claim for benefits would be futile and she retained an attorney. After she received the denial notice, she did not receive any further communication from the insurance company or HR about her claim. An examination had been scheduled at one time, but she did not attend it, because she did not feel that she needed another doctor to tell her that she had a serious medical problem. She did not remember the date of the appointment. She never received any communication about the failure to go to the appointment. She declared that she initiated a workers' compensation claim and pursued it until the claim was denied. At that point, she relied on the denial of the claim.

HR filed a reply arguing that Gilbreath had admitted that she was acting in the course and scope of her employment at the time of her injury and she had abandoned her workers' compensation claim by failing to attend a scheduled medical examination.

On February 4, 2009, the trial court granted the motion for summary judgment on the ground that Gilbreath admitted she was acting within the course and scope of her employment at the time of her injury and the insurance company had not taken the position that she was not acting within the course and scope of her employment. Instead, Gilbreath made a unilateral decision not to pursue her workers' compensation claim. The court entered judgment in favor of HR. Gilbreath filed a timely notice of appeal.

DISCUSSION

Standard of Review

"A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. [Citation.] We review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports. [Citation.] In the trial court, once a moving defendant has 'shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established,' the burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff 'may not rely upon the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action . . . .' [Citations.]" (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476-477.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.)

Workers' Compensation Claim

Gilbreath contends triable issues of fact exist as to whether she abandoned her claim for workers' compensation or the insurance company denied the claim after finding Gilbreath was not acting within the course and scope of her employment at the time of her injury. We conclude no triable issue of fact exists as to a material issue, because the undisputed facts show Gilbreath was acting within the course and scope of her employment at the time of her injury as a matter of law.

"As a general rule, an employee who sustains an industrial injury 'arising out of and in the course of the employment' is limited to recovery under the workers' compensation system. [Citations.] We have observed that this rule of exclusivity is based on the '"presumed 'compensation bargain,' pursuant to which the employer assumes liability for industrial personal injury or death without regard to fault in exchange for limitations on the amount of that liability. The employee is afforded relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury without having to prove fault but, in exchange, gives up the wider range of damages potentially available in tort."' [Citation.]" (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1001.)

"The Legislature has extended the protection of these exclusive remedy provisions to workers' compensation insurance carriers by defining the term 'employer' to include 'insurer.' ([Lab. Code,] § 3850, subd. (b).) Thus, these insurers 'retain immunity from lawsuit as the "alter ego" of the employer.' [Citation.] Employees may, however, 'bring suit against any person other than [their] employer [or their employer's workers' compensation insurer] who proximately caused [their] injury.' [Citation.]" (*Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800, 813.)

In this case, if Gilbreath was acting in the course and scope of her employment at the time of her injury, then her premises liability claim is barred by the exclusive remedy of workers' compensation. The evidence was that Gilbreath walked the CitiPlace property every morning, looking for concerns that required her employer's attention. She

entered an open elevator to look at the problem and called the office manager to arrange for repair, so that other residents would be able to use the elevator. She did not enter the elevator for her own use. Her action was for the benefit of her employer and part of her job as a senior manager responsible for oversight of the property.

It is clear that Gilbreath was acting within the course and scope of her employment at the time of her injury as a matter of law. In fact, both parties agree that she was acting within the course and scope of her employment. Although HR's workers' compensation insurance company may have denied Gilbreath's claim based on an erroneous determination that her injury was not within the course and scope of her employment, the insurer's denial of the claim does not constitute evidence that she was acting outside the course and scope of her employment at the time of her injury. The undisputed facts show that workers' compensation is the exclusive remedy for Gilbreath's injuries.

Judicial Estoppel

Gilbreath contends that after the insurance company denied her claim for benefits in part on the ground that she was not acting within the course and scope of her employment, HR is estopped from taking an inconsistent position in this case under the doctrine of judicial estoppel. We disagree.

"Judicial estoppel is an extraordinary remedy that should be applied with caution. [Citation.] '[T]he doctrine should apply when: (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.' [Citation.]" (*Kelsey v. Waste Management of Alameda County* (1999) 76 Cal.App.4th 590, 598.)

"The courts invoke judicial estoppel to prevent judicial fraud from a litigant's deceitful assertion of a position completely inconsistent with one previously asserted,

thus compromising the integrity of the administration of justice by creating a risk of conflicting judicial determinations. [Citations.] [¶] As a general rule, the court should apply the doctrine only when the party stating an inconsistent position succeeded in inducing a court to adopt the earlier position or to accept it as true. If the party did not succeed, then a later inconsistent position poses little risk of inconsistent judicial determinations and consequently introduces '"little threat to judicial integrity."' [Citation.]" (*ABF Capital Corp. v. Berglass* (2005) 130 Cal.App.4th 825, 832.)

In this case, the insurance company's notice denying Gilbreath's claim for workers' compensation benefits was not the equivalent of taking a position in a judicial or quasi-judicial administrative proceeding. Gilbreath cannot argue that the insurance company has successfully asserted she was not within the course and scope of her employment at the time of her injury, because no court or tribunal has adopted the insurance company's position or accepted it as true. The insurer left open the possibility of coverage, if Gilbreath presented additional evidence of liability, and the insurer included information to aid Gilbreath in pursuing her claim. The doctrine of judicial estoppel simply does not apply to the facts of this case as presented to the trial court.

DISPOSITION

The judgment is affirmed. Respondent Holland Residential, LLC is awarded its costs on appeal.

KRIEGLER, J.

We concur:

ARMSTRONG, Acting P. J. MOSK, J.