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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF LIMESTONE

10 JOHN K. LEE,

11 Plaintiff,

12 v.

13 ACME CORPORATION and DOES 1 TO
14 100, Inclusive,

15 Defendants.
16

Case No. 54321

OPPOSITION TO MOTION FOR
SUMMARY JUDGMENT

Date:

Time:

Dept. Complaint filed:

Trial date:

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18 Defendant Acme Corporation's motion for summary judgment is entirely without
19 merit for three separate and distinct reasons. First and foremost, it is based exclusively on
20 inadmissible evidence. Acme brought its motion before plaintiff John K. Lee had
21 reviewed and signed his deposition transcript, and thus before that testimony was rendered
22 admissible evidence. For this reason alone, the motion can be denied.

23 Second, defendant Acme failed to meet its initial burden of going forward, and of
24 showing that there is no triable issue of material fact as to whether it met its duty of care.
25 Acme's moving papers incorrectly assume that Acme only had a duty to prevent plaintiff
26 Lee from losing his balance. In fact, Acme also had a duty to protect plaintiff in the event
27 he did lose his balance. The moving papers never even mention this aspect of Acme's
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1 duty, let alone prove that Acme, in fact, acted reasonably toward plaintiff in this regard.
2 For this reason as well, the motion should be denied.

3 Third, plaintiff's evidence demonstrates that there are triable issues of material fact.
4 When plaintiff ultimately did read and sign his deposition transcript, he made a critical
5 addition that is sufficient to defeat this motion in its entirety. His deposition now reads
6 that the stairway hand railings were too short and that he was unable to use them to stop
7 his fall. Moreover, his expert witness likewise has determined that the railings were not up
8 to Code, as they were considerably shorter than required. Because there are triable issues
9 of material fact as to whether Acme maintained a defective condition on its property that
10 caused plaintiff's injuries, this motion should be denied.

11 12 **FACTS**

13 Plaintiff John Lee's complaint alleges that defendant Acme Corporation "owned,
14 operated, controlled, maintained, designed, built, manufactured, leased, let, sold and
15 occupied" the property located at 123 Elm Street, Aralia, CA. Plaintiff's Separate
16 Statement of Undisputed Fact (PSS) # 1. The complaint also alleges that Acme
17 negligently caused the premises to be dangerous and defective and that plaintiff was
18 injured as a proximate result of the property's condition. PSS # 2.

19 In his responses to form interrogatories, dated February 6, 20__, plaintiff stated that
20 Acme violated certain statutes and ordinances with regard to the property. PSS # 3. His
21 responses also referred Acme to his expert witness report for a list of the various code
22 violations. PSS # 4. In his responses to special interrogatories, dated February 6, 20__,
23 when asked to state why Acme was negligent, plaintiff responded that there were Building
24 Code violations. PSS # 5. In his response to a question as to how Acme's negligence
25 caused the incident, he stated that, had the condition of the stairway complied with the
26 Building Code, and had the owner addressed the problems with the stairway, the accident
27 would not have occurred. PSS # 6. Plaintiff again referred Acme to his expert witness
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1 report for further details regarding the property’s condition, the Building Code violations,
2 and Acme’s negligence. PSS # 7.

3 Plaintiff Lee was deposed on February 21, 20__. The parties stipulated that the
4 deposition transcript be forwarded to plaintiff’s attorney for review, correction, and
5 signature, and that within 45 days of receipt of the transcript, plaintiff’s counsel would
6 notify all parties of any changes to the deposition testimony. PSS # 9. On February 23,
7 20__, the court reporter signed the Certificate of Shorthand Report and forwarded the
8 original transcript to plaintiff’s counsel per the stipulation. PSS # 10.

9 Acme moved for summary judgment on March 2, 20__, before the 45 days expired
10 for plaintiff to correct his deposition. On receiving the deposition transcript during the
11 week following February 23, 20__, plaintiff made the following change to his deposition:
12 “also the handrails were too short and I could not grab them to stop my fall.” PSS # 11.
13 Plaintiff Lee served notice of the change to his deposition transcript on April 10, 20__.
14 PSS # 12.

16 ARGUMENT

17 1. Acme’s motion is based entirely on inadmissible evidence.

18 A court reporter’s records of questions and answers, which have not yet been signed
19 by the deponent, are not admissible in evidence as depositions. *Bennett v. Superior Court*
20 *of San Diego County* (1950) 99 Cal.App.2d 585. It is the deponent’s reading and signing
21 of a deposition that renders it his testimony, rather than its mere recordation by a reporter.
22 *Reimel v. House* (1969) 268 Cal.App.2d 780.

23 Here, the parties stipulated that plaintiff would have 45 days from the date of the
24 transcript’s receipt from the court reporter to review, correct, and sign the deposition. The
25 court reporter forwarded the deposition after February 23, 20__. Acme brought this
26 motion, based on the then-unsigned deposition transcript, on March 2, 2006. Not until
27 April 10, 20__, did plaintiff read, correct, and sign his deposition transcript.

1 Thus, when Acme brought this motion, plaintiff’s deposition transcript was not his
2 “testimony”; it was merely a court reporter’s perceived understanding of what his
3 testimony was. As a result, Acme’s entire motion is based exclusively on evidence that
4 was inadmissible when the motion was prepared, filed, and served. The motion should
5 therefore be denied.

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7 **2. Acme failed to meet its initial burden of going forward.**

8 Even if the Court is inclined to admit the deposition transcript as evidence, Acme
9 here failed to meet its initial burden of going forward. Where the moving party on a
10 motion for summary judgment is the defendant, he has the burden of proving that the
11 action has no merit. Code Civ. Proc. §§ 437c(a), (f)(1) and (o)(2). A defendant has met
12 that burden if he has shown that one or more elements of the cause of action cannot be
13 established or that there is a complete defense to that cause of action. Code Civ. Proc.
14 § 437c(o)(2). The first step in analyzing any motion for summary judgment is to identify
15 issues framed by the pleadings. *Allyson v. Department of Transportation* (1997) 53
16 Cal.App.4th 1304. The motion must respond to these allegations by establishing a
17 complete defense or by otherwise showing that there is no factual basis for relief on any
18 theory reasonably contemplated by the opponent’s pleading. *Anderson v. Pacific Bell*
19 (1988) 204 Cal.App.3d 277.

20 Here, Acme has failed to show that there is no factual basis for relief on any theory
21 reasonably contemplated by his complaint. The entire gist of Acme’s argument on
22 summary judgment is: plaintiff admitted he fell because he lost his balance, and therefore
23 Acme is relieved of liability for his injuries. But many cases have held that a landowner
24 can be liable if there is evidence that a handrail was either too short, improperly
25 maintained, or non-existent, if the plaintiff can show that this condition proximately caused
26 his injuries. See, *Montijo v. Western Greyhound Lines* (1963) 219 Cal.App.2d 342, 346;
27 *Laird v. T.W. Mather, Inc.* (1958) 51 Cal.2d 210, 216. (Because Acme has artificially
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1 truncated the scope of its duty to plaintiff, it has failed to meet its initial burden.)

2 The complaint alleges that Acme “owned, operated, controlled, maintained,
3 designed, built, manufactured, leased, let, sold and occupied” the premises and caused
4 them to be dangerous and defective. Plaintiff’s theory of the case was also described in
5 greater detail in his responses to discovery and the report of his expert witness, referenced
6 in those responses. He contends that the premises were defectively designed, built, and
7 maintained because, among other things, the stairway handrail was too short and did not
8 comply with the applicable Building Code. Acme’s moving papers failed to even mention
9 this aspect of plaintiff’s theory of liability, let alone show that there is no factual basis for
10 relief on this theory. Acme’s motion should therefore be denied.

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12 **3. Key material facts are in dispute.**

13 Even if the Court could overlook the fact that Acme has not addressed all the
14 necessary allegations in the complaint and has not shown that there is no factual basis for
15 any legal theory reasonably contemplated by plaintiff’s complaint, Acme’s motion should
16 nonetheless be denied because certain pivotal facts remain in dispute. For instance,
17 plaintiff contends, and testified in his changes to his deposition, that the handrail on the
18 stairs was too short and that he was unable to grab it as he fell, thus causing his injuries.
19 He contends that the handrail did not comply with applicable Building Code sections,
20 because it was far too short. His expert witness has corroborated this contention,
21 concluding that the Building Code requires the handrail to extend no less than 12 inches
22 beyond the bottom riser; the handrail here extended only 2½ inches beyond the bottom
23 riser. The presentation of this evidence is sufficient to raise a triable issue of fact as to
24 whether the stairway and handrail were defective, and whether that defective condition
25 caused plaintiff’s injuries.

26 For this reason as well, Acme’s motion for summary judgment should be denied.
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1 **CONCLUSION**

2 Plaintiff John K. Lee respectfully requests that this Court deny defendant’s motion
3 for summary judgment. Defendant Acme relies entirely on inadmissible evidence and fails
4 to meet its initial burden of going forward. In any event, key material facts remain in
5 dispute.

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7 Dated: May 17, 20__

Respectfully submitted,

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Attorneys for Plaintiff

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