IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
[DIVISION p]

IMAGING SERVICES, INC., a California Corporation; and DEAN JANES, an individual,

Plaintiffs and Appellants,

vs.

TOWER ENGINEERING, a California Corporation; and DOES 1 - 100, inclusive,

Defendant and Respondent

CASE NO. B 179613
(Superior Court No. EC 033 979)

Appeal from the Superior Court of the County of Los Angeles, No. EC 033 979

The Honorable Laura Matz, Judge

APPELLANTS' OPENING BRIEF

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1. INTRODUCTION.

This case involves disputed contentions concerning causation in connection with a warehouse fire. The question before this Court is a simple one: did the Plaintiffs/Appellants adequately present sufficient material facts to support their cause of action for negligence sufficient to overcome Defendant's (Second) Motion for Summary Judgment to allow the case to proceed to trial on its merits? The answer is an unqualified "yes". Yet, the court below improperly granted Defendant/Respondent's Motion for Summary Judgment as to the Plaintiffs' entire Complaint. [Clerk's Transcript (hereafter "CT") 001011-001020.]

Purportedly relying on a finding that "causation cannot be established," the trial court took the extraordinary step of granting Summary Judgment against Appellants despite an overwhelming number of disputed material facts sufficient to defeat summary judgment and proceed to trial. As a matter of law, the lower court erred in granting Defendant Summary Judgment and dismissing all of Plaintiffs' claims. Appellants respectfully request that this Court reverse the judgment below, overrule the Defendant's summary judgment motion, vacate costs, and remand for further proceedings.

2. STATEMENT OF THE CASE.

A. Nature of Action and Relief Sought.

Plaintiff and Appellant Imaging Services, Inc. is an x-ray equipment manufacturer and remanufacturer. It provides service and service contracts and

sells accessory and disposable items for x-ray equipment as well as replacement parts. Plaintiff and Appellant Dean Janes is its President and Chief Executive Officer, who owned Imaging Services' warehouse facility that burned down, as described herein. [Declaration of Dean Janes in Support of Plaintiffs' Opposition to Defendant Tower Engineering's Second Motion for Summary Judgment Motion, paragraph 3; CT 000485.]

Plaintiffs filed the complaint in this action on March 4, 2002 against Defendant Tower Engineering, their construction contractor, and its electrical subcontractor. [CT 000019-000022.] The lawsuit relates to damages suffered when the Plaintiffs' business facility (offices, warehouse, and manufacturing site) had a catastrophic fire and burned to the ground. The building was being constructed Defendant Tower Engineering, and various subcontractors (including electrical subcontractor, Defendant Albert's Electric), at the time of the fire. [Declaration of Dean Janes in Support of Plaintiffs' Opposition to Defendant Tower Engineering's Second Motion for Summary Judgment Motion, paragraph 4; CT 000485.]

In connection with the fire, nearly all of Plaintiffs' books and records were destroyed, along with nearly everything else contained in the facility. This, of course, greatly impeded the ability to fully respond to discovery, a fact well known to Defendant and its various counsel.

As stated in Plaintiffs' responses to special interrogatories, set two, response #17:

> "Tower entered into a contractor agreement with Imaging Services, Inc. (already produced in this litigation), pursuant to which Tower was to provide certain contractor's services. Tower had certain explicit and implicit obligations to perform these services according to the terms of the contract, and in a skillful, non-negligent, competent fashion, which it failed to do. Plaintiffs made certain payments to Tower, which payments are still being ascertained (because of the fire which is the subject of this litigation). Plaintiffs are informed and believe that Tower (and its agents and employees, including subcontractors) performed in an unprofessional and negligent fashion, as alleged in Plaintiff's complaint, resulting in a catastrophic fire and the resultant destruction of the subject premises and the Plaintiffs' business. Damages to plaintiffs far exceed the amount of the construction contract, particularly in light of payments already made to Tower.
>
> Damages are still being ascertained and investigated. All physical assets of the company were destroyed, including, but not limited to, parts inventory, equipment inventory, office furniture, computer equipment, telephone equipment, corporate records, accounting records, all money spent for leasehold improvements. This was in excess of 2 million dollars. Lost income exceeds $5,950,000.00 to date. Since replacement parts inventory was completely destroyed, and most of it cannot be replaced, the company and its principals will lose income from their sales. These parts were sold on an exchange basis so they could be sold over and over again. Since the fire Responding Party has lost and must regain ability to sell equipment. Annual sales last year were approximately 7 Million and they are projected to be only 3 Million this year, Responding Party must rebuild business to previous levels. Prior to the fire our goal for 2002 was $10 Million in annual sales. Plaintiffs suffered loss of revenue/income per year to rebuild, loss of revenue/income of useful lifetime of parts inventory. Damages are continuing, including losses and costs attributable to this litigation." [Plaintiffs' Responses to Special Interrogatories, Set Two, number 17, attached as Exhibits E and D to Plaintiffs' Separate Statement in Dispute in Opposition to Motion for Summary Judgment; CT 000901-000902.]

Early in the litigation, as a Cross-complainant, seeking to collect disputed construction invoices, Respondent Tower brought its first summary judgment action against the Plaintiffs on December 31, 2002. [CT 000827-000833.] Plaintiffs successfully opposed this motion. [CT 000792-000800; CT 000834-

000836.] This first summary judgment motion of Tower was denied on February 7, 2003. [CT 000834-000836.]

The trial court, however, on October 13, 2004[1], granted Summary Judgment on the issue of causation of the fire, against Plaintiffs in favor of Defendant Tower Engineering. [CT 001023 - 001036] This summary judgment ruling is the subject of this appeal. Appellants maintain that the Trial Court, completely disregarding the evidence that the fire was the result of the actions and omissions of Tower Engineering and its electrical subcontractor, improperly accepted Tower's unsupported conclusion that "plaintiffs' cause of action for general negligence has no merit because the element of causation cannot be established." [Motion, page 18, lines 1-2; CT 000194.] Appellants maintain in this appeal that Imaging Services and Dean Janes set forth material facts establishing causation, and additional facts concerning damages attributable to the defendants' negligent construction. The Trial Court erred in accepting Tower's assertion that "There is no evidence that any action or omission on the part of TOWER caused or contributed to the subject fire." [Motion, page 18, lines 3-4; CT 000194.] It also erred in its findings that additional expert testimony was required to establish causation, and further erred in awarding costs to Defendants, including a defendant who was dismissed solely due to his undisclosed bankruptcy filing.

[1] The trial court's minute order was dated October 13, 2004 [CT 001027]. The Order was file-stamped October 28, 2004 [CT 001026], and Notice of Entry of Judgment was filed November 5, 2004 [CT 001023.]

This ruling neglected to address the myriad amount of evidence that have supported Plaintiffs' claims of causation throughout the existence of this case.

B. Summary of Material Facts.

Plaintiffs, the owners and occupants of an office and warehouse facility that was destroyed in a fire, filed suit against the Defendants, the general contractor and electrical subcontractor who were constructing and refurbishing the facility. The electrical contractor (Mario Osorio dba Albert's Electric) was discharged in a nondisclosed bankruptcy proceeding, and dismissed by the Trial Court, which improperly awarded him costs as a prevailing party. The general contractor, Defendant Tower Engineering, filed a summary judgment against the Plaintiffs, claiming that causation of the fire could not be proven. [CT 000175 - 000194.] The Trial Court granted Summary Judgment to Defendant Tower, dismissing Plaintiffs' claims in their entirety. Appellants appeal this Summary Judgment ruling.

C. Judgment/Ruling of Superior Court and Statement of Appealability.

Respondent Tower Engineering filed a motion for Summary Judgment on March 19, 2004 against Plaintiffs/Appellants, asserting that "there is no triable issue of any material fact that any actions or omissions by TOWER caused or contributed to plaintiffs' fire-related damages." [CT 000175 -000194 at 000176 (emphasis added).] Plaintiffs opposed the Motion. [CT 000900-000914.] The Plaintiffs' opposition consisted of an opposing Memorandum of Points and Authorities [CT 000900-000917], Responses to Defendant's Statements of Facts

[CT 000454 through CT 000483], a Separate Statement of Material Facts in Dispute [CT 000517 through CT 000543], Evidentiary Objections [CT 000449 through 000452], and extensive factual declarations of Plaintiff Dean Janes [CT 000484 through CT 000499], expert James Izzo[2] [CT 000500 through CT 000516], and attorney Richard D. Farkas [CT 000710 through 000899], and accompanying exhibits.

The Los Angeles Superior Court held that the "Motion for Summary Judgment is granted on the ground that plaintiff [*sic*] has failed to raise a triable issue of fact as to causation." [CT 001013.] Although acknowledging that the Plaintiffs' "evidence may be sufficient to raise a triable issue as to whether there were problems with the electrical system," the Court concluded that "no reasonable inference can be drawn from these facts that the unspecified and nonspecific 'fault' in the electrical system … was such that it could or did cause the subject fire." [CT 1017, in Order found at CT 001011.]. The court thus ordered Summary Judgment in favor of Respondent and against the Appellants.

The Superior Court of California, County of Los Angeles, by the Honorable Laura Matz, Judge, rendered its final Order Granting Summary Judgment to

[2] James Izzo does business as the Elite Group, an architectural and design firm, dealing with planning, design, and project management. The Elite Group was described in Plaintiffs' counsel's Designation of Expert Witnesses as anticipated to "provide testimony concerning building progress and issues with building construction and contractors. The firm will provide testimony concerning building the field of construction and quality of work, including general contractor work and electrical. [CT 000366-000367.]

Respondents on October 28, 2004. [CT 001011] The Judgment was entered on October 13, 2004 [*Id*.], as indicated in the Notice of Entry of Judgment filed on November 5, 2004. [CT001023] Notice of Appeal from the Judgment was timely filed on November 29, 2004. [CT 001037.] The appeal is from a judgment that finally disposed of all affirmative claims of Plaintiffs against the Defendant.

D. Standard of Review.

SUMMARY JUDGMENT IS INAPPROPRIATE WHERE, AS HERE, MATERIAL FACTUAL DISPUTES EXIST.

i. Applicable Legal Standards. This appeal arises after the trial court erroneously granted Summary Judgment against the Plaintiffs. In determining a Motion for Summary Judgment, the evidence must be viewed by the Court in the light most favorable to the non-moving party, and any factual conflicts must be resolved in favor of the non-moving party. [*Chesny v. Grisham* (1976) 64 Cal.App.3d 120, 134 Cal.Rptr. 238.] The moving party bears the burden of furnishing supporting documents that establish that the claims of the adverse party are entirely without merit on any legal theory. *Lipson v. Superior Court* (1982) 31 Cal.3d 362, 374; see also *FSR Brokerage Inc., v. Superior Court* (1995) 35 Cal.App.4th 69 (construing 1993 amendment to summary judgment statute, Calif. *Code of Civil Proc*. § 437c). The facts alleged in affidavits by the non-moving party must be accepted as true. *Zeilman vs. County of Kern* (1985) 168 Cal.App.3d 1174, 1178, 214 Cal. Rptr. 746.

Further, the court must consider not only the direct evidence presented, but also the reasonable inferences to be drawn therefrom. California *Code of Civil Procedure* section 437c(c); *Mann v. Cracciolo* (1985) 35 Cal.3d 18, 210 Cal.Rptr. 62. Any doubt as to the propriety of the motion is resolved in favor of the party opposing the motion. *Stationer's Corp. v. Dunn & Bradstreet, Inc.* (1965) 62 Cal.2d 412, 417, 42 Cal.Rptr. 449.

At the summary judgment stage, the court's sole function is issue-finding, not issue determination. [California *Code of Civil Procedure* section 437c.] The summary judgment procedure is "drastic," and is to be used with caution so that it does not become a substitute for a full trial. [*Sprecher v. Adamson Companies* (1981) 30 Cal.3d 358, 372, 178 Cal.Rptr 783.] "It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'" [*Poller v Columbia Broadcasting* (1962) 368 U.S. 464, 473, 82 S.Ct. 486 491. (Emphasis added).]

ii. Burden of the Parties. Where, as here, the defendants are the moving parties, a court must determine whether they have met their burden under subdivision (o)(2) of section 437c of producing admissible evidence showing that a cause of action has no merit because "one or more elements of the cause of action, even if not separately pleaded, cannot be established, or there is a complete defense to that cause of action." If the moving party has met its statutory burden

and the summary judgment motion *prima facie* justifies a judgment, we determine whether the opposing party has met its burden under section 437c. (*Zavala vs. Arce*, 58 Cal.App.4th at p. 926; 437c, subd. (o)(1-2).) If defendants have met their burden, the court must then determine whether the plaintiff has met his burden under subdivision (o)(2) of section 437c of producing admissible evidence showing that "a triable issue of one or more material facts exists as to that cause of action or a defense thereto." In making this determination, courts must strictly construe the evidence of the moving parties and liberally construe that of the opponents, and any doubts as to the propriety of granting the motion should be resolved in favor of the parties opposing the motion. [*Branco v. Kearny Moto Park, Inc*. (1995) 37 Cal.App.4th 184, 189.]

Under the current version of section 437c of the *Code of Civil Procedure*, a defendant moving for summary adjudication has met its "burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established." Only once the defendant has met that burden does the burden shift to the plaintiff "to show that a triable issue of one or more material facts exists as to that cause of action." (§ 437c, subd. (o)(2), emphasis added.)

As explained in *Certain Underwriters at Lloyd's Of London (Lowsley-Williams) v. Superior Court of Los Angeles County (Southern California Gas Company)* (1997) 56 Cal.App.4th 952, "Under the plain language of the statute, the burden does not shift to the plaintiff unless the moving defendant first meets its

burden of "showing" that the plaintiff cannot establish at least one element of its cause of action. (§ 437c, subd. (o)(2).) Under our holding in *Leslie* (and under the rules announced in all of the cases decided since the 1993 amendment to section 437c [Stats. 1993, ch. 276]), this initial burden can be met by the presentation of "factually vague discovery responses or otherwise" -- but we know of no case suggesting that section 437c permits the moving defendant to meet its initial burden without any showing at all."

iii. Review on Appeal. The appellate court will review a summary judgment motion *de novo* to determine whether there is a triable issue as to any material fact and whether the moving party is entitled to judgment as a matter of law. (*Galanty v. Paul Revere Life Ins. Co.* (2000) 23 Cal.4th 368, 374; *Code Civ. Proc*., § 437c, subd. (c).) The Court is not bound by the trial court's stated reasons or rationales. (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 878.) "In practical effect, we assume the role of a trial court and apply the same rules and standards which govern a trial court's determination of a motion for summary judgment." (*Lenane v.Continental Maritime of San Diego, Inc.* (1998) 61 Cal.App.4th 1073, 1079.) Thus, the Court will independently determine the construction and effect of the facts presented to the trial judge as a matter of law. (*Saldana v. Globe-Weis Systems Co.* (1991) 233 Cal.App.3d 1505, 1511-1515.) Summary judgment is a drastic remedy to be used sparingly, and any doubts about the propriety of summary judgment must be resolved in favor of the opposing

party. (*Kulesa v. Castleberry* (1996) 47 Cal.App.4th 103, 112; *WYDA Associates v. Merner* (1996) 42 Cal.App.4th 1702, 1709.)

The Appellants herein maintain that the Defendant, in providing insufficient evidence or documentation to refute Plaintiffs' facts, failed even to meet their initial burden because they have made no showing of an absence of material facts. Defendant's Motion should not have been granted under these standards.

3. ARGUMENT.

MATERIAL FACTUAL DISPUTES WERE PRESENTED TO THE TRIAL COURT, REQUIRING DENIAL OF DEFENDANT'S SUMMARY JUDGMENT MOTION.

Plaintiffs and Cross-defendants Imaging Services, Inc. and Dean Janes disputed the "facts" contained in the Defendant Tower's Second Summary Judgment Motion, and presented ample facts entitling them to a trial and, eventually, judgment in their favor. [CT 000900-000913, CT 000424-000429, CT 000449-000899.]

Plaintiffs alleged, and can prove at trial, that Defendant TOWER ENGINEERING, INC. was responsible for the safe and proper construction of Plaintiffs' business facility, which burned down in the fire which is the subject of the Plaintiffs' complaint. Because of the errors and omissions of Defendant, and

the resulting fire, Plaintiffs' obligations to TOWER, if any, were excused.[3] Prior to the fire, any contractual obligations were released to the extent of the progress payments received by TOWER. Further obligations of the Plaintiffs, if any, were terminated because of the fire. The facts presented to the Trial Court in opposing Defendant's summary judgment motion were as follows:

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[3] As detailed in Plaintiff's Statement of Liability Contentions:
a) Albert's Electric's and Tower's work performed was substandard.
b) Defendants' work performed was incomplete.
c) The electrical system created a great deal of noise visible on almost every computer used in the facility as well as x-ray equipment.
d) Several employees stated smelling a burning smell well before the fire.
e) Defendants came out to investigate the burning smell and could not find any problem.
f) Several consultants visited the facility, when it was finally determined one problem was caused by not bringing ground to earth ground or the cold water pipe.
g) Light fixtures constantly flickered and even turned off by themselves and Tower and Albert's Electric never fixed problem, though they came several times.
h) Chris Sohn and Dean Janes had laptop computers destroyed when left plugged in overnight to charge on different occasions.
i) Ground wires were not pulled to every outlet and if they were instead of using green wire Albert's Electric taped them with black electrical tape, displaying shoddy work.
j) Circuit breakers would trip with very little load, not even their current rating.
k) Electrical circuits were not pulled to design specifications as clearly marked on the Construction Plans.
l) Several of Defendants' employees looked "stoned" most of the time and had a continual lazy attitude. Consistently not showing up on time or when scheduled.
m) Albert's Electric demonstrated poor workmanship by using black electric tape to cover a wire to identify it as a ground wire instead of using a green colored wire as called by code.

In addition, Defendants were behind schedule concerning the building completion date. A delay of greater than one month was due, in part, to Defendants' slow and poor work performance. The unprofessional conduct by Albert's Electric's electric contractor, for example, who appeared "stoned" most of the time was reinforced by his poor work performance, slow response and inability to complete the full scope of his work. [CT 000289-000290.]

Tower entered into a contractor agreement with Imaging Services, Inc., pursuant to which Tower was to provide certain contractor's services. [Plaintiffs' Separate Statement of Material Facts (SSMF), No. 1; CT 000518] Tower had certain explicit and implicit obligations to perform these services according to the terms of the contract, and in a skillful, non-negligent, competent fashion, which it failed to do. [SSMF No. 4; CT 000520] Plaintiffs made certain payments to Tower, which payments are still being ascertained (because of the fire which is the subject of this litigation). [SSMF No. 34; CT 00535-000536] Plaintiffs demonstrated that Tower (and its agents and employees, including subcontractors) performed in an unprofessional and negligent fashion, as alleged in Plaintiff's complaint, resulting in a catastrophic fire and the resultant destruction of the subject premises and the Plaintiffs' business. [SSMF No. 8; CT 000523] Damages to plaintiffs far exceed the amount of the construction contract, particularly in light of payments already made to Tower. [SSMF No. 35; CT 000536]

During construction (and prior to the fire), Tower (the general contractor) performed its contractual services in an unsatisfactory manner. Among other things, occupancy was delayed by a month, due to contractor delays, and not all of the required work was completed. The contractors continually would not finish jobs, and would constantly have to be called out to redo substandard work. [SSMF No. 10; CT 000524; and extensive references therein.] As Plaintiff Janes declared (at paragraph 27):

"27. During construction (and prior to the fire), Tower (the general contractor) performed its contractual services in an unsatisfactory manner. Among other things, occupancy was delayed by a month, due to contractor delays and the fact that not all of the required work was completed. The contractor continually would not finish jobs and would constantly have to be called out to redo substandard work. Several items were taken when workers were left alone to work weekends or after hours. Wallpaper and wall coverings were not completed and were of poor workmanship. Floor coverings, tile and carpet were installed poorly, showing seams and lifting up from the floor. Drywall surfaces were uneven and poorly leveled, showing waves and bumps. The electrical work was particularly problematic. Not all light fixtures were installed and they were not working properly; they would flicker constantly and sometimes turn off by themselves. Electrical outlets had electronic noise which would make computer monitors flicker and show distortion; computer equipment would malfunction at times and one laptop was destroyed when left to charge overnight. Several employees complained about burning smells, and Tower Engineering and Albert's Electric would come to investigate saying there was no problem. Repeated attempts to work out issues with Tower Engineering and Albert's Electric only resulted in broken promises by Tower Engineering and Albert's Electric and further delays. Documentation of such delays is noted in facsimiles between Bobby Dieken and Albert Osorio, attached as Exhibit D to the Declaration of Richard D. Farkas in Support Plaintiffs' Opposition to

Defendant Tower's Second Summary Judgment Motion." [CT 000710, 000762-000767.]

Albert's Electric Service (the electrical contractor hired by Tower) also performed its contractual services in an unsatisfactory manner, displaying unprofessional behavior and negligence as noticed by Defendant Tower Engineering; a fact well documented in the September 21, 2001, letter addressed to Albert Osorio, wherein it states, "…I see negligence on your part to have materials and/or manpower to complete this project in a timely manner." [SSMF No. 21; CT 000529-000530] On many occasions, Albert's Electric's performed with a lack of professionalism based on workers' conduct. Light fixtures were not ordered as claimed for several months; Tower Engineering had to pay for light fixtures that Albert's Electric ordered because they couldn't get the credit with the wholesale supply house; discrepancies were noticed regarding wiring; some of the workers were not responding in a professional manner or were non-responsive, and it was suggested by Dean Janes that some of the workers "looked stoned all the time." [SSMF No. 19; CT 000528-000529; Janes declaration ¶ 39, CT 000492] The responsibility of Albert's Electric Services' performance was that of Defendant Tower Engineering [SSMF No. 11; CT 00525]

Despite the persistent complaints regarding the various electrical problems, i.e. electronic noise, flickering lights and computer monitors, burning odors, and grounding issues, the contractors were unable to determine the source of electrical problems. [SSMF No. 13; CT 000526] The repeated attempts to

work out issues with Tower Engineering and Albert's Electric only resulted in broken promises by Tower Engineering and Albert's Electric and further delays. [SSMF No. 28; CT 000532]

The grounding issues, flickering monitors and noise issues were not "normal" construction problems. [SSMF No. 24; CT 000531] The flickering of lights and monitors were seen as serious problems that could prove to result in fire, which is why Plaintiffs found it necessary to seek the opinion of other experts. [SSMF No. 25; CT 000531] Flickering lights are attributable to ballasts and bad lights, wiring errors and breaker problems. [SSMF No. 26; CT 000531]

When neither Tower nor Albert's could determine the source of the electrical problems, Burbank Water & Power was called out to investigate. [SSMF No. 13; CT 000526] In an attempt to remedy these electrical problems, the Burbank Water & Power Company performed a test on the incoming service, which concluded that the power was not coming into the building "dirty" but that the problem was internal. The utility company then went back and inspected all the wiring to find that it was not tight on all of the connections. [Declaration of Dean Janes in Support of Plaintiffs' Opposition to Defendant Tower's Motion for Summary Judgment, paragraph 29; CT 000490.]

Shortly thereafter, on October 25, 2001, another electrical company, Smallcomb Wiring, was called to investigate the computer monitor screen flicker/interference in several offices. The service technician, Eric Zuber, performed several tests. At the time of inspection, Mr. Zuber came across

incorrect wiring. As stated in his report, "The neutral conductor was not properly split between the line phases. **This wiring error…could cause over-heating and failure** of the neutral conductor if the two branch circuits included in this '3-wire' circuit were ever loaded to capacity." [SSMF No. 16; CT 000527] After making the necessary wiring corrections, Mr. Zuber then checked the computers again, only to find that the high frequency screen flicker was still present. Moreover, on its face, the report of Smallcomb was limited to problems with the computer screens; it did not address the myriad other problems with the electric installations and problems at the site. [SSMF No. 17; CT 000527]

As part of the owner-contractor agreement, construction was to be substantially complete by August 2001 (with a construction commencement date of July 2001). [A true and correct copy of the owner-contractor agreement is attached to the Declaration of Richard D. Farkas in Support of Plaintiffs' Opposition to Defendant Tower's Second Motion for Summary Judgment as Exhibit B; CT 000730-000741.] Contrary to Tower's claims that its construction work at the subject property was substantially complete by September 2001 [See Defendant's Notice of Motion and Motion for Summary Judgment, page 5, line 9; CT 000181], there were, in fact, incomplete items. [James Izzo Declaration in Support of Plaintiffs' Opposition to Defendant Tower's Second Motion for Summary Judgment [CT 000500-000516], paragraph 28; CT 000506.] Tower did not "substantially complete" its required work. [SSMF No. 7; CT 000522] In fact, the incomplete work of Tower and Defendants alike led to a delayed

completion date of approximately one month and further delayed occupancy. [SSMF No. 10; CT 000524-000525]

Though Defendants' experts' testimony concluded that the source of the fire could not be definitely confirmed due to its severity, other sources were extensively investigated and excluded as likely causes. According to the Fire Investigation Report from the Burbank Fire Department, prepared by Captain Bob Reinhardt, he "requested a Canine Accelerant Detection dog to check the interior for any possible use of accelerants. The Canine did not alert any areas." [SSMF No. 29CT 000533; Janes declaration ¶ 43, CT 000493] This suggested that arson was not a source of the cause. When later interviewed on February 21, 2002, Captain Reinhardt further indicated that **"he cannot identify a cause for the fire, …but is leaning towards a possible electrical failure**." [SSMF No. 30; CT 000530]

Further testing was conducted by Armstrong Forensic Laboratory regarding the presence of ignitable liquids. Following the collection and submission of samples taken from the subject location, the test results proved negative for ignitable liquids, which further confirmed that arson or Plaintiffs' activities were not the cause of the subject fire. [SSMF No. 29; CT 000533]

Consistent with Plaintiff's testimony that many employees, including Dean Janes, smelled the presence of burning odors toward the northwest side of the building, is the determination of the origin of the fire in this same northwest location, according to several Fire Investigators such as Captain Bob Reinhardt,

Scot Hays, and William Keener. [True and correct copies of the Fire Investigators' reports are attached, respectively, to the Declaration of Richard D. Farkas, as Exhibits K, L, M, and N; CT 000710.] The main power input and the majority of the circuit breaker boxes were also located in this same northwest location. [Declaration of Dean Janes in Support of Plaintiffs' Opposition to Defendant Tower's Motion for Summary Judgment, ¶ 47; CT 000494.] As previously mentioned, Plaintiffs were having problems with the circuit breakers constantly tripping, which further support an electrical cause of the fire [Declaration of Dean Janes in Support of Plaintiffs' Opposition to Defendant Tower's Motion for Summary Judgment, paragraph 33. CT 000491; Declaration of James Izzo in Support of Plaintiffs' Opposition to Defendant Tower's Motion for Summary Judgment, paragraph 30 and 34; CT 000506 and CT 000507.]

Because Tower Engineering failed to pursue the necessary corrective measures with respect to Albert's Electric Service, and due to their lack of professional and diligent work practices, the electrical problems persisted, which was ultimately the cause of the devastating fire that destroyed the subject location of this litigation. [Dean Janes' Declaration in Support of Plaintiffs' Opposition to Defendant Tower Engineering's Second Summary Judgment Motion, paragraph 55; CT 000496.]

There were no other factors present that could have been the cause of this fire, other than electrical. There were no acts of God that caused the fire: no earthquake(s), no lightning storms. [SSMF No. 44; CT 000543; Declaration of

Dean Janes in Support of Plaintiffs' Opposition to Defendant Tower's Motion for Summary Judgment, ¶ 50; CT 000495] Furthermore, other possibilities have been ruled out: there is no evidence that the fire was intentionally set, despite exhaustive investigations. There were no employees present at the time of the fire and there was no cigarette use, welding or use of fire. The only outstanding explanation is that of an electrical source. [Dean Janes' Declaration in Support of Plaintiffs' Opposition to Defendant Tower Engineering's Second Summary Judgment Motion, paragraph 59, CT 000497; Declaration of James Izzo in Support of Plaintiffs' Opposition to Defendant Tower's Motion for Summary Judgment, paragraph 52, CT 000500-000512; Declaration of Richard D. Farkas in Support of Plaintiffs' Opposition to Defendant Tower's Motion for Summary Judgment, paragraph 48; CT 000725.]

The existence of scores of electrical problems, in the complete absence of other factors, is sufficient to prove causation, through common knowledge of electrical fires, which requires no further expert testimony. [Dean Janes' Declaration in Support of Plaintiffs' Opposition to Defendant Tower Engineering's Second Summary Judgment Motion, paragraph 60; CT 000497.] The trial court, however, erroneously held that "Whether the fire was caused buy an electrical problem (or problems) for which defendant Tower Engineering is liable is a matter which requires expert testimony and special knowledge." [CT 001013, 001014.] Acknowledging that "expert testimony is not required to establish causation for all fires," the trial court nevertheless held that "it is

required where, as here, the cause 'may be so foreign to the common experience of the ordinary juror that he cannot know without the aid of expert testimony whether a fire might be expected to result or not.'" [CT 001014.]

4. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT.

As detailed throughout this brief, the Trial Court, it is submitted, erred in granting Summary Judgment. Among other things, it was error to hold that causation of an electrical fire "is a matter which requires expert testimony and special knowledge." [CT 001013, 001014.][4] Indeed, this was not even the holding of the cases relied upon, *Raymond George v. Bekins Van & Storage Co.*[5] (1949) 33 Cal.2d 834 and *Hyman v. Gordon* (1973, 2nd Dist.) 35 Cal.App.3d 769. To the contrary, **none of the cases cited by Defendant (and incorporated into the Trial Court's ruling) <u>required</u> expert testimony**; they only allowed it. *Raymond George vs. Bekins Van & Storage* dealt with whether or not expert testimony would be allowed, and stated "The possible causes of warehouse fires are sufficiently beyond the common experience of the ordinary judge or juror to

[4] It should be noted that Plaintiff Dean Janes himself has extensive expertise in connection with the matters at issue in this litigation. After describing his extensive educational and professional background in his declaration (at paragraphs 7 through 20), and describing his percipient observations, he concluded: "In my own personal and professional experience, I have witnessed conditions similar to those associated with the subject location that have resulted in electronic components catching fire very easily, making it probable that the cause of the fire was indeed electrical." [Janes Declaration ¶ 48; CT 000494.]

[5] The trial court mistakenly referenced the plaintiff in this case as "George," rather than "Raymond George," and mistakenly cited the case as 32 Cal.2d, rather than 33 Cal.2d. [CT001014.]

justify the admission of expert opinion testimony on that issue." Nowhere did that court indicate that expert testimony was required. Similarly, *Hyman v. Gordon* dealt with a case in which the trial court had refused to admit expert testimony as to fire causation, and the appellate court ruled that the expert should have been allowed to testify pursuant to California *Evidence Code* section 720, that states that a "person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." Again, neither of these cases, cited by Respondent and adopted by the trial court, held that expert testimony was required to establish causation of a warehouse fire.

The Trial Court further disregarded the mountains of credible and admissible evidence, including that of Messrs. Janes and Izzo [CT 000484 - 000499 and CT 000500 - 000514], to establish negligence and causation of the fire. Instead, the Trial Court stated this evidence "consists of mere speculation, conjecture, or inferences drawn from other inferences to reach a conclusion unsupported by real evidence." [CT 001002, also CT 001030.] Even acknowledging that "this evidence may be sufficient to raise a triable issue as to whether there were problems with the electrical system, no reasonable inference can be drawn from these facts … that it could or did cause the subject fire." [CT 001003, also CT 001031.] It is respectfully submitted that the Trial Court erred in dismissing all of Plaintiffs' claims (including those unrelated to the fire), and

further erred in awarding costs to Tower (in connection with the erroneous summary judgment), and to Albert's Electric (which could not properly be deemed a "prevailing party," as detailed below).

5. NO COSTS SHOULD HAVE BEEN AWARDED TO ANY DEFENDANT. DEFENDANT ALBERT'S ELECTRIC, HAVING BEEN DISMISSED BECAUSE OF HIS BANKRUPTCY DISCHARGE, WAS NOT ENTITLED TO AN AWARD OF COSTS UNDER ANY CIRCUMSTANCES.

A. ALBERT'S ELECTRIC WAS NOT A "PREVAILING PARTY," AND WAS NOT ENTITLED TO COSTS.

Defendant Albert's Electric was not a prevailing party, entitled to costs, as there was no determination concerning the merits of this case relative to this party or the defense. Defendant's costs were actually incurred in violation of the existing bankruptcy of defendant, and should not form the basis of a cost award.

Defendant Mario Albert Osorio, dba Albert's Electric Service successfully sought to be dismissed from the current action after this Defendant filed for Chapter Seven bankruptcy with the United States Bankruptcy Court, case number LA03-24299-TD, and after the U.S. Bankruptcy Court entered an "Order Closing Case," granting MARIO ALBERT OSORIO a discharge on September 26, 2003. [CT 000419.] Neither Plaintiffs nor any other party in this case were ever served with or notified of this bankruptcy action or any orders associated therewith. Although this defendant was dismissed, because of his bankruptcy

filing, he was not a prevailing party, and there was no determination on the merits.

On November 17, 2003, an Order of Rehabilitation and Preliminary Injunction was issued by the General Court of Justice, Superior Court Division of Wake County, North Carolina. Defendant and Cross-Complainant Albert's Electric Service filed an *ex parte* Application for Order Shortening time to serve Motion to Stay proceedings in pursuant to and consistent with the Agreed Order of Rehabilitation and Preliminary Injunction issued by the General Court of Justice, Superior Court Division of Wake County, N. Carolina, on January 5, 2004. On January 7, 2004, Alert's Electric Service's Application was denied. On the same day, January 7, 2004, Defendant filed a Withdrawal notice of Motion and Motion to Enforce Stay.

On April 6, 2004, a Mandatory Stay in Compliance with North Carolina Order and California Insurance Code §103.6 was formerly imposed. Then on April 21, 2004, this Court vacated and continued all pending court dates, including Albert's Electric's Motion to Continue Trial, the motions for summary Judgment filed by Albert's Electric, Tower Engineering and Smallcomb Wiring, an the trial date. All depositions, therefore, were suspended, as were Plaintiffs' motions to compel and other discovery efforts directed to Albert's Electric/Mario Osorio. The Stay was lifted on June 22, 2004.

Plaintiffs were made aware of the aforesaid discharge when Defendant Albert Osorio's attorney announced for the first time at the Case Management

Conference on June 22, 2004, that Mr. Osorio filed for Chapter 7 Bankruptcy in 2003. Shortly thereafter, on July 2, 2004, Mr. Osorio, dba Albert's Electric, filed a Motion to Dismiss Action Pursuant to Bankruptcy Discharge, which was granted. [CT 00411.] Neither Plaintiffs nor the other parties had been notified, formally or informally, of this bankruptcy filing. Due to Defendant's lack of notification, Plaintiffs were unable to file an Objection to Discharge or any other paper with the bankruptcy court.

Plaintiffs filed a Notice of Motion and Motion to Tax or, in the Alternative, Strike All or a Portion of Albert's Electric Service's Memorandum of Costs on September 2, 2004. [CT 000003.] A copy of this Motion to Tax Costs is attached hereto as Appendix A. Plaintiffs argued, in this Motion:

1. "Defendant Albert's Electric Service is not a "prevailing party" in this action entitled to costs.

2. Defendant Albert's Electric Service was discharged by the United States Bankruptcy Court, Case No. LA03-24299-TD, on September 26, 2003, at which time Defendant failed to inform all involved parties.

3. At the time that Defendant Albert's Electric Service was formally dismissed (on August 4, 2004) by the Los Angeles Superior Court from the above-entitled action, it was not awarded costs.

4. Defendant Albert's Electric Service neither received a judgment nor was any ruling made on the merits of its request for dismissal. Defendant was merely

dismissed by the Court because Albert's Electric filed for bankruptcy protections and its insurance carrier went into liquidation.

5. The costs purportedly incurred are excessive and unreasonable;

6. The costs sought were incurred in violation of existing bankruptcy stays;

7. It is for the reasons stated above that Plaintiffs believe that Defendant Albert's Electric Service is not entitled to any such costs indicated in its Memorandum of Costs." [Exhibit A, page 2.]

The trial court denied Plaintiffs' Motion to Tax Costs on October 1, 2004. [CT 000995.] Plaintiffs contend that this denial constituted error as well.

Defendant Osorio/Albert's Electric was not a prevailing party, entitled to costs, and there was no determination concerning the merits of this case or the defense. Defendant's costs were actually incurred in violation of the existing bankruptcy of defendant, and should not form the basis of a cost award.

B. SINCE SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED TO TOWER ENGINEERING, AN AWARD OF COSTS MUST BE REVERSED.

In granting Summary Judgment against the Plaintiffs in favor of Tower Engineering, the Trial Court awarded costs in the sum of $9,954.00. [CT 001007.] For all of the reasons set forth herein, the motion of Tower Engineering for summary judgment against Plaintiffs should not have been

granted. Accordingly, the Trial Court's award of costs of $9,954.00 [CT 001007] against Plaintiff was improper, and should also be reversed.

6. CONCLUSION.

In review a grant of summary judgment, the role of the appellate court is well established: "In ruling on the motion the court must 'consider all of the evidence' and 'all of the 'inferences' reasonably drawn therefrom ([*Code Civ. Proc.*,] § 437c, subd. (c)), and must view such evidence [citations] and such inferences [citations] in the light most favorable to the opposing party." (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 843.) In this case, Plaintiffs presented more than enough evidence in their opposition to overcome Defendant's summary judgment, such that this case should have proceeded to trial.

For the reasons stated herein, Plaintiffs and Appellants respectfully request that this Court should reverse the lower court's Summary Judgment decision, reverse costs, and allow the case to go forward on its own merits.

DATED: March 30, 2005 LAW OFFICES OF RICHARD D. FARKAS

By: _____
RICHARD D. FARKAS
Attorneys for Plaintiffs and
Appellants IMAGING SERVICES, INC.
and DEAN JANES

CERTIFICATE OF LENGTH

Pursuant to Rule 14, subdivision (c)(1) of the California *Rules of Court*, Appellants certify that the number of words in the body of this brief is approximately 6,713 according to the word processor program (Microsoft Word®) used for this brief.

DATED: March 30, 2005 LAW OFFICES OF RICHARD D. FARKAS

By: _____
RICHARD D. FARKAS
Attorneys for Plaintiffs and
Appellants IMAGING SERVICES, INC.
and DEAN JANES

Imaging Services, Inc., Janes vs. Tower Engineering, etc.
Court of Appeals Case No. B 179613

PROOF OF SERVICE

I am a resident of the State of California, I am over the age of 18 years, and I am not a party to this lawsuit. My business address is Law Offices of Richard D. Farkas, 15300 Ventura Boulevard, Suite 504, Sherman Oaks, California 91403. On the date listed below, I served the following document(s):

APPELLANTS' OPENING BRIEF

XX by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as set forth below.
I am readily familiar with the firm's practice of collecting and processing correspondence for mailing. According to that practice, items are deposited with the United States mail on that same day with postage thereon fully prepaid. I am aware that, on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing stated in the affidavit.

John M.C. Reilly, Esq. and Gregory Dilts, Esq. Bistline & Cohoon 23456 Hawthorne Blvd. Skypark Bldg. 5, Ste. 130 Torrance, CA 90505-4717	California Supreme Court (5 copies) 350 McAllister Street San Francisco, CA 94102

XX by personally delivering the document(s) listed above to the person/court at the address set forth below.

Court of Appeal Second Appellate District 300 South Spring Street 2nd Floor, North Tower Los Angeles, CA 90013	Clerk of the Los Angeles County Superior Court North Central District 600 East Broadway Glendale, CA 91206 (Hon. Laura Matz)	

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: March 30, 2005

_____
KERRI CONAWAY