

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWIN SIMMONS	:	CIVIL ACTION
	:	NO. 97-6151
v.	:	
	:	
JACQUES GALIN, et al	:	
	:	
O'NEILL, J.	:	SEPTEMBER , 2001

MEMORANDUM

Plaintiff Edwin Simmons brings this suit against Jacques Galin, Rosita Conroy, Maria Conroy, Mellon Bank Corporation and Mellon Bank, N.A. Before me is Mellon Bank Corporation and Mellon Bank, N.A.'s motion for summary judgment.¹ For the reasons stated below I will grant their motion.

BACKGROUND

At or about 4 am on the morning of October 4, 1995, plaintiff and his employer David Hermes were attempting to repossess a car owned by Rosita Conroy when the plaintiff was shot and seriously wounded by Jacques Galin.² Plaintiff had gotten into the car using a duplicate key which was made with information supplied by Mellon. Plaintiff was backing the car out of the alley near Rosita's home into the parking lot of a nearby gas station when Galin appeared with a gun and fired eleven shots at the plaintiff. Galin, Rosita's live-in boyfriend, allegedly thought the car was being stolen because Rosita had informed him that her mother, Maria Conroy, had paid the overdue balance on the car loan. The car had been

¹ Defendants Mellon Bank Corporation and Mellon Bank, N.A. will be collectively referred to as "Mellon".

² Galin was criminally charged for his actions and was found guilty of felony assault.

financed by Mellon and the loan was allegedly in default when Mellon hired D&D Adjustment Co., the car repossession company for whom the plaintiff worked.

Plaintiff initiated this suit asserting negligence, negligent misrepresentation, vicarious liability-peculiar risk, and vicarious liability-unreasonable risk of harm claims against Mellon. Plaintiff also alleges negligent assault and battery, intentional assault and battery, and intentional infliction of emotional distress claims against Jacques Galin, Rosita Conroy and Maria Conroy.³

STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). The party moving for summary judgment “bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions. . . which it believes demonstrate the absence of a genuine issue of material fact.” Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has filed a properly supported motion, the burden shifts to the nonmoving party to “set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e). The nonmoving party may not rest upon the mere allegations or denials of the party's pleading. See Celotex, 477 U.S. at 324.

To determine whether summary judgment is appropriate, I must determine whether any genuine issue of material fact exists. An issue is “material” only if the dispute over facts

³ On August 23, 1999, I granted Maria Conroy’s motion for judgment on the pleadings and dismissed her from this action. See Simmons v. Galin, 1999 WL 639843 (E.D. Pa).

“might affect the outcome of the suit under the governing law.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). If the record taken as a whole in a light most favorable to the nonmoving party, “could not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for trial.’” Matsushita Elec. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986) (citation omitted).

DISCUSSION

There is no genuine issue of material fact in the present dispute. A substantial portion of the plaintiff’s and defendants’ briefs address the factual dispute of when Mellon received the check written by Maria Conroy, which allegedly paid off the overdue balance on the car loan. Mellon argues it is entitled to judgment because the payment was not received until after the date of the attempted repossession, it did not owe a duty of care to the plaintiff and its actions were not the proximate cause of the plaintiff’s injuries. Plaintiff argues that the date Mellon received the check is a material fact in dispute so summary judgment is inappropriate. Although the date Mellon received the check may be a “genuine” issue of fact, it is not a fact that is “material” to plaintiff’s negligence claim because I hold that Mellon does not owe a duty of care to the plaintiff under these circumstances.

In exercising diversity jurisdiction, I am obliged to apply the substantive law of Pennsylvania. See Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). If the Pennsylvania Supreme Court has not addressed a precise issue, a prediction must be made taking into consideration “relevant state precedents, analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand.” Nationwide Mut. Ins. Co. v. Buffetta, 230 F.3d 634, 637 (3d. Cir. 2000) (citation omitted). “The opinions of intermediate state courts are ‘not to be disregarded by a federal court unless it is convinced by other persuasive data that the

highest court in the state would decide otherwise.” Id. at 637, citing West v. AT&T Co., 311 U.S. 223, 227 (1940).

Plaintiff seeks recovery against Mellon for four causes of action, two of which seek recovery under the Restatement (Second) of Torts §§ 416, 427 which the Supreme Court of Pennsylvania has adopted as law.⁴ See Philadelphia Elec. Co. v. James Julian, Inc., 228 A.2d 669, 671 (Pa. 1967). However “the duties defined in these sections. . . impose vicarious liability for the negligence of an independent contractor upon one who employs the contractor to do work involving heightened risks of physical harm to third parties.” Collo v. Philadelphia Elec. Co., 481 A.2d 616, 622 (Pa. Super. Ct. 1984) (referring to Restatement (Second) of Torts §§416, 427). Therefore, in order to seek recovery plaintiff must allege that he failed to exercise reasonable care. Because plaintiff alleges that his injuries were caused by the negligence of others and not himself, these two claims of vicarious liability against

⁴ Counts VIII and IX of plaintiff’s complaint allege “vicarious liability-peculiar risk” and “vicarious liability-unreasonable risk of harm” claims but do not specifically refer to the Restatement (Second) of Torts §§416, 427. Mellon asserts that the source of those counts is the Restatement (Second) of Torts §§416, 427. Plaintiff’s motion in opposition does not address counts VIII or IX. The sections state:

§416. Work Dangerous in Absence of Special Precautions

One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise.

§427. Negligence as to Danger Inherent in the Work

One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor’s failure to take reasonable precautions against such danger.

Mellon are not viable.

The remaining claims against Mellon are negligence and negligent misrepresentation. In order to prevail on a cause of action in negligence under Pennsylvania law, a plaintiff must establish a duty requiring the actor to conform to a certain standard of conduct, a failure to conform to that standard, a causal connection between the conduct and the resulting injury, and actual damage. See Morena v. South Hills Health Sys., 462 A.2d 680, 684 (Pa. 1983). “Before a person may be subject to liability for failing to act in a given situation, it must be established that the person has a duty to act; if no care is due, it is meaningless to assert that a person failed to act with due care.” Wenrick v. Schloemann-Siemag Aktiengesellschaft, 564 A.2d 1244, 1248 (Pa. 1989).

Negligent misrepresentation is a misrepresentation which arises from a want of “reasonable care or competence in obtaining or communicating information.” Restatement (Second) of Torts § 552. See also Gibbs v. Ernst, 647 A.2d 882, 890 (Pa. 1988). “Moreover, like any action in negligence, there must be an existence of a duty owed by one party to another” to successfully pursue a claim for negligent misrepresentation. Bortz v. Noon, 729 A.2d 555, 561 (Pa. 1999).

Whether a defendant owes a duty of care to a plaintiff is a question of law. Kleinknecht v. Gettysburg Coll., 989 F.2d 1360, 1366 (3d. Cir. 1993) (applying Pennsylvania law). The Supreme Court of Pennsylvania has stated that “[d]uty, in any given situation, is predicated on the relationship existing between the parties at the relevant time. . .,” Morena, 462 A.2d at 684, and that

[a]lthough each person may be said to have a relationship with the world at large that creates a duty to act where his own conduct places others in peril, Anglo-American common law has for centuries accepted the fundamental premise that mere knowledge of a dangerous situation, even by one who has the ability to intervene, is not sufficient to create a duty to act.

Wenrick, 564 A.2d at 1248 (emphasis in original).

In Elbasher v. Simco Sales Service of Pennsylvania, 657 A.2d 983 (Pa. Super. Ct. 1995), the Superior Court of Pennsylvania held that the ice cream manufacturer did not owe a duty to protect an independent contractor from the criminal acts of unknown third persons. There the plaintiff had leased an ice cream truck from the defendant manufacturer and sold the defendant's ice cream products along a pre-assigned route. Id. at 984. While selling ice cream along the route, the plaintiff was robbed at gunpoint and shot in the stomach. Id. That Court noted that

[a]s a general rule, a person is not liable for the criminal conduct of another in the absence of a special relationship imposing a pre-existing duty. Neither the common law nor the Pennsylvania courts have imposed upon a contractee a special duty to protect independent contractors against the criminal acts of unknown third persons.

Id. at 984. See also Bunn v. Meridian Bankcorp, Inc., 1993 WL 259434 at *2 (E.D. Pa.) (applying Pennsylvania law); Feld v. Merriam, 485 A.2d 742, 746 (Pa. 1984).

Similarly, Simmons is an independent contractor and does not stand in a special relationship with Mellon imposing a pre-existing duty. Mellon does not owe a duty to protect an employee of its independent contractor against the intentional, violent criminal assault by a third person unknown to Mellon. I predict the Pennsylvania Supreme Court would adopt the Elbasher decision. Therefore I conclude summary judgment should be entered in favor of Mellon.

An appropriate ORDER follows.

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ORDER

AND NOW, this day of September, 2001, in consideration of defendants' motion for summary judgment, the parties' various filings related thereto, and for the reasons set forth in the accompanying memorandum, it is ORDERED that defendants Mellon Bank Corporation and Mellon Bank, N.A.'s motion for summary judgment is GRANTED and judgment is entered in favor of defendants and against plaintiff.

THOMAS N. O'NEILL, JR., J.