

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

LATIFEH KORMI : CIVIL ACTION
 :
 v. :
 :
 TOURAJ KORMI : NO. 97-2788

M E M O R A N D U M

Ludwig, J.

March 17, 1998

This memorandum follows the granting of defendant Touraj Kormi's motion for summary judgment, Fed. R. Civ. P. 56,¹ on January 15, 1998.

This is the second action to arise from the alleged theft of plaintiff Latifeh Kormi's belongings from a U-Haul truck. On August 22, 1995 defendant, Touraj Kormi, plaintiff's brother-in-law, agreed to drive the truck from plaintiff's home in Gladwyne, Pennsylvania to Worcester, Massachusetts. Compl. ¶ 5. On the way, defendant stopped overnight at his home in Bayside, New York, leaving the truck parked on the street. Id. ¶ 7. At about 4:30 a.m. the next morning, defendant discovered that the truck had disappeared. The truck was subsequently found, but plaintiff's belongings were never recovered. Id. ¶¶ 8-9.

¹ "[S]ummary judgment should be granted if, after drawing all reasonable inferences from the underlying facts in the light most favorable to the non-moving party, the court concludes that there is no genuine issue of material fact to be resolved at trial and the moving party is entitled to judgment as a matter of law." Kornegay v. Cottingham, 120 F.3d 392, 395 (3d Cir. 1997) (quoting Spain v. Gallegos, 26 F.3d 439, 446 (3d Cir. 1994) (further citation omitted)).

On February 6, 1996 plaintiff filed an action – Latifeh Kormi v. The Greentree Insurance Co. and Madden Insurance Agency, NO. 96-CV-889 (E.D. Pa. 1996) – for breach of her homeowner’s insurance policy. Defendants filed third-party complaints against Touraj Kormi, Fed. R. Civ. P. 14(a), alleging that he was responsible for plaintiff’s loss. Thereafter, at the outset of trial, plaintiff settled her case with defendants.

The present action asserts claims for breach of bailment contract, negligence, intentional infliction of emotional distress, and defamation, and claims damages in excess of \$800,000, compl. ¶ 6. The defamation count is based on statements made by defendant that a \$600,000 stamp collection alleged to have been in the truck had actually been stolen from plaintiff and her late husband in Iran in 1979.² Memorandum in support of defendant’s motion for summary judgment (defendant’s motion), at 3. The claim for intentional infliction of emotional distress is based on defendant’s purportedly defamatory statements, compl. ¶ 21, and on his \$30,000 counterclaim against plaintiff for nonpayment of personal loans, see plaintiff’s response, at 9.

1. Breach of bailment agreement (Count I) – “A bailment is a delivery of personalty for the accomplishment of some purpose

² Touraj Kormi’s answer to the third-party complaint in No. 96-CV-889 incorporated these statements as an affirmative defense. See plaintiff’s response to motion for summary judgment (plaintiff’s response), exh. d. The defendant insurers in that action subsequently amended their answers, adding an affirmative defense and a counterclaim against plaintiff for violation of the Pennsylvania Insurance Fraud Act, 18 Pa. Cons. Stat. Ann. § 4117(a) (1983 & Supp. 1997). See plaintiff’s response, exh. f.

upon a contract, express or implied, that after the purpose has been fulfilled, it shall be redelivered to the person who delivered it, otherwise dealt with according to his directions or kept until he reclaims it." Price v. Brown, 545 Pa. 216, ___, 680 A.2d 1149, 1151-52 (1996) (quoting Smalich v. Westfall, 440 Pa. 409, 413, 269 A.2d 476, 480 (1970) (citation omitted)). A bailor has a cause of action for breach of a bailment agreement if he can establish that personalty has been delivered to the bailee, the bailor made a demand for return of the goods, and the bailee has not done so. See Price, 545 Pa. at ___, 680 A.2d at 1152. If these elements are satisfied –

the bailee has the duty of going forward with evidence accounting for the loss and if the bailee fails to do so, he is responsible for the loss. It is assumed under those circumstances that the bailee has failed to exercise the duty of care required by the agreement.

* * * *

On the other hand, should the bailee go forward with evidence showing that the personalty was lost and the manner in which it was lost, and the evidence does not disclose a lack of due care on his part, then the burden of proof again shifts to the bailor, who must prove negligence on the part of the bailee.

Id. (citations omitted).

The parties do not contest the existence of a bailment agreement, and defendant's explanation for the loss – the theft of the truck – is not in dispute. They disagree, however, as to the type of bailment and, consequently, the measure of defendant's duty of care. According to defendant's motion, the bailment was gratuitous, see defendant's motion, at 6, i.e., that he was bound

only to use "slight care," and would be liable only for "gross negligence," Ferrick Excavating and Grading Co. v. Senger Trucking Co., 506 Pa. 181, 192, 484 A.2d 744, 749 (1984) (citation omitted). Plaintiff's response argues that the bailment was one of mutual benefit, see plaintiff's response, at 6, in which event the bailee must "use ordinary care and is liable for ordinary negligence," Ferrick, 506 Pa. at 192, 484 A.2d at 749 (citation omitted).

The classification as a mutual benefit bailment does not require the bailor to show "a specific, tangible benefit or compensation running to the bailee." American Enka Co. v. Wicaco Machine Corp., 686 F.2d 1050, 1053 (3d Cir. 1982). Instead, evidence of "a possibility or chance of expected profit to accrue from the bailment is sufficient to make the relationship one for mutual benefit." Id. (quoting Kleckner v. Hotel Strand, 60 Pa.Super. 617 (1915) (internal quotations omitted)).

Here, however, plaintiff's evidence is insufficient to create a triable issue as to the existence of a mutual benefit bailment agreement. Plaintiff concedes that defendant had offered to drive the truck to Massachusetts without remuneration. Plaintiff's Oct. 24, 1997 deposition (1997 dep.), at 41. When asked how the bailment arose, plaintiff said, "Actually, in a way, he volunteered. I was very happy that he did, because I thought that it was a family, relative gesture . . . a relative gesture trying to be the - to meet the family relation which is part of our national background. Relationship, family relationship in our culture." Id. at 29, 41. Plaintiff contends that this "family

relationship" was the "consideration" for the bailment agreement. See plaintiff's response, at 6. She admits that defendant paid for the U-Haul rental and helped to load the truck. Id. at 41-42.

Given the evidence presented, what occurred was a gratuitous bailment, requiring defendant to exercise only "slight care" and subjecting him to liability only for "gross negligence." Ferrick, 506 Pa. at 192, 484 A.2d at 749.

Where personalty that is the subject of a bailment is lost by theft, "[t]he question of the bailee's liability for the loss depends upon whether the theft was the result of his negligence which it is incumbent upon the bailor to show once the theft is made to appear as the cause of the loss." I.H. Moss v. Bailey Sales and Service, 385 Pa. 547, 553, 123 A.2d 425, 428 (1956). A cause of action for negligence requires (1) a duty recognized by law requiring defendant to conform to a certain standard of conduct; (2) failure to conform to that standard; (3) a causal connection between the conduct and the resulting injuries; and (4) actual loss or damage. See Smith v. Commonwealth of Pa., ___ Pa. ___, ___ n.4, 700 A.2d 587, 589 n.4 (1997) (citing Morena v. South Hills Health Sys., 501 Pa. 634, 642 n.5, 462 A.2d 680, 684 n.5 (1983)).

Plaintiff points to no evidence showing gross negligence or, for that matter, a violation of the duty of ordinary care. It is undisputed that defendant parked the truck directly in front of his home, and that he checked the locks on the vehicle before leaving it for the night. See plaintiff's response, at 2. In her

deposition, plaintiff testified she believed defendant's home was in a "nice" residential area. Plaintiff's Oct. 25, 1996 deposition (1996 dep.), at 233. The only evidence supposedly critical of defendant is that he left the locked truck unattended in front of his home for three hours while he slept.³

There is no evidence that defendant departed from her instructions. "If the bailor has given instructions for the disposition of the bailed property expressly or by clear implication, even a gratuitous bailee makes himself responsible for any loss or injury if he departs therefrom." 8 Am. Jur. 2d Bailments § 203 (1980). True, the complaint alleges that defendant's stopover in Bayside was "contrary to the intention and understanding between the parties." ¶ 7. However, when asked in her deposition about their understanding, plaintiff admitted that she "didn't ask . . . didn't even think about it. I was assuming that it was Massachusetts, but I don't blame him to stay in New York if he got sleepy. You cannot predict that, you should not jeopardize." Plaintiff's 1996 dep., at 232.

In view of the foregoing, Count I for breach of bailment agreement was dismissed as a matter of law.

2. Negligence (Count II) – For the same reasons, this count was also dismissed.

³ The response argues that defendant owed a higher duty of care because of the value of the goods on the truck. See response, at 6. Plaintiff admitted at her deposition however, that she never informed defendant about the alleged \$600,000 stamp collection. Plaintiff's 1996 dep., at 85 ("I didn't say anything, he didn't ask, there was no purpose.").

3. Intentional Infliction of Emotional Distress (Count III) – Intentional infliction of emotional distress has been defined as outrageous intentional or reckless conduct that causes severe emotional distress. See Hoy v. Angelone, 456 Pa. Super. 596, 610, 691 A.2d 476, 482 (1997). In Pennsylvania, recovery can be obtained only in “very egregious cases.” Id. Plaintiff’s claims that defendant defamed her by his statements regarding the stamp collection and that he filed a counterclaim against her in this action are insufficient as a matter of law to make out this count.

4. Defamation (Count IV) – At the Rule 12 stage relative to the alleged theft of the stamp collection, plaintiff pointed to the deposition testimony of defendant in the first action and asserted that these statements “must have been made” to defense counsel at some time beforehand. Plaintiff’s response to motion to dismiss, at 6. To counter summary judgment, plaintiff delineated other recipients of the information, including the attorneys for plaintiff’s insurance company, and a mutual friend of the parties – a Dr. Rostami. These bare allegations refer to what transpired in connection with the first action. See plaintiff’s response, at 7-8.

“All communications pertinent to any stage of a judicial proceeding are accorded an absolute privilege which cannot be destroyed by abuse. . . . Thus statements by a party, a witness, counsel, or a judge cannot be the basis of a defamation action whether they occur in pleadings or in open court.” Binder v.

Triangle Publications, Inc., 442 Pa. 319, 324, 275 A.2d 53, 56 (1971); see also Doe v. Kohn Nast & Graf, P.C., 866 F. Supp. 190, 194 (E.D. Pa. 1994). Defendant's deposition testimony and statements in pleadings in the first action are absolutely privileged. The privilege also extends to pretrial proceedings. See Moses v. McWilliams, 379 Pa. Super. 150, 163, 549 A.2d 950, 956-57 (1988). Therefore, statements by defendant to his attorneys or during a pretrial conference telephone call are, likewise, privileged.

Statements made outside a judicial proceeding may be afforded a qualified, or conditional, privilege if (1) they are a fair and accurate report of statements made or pleadings filed in a judicial action; (2) there is no abuse of the privilege – such as over-embellishment – and (3) the out-of-court statements are not uttered for the sole purpose of causing harm. See Binder, 442 Pa. at 324, 275 A.2d at 56; Doe, 866 F. Supp. at 194. Here, defendant's telephone conversation with Dr. Rostami regarding his deposition testimony and sending him a copy of the deposition transcript constituted a privileged fair comment on statements given in the course of a judicial proceeding. In any event, plaintiff presented no evidence that defendant abused the privilege or supplied the transcript for any reason other than to answer Dr. Rostami's questions about his testimony.

As to this count, there was no triable issue to be submitted to the jury.

Edmund V. Ludwig, J.