

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

EDWIN SIMMONS, :
 :
 : CIVIL ACTION
 v. :
 :
 : No. 97-6151
 JACQUES GALIN, ROSITA CONROY, :
 JACQUES GALIN and ROSITA CONROY, :
 as husband and wife, :
 MARIA CONROY, :
 MELLON BANK CORP., :
 and MELLON BANK, N.A., :

O'Neill, J.

August , 1999

MEMORANDUM

One of the defendants in this tragic case, Maria Conroy, moves for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). Plaintiff Edwin Simmons worked for a car repossession company and was attempting to repossess a car owned by Maria Conroy's daughter, Rosita Conroy, when he was shot and seriously wounded by Rosita's live-in boyfriend and alleged common-law spouse, defendant Jacques Galin.¹ Jacques allegedly thought the car was being stolen because Maria Conroy had told Rosita she had paid off the car loan on the car when, allegedly, she had not. Plaintiff seeks to hold Maria Conroy vicariously liable for his injuries on grounds that Jacques acted as her agent, and directly liable on grounds that she was negligent in misrepresenting that she had paid off the loan. Maria Conroy argues that she is entitled to judgment because there are no factual

¹ Criminal proceedings have been brought against Jacques Galin for this incident and are ongoing.

allegations to support the supposed agency between her and her son-in-law; she did not owe a duty of care to the plaintiff; and her actions were not the proximate cause of his injuries. I agree with each of these contentions and therefore will dismiss Maria Conroy from this action.

I.

Maria's motion for judgment on the pleadings is opposed by her co-defendant, Mellon Bank, as well as by plaintiff. Mellon Bank also insists the motion should be treated as one for summary judgment because Maria has attached a police report and, like the other parties, has cited certain alleged facts which were not alleged in the Complaint but have apparently arisen in the course of discovery.² In particular, while the Complaint alleged that Maria had paid off the car loan as of September 30, plaintiff and Mellon Bank now contend that Maria did not send a check to pay off the loan until October 4. Indeed, this new allegation is the crux of plaintiff's claim that Maria is liable to him for her own negligence.

It is a matter for the Court's discretion whether to consider a motion on the pleadings as a motion for summary judgment, Brennan v. National Tel. Directory Corp., 850 F. Supp. 331, 335 (E.D. Pa. 1994), and I will not do so in this case. The single-page police report attached to Maria's motion is of no material significance to her arguments for judgment on

² Federal Rule of Civil Procedure 12(c) states in pertinent part: "If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment."

the pleadings, and I can consider the parties' new factual assertions -- viewing them as new allegations effectively amending plaintiff's complaint and construing them in his favor -- without treating the motion as one for summary judgment. The point is that Maria Conroy is arguing the law in her motion, not the truthfulness of the allegations or the sufficiency of the evidence, and plaintiff has responded in kind by arguing the law without attempting to produce evidence to support his claims. The motion is therefore most appropriately treated pursuant to the usual Rule 12(c) standards, which is to say, like a motion to dismiss under Rule 12(b)(6): assuming the truth of plaintiff's well-plead allegations and any inferences reasonably drawn therefrom, can plaintiff state a claim upon which relief could be granted against Maria Conroy?

II.

Construing the allegations liberally in plaintiff's favor and against Maria Conroy, the facts of this case are as follows. In 1991, Rosita Conroy purchased an automobile with a Mellon Bank loan co-signed by her mother, Maria, and secured by the car as collateral. In September, 1995, Maria learned Rosita had fallen behind on one or two payments and contacted Mellon to find out how much was due on the loan. On or before October 3, she told Rosita she had paid off the loan by check mailed September 28. Rosita passed this information along to Jacques Galin, her alleged common-law husband. In fact, Maria did not send the check until the afternoon of October 4.

In the meantime, in late September Mellon Bank contacted plaintiff's employer, a repossession company by the name of D&D Adjustment, to repossess Rosita's car. See 13 Pa. C.S. § 9503(a) (giving creditor right to self-help in repossessing collateral upon default). On October 3, Mellon Bank supplied information to D&D which allowed it to make a duplicate key for plaintiff's car.

At about 4:00 a.m. on October 4, plaintiff and the owner of D&D went to the home that Rosita shared with Jacques to repossess the car. As they attempted to take the car away, Jacques, believing the car was being stolen, pursued them and shot plaintiff several times. The details of the shooting are not clear from the complaint, but it appears plaintiff and/or his employer tried to show Jacques the repossession papers before he shot at plaintiff. (Compl. ¶ 33(j).) Plaintiff suffered significant injuries to his head, neck, chest, abdomen and pelvis resulting in several surgeries, a significant hospital stay, over \$242,000 in medical bills, and possibly permanent disabilities.

III.

Plaintiff asserts claims against Maria for infliction of emotional distress and assault and battery on grounds that she is vicariously liable for Jacques' intentional torts because he acted as her agent. Plaintiff argues that Jacques was Maria's agent because he was Rosita's common-law husband and was acting with respect to an object (the car) in which Maria had an interest as the co-signer of the loan when he pursued and shot plaintiff.

Agency is the relationship between two parties who agree that one shall act on behalf of and subject to the control of the other. See, e.g., Smalich v. Westfall, 269 A.2d 476, 480 (Pa. 1970). To state a claim based on agency, plaintiff must allege facts that, if proved, would establish that the alleged agent had express, implied, or apparent authority to act on behalf of the principal. See Volunteer Fire Co. of New Buffalo v. Hilltop Oil Co., 602 A.2d 1348, 1351-52 (Pa. Super. Ct. 1992). It should go without saying that agency does not exist merely because one has acted with respect to an object in which another has an interest, or because one has a familial relationship with another. Yet that is all plaintiff alleges with respect to the relationship between Maria and Jacques' conduct in shooting at plaintiff. There are no allegations even hinting that Maria authorized Jacques' conduct or appeared to have done so. Accordingly, plaintiff fails to state a claim against Maria based on vicarious liability for Jacques' conduct.

IV.

Plaintiff also asserts a claim against Maria for her own negligence.³ To state a claim for negligence, plaintiff must allege that defendant breached a duty of care owed to plaintiff and thereby caused him injury. Plaintiff and defendant Mellon Bank assert that Maria had a duty to act with reasonable care because she should have foreseen a potentially violent confrontation if the Bank attempted to have Rosita's car repossessed when Rosita and

³ As set forth already, plaintiff's Complaint originally did not allege a claim against Maria for her own negligence, but I consider it effectively amended.

Jacques thought it had been paid off, and she breached this duty by misleading Rosita that the loan had been paid off. Maria argues she owed plaintiff no duty of care and, even if she did, did not proximately cause his injuries.

Whether a defendant owes a duty of care to a particular plaintiff or class of plaintiffs is a question of law. Kleinknecht v. Gettysburg College, 989 F.2d 1360, 1366 (3d Cir. 1993) (applying Pennsylvania law). “‘Duty, in any given situation, is predicated on the relationship existing between the parties at the relevant time’ . . . Where, as here, the parties are strangers to each other, such a relationship may be inferred from the general duty imposed on all persons not to place others at risk of harm through their actions.” Zanine v. Gallagher, 497 A.2d 1332, 1334 (Pa. Super. Ct. 1985) (citation omitted). The scope of this duty is limited to those risks that are reasonably foreseeable under the circumstances. Id.

In their vague references to Maria’s duty to act with reasonable care, plaintiff and Mellon Bank gloss over the issue of to whom Maria owed such a duty. It might reasonably be said that Maria owed a duty of care to her daughter upon promising to pay off the loan, see Restatement (2d) of Torts §323 (1965) (imposing on one who undertakes, whether gratuitously or not, to provide services for another a duty to perform that undertaking with reasonable care), but Maria is not being sued for harm caused her daughter as a result of the unexpected repossession of her car. She is being sued by a car reposessor who contracted with the Bank and was a complete stranger to her and was shot by a third party not under her control.

Plaintiff is arguing that persons like Maria – borrowers or persons who undertake to pay loans on their behalf – owe a duty to potential reposseors to be accurate to third parties about the state of secured loans. This duty is said to arise because persons such as Maria should foresee not only the possibility of an unexpected repossession in the middle of the night and without notice, but also the possibility that third parties will meet the attempted repossession with unlawful, excessive force resulting in harm to the reposseor. Unsurprisingly, neither plaintiff nor Mellon Bank has cited a single case or other authority recognizing such a duty or one even remotely analogous. In my view, it is not reasonably foreseeable that inaccuracy about the status of payment on a loan will lead to an attempted repossession in which a third party such as Jacques will react with unlawful excessive force against the reposseor. I therefore hold that Maria did not owe a duty of care to plaintiff under the circumstances of this case.⁴

In the alternative, I find the causal link between Maria’s alleged misrepresentation and plaintiff’s injuries too attenuated to satisfy the requirements of proximate causation. To state a claim for negligence, plaintiff must show that Maria’s conduct was both a cause-in-fact

⁴ I am fortified in this decision by the fact that Pennsylvania courts have refused to recognize duties of care in circumstances involving what appear to be more substantial relationships between the plaintiff and the defendant and/or more obvious risks than those present in this case. See, e.g., Estate of Witthoeft v. Kiskaddon, — A.2d —, 1999 WL 459851 (Pa. 1999) (holding ophthalmologist owed no duty of care (i.e., to report patient’s eye condition to state authorities) to bicyclist killed by a patient in an automobile accident); Zanine v. Gallagher, 497 A.2d 1332 (Pa. Super. Ct. 1985) (holding motorist in high speed chase did not have a special duty of care to police officer who suffered a heart attack after the chase).

and a proximate, or “legal,” cause of his injuries.⁵ Proximate causation requires that the act at issue be a “substantial factor in bringing about the plaintiff’s harm.” Hamil v. Bashline, 392 A.2d 1280, 1284 (Pa. 1978). Under Pennsylvania law, a court must “evaluate the alleged facts and refuse to find an actor’s conduct the legal cause of harm when ‘it appears to the court highly extraordinary that [the actor’s conduct] should have brought about the harm.’” Bell v. Irace, 619 A.2d 365, 367 (Pa. Super. Ct. 1993) (alteration in original; inner quotation omitted), quoting White v. Rosenberry, 271 A.2d 341, 343 (Pa. 1970), quoting Restatement (2d) of Torts at § 435(2) (1965). Even when harm to a particular plaintiff is sufficiently foreseeable to impose a duty of care on the defendant and harm actually results as a breach of that duty, “the law makes a determination that, at some point along the causal chain, liability will be limited.” Alumni Ass’n v. Sullivan, 535 A.2d 1095, 1098 (Pa. Super. Ct. 1987).

In my view, the connection between Maria’s alleged misrepresentation that the “check was in the mail” and plaintiff’s injuries is simply too remote, insubstantial, and unlikely to constitute proximate cause. Maria’s misrepresentation allegedly caused plaintiff’s injuries by contributing (in combination with the reposseors appearing without notice at 4:00 a.m. in the night) to Jacques’ belief that the car was stolen, which may have persisted despite the attempts of plaintiff or his employer to identify themselves as reposseors, and which lead

⁵ I assume arguendo that Maria’s misleading statement to Rosita was a cause in fact of plaintiff’s being shot. I think it not without significance, however, that even cause-in-fact is not obvious in this case and requires speculation as to Jacques’ state of mind when he chased and shot plaintiff (and whether it did or would have made any difference had he known plaintiff was a reposseor).

Jacques to use force on plaintiff that was quite simply unlawfully excessive. The causal connection between Maria's alleged conduct and plaintiff's injuries was thus both "highly extraordinary," to say the least, and highly attenuated. I conclude as a matter of law that Maria's actions cannot be considered a legal cause of plaintiff's injuries.

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JACQUES GALIN, ROSITA CONROY,	:	
JACQUES GALIN and ROSITA CONROY,	:	
as husband and wife,	:	
MARIA CONROY,	:	
MELLON BANK CORP.,	:	
and MELLON BANK, N.A.,	:	

ORDER

AND NOW this day of August, 1999, upon consideration of defendant Maria Conroy's motion for judgment on the pleadings and the parties' various filings related thereto, it is hereby ORDERED that the motion is GRANTED and all claims against Maria Conroy are DISMISSED.

IT IS FURTHER ORDERED, per the Court's Order dated June 28, 1999, that all proceedings in this case are STAYED pending resolution of criminal proceedings against defendant Jacques Galin.

THOMAS N. O'NEILL, JR. J.