2017 IL App (1st) 153480-U

FIFTH DIVISION
March 24, 2017

Nos. 1-15-3480, 1-16-0258 (cons.)

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

TAMELA BANGS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	2015 M1 30160
	)	
MEDICAL MANAGEMENT	)	
INTERNATIONAL, INC., d/b/a	)	
BANFIELD PET HOSPITAL and	)	
JENNIFER CRETU, DVM.,	)	Honorable
	)	Sheryl A. Pethers,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Gordon and Justice Lampkin concurred in the judgment.

ORDER

HELD: Matter reversed and remanded with directions to conduct further proceeding where plaintiff presented disputed issues of material fact concerning the elements of her apparent agency claim which precluded resolution of these issues by a motion to dismiss under section 2-619 of the Illinois Code of Civil Procedure (735 ILCS 5/2-619 (West 2012)).

¶ 1 In this appeal, plaintiff Tamela Bangs challenges the circuit court's dismissal of her claims against defendants Medical Management International, Inc. (MMI) d/b/a Banfield Pet Hospital, and Dr. Jennifer Cretu, DVM, a licensed veterinarian. The issues underlying plaintiff's claims arise from the veterinary medical treatment her pet cat was given at the Banfield Pet Hospital. The circuit court granted the defendants' motion dismissing plaintiff's claims pursuant to section 2-619 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2012)). For the reasons that follow, we affirm in part, reverse in part, and remand with directions.

¶ 2 BACKGROUND

¶ 3 Dr. Cretu is part owner of McGuffy Veterinary Management, LLC (McGuffy). McGuffy manages and operates a Banfield Pet Hospital franchise under a franchise agreement with MMI. Banfield Pet Hospitals are a national chain of veterinary clinics. The Banfield Pet Hospital (Banfield), at issue in this case is located in Gurnee, Illinois.

¶ 4 In her four-count first amended complaint, plaintiff alleged that on February 6, 2014, she took her pet cat to Banfield because the cat was suffering from eye and nose discharge and was coughing. A veterinarian determined the cat had an upper respiratory infection. The cat was placed on various medications including the penicillin based antibiotic Clavamax. The cat allegedly developed a skin rash as an allergic reaction to the Clavamax.

¶ 5 On February 16th, the cat was given an injection of the antibiotic Cefovecin, tradename Convenia. Plaintiff alleged her cat developed anemia and a skin condition as allergic reactions to the Convenia. Plaintiff claimed she discovered her cat should not have been injected with Convenia in light of the fact that the cat had experienced an allergic reaction to the Clavamox.

Plaintiff alleged that according to Banfield's own policies and procedures set out in its literature, Convenia was contraindicated for cats like hers who had previously experienced allergic reactions to penicillin based antibiotics such as Clavamax.

¶ 6 Plaintiff brought claims against Dr. Cretu for professional malpractice (count I) and fraud (count IV). She brought claims against Banfield under the doctrine of apparent agency (count II) and for negligent supervision (count III). Plaintiff sought money damages in excess of $15,000.00, for alleged expenses she incurred in bringing her pet cat "back to health."

¶ 7 On December 10, 2015, the circuit court granted the defendants' section 2-619 motion dismissing MMI as a defendant. The court also dismissed counts II, III, and IV with prejudice pursuant to section 2-619. The court's order included language pursuant to Illinois Supreme Court Rule 304(a) (210 Ill. 2d R. 304(a)) stating there was no just reason to delay enforcement or appeal of the order.

¶ 8 Plaintiff filed a notice of appeal challenging the dismissal of counts II and III. The appeal was assigned case number 15-3480. Shortly thereafter, plaintiff filed a motion requesting the circuit court to reconsider its dismissal of count IV. In response, defendants filed a motion asking the circuit court to stay further proceedings concerning count IV pending resolution of appeal No. 15-3480.

¶ 9 On January 25, 2016, the circuit court entered an order granting the defendants' motion for the stay and denied plaintiff's motion to reconsider the dismissal of count IV. The order included language indicating it was final and appealable under Supreme Court Rule 304(a). The

order also added that once appeal No. 15-3480 was concluded, the circuit court would schedule a date to resolve count I.

¶ 10 On February 9, 2016, our court granted plaintiff's motion to consolidate appeal No. 15-3480 with appeal No. 16-0258 regarding the dismissal of count IV. Timely notices of appeal were filed.

¶ 11 ANALYSIS

¶ 12 Plaintiff first contends the circuit court erred in dismissing count II of her first amended complaint which alleged liability against Banfield based upon a theory of apparent agency. Plaintiff claims that count II was improperly dismissed because she presented sufficient evidence raising material issues of fact as to whether MMI d/b/a Banfield, held out Dr. Cretu as its apparent agent for the veterinary medical treatment her pet cat received. We agree.

¶ 13 The circuit court dismissed count II pursuant to section 2-619 of the Code. "The purpose of a 2-619 motion to dismiss is to dispose of issues of law and easily proved issues of fact at the outset of litigation." *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367 (2003). A motion to dismiss under this section of the Code admits the legal sufficiency of the plaintiff's claims but raises certain defects, defenses, or other affirmative matters outside the pleadings which defeat the claims. *Burton v. Airborne Express, Inc.*, 367 Ill. App. 3d 1026, 1029 (2006). In ruling on such a motion, the court interprets the pleadings and supporting documents in the light most favorable to the nonmoving party. *Van Meter*, 207 Ill. 2d at 367-68. A motion to dismiss pursuant to section 2–619 should not be granted unless it is clearly apparent that no set of facts

can be proved that would entitle the plaintiff to recovery. *Snyder v. Heidelberger*, 2011 IL 111052, ¶ 8. Our review of a section 2-619 dismissal is *de novo*. *Id*.

¶ 14 "An agency is a fiduciary relationship in which the principal has the right to control the agent's conduct and the agent has the power to act on the principal's behalf." *Kaporovskiy v. Grecian Delight Foods, Inc.*, 338 Ill. App. 3d 206, 210 (2003). "A principal-agent relationship exists when the principal has the right to control the manner in which the agent performs his work and the agent has the ability to subject the principal to liability." *Saletech, LLC v. East Balt, Inc.*, 2014 IL App (1st) 132639, ¶ 15. "The right to control the actions of another is a hallmark of agency." *Kaporovskiy*, 338 Ill. App. 3d at 210-11. The existence of an agency relationship is generally a question of fact. *Krickl v. Girl Scouts, Illinois Crossroads Council, Inc.*, 402 Ill. App. 3d 1, 5 (2010). The issue becomes one of law only where the facts relating to the relationship are undisputed or no liability exists as a matter of law. *Id*. An agent's authority may be either actual or apparent. *Kaporovskiy*, 338 Ill. App. 3d at 210.

¶ 15 Apparent agency involves a case in which there may be no agency in fact, but where the principal holds out or represents a person to be his agent. See *All Med, LLC v. Randolph Engineering Co., Inc.*, 228 W. Va. 634, 641, 723 S.E.2d 864, 871 (2012); *Crinkley v. Holiday Inns, Inc.*, 844 F.2d 156, 166 (4th Cir. 1988). Apparent agency is the authority the principal knowingly permits the agent to assume, or the authority which the principal holds the agent out as possessing. *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 523 (1993). The doctrine of apparent agency is rooted in the principles of equitable estoppel and is based on the concept that if a principal creates the appearance that someone is his agent, he is then estopped

from denying the agency if an innocent third party reasonably relied on the apparent agency and is harmed as a result. *O'Banner v. McDonald's Corp.*, 173 Ill. 2d 208, 213 (1996); see also *First Chicago Insurance Co. v. Molda*, 408 Ill. App. 3d 839, 846 (2011) ("Apparent authority is that authority which a reasonably prudent person would naturally suppose the agent to possess, given the words or conduct of the principal").

¶ 16 To prove apparent agency, a party must establish: (1) that the principal held the agent out as having authority or knowingly acquiesced in the agent's exercise of authority; (2) based on the actions of the principal and agent, the party reasonably concluded that an agency relationship existed; and (3) the party relied on the agent's apparent authority to her detriment. *Oliveira-Brooks v. Re/Max International, Inc.*, 372 Ill. App. 3d 127, 137 (2007). The party asserting the agency has the burden of proving the existence of the agency by a preponderance of the evidence. *Raclaw v. Fay, Conmy & Company, Ltd.*, 282 Ill. App. 3d 764, 767 (1996).

¶ 17 In the instant case, we believe there are disputed issues of material fact concerning the "holding out" and "reliance" elements of plaintiff's apparent agency claim which preclude resolution of these issues by a section 2-619 motion to dismiss. We believe that plaintiff's pleadings and accompanying exhibits raise disputed issues of material fact as to whether MMI d/b/a Banfield held out Dr. Cretu as its apparent agent and whether plaintiff relied on that representation in seeking veterinary medical treatment for her cat.

¶ 18 The record contains ample evidence suggesting that MMI d/b/a Banfield held out Dr. Cretu as its apparent agent. The franchise agreement required the franchisee to display the Banfield logo on all of its signage, advertisements, and business records. The medical records

concerning Dr. Cretu's treatment of plaintiff's cat all bear the Banfield logo. Plaintiff submitted a two-page printout dated April 25, 2015, from Veterinarians.com advertising Banfield and stating that Dr. Cretu "has been with our practice for the past three years."

¶ 19 Defendants argue this evidence is insufficient to support plaintiff's position because the Veterinarians.com advertisement also states that Dr. Cretu had "recently purchased the practice." Defendants contend that the "Banfield Gurnee location was not held out as an apparent agent of MMI because it was clearly stated on the advertising Plaintiff attaches to her complaint that Dr. Cretu owned the practice." Defendants further contend that plaintiff fails to acknowledge that when a franchise is involved, the franchisee is legally permitted to use logos, marks, products and services.

¶ 20 We do not find that these factors change our analysis. Defendants' contentions "demands a higher level of sophistication about the nature of franchising than the general public can be expected to have and ignores the effect of its own efforts to lead the public to believe that [Banfield Pet Hospitals] are part of a uniform national system of [pet hospitals] with common products and common standards of quality." *Miller v. McDonald's Corp.*, 150 Or. App. 274, 285, 945 P. 2d 1107, 1113 (1997).

¶ 21 The advertisements and medical records Banfield gave to plaintiff, as well as her enrollment in the "Optimum Wellness Plan,"[1] could have reasonably given plaintiff the impression that Banfield was the entity that provided the veterinary medical services to her cat and that Dr. Cretu was the agent through which these services were provided. Plaintiff's

[1] Banfield markets, advertises, and sells what is referred to as "Optimum Wellness Plans," which are designed to offer savings and discounts on pet care services and products in return for a one-time membership fee and monthly payments.

enrollment in the "Optimum Wellness Plan" also supports her contention that she justifiably relied on the representations made by Banfield in bringing her cat into the pet hospital for veterinary medical treatment.

¶ 22 Plaintiff alleged that she took her cat to Banfield because of its reputation and wellness program. In her affidavit, plaintiff averred that she would not have taken her cat to Banfield if she had "been informed that the facility did not (or would not) follow the policies and procedures of Banfield as set forth in the Banfield documents provided by Defendant Dr. Cretu or in any of the other literature provided by Banfield for its customers/clients of the veterinary facilities in Gurnee Illinois." We believe these allegations are sufficient to raise a disputed issue of fact regarding plaintiff's justifiable reliance. See, *e.g.*, *Gizzi v. Texaco, Inc.*, 437 F. 2d 308, 310 (3d Cir. 1971) (plaintiff's testimony that Texaco's advertising instilled a sense of confidence in the corporation and its products created an issue of fact concerning reliance).

¶ 23 We find that disputed issues of material fact exist concerning the "holding out" and "reliance" elements of plaintiff's apparent agency claim which prevent resolution of these issues by a section 2-619 motion to dismiss.

¶ 24 Plaintiff next contends the circuit court erred in dismissing count III of her first amended complaint which alleged a claim of negligent supervision against MMI d/b/a Banfield for failing to ensure that its franchisee did not misuse the drug Convenia. Plaintiff alleges that MMI d/b/a Banfield, owed her a duty to properly supervise its apparent agents in making sure they followed the policies and procedures set out in Banfield's literature, which instructed that Convenia was

contraindicated for cats like hers who had previously experienced allergic reactions to penicillin based antibiotics like Clavamax.

¶ 25 Appellate review of this issue would be premature at this time. If the circuit court determines, under the factual circumstances of this case, that Dr. Cretu and her colleagues are not apparent agents of MMI d/b/a Banfield, then Banfield would not have owed plaintiff a duty to supervise the operations of its franchisee and hence there could not have been a breach of duty. See, *e.g.*, *Phelps v. Williams*, 132 Ill. App. 2d 212, 214 (1971) ("plaintiff cannot expect to recover damages for a breach of a non-existent duty").

¶ 26 Finally, we reject plaintiff's claim, made in count IV of her first amended complaint, that Dr. Cretu committed fraud by allowing her franchise to use the Banfield logo on its signage, advertisements, and business records. The franchise agreement gave McGuffy a license to use the Banfield service mark and logo. Plaintiff provides no authority to support her position that franchisees can be liable for fraud for using the licenses granted to them as part of the franchise.

¶ 27 For the foregoing reasons, we affirm the circuit court's dismissal of count IV, reverse its dismissal of counts II and III, and remand the matter to the court for further proceedings on the apparent agency claim, and if necessary the negligence claim.

¶ 28 Affirmed in part, reversed in part and remanded with directions.