2012 IL App (1st) 103818-U

THIRD DIVISION
May 2, 2012

No. 1-10-3818

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PATRICIA BOATWRIGHT, Plaintiff-Appellant, v. JASON NEAGU, GOLD COAST BENTLEY, LUXURY MOTORS GOLD COAST, INC., LUXURY MOTORS.COM, INC., BENTLEY MOTORS, INC., AMCO INSURANCE COMPANY, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 09 L 1961 Honorable James E. Snyder, Judge Presiding.

ORDER

JUSTICE SALONE delivered the judgment of the court.
Presiding Justice Steele and Justice Murphy concurred in the judgment.

HELD: Trial court did not err in dismissing plaintiff's third amended complaint for failure to state a cause of action.

¶ 1 Plaintiff Patricia Boatwright M.D., P.C. brought a 46-count complaint against

multiple defendants to recover for alleged negligence, fraud, and violation of the Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/2 (West 2008)). In response to a motion pursuant to section 2-615 of the Illinois Code of Civil Procedure (735 ILCS 5/2-615 (West 2008)), the trial court dismissed those portions of plaintiff's third amended complaint involving defendants Gold Coast Bentley, Luxury Motors Gold Coast, Inc., and Luxury Motors.com, Inc. (collectively, dealership defendants) and Bentley Motors Inc. (BMI). Plaintiff sought damages from these defendants in excess of $50,000.

¶ 2 On appeal, plaintiff contends that: (1) her third amended complaint sufficiently stated a cause of action for negligence and violation of the Consumer Fraud Act against the dealership defendants; and (2) the complaint also sufficiently stated a cause of action for negligent supervision and vicarious liability against BMI. For the following reasons we affirm.

¶ 3 BACKGROUND

¶ 4 On or about May 7, 2007, plaintiff leased a 2007 Bentley Continental from the dealership defendants. On October 11, 2007, plaintiff took her vehicle to the dealership defendants for repair and paint services. As a result, Jason Neagu, an employee of the dealership defendants, recommended that plaintiff take her car to Island Enterprises M&P Inc., We'll Clean Car Wash and/or We Wash III (collectively, the Car Wash) for repair and painting services to be performed on her leased Bentley. After plaintiff entrusted her vehicle to the Car Wash for the required work, a Car Wash employee was involved in a car accident while driving plaintiff's Bentley on a public street, causing damage to the vehicle.

¶ 5 This appeal arises from the dismissal of counts XVII (negligence-dealership), XIX

(*respondeat superior*-dealership), XXI (violation of the Consumer Fraud Act-dealership), XXXVII (negligence-dealership), XXXIX (*respondeat superior*-dealership), XLI (violation of the Consumer Fraud Act-dealership), XXIII (negligence-BMI), and XXV (vicarious liability-BMI) of the third amended complaint.

¶ 6 In relation to the dealership defendants, counts XVII and XXXVII of plaintiff's complaint alleged that they breached their duties to plaintiff by: (1) representing to plaintiff that the Car Wash was licensed to repair and paint motor vehicles and was authorized by BMI to repair and paint Bentley vehicles pursuant to a Bentley warranty; (2) failing, prior to the time of the alleged representations, to undertake reasonable and adequate investigations to confirm that the Car Wash was so licensed and authorized; and (3) failing, prior to the time of the alleged representations, to reasonably and adequately supervise and instruct the dealership staff regarding referrals for repair services. Plaintiff further alleged that as a direct and proximate result of the foregoing wrongful acts and omissions her Bentley was damaged.

¶ 7 In counts XXI and XLI, plaintiff alleged that pursuant to the Consumer Fraud Act, the dealership defendants engaged in unfair methods of competition and unfair deceptive acts or practices when they represented to plaintiff that the Car Wash was licensed to repair and paint motor vehicles and was authorized by BMI to repair and paint Bentley motor vehicles pursuant to a Bentley Warranty. Plaintiff further alleged that the dealership defendants intended for plaintiff to rely on these misrepresentations, which allegedly occurred in the course of conduct involving trade or commerce, and as a direct and proximate result of these acts her vehicle was damaged.

¶ 8 In counts XIX and XXXIX, plaintiff alleged, under a theory of *respondeat superior*, that

Jason Neagu, as an employee of the dealership defendants, committed each of the wrongful acts or omissions previously stated in counts XVII and XXXVII, within the scope and course of his employment.

¶ 9 In relation to BMI, plaintiff alleged in count XXIII of her third amended complaint that BMI breached its duty of care to plaintiff by: (1) failing to undertake reasonable and adequate investigations to confirm that Car Wash was licensed to repair and paint motor vehicles and was qualified to repair and paint Bentley motor vehicles pursuant to a Bentley warranty; and (2) failing to adequately supervise the dealership defendants regarding investigations of and referrals to individuals and organizations licensed to repair and paint motor vehicles. Plaintiff further alleged that as a direct and proximate result of BMI's negligence, she suffered damage to her Bentley motor vehicle.

¶ 10 In count XXV, plaintiff alleged that BMI is vicariously liable for the actions of the dealership defendants pursuant to an apparent agency theory. Specifically, plaintiff alleged that the dealership defendants acted as agents of BMI, and represented to plaintiff that they were authorized to act and to provide information on behalf of BMI. In so doing, the dealership defendants displayed the BMI logo in connection with their dealings; gave information and advice concerning the use, sales, financing, and repair of Bentley motor vehicles; and undertook representations and actions with plaintiff without stating, representing or implying that they were not authorized to make representations or act on behalf of BMI. Plaintiff further alleged that as a direct and proximate result of the apparent agency between BMI and the dealership defendants, plaintiff entrusted her Bentley motor vehicle to the Car Wash and the vehicle was damaged.

¶ 11 Thereafter, the trial court dismissed counts XVII, XIX, XXI, XXXVII, XXXIX, and XLI against the dealership defendants and counts XXIII and XXV against BMI.

¶ 12 This timely appeal followed.

¶ 13 ANALYSIS

¶ 14 The issue here is whether the trial court erred in dismissing the enumerated counts of plaintiff's third amended complaint pursuant to section 2-615 of the Code. Although plaintiff filed suit against multiple defendants, her appeal addresses only the trial court's dismissal of counts relating to the dealership defendants and BMI.

¶ 15 A Section 2-615 Motion to Dismiss and the Standard of Review

¶ 16 A motion to dismiss brought under section 2-615 tests the legal sufficiency of a complaint. *Napleton v. Village of Hinsdale*, 229 Ill. 2d 296, 305 (2008). A 2-615 motion does not raise affirmative factual defenses, as does a motion under section 2-619 of the Code, but rather alleges only defects on the face of the complaint. *Urbaitis v. Commonwealth Edison*, 143 Ill. 2d 458, 475 (1991). On review, the inquiry is whether the allegations of the complaint, construed in the light most favorable to the plaintiff, and taking all well-pleaded facts as true, are sufficient to establish a cause of action upon which relief may be granted. *Napleton*, 229 Ill. 2d at 305. However, this court will disregard mere conclusions of law or facts not supported by specific factual allegations. *White v. DaimlerChrysler Corp.*, 368 Ill. App. 3d 278, 282 (2006). The only matters to be considered when ruling on a 2-615 motion are the allegations contained within the pleadings and any exhibits attached thereto. *Haddick ex. rel. Griffith v. Valor Insurance*, 198 Ill. 2d 409, 414 (2001). We review, *de novo*, the trial court's dismissal of

plaintiff's action. *Poruba v. Poruba*, 396 Ill. App. 3d 214, 215 (2009).

¶ 17 Dealership Defendants

¶ 18 On appeal, plaintiff contends the trial court erred in dismissing counts XVII (negligence), XIX (*respondeat superior*), XXI (Consumer Fraud Act), XXXVII (negligence), XXXIX (*respondeat superior*) and XLI (Consumer Fraud Act). We first address counts XVII and XXXVII, whereby plaintiff brought a claim for negligence against the dealership defendants.

¶ 19 To establish a claim for negligence, a plaintiff must prove all four elements of the claim: the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, proximate cause and injury. *Engelland v. Clean Harbors Environment Services,* Inc., 319 Ill. App. 3d 1059, 1062 (2001). The factors a court uses to determine whether a duty of reasonable care exists are: (1) the reasonable forseeability of injury; (2) the likelihood of injury; (3) the magnitude of the burden of guarding against the injury; and (4) the consequences of placing the burden upon the defendant. *Forsythe v. Clark USA*, 224 Ill. 2d 274, 290-91 (2007).

¶ 20 Here, counts XVII and XXXVII of plaintiff's third amended complaint alleged the following:

> "14. At all times relevant, Luxury Motors Gold Coast, Inc. and Luxury Motors.Com, Inc. were Illinois corporations or units of Illinois corporations that were licensed to sell, lease, and provide information about repair and repainting related to Bentley motor vehicles and sold, leased, and provided information about repair and repainting Bentley motor vehicles in Illinois as Bentley

dealerships.

15. At all times relevant, Luxury Motors Gold Coast, Inc. And Luxury Motors.Com, Inc. owned and operated a Bentley dealership under the name of Gold Coast Bentley.

16. At all times relevant, Gold Coast Bentley, Luxury Motors Gold Coast, Inc., and Luxury Motors.Com, Inc., retained the duty to exercise reasonable and appropriate care and precaution for the plaintiffs and their motor vehicle."

In counts XVII and XXXVII, plaintiff sufficiently alleged that the dealership defendants were in the business of providing information about repair and painting services related to Bentley motor vehicles and that in the course of their dealings with plaintiff they misrepresented information and failed to confirm that the Car Wash was licensed and authorized to perform the work. However, plaintiff failed to allege that there was a likelihood of injury or reasonable forseeability of injury occurring due to the misrepresentations allegedly made to plaintiff. Plaintiff contends in portions of her brief that car accidents are a common occurrence in a situation where a vehicle is left at a repair shop for work to be performed. However, in the case at bar, the only injury that could have been reasonably contemplated by the dealership defendants is damage resulting from faulty repair or paint work. The injury alleged here, damage to the Bentley from an auto accident, is neither likely to occur or reasonably foreseeable under the facts in the case. Accordingly, we conclude that plaintiff's allegations set forth in the complaint do not sufficiently allege the existence of a duty owed by the dealership defendants to plaintiff.

¶ 21 Plaintiff contends in the alternative that even if a duty does not exist, the dealership defendants voluntarily assumed the duty and were required to provide the information with reasonable care. Under the voluntary undertaking doctrine, one who gratuitously, or for consideration, renders services to another is subject to liability for injury caused to the other by one's failure to exercise due care or such competence and skill as one possesses. See *Engellend*, 319 Ill. App. 3d at 1062-63. The duty of care to be imposed upon a defendant is limited to the extent of the undertaking. *Frye v. Medicare-Glaser Corp.*, 153 Ill. 2d 26, 32 (1992). When analyzing a duty we must determine whether the defendant and the plaintiff stood in such a relationship to each other that the law imposed upon defendant an obligation to act with reasonable care. *Ward v. K-Mart Corp.*, 136 Ill. 2d 132, 140 (1990).

¶ 22 Our supreme court's decision in *Frye* is instructive on the voluntary undertaking doctrine. There, a pharmaceutical drug was prescribed to the plaintiff following knee surgery. The prescription was filled by a pharmacist, who affixed a label with a "drowsy eye" and the words "May Cause Drowsiness." The pharmacist admitted that she failed to include a warning label pertaining to harmful effects from the use of alcohol. The trial court granted summary judgment in favor of the defendants, and the appellate court reversed, holding that because the defendants chose to provide some warnings on the bottle, they undertook a duty to warn the consumer of the drug's dangerous side effects and were therefore liable for plaintiff's resulting injuries. Our supreme court reversed the judgment of the appellate court, concluding that the plaintiff had taken an overly broad interpretation of the voluntary undertaking doctrine. The court held that, "the extent of defendants' undertaking was the placing of the 'drowsy eye' label on Frye's

prescription container which warned that Fiorinial may cause drowsiness." *Frye*, 153 Ill. 2d at 33. The court explained that a narrow construction of the voluntary undertaking doctrine is supported by public policy for two reasons. First, if providing a customer with one warning of a side effect translated into the pharmacist assuming the duty to warn of all possible side effects, this would result in pharmacists refraining from placing any warning labels on prescription containers. Second, a duty to warn of all possible side effects is difficult to accomplish from a practical standpoint. Our supreme court concluded that the defendants did not voluntarily undertake a duty to warn the plaintiff of all possible dangers of taking the drug.

¶ 23 In the case at bar, we decline to accept plaintiff's argument to expand the voluntary undertaking doctrine. Plaintiff contends that because the dealership defendants referred her to the Car Wash, the dealership defendants should now be liable for the damages resulting from the car accident. We initially note that, unlike in *Frye*, the dealership defendants did not warn plaintiff of any dangers in using the Car Wash for repair and painting services. However, even if the dealership defendants had warned plaintiff of a danger, the court in *Frye* determined that liability does not extend to all injuries. As such, we hold that the dealership defendants did not voluntarily undertake a duty to warn plaintiff of any and all possible injuries that may result from recommending the Car Wash to plaintiff.

¶ 24 In sum, we conclude that the trial court did not err in dismissing counts XVII and XXXVII of plaintiff's third amended complaint for failure to state a cause of action for negligence.

¶ 25 Having concluded that plaintiff failed to sufficiently state a cause of action for

negligence, we need not address her contentions on appeal that the trial court erred by dismissing counts XIX and XXXIX for failure to state a cause of action for *respondeat superior*. As noted, the *respondeat superior* counts against the dealership defendants arise from the same operative facts as the negligence counts.

¶ 26 Plaintiff next contends that the trial court erred in dismissing counts XXI and XLI for failure to state a cause of action. Counts XXI and XLI set forth a claim against the dealership defendants for a violation of the Consumer Fraud Act. Specifically, plaintiff alleged that the dealership defendants misrepresented to plaintiff that the Car Wash was licensed to repair and paint motor vehicles and was authorized by BMI to perform repair and paint services to Bentley motor vehicles.

¶ 27 In order to state a cause of action under the Consumer Fraud Act, a plaintiff must allege that: (1) the defendant committed a deceptive act or practice; (2) the defendant intended for plaintiff to rely on the deception; and (3) the deception occurred in the course of conduct involving trade or commerce. *Sanchez v. American Express Travel Related Services Company, Inc.*, 372 Ill. App. 3d 449, 456 (2007). The purpose of the Act is to protect consumers, borrowers, and business people against fraud, unfair methods of competition, and other unfair and deceptive business practices. *Covarrubias v. Bancomer*, *S.A.*, 351 Ill. App. 3d 737, 739 (2004). A valid claim brought pursuant to the Consumer Fraud Act must show that the consumer fraud proximately caused plaintiff's injury. *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 501 (1996). Additionally, a complaint alleging a violation of the Consumer Fraud Act must be pled with the same particularity and specificity as required for common law fraud. *Connick*, 174 Ill.

2d at 501.

¶ 28 In counts XXI and XLI, plaintiff alleges the dealership defendants engaged in deceptive acts or practices by misrepresenting to plaintiff that the Car Wash was licensed to repair and paint motor vehicles and was authorized by BMI to repair and paint Bentley motor vehicles pursuant to a Bentley warranty. Plaintiff also alleges defendants intended for plaintiff to rely on the deception and that the deceptive acts occurred in the course of conduct involving trade or commerce, specifically, providing information about repair and repainting of Bentley motor vehicles in Illinois as a Bentley dealership. However, this alleged misrepresentation did not proximately cause plaintiff's injury, which resulted not from faulty repairing or painting, but from an auto accident allegedly caused by a Car Wash employee who was driving plaintiff's vehicle on a public street. Proximate cause requires that the injury be the natural and probable result of the violation, one that could have been foreseen or reasonably anticipated by an ordinarily prudent person. *Kacena v. George W. Bowers Co.*, 63 Ill. App. 2d 27, 33 (1965). Here, the injury was not damage from faulty repairing or painting, which conceivably could have been the natural and probable result of the alleged misrepresentations. Instead, the damage was from a car accident, which was not reasonably foreseeable by the Car Wash. Accordingly, we conclude that the trial court properly dismissed counts XXI and XLI for failure to state a cause of action.

¶ 29 BMI Defendants

¶ 30 Plaintiff contends that the trial court erred in dismissing counts XXIII (negligence) and XXV (vicarious liability) of plaintiff's third amended complaint. In count XXIII, plaintiff alleged that BMI breached its duty to supervise the actions of the dealership pursuant to the Bentley

Warranty. BMI counters that the Bentley Warranty[1] does not impose a duty on BMI to supervise the dealership defendants when referrals are made to third parties for non-warranty repair work.

¶ 31 Count XXIII of plaintiff's third amended complaint alleged that BMI negligently supervised the actions of the dealership, stating in relevant part:

> "a. It failed to undertake reasonable and adequate investigations to confirm that Emmanuel Rigatos, Island Enterprises M & P, Inc., We'll Clean Car Wash, and/or We Wash III were licensed to repair and paint motor vehicles, generally, and the plaintiffs' motor vehicle, specifically, and were qualified to repair and paint Bentley motor vehicles pursuant to Bentley warranty.
>
> b. It failed to adequately supervise its dealerships Gold Coast Bentley, Luxury Motors Gold Coast, Inc., and Luxury Motors.Com, Inc. regarding investigations of and referrals to individuals and organizations licensed to repair and paint motor vehicles."

¶ 32 In a claim for negligent supervision, a plaintiff must allege that: (1) the defendant had a duty to supervise; (2) the defendant negligently supervised the employee, thereby breaching its duty; and (3) such negligence proximately caused the plaintiff's injuries. *Vancura v. Katris*, 238

[1]BMI attached a copy of the Bentley Warranty to its motion to dismiss the third amended complaint.

Ill. 2d 352, 373 (2010). If plaintiff does not plead that there is a duty to supervise, then the duty upon which plaintiff relies must be based on a special relationship between the employer and employee. *Vancura,* 238 Ill. 2d at 375.

¶ 33 In the case at bar, plaintiff contends that BMI had a duty to supervise the actions of the dealership defendants pursuant to the Bentley Warranty. However, as stated previously, in reviewing a 2-615 motion we shall address only the allegations contained in the complaint and any exhibits attached thereto. *Haddick*, 198 Ill. 2d at 414. Here, plaintiff failed to attach a copy of the warranty to the complaint. Therefore, we are unable to conclude that the dealership defendants owed a duty to the plaintiff pursuant to the Bentley Warranty.

¶ 34 Plaintiff further contends that her allegations in the complaint sufficiently pleaded that a principal/agent relationship existed. Yet, count XXIII of plaintiff's third amended complaint does not contain allegations of an agency relationship. As such, plaintiff's failure to attach the Bentley Warranty to the complaint and sufficiently allege the existence of an agency relationship renders count XXIII of plaintiff's complaint insufficient to state a cause of action for negligence. Accordingly, we conclude that the trial court properly dismissed count XXIII of plaintiff's third amended complaint.

¶ 35 Moreover, having concluded that plaintiff failed to sufficiently state a cause of action for negligence against the dealership defendants, we need not address her allegations against BMI for vicarious liability in count XXV.

¶ 36 CONCLUSION

¶ 37 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 38 Affirmed.