2011 IL App (1st) 110002-U

SECOND DIVISION
August 16, 2011

No. 1-11-0002

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

STATE FARM FIRE & CASUALTY COMPANY, Plaintiffs, v. PABLO SERANNO a.k.a. PABLO SERIANO, RAFAEL CERVANTES and JUAN FLORES, Individually and doing business as LABALANZA GROCERIES, Defendants.	)	Circuit Court of Cook County No. 08 CH 029955 The Honorable Peter A. Flynn, Judge Presiding.

JUAN FLORES and RAFAEL CERVANTES, Counterplaintiffs-Appellants, v. STATE FARM FIRE & CASUALTY COMPANY, and DOUGLAS J. TAGLER, Counterdefendants-Appellees.	)	Appeal from the Circuit Court of Cook County No. 1-11-0002 The Honorable Peter A. Flynn, Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Cunningham and Justice Karnezis concurred in the judgment.

ORDER

¶ 1 Held: Summary judgment in favor of appellees was proper where appellees had no duty to procure workers' compensation insurance for appellant Juan Flores' grocery business without a specific request by Flores to obtain such insurance.

¶ 2 Appellants Juan Flores and Rafael Cervantes (Flores) appeal the order of the circuit court granting summary judgment in favor of appellee State Farm Fire & Casualty Company (State Farm) on appellants' counterclaim for damages. In his counterclaim, Flores alleged that State Farm and Tagler failed to issue workers' compensation insurance for his grocery business. On appeal, he contends the trial court erred because, in construing the pleadings liberally in favor of appellants and against appellees, genuine issues of fact exist precluding summary judgment. We affirm.

¶ 3 JURISDICTION

¶ 4 The trial court entered a final judgment in the instant case on November 29, 2010, and plaintiffs filed their notice of appeal on December 28, 2010. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rules 301 and 303 governing appeals from final judgments entered below. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. May 30, 2008).

¶ 5 BACKGROUND

¶ 6 In May, 2001, Flores purchased property at 19100 Burnham Avenue in Lansing, Illinois. He intended to operate a grocery business called La Balanza. At the time, Flores also owned another grocery business located at 10500 Avenue M in Chicago, Illinois, which he eventually sold two years later. In order to close on the Lansing building, Flores needed insurance so he met

with State Farm agent Tagler who had an office across the street from the Lansing property. Flores' son, Oscar, served as a translator. At the meeting, he requested insurance for the building in order to satisfy the loan requirement, and stated that he "needed business insurance, also." Specifically, he asked for "complete insurance for an operating business." Flores told Tagler that he would be remodeling the building to accommodate his grocery business, and that he would have four employees.

¶ 7 Flores was not aware of workers' compensation insurance at the time. He learned of workers' compensation insurance after one of his employees was injured on the job in 2007. Tagler never mentioned workers' compensation insurance to him at the meeting. He also did not know whether they discussed the insurance coverage he had on the Avenue M business. Tagler, however, stated that at the meeting he asked Flores about workers' compensation insurance and vehicle insurance in an attempt to generate more business. Flores informed him that he already had a grocery business on the south side of the city, and the other insurance needs were taken care of through that store. In any event, the fact that Flores never specifically requested that Tagler obtain workers' compensation insurance for his business is not in dispute.

¶ 8 State Farm issued a business policy to Flores on June 18, 2001, effective from May 31, 2001, to May 31, 2002. The policy did not provide workers' compensation coverage, but rather explicitly excluded such coverage. Flores paid the premiums and renewed the policy through Tagler for each successive policy year until June of 2008, when State Farm cancelled the policy. Flores never read the policy after receiving it, nor did he ask anyone to read the policy.

¶ 9 La Balanza in Lansing opened for business in February or March of 2002.[1] Cervantes and Pablo Seranno were employees at La Balanza. On or about October 26, 2007, they were unloading a truck used in the grocery business when Cervantes struck and injured Seranno. Seranno filed suit against Flores and Cervantes. State Farm filed a declaratory judgment action seeking a declaration that the insurance policy it issued on the truck did not provide coverage for Seranno's claim. The trial court entered summary judgment in favor of State Farm, and that issue is not involved in this appeal.

¶ 10 Flores filed a counterclaim against State Farm and Tagler, alleging that he "effectively requested workers' compensation coverage [through Tagler], and that State Farm should have provided it." Count I was for damages, and count II requested a declaratory judgment that the policy State Farm issued to Flores provided workers' compensation coverage, and that Flores and Cervantes are not liable for any injury or loss suffered by Seranno.[2] On January 8, 2009, Tagler filed a motion to dismiss the counterclaim pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 2-615 (West 2006)), which the trial court granted without prejudice on February 2, 2009. No further allegations have been asserted against Tagler. On August 13, 2010, State Farm filed a motion for summary judgment on the counterclaim, which the trial court granted on November 29, 2010. Flores filed this timely appeal.

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[1]Although in their brief appellants state that the store opened for business in June, 2001, the affidavit of Oscar Flores specifies the opening date as February or March, 2002.

[2]Appellants' brief mentions count II, but makes no argument and cites no authority as to why the court should enter a declaratory judgment that the policy issued to Flores actually provides workers' compensation coverage. Pursuant to Supreme Court Rule 341(h)7 (Ill. S. Ct. R. 341(h)7 (eff. July 1, 2008), appellants waived review of this issue on appeal.

¶ 11 ANALYSIS

¶ 12 Flores contends that the trial court erred in granting summary judgment in favor of State Farm on their counterclaim. Summary judgment is proper "if the pleadings, depositions, 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." 735 ILCS 5/2-1005 © (West 2008). When ruling on a summary judgment motion, the evidence is construed liberally in favor of the nonmoving party. *Tannehill v. Costello*, 401 Ill. App. 3d 39, 42 (2010). Although he need not prove his case at the summary judgment stage in order to survive the motion, "the nonmoving party must present a factual basis that would arguably entitle [him] to a judgment." *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335 (2002). A genuine issue of material fact exists where the material facts are in dispute, or if they are not in dispute reasonable persons might draw different inferences from those facts. *Adames v. Sheahan*, 233 Ill. 2d 276, 296 (2009). The trial court's grant of summary judgment is reviewed *de novo*. *Adames*, 233 Ill. 2d at 296.

¶ 13 Flores contends that State Farm's agent, Tagler, should have known that "complete insurance" for Flores' business required workers' compensation coverage. Therefore, Tagler "should have provided workers' compensation coverage for Flores' business and [ ] State Farm is liable for Tagler's failure to do so." Flores appears to base State Farm's liability solely on the theory of *respondeat superior* with Tagler acting as an agent to principal State Farm. See *Martin v. Yellow Cab Company*, 208 Ill. App. 3d 572, 576 (1990) ("[t]he complaint alleged that Stokes as the cab driver was negligent in his operation of the cab and under the theory of *respondeat*

superior Yellow Cab Company was also liable."). Under this doctrine, when a claim is brought against a principal based solely on the alleged negligent acts of its agent, the principal's liability is "entirely derivative." *Towns v. Yellow Cab Company*, 73 Ill. 2d 113, 123-24 (1978). Accordingly, unless Flores can show that Tagler owed him a duty, his counterclaim against State Farm cannot stand and summary judgment in favor of State Farm was proper. See *Towns*, 73 Ill. 2d at 124 ("the liability of the master and servant for the acts of the servant *** is a consolidated or unified one" and "any legal claim against the master must be said to be identical to that which the plaintiff may have asserted against the servant").

¶ 14 To prevail on his claim, Flores must show that (1) Tagler owed him a duty; (2) Tagler breached that duty; and (3) the breach proximately caused an injury to Flores. *First Springfield Bank & Trust v. Galman*, 188 Ill. 2d 252, 256 (1999). "Where no duty is owed, there is no negligence, and [Flores] is precluded from recovery as a matter of law." *Melrose Park Sundries, Inc. v. Carlini*, 399 Ill. App. 3d 915, 919 (2010).

¶ 15 *Carlini* is instructive here. In *Carlini*, the plaintiff was the corporate owner of a packaged liquor and sundries store located in a commercial building in Melrose Park, Illinois. *Carlini*, 399 Ill. App. 3d at 917. Prior to the store's opening, Faye Alport, the owner of the corporation and the commercial building, and Constantino A. Taddeo, who was responsible for the store's day-to-day operations, met with Carlini to obtain insurance for the store. *Id.* At the meeting, Alport asked Carlini to "make sure that all of the requirements for insurance [were] taken out, including the building, *** the liquor, any type of liability policy" and Carlini assured her he would "handle it." *Id.* Alport admitted that she did not specifically request workers' compensation

insurance, nor did she ask whether such insurance was necessary. *Id.* She also admitted that she did not read or review the insurance policies Carlini obtained for the business, or discuss the policies with him when they were renewed. *Id.* at 918. Taddeo also acknowledged that they never addressed the issue of workers' compensation insurance, and neither he nor Alport specifically requested that Carlini obtain such insurance. *Id.* When Carlini visited the store after the meeting, Taddeo asked him if they were "covered on everything" but they did not discuss exactly what "everything" encompassed. *Id.* The policies Carlini obtained for the business provided for "liquor liability" coverage and other business coverage, but did not include workers' compensation. *Id.* at 917. The policy was issued on January 23, 2004, and subsequently renewed in 2005, effective through January 23, 2006. *Id.*

¶ 16 On October 9, 2005, employee Sharon Sullivan was injured while working in the store. Although Alport and Taddeo paid for Sullivan's medical expenses initially, they eventually ceased payment and she filed for workers' compensation benefits. *Id.* Melrose Park filed a negligence complaint against Carlini, alleging that he failed to obtain or offer to obtain workers' compensation insurance for the business, and failed to advise them that the law required such insurance. *Id.* at 918. Carlini filed a motion for summary judgment, arguing that Melrose Park failed to establish a duty on his part to procure workers' compensation insurance for the store. *Id.* The trial court granted Carlini's motion and Melrose Park appealed. *Id.*

¶ 17 This court affirmed the judgment of the trial court. We found that an insurance producer's duty to procure insurance for a client is predicated on section 2-2201(a) of the Code of Civil Procedure (735 ILCS 5/2-2201 (a) (West 2006)). *Id.* at 919-20. Pursuant to the clear

language of the statute, "Carlini had a duty to exercise ordinary care and skill in procuring *the coverage requested* by Melrose Park." (Emphasis in the original). *Id.* at 920. We held that since neither Alport or Taddeo inquired about or requested workers' compensation insurance, Carlini had no duty to obtain such insurance nor was he obligated to offer advice regarding the need for the insurance. *Id*. "To hold Carlini responsible for insurance coverage beyond that requested by Melrose Park would extend the duty of ordinary care beyond that expressly defined by the legislature." *Id.*

¶ 18 The evidence that Flores did not specifically inquire about or request workers' compensation insurance when he met with Tagler is undisputed. In fact, Flores conceded that he did not even know about workers' compensation insurance until after Serrano's accident. Instead, Flores requested insurance for the building and business insurance, which Tagler obtained for him. Flores, however, contends that he effectively asked for workers' compensation insurance because "Tagler inquired and was specifically informed by Flores that his new business would have employees" and thus knew or should have known that "complete insurance for an operating business" included workers' compensation coverage. Flores and Tagler, however, did not explicitly discuss what "complete" coverage encompassed. See *Carlini*, 399 Ill. App. 3d at 918 (it is not enough that a client asks if it is "covered on everything" or if "all the requirements for insurance [were] taken out" including "any type of liability policy"). As we held in *Carlini*, since Flores did not request or inquire about workers' compensation insurance, Tagler had no duty to obtain or offer advice about obtaining such insurance for him.

¶ 19 Furthermore, when a policy is due for renewal, it is Flores' duty, not Tagler's, to review

the adequacy of his coverage. *Cleary v. Country Mutual Insurance Co.*, 63 Ill. App. 3d 637, 638 (1978). Flores bears the burden of knowing the contents of his policy and bringing any discrepancies or inadequacies to the insurer's attention. *Id.* The policy issued to Flores explicitly excluded workers' compensation coverage. If Flores had any questions regarding the adequacy of the policy's coverage, he never made his reservations known to Tagler. Instead, Flores renewed his policy each year from 2002 to 2008. He admitted that he did not read the policy after receiving it, nor did he ask anyone to read the policy. Although "laymen may not, as a common practice, read insurance policies, we cannot excuse [Flores] from [his] burden of knowing the contents of insurance policies and bringing alleged discrepancies to the attention of the company." *Foster v. Crum and Forster Insurance Co.*, 36 Ill. App. 3d 595, 598 (1976).

¶ 20 The undisputed facts show that Flores did not specifically request or inquire about workers' compensation coverage. Although the policy's provisions explicitly excluded workers' compensation coverage, Flores continued to renew the policy each year from 2002 to 2008. Without a specific request from Flores, Tagler had no duty to obtain or advise him about workers' compensation insurance. Where there is no duty owed, there is no negligence and Flores is precluded from recovery as a matter of law. See *Carlini*, 399 Ill. App. 3d at 919. Since Flores cannot recover from Tagler, it follows that, under the doctrine of *respondeat superior,* he also cannot recover from State Farm. The trial court properly granted summary judgment in favor of State Farm.

¶ 21 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 22 Affirmed.