2018 IL App (1st) 172419-U

No. 1-17-2419

Order filed on October 23, 2018.

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

BWT, LLC,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 15 L 00270
	)	
J.F. AHERN COMPANY, d/b/a AHERN,	)	The Honorable
	)	William E. Gomolinski,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Mason and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: Plaintiff could not establish duty under traditional tort analysis or pursuant to section 324A of the Restatement (Second) of Torts (1965). Accordingly, the trial court properly granted summary judgment in favor of defendant on plaintiff's negligence claim.

¶ 2 This case stems from a January 2014 factory fire which resulted in property damage of approximately $2 million. Plaintiff BWT, LLC, (BWT) brought a negligence action against defendant J.F. Ahern Company (Ahern), which had contracted with BWT's sister company, Hi-Temp, LLC, (Hi-Temp), to provide fire suppression services at the facility housing BWT's high

temperature furnaces. The trial court, however, granted summary judgment in favor of Ahern, finding that it had no duty to BWT. On appeal, BWT asserts that Ahern had a duty under traditional tort analysis as well as section 324A of the Restatement (Second) of Torts (1965) (the restatement). We affirm the court's judgment.

¶ 3 I. Background

¶ 4 BWT and Hi-Temp are separately organized companies and wholly-owned subsidiaries of BWT Holdings, LLC.[1] In terms of the corporate organization and activities at the plant, BWT leased the premises and owned and operated its furnaces there. Additionally, Hi-Temp operated some of BWT's furnaces at the facility. As the lessee of the property, BWT was responsible for damage to the building.

¶ 5 As stated, Ahern is a company engaged in the business of inspecting fire suppression systems and it entered into a contract with Hi-Temp to inspect and test the CO2 fire suppression system and the fire alarm system in place at the facility for $450. The contract between Ahern and Hi-Temp stated as follows:

> **"Limitation of Liability/Limited Warranty:**
>
> [Ahern] makes NO WARRANTIES OR REPRESENTATIONS, EXPRESS, OR IMPLIED, INCLUDING WITHOUT LIMITATION, WARRANTIES OF MERCHANTABILITY AND WARRANTIES OF FITNESS FOR A PARTICULAR PURPOSE AS TO ANY SERVICES OR GOODS WHICH ARE FURNISHED BY CONTRACTOR. No premise not contained herein or affirmation of fact made by any employee, agent or representative of the contractor shall constitute a warranty by the Seller or give rise to any liability or obligation.

[1]Hi-Temp is not a party to this appeal.

> **[Ahern's] liability to [Hi-Temp] for personal injury, death or property damage arising from performance under this contract shall be limited to an amount not to exceed one (1) year's contract price at the then applicable rate.** [Hi-Temp] shall hold [Ahern] harmless from any and all third party claims for personal injury, death or property damage, arising from [Hi-Temp's] failure to maintain these systems and equipment or keep them in operative condition, whether based upon contract, warranty, tort, strict liability or otherwise. **In no event shall [Ahern] be liable for any special, indirect, incidental, consequential or liquidated, penal or any economic loss damages of any character, including but not limited to loss of use of [Hi-Temp's] property, lost profit or lost production, whether claimed by [Hi-Temp] or by any third party, irrespective of whether claims or actions for such damages are based upon contract, warranty, negligence, tort, strict liability or other.** The foregoing limitation of warranty and liability shall supersede any and all other warranty terms previously given or hereafter given unless amendment is made by an officer of [Ahern] in writing."

Although the contract purported to significantly limit Ahern's liability, BWT nonetheless commenced this action against Ahern.

¶ 6 Ultimately, BWT's fifth-amended complaint alleged, in pertinent part, that Ahern was negligent and had a duty toward BWT under Illinois law and the aforementioned section of the Restatement. According to BWT, Ahern was exposed to liability because it voluntarily undertook a duty to ensure the safety of the fire alarm and fire suppression systems. BWT alleged that "Ahern should have recognized that the products and/or services it rendered to *** Hi-Temp were also necessary for the protection of third-parties, including but not limited to,

[BWT]; and, thus, *** Ahern owed *** BWT an independent duty, in tort, to use reasonable care so as to not cause physical damage to BWT's Premises or to BWT's Other Property." BWT further alleged that it "relied on the products and/or services that Ahern contractually supplied to Hi-Temp in order to protect BWT's premises and/or BWT's other property from physical damage by fire."

¶ 7 In response, Ahern denied that it had any duty to BWT and raised, among other affirmative defenses, the limitation on liability and limited warranty contained in the contract between Ahern and Hi-Temp. Ahern then filed a partial motion for summary judgment as to BWT's negligence claim, arguing that BWT could not establish the element of duty. Following a hearing, the trial court granted Ahern's motion. BWT now appeals.

¶ 8 II. Analysis

¶ 9 Summary judgment is warranted where the pleadings, admissions on file, depositions and any affidavits reveal no genuine issue of material fact so that the movant is entitled to judgment as a matter of law. *Oswald v. Hamer*, 2018 IL 122203, ¶ 9. The movant may satisfy its burden by either affirmatively demonstrating that an element must be resolved in its favor or by showing an absence of evidence to support the non-movant's case. *McGinley Partners, LLC, v. Royalty Properties, LLC*, 2018 IL App (1st) 171317, ¶ 33. Additionally, courts must strictly construe the record against the movant. *Mason v. City of Danville*, 2018 IL 122486, ¶ 12. We review summary judgment rulings *de novo* (*Oswald*, 2018 IL 122203, ¶ 9), and may affirm the judgment on any basis in the record, regardless of the trial court's reasoning (*Illinois Municipal League Risk Management Ass'n v. City of Collinsville*, 2018 IL App (4th) 170015, ¶ 29).

¶ 10 It is axiomatic that to maintain an action for negligence, a plaintiff must show that the defendant owed it a legal duty, that there was a breach of that duty and that damages were

proximately caused by the breach. *Krywin v. Chicago Transit Authority*, 238 Ill. 2d 215, 225 (2010). Here, the element of duty is at issue. Under the facts of this case, as pleaded, plaintiff claims to be a "third party" whose property was damaged as a result of the claimed negligent work performed by Ahern at Hi-Temp's contractual request. The law does recognize certain special relationships which would impose a legal duty in certain circumstances. See, *e.g.*, *Boenberger v. Pi Kappa Alpha Corp.*, 2018 IL 120951, ¶ 33 (recognizing special relationships between (1) carriers and passengers, (2) innkeepers and guests, (3) custodians and wards, and (4) possessors of land and invited members of the public). BWT has not pleaded or argued that it had any legally recognized special relationship with Ahern that would have created a legal duty for it to protect BWT's property. BWT relies instead on common law duty and voluntary undertaking, each of which will be discussed below.

¶ 11 A. Traditional Duty Analysis

¶ 12 Lacking any legal relationship with Ahern, BWT argues that "every person owes a duty to all persons to exercise ordinary care to guard against any injury which may naturally flow as a reasonably probable and foreseeable consequence of his act." *Wintersteen v. National Cooperage & Woodenware Co.*, 361 Ill. 95, 103 (1935). The existence of a legal duty is a question of law for the court to decide. *Bell v. Hutsell*, 2011 110724, ¶ 11. Furthermore, the touchstone of determining whether a duty exists requires examining whether the parties stood in a relationship to each other such that the law required the defendant to conduct itself reasonably for the plaintiff's benefit. *Rozowicz v. C3Presents, LLC*, 2017 IL App (1st) 161177, ¶ 13. In such an analysis, a court will consider the foreseeability of injury, the likelihood of injury, the magnitude of the burden of guarding against injury and the consequences of placing that burden on the defendant. *Krywin*, 238 Ill. 2d at 226.

¶ 13 First, BWT has not shown that the injury here was foreseeable. Ahern contracted with Hi-Temp, a commercial entity engaged in metal hardening and heat treatment. Given the industrial nature of Hi-Temp's business, an entity in Ahern's position would not have reasonably foreseen that a third party would keep substantial property on the premises or be subject to significant property loss from fire. Additionally, BWT has never suggested, and the record does not otherwise show, that Ahern was aware of BWT's presence on the property before the fire. Thus, it was not reasonably foreseeable that fire would destroy significant property of BWT. *Cf. Scott & Fetzer Co. v. Montgomery Ward & Co.*, 112 Ill. 2d 378, 382, 388-89 (1986) (finding that where Montgomery Ward & Company, Inc. (Wards) hired the defendant for fire protection services in Wards' portion of a large warehouse, losses to other warehouse tenants were highly foreseeable and the burden on the defendant was no more than the exercise of due care, notwithstanding the low service charge and contract purporting to limit the defendant's liability); *Nelson v. Union Wire Rope Corp.*, 31 Ill. 2d 69, 86 (1964) (finding it was foreseeable to the defendant insurer that the plaintiff workmen, the chief beneficiaries of the defendant's safety inspection and engineering services, would be endangered by the defendant's failure to use due care); *Wintersteen,* 361 Ill. 95 (affirming the negligence judgment in favor of the plaintiff where the defendant improperly loaded a train car and a falling barrel struck the plaintiff attempting to unload the car). Furthermore, Ahern's procurement of substantial insurance coverage does not show it foresaw that such an injury might occur, as Ahern's coverage applied to all of its commercial endeavors, not just the services tendered to Hi-Temp.

¶ 14 Ahern also argues that fires are, by nature, sporadic and unexpected, rather than likely. While one fire occurred at the facility in 2013, we are not persuaded that that alone rendered the injury here more likely. Even assuming that fire was likely to occur, nothing suggests that a fire

was likely to harm significant property of a third party. Additionally, the burden of recognizing a duty to BWT also weighs in Ahern's favor. BWT suggests that the burden would be modest given that Ahern could have simply inspected and tested its systems in compliance with industry standards. BWT does not specify what this would entail, however, or assert that such an inspection would by itself guard against the numerous failings BWT alleged to have occurred here. BWT asserts that Ahern breached its duty in at least 29 different ways. Similarly, the record indicates that the fire suppression and alarm devices at issue are complex.

¶ 15 Moreover, we reject BWT's contention that Ahern should have known a failure in its systems would pose "a threat to the public at large." Nothing about Hi-Temp's business would lead one to believe that the public at large would regularly be in contact with the facility. Where Ahern had no reason to believe that anyone other than Hi-Temp had substantial property on the premises or that Ahern's services could impact the property of a third person, the burden of recognizing a duty to some unknown class of future claimants would be great indeed. *Cf. Scott & Fetzer Co.*, 112 Ill. 2d at 389 (finding that "although the potential amount of liability is substantial, the group of people to whom [the defendant] owed the duty of exercising due care did not constitute an unknown or indeterminate class"). As a consequence, Ahern would find itself in the untenable position of being an involuntary insurer. While BWT asserts that allowing Ahern to escape liability to third parties' would undermine its incentive to competently perform its services, a company in the business of protecting entities from fire will not survive long with a reputation for incompetence. *Cf. Chicago Steel Rule & Die Fabricators C. v. ADT Security Systems Inc.*, 327 Ill. App.3d 642, 650-53 (2002) (finding the contractual exculpatory clause agreed to by the plaintiff steel plant and the defendant security company was enforceable against that plaintiff's negligence claim where disregarding the clause would cause the defendant to

substantially increase the cost of services and enforcing it would not eliminate the incentive to provide adequate services given the potential liability for third-party negligence claims). Ahern had no duty to BWT under traditional tort analysis.

¶ 16 B. The Restatement

¶ 17 The other legal vehicle that BWT utilized in its complaint and upon which it relies here, is a claim that Ahern somehow voluntarily undertook duties pursuant to subsections 324A(a) and 324A(c) the restatement. Illinois has recognized and adopted section 324A of the restatement and it has been interpreted in numerous decisions. See, *e.g.*, *Vesey v. Chicago Housing Authority*, 145 Ill. 2d 404 (1991); *Nelson*, 31 Ill. 2d 69; *McKenna v. Allied Barton Security Services, LLC*, 2015 IL App (1st) 133414. That section, titled, "Liability to Third Person for Negligent Performance of Undertaking" states as follows:

> "One who undertakes, gratuitously or for consideration, to render services to another *which he should recognize as necessary for the protection of a third person or his things*, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking." (Emphasis added.) Restatement (Second) of Torts § 324A (1965).

Even where section 324A applies, the scope of duty is limited to the extent of the undertaking. *Vesey*, 145 Ill.2d at 416-17.

¶ 18 With respect to section 324A(a), BWT argues that Ahern cannot challenge BWT's reliance on that subsection because Ahern did not respond to it below. In contrast, Ahern contends that BWT never specifically addressed that subsection below. See *Cabrera v. ESI Consultants, Ltd.*, 2015 IL App (1st) 140933, ¶ 106 (stating that an argument cannot be raised for the first time on appeal from a summary judgment order). While there is some merit to Ahern's suggestion that BWT forfeited any reliance on subsection (a), and that Ahern could not have responded to a basis of duty that BWT did not specifically address, we will address the issue on its merits. BWT generally cited section 324A below and Ahern generally responded to it. Under either subsection (a) or (c), however, a plaintiff must show that the defendant should have recognized that the services undertaken were necessary to protect a third person or his property. This BWT cannot do.

¶ 19 Once again, the record does not show that anyone in Ahern's position would have had reason to know that any third party held, or would hold, substantial property on Hi-Temp's premises. Thus, even viewing the record in the light most favorable to BWT, it cannot demonstrate that Ahern knew its services were necessary to protect BWT's property. *Cf. McKenna*, 2015 IL App (1st) 133414, ¶¶ 3, 29-33 (finding that a defendant security firm and a defendant building owner were not entitled to summary judgment on the plaintiffs' negligence claim where the defendants had entered into a contract to design a security system to protect property and life in the multi-use development housing a train station, a commercial space open to the public and a private office tower).

¶ 20 The exculpatory clause in the contract between Ahern and Hi-Temp also shows that Ahern had no reason to know its services were necessary to protect BWT. Although BWT was not a signatory to the contract, that clause stated that "in no event shall [Ahern] be liable for any special, indirect, incidental, consequential or liquidated, penal or any economic loss damages of any character, including but not limited to loss of use of [Hi-Temp's] property, lost profit or lost production, whether claimed by [Hi-Temp] *or by any third party*, irrespective of whether claims or actions for such damages are based upon contract, warranty, negligence, tort, strict liability or other." (Emphasis added.) Thus, Ahern unequivocally disclaimed liability for the losses of third parties. *Cf. Scott & Fetzer Co.*, 112 Ill. 2d at 388-89 (stating that the exculpatory clause in the fire protection contract with Montgomery Ward and Company, Inc., did not clearly apply to the tenants sharing the same building but the clause "possibly [applied] to the property of others located on Wards' premises" where the clause explicitly referred to such property). Additionally, we reject BWT's suggestion that the consequential damages could not have included property damage. See *Westlake Financial Group, Inc., v. CDH-Delnor Health System*, 2015 IL App (2d) 140589, ¶ 31 (stating that direct damages are those that the law presumes follow the kind of wrong complained of but that consequential damages result indirectly from the party's wrongful act). Having disclaimed liability to third parties, Ahern had no reason to know its services were nonetheless necessary to protect the property of a third party.

¶ 21 In light of our determination, we need not consider the other components of section 324A. That being said, we briefly address Ahern's argument that BWT could not have relied on Ahern's undertaking to provide BWT with fire protection services, as required by section 324A(c), in light of the exculpatory clause. *Cf. Scott & Fetzer Co.*, 112 Ill. 2d at 391 (stating that under section 324A(c) it is unnecessary to show reliance by the third person; rather, it is enough

that the other person to the contract relied on the undertaking). In this regard, BWT endeavors to separate itself from its co-subsidiary, Hi-Temp. Even if BWT and Hi-Temp are distinct legal entities, however, they shared the same space and were intimately connected, being answerable to the same holding company. According to the fifth-amended complaint, they operated the heat treatment facility together. Given the importance that BWT now places on fire protection services, we question how a prudent company would operate high temperature furnaces without inquiring into what fire protection service had been procured.

¶ 22 III. Conclusion

¶ 23 For the foregoing reasons, the trial court properly entered partial summary judgment in favor of Ahern and against BWT. Accordingly, we affirm the court's judgment.

¶ 24 Affirmed.