2012 IL App (3d) 110278-U

Order filed March 20, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

JOANNE SAPORTA, Plaintiff-Appellant, v. PLAINFIELD TOWNSHIP PARK DISTRICT, a unit of local government and body politic, and AMANDA BERGMAN, Defendants-Appellees.	) Appeal from the Circuit Court) of the 12th Judicial Circuit,) Will County, Illinois,)) Appeal No. 3–11–0278) Circuit No. 08–L–606)) Honorable) Michael J. Powers,) Judge, Presiding.)

JUSTICE O'BRIEN delivered the judgment of the court.
Presiding Justice Schmidt and Justice Carter concurred in the judgment.

ORDER

¶ 1 *Held*: Summary judgment in favor of the defendants in an action by an injured horseback rider was upheld on appeal because the rider's negligence claims were barred by Equine Activity Liability Act. In addition, an affidavit submitted by the plaintiff opposing summary judgment did not raise a genuine issue of material fact precluding summary judgment on the issue of willful and wanton misconduct. The plaintiff's fraud claims did not survive summary judgment because the defendants' statements regarding the horse were either true statements, statements of opinion, or puffery, but not false statements of material fact.

¶ 2 The plaintiff, Joanne Saporta, was injured after falling off a horse during a riding lesson

with the defendant, Amanda Bergman, at a riding center owned and operated by the other defendant, Plainfield Township Park District (Park District). The trial court granted summary judgment in favor of the defendants on Saporta's original three-count complaint. The trial court allowed Saporta to file an amended complaint, which added two claims of fraud. Thereafter, the trial court affirmed its prior entry of summary judgment as to the first three counts, and also granted summary judgment in favor of the defendants on the fraud counts. Saporta appealed.

¶ 3 FACTS

¶ 4 Saporta was a 73-year-old experienced rider, with more than 20 years of riding experience. She began taking riding lessons at the Park District's riding center around 1998. On November 8, 2004, Saporta signed the Park District's general release. The release stated:

¶ 5 "Under the Equine Liability Act 745 ILCS 47/1 *et seq*., each participant who engages in an equine activity expressly assumes the risks of and responsibility for injury, loss or damage to person or property resulting from the risk of equine activities."

¶ 6 At some point in 2006, Bergman became Saporta's riding instructor. At the time of the accident, Bergman had given Saporta approximately 50 lessons and had also taught Saporta's 10-year-old granddaughter.

¶ 7 Sometime in the week preceding July 27, 2007, Bergman went with the riding center's manager to pick up a horse named "Rosie" from another stable facility. Bergman rode Rosie for at least 20 minutes, in an indoor arena similar to that of the Park District, and evaluated Rosie's gait and behavior. Rosie was transported to the Park District's barn; the trip was uneventful and Rosie had no issues going into the barn. Bergman testified in her deposition that she had an advanced student ride Rosie on the day that Rosie was brought back to the riding center.

Bergman also stated that she rode Rosie another time and another instructor rode Rosie in the few days prior to Saporta's accident on July 27.

¶ 8 On July 27, Saporta and her granddaughter had lessons at the riding center with Bergman. According to Bergman, she informed Saporta that Rosie had just been acquired by the riding center, and suggested that Saporta and her granddaughter ride Rosie. According to Bergman, Saporta and her granddaughter did not object and were excited to ride the new horse. Saporta claimed that Bergman told her to ride Rosie, claiming that Rosie would be perfect for her and her granddaughter. Bergman does not remember characterizing Rosie as "perfect," but she did encourage them to ride Rosie. The granddaughter rode Rosie first, without incident. Saporta walked and then trotted Rosie, and then Bergman told Saporta to canter. Although Saporta did not want to, she started to canter. According to Saporta, Rosie shook and then took off running. Saporta fell forward into Rosie's mane. After running around the arena a few times, Saporta looked for a place to jump off. Since there were jumping poles in the center, she jumped off near the door, where the mounting block was located. Saporta landed on the mounting block, and she suffered some fairly serious injuries, including a broken collarbone, several broken ribs, and a punctured lung.

¶ 9 Saporta filed a three- count complaint against the defendants, alleging a violation of the Equine Activity Liability Act (EALA), premises liability, and failure to properly supervise an equine activity. The defendants moved for summary judgment, arguing that Saporta had assumed the risk under EALA and there was no willful and wanton misconduct. Saporta's response relied upon the affidavit of Susan Buhle, the manager of Arabian Knights Farm in Willowbrook, Illinois. Buhle's affidavit stated that she was familiar with the custom and industry

practice as it related to acquiring and preparing horses for giving riding lessons. Buhle stated that the custom and industry practice was to acquire a horse on a trial basis for 30 days before using it as a lesson horse, and that she followed that practice at Arabian Knights Farm. The trial court granted the defendants' motion, finding that, as a matter of fact and law, there was no genuine issue of material fact that the defendants' conduct did not rise to the level of wilful and wanton, and the exculpatory clause of the release signed by Saporta barred the negligence counts.

¶ 10 Saporta filed an amended complaint, re-alleging the original three counts and adding counts of common law fraud and a violation of the Illinois Consumer Fraud Act. The defendants again moved for summary judgment, arguing that Bergman's recommendation of Rosie was puffery, Bergman had no fraudulent state of mind, and nothing was concealed from Saporta. The trial court affirmed its grant of summary judgment as to the first three counts, and also granted summary judgment in favor of the defendants as to the two fraud counts. Saporta appealed.

¶ 11 ANALYSIS

¶ 12 Saporta argues that the trial court failed to consider all of the evidence that she provided to establish that there was a question of fact as to whether the defendants' conduct was wilful and wanton. Specifically, Saporta argues that the trial court erroneously disregarded the affidavit of her expert, Buhle. Saporta also argues that the trial court did not construe the evidence liberally in her favor, the nonmoving party.

¶ 13 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(c) (West 2006). In determining whether a genuine issue as to any material fact exists, pleadings,

depositions, and admissions are construed against the party moving for summary judgment. *Williams v. Manchester*, 228 Ill. 2d 404 (2008). Summary judgment is inappropriate "where the material facts are disputed or where, the material facts being undisputed, reasonable persons might draw different inferences from the undisputed facts." *Williams*, 228 Ill. 2d at 417. Summary judgment is appropriate where the plaintiff cannot establish an element of the cause of action. *Williams*, 228 Ill. 2d at 417. We review *de novo* the granting of summary judgment. *Williams*, 228 Ill. 2d at 417.

¶ 14 The Equine Activity Liability Act (EALA), 745 ILCS 47/1 *et seq*. (West 2006), recognizes that equine activities can be dangerous and provides that each participant in an equine activity expressly assumes the risk for any injury, loss, or damage that results from that activity. 745 ILCS 47/15 (West 2006). Section 20 of the EALA, however, provides an exception, permitting liability for equine activity sponsors or professionals who commit acts or omissions that constitute wilful or wanton disregard for the participant and that act or omission causes the injury. 745 ILCS 47/20(b)(4) (West 2006). Illinois cases interpreting EALA have found that the Act precludes negligence actions unless the parties fall outside the parameters of Act. See *Kush v. Wentworth*, 339 Ill. App. 3d 157 (2003) (EALA did not preclude negligence liability for owner of a horse that kicked another rider during a group ride because owner was not an equine activity sponsor or equine professional); *Smith v. Lane*, 358 Ill. App. 3d 1126 (2005)(negligence and strict liability claims of a passenger in a horse drawn carriage were not precluded by EALA because passenger was not engaged in an equine activity by riding in a carriage).

¶ 15 In this case, Saporta, riding a lesson horse at a riding center, was engaged in an equine activity and the defendants, the instructor and the provider of the horse, were equine activity

sponsors or equine professionals. Thus, Saporta's negligence claims are barred by EALA, in accordance with her signed release. Saporta also alleged wilful and wanton disregard, which would permit liability under EALA. *Lessman v. Rhodes*, 308 Ill. App. 3d 854 (1999). A willful or wanton act is one which is intentional or committed under circumstances exhibiting a reckless disregard or indifference for the safety of others. *Oelze v. Score Sports Venture, LLC*, 401 Ill. App. 3d 110 (2010). The primary evidence offered by Saporta to show that the defendants' actions with regard to Rosie were wilful and wanton, and thus liable under EALA, was the affidavit Buhle.

¶ 16 An expert's affidavit in support of or in opposition to a motion for summary judgment must comply with Illinois Supreme Court Rule 191(a) (eff. July 1, 2002). *Robidoux v. Oliphant*, 201 Ill. 2d 324 (2002). Rule 191(a) provides, in part, that the affidavit "shall not consist of conclusions but of facts admissible in evidence." Ill. S. Ct. R. 191(a) (eff. July 1, 2002).

¶ 17 The trial court denied the defendants' motion to strike Buhle's affidavit, reserving ruling on the motion to strike with the motion for summary judgment, but did not mention the affidavit when making its ruling. However, it is clear that the trial court found that the evidence presented in the affidavit was not sufficient to avoid summary judgment. In the affidavit, Buhle generally stated that she was familiar with the custom and industry practice for acquiring, testing, and preparing horses for riding lessons. She also stated that she followed that practice. Buhle does not state where that practice comes from, nor does she offer any other facts in support other than what she did at her own stable. The affidavit also stated that until the decision was made regarding whether a particular horse would be a good riding horse, "the custom and industry practice we follow at Arabian Knights Farm [wa]s not to put the horse into service as a lesson

horse." Essentially, Buhle's affidavit delineated her own custom and practice, without reference to any admissible facts that established when or what industry that Buhle was referencing. See *Buchelares v. Chicago Park Dist.*, 171 Ill. 2d 435 (1996). Thus, we find that the affidavit was insufficient to create a genuine issue of fact as to whether the defendants acted in a willful and wanton manner.

¶ 18 Saporta also contends that she presented sufficient evidence to establish a genuine issue of material fact that defendants' failure to move the mounting block was wilful and wanton misconduct. Saporta claimed to have seen other riders fall off at the corner where the mounting block was kept. Bergman confirmed that the mounting block was never moved, but it was set off to the side and not in the direct way of travel.

¶ 19 As already noted, willful or wanton conduct is conduct that is either intentional or done with a reckless disregard for the safety of others. *Oelze*, 401 Ill. App. 3d at 148. In addition, EALA provides an exception, allowing liability, if the equine professional controls the facility and the injury is caused by a dangerous latent condition for which there were no warning signs. 745 ILCS 47/20(b)(3) (West 2006). The undisputed facts establish that the mounting block was in plain sight, but out of the path of traffic, and, in fact, Saporta used the block to mount Rosie. Although Saporta claimed to have seen other riders fall of in the open area near the mounting block, she did not present any evidence that another rider had ever hit the mounting block, even though it was always in the same place. Thus, because there was no indication of wilful and wanton misconduct, and no basis for applying the EALA exception, the trial court's grant of summary judgment in favor of the defendants is affirmed.

¶ 20 The fraud alleged by Saporta was that Bergman told her that the defendants had recently

acquired Rosie, which could be interpreted to mean that the defendants owned Rosie. Saporta also alleges fraud in the failure to disclose that Rosie had been brought to the stable for a trial period and few other people had ridden Rosie prior to Saporta's granddaughter. Saporta also alleges that she was a purchaser under the Illinois Consumer Fraud and Deceptive Business Practices Act and that the statement that Rosie was recently acquired was a misrepresentation. The defendants argue that the statement that Rosie was "perfect" was simply puffing, not a statement of fact.

¶ 21 The elements for a cause of action for fraudulent misrepresentation are: (1) a false statement of material fact; (2) known or believed to be false by the party making it; (3) an intent to induce the other party to act; (4) action in justifiable reliance on the truth of the statement; and (5) damage resulting from such reliance. *Doe v. Dilling*, 228 Ill. 2d 324 (2008). In this case, there is no genuine issue of material fact for a jury. Assuming that the statements were made: that the defendants had recently acquired Rosie, and that she was perfect for Saporta and her granddaughter to ride, they were not false statements. The first is an accurate statement. The second is clearly an opinion: Bergman was not saying that Rosie was literally perfect. Saporta has failed to present any evidence to support her allegations that the defendants made false statements of material fact or that they believed the statement to be false when they made it.

¶ 22 The elements of a claim under the Illinois Consumer Fraud Act are: (1) a deceptive act or practice by a defendant; (2) the defendant's intent that plaintiff rely on the deceptive act or practice; and (3) the deception occurred in the course of conduct involving trade and commerce. *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482 (1996). The defendants argue that the statement that Rosie was perfect was an example of puffing. "Puffing" refers to exaggerations that sellers

make regarding their products that cannot be determined to be true or false. *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill. 2d 100 (2005). "Perfect" is a subjective characterization that is not actionable under the Illinois Consumer Fraud Act. *Breckenridge v. Cambridge Homes*, 246 Ill. App. 3d 810 (1993).

¶ 23 Saporta also alleged the defendants' statement that they had "recently acquired" Rosie was actionable under the Illinois Consumer Fraud Act. Again, it was an accurate statement; the defendants had just acquired Rosie on a trial basis, and they did end up purchasing Rosie. As there were no questions of material fact, the trial court properly granted summary judgment in favor of the defendants.

¶ 24 CONCLUSION

¶ 25 The judgment of the circuit court of Will County is affirmed.

¶ 26 Affirmed.