STATE OF MICHIGAN

COURT OF APPEALS

ERICKA BELLAMY,

Plaintiff-Appellant,

v

TARGET STORES d/b/a DAYTON HUDSON CORP., DAYTON HUDSON CORP., KATHY ZACCARIA, KATHY WILLIAMS, and TIM COOK,

Defendants-Appellees.

UNPUBLISHED
November 19, 2002

No. 235334
Wayne Circuit Court
LC No. 98-838964-NO

Before: Murray, P.J., and Cavanagh and Bandstra, JJ.

PER CURIAM.

Plaintiff appeals as of right the summary dismissal of her claims arising from a shoplifting accusation for which she was detained by defendant Target Stores' employees, codefendants Tim Cook, Kathy Zaccaria, and Kathy Williams. We affirm.

On July 26, 1996, plaintiff had been shopping at Target with her two children and sister when she was accused of shoplifting after she was allegedly seen "box stuffing."[1] On December 4, 1998, plaintiff brought this action against Target and two unnamed employees who were designated as John Doe and Fred Roe. Plaintiff's six-count complaint alleged gross negligence, negligence, false arrest, false imprisonment, intentional infliction of emotional distress, and a violation of the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq*.

In January 1999, the action was removed to federal court on the basis of diversity. On January 28, 2000, plaintiff amended her complaint to include violations of 42 USC §§ 1981, 1983, 1985(3), and 1986, and named the "John Doe" defendants as Target employees, Cook, Williams, and Zaccaria. On February 8, 2000, the district court judge entered an opinion and order granting Target's motion for summary disposition with regard to all of the federal claims, and remanding the case back to the state court, noting that naming the individual employees as defendants destroyed the diversity jurisdiction.

[1] Defendants explain that "box stuffing" is "where a customer, while in the store, will select a box of merchandise, open it, place other merchandise in the box, seal the box, and pay only for the original merchandise in the box."

On September 11, 2000, Target, Williams, and Zaccaria[2] moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10). These defendants argued that (1) all of the claims against Williams and Zaccaria should be dismissed as barred by the statute of limitations, (2) the gross negligence and negligence claims should be dismissed because defendants had probable cause to suspect plaintiff of shoplifting and, thus, to detain her, (3) the false arrest and false imprisonment claims should be dismissed as barred by the applicable two year statute of limitations, (4) the claim for intentional infliction of emotional distress should be dismissed because plaintiff could not establish the requisite elements, and (5) the Elliott-Larsen claim should be dismissed because plaintiff was not stopped because of her race but because she was suspected of shoplifting, as noted by the federal district court.

On October 25, 2000, the trial court granted defendants' motion, holding that (1) the claims against the three employees were barred by the statute of limitations because the amended complaint did not relate back to the date of the original complaint, (2) there was no genuine issue of material fact that there was probable cause to suspect plaintiff of shoplifting, therefore, the gross negligence, negligence, and intentional infliction of emotional distress claims were dismissed, (3) the false arrest and false imprisonment claims were barred by the statute of limitations, and (4) the Elliott-Larsen claim was unsupported because there was no evidence that plaintiff was treated differently because of her race. Plaintiff's motion for reconsideration was denied. Subsequently, defendant Cook's motion for summary disposition pursuant to MCR 2.116(C)(7) [statute of limitations] was also granted. This appeal followed.

First, plaintiff argues that the statute of limitations did not bar her claims against Target employees, Williams, Zaccaria, and Cook, because the amended complaint that added them as named defendants related back to the filing of the original complaint. We disagree. This is a question of law that we review de novo on appeal. *Smith v Henry Ford Hosp*, 219 Mich App 555, 557; 557 NW2d 154 (1996).

MCR 2.118(D) provides:

> An amendment that adds a claim or a defense relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading.

However, it is well established in Michigan that the relation-back doctrine does not apply with regard to the addition of new parties. See *Hurt v Michael's Food Center, Inc*, 220 Mich App 169, 179; 559 NW2d 660 (1996); *Employers Mut Cas Co v Petroleum Equip, Inc*, 190 Mich App 57, 63; 475 NW2d 418 (1991). In particular, amendments to "John Doe" complaints by the addition of specifically named defendants do not relate back for the purpose of tolling the statute of limitations. *Thomas v Process Equip Corp*, 154 Mich App 78, 84-85; 397 NW2d 224 (1986); *Fazzalare v Desa Industries, Inc*, 135 Mich App 1, 6; 351 NW2d 886 (1984); *Browder v International Fidelity Ins Co*, 98 Mich App 358, 361; 296 NW2d 60 (1980).

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[2] Apparently Cook had not been served with the summons and complaint at this point.

In this case, plaintiff's cause of action allegedly accrued on July 26, 1996. She filed her original complaint on December 4, 1998. On January 28, 2000, plaintiff filed her second amended complaint in the federal district court, which specifically named the three defendant employees. The gross negligence, negligence, emotional distress, and Elliott-Larsen claims were subject to a three year statute of limitations. See MCL 600.5805(9). The false arrest and false imprisonment claims were subject to a two-year statute of limitations. See MCL 600.5805(2). Consequently, with regard to former claims, the statute of limitations expired on July 26, 1999, and with regard to the latter claims, the statute of limitations expired on July 26, 1998. Plaintiff named the three employees as defendants on January 28, 2000, well after the statute of limitations expired with regard to all of these claims; therefore, the trial court properly dismissed the action against the employees as barred by the statute of limitations.

We reject plaintiff's contention that Rule 15(c) of the Federal Rules of Civil Procedure (FRCP) should apply to this case. This is a cause of action based on state laws, instituted in a state court, and is governed by the Michigan Court Rules. See MCR 1.103; *People v Sinclair*, 247 Mich App 685, 689; 638 NW2d 120 (2001); *Bowers v Bowers*, 216 Mich App 491, 498; 549 NW2d 592 (1996). Although the case had been removed to the federal district court for a period of time, that court did not rule on the issue whether the statute of limitations barred the actions against the three defendants that were added by amendment almost four years after the original complaint was filed. Accordingly, the claims against Williams, Zaccaria, and Cook were properly dismissed as barred by the statute of limitations.

Next, plaintiff argues that the trial court erred when it dismissed her gross negligence and negligence claims because a genuine issue of fact existed as to whether the Target employees had probable cause to accuse her of shoplifting. We disagree. This Court reviews the grant or denial of a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

A merchant, as a business invitor, owes a duty to its customers to maintain its premises in a reasonably safe condition and may be liable for an injury resulting from an unsafe condition caused by the active negligence of itself or its employees. See *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001), quoting *Serinto v Borman Food Stores*, 380 Mich 637, 640-641; 158 NW2d 485 (1968). Here, plaintiff claims that Target's employees were, in essence, the unsafe condition on the premises because they accused her of, and detained her for, shoplifting without justification. However, pursuant to MCL 600.2917, Target was statutorily authorized to detain plaintiff if it, through its employees, "had probable cause for believing and did believe that the plaintiff" had shoplifted. Therefore, whether Target breached its duty owed to plaintiff, its customer, depends on whether the Target employees' belief that plaintiff had shoplifted was supported by probable cause.

In support of its motion for summary disposition, defendant argued that there was no genuine issue of material fact that the Target employees had probable cause to believe that plaintiff had shoplifted. A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek*, *supra*. However, the motion must be supported by documentary evidence. MCR 2.116(G)(3)(b); *Meyer v Center Line*, 242 Mich App 560, 574; 619 NW2d 182 (2000). Consequently, defendants attached excerpts of testimony from the depositions of defendants Zaccaria and Williams, asset protection specialists, and plaintiff. Zaccaria testified that she observed plaintiff and her sister, who were in the toy department, place

children's and women's clothing into an open box containing a shelving unit which had been in their shopping basket, tape the box shut, and proceed to the checkout line. Zaccaria observed plaintiff pay for the shelving unit and some other items, but not the clothing that was inside the box, and then proceed toward the store exit. Zaccaria and Williams then approached plaintiff, told her about the unpaid merchandise contained within the box, and requested that plaintiff accompany them to the store office. Both Zaccaria and Williams testified that plaintiff responded by exiting the store, but left one of her children behind in the store. The box was opened and the clothing was found in the box. Plaintiff returned to the store, but continued to refuse to cooperate, resulting in Cook attempting to direct her by the arm toward the store office. A struggle ensued, plaintiff struck Cook, plaintiff's sister returned to the store and began striking Cook, and both uttered threats and profanity. Zaccaria and others eventually restrained and handcuffed plaintiff.

A party opposing a motion for summary disposition has the burden of demonstrating, with evidentiary materials, that a genuine issue of material fact exists on which reasonable minds could differ. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). Here, in response to the motion for summary disposition of plaintiff's negligence and gross negligence claims, plaintiff relied on her deposition testimony denial which consisted of the question, "[w]ere you shoplifting on the day of the incident?" to which plaintiff responded, "[n]o." We agree with the trial court that this evidence is not sufficient to create a question of fact, on which reasonable minds could differ, that the Target employees' belief that plaintiff had shoplifted was supported by probable cause. Consequently, there was no genuine issue of material fact that Target did not breach a duty owed to plaintiff and the trial court's summary dismissal of plaintiff's gross negligence and negligence claims was proper.

Next, plaintiff argues that the trial court erred when it dismissed her claim for the intentional infliction of emotional distress because the Target employees' conduct was extreme and outrageous. We disagree.

To establish the tort of intentional infliction of emotional distress, the plaintiff must prove: (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress. See *Haverbush v Powelson*, 217 Mich App 228, 234; 551 NW2d 206 (1996). Here, as previously discussed, Target, through its employees, had the right to detain plaintiff for suspected shoplifting. That plaintiff was offended by the accusation and refused to cooperate, allegedly because a "white lady and foreign dressed lady" had left the store with boxes and were not detained, does not rise to the level of extreme and outrageous conduct required for an intentional infliction of emotional distress claim. Consequently, the trial court properly dismissed this claim.

Finally, plaintiff argues that her Elliott-Larsen claim should not have been dismissed since she was denied the enjoyment of a place of public accommodation because she is black. Plaintiff has failed to properly present this issue for appeal, having given it cursory treatment with little argument, analysis, and citation to supporting authority. See *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001); *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). In any event, the issue is without merit.

The Elliott-Larsen Civil Rights Act, in particular, MCL 37.2302, prohibits the denial of "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or

accommodations of a place of public accommodation" on the basis of religion, race, color, national origin, age, sex or marital status. MCL 37.2302; *Schellenberg v Rochester Elks*, 228 Mich App 20, 32; 577 NW2d 163 (1998). Here, we agree with the trial court that plaintiff's claim of discrimination is wholly unsupported. Plaintiff alleges that she was treated differently than a "white lady and foreign dressed lady" who left the store with boxes without being detained on suspicion of shoplifting. However, plaintiff has failed to set forth any evidence that either alleged lady behaved in such a manner as to give the Target employees probable cause to believe that they had shoplifted merchandise and yet were permitted to exit the store with the stolen merchandise without confrontation. Accordingly, this claim is without merit and was properly dismissed.

Affirmed. Defendants, having prevailed in full, may tax costs pursuant to MCR 7.219(F).

/s/ Christopher M. Murray
/s/ Mark J. Cavanagh
/s/ Richard A. Bandstra