IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

JST ENTERPRISES LLC, et al., *Plaintiffs/Appellants*,

v.

DAISY MOUNTAIN FIRE DISTRICT, *Defendant/Appellee*.

No. 1 CA-CV 18-0651
FILED 12-10-2019

Appeal from the Superior Court in Yavapai County
No. P1300CV201800458
P1300CV201800476
(Consolidated)
The Honorable David L. Mackey, Judge

AFFIRMED

COUNSEL

Gillespie Shields Goldfarb Taylor, Phoenix
By Kristina B. Reeves, April Maxwell
Counsel for Plaintiffs/Appellants

Law Office of Dennis A. Sever PLLC, Mesa
By Dennis A. Sever
Counsel for Plaintiff/Appellant CNS Towing LLC

Beaugureau Hancock Stoll & Schwartz PC, Phoenix
By Anthony J. Hancock, W. Reed Campbell
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Presiding Judge Randall M. Howe delivered the decision of the Court, in which Judge David D. Weinzweig and Judge Joshua Rogers[1] joined.

H O W E, Judge:

¶1 JST Enterprises, LLC, Desert Valley Auto Parts Inc., Jason McClure, Ronald McClure, Linda McClure,[2] and CNS Towing, LLC challenge the trial court's ruling dismissing their negligence claims against Daisy Mountain Fire District for failure to state a claim under Arizona Rule of Civil Procedure 12(b)(6). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 On this appeal from the grant of a motion to dismiss, we "assume the truth of all well-pleaded factual allegations." *Coleman v. City of Mesa,* 230 Ariz. 352, 356 ¶ 9 (2012). This case involves two adjacent properties in Black Canyon City, Arizona: the "JST Property" and the "CNS Property." The JST Property is owned by Ronald and Linda, who had leased a part of it to JST and another part to Desert Valley. CNS operates an automobile storage lot on its part and JST operates a towing and recovery business on its part. Each property housed several vehicles and various other personal property.

¶3 Judy Bruce, Allison Granados, and Thomas Dovichi lived together in a trailer on the JST Property. One afternoon in May 2017, they discovered a wildfire on the CNS Property and called 9–1–1. Daisy Mountain Fire District firefighters responded, and Dovichi told Carol Dysert, who then told Ronald, about the fire. Ronald called Jason for help in preventing the fire from spreading to the JST Property.

---

[1] The Honorable Joshua Rogers, Judge of the Arizona Superior Court, has been authorized to sit in this matter pursuant to Article VI, Section 3 of the Arizona Constitution.

[2] Because some of the plaintiffs share the name McClure, this Court, with respect, will refer to them individually by their first names.

¶4 When Jason arrived at 6:00 p.m., an individual firefighter asked him "to leave the area" and "not to get in [the firefighters'] way," explaining that the fire was under control and was "almost entirely extinguished." Because Jason was concerned for the assets on the property, he asked if "he could possibly help to protect" his property and offered the use of his own equipment to fight the fire. The firefighter denied the request "and again asked him to leave the area because the [firefighters] would take care of everything." When Ronald arrived between 6:30 and 6:45 p.m., the firefighters directed him to leave the area, just as they had directed Jason to leave. They told Ronald that "they had the fire under control and did not want his assistance," and "did not want anyone near" the property or the fire. They repeated that Ronald "should leave the premises of his business, since there was no further exposure." Ronald and Jason then left.

¶5 About 7:00 p.m., Granados told the firefighters that she had observed smoldering embers and asked them to spray down her yard. The firefighters declined, "making it abundantly clear that they had the [f]ire under control and did not need [her] assistance." When Granados pointed to the smoldering fire and live embers, the firefighters said, "not to worry about it," that they would leave fire spotters to observe any rekindling. About the same time, firefighters came upon Dysert, who was standing with a hose. They told her "not to worry about the [f]ire and to let the fire department do its job." The firefighters were "clear" that the fire department had the fire under control and would leave fire spotters on the land. The firefighters reiterated that "there were no problems whatsoever," and that if anything flared up, they "would be back to handle it." Granados and Dysert left.

¶6 After fighting the fire for several hours, Daisy Mountain concluded that the fire had been extinguished and left the scene without stationing any fire-spotters in the area. At some point during the night, however, the fire rekindled, destroying a significant amount of the JST Property and CNS Property, along with personal property stored there. With the help of eight different fire agencies, the fire was finally extinguished approximately six hours after it had rekindled.

¶7 JST, Desert Valley, and the McClures (collectively "JST") sued Daisy Mountain for negligence for failing to protect their property and the general public. CNS also sued Daisy Mountain for negligence, and the trial court consolidated the cases.

¶8 Daisy Mountain moved to dismiss the complaints, arguing that the plaintiffs had failed to state a claim upon which relief could be

granted as a matter of law because Daisy Mountain had no duty to them. JST and CNS countered that (1) during the efforts to fight the fire, Daisy Mountain had affirmatively undertaken a special duty to them by making specific promises and representations about Daisy Mountain's control of the fire and measures that it would take to prevent the fire's rekindling and (2) they had relied on those statements and suffered harm. The trial court heard argument on the motion and ruled that, as recognized in *Acri v. State*, 242 Ariz. 235, 238 ¶ 4 (App. 2017), Daisy Mountain had no duty to property owners in fighting wildfires, and the "affirmative undertaking alleged in this case are insufficient" to apply Restatement (Second) of Torts § 323. The court thus dismissed the complaint, and JST and CNS timely appealed.

DISCUSSION

¶9 JST and CNS contend on appeal that the trial court erred in dismissing their complaint. This Court reviews this issue de novo. *Coleman*, 230 Ariz. at 355–56 ¶¶ 7–8. In doing so, we consider only the pleadings themselves, and "assume the truth of all well-pleaded factual allegations and indulge all reasonable inferences from those facts, but mere conclusory statements are insufficient." *Id.* at 356 ¶ 9. Dismissal for failure to state a claim is appropriate when, as a matter of law, "the plaintiffs would not be entitled relief under any interpretation of the facts susceptible of proof." *Id.* at ¶ 8 (quoting *Fid. Sec. Life Ins. Co. v. State Dep't of Ins.*, 191 Ariz. 222, 224 ¶ 4 (1998)).

¶10 JST and CNS contend that the trial court erred in concluding that Daisy Mountain did not owe them a duty of care. We review duty determinations de novo. *Quiroz v. ALCOA Inc.*, 243 Ariz. 560, 564 ¶ 7 (2018). We must determine whether a duty exists as a matter of law before considering the case-specific facts. *Id.* Duties arise from either recognized common law special relationships or relationships created by public policy. *Id.* at 565 ¶ 14. Duties based on special relationships come from several sources, including those recognized under common law, contracts, or conduct undertaken by the defendant. *Id*.

¶11 Neither a common law nor a contractual relationship giving rise to a duty of care is present here. JST and CNS concede that, as recognized in *Acri*, Daisy Mountain did not assume a duty to them merely by responding to the fire. They argue, however, that Daisy Mountain assumed a duty under Restatement (Second) of Torts § 323 by voluntarily undertaking to protect their property. Restatement § 323 provides that

> [o]ne who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

¶12 But the complaints do not allege that the Daisy Mountain Fire District "undert[oo]k . . . to render services" specifically to JST and CNS to protect their property from the impending fire. Instead, the complaints merely allege that individual firefighters told Jason, Ronald, Granados, and Dysert during their firefighting efforts that the fire was "under control," that "they would do everything necessary to protect [the] property from being damaged," that "the fire was contained," and that they need not worry about embers because "fire-spotters" would remain.

¶13 These are not statements of an undertaking, but statements designed to persuade civilians to leave a dangerous area so that the firefighters could fight a fire unimpeded by well-meaning but untrained bystanders. The complaint acknowledges that the firefighters expressly told Jason and Ronald to leave the area, told Granados they "did not need [her] assistance," and told Dysert "to let the fire department do its job."[3] The statements, seen in context, were not intended to assume a duty to JST and

[3] Under A.R.S. § 13–2404(A)(2), knowingly disobeying a firefighter's command in the vicinity of a fire is a misdemeanor criminal offense. Thus, the plaintiffs are unable as a matter of law to show that they relied on the firefighters' statement in declining to stay to protect their property. *See Barnum v. Rural Fire Protection Co.*, 24 Ariz.App. 233, 238–39 & n.2 (1975) (firefighter ordered person not to attempt to rescue property during a fire; in rejecting the person's claim that the firefighter's order created a duty under Restatement (Second) of Torts § 323 because he had relied on that order in not rescuing his property, this Court ruled that "the element of reliance implies willed conduct, not conduct or inaction brought about by force of law.").

CNS to specifically protect their property. Thus, the complaints fail to state a claim for which relief can be granted.

¶14 Plaintiffs' arguments, if accepted, would interfere with a fire department's ability to communicate with property owners. When fires occur, firefighters routinely inform property owners of the actions they are taking and provide updates on their success or difficulty in fighting the fire. If such statements can be deemed to assume a duty of care to the property owners, firefighters will provide no information to property owners for fear of incurring liability should their firefighting efforts cause loss to the property owners. A fire department will therefore be unable to allay the fears of anxious property owners and calm a dangerous situation, impeding its ability to fight fires.

¶15 Plaintiffs' analysis also runs counter to Arizona Supreme Court precedent on determining whether a tort duty exists. "A fact-specific analysis of the relationship between the parties is a problematic basis for determining if a duty of care exists. The issue of duty is not a factual matter; it is a legal matter to be determined before the case-specific facts are considered." *See Gipson v. Kasey*, 214 Ariz. 141, 145 ¶ 21 (2007) (noting that the Arizona Supreme Court has "cautioned against narrowly defining duties of care in terms of the parties' particular actions in particular cases"). Yet, under plaintiffs' argument, whether a duty exists would depend on disputed facts about what the firefighters said and meant and how the property owners responded, and the trial court or a jury would have to resolve whether a duty was created.

¶16 Because the statements presented in the complaints do not constitute an "undertaking" under Restatement (Second) of Torts § 323 to protect the plaintiffs' property, the complaints fail to allege facts that show Daisy Mountain owed a duty of care to the plaintiffs. The trial court thus properly dismissed the complaints.

CONCLUSION

¶17 For the foregoing reasons, we affirm. Daisy Mountain may recover its costs on appeal contingent upon its compliance with ARCAP 21.