Third District Court of Appeal

State of Florida

Opinion filed December 26, 2019.
Not final until disposition of timely filed motion for rehearing.

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No. 3D18-1085
Lower Tribunal No. 16-5176
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Nancy Cascante and Sean Hutchins,
Appellants,

vs.

50 State Security Service, Inc., etc., et al.,
Appellees.

An appeal from the Circuit Court for Miami-Dade County, John Schlesinger, Judge.

Hunter & Lynch, P.A., and Christopher J. Lynch; Downs Law Group, and C. David Durkee, for appellants.

Kubicki Draper, P.A., Caryn L. Bellus, and Barbara E. Fox, for appellee 50 State Security Service, Inc.

Before FERNANDEZ, MILLER, and GORDO, JJ.

MILLER, J.

Appellants, Nancy Cascante and Sean Hutchins, challenge a final summary judgment rendered in favor of appellee, 50 State Security Service, Inc. ("50 State"), in their negligent security action.[1] 50 State was contractually obligated to furnish a crime analyst and security services at a parking garage owned by Miami-Dade County (the "County"). Under the terms of the contract, the County retained unilateral control over both the shift schedule and number of guards assigned to the premises. Cascante was attacked and injured in the parking garage during the early evening hours. At the time of the attack, there was no security guard on duty in the garage. Accordingly, the lower tribunal determined that 50 State did not assume the County's legal duty to protect Cascante. For the reasons explicated below, we discern no error and affirm.

FACTS AND BACKGROUND

On June 27, 2008, the County extended a Public Invitation to Bid (the "Bid"), seeking "to establish a contract for the purchase of security guard services in conjunction with the needs of the Miami-Dade Transit." The types of services required were: "(1) armed security; (2) unarmed security; and (3) security management and supervision." Although the vendor was required to provide

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[1] Hutchins joined in the complaint as a derivative claimant seeking damages for loss of consortium.

security personnel, under the Bid, the County was solely charged with determining "the number of security officers, the shift schedule, and level of training required."

The bidder was specifically required to furnish a crime analyst. The tasks and responsibilities of the analyst were as follows:

> The vendor shall provide a full time Crime Analyst to compile criminal statistics to an electronic database and analyze crime trends for all modes of [Miami-Dade] transit. Specifically, this individual is responsible for monthly generation of crime statistics reports and the reporting of crime trends to management in a timely manner to effect proactive prevention of criminal activity. This individual is also responsible for generating other MDT reports such as MDT bus incident reports and MDT Maintenance Repair Reports.

The analyst was further charged with identifying "evolving and existing crime patterns and series," forecasting "future crime trends," and providing "data to support departmental planning activities."

In the third addendum to the Bid (the "Addendum"), the County specified that minimum coverage for the South Miami Metrorail parking lot would be a single armed security guard assigned to work from seven o'clock in the morning until seven o'clock in the evening, seven days per week. 50 State was the winning bidder, hence, the terms of the Bid morphed into the contract, which has become the focal point of this litigation.

On May 29, 2014, at approximately eight o'clock p.m., Cascante was violently assaulted by two men in the South Miami Metrorail Station parking garage. No roving security guard was on duty, as the shift of the last watchman ended at

seven o'clock that evening. Vigorous efforts by the assailants to force Cascante into her own vehicle were only thwarted by an approaching vehicle. Cascante sustained permanent, debilitating injuries.

Appellants filed suit in the lower tribunal, seeking to hold both 50 State and the County liable for the injuries inflicted upon Cascante. In their first amended complaint, appellants cited various provisions of the contract for the proposition that 50 State "owed a duty to patrons who utilized [the] parking garage to provide reasonable security, prevent foreseeable crimes from taking place, and to audit the activity on the premises and make recommendations so that the security at the premises remained reasonable." They further alleged that, 50 State failed to "timely identify" the two perpetrators on the premises, "take reasonable measures so that these suspicious persons would be deterred from committing this violent crime, take reasonable steps so that criminals . . . would be deterred from committing crimes at [the] garage," analyze the data, and "make reasonable recommendations and enact reasonable measures so that foreseeable crime would be prevented on" the parking garage.

50 State sought final summary judgment, contending the County retained the exclusive right to determine the scope of appropriate security measures. Finding that 50 State harbored no duty to provide security beyond that directly circumscribed by the County, the lower court granted the motion. The instant appeal ensued.

STANDARD OF REVIEW

"Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law." Volusia Cty. v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000) (citing Menendez v. Palms W. Condo. Ass'n, Inc., 736 So. 2d 58 (Fla. 1st DCA 1999)). The court "view[s] the facts in a light most favorable to the nonmoving party and conduct[s] a de novo review of such a judgment." Maronda Homes, Inc. v. Lakeview Reserve Homeowners Ass'n, Inc., 127 So. 3d 1258, 1268 (Fla. 2013) (citations omitted).

LEGAL ANALYSIS

Whether a duty in tort exists is a question of law. McCain v. Fla. Power Corp., 593 So. 2d 500, 502 (Fla. 1992). "Crucial to the duty inquiry is 'whether the defendant's conduct foreseeably create[s] a broader "zone of risk" that poses a general threat of harm to others.'" Knight v. Merhige, 133 So. 3d 1140, 1144-45 (Fla. 4th DCA 2014) (alterations in original) (citation omitted). "[T]he zone of risk created by a defendant defines the scope of the defendant's legal duty and the scope of the zone of risk is in turn determined by the foreseeability of a risk of harm to others." Smith v. Fla. Power & Light Co., 857 So. 2d 224, 229 (Fla. 2d DCA 2003).

Pursuant to Florida law, "[w]henever one undertakes to provide a service to others, whether one does so gratuitously or by contract, the individual who undertakes to provide the service—i.e., the 'undertaker'—thereby assumes a duty to

act carefully and to not put others at an undue risk of harm." Clay Elec. Co-op., Inc. v. Johnson, 873 So. 2d 1182, 1186 (Fla. 2003).

Accordingly, under well-entrenched jurisprudence, an action sounding in tort will lie where a security agency contractually undertakes a duty to protect persons lawfully on defined premises and the agency fails to exercise reasonable care in performing its obligation.[2] See 50 State Sec. Serv., Inc. v. Giangrandi, 132 So. 3d 1128 (Fla. 3d DCA 2013); see also Restatement (Second) of Torts § 324A (Am. Law Inst. 1965) (allowing for liability where one has failed to exercise reasonable care to "protect his undertaking" and "has undertaken to perform a duty owed by the other to the third person" or "the harm is suffered because of reliance of the other or the third person upon undertaking"); Travelers Ins. Co. v. Securitylink from Ameritech, Inc., 995 So. 2d 1175 (Fla. 3d DCA 2008). This is because "the purpose and object of the [security services] contract is to obviate or protect" from that which may occur

[2] Several "[o]ther jurisdictions have set forth a rough framework for making such a determination which requires a court to examine the contract between the client and security company to determine if it obligates the security company to protect the class of persons injured, not other persons or simply the client's property." Parker v. Dillon Cos., Inc., No. 90,108, at *9 (Kan. Ct. App. Jan. 30, 2004); see Frederick v. TPG Hosp., Inc., 56 F. Supp. 2d 76 (D.D.C. 1999); Prof'l Sports, Inc. v. Gillette Sec., Inc., 766 P.2d 91 (Ariz. Ct. App. 1988); Pippin v. Chicago Housing Auth., 399 N.E.2d 596 (Ill. 1979); Hill v. Chicago Housing Auth., 599 N.E.2d 1118 (Ill. App. Ct. 1992); L.A.C. v. Ward Parkway Shopping Ctr. Co., L.P., 75 S.W.3d 247 (Mo. 2002); Banzhaf v. ADT Sec. Sys. Sw., Inc., 28 S.W.3d 180 (Tex. Ct. App. 2000); 7 Causes of Action 641 (2d 1995).

if a party went unprotected. Cooper v. IBI Sec. Serv. of Fla., Inc., 281 So. 2d 524, 526 (Fla. 3d DCA 1973). Nonetheless, "the extent of the undertaking" as defined under the terms of the contract "should define the scope of the duty." McGee By & Through McGee v. Chalfant, 806 P.2d 980, 985 (Kan. 1991); see also 6 Causes of Action 659 Cause of Action against Security System Company for Failure to Provide Security Services § 12 (2019) ("Because the defendant's duties to the plaintiff are usually based on the express terms of the contract between the parties, the contract itself is the best evidence of the exact nature and extent of those duties.").

In the instant case, appellants contend 50 State owed a specific duty to provide reasonable security, audit criminal activity, and render prudent private policing recommendations. Although the parties agree with the general principle that 50 State's duty to appellants is measured by the terms of its agreement with the County, they disagree on the specific scope of that legal duty, as evidenced by the contractual language. "[T]he court is not only required to begin its analysis with the language of the contract, but if such language is unambiguous, that is also where inquiry should end." W. Am. Ins. Co. v. Johns Bros., Inc., 435 F. Supp. 2d 511, 518 (E.D. Va. 2006) (citation omitted); see M & G Polymers USA, LLC v. Tackett, 574 U.S. 427, 435, 135 S. Ct. 926, 933, 190 L. Ed. 2d 809 (2015) ("Where the words of a contract in writing are clear and unambiguous, its meaning is to be ascertained in accordance with its plainly expressed intent.") (citing 11 Williston, Williston on

Contracts §30:6 (4th ed. 2012)); Walgreen Co. v. Habitat Dev. Corp., 655 So. 2d 164, 165 (Fla. 3d DCA 1995) ("When a contract is clear and unambiguous, the court is not at liberty to give the contract 'any meaning beyond that expressed.'") (quoting Bay Mgmt., Inc. v. Beau Monde, Inc., 366 So. 2d 788, 791 (Fla. 2d DCA 1978)).

Here, under the unambiguous contractual terms, the County alone was charged with determining "the number of security officers, the shift schedule, and level of training required." Indeed, as demonstrated by the record, for the duration of the contract, the County never strayed from its initial determination that the South Miami Metrorail parking garage only be staffed by a single roving guard from seven o'clock a.m. to seven o'clock p.m.[3]

Further, although 50 State was endowed with the responsibility for identifying "evolving and existing crime patterns and series," forecasting "future crime trends," and providing "data to support departmental planning activities," the contract is devoid of any reciprocal obligation of the County to take action in reliance on such information. Indeed, as borne out by deposition testimony adduced below, despite recommendations to the contrary, the County refused to vary its staffing schedules. Here, as in Cross v. Wells Fargo Alarm Services., 412 N.E.2d 472, 475 (Ill. 1980), 50 State, by

[3] This grant of unilateral, ultimate control, discerned from the plain contractual language, is further evidenced by the fact that immediately following the attack, the County ordered extended security staffing hours at the crime site.

> itself, could not make changes in security. It had no control over the . . . premises and . . . [a]ny suggestions that it might furnish to [the County] regarding the . . . hours would be purely advisory. Too, [the County] had no duty to act on recommendations [50 State] might make, and there was no allegation in the complaint that [the County] would have acted.

Thus, the responsibility to "enact reasonable security measures" was borne solely by the County.[4] See Estate of Johnson ex rel. Johnson v. Badger Acquisition of Tampa LLC, 983 So. 2d 1175 (Fla. 2d DCA 2008) (finding where defendant undertook role of providing consultant services, but ultimate decisions were made by another, there existed no duty legal to plaintiff who could not establish reliance on defendant consultant); see also Robert-Blier v. Statewide Enterprises, Inc., 890 So. 2d 522, 524 (Fla. 4th DCA 2005) ("Because plaintiffs adduced no evidence that the contractor assumed the association's broad, general duty to protect invitees and visitors from known risks of harm, the trial court erred in denying the contractor's motion for a directed verdict at the close of the evidence.").

[4] As then-Chief Judge Cardozo aptly reasoned, contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party as "[e]very one making a promise having the quality of a contract will be under a duty to the promisee by virtue of the promise, but under another duty, apart from contract, to an indefinite number of potential beneficiaries when performance has begun. The assumption of one relation will mean the involuntary assumption of a series of new relations, inescapably hooked together." H.R. Moch Co. v. Rensselaer Water Co., 159 N.E. 896, 899 (N.Y. 1928). Accordingly, only "where the contracting party has entirely displaced the other party's duty to maintain the premises safely," will the defendant be found liable in tort. Espinal v. Melville Snow Contractors, Inc., 773 N.E.2d 485, 488 (N.Y. 2002).

Finally, we glean no abuse of discretion in the rejection by the trial court of appellants' conclusory expert affidavit. See Landers v. Milton, 370 So. 2d 368, 370 (Fla. 1979) (holding conclusory affidavits inadequate to create issue of fact); K.E.I. Title Ins. Agency, Inc. v. CIT Tech. Fin. Servs., Inc., 58 So. 3d 369, 370 (Fla. 5th DCA 2011) ("[T]he trial court did not err in granting summary judgment because Appellant's affidavit was merely conclusory in nature and insufficient to raise a genuine issue of material fact."); Valderrama v. Portfolio Recovery Assocs., LLC, 972 So. 2d 239, 239 (Fla. 3d DCA 2007).

CONCLUSION

Accordingly, as the duty to protect patrons of the parking garage after-hours, was not displaced, and thus, remained with the only party "able to mitigate or control the anticipated harm"—the County—, we conclude that summary judgment was providently granted below. Certification from the U.S. Court of Appeals for the Ninth Circuit in Centurion Props. III, LLC v. Chicago Title Ins. Co., 375 P.3d 651, 663 (Wash. 2016).

Affirmed.