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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002908-MR

MORRIS COLLINS — APPELLANT

v.

APPEAL FROM LAWRENCE CIRCUIT COURT
HONORABLE STEPHEN NICK FRAZIER, JUDGE
ACTION NO. 97-CI-00233

CITY OF LOUISA, KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: DYCHE, GUIDUGLI, AND MILLER, JUDGES.

DYCHE, Judge: This appeal is taken from the entry of summary judgment finding that appellee, the City of Louisa, was not required to compensate appellant, Morris Collins, for the loss of his tools, which were destroyed when an uninsured city building burned as a result of arson.

In 1995 Collins was hired as a mechanic and water department worker by Louisa Mayor James L. Vanhoose. Following

his employment, a new garage was constructed wherein Collins performed his mechanic duties. The garage also served as a base for various water department, sewer department, and street department operations. It was agreed that Collins could use the garage during his off-hours. In conjunction with his duties as a mechanic, Collins was to provide his own tools. The tools were worth approximately $18,000.00, and Collins contends that he therefore sought assurance that the city carried insurance that would cover his tools. According to Collins, the issue of insurance was the first, and most important, subject raised during the initial discussions regarding his hiring. Collins contends that Mayor Vanhoose assured him then, and on several occasions thereafter, that his tools would be covered by insurance. Mayor Vanhoose recalls only two occasions when he assured Collins that his tools were covered by insurance, once a few weeks before the fire, and the morning of the fire. Vanhoose admits that there may have been several occasions after the fire when he assured Collins the tools were insured. As it turns out, the city's insurance policies did not cover the garage. It is undisputed that Mayor Vanhoose did not intentionally mislead Collins regarding the insurance coverage, but, rather, was simply mistaken in his understanding.

In September 1997, city police stored a vehicle involved in a criminal investigation in the garage. Shortly thereafter, the garage was destroyed by fire, probably as a result of arson, though it apparently is not known for sure that the motive of the arsonist was to destroy the vehicle. Collins's

tools were destroyed in the fire. When it turned out the tools were not covered by insurance, the city counsel voted to compensate Collins for the loss of his tools. The city paid Collins $3,500.00 on the loss of his tools, but upon the advice of the city attorney that the city's reimbursement of Collins would be legally improper, the city counsel rescinded the earlier resolution.[1]

On November 13, 1997, Collins filed a complaint in Lawrence Circuit Court seeking compensation for the loss of his tools and for loss of income. The complaint pled that the conditions of Collins's employment "create[d] a mutual bailment of [the] tools," and that he, as a mutual bailor, was "entitled to reimbursement for his tools and all other resulting loss by reason of the tools being destroyed while in the exclusive care of the city and without any proof of negligence on the part of anyone other than the city." The complaint also noted that Collins had been assured by the mayor that he would be compensated for the loss of his tools. On April 25, 1998, the city filed a motion for summary judgment. Based upon the defenses raised in the motion, on August 10, 1998, Collins filed a motion to amend his complaint to name Mayor Vanhoose in his individual capacity based upon a theory of negligent

[1]The record does not disclose the basis for the city attorney's advice. Under the undisputed facts, we perceive no bar, following a proper vote by the city counsel, to the city reimbursing Collins for the loss of his tools. City of Lexington v. Tank, Ky., 431 S.W.2d 892 (1968) (Principal-agent and master-servant relationships within the scope of *respondeat superior* doctrine do exist between a municipal corporation and its officers and employees).

misrepresentation.[2] The record on appeal does not contain a ruling on this motion. On September 14, 1998, the trial court entered an order granting summary judgment to the city. Summary judgment was granted only as to the City of Louisa, and Vanhoose is not a party to this appeal.

In order to qualify for summary judgment, the movant must "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." CR 56.03. On appeal, the standard of review of a summary judgment is whether the trial court correctly found that there was no genuine issue as to any material fact and that the moving party was entitled to judgment as a matter of law. "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991)(citations omitted). Summary judgment should only be used when, "as matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." Id. at 483 (citing Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 [1985]).

First, Collins contends that the city violated the standard of care imposed upon it as a bailee of his tools. The trial court found the tool storage arrangement to be a bailment for the mutual benefit of the parties. Though in his complaint

[2]Collins did not plead negligent misrepresentation, under the doctrine of *respondeat superior*, in his original complaint against the city.

Collins likewise referred to the circumstances as a "mutual bailment," Collins now rejects this characterization because he was paid "a mere twenty dollars" per month as tool rental.

We agree with the trial court that the storage of the tools in the city garage was a bailment for the mutual benefit of the parties. Bailment "is generally defined as meaning a delivery of property for some particular purpose on an express or implied contract that after the purpose has been fulfilled the property will be returned to the bailor, or dealt with as he directs." 8 C.J.S Bailments § 2 (1988). The delivery of the tools to, and subsequent storage on, city property, for rent, along with the remaining understandings between the parties, satisfies this definition. "A bailment for mutual benefit arises when it appears that both parties to a contract of bailment will receive a benefit from the transaction." 8 C.J.S Bailments § 16 (1988). The storage of the tools at the garage benefitted Collins in performing his duties both as a city employee and in his moonlighting work, and, in addition, earned him a rental fee. The bailment benefitted the city in facilitating needed mechanical work.

"The rule is that where the relation of bailor and bailee for hire or mutual benefit exists, the bailee must exercise ordinary care and diligence in safeguarding the property and is liable for injury to, or loss of, the property resulting from his failure to do so, but is not liable for the injury or loss of the property not resulting from negligence on his part,

or that of his agents or employees."[3] Webb v. McDaniels, 305 Ky. 739, 205 S.W.2d 511, 513 (1947). A bailee never becomes an insurer of the articles intrusted to him, except under the terms of a special contract creating such an obligation. Barnett v. Latonia Jockey Club, 249 Ky. 285, 60 S.W.2d 622, 624 (1933). "[I]f a bailor makes out a prima facie case and it appears that the bailed goods were damaged or destroyed by fire, the bailee has the burden of proving that the fire resulted otherwise than from his negligence." General Truck & Sales Service Co. v. Schlensker, Ky., 424 S.W.2d 387, 389 (1968) (quoting Threlkeld v. Breaux Ballard, Inc., 296 Ky. 344, 177 S.W.2d 157 (1944).

The only act of negligence identified by Collins is the city's decision to store the stolen vehicle in the garage. We agree with the trial court that the security provided by the city in this case exceeded the security in a similar case where the bailee in a bailment for mutual benefit was found to have exercised ordinary care. In Webb v. McDaniels, supra, a vehicle was left overnight in a garage for repairs. During the night, someone broke in and stole the vehicle. The thief gained entrance by breaking the glass in the door of the garage. The garage owner, however, was adjudged to have exercised ordinary care in protecting the vehicle. In this case, it is uncontested that the garage was surrounded by a locked chain link fence topped with three strands of barbed wire. Further, the garage

[3]In contrast, if this were a bailment for the sole benefit of the city, the city would owe a greater duty to care for the tools. Where a bailment is for the sole benefit of the bailee, he must exercise extraordinary care, and is liable for slight neglect. Barret v. Ivison, 248 Ky. 243, 138 S.W.2d 1005 (1933).

was locked, and the tools were located in a locked tool chest which in turn was located inside of a locked room. In view of Webb, we conclude that Collins could not succeed at trial in proving the city acted negligently in protecting his tools. The trial court therefore correctly granted summary judgment as to the issue of the city's liability as a bailee of the tools.

Next, Collins argues that the city is liable under negligence law. "Fundamentally, a basic element of actionable negligence is the breach of a legal duty." Commonwealth, Transportation. Cabinet, Bureau of Highways v. Roof, Ky., 913 S.W.2d 322, 324 (1996). There is nothing to distinguish this argument from the bailment argument just addressed. As noted above, the city's duty as a bailee was to "exercise ordinary care and diligence in safeguarding the property." The only legal duty that the city had was to exercise ordinary care. Without more, the storage of a stolen vehicle in a well secured city-owned garage is not a breach of the duty of ordinary care owed by the city to Collins.

Next, Collins contends that the mayor's assurances that his tools were insured under the city's insurance policies imposes liability on the city. While there is some dispute as to exactly how many times the mayor gave such assurances to Collins prior to the fire, it is uncontested that the mayor represented to Collins that the tools would be covered by the city's insurance policies while stored in the garage and that this information was incorrect. Collins contends that he relied on

this representation in deciding to store his tools in the garage.[4]

Citing Louisville Civil Service Board v. Blair, Ky., 711 S.W.2d 181 (1986), the city contends that regardless of how many times the mayor told Collins that the tools were insured, that would impose no liability on the city because a city can speak through, and be bound only by, its minutes. We agree. The "well-founded interpretation of every . . . act relating to . . . municipal bodies [is] to the effect that they can function and contract only as such units and speak by their records, and that neither such bodies nor the municipalities are bound by any promise or commitment of the county attorney or other individual or group of persons." Postlethweighte v. Towery, 258 Ky. 468, 80 S.W.2d 541, 542 (1935).

In summary, though it is uncontested that the mayor mistakenly misrepresented the status of the city's insurance coverage as to Collins's tools, the city is not estopped from denying that representation (Blair), nor does the misrepresentation bind the city (Towery). Summary judgment was therefore proper as to the issue of the mayor's misrepresentation inasmuch as the mayor's representation could not contractually bind the city.

Finally, Collins contends that the city has a duty to compensate him pursuant to the terms of its employment agreement with Collins. Collins contends that an "employment agreement"

[4]We review this issue in light of the fact that Collins did not plead negligent misrepresentation in his complaint against the city.

existed between him and the city, as negotiated by the mayor within the course and scope of his duty, which required that Collins be protected against the loss of his tools, and that, therefore, the city must honor the express terms of this agreement.

The mayor does not have the power to create an employment contract in this manner, i.e., outside the minutes of the city counsel. "Generally, the governing body of a municipal corporation . . . speaks only through its records and wherein authority is conferred to either make or terminate contracts by proceedings and where its acts are recorded and authenticated." Board of Education of Perry County v. Jones, Ky., 823 S.W.2d 457, 459 (1992); Postlethweighte, supra. As we understand the record, it is uncontested that there are no city counsel minutes reflecting the city's obligation to maintain insurance as a term of Collins's employment, nor is there a written contract between the city and Collins with this provision. "The records [of the municipal corporation] may not be enlarged or restricted by parol evidence." 825 S.W.2d at 459 (citing Lewis v. Board of Education of Johnson County, Ky., 348 S.W.2d 921 [1961]). Inasmuch as the minutes are silent as to this term of employment, the mayor's oral statements may not be used to enlarge the terms of employment of Collins beyond that which is reflected in the minutes of the city counsel so as to make it a term of employment, and summary judgment is not defeated by this argument.

The judgment of the Lawrence Circuit Court granting summary judgment to the City of Louisa is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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