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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001958-MR

BREWER MACHINE & CONVEYOR
MFG., CO., INC. APPELLANT

v.

APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE BRIAN WIGGINS, JUDGE
ACTION NO. 07-CI-00670

OLD NATIONAL BANCORP,
OLD NATIONAL BANK, and
PEGGY WILLIAMS APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE, STUMBO, AND WINE, JUDGES.

MOORE, JUDGE: Brewer Machine & Conveyor Manufacturing Company, Inc. (Brewer), appeals the Muhlenberg Circuit Court's orders granting summary judgment in favor of Peggy Williams, Old National Bancorp, and Old National Bank (collectively ONB). After a review of the record, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

This action arose when Brewer discovered that its long time employee, Cindy Beeckman, had used Brewer's Automated Clearing House (ACH) account with ONB to transfer over $3 million to herself and her boyfriend in several transactions between 2000 and 2007. Beeckman was responsible for submitting Brewer's employee payroll through the system, which was used to make automatic deposits into employee checking accounts. ONB was in no way directly involved in this process, nor did it have any knowledge of the appropriate parties to which payments were to be made. ONB did however provide Brewer with statements documenting these transfers. An inspection of these statements by Brewer, which it had been receiving for years, would have revealed that Beeckman had been making unauthorized transfers. However, Brewer failed to inspect the statements.

Rather, Brewer allowed Beeckman to have control over its books, records, and bank accounts. It specifically designated Beeckman as the only authorized user on the ONB ACH system and placed no limitations upon her ability to transfer funds from its payroll account. In fact, Beeckman was the sole signator on Brewer's account agreements. It was not until Beeckman inexplicably failed to show up for work that Brewer discovered that Beeckman had been making additional transfers to herself from its payroll account. At that point, Brewer undertook a review of its payroll records, which revealed Beeckman's transfers.

Brewer then brought this action in Muhlenberg Circuit Court alleging that ONB and Williams, individually and in her official capacity as an officer of ONB, negligently performed a 2004 "investigation" as to "why [Brewer was] losing money." Brewer argued that the requested investigation, if properly executed, would have revealed Beeckman's embezzlement scheme.

The evidence in the case consisted of, among other things, the deposition of Cathy Gilles, authorized representative for Brewer. Gilles testified that she asked Williams to investigate why Brewer was "losing money," but made no more specific requests for Williams to investigate Brewer's accounts. In her deposition, Gilles described her request to Williams:

> A. We owed the bank a line of credit, a sizable line of credit. We had been working to pay the line of credit. And our company was in a bad situation financially, and we would talk with [Williams] often about this.
>
> …
>
> Q. Go ahead.
>
> A. Right, And she would talk with us about how to improve, or whatever. So we asked her, [Williams], we have looked – I have looked at every way, I can't figure out why our company can't make money. Will you help us.
>
> Q. What did she say?
> A. Yes. She would definitely look into our situation, take our information, and try to analyze it.

Gilles further testified that Brewer did not provide ONB with information regarding employee payroll, specifically the names of Brewer's employees or the

amount of their respective wages. Nor did Gilles advise Williams that she thought Brewer might be the victim of embezzlement.

Brewer also submitted a copy of a "Quick Call Summary" provided by ONB. Williams, ONB's regional president, testified that the Quick Call Summary was an "analysis to point out the strengths or weaknesses of the credit" that Brewer had with ONB and that the analysis was an "ongoing process that takes place with all credit." She further testified that she did not recall the particular circumstances under which the Quick Call Summary at issue was done.

Williams filed a motion for summary judgment, arguing that she owed no duty to Brewer. More specifically, she argued that she bore no personal liability because any services performed by her were in her capacity as an agent of ONB and she did not personally undertake an investigation of Brewer's financial situation. Williams pointed out that it would have been impossible for her to undertake any type of investigation of Brewer's funds in her individual capacity because she only had access to Brewer's records due to her affiliation with ONB.

ONB also filed a motion for summary judgment, arguing that Brewer had offered no factual support for its claim that ONB had negligently performed an investigation regarding Brewer's accounts. The court granted summary judgment in favor of both Williams and ONB.[1] This appeal followed.

[1] In its orders, the trial court did not include any rationale for granting summary judgment in favor of Williams and ONB. This has no bearing on our analysis however because we may affirm the trial court on any basis that is supported by the record. *Kentucky Farm Bureau v. Gray*, 814 S.W.2d 928, 930 (Ky. App. 1991) (citing *Richmond v. Louisville & Jefferson County MSD*, 572 S.W.2d 601 (Ky. App. 1978)).

II. STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, stipulations, 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 judgment as a matter of law." CR[2] 56.03. It is appropriate where it "appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." *Steelvest, Inc. v. Scansteel Serv. Ctr. Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). When deciding a motion for summary judgment, the record must be viewed in the light most favorable to the party opposing the motion. *Id*. "The circuit court's decision to grant summary judgment is reviewed *de novo*." *Harstad v. Whiteman*, 338 S.W.3d 804, 809 (Ky. App. 2011) (citing *Lewis v. B&R Corp*., 56 S.W.3d 432, 436 (Ky. App. 2001)).

III. ANALYSIS [3]

[2] Kentucky Rule of Civil Procedure.

[3] This case was initially removed to federal court on the basis of diversity jurisdiction. The federal court remanded the action for lack of complete diversity. Brewer argued that the federal court's conclusion that "[Williams and ONB have] not met their burden of establishing lack of a 'colorable' negligence claim" when holding that it did not have diversity jurisdiction with respect to Brewer's negligence claim constituted law of the case, or, alternatively, mandated issue preclusion. We decline to address these arguments, as they were not raised before the trial court, and therefore were not properly preserved. *See Dolomite Energy, LLC v. Commonwealth of Kentucky Office of Financial Institutions*, 269 S.W.3d 883, 888 (Ky. App. 2008). With respect to Brewer's argument that the federal court made a holding amounting to law of the case, we reiterate that the federal court remanded this case solely on the basis that Brewer had a colorable claim against Williams, thereby divesting it of jurisdiction because there was a lack of complete diversity.

The sole issue before us on appeal is whether Williams negligently performed an investigation of Brewer's accounts which triggered liability either in her individual or official capacity such that ONB is also vicariously liable. To prevail in its negligence claim, Brewer was required to prove, by a preponderance of the evidence, four elements: duty, breach, causation, and injury. *CSX Transp., Inc. v. Begley*, 313 S.W.3d 52, 58 (Ky. 2010). The focus of our analysis will be the first of these elements.

Brewer does not identify the origin or nature of the duty owed to it by ONB or Williams. Nevertheless, an evaluation of whether a party was owed a duty is a question of law to be resolved by the court. *Mullins v. Commonwealth Life Ins. Co.*, 839 S.W.2d 245, 248 (Ky. 1992).

We begin our analysis by evaluating whether ONB owed a fiduciary duty to Brewer. As a general rule, banks do not owe a fiduciary duty to their customers. *De Jong v. Leitchfield Deposit Bank*, 254 S.W.3d 817, 822 (Ky. App. 2007) (citing *Sallee v. Fort Knox Nat'l Bank, N.A.*, 286 F.3d 878, 893 (6th Cir. 2002)). In fact Brewer's Agreement for ACH services with ONB specifically disclaimed any such duty, stating that ONB was not "required to act upon any notice or instruction received from the Customer or any person, or to provide any notice *or advice* to the Customer or any other person with respect to any matter." (Emphasis added). Brewer presents no evidence to the contrary.

We next turn to the question of whether ONB breached a duty of ordinary care. Generally, a bank owes a duty of ordinary care in handling its

customer's accounts. *Bullitt County Bank v. Publishers Printing Co.*, 684 S.W.2d 289, 291 (Ky. App. 1984). However, we do not believe that such a general duty would extend to an in depth evaluation of account transactions initiated by an authorized user, which was the case *sub judice*. We likewise fail to see how this duty could encompass an evaluation of information that ONB was not privy to. As mentioned previously, Brewer did not provide ONB with its payroll information, which clearly would have been necessary to ascertain that Beeckman was transferring funds to herself in excess of her salary and that she was transferring funds to an individual not employed by Brewer.[4] Moreover, Brewer authorized Beeckman to make transactions, and Brewer was provided with monthly statements by ONB that would have revealed Beeckman's activities long ago.

Finally, we turn to Brewer's argument that Williams assumed a duty to investigate its accounts, and, due to her negligent performance of this duty, ONB is vicariously liable. Even where no affirmative duty exists, an individual may nonetheless assume a duty which, if performed without reasonable care, gives rise to tort liability. *Grand Aerie Fraternal Order of Eagles v. Carneyhan*, 169 S.W.3d 840, 847 (Ky. 2005). "A threshold inquiry under this doctrine is whether the putative tortfeasor has actually and specifically undertaken to render the services allegedly performed without reasonable care." *Id*. "The scope of this undertaking defines and limits an actor's duty…." *Id*. (quoting *In re Temporomandibular Joint [TMJ] Implants Prod. Liab. Litig*., 113 F.3d 1484, 1493

[4] Beeckman made several transfers to her boyfriend, Bryan Curtis, who was not employed with Brewer.

(8th Cir. 1997)). "'The actor's knowledge that the undertaking serves to reduce the risk of harm to another or circumstances that would lead a reasonable person to the same conclusion is a prerequisite for an undertaking….'" *Id*. (quoting Restatement (Third) of Torts: Liability for Physical Harm § 42 cmt. d (Proposed Final Draft No. 1, 2005)).

Brewer argues that Williams assumed a duty to perform an investigation and was therefore required to do so in a non-negligent manner. However, Brewer produced no evidence demonstrating that Williams assumed such a duty. Brewer asserts that its request for ONB to determine why Brewer "was losing money" and the fact that Brewer subsequently provided a Quick Call Summary, which indicated Brewer's business position relative to other businesses is indicative of ONB's assumption of duty to find the source of Brewer's loss. Although Williams admits that she provided Brewer with a Quick Call Summary, this alone does not support Brewer's argument that Williams assumed a duty to evaluate its account activity.

Moreover, even if Williams had assumed a duty, the scope of that duty was limited by the general nature of Gilles' request. *Grand Aerie Fraternal Order of Eagles*, 169 S.W.3d at 847. Gilles admitted that she "didn't really know what [Williams] was going to do an analysis of how we could make money, or why we were losing money. I didn't know what her efforts would be." She further testified that she did not ask Williams to look at any specific aspect of Brewer's business, simply why Brewer was "losing money." In fact, Ms. Gilles testified that

Williams never represented to anyone at Brewer that she was going to look at the BankConnect [ACH] program and perform an analysis. Gilles merely "assume[d] that would be part of [William's] analysis since she was my banker," but she never specifically asked Williams to review the account.

IV. CONCLUSION

We reiterate that liability on the basis of negligence presupposes that the individual owed a duty to the injured party. *Begley*, 313 S.W.3d at 58. The burden was on Brewer to prove that a duty existed, *Murphy v. Second Street Corp.*, 48 S.W.3d 571,573 (Ky. App. 2001), and Brewer failed to demonstrate that any such duty existed. Therefore, its claim fails as a matter of law and summary judgment was appropriate. Although ONB raises further defenses, we decline to address them. Hence, we affirm.

ALL CONCUR.

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