

COUNSEL FOR DEFENDANT/APPELLANT

AFFIRMED

This is an appeal by defendant, Mr. B. Services Inc. from a judgment by the trial court that found in favor of plaintiff, Allstate Insurance Company, as subrogee of Yolanda and Frank Phoenix, in the amount of \$14,805.54. For the reasons stated more fully herein, we affirm.

PROCEDURAL HISTORY AND FACTS

On May 20, 1998, Allstate Insurance Company (“Plaintiff”) brought this suit for damages against Earnest R. Bourgeois, Daniel G. Bourgeois, Madge M. Bourgeois, Mr. B Services, Inc., and its insurer the Louisiana Pest Control Insurance Company. Plaintiff alleged in its Petition the following, in pertinent part:

XI.

On or about May 19, 1997, the insured (the Phoenix’s) had contracted with Mr. B to perform pest services, specifically, fumigation to the home for termites.

XII.

On May 19, 1997, Mr. B placed a tent over the home to ensure that the pesticides used to treat the structure would not escape.

XIII.

Due to the poisonous nature of the pesticides used in fumigating the home for termites, the insured was required to be out of his home for three days, the time it would take to complete the fumigation process.

XIV.

Between May 19 and 20, 1998, heavy rains occurred, collecting on the portion of the tent above a patio cover attached to the home.

XV.

On May 20, 1997, the rain fall that collected on the tent caused the tent to collapse. The sudden deluge of water entered the home (“the deluge”).

* * *

XVIII.

The damage caused by the deluge required the insured to perform extensive cleaning, repair the severe damage to the floors, walls and ceiling of the home, repair the home’s patio, necessitated other repairs as well as replacement of some of the contents of the home. The total cost of the damages sustained by the insured was \$14,305.54. See, Exhibit “A”, documentation of loss amount.

* * *

XXI.

The damages sustained by the insured’s residence were caused by the negligence of Mr. B and its employees in failing to properly place the tent enclosure over the insured’s residence.

XXII.

Further, Mr. B and its employees were negligent in failing to take preventive action to avoid the deluge.

* * *

On June 11, 1998, Defendants’ filed an Answer, which denied

Plaintiff's allegations. Following a one-day bench trial, the trial court signed a judgment on September 12, 2001, awarding Plaintiff the full sum of \$14,805.54. Judgment was rendered without written reasons for judgment. After reviewing the record, we find that the trial court did not abuse its discretion in its award for damages.

Defendants briefed three assignments of error, arguing that the trial court erred in: (1) finding that the form contract issued by the State of Louisiana provided for plaintiff's claims for damages sustained on the aluminum patio enclosure in spite of the contract's limitations of remedies arising out of ordinary negligence in the execution of the pest control contract unless gross negligence is proven; (2) attributing gross negligence to defendants as a matter of law; (3) and in expanding the pleadings.

DISCUSSION

The primary issue before this court is whether the facts of this case constitute gross negligence by Mr. B. Mr. B contends that the standard State contract provides that the pest control operator must exercise care but that damages arise only from gross negligence. The limitation of liability clause in the contract provides as follows:

1. PERFORMING THE WORK

The Company agrees to treat the building(s) in complete compliance with applicable laws, rules and regulations of the Louisiana Structural Pest Control Commission and to inspect

the property annually prior to expiration of this agreement. The Company will exercise care while performing any work hereunder to try and avoid damaging any part of the property, plants or animals. Under no circumstances or conditions shall the Company be responsible for damage caused by the Company at the time the work is performed except those damages resulting from gross negligence on the part of the Company.

Thus, if the conduct of Mr. B's constituted gross negligence, then the limitation of liability clause does not apply to relieve Mr. B from liability under the contract.

Gross negligence has a well-defined legal meaning distinctly separate, and different, from ordinary negligence. *Ambrose v. New Orleans Police Dept. Ambulance Service*, 93-3099 p.6 (La.7/5/94), 639 So.2d 216, 220. In *Ambrose* the court cited various definitions of gross negligence by Louisiana courts:

Gross negligence has been defined as the "want of even slight care and diligence" and the "want of that diligence which even careless men are accustomed to exercise." ... Gross negligence has also been termed the "entire absence of care" and the "utter disregard of the dictates of prudence, amounting to complete neglect of the rights of others." ... Additionally, gross negligence has been described as an "extreme departure from ordinary care or the want of even scant care." ... "There is often no clear distinction between such [willful, wanton, or reckless] conduct and 'gross' negligence, and the two have tended to merge and take on the same meaning. [Citations omitted.]

639 So.2d 219-220. Gross negligence has also been defined as "conduct

which falls below that which is expected of a reasonably careful person under like circumstances.” *Rosenblath’s, Inc. v. Baker Industries, Inc.*, 25,685 p.8 (La.App. 2 Cir. 3/30/94), 634 So.2d 969, 973.

At trial, Plaintiff offered the testimony of Mrs. Yolanda Phoenix and Mr. Frank Phoenix as evidence that Mr. B’s failed to exercise the slightest degree of care and diligence for the Phoenix’s home while fumigating the home for termites. Mr. B’s offered the testimony of Mr. David Roussell, a salesman for Fumigation Unlimited, who was working for Mr. B’s during the fumigation of the Phoenix’s home.

Testimony of Ms. Yolanda Phoenix

Ms. Phoenix testified at trial about the problems that occurred while her house was fumigated by Mr. B. Specifically, Ms. Phoenix testified to the following:

When my husband and I arrived home after the fumigation was supposed to be done we were met at the door with people from Mr. B Services and they told us that when they opened the home to go back in after the fumigation process was supposed to be over and they were supposed to remove the tarp that water gushed out of the door when they opened the door.

Because it rained so severely the water collected on the tarp and caved in, in the patio. And it went all in the home. It went from the back part of the home all the way through the front.

Ms. Phoenix testified that to the best of her recollection, none of her

neighbors sustained flooding or storm damages on the night her house received the water damage. She further testified that Mr. B's led her to believe that, while she was away from the home during the fumigation process, an employee of Mr. B's would be looking after her house for her the whole time. In fact, Ms. Phoenix testified that Mr. B's employee had a key to the house and was suppose to lock it.

Testimony of Mr. Frank Phoenix

Mr. Phoenix testified that he entered into a contract with Mr. B's to fumigate his home in order to get rid of the termites. Mr. Phoenix testified that Mr. B never suggested that, in the event of rain, he should consult a roofer or structure engineer before the fumigation of the house. Further, Mr. Phoenix testified that once the house was tarped, no one from Mr. B's attempted to contact him to advise that there was potentially a problem if it rained with water pooling on the top of the tarp. He testified that no one in his area experienced any flooding or broken roofs that caved in. Mr. Phoenix testified that he was under the impression that someone with Mr. B's would remain in the house during the entire fumigation process and that he had to leave all the door keys with him.

Testimony of Mr. David Roussell

Mr. Roussell testified to the following, concerning the flooded home:

I immediately went to the back to take a look at this

patio. And I can see that the tarp still had a tremendously amount of water still in it. The tarp was full and it was somewhat split. You can see where the water had rushed in through the back door where the sliding glass door was.

Mr. Roussell testified that there is a watchman, who's a technician,

who stays out there to ensure that nobody enters the structure. Specifically,

he testified that:

A. The watch person has a phone to contact us in case of any emergencies or such things as a weather coming through where a tarp would split open. And they say look, I need help I can't button this back up by myself. They would send someone out to give them a hand.

* * *

Q. Now, this watchman that's employed by Mr. B to watch the house, a couple of different duties that you said that person has; one is to measure the level of fumigant in the house and record it on that work sheet?

A. Yes.

Q. Another one is to keep an eye out on the house from just the safety stand point, isn't that true?

A. Yes, sir.

* * *

Q. And a situation may be in climate weather that's causing a problem to the house?

A. Right.

Q. And as part of the watchman's job to do that properly, one would have to keep an eye on the house, wouldn't they? They would have to get up and walk around the house and make sure nothings going on?

A. Yes, sir. Walk around, check it. If you see some – if you notice some wind picking up, you want to give a walk around just to check it. A house like that is relatively small, low roof

profile, so it would be something that would - - I've done watches before where if I see a tremendous amount of wind pickup, I'm going to walk around check it. Everything is fine.

* * *

Q. Now, since the watchman's job is to look after the house while it's being fumigated, if problems arise, isn't it true that the watchman is advised to call someone to report the problems so something can be done about it?

A. Yes, sir.

The evidence of this case establishes that the watchman's duties specifically included insuring the safety of the home, and immediately reporting problems so that damage could be avoided. Mr. B failed to present any evidence that the watchman discovered the problem any sooner than the next day or that the watchman tried to drain the water or call for help. We find that the evidence supports a finding that Mr. B's watchman exercised utter disregard for the duties owed to the Phoenix's during the fumigation process, and that Mr. B's conduct was in fact "gross negligence."

Accordingly, we affirm the judgment of the trial court, which found in favor of the plaintiff, Allstate Insurance Company, in the sum of \$14,805.54.

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