Court of Appeals, State of Michigan

ORDER

North Pointe Ins Co v Emanuel Steward

Docket No. 240125

LC No. 99-901524 CK

Richard A. Bandstra
Presiding Judge

Joel P. Hoekstra

Stephen L. Borrello
Judges

On the Court's own motion, the February 26, 2004, majority opinion and the partial concurrence/dissent are hereby VACATED. A new majority opinion is attached. The original partial concurrence/dissent is reissued herewith to conform its date with the date of the new majority opinion.

Presiding Judge

STATE OF MICHIGAN COURT OF APPEALS

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

MAR 4 2004
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

NORTH POINTE INSURANCE COMPANY,

Plaintiff/Counterdefendant-Appellant,

v

EMANUEL STEWARD and EMANUEL STEWARD ENTERPRISES, INC.,

Defendants/Counterplaintiffs-Appellees,

and

DWAYNE J. ROBINSON,

Defendant.

UNPUBLISHED
March 4, 2004

No. 240125
Wayne Circuit Court5
LC No. 99-901524

Before: Bandstra, P.J., and Hoekstra and Borrello, JJ.

PER CURIAM.

Plaintiff/counterdefendant North Pointe Insurance Company appeals as of right from the trial court's order denying its motion for JNOV, new trial, and remittitur after a jury awarded defendants/counterplaintiffs Emanuel Steward and Emanuel Steward Enterprises, Inc., approximately $1.8 million in damages. We reverse.

I. Facts

This case originated out of two unrelated injuries that occurred at defendant Emanuel Steward's Detroit nightclub (doing business as Emanuel Steward's Place) in April 1996. The first person injured was Dwayne Robinson, who claimed he tripped and fell because the bar was overcrowded and the stage was improperly located. Robinson settled his claim. The second person injured was Kevin Fuquay, who claimed he was injured as a bystander when a fight broke out in the club. Fuquay went to trial, and the jury awarded no cause of action.

Emanuel Steward owned the club where the alleged injuries occurred. He had insurance on the business through North Pointe Insurance Company. On September 4, 1996, North Pointe

wrote Steward's business a reservation of rights letter regarding the Robinson case. At issue in the letter is the following phrase: "We will vigorously defend against this claim." The letter also stated that the insured must "cooperate with us in the investigation, settlement or defense of a claim or suit."

Along with the reservation of rights letter, North Pointe mailed a separate letter stating that they were "investigating this claim for your insurance company, North Pointe Insurance Company."

North Pointe filed a complaint for declaratory relief on January 20, 1999, against both Steward and Dwayne Robinson. In it, North Pointe claimed that although the date of Robinson's alleged injury was January 5, 1996, North Pointe was not notified of the claim until June 3, 1998. North Pointe also claimed that Steward "failed to cooperate in the defense of the underlying action by, among other things, failing to identify witnesses, failing to produce requested documents and by failing to have known witnesses available." North Pointe asked the court to hold that North Pointe had no duty to defend Steward and his nightclub.

Steward filed a counterclaim, alleging breach of contract; misrepresentation; negligent handling of insurance claim (bad faith); malicious, willful, and reckless mishandling of insurance claim (bad faith); negligent training and supervision of claims adjusters; violation of the fair trade practices act; intentional infliction of emotional distress; negligent infliction of emotional distress; gross negligent infliction of emotional distress; and abuse of process. Steward also requested exemplary damages and damages for himself and his corporation. Following actions by North Pointe to dismiss Steward's claims pursuant to the trial court's ruling, Steward filed an amended counterclaim to reflect the three surviving counts (abuse of process, intentional infliction of emotional distress, and negligent performance of a voluntarily undertaken duty). On October 10, 2001, North Pointe dismissed the declaratory judgment action.

The jury returned a verdict in favor of Steward, awarding him $1.4 million in damages for emotional distress, $52,000 in attorney's fees, and $350,000 in exemplary damages. The jury found Steward ten percent comparatively negligent.

II. Causes of Action

North Pointe first argues that no cause of action lied in this matter because Steward's claims were governed by the insurance contract. In essence, North Pointe argues that it had no duty to investigate Robinson's claim, despite its assertions in its letter that it would vigorously defend against this claim and that it had opened an investigation. We agree. Questions of duty are questions of law for the trial court. *Scott v Harper Recreation*, 444 Mich 441, 448; 506 NW2d 857 (1993), citing *Williams v Cunningham Drug Stores*, 429 Mich 495, 500; 418 NW2d 381 (1988).

This Court has recognized that a duty can arise, and therefore a cause of action in tort, "where a defendant voluntarily assumed a function that it was under no legal obligation to assume." *Baker v Arbor Drugs Inc*, 215 Mich App 198, 205; 544 NW2d 727 (1996). However, if the parties' relationship arises from a contract, a tort action will lie for negligent performance of a voluntarily undertaken duty only if there is a breach of a duty that is separate and distinct from the duties imposed by the contract. See *Nelson v Northwestern Savings & Loan Ass'n*, 146

Mich App 505; 381 NW2d 757 (1985). See also *Crews v Gen Motors Corp*, 400 Mich 208, 226; 253 NW2d 617 (1977) ("a tort action will not lie when based *solely* on nonperformance of a contractual duty"), and *Hart v Ludwig*, 347 Mich 559, 565; 79 NW2d 895 (1956). In other words, a relationship must exist that would give rise to a legal duty without enforcing the contract promise itself. *Nelson, supra*.

In this case, Steward claimed that North Pointe negligently performed a voluntarily undertaken duty to vigorously defend against Robinson's claim. Steward's claim is predicated on one sentence contained in North Pointe's reservation of rights letter sent to Steward on September 4, 1996. The sentence states, "We will vigorously defend against this claim, and it remains our hope that a settlement may be reached on terms that North Pointe regards as reasonable."

North Pointe sent the reservation of rights letter to Steward by North Pointe as part of a package of correspondence relative to the Robinson's claim. The letter stated:

RESERVATION OF RIGHTS

> The above referenced policy has an aggregate coverage period limit of $1,000,000/$1,000,000. Unfortunately, in today's litigious society any claim may expose you to liability above your policy limits. If you wish, you may retain separate counsel at your own expense to assist in the defense of this action, or to monitor or oversee its progress. We will vigorously defend against this claim, and it remains our hope that a settlement may be reached on terms that North Pointe regards as reasonable.
>
> In addition, your policy requires that you cooperate with us in the investigation, settlement or defense of a claim or suit. Therefore, North Pointe Insurance Company is reserving its right to deny coverage of this claim in the event your failure to cooperate prejudices our ability to defend this claim.
>
> By reserving its rights under the policy, North Pointe Insurance Company does not waive any other or additional defenses that may be available under the policy. In addition, North Pointe shall not be estopped from asserting other or additional defenses as may be available under the policy by issuing this reservation of rights.

We conclude that in its reservation of rights letter North Pointe did not voluntarily undertake a duty separate and distinct from the contract of insurance that existed between it and Steward. The "vigorously defend" language is gratuitous and read in context, this letter does not communicate an intent to assume a duty beyond that found in the insurance policy. Further, it defies reason and common sense that an insured could reasonably conclude that his insuror intended to assume a duty not contained in the policy of insurance and communicated that intent in a letter entitled "RESERVATION OF RIGHTS." Because no duty as alleged by Steward existed, North Pointe was entitled to summary disposition on Steward's claim of negligent performance of a voluntarily undertaken duty.

North Pointe next contends that Steward's claim of abuse of process should fail as a matter of law. We agree.

The parties agree that the controlling authority here is *Friedman v Dozorc*, 412 Mich 1; 312 NW2d 585 (1981). *Friedman* requires that an abuse of process claimant prove both "an ulterior purpose" and "an act in the use of process which is improper in the regular prosecution of the proceeding." *Id*. at 30. *Friedman* quoted from the Restatement, which provides that "the gravamen of the misconduct . . . is not . . . the wrongful initiation of . . . civil proceedings; it is the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to accomplish." *Id*. at 30, n 18. Accordingly, the *Friedman* court reasoned that "we need not decide whether plaintiff's pleadings sufficiently allege that the defendants had an ulterior purpose in causing process to issue, since it is clear that the plaintiff has failed to allege that defendants committed some irregular act in the use of process." *Id*. at 31.

Defendants here concentrate on the "ulterior purpose" they allege; i.e., that plaintiff was trying to promote a lesser cost settlement with underlying plaintiffs through the litigation against defendants. They do not, however, tell us what "irregular act" defendants employed during the litigation, as required by *Friedman*. Tellingly, when discussing the "smoking guns" that establish a claim for abuse of process, defendants misstate the second component of the cause of action as being "action in the use of legal process to achieve that ulterior purpose," without suggesting that they can prove that such action was somehow "improper or irregular." Accordingly, we conclude that they failed to state a cause of action and that summary disposition should have been granted to plaintiff.

This is not to say that defendants have no remedy if, in fact, the lawsuit against them was totally unfounded. As plaintiff points out, *Friedman* itself was the reason that the General Court Rules were supplemented when the Michigan Court Rules were adopted to include provisions for remedies if lawsuits are filed without an appropriate factual or legal basis. See *id*. at 57-63 (Levin, J., concurring). Defendants have not asked for that relief and cannot reasonably expect to obtain an alternative remedy under an abuse of process claim that is simply unfounded.

North Pointe next contends that Steward's claim of intentional infliction of emotional distress should have failed as a matter of law. We agree.

To succeed on a claim of intentional infliction of emotional distress, a plaintiff must prove the following elements: "(1) 'extreme and outrageous' conduct, (2) intent or recklessness, (3) causation, and (4) 'severe emotional distress.'" *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 602; 374 NW2d 905 (1985), quoting Restatement Torts, 2d, § 46, p 71. The type of conduct that would subject a defendant to liability has been further described as follows:

> "It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice', or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'

> The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where some one's feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam." [*Id.* at 602-603, quoting Restatement Torts, 2d, § 46, comment d, pp 72-73.]

North Pointe was correct in asserting that intentional infliction of emotional distress is generally not recoverable where a party claims breach of contract. See *Kewin v Massachusetts Mut Life Ins Co*, 409 Mich 401, 415-416; 295 NW2d 50 (1980). Additionally, and more importantly, the harm Steward claimed to have suffered simply does not rise to the level of proof necessary to prevail in an action for intentional infliction of emotional distress. Thus, we hold that the trial court erred by allowing Steward's claim of intentional infliction of emotional distress to proceed to the jury.

Our resolution of North Pointe's challenges to the causes of actions brought by Steward makes resolution of the remaining issues raised in this appeal unnecessary.

We reverse.

/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra