[Cite as *Lombardo v. Mahoney*, 2009-Ohio-5826.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92608

JOSEPH A. LOMBARDO, ET AL.

PLAINTIFFS-APPELLANTS

vs.

BRIAN MAHONEY, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-627530

BEFORE: Stewart, J., Cooney, A.J., and Dyke, J.

RELEASED: November 5, 2009

JOURNALIZED:

ATTORNEY FOR APPELLANTS

Sam A. Zingale
700 Rockefeller Building
614 Superior Avenue, N.W.
Cleveland, OH 44113-1318

ATTORNEY FOR APPELLEE BRIAN MAHONEY

Victor V. Anselmo
Victor V. Anselmo, Esq., LLC
1360 W. 9th Street, Suite 310
Cleveland, OH 44113

ATTORNEYS FOR APPELLEE FRANCINE BOKAR

Martin T. Galvin
Marianne K. Barsoum Stockett
Reminger & Reminger Co., LPA
1400 Midland Building
101 Prospect Avenue, West
Cleveland, OH 44115-1093

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MELODY J. STEWART, J.:

{¶ 1} Plaintiff-appellant, Joseph Lombardo, and third-party defendant-appellant, Prim Capital Corporation, appeal from two separate summary judgments granted to defendants-appellees, Brian Mahoney and Francine Bokar. The first summary judgment concerned Lombardo's claim that a threatening, nine-second voicemail left by Mahoney, and allegedly instigated by Bokar, rose to the level of intentional infliction of emotional distress. The second summary judgment involved Prim's complaint that Bokar, a former employee, breached a fiduciary duty to Prim. None of the claims have merit, so we affirm.

I

{¶ 2} Lombardo argues that the court erred by granting summary judgment to Mahoney on his intentional infliction of emotional distress claim. He maintains that he offered evidence from which reasonable minds could differ on whether he established the essential elements of a claim for intentional infliction of emotional distress.

{¶ 3} The facts show that Lombardo is a principal of Prim Capital, a financial services business. Bokar worked for Prim Capital as an administrative assistant to Lombardo. Mahoney and Bokar were friends. Bokar and Lombardo had a falling out, and Bokar told Mahoney that

Lombardo had been verbally abusive to her. Mahoney called Lombardo's cell phone and left the following voicemail message: "you cock sucking, mother fucker, you fucking asshole you, I'm going to fuck you up. You, Joe, mother fucker."

{¶ 4} Lombardo was in New York City at the time he retrieved the voicemail message. He did not know who placed the call and said he feared for the safety of his wife, who was at their home at the time. Lombardo called the police, and they eventually traced the call to Mahoney. Mahoney later pleaded no contest to a misdemeanor charge of telephone harassment.

{¶ 5} Under Civ.R. 56(C), summary judgment is appropriate when, after viewing the evidence in a light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

{¶ 6} To establish a claim for intentional infliction of emotional distress, a plaintiff must prove the following elements: (1) the defendant intended to cause, or knew or should have known that his actions would result in serious emotional distress; (2) the defendant's conduct was so extreme and outrageous that it went beyond all possible bounds of decency and can be considered completely intolerable in a civilized community; (3) the defendant's actions proximately caused psychological injury to the plaintiff; and (4) the plaintiff suffered serious mental anguish of a nature no

reasonable person could be expected to endure. *Ashcroft v. Mt. Sinai Med. Ctr*. (1990), 68 Ohio App.3d 359, 366.

{¶ 7} It is the rare case that reaches the very high bar of showing "extreme and outrageous" conduct. "Only the most extreme wrongs, which do gross violence to the norms of a civilized society, will rise to the level of outrageous conduct." *Brown v. Denny* (1991), 72 Ohio App.3d 417, 423. In *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369, the supreme court stated:

{¶ 8} "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!'

{¶ 9} "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 someone'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. See Magruder, Mental and Emotional Disturbance in the Law of Torts, [49] Harvard Law Review 1033, 1053 (1936)." Id. at 374-375.

{¶ 10} Mahoney's message was undeniably vulgar, but it did not rise to the level of outrageous conduct required to establish a claim of intentional infliction of emotional distress. The vulgarity used in the message was not of a kind that society would find so intolerable as to constitute outrageous conduct, and Lombardo conceded that he, too, had spoken similar words. When asked during his deposition if he had ever said "you cock sucking, mother fucker," Lombardo replied "[y]es." He explained that he used it "with the guys trying to be macho." He also admitted that he had been around other individuals who used language of that same type. By any measure, Lombardo himself was "hardened to a certain amount of rough language[.]" Id.

{¶ 11} We likewise find that Mahoney's use of the words "fuck you up" did not constitute a threat that would rise to the level of outrageous conduct.

As noted in *Yeager*, liability clearly does not extend to "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." Viewed in context, Mahoney's words did not constitute a credible threat of harm because they contained no indication of actionable threat or menace. Lombardo admitted during his deposition that he harbored no fear for himself apart from wondering who might have left the message. And he admitted during his deposition that he had once made a similar threat in a moment of anger, telling a business associate that "you deserve to be thrown out of this window[.]" Mahoney's words, like those that Lombardo himself had used in the past, were a kind of spleen-venting that was nothing more than threats, annoyances, and petty oppressions that fall outside the tort of intentional infliction of emotional distress.

{¶ 12} We also conclude that Lombardo offered no evidence to show that he suffered severe and debilitating distress as a result of hearing Mahoney's message.

{¶ 13} "Serious emotional distress" has been described as "emotional injury which is both severe and debilitating" and may be found when "a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances of the case." *Paugh v. Hanks* (1983), 6 Ohio St.3d 72, 78.

{¶ 14} Lombardo conceded that he did not suffer any long-term psychological consequences apart from being "extremely anxious" and finding it "very difficult to sleep" during the period in which the police investigated the identity of the caller. He had no medical expenses related to the emotional distress caused by Mahoney's voicemail message — he admitted that he sought no medical treatment of any kind for his "anxiety." He likewise offered no independent evidence to substantiate the level of his distress. In *Crable v. Nestle USA, Inc.*, Cuyahoga App. No. 86746, 2006-Ohio-2887, we stated: "Summary judgment [on an intentional infliction of emotional distress claim] is appropriate when the plaintiff presents no testimony from experts or third parties as to the emotional distress suffered and where the plaintiff does not seek medical or psychological treatment for the alleged injuries." Id. at ¶58 (footnote omitted). See, also, *Farmer v. Rolls-Royce Energy Sys., Inc.*, Muskingum App. No. 06CA8, 2006-Ohio-4050. We find as a matter of law that Lombardo's evidence did not establish evidence of a severe and debilitating emotional injury for a claim for intentional infliction of emotional distress against Mahoney.

{¶ 15} For the same reasons, the court did not err by granting summary judgment to Bokar. Lombardo only argued that Bokar was liable as a joint tortfeasor for urging Mahoney to make the telephone call. Given Lombardo's failure to establish that Mahoney's telephone call rose to the level of

outrageous conduct and that he suffered a severe and debilitating emotional injury as a result of that telephone call, it follows that he did not, as a matter of law, establish any triable issues of material fact on his intentional infliction of emotional distress claim against Bokar.

II

{¶ 16} Next, Prim argues that the court erred by granting summary judgment to Bokar on its claims against her for breach of fiduciary duty. It maintains that Bokar did not offer any evidence to carry her initial burden in a summary judgment motion.

{¶ 17} In its counterclaim against Bokar, Prim did not title its cause of action. It alleged that Bokar knowingly assisted a former Prim employee, Anthony Delfre, in "activities that were improper and detrimental to Prim." These activities allegedly included accessing a line of credit without proper authorization; moving money between customer accounts without proper authority; seeking to sabotage Prim and its business; taking steps to create a competing business; knowingly destroying relevant records; and using funds for improper purposes without necessary authority. Bokar sought judgment on the pleadings on the basis that none of these allegations were sufficient to state a claim for tortious interference with business relations. Prim responded to Bokar's motion by stating that it had not stated a claim for tortious interference with business relations, but a claim for breach of

fiduciary duty. The court denied Bokar's motion for judgment on the pleadings.

{¶ 18} To prove a breach of fiduciary duty claim, the plaintiff must establish: (1) the existence of a duty arising from a fiduciary relationship; (2) a failure to observe the duty; and (3) an injury resulting proximately therefrom. *Camp St. Mary's Assn. of W. Ohio Conference of the United Methodist Church, Inc. v. Otterbein Homes*, 176 Ohio App.3d 54, 2008-Ohio-1490, at ¶19. A claim of breach of fiduciary duty is basically a claim for negligence that involves a higher standard of care. *All Star Land Title Agency, Inc. v. Surewin Invest., Inc.*, Cuyahoga App. No. 87569, 2006-Ohio-5729, at ¶36.

{¶ 19} Prim did not show that Bokar had any legal duty arising from a fiduciary relationship. "A 'fiduciary' has been defined as 'a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with his undertaking.'" *Strock v. Pressnell* (1988), 38 Ohio St.3d 207, 216, quoting *Haluka v. Baker* (1941), 66 Ohio App. 308, 312. There may be some instances in which an employee can be a fiduciary of an employer, but ordinary employees typically owe their employer nothing more than a duty to act "in the utmost good faith and loyalty[.]" *Connelly v. Balkwill* (1954), 160 Ohio St. 430, 440.

{¶ 20} Prim made no allegation that Bokar owed it a fiduciary duty, and the word "fiduciary" does not appear in its counterclaim. Bokar submitted an affidavit in support of her motion for summary judgment in which she described her job duties as answering telephones; taking messages; paying office bills and expenses; paying Lombardo's personal expenses; opening new client accounts; servicing client accounts upon orders to transfer funds; relaying pertinent information to money managers for specific client accounts; and changing addresses. She denied taking any action on a line of credit that Prim had with a bank and offered proof that five separate withdrawals from the line of credit were authorized either by Lombardo or Delfre, and her signature only appeared on those withdrawals because she had been the typist.

{¶ 21} Prim offered no evidence of any kind in response to Bokar's affidavit. In its brief in opposition to Bokar's motion for summary judgment, it indicated that it would be filing Lombardo's affidavit, but it did not do so. Nonetheless, Prim did nothing more than allude to facts that were unsubstantiated and therefore not competent for opposing summary judgment. Civ.R. 56(E) states that an adverse party may not rest upon the mere allegations of a complaint and must set forth "specific facts showing that there is a genuine issue for trial." Prim could not simply challenge the veracity of Bokar's affidavit by referring to facts not in evidence — it had the

obligation to come forward with evidence of its own to establish a triable issue of material fact. With Prim having failed to offer evidence of any kind, the court did not err by granting summary judgment on Prim's counterclaim against Bokar.

Judgment affirmed.

It is ordered that appellees recover of appellants their costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MELODY J. STEWART, JUDGE

COLLEEN CONWAY COONEY, A.J., CONCURS
ANN DYKE, J., CONCURS IN JUDGMENT ONLY