Puro and Yoken v. Neil Enterprises, Inc., No. 531-9-06 Wrcv (Morris, J., May 21, 2008)



**STATE OF VERMONT**
**WINDSOR COUNTY**

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| **Timothy J. Puro and Steve Yoken** | ) | **Windsor Superior Court** |
| | ) | **Docket No. 531-9-06 Wrcv** |
| **v.** | ) | |
| | ) | |
| **Neil Enterprises, Inc.,** | ) | |
| **d/b/a Quechee Gorge Village** | ) | |

**DECISION REGARDING:**
**DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

***Introduction***

Plaintiffs Timothy Puro and Steve Yoken seek compensation from defendant Neil Enterprises, Inc. for losses sustained when unknown third parties stole goods from their respective display cases at defendant's antiques mall. Defendant has filed for summary judgment, claiming that plaintiffs cannot sustain any cause of action against it. Attorney Kaveh S. Shahi represents the plaintiffs. Attorney Samuel Hoar, Jr. represents the defendant.

***Summary Judgment***

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, referred to in the statements required by Rule 56(c)(2), show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." V.R.C.P. 56(c)(3). The party moving for summary judgment has the burden of proof, and the opposing party must be given the benefit of all reasonable doubts and inferences in determining whether a genuine issue of material fact exists. *Price v. Leland*, 149 Vt. 518 (1988). However, summary judgment is mandated where, after an adequate time for discovery, a party fails to make a showing sufficient to establish the existence of an element essential to his or her case, and on which he or she has the burden of proof at trial. *Poplaski v. Lamphere*, 152 Vt. 251 (1989).

***Undisputed Facts***

The court derives the undisputed facts from the parties' statements of fact submitted

under V.R.C.P. 56(c)(2) and the supporting documents. *Boulton v. CLD Consulting Engineers, Inc*., 2003 VT 72, ¶ 29, 175 Vt. 413, 427. The court need not consider any facts not set forth in the parties' statements of facts, or any facts set forth without specific citation to the record. The purpose of the rule requiring statements of fact with citations to the record is "to focus summary judgment arguments and allow courts to more readily determine the material facts in issue." *Webb v. Leclair*, 2007 VT 65, ¶ 4, 18 Vt.L.W. 235, 236. The court need not sift through the record in a "needle in a haystack" approach. *Id*. at ¶ 6. On the other hand, the court may address a summary judgment motion based on nonconforming documents. *State v. Great Northeast Productions, Inc*., 2008 VT 13, ¶ 6, 19 Vt.L.W. 37.

Here, the parties have submitted statements of fact, along with some citations to the record, but they have still left it to the court to sift through their supplemental materials to determine the specific material facts. Both parties have submitted arguments relying heavily on facts that they omitted from their respective statements of fact. As one example, they argue over the effect of an exculpatory clause in the contract, but they have left it to the court to add that clause to the undisputed facts. We have done so because the existence of the contract is undisputed, but the better practice would have been for the parties to include all of the material facts in their statements of fact, to provide a clear basis for their arguments.

Based on the parties' statements of fact, and the court's independent review of parts of the record, the undisputed facts for present purposes are as follows:

Plaintiffs Timothy Puro and Steve Yoken seek to recover damages resulting from a theft of goods from their respective display cases in the Antiques Mall at Quechee Gorge Village, on or about September 7, 2005. It appears that the theft was perpetrated by unknown third parties, without any direct involvement by Defendant Neil Enterprises. Although plaintiffs suspect possible "insider involvement," given a repeat burglary a month later, they have no evidence to prove their suspicion at this time.

Plaintiffs Puro and Yoken were two dealers who had rented booths from Neil Enterprises. The Antiques Mall contains display booths of about 450 dealers. Dealers who rent booths from Neil Enterprises are provided with copies of the "Quechee Gorge Village Dealer Handbook."

Before plaintiffs Puro and Yoken signed their respective Quechee Gorge Village Dealer Contracts, each spoke with General Manager Michael Leathe about the security system. Mr. Yoken alleges that Mr. Leathe told him that the Antiques Mall had "cameras everywhere, video cameras everywhere." Mr. Puro alleges that Mr. Leathe told him that the Mall had a "state-of-the-art security system," and that the booths were "covered by cameras at all times." Mr. Leathe said nothing to either plaintiff about when the video cameras were operational, or when they were recording. Nevertheless, Mr. Puro believed that the booths were covered by the cameras at all times and that the system was state-of-the-art.

Plaintiffs Puro and Yoken both now say that, if they had understood the limitations of the security system at the Antiques Mall, they would not have rented their booths.

When they contracted to rent their respective booths in the Quechee Gorge Village, the plaintiffs each signed a copy of the "Quechee Gorge Village Dealer Contract." The contract contains the following provision:

> The undersigned dealer/licensee agrees that Neil Enterprises, Inc., D/B/A Quechee Gorge Village (hereinafter "Quechee Gorge Village"), its shareholders, directors, officers, agents, employees, and staff shall not be held liable for any damages to or loss of property from any cause whatsoever including but not limited to fire or theft, it being understood that to the extent desired and at their option, that this property shall be insured by the undersigned dealer/licensee. The dealer/licensee further agrees to indemnify and hold harmless QUECHEE GORGE VILLAGE from any loss, claims, damages or charge for any injury to any person or damage to property arising out of the display or sale of any items being displayed by dealer/licensee at QUECHEE GORGE VILLAGE.

When the plaintiffs signed their first respective Quechee Gorge Village Dealer Contracts, each received a copy of the "Quechee Gorge Village Dealer Handbook." The Quechee Gorge Village Dealer Handbook contains the following provisions:

> *Lost or Damaged Merchandise*
>
> Dealers are responsible for their own lost or damaged merchandise. This does happen, and we encourage our dealers to get insurance for the items in their booths.
>
> * * *
>
> *Security*
>
> The Antique mall is equipped with cameras and customer service personnel who watch over your merchandise. In addition, all dealers, while stocking their booths, are asked to report any suspicious activity to the manager. The building is secured by an alarm system with a direct link to the central office. All doors are alarmed as well as infrared motion detectors in strategic areas. The entire building is covered by a sprinkler system in case of fire. All keys for locks are accounted for on a daily basis. They are signed out and in each business day.

Michael Leathe, the General Manager at Quechee Gorge Village, believed that the security system in place prior to September 2005 was "state of the art," based on his communications with Tasco Security, Inc. Nevertheless, he was aware that there were lapses and shortcomings in the system.

At that time, the security system at the Antiques Mall included a system of video cameras. There were four cameras—including three on the ground floor of the Antiques Mall

where the break-in occurred—that recorded the events within their range. They were overwritten every seven days. They recorded during the hours of business operation. There were also 16 additional cameras that monitored the premises during business hours, but they did not record. Those cameras surveyed the entire Antiques Mall facility. There were also "dummy" cameras here and there within the premises. The security system at the Antiques Mall also included a burglar-alarm system on all of the doors, and infrared motion detectors throughout the building. In the event of a break-in, a loud siren would immediately sound.

Security systems expert James Cronan states, in an affidavit, that the existing security system at Quechee Gorge Village fell short of a "state-of-the-art" system, in the following ways:

> 4. As of September 7, 2005, the security system at the Quechee Gorge facility was not state-of-the-art. In the field of security, a state-of-the-art system would have had 24/7 surveillance coverage by exterior cameras recording, interior cameras recording (night vision or with the premises lit) with special attention to the booths containing valuables, adequate monitoring/patrolling by private security, access points such as doors sufficiently secured, and deterrence measures such as warning signs employed.

On or about the night of September 7, 2005, after Quechee Gorge Village had closed for the day, a thief or thieves broke and entered the rear door of the Antiques Mall, grabbed some of the items in the booths of Yoken and Puro, and left. The theft is believed to have occurred quickly, perhaps in as little as three minutes. The alarm on the back door sounded, Tasco Security Inc. promptly called the police, and officers promptly responded to the scene, but, by the time the police arrived, the thief or thieves had fled and could not be found.

When the break-in occurred, the security system did what it was designed to do. However, when the break-in occurred, the store was closed, and the cameras were not operating. The security system failed to prevent the theft from occurring, and it also failed to yield information that could lead to the capture of the thieves and the recovery of plaintiffs' property.

As a result of the theft, Mr. Puro lost merchandise with a value of $25,293.50, and Mr. Yoken lost merchandise with a value of $31,698.

***Discussion***

Plaintiffs have filed a five-count complaint, as follows: Count 1 alleges that defendant "knowingly, intentionally, and fraudulently" misrepresented the security of the premises, to induce them to enter into the rental agreements. Count 2 alleges common law fraud as well as violation of the Consumer Fraud Act, 9 V.S.A. § 2453 et seq. Count 3 alleges common law negligent misrepresentation. Count 4 alleges negligent failure to maintain the premises safe and secure. Count 5 seeks declaratory relief that the exculpatory clause in the signed contract is unenforceable and contrary to public policy. Defendant moves for summary judgment on all claims, based on numerous arguments.

The key issue presented is whether the alleged causes of action are precluded by the exculpatory clause in the signed contract. We assume, without deciding, that defendant's representative made material misrepresentations beyond mere "puffing." Viewing the evidence in a light favorable to the plaintiffs, Mr. Leathe told them that the security system was "state-of-the-art," that there were video cameras "everywhere," and that the booths were "covered by cameras at all times." These statements differ from commercial puffery in that the truth or falsity can be objectively determined. Compare *Heath v. Palmer*, 2006 VT 125, ¶ 14, 17 Vt.L.W. 426 (explaining that terms such as "high quality" or "exceptional value" cannot form the basis for a claim, because their truth or falsity cannot be precisely determined). Mr. Leathe may have been stating his opinions, but there were no cameras positioned to record the view outside the back door, and the booths were not "covered by cameras" during the off hours. These discrepancies could be viewed as material misrepresentations based on incomplete disclosure. See *Sarvis v. Vermont State Colleges*, 172 Vt. 76, 82-83 (2001) (citing *Crompton v. Beedle*, 83 Vt. 287, 298 (1910)).

Thus, the critical question on summary judgment is whether the exculpatory clause effectively bars plaintiffs' claims. It is undisputed that each plaintiff signed a contract containing the exculpatory clause, and that the clause itself is broadly worded to preclude liability "for any damages to or loss of property from any cause whatsoever including but not limited to fire or theft." The parties disagree, however, on (1) whether enforcement of the clause would be contrary to public policy, and (2) whether an exculpatory clause within the contract can bar a claim based on material misrepresentations in the inducement.

Exculpatory clauses are "traditionally disfavored," and they are subject to "more exacting judicial scrutiny." "[A] greater degree of clarity is necessary to make the exculpatory clause effective than would be required for other types of contract provisions," and exculpatory clauses "must be construed strictly against the party relying on them." *Fairchild Square Co. v. Green Mountain Bagel Bakery, Inc.*, 163 Vt. 433, 436-37 (1995) (quoting from *Colgan v. Agway, Inc.*, 150 Vt. 373, 375 (1988)). In *Fairchild Square*, the Court upheld an exculpatory clause which clearly and reasonably allocated the respective responsibilities of landlord and tenant for the purchase of fire insurance.

The Vermont Supreme Court has also held that "[e]ven well-drafted exculpatory agreements, however, may be void because they violate public policy." *Dalury v. S-K-I, Ltd.*, 164 Vt. 329, 332 (1995). According to the Restatement, "an exculpatory agreement should be upheld if it is (1) freely and fairly made, (2) between parties who are in an equal bargaining position, and (3) there is no social interest with which it interferes." *Id.* (citing Restatement (Second) of Torts, § 496B comment b (1965)). "The critical issue here concerns the social interests that are affected." *Id.* The circumstances of *Dalury* implicated broad social interests, primarily because the skiing facility attracted thousands of customers per day, and a decision upholding the waivers of liability could have had far-reaching effects on the law of premises liability. *Id.* at 334.

The circumstances of this case more closely resemble those of *Fairchild Square* than

those of *Dalury*. The contracts for renting booths at the Antiques Mall are between business persons in relatively equal bargaining positions, and they involve relatively long-term rental arrangements, as opposed to the short-term arrangements by members of the public who wish to ski for a day. Moreover, as applied to the facts of this case, the exculpatory clause in the Quechee Gorge Village Dealer Contract serves to allocate the risks of loss caused by criminal acts of third parties. In contrast to *Dalury*, this case does not involve any allegations of personal injury caused by direct negligence of one of the contracting parties. Enforcement of the exculpatory clause under these circumstances does not violate public policy.

As applied to the claims in this case, the intent behind the exculpatory clause is crystal clear. "Neil Enterprises, Inc. . . . shall not be held liable for any damages to or loss of property from any cause whatsoever including but not limited to fire or theft." The focus is on precluding a lawsuit against Neil Enterprises for dealer losses due to fire or theft, even if the dealer succeeds in showing that Neil Enterprises was negligent, and that its negligence played a role in allowing the losses to occur. See *Thompson v. Hi Tech Motor Sports, Inc.*, 2008 VT 15, ¶ 17, 19 Vt.L.W. 45 (where the language is clear, we must implement the intent and understanding of the parties).

Moreover, the scope of the clause is broad enough to cover the plaintiffs' claims that Neil Enterprises induced them to sign the agreements by over-stating the extent of the existing security measures. The clause itself flatly contradicts any suggestion that Neil Enterprises intended to take on a legal duty to protect items in the booths, or to otherwise insure against the risk of loss due to third-party theft. Reasonable dealers who are asked to sign this contract might ask more questions about the security, or they might decide to purchase insurance. It would be unreasonable to sign the contract, but to nevertheless assume that Neil Enterprises would cover losses due to third-party theft. See *Sugarline Associates v. Alpen Associates*, 155 Vt. 437, 445 (1990) (it was not reasonable to rely upon information conveyed, when it was coupled with an express disclaimer). The effect of the exculpatory clause differs from that of an "as is" term, which merely indicates that there are no implied warranties. Compare *Silva v. Stevens*, 156 Vt. 94, 112-13 (1991) ("as is" clause does not address tort liability). Here, the language of the exculpatory clause is clear enough, and broad enough, to exclude tort liability by Neil Enterprises, especially where the primary fault lies with unknown third-party criminals.

The exculpatory clause is broad enough to preclude liability on all of the plaintiffs' claims. Neil Enterprises is entitled to summary judgment as a matter of law.

**ORDER**

Defendant's Motion for Summary Judgment is GRANTED.

Dated at Woodstock, Vermont, this ____ day of May, 2008.

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Walter M. Morris, Jr.,
Presiding Judge