2017 IL App (1st) 160446-U

No. 1-16-0446

FIFTH DIVISION
June 16, 2017

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

AMERICAN FAMILY MUTUAL INSURANCE COMPANY a/s/o MICHAEL KALLAS and VIRGINIA KALLAS,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellant,	)	
v.	)	No. 13 M1 013756
ANTOINE HARRIS and ANTONIETA RODRIGUEZ,	)	The Honorable Sheryl A. Pethers,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Gordon and Justice Hall concurred in the judgment.

O R D E R

¶1 *HELD*: Illinois Supreme Court Rule 222 did not require defendant to disclose herself as a witness to the opposing party. Summary judgment was proper where the evidence demonstrated that defendant did not have an agency relationship with the driver at the time of the accident in question and did not negligently entrust her vehicle to said driver.

¶2 Plaintiff, American Family Mutual Insurance Company (American Family), as subrogee of Michael and Virginia Kallas, appeals the circuit court's order granting summary judgment in

favor of defendant, Antonieta Rodriguez, thereby dismissing its action for negligence, agency, and negligent entrustment related to a vehicle accident involving defendant, Antoine Harris. Plaintiff contends the circuit court erred in denying its motion to strike Antonieta's summary judgment motion, erred in denying its motion to reconsider that ruling, and erred in ultimately granting summary judgment in favor of Antonieta. Based on the following, we affirm.

¶3 FACTS

¶4 Michael and Virginia Kallas owned a 2010 Chevrolet Cobalt that was insured by American Family. On May 11, 2012, the Cobalt, which was parked at 1404 West Estes Avenue in Chicago, Illinois, was struck by a 2008 Nissan Altima. The driver of the Altima was Antoine, but the owner of the vehicle was Antonieta. Antoine and Antonieta were married at the relevant time.

¶5 On July 29, 2014, plaintiff, as subrogee of Michael and Virginia Kallas, filed its first amended complaint, adding Antonieta as a defendant and claiming Antoine was negligent in operating and driving the Altima that caused damage and claiming Antonieta committed negligence under a theory of agency. Antonieta filed an appearance and answer, and later filed a motion for summary judgment, arguing there were no genuine issues of material fact where Antonieta was the insured for the vehicle in question, but was not driving at the time of the accident. Moreover, Antonieta alleged that Antoine was not her employee, servant, or on any errand on her behalf at the time of the accident. An affidavit authored by Antonieta was attached to the summary judgment motion. In the affidavit, Antonieta attested: (1) she was the insured of the vehicle involved in the accident; (2) Antoine was driving at the time of the accident; (3) she was not present at the time of the accident; (4) Antoine was not acting as her "employee, servant or on any errand on [her] behalf at the time of the accident;" and (5) the only knowledge she had

regarding the accident was from accounts relayed by others. On April 28, 2015, the circuit court granted summary judgment in favor of Antonieta and dismissed her from the case "with prejudice." Plaintiff, however, moved to vacate the April 28, 2015, order and requested leave to file a second amended complaint. Plaintiff's requests were granted on June 2, 2015.

¶6 On June 9, 2015, plaintiff filed a second amended complaint reasserting the negligence claim against Antoine and the agency claim against Antonieta, and adding a claim against Antonieta for negligent entrustment of her vehicle to Antoine. Plaintiff also submitted an affidavit pursuant to Illinois Supreme Court Rule 222 (eff. Jan. 1, 2011) indicating that the total money damages sought in the lawsuit did not exceed $50,000.

¶7 In response, Antonieta filed another motion for summary judgment, arguing there were no issues of material fact with regard to her liability related to the May 11, 2012, vehicle accident. More specifically, Antonieta argued that she was not driving the vehicle at the time of the accident, Antoine was not her employee, servant, or on any errand on her behalf at the time of the accident, and she had no knowledge and would not reasonably have had any knowledge of any incompetence, inexperience, or recklessness on the part of Antoine's driving history or ability. Antonieta additionally submitted an affidavit in which she attested: (1) she was the insured of the vehicle involved in the accident; (2) Antoine was driving at the time of the accident; (3) she was not present at the time of the accident; (4) Antoine was not acting as her "employee, servant or on any errand on [her] behalf at the time of the accident;" (5) the only knowledge she had regarding the accident was from accounts relayed by others; and (6) she "had no knowledge and would not reasonably have had any knowledge of any incompetence, inexperience or recklessness on the part of Antoine's *** driving history or ability." The circuit court entered and continued the motion until November 12, 2015.

¶8 In the interim, on November 4, 2015, arbitration took place, after which the arbitrators entered an award in favor of plaintiff and against Antoine for $12,100.25. The arbitrators also entered an award in favor of Antonieta.

¶9 At the subsequent November 12, 2015, hearing on Antonieta's summary judgment motion, plaintiff orally moved to strike the motion based on Antonieta's failure to comply with Supreme Court Rule 222. Plaintiff asserted that Antonieta's motion was only supported by her affidavit, which had never been disclosed in violation of Supreme Court Rule 222. In a written order, the circuit court denied plaintiff's motion to strike, finding the issue was waived. A hearing date was issued for January 12, 2016.

¶10 On December 10, 2015, plaintiff filed a response to Antonieta's summary judgment motion. In the response, plaintiff argued that Antonieta was not entitled to summary judgment where she failed to rebut the presumption of agency based on proof of her ownership of the vehicle that Antoine was driving in the accident. Plaintiff insisted Antonieta's affidavit in support of her motion failed to submit factual evidence clearly demonstrating non-agency; instead, according to plaintiff, Antonieta's affidavit merely listed legal conclusions. Plaintiff's response additionally provided that Antoine testified at the prior arbitration that he drove the vehicle on the date of the accident in order to pick up the couple's children from school. According to plaintiff, the testimony provided a genuine issue of material fact as to whether Antoine was performing an errand for Antonieta.

¶11 Then, on December 23, 2015, plaintiff filed a motion to reconsider the denial of its oral motion to strike Antonieta's summary judgment motion.

¶12 Antoine additionally filed a response to Antonieta's summary judgment motion and requested sanctions against plaintiff. In relevant part, in his response, Antoine alleged that

plaintiff failed to conduct discovery to support its negligent entrustment claim. Antonieta also filed a reply to plaintiff's response to her motion for summary judgment, continuing to argue that there were no genuine issues of material fact as to plaintiff's negligent entrustment or agency claims.

¶13 On January 5, 2016, the circuit court denied plaintiff's motion to reconsider its request to strike Antonieta's summary judgment motion. Plaintiff's summary judgment motion was taken under advisement, along with all of the other pleadings and arguments.

¶14 On January 12, 2016, a hearing was held on the summary judgment motion. Antonieta testified at the hearing that she did not give consent, permission, possession, or use of her vehicle to Antoine on the date of the accident. She did not entrust her vehicle to Antoine on that date. In fact, Antonieta testified that she permanently revoked consent to use her vehicle from Antoine as of June 24, 2009, after he received a ticket and his license was suspended. Antonieta testified that Antoine's license was suspended due to unpaid parking tickets; thus, she had no reason to know or believe he was an incompetent, inexperienced, or reckless driver. Antonieta stated that she never witnessed Antoine driving with incompetence, inexperience, or in a reckless manner. According to Antonieta, she retained possession of the sole set of keys to the vehicle in question. Antonieta stated that Antoine typically walked to pick up their children from school; however, on May 11, 2012, Antoine used Antonieta's vehicle to pick up the children without her knowledge, consent, or instruction. Antonieta further stated that she was at work at the time of the accident and was completely unaware that Antoine took her vehicle without permission. The circuit court denied Antoine's request for sanctions and granted Antonieta's motion for summary judgment. The court's January 12, 2016, order also contained language pursuant to Illinois

Supreme Court Rule 304(a) (eff. Feb. 26, 2010) providing that there was no just reason for delaying the enforcement or appeal of the order. This appeal followed.

¶15 ANALYSIS

¶16 Plaintiff contends the circuit court should have stricken Antonieta's affidavit in support of her summary judgment motion because she failed to comply with Supreme Court Rule 222. More specifically, plaintiff argues that Antonieta was required, yet failed, to disclose any witnesses and all parties with relevant knowledge of the accident. See Ill. S. Ct. R. 222(c), (d) (eff. Jan 1. 2011). According to plaintiff, because Antonieta did not disclose herself as a witness, her affidavit must be excluded pursuant to subsection (g) of Supreme Court Rule 222, and, therefore, her motion should have been stricken as it was entirely based on the improper affidavit. Plaintiff additionally argues that, even if the affidavit could be considered, genuine issues of material fact prevented the entry of summary judgment.

¶17 Whether the circuit court erred in refusing to strike Antonieta's affidavit and summary judgment motion is a question of law that we review *de novo*. See *Filliung v. Adams*, 387 Ill. App. 3d 40, 50-51 (2008). In order to make that determination, we must review Supreme Court Rule 222.

¶18 Supreme court rules are interpreted in the same way as statutes. *Dovalina v. Conley*, 2013 IL App (1st) 103127, ¶ 16 (citing *Robidoux v. Oliphant*, 201 Ill. 2d 324, 332 (2002)). Accordingly, a court's primary goal is to ascertain and give effect to the intent of the drafters by applying the plain language of the rule. *Id.* " 'Where the language of a rule is clear as written, it must be applied without reading into it any conditions, exceptions, or limitations not expressed by the drafter.' " *Id*. (quoting *Timothy Whelan Law Associates, Ltd. v. Kruppe*, 409 Ill. App. 3d 359, 375 (2011)).

¶19 Supreme Court Rule 222 provides, in relevant part:

"(a) Applicability. This rule applies to all cases subject to mandatory arbitration, civil actions seeking money damages not in excess of $50,000 exclusive of interest and costs, and to cases for the collection of taxes not in excess of $50,000. ***

***

(c) Time for Disclosure; Continuing Duty. The parties shall make the initial disclosure required by this rule as fully as then possible in accordance with the time lines set by local rule, provided however that if no local rule has been established pursuant to Rule 89 then within 120 days after the filing of a responsive pleading to the complaint *** unless the parties otherwise agree, or for good cause shown, if the court shortens or extends the time. ***. The duty to provide disclosures as delineated in this rule and its subsections shall be a continuing duty ***. ***.

(d) Prompt Disclosure of Information. Within the times set forth in section (c) above, each party shall disclose in writing to every other party:

(1) The factual basis for the claim. ***.

(2) The legal theory upon which each claim or defense is based ***.

(3) The names, addresses, and telephone numbers of any witnesses whom the disclosing party expects to call at trial with a designation of the subject matter about which each witness might be called to testify.

(4) The names, addresses, and telephone numbers of all persons whom the party believes may have knowledge or information relevant to the events, transactions, or occurrences that give rise to the action, and the nature of the knowledge or information each such individual is believed to posses.

* * *

(g) Exclusion of Undisclosed Evidence. In addition to any other sanction the court may impose, the court shall exclude at trial any evidence offered by a party that was not timely disclosed as required by this rule, except by leave of court for good cause shown." IL. S. Ct. R. 222 (eff. Jan. 1, 2011).

¶20 It is clear from the plain language of Rule 222 that the drafters intended to treat a "party" differently from "any witnesses" or "all persons" as used in subsection (d). Critically, the drafters stated that each "party" shall disclose "any witnesses whom the disclosing *party* expects to call at trial" and "all persons whom the *party* believes may have knowledge or information related to the events." The drafters differentiated the *party*, yet did not include a separate requirement for disclosing himself or herself to the opposing party. Logic dictates that any named party may testify at trial and would have knowledge or information related to the events. Accordingly, it would be nonsensical to require a party to disclose that it "expects to call" himself or herself at trial or to disclose that he or she has knowledge or information related to the events in question. Moreover, plaintiff cannot honestly contend that the fact of Antonieta providing some form of testimony in defense of the claims against her caused it surprise. See, *e.g.*, *Kapsouris v. Rivera*, 319 Ill. App. 3d 844, 851 (2001); *Smith v. Murphy*, 2013 IL App (1st) 121839, ¶ 25 (one of the reasons for strict adherence to disclosure rules is to avoid surprise). We, therefore, conclude that Antonieta's failure to disclose her as a witness did not violate Supreme Court Rule 222. As a result, the circuit court did not err in denying plaintiff's oral motion to strike Antonieta's summary judgment motion and did not err in denying plaintiff's subsequent motion to reconsider that finding.

¶21 We next turn to plaintiff's contention that the circuit court erred in granting summary judgment in favor of Antonieta where genuine issues of material fact prevented the entry of such judgment.

¶22 Summary judgment is appropriate where "the pleadings, depositions, 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 a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2012). The purpose behind summary judgment is to determine whether a question of fact exists. *Robidoux*, 201 Ill. 2d at 335. A plaintiff is not required to prove his case at the summary judgment stage; however, in order to survive the motion, the nonmoving party must present a factual basis that arguably would entitle the party to a judgment. *Id*. In reviewing a circuit court's grant of summary judgment, we do not assess the credibility of the testimony presented but, rather, only determine whether the evidence presented was sufficient to create an issue of fact. *McGath v. Price*, 342 Ill. App. 3d 19, 27 (2003). This court reviews the decision of whether to grant summary judgment *de novo*. *Id*.

¶23 Plaintiff argues that Antonieta's affidavit and her testimony at the summary judgment hearing failed to demonstrate she was entitled to judgment as a matter of law. Instead, plaintiff maintains the information provided by Antonieta revealed that there are genuine issues of material fact regarding its claims of agency and negligent entrustment. We discuss each claim in turn.

¶24 In order for an owner of a vehicle to be held liable for the negligent operation of said vehicle by another, the plaintiff must demonstrate that the relationship of principle and agent, or master and servant, existed between the owner and the driver at the time of the negligent operation. *Bell v. Reid*, 118 Ill. App. 3d 310, 313 (1983). " 'It is unquestioned that, as a matter of

evidence, mere proof of one defendant's ownership of an automobile driven by another defendant is *prima facie* proof of agency, which if not rebutted will support a judgment for plaintiff, insofar as the proposition of agency is concerned.' " *Id*. (quoting *Parrino v. Landon*, 8 Ill. 2d 468, 470 (1956)). The presumption, however, may be overcome by evidence of non-agency. *Cahill v. Keefe*, 26 Ill. App. 3d 929, 932 (1975). Whether evidence demonstrates the driver's non-agent status is a question of fact for the jury. *Bell*, 118 Ill. App. 3d at 314. That said, "if such evidence is strong and unquestionable and the plaintiff presents no contrary evidence, a verdict may be directed for the defendant." *Cahill*, 26 Ill. App. 3d at 932.

¶25 The parties agree that *prima facie* proof of agency was established by Antonieta's undisputed ownership of the vehicle involved in the accident on May 11, 2012, and by Antoine's driving of said vehicle. Plaintiff argues that the evidence presented by Antonieta to dispute the agency relationship was not so clear to entitle her to summary judgment. More specifically, plaintiff insists that Antoine was doing something to benefit his family, namely, picking up the couple's children from school, when the accident occurred, thus demonstrating agency. Plaintiff additionally maintains that it is unbelievable that a husband would not have access to a wife's vehicle, especially when they had a daily arrangement for the children's school transportation.

¶26 Contrary to the plaintiff's arguments, we find the record clearly establishes Antoine was not acting as an agent of Antonieta at the time of the accident. To rebut plaintiff's *prima facie* proof of agency, Antonieta provided an uncontradicted affidavit and unchallenged testimony at the summary judgment hearing. The evidence demonstrated Antonieta did not give consent, permission, possession, or use of her vehicle to Antoine on the date of the accident. In fact, Antonieta testified that, as of June 24, 2009, she permanently revoked Antoine's consent to use her vehicle after his license was suspended. Antonieta stated that she retained possession of the

sole set of keys to the vehicle in question. Antonieta acknowledged her and her husband's pickup arrangement for their school-aged children, but testified that Antoine typically walked to pick them up. Antonieta insisted that she had no knowledge that Antoine used her vehicle to pick up the children on the date of the accident. Antonieta added that Antoine did so without her consent or permission while she was at work. We find the evidence strongly demonstrated a non-agency relationship, especially where plaintiff failed to provide contradicting evidence. We, therefore, conclude the circuit court did not err in granting summary judgment in favor of Antonieta on the agency claim.

¶27 We finally address plaintiff's contention related to the negligent entrustment claim. An action for negligent entrustment involves the entrustment of a dangerous article whom the lender knows, or should know, is likely to use it in a manner involving an unreasonable risk of harm to others. *Zedella v. Gibson*, 165 Ill. 2d 181, 185 (1995) (citing *Teter v. Clemens*, 112 Ill. 2d 252, 257 (1986)). "An automobile is not a dangerous article *per se* but may become one if it is operated by a person who is unskilled in its use." *Id*. Negligent entrustment may be found where a person entrusts a vehicle to one whom the person knows or should know is incompetent, inexperienced, or reckless, and it was this incompetence, inexperience, or recklessness that was a proximate cause of the resulting accident. *McGath*, 342 Ill. App. 3d at 28.

¶28 Plaintiff argues the evidence demonstrates that Antonieta knew Antoine should not have been driving and Antoine had access to the car keys despite Antonieta's testimony that she had the only set of keys and was at work at the time of the accident. Plaintiff, therefore, maintains there are genuine issues of material fact demonstrating Antonieta negligently entrusted her vehicle to Antoine.

¶29 Based on the record, we find the evidence failed to demonstrate Antonieta negligently entrusted her vehicle to Antoine. Antonieta testified that she did not entrust her vehicle to Antoine. Without presenting contradictory evidence, Antoine insinuates that Antonieta must have entrusted the vehicle to Antoine because she testified that she retained the only set of car keys and he somehow obtained those keys to drive the vehicle on the date in question. We disagree; however, even if we find the evidence is not clear enough regarding the actual entrustment of the vehicle, we find the evidence was insufficient to create a reasonable suspicion that she knew, or had reason to believe, Antoine was incompetent, inexperienced, or reckless in the use of vehicles. Antonieta acknowledge that Antoine's license had been suspended more than once. Antonieta, however, testified that the suspension was due to unpaid parking tickets; thus, she had no reason to know or believe he was an incompetent, inexperienced, or reckless driver. See *McGath*, 342 Ill. App. 3d at 28-29. In addition, Antonieta stated that she never witnessed Antoine driving with incompetence, inexperience, or in a reckless manner. Plaintiff provided no evidence to contradict Antonieta's testimony. Accordingly, to find not only that Antonieta entrusted Antoine with her vehicle, but also that she knew or should have known he would operate the vehicle in a negligent manner on the date in question would require us to engage in mere conjecture and speculation, which we must not do. See *Id*. at 30. We, therefore, conclude that the circuit court did not err in granting summary judgment in favor of Antonieta on the negligent entrustment claim.

¶30 CONCLUSION

¶31 We affirm the judgment of the circuit court granting summary judgment in favor of defendant Antonieta.

¶32 Affirmed.