2017 IL App (1st) 161956-U
No. 1-16-1956
Order filed June 13, 2017

Second Division



IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

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| TIMOTHY GRANT JEWELRY, LTD.,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>CHICAGO LAPIDARY CO., et al.,<br><br>Defendants-Appellants. | ) | Appeal from the Circuit Court of Cook County.<br><br>No. 14 M1114192<br><br>The Honorable Jessica O'Brien, Judge, presiding. |

PRESIDING JUSTICE HYMAN delivered the judgment of the court.
Justices Neville and Mason concurred in the judgment.

**ORDER**

¶ 1 *Held*: The trial court did not err in assessing damages against jewelry repair company for negligence, and did not abuse discretion in allowing plaintiff to amend the complaint before trial.

¶ 2 Chicago Lapidary Company (CLC), a jewelry repair company, challenges the trial court's assessment of damages against it for losing a diamond sent to it by Timothy Grant Jewelry (TGJ). The trial court did not misapply the *Moorman* doctrine in finding CLC had been negligent. Because CLC did not provide us with a transcript, we must also find that the trial court

did not abuse its discretion in allowing, just before trial, TGJ to file an amended complaint adding a new count of negligence.

¶ 3 BACKGROUND

¶ 4 For a number of years, TGJ had an ongoing business relationship with CLC—TGJ would send CLC jewelry to be repaired. In May 2012, a customer of Timothy Grant Jewelry gave TGJ a 1.06 carat diamond in need of repair, and TGJ sent it to CLC via United Express Systems, Inc. The package was delivered to CLC on May 2, 2012, and signed for by a CLC employee, Brian Lopez. The diamond, however, was never returned to TGJ, and Lopez claimed that neither he nor CLC had the diamond. As a result, TGJ had to pay to replace the customer's diamond.

¶ 5 In May 2014, TGJ filed a complaint against CLC and Lopez, alleging two counts (breach of contract and conversion); TGJ asked for damages in the amount of $5872.81, as the replacement cost. On the evening before trial, TGJ filed an amended complaint adding a third claim, a negligence count. According to the trial court's written order, the court held a short hearing the next day on whether to allow this amendment, and ultimately allowed it.

¶ 6 We have no transcript of that hearing, or of the trial that followed. The trial court found that CLC was not liable for either breach of contract or conversion, but did find CLC liable for negligence. On August 12, 2015, the trial court entered judgment for TGJ for $3230.05, finding that TGL was 45% contributory negligent.

¶ 7 Both parties moved to reconsider the trial court's order, and in these motions they disagreed as to the sequence of events that led to the filing of the amended complaint. On June 15, 2016, the trial court granted TGJ's motion in part, reversing the contributory negligence finding and assessing full damages of $5872.81 against CLC.

¶ 8 ANALYSIS

¶ 9 As a preliminary matter, TGJ filed no brief responding to CLC's arguments. Yet we may decide this appeal on its merits as the record and claimed errors are straightforward and can be determined without the aid of an appellee's brief. *First Capitol Mortgage Corp. v. Talandis Construction Corp*., 63 Ill. 2d 128, 133 (1976).

¶ 10 The *Moorman* Doctrine Does Not Apply.

¶ 11 CLC first argues that the trial court erred in assessing damages for replacing the diamond, citing the *Moorman* doctrine. In *Moorman Manufacturing Co. v. National Tank Co*., our Supreme Court held that purely economic losses are not recoverable in tort actions. 91 Ill. 2d 69, 91 (1982). The Court drew this line to prevent tort law from gradually enveloping contract law, the traditional means for sellers and buyers to define the duties between them. *Congregation of the Passion, Holy Cross Province v. Touche Ross & Co*., 159 Ill. 2d 137, 159-60 (1994). This barrier applies even if the plaintiff is unable to recover under a contract action. *Anderson Electric, Inc. v. Ledbetter Erection Corp*., 115 Ill. 2d 146, 153 (1986).

¶ 12 This rule also applies to the service industry; just as in a buyer-seller relationship, both a provider of services and its client "have an important interest in being able to establish the terms of their relationship prior to entering into a final agreement." *Fireman's Fund Insurance Co. v. SEC Donohue, Inc*., 176 Ill. 2d 160, 166 (1997) (quoting *Congregation of the Passion*, 159 Ill. 2d at 161). But the doctrine applies only when the duty of the party performing the service is defined by the contract; if the duty arises outside of the contract, the *Moorman* doctrine does not prevent recovery on a tort negligence theory. *Fireman's Fund Insurance*, 176 Ill. 2d at 167.

¶ 13 Here, the trial court apparently found that no contract existed between TGJ and CLC, but that does not fully answer the question. Even if a contract had existed between the parties, it would have been for repairing the diamond. But the damage incurred here had nothing to do with

its repair, but rather for the diamond having gone astray (which apparently took place before any repairs could be done). Thus, the *Moorman* doctrine does not apply: the duty to not lose the diamond arose outside of any contractual relationship. *Fireman's Fund Insurance,* 176 Ill. 2d at 167 (if duty arose outside contract, party can recover on negligence theory). TGJ was able to plead that CLC was negligent in its handling of the package, leading to the diamond's loss. So, the trial court did not err in assessing damages.

¶ 14 The Amended Complaint

¶ 15 Next, CLC argues that the trial court erred in allowing TGJ to amend its complaint just before trial, adding a count of negligence. We review a trial court's decision to grant leave to amend the pleadings for an abuse of discretion. *Goldberg v. Brooks*, 409 Ill. App. 3d 106, 113 (2011). The trial court should consider whether the amendment cures a defect in the pleadings; whether the other party is prejudiced or surprised by the proposed amendment; whether the proposed amendment is timely; and whether there were previous opportunities to amend the pleadings. *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 467-68 (1992).

¶ 16 CLC alleges that it was unfairly taken by surprise when TGJ tried to amend its complaint. In CLC's motion to reconsider, its attorney alleged that she did not even know about the new negligence claim until the trial was almost over (implying that she did not read the four-page amended complaint). The trial court's order stated that it held a hearing on TGJ's request and that CLC did not ask for a continuance, even though the trial court would have been willing to give one. We cannot review these factual contentions because CLC did not provide us with a transcript of that hearing.

¶ 17 "The law is well settled that appellants bear the duty to present a record which fairly and fully presents all matters necessary and material for a decision of the question raised." (internal

quotations omitted) *Emery v. Northeast Illinois Regional Transportation Co*., 374 Ill. App. 3d 974, 979 (2007); *see also* Ill. S. Ct. R. 321 (eff. July 30, 1979) (record on appeal shall include reports of proceedings prepared); Ill. S. Ct. R. 323(a) (eff. Jan. 1, 1970) (report of proceedings shall include "all the evidence pertinent to the issues on appeal"). In the absence of a report of proceedings, any doubts will be resolved against the appellants and we presume that the trial court's orders conform with the law and had a sufficient factual basis. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984). On this bare record, we must assume that the trial court applied the relevant legal standard and did not abuse its discretion in allowing TGJ to amend its complaint.

¶ 18 Affirmed.