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Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001476-MR

EH CONSTRUCTION, LLC APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 98-CI-00937

DELOR DESIGN GROUP, INC.;
PRESNELL CONSTRUCTION
MANAGERS, INC.;
KENNETH D. AND DEBRA K.D. DELOR;
CREEL BROWN PAINTING
CONTRACTORS, INC.; and
RUDD DRYWALL COMPANY, INC. APPELLEES

OPINION
REVERSING AND REMANDING
* * * * * * * * * *

BEFORE: BUCKINGHAM, GUIDUGLI, and KNOPF, Judges.

BUCKINGHAM, JUDGE. EH Construction, LLC ("EH") appeals from an order of the Jefferson Circuit Court dismissing its complaint for damages against Presnell Construction Managers, Inc. ("Presnell"), for breach of contract and negligence. The main issue involves whether Kentucky courts will adopt the Restatement (Second) of Torts § 552 (1977) ("Restatement"), and allow negligence claims by contractors against construction managers. We hold that a contractor may make a claim in tort against a

construction manager based upon negligent misrepresentation, despite a lack of privity of contract. Therefore, we reverse and remand to the trial court.

In May 1996, the Delor Design Group, Inc. ("Delor"), began a project renovating a commercial building in Louisville, Kentucky, to be used as its offices. It engaged an architect and completed the demolition at the site. Thereafter, Delor hired Presnell as a construction manager to oversee the project. In January 1997, EH's proposal for the general trades bid package was accepted by Delor, and EH became a contractor for the project.

Work on the project proceeded with great difficulty. There were numerous disputes relating to the timing and quality of the work and to the payment of outstanding invoices. These conflicts culminated with EH's filing a mechanics and materialmen's lien on the property in the amount of $268,218 for materials and labor furnished to Delor.

In February 1998, EH filed suit in the Jefferson Circuit Court against Delor, Presnell, and other lienholders, seeking satisfaction of its lien and seeking damages from Presnell. EH's complaint, as it related to Presnell, asserted claims based on theories of breach of contract and negligence. EH's theory of recovery was that Presnell negligently supplied information to it, that it relied on those misrepresentations in the performance of its contracted service, and that it thereby incurred damages. EH also alleged that Presnell was negligent in its coordination and supervision of the contractors. EH claimed

that it was required to restore much of the work it had already completed due to changes and improper scheduling by Presnell which led other contractors and subcontractors to destroy work that EH had already finished.

Presnell filed a motion to dismiss EH's complaint against it, arguing that the claim for breach of contract was barred for lack of privity and that the claim for negligence was barred for lack of any duty owed to EH. The trial court entered an order granting Presnell's motion to dismiss. The order stated that the breach of contract claim was dismissed due to lack of privity because there was no contractual relationship between EH and Presnell. As for EH's negligence claim, the court stated that "Presnell's duties and responsibilities under its contract were to Delor. It had no duty to EH Construction. No legal liability can arise, since no duty existed between Presnell and EH Construction. Relief, if any, for EH Construction would be against Delor." This appeal by EH followed. EH does not contest the ruling of the trial court dismissing EH's breach of contract claim against Presnell. Its sole argument on appeal is that the trial court erred by dismissing its negligence claim.

As we have noted, the trial court dismissed EH's negligence claim against Presnell on the ground that all of Presnell's duties were under its contract to Delor and that Presnell had no duty to EH. EH argues that there does not have to be privity between EH and Presnell in order for a duty to arise. It urges this court to adopt § 552 of the Restatement (Second) of Torts, which imposes liability for those who, in the

course of business, negligently gather and distribute information intended for reliance by others.

Section 552, entitled "Information Negligently Supplied for the Guidance of Others," states as follows:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
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> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
>
> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.
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> (3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

Restatement (Second) of Torts § 552 (1977). According to Bethlehem Steel Corp. v. Ernst & Whinney, 822 S.W.2d 592 (Tenn. 1991), a majority of jurisdictions have adopted § 552. Id. at 594. See Bronster v. United States Steel Corp., 919 P.2d 294 (Haw. 1996) (extensive discussion of § 552); John Martin Co. v. Morse/Diesel, Inc., 819 S.W.2d 428 (Tenn. 1991) (specifically

adopting § 552 in a construction manager case); Ritter v. Custom Chemicides, Inc., 912 S.W.2d 128 (Tenn. 1995) (expanding § 552 to apply to nonprofessionals who negligently supply false information); Bethlehem Steel Corp. v. Ernst & Whinney, 822 S.W.2d 592 (Tenn. 1991) (adopting § 552 regarding accountant liability); Robinson v. Omer, 952 S.W.2d 423 (Tenn. 1997) (recognizing § 552 but declining to extend its application to casual advice given by an attorney to a non-client); McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787 (Tex. 1999) (specifically adopting § 552 for negligent misrepresentation of an attorney); Safeway Managing Gen. Agency, Inc. v. Clark & Gamble, 985 S.W.2d 166 (Tex. Ct. App. 1998) (recognizing attorney liability under § 552); James V. Facciolla, JVF, Inc. v. Linbeck Constr. Corp., 968 S.W.2d 435 (Tex Ct. App. 1998) (citing § 552 as supporting the tort of negligent misrepresentation, but declining to extend to the facts of that case); Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP, 513 S.E.2d 320 (N.C. 1999) (specifically adopting § 552 as imposing liability on accountants); Bortz v. Noon, 729 A.2d 555 (Pa. 1999) (recognizing § 552 as a viable means for imposing liability, but choosing not to do so based on the facts of the particular case); G.A.W., III v. D.M.W., 596 N.W.2d 284 (Minn. Ct. App. 1999) (recognizing the tort of negligent misrepresentation and citing § 552 as reference); Guardian Constr. Co. v. Tetra Tech Richardson, Inc., 583 A.2d 1378 (Del. Super. Ct. 1990) (adopting § 552 for suit by subcontractor against design engineer between whom there was no privity of

contract); Detweiler Bros. v. John Graham & Co., 412 F. Supp. 416 (E.D. Wash. 1976) (acknowledging the viability of tort for negligent misrepresentation under Washington law, but remanding for resolution of genuine issues of material fact); Davidson & Jones, Inc. v. County of New Hanover, 255 S.E.2d 580 (N.C. Ct. App. 1979) (specifically adopting § 552 in construction case); Berkel & Co. Contractors v. Providence Hosp., 454 So.2d 496 (Ala. 1984) (privity of contract not required for negligence suit by subcontractor against the architect); Gutler, Hebert & Co. v. Weyland Mach. Shop, Inc., 405 So.2d 660 (La. Ct. App. 4th Cir. 1981) (subcontractor had viable cause of action against architect without privity of contract); Waldor Pump & Equip. Co. v. Orr-Schelen-Mayeron & Ass'n., 386 N.W.2d 375 (Minn. Ct. App. 1986) (no privity of contract required for negligence suit by subcontractor against engineering firm); National Sand, Inc. v. Nagel Const., Inc., 451 N.W.2d 618 (Mich. Ct. App. 1990) (contractor can maintain negligence action against engineer absent privity of contract); Duncan v. Afton, Inc., 991 P.2d 739 (Wyo. 1999) (stating that § 552 dispenses with privity requirement in negligent misrepresentation cases). Although this court has cited § 552 with favor, Seigle v. Jasper, Ky. App., 867 S.W.2d 476, 482 (1993), this is an issue of first impression in Kentucky.

Kentucky courts have recognized that privity is not a prerequisite for tort actions. Tabler v. Wallace, Ky., 704 S.W.2d 179, 186 (1985) (recognizing the error in requiring privity of contract as a prerequisite for tort liability); Hill

v. Willmott, Ky. App., 561 S.W.2d 331, 334 (1978) (addressing attorney liability to parties who lack privity); Seigle, 867 S.W.2d at 483 (citing Hill for the proposition that an attorney may be held liable to a third party who lacks privity with the attorney); Sparks v. Craft, 75 F.3d 257, 261 (6th Cir. 1996) (addressing attorney liability to parties who lack privity under Kentucky law). Further, as we have stated, this court has previously cited § 552 with favor. Seigle, 867 S.W.2d at 482. Moreover, when the court in Ingram Industries v. Nowicki, 527 F.Supp. 683 (E.D. Ky. 1981), was obligated to predict what the Kentucky Supreme Court would decide if it were confronted with the issue of whether a third party plaintiff not in privity of contract could recover against an accountant for negligence causing loss, it held that Kentucky would adopt the standards in § 552. Id. at 684.

In support of its argument that Kentucky should adopt § 552 of the Restatement, EH cites Morse/Diesel, 819 S.W.2d 428, a case where the Tennessee Supreme Court addressed this same issue as one of first impression in that state. Morse/Diesel is similar to this case in that in Morse/Diesel a subcontractor made a claim against a construction manager for damages caused by negligent misrepresentations. Id. at 430. In Morse/Diesel, Provident Insurance Company hired Morse/Diesel as a contract manager to act on its behalf to employ subcontractors, to coordinate their schedules, and to supervise their work. Id. at 429. Provident then employed the John Martin corporation to provide concrete and rough carpentry for the superstructure. Id.

at 430. Morse/Diesel was not a party to the contract between Provident and John Martin, but Morse/Diesel was to supervise the work. Id.

In the course of the construction of the building, difficulties arose over the amount of concrete necessary for John Martin to complete its work. Id. John Martin then filed suit against Morse/Diesel, alleging negligent misrepresentation upon which it relied and which caused it to be damaged. Id. The court held that the applicable law in Tennessee, absent privity, was found in § 552 of the Restatement. Id. at 431. It also held that

> [b]ecause this Court has previously dispensed with privity as a prerequisite for actions in tort based upon negligent misrepresentation against title examiners, surveyors, and attorneys, the rule must extend to other professions whose business is to supply technical information for the guidance of others.
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> . . . . The Restatement makes no distinction based upon the nature of the profession. Neither do we.

Id. at 433-34.

In line with the inclination of Kentucky courts to dispense with the requirement of privity as a prerequisite for actions in tort in other cases, we follow the approach taken by the Tennessee Supreme Court in Morse/Diesel and adopt § 552 of the Restatement. In so doing, we hold that the trial court erred in determining that EH, a contractor, could not maintain an action for negligent misrepresentations and supervision against Presnell, the construction manager, with whom EH had no privity of contract.

Presnell contends that it does not oppose the adoption of § 552 of the Restatement, and it even concedes that the section might apply to a construction manager under other circumstances. It argues, however, that it had no duty under these facts to provide information to EH. The contract between Presnell and Delor provided, however, that Presnell

> shall provide administrative, management and related services to coordinate scheduled activities and responsibilities of the Contractors with each other and with those of the Construction Manager, the Owner and the Architect to endeavor to manage the Project in accordance with the latest approved estimate of Construction Cost, the Project Schedule and the Contract Documents.
>
> . . . .
>
> [S]hall coordinate the sequence of construction and assignment of space in areas where the Contractors are performing Work.
>
> . . . .
>
> Shall schedule and coordinate the sequence of construction in accordance with the Contract Documents and the latest approved Project construction schedule.

These contract provisions establish that Presnell was to be in charge of coordinating the sequence of construction. Although these contract provisions are indicative of the type of duty owed, Presnell's duty to EH does not rest on these contractual duties to Delor. Likewise, it does not rest on any professional duty, but it is "based on an independent duty to avoid misstatements intended to induce reliance." Safeway Managing General Agency, Inc. v. Clark & Gamble, 985 S.W.2d 166, 169 (Tex. Ct. App. 1998). Under § 552 of the Restatement, Presnell had a duty to EH to exercise reasonable care or competence in its

supervision, collection, and distribution of information and directions that it provided to EH for guidance. Although Presnell argues that its duties were strictly those set forth in its contract with Delor and that no duty was owed to EH, we conclude that it had additional, independent duties pursuant to § 552.

Presnell further argues that Penco, Inc. v. Detrex Chemical Indus., Ky. App., 672 S.W.2d 948 (1984), is authority for its position. In Penco, a contractor sued a party who allegedly made negligent misrepresentations to the contractor's subcontractor. Id at 950. The facts in Penco are not the same as the facts in this case because in Penco, the contractor and the party advising the subcontractor had no relationship. Id. at 951. In this case, however, EH and Presnell had a relationship whereby Presnell was giving information and supervision directly to EH for EH's reliance. The result in Penco may or may not have been different had Kentucky adopted § 552 of the Restatement (Second) of Torts at that time.

In order to prevail on its claim against Presnell for negligent misrepresentation, EH must prove that (1) Presnell was acting in the course of its business, profession, or employment, or in a transaction in which it had a pecuniary (as opposed to gratuitous) interest; (2) Presnell supplied faulty information intended to guide others in their business transactions; (3) Presnell failed to exercise reasonable care in obtaining or communicating the information; and (4) EH justifiably relied upon the information and thereby incurred pecuniary loss. See

Robinson v. Omer, 952 S.W.2d 423, 427 (Tenn. 1997); Morse/Diesel, 819 S.W.2d at 431; Federal Land Bank Ass'n. v. Sloane, 825 S.W.2d 439, 442 (Tex. 1991); American Tobacco Co. v. Grinnell, 951 S.W.2d 420, 436 (Tex. 1997). There are fact issues regarding one or more of these elements. "A claim for negligent misrepresentation is ordinarily one for a jury, unless the undisputed facts are so clear as to permit only one conclusion." Golber v. Baybank Valley Trust Co., 704 N.E.2d 1191, 1192 (Mass. App. Ct. 1999). Since there are genuine issues of material fact to be resolved, summary judgment is not appropriate. Kentucky Rule of Civil Procedure (CR) 56.03; Dossett v. New York Mining & Mfg. Co., Ky., 451 S.W.2d 843, 845 (1970).

The order of the Jefferson Circuit Court is reversed, and this matter is remanded to the trial court for proceedings consistent with this opinion.

KNOPF, JUDGE, CONCURS.

GUIDUGLI, JUDGE, DISSENTS WITHOUT SEPARATE OPINION.

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