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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001113-MR

LAND AIR & SEA, INC. — APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NO. 05-CI-01161

ADT SECURITY SERVICES, INC. and
SECURE AMERICA, INC. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; NICKELL AND WINE, JUDGES.

NICKELL, JUDGE: Land Air & Sea, Inc. ("LAS") has appealed from the April 3, 2006, order of the Campbell Circuit Court granting summary judgment to ADT Security Services, Inc. ("ADT")[1] and Secure America, Inc. ("Secure America"), and the April 28,

[1] Although ADT was a defendant below and is listed in the notice of appeal as an appellee, no argument is made before this Court regarding the granting of summary judgment in its favor, and ADT did not file a brief before this Court. As such, we must assume LAS does not contest that part of the judgment and thus further discussion of issues relating to ADT is unnecessary except

2006, order denying its motion to alter, vacate or amend the April 3 order. For the following reasons, we affirm.

LAS operates a firearms, ammunition, and surplus sales business in Campbell County, Kentucky. Secure America, as an authorized dealer for ADT, sells and installs security systems for which ADT provides monitoring services. On September 12, 2002, LAS contracted with Secure America for the installation of a security system at its premises and the parties executed an Alarm Services Agreement to memorialize the transaction. After installation of the system at LAS's premises in late September or early October 2002, ADT purchased the monitoring contract from Secure America, and Secure America's interest in the contract ceased.

On December 6, 2004, an unknown person unlawfully gained entry into LAS's business premises. The alarm system installed in the premises included two major safety features. First, via LAS's telephone system it signaled ADT that an alarm event had occurred, thus triggering ADT's response, and second, an interior siren acted as an on-site deterrent. In effectuating entry, however, the perpetrator cut the telephone line located on the exterior of the building, and once inside, cut the wires connected to the siren. Therefore, no alarm signal was sent to ADT and the siren did not sound. The thief escaped unnoticed with a quantity of merchandise including several firearms.

On September 1, 2005, LAS filed suit against ADT and Secure America alleging fraud, negligent installation, breach of contract, breach of warranty, violations of the Uniform Commercial Code (UCC), the Kentucky Consumer Protection Act, and

as needed to clarify the remaining issues on appeal.

seeking both actual and punitive damages, attorney fees, and costs. Following completion of limited discovery, on November 16, 2005, Secure America filed a motion to dismiss, and on December 16, 2005, ADT filed a motion for summary judgment. LAS filed responses to both motions to which Secure America and ADT replied. On April 3, 2006, the trial court entered an order granting summary judgment.[2] On April 13, 2006, LAS filed a motion to "amend, vacate or set aside" the summary judgment as to the negligent installation issue. That motion was denied on April 28, 2006. This appeal followed.

The standard of review governing an appeal of a summary judgment is well settled. We must determine whether the trial court erred in concluding there was no genuine issue as to any material fact and the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, stipulations, 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." CR 56.03. The Supreme Court of Kentucky held in *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985), that summary judgment is proper only when the movant shows the adverse party cannot prevail under any circumstances. The Supreme Court has also stated "the proper function of summary

[2] Although the record is not completely clear, the language contained in the April 3 order indicates the trial court elected to treat Secure America's motion to dismiss as a motion for summary judgment. LAS did not complain about this treatment, and the propriety of the trial court's election is not before us on appeal.

judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). There is no requirement that the appellate court defer to the trial court since factual findings are not at issue. *Goldsmith v. Allied Building Components, Inc.*, 833 S.W.2d 378 (Ky. 1992). "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor [citation omitted]." *Steelvest*, 807 S.W.2d at 480. Furthermore, "a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." *Id*. at 482. *See also* Philipps, *Kentucky Practice*, CR 56.03, p. 418 (6th ed. 2005).

In the case *sub judice*, LAS contends that whether the alarm system was securely and properly installed was an issue of fact for a jury to decide, and thus summary judgment was improper. However, even when viewed in the light most favorable to LAS, its assertions do not raise genuine issues of material fact.

LAS argued to the trial court that Secure America and ADT were aware of the possibility of an intruder severing telephone lines in order to compromise a security system, but failed to take affirmative action to guard against this possibility or to warn customers of this possibility. LAS reiterates this argument on appeal, claiming the question to be one of fact and not one of law, thus requiring resolution by a finder of fact. The trial court disagreed, as do we.

LAS first contends Secure America's failure to encase the exposed telephone wiring and the exposed wiring to the interior siren at its gun shop in steel tubing or other suitable material deviated from the standard of reasonable care for security system retailers and installers. However, LAS failed to produce any evidence, through expert testimony or otherwise, regarding the applicable standard of care for such service providers. In its brief to this Court, LAS argues no such evidence was necessary, citing *Turner v. Reynolds*, 559 S.W.2d 740 (Ky.App. 1977) and *Johnson v. Vaughn*, 370 S.W.2d 591 (Ky. 1963), two medical malpractice cases which hold that no medical expert is necessary to establish negligence when the alleged negligent actions of a treating physician and the injuries resulting therefrom are "so apparent that laymen with a general knowledge would have no difficulty recognizing it." *Turner*, 559 S.W.2d at 741. While we believe the law enunciated by these two opinions is correct in the context of medical malpractice cases, it is inapplicable to the case at bar. Furthermore, not only did LAS fail to produce expert testimony on this issue, the record is devoid of any evidence supporting its contention other than its own conclusory allegations. Even in the face of an impending motion for summary judgment, LAS failed to offer more than unsubstantiated assertions. Without placing affirmative evidence to the contrary before the trial court, LAS failed to carry its burden of showing the existence of a genuine issue of material fact for trial, and therefore summary judgment was properly granted. *See Steelvest, supra*.

Finally, LAS argues Secure America and/or ADT had a duty to warn it of the potential threat to the security of its premises if the telephone lines servicing the

building were cut. Again, LAS failed to offer the trial court even a mere scintilla of evidence in support of its argument, and offers no more than conclusory assertions in its brief to this Court. However, even a cursory review of the original Alarm Services Agreement reveals the inclusion of language which specifically refutes LAS's argument. In capital letters in approximately the middle of the front page of the agreement it states:

> SUBSCRIBER ACKNOWLEDGES THAT IF THE PHONE SERVICE IS DISCONNECTED IN ANY MANNER WHATSOEVER, OR NOT WORKING FOR ANY REASON, ALARM SIGNALS CANNOT BE TRANSMITTED TO A CENTRAL STATION OR TO AN OUTSIDE MONITORING FACILITY, IF APPLICABLE (SEE PARAGRAPH 2 FOR MORE DETAILS). SUBSCRIBER ACKNOWLEDGES THAT ADDITIONAL PROTECTION WAS MADE AVAILABLE TO SUBSCRIBER AND DECLINED.[3]

The trial court noted this language in its order granting summary judgment. Further, a later paragraph on the same page contains a certification from the subscriber that it has read all terms of the contract, including the reverse side of the agreement and any and all documents attached thereto, prior to execution of the agreement.[4] Therefore, LAS's contention that it was not warned of the potential security risk posed by non-functioning telephone lines clearly must fail.

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[3] Paragraph 2, as referenced in this paragraph, was located on the reverse side of the agreement and contained more detailed information regarding the transmission of alarm signals over telephone lines, as well as a cautionary statement that no warranty or representation was being made "that the transmission of signals to or from the central station via telephone lines may not be interrupted, circumvented, or compromised."

[4] That same paragraph also contains a merger clause and an express acceptance of the terms relating to limitation of liability and liquidated damages.

It is axiomatic that a party is charged with knowledge of the terms of each written contract he executes and failure to read or know the contents thereof does not provide a sound legal basis for voiding or reforming a contract. *See Grisby v. Mountain Valley Ins. Agency, Inc.*, 795 S.W.2d 372 (Ky. 1990); *Howard v. Reliance Ins. Co. of Philadelphia,* 347 S.W.2d 508 (Ky. 1961). Here, Karen Denny and Kip Denny, the sole owners of LAS, executed a written agreement on behalf of their company after being given ample opportunity to read the contract and question its terms.[5] As such, knowledge of the terms of the agreement is imputed to LAS, and the company cannot now be heard to complain that it was somehow unaware of the provisions contained therein.

For the foregoing reasons, the judgment of the Campbell Circuit Court is affirmed.

ALL CONCUR.

[5] A review of the record further reveals the Denny's had previously engaged the services of Secure America to install a security system at their private residence. In so doing, the Denny's had personally executed an Alarm Services Agreement, presumably prepared by Secure America utilizing the same standardized form and containing the same cautionary language as the agreement in question here, thus making LAS's position more untenable.

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No brief filed