

Franklin County Legal Journal
Volume 20, Issue 29, Pages 175-183
Cosey v. McDonald's Corporation, et al

ROBERT A. COSEY and STEPHANIE COSEY, Plaintiffs, v. McDONALD'S CORPORATION, DELAMOR ENTERPRISE, INC., and McMORRISON INCORPORATED, Defendants
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch
Civil Action - Law, No. 1999-20176

Rule 1035 of the Pennsylvania Rules of Civil Procedure - Summary Judgment, Burden of Proof; Agency - Actual Agency, Burden of Proof, Control, Apparent Agency

1. Summary judgment may only be granted when the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, show that there is no genuine issue as to material facts and that the moving party is entitled to judgment as a matter of law.
2. The party moving for summary judgment bears the burden of proving that there is no genuine issue of material fact.
3. The non-moving party must adduce sufficient evidence on issue to his case and on which he bears the burden of proof such that a jury could return a verdict in his favor.
4. Plaintiffs must establish that a master/servant relationship existed between Defendant McDonald's Corporation and Defendant Delamor Enterprise.
5. Three elements of agency are the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking, and the understanding of the parties that the principal is to be in control of the undertaking.
6. The hallmark of the relationship is that the principal not only controls the results of the work but has the right to direct the manner in which the work is accomplished.
7. The two basic elements of apparent agency are that there must be negligence on the part of the principal in failing to correct the belief of the third party concerning the agent and there must be justifiable reliance by the third party.
8. Apparent agency is only customarily relevant in the context of business transactions.

Appearances:

Charles E. Ganley, Esq., *Counsel for Plaintiffs*

Todd J. Shill, Esq., *Counsel for Defendants*

OPINION

Walker, P.J., January 8, 2003

Factual Summary

Plaintiff Robert A. Cosey alleges that he entered the Waynesboro McDonald's Restaurant on April 7, 1997. After finishing his lunch, Mr. Cosey entered the men's restroom. After washing and drying his hands, Mr. Cosey alleges that he slipped and fell on some standing water located on the floor next to the

restroom door. Mr. Cosey alleges that he sustained severe injuries to his left knee.

To support his allegations, Mr. Cosey provided an eyewitness, Jeffrey Piper. Mr. Piper's testimony allegedly corroborates Mr. Cosey's memory of the incident. Both Mr. Cosey and Mr. Piper suggest that no warning signs were visible and that no employees were observed in the vicinity at the time of Mr. Cosey's alleged fall.

Mr. Cosey brought suit against Defendant Delamor Enterprises, Inc., which is the owner and operator of the Waynesboro McDonald's Restaurant. Mr. Cosey also brought suit against Defendant McDonald's Corporation because Delamor Enterprises, Inc. leased the building that housed the Waynesboro McDonald's Restaurant and McDonald's Corporation held itself out as the owner of the Waynesboro restaurant. Mr. Cosey also brought suit against McMorrison, Inc., which Delamor Enterprises bought out in 1991.

Collectively, the defendants filed a motion for summary judgment. In their motion, the defendants argue that the court should dismiss the plaintiffs' claim because the plaintiffs fail to plead a prima facie case for negligence. In addition, the Court should dismiss Plaintiff Stephanie Cosey's claim for loss of consortium because Mrs. Cosey stated that her husband "met all of her expectations." Next, the defendants argue that the Court should dismiss the plaintiffs' claims against Defendant McDonald's Corporation because the plaintiffs have failed to establish the existence of an agency relationship between Defendant McDonald's Corporation and Defendant Delamor Enterprises, Inc. Finally, the defendants argue that the plaintiffs' claim against Defendant McMorrison, Inc. should be dismissed because McMorrison, Inc. did not exist at the time of the alleged incident.

To support their contentions, the defendants direct the court's attention to the depositions of Robert Cosey, Stephanie Cosey, Mr. Delamater and Sheri Neady. The defendants proffer that the evidence from these depositions clearly indicates that the material facts are not in dispute and summary judgment should be granted.

Defendants filed a brief in support of their motion. Plaintiffs Robert Cosey and Stephanie Cosey filed a brief in opposition to the defendants' motion. The defendants filed a reply brief. Oral arguments were heard at the beginning of October 2002. At oral argument, all parties agreed that Defendant McMorrison would be dropped from the suit because it was no longer in existence at the time of the incident.

The Court has considered the defendants' motion for summary judgment, their brief in support of their motion for summary judgment, the plaintiffs' brief in opposition to defendants' motion for summary judgment, the defendants' reply brief, issues and theories presented at oral argument, the record and the applicable law.

This opinion results from such review.

Discussion

In their motion for summary judgment, Defendants McDonald's Corporation, Delamor Enterprises and McMorrison, Inc. (Defendants) present four issues that this Court must decide upon. First, the defendants argue that summary judgment should be granted because Plaintiff Robert A. Cosey failed to establish his negligence claim. Second, the defendants ask the Court to dismiss Plaintiff Stephanie Cosey's suit because it is a derivative claim and there was no change in the marital relationship following the alleged incident. Third, the defendants argue that the Court should dismiss the plaintiffs' claim against Defendant McDonald's Corporation because there is no agency relationship between Defendant McDonald's Corporation and Defendant Delamor Enterprises. Finally, the defendants argue that the Court should dismiss the plaintiffs' claim against Defendant McMorrison because Defendant McMorrison was legally dissolved six years prior to the alleged incident.

Rule 1035.2 of the Pennsylvania Rules of Civil Procedure governs the procedure for summary judgment. Rule 1035.2 provides:

After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law

(1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report.

Pa. R. Civ. P. 1035.2

Summary judgment may only be granted when pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, show that there is no genuine issue as to material facts and that the moving party is entitled to judgment as a matter of law. Coleman v. Coleman, 663 A.2d 741 444 Pa. Super. 196 (Pa. Super. Ct. 1995).

The party moving for summary judgment bears the burden of proving that there is no genuine issue of material fact. Laich v. Bracey, 776 A.2d 1022 (Pa. Commw. Ct. 2001). The non-moving party may not just rest upon the pleadings themselves without responding to a motion for summary judgment. The non-moving party must adduce sufficient evidence on issue to his case and on which he bears the burden of proof such that a jury could return a verdict in his favor. See Ertel v. Patriot-News Co., 674 A.2d 1038, 544 Pa. 93 (Pa. 1996); See also Pa. R. Crim. P. 1035.3(d) requiring the non-moving party to respond to a motion of summary judgment or the court may enter summary judgment against him. In other words, the non-moving party has some responsibility.

The defendants first argue that there is no evidence of record establishing that a hazardous water condition caused Mr. Cosey's accident. To support this contention, the defendants point out that Mr. Cosey made a statement in his deposition that he "didn't even pay attention to the floor." The defendants also direct the Court's attention to Harclerode v. G.C. Murphy Co. Inc., 217 A.2d 778, 207 Pa. Super. 400 (Pa. Super. Ct. 1966).

The Court is rather unimpressed by the defendants' misuse of a statement. Mr. Cosey made this statement in his deposition while talking about the color and type of tile in the bathroom. The defendants would have this Court believe that this statement meant Mr. Cosey did not notice anything about the floor. In all reality, Mr. Cosey was giving responses to the questions asked. They are responses to questions asked by defense counsel. There is no penumbra of answers that could be interpreted from this response. This Court will not read into Mr. Cosey's statements something that is not there.

In addition, assuming that Mr. Cosey did not pay attention to the floor, the negligence of the defendants does not disappear. The defendants would have the Court rule that a person must be aware of all conditions at all times. Mr. Cosey should have known that there was water there and avoided it. It is true that Mr. Cosey does have a duty to avoid potentially dangerous situations. But, it is also true that the defendants had the responsibility of ensuring that their restrooms were clean and safe for consumer use. And, if the allegations made by the plaintiffs were true, the plaintiffs would be able to establish a prima facie case of negligence. As such, looking at the evidence in the light most favorable to the plaintiffs, this Court is obligated to deny the defendants' motion for summary judgment because there are several material facts in dispute. This Court also believes that the defendants' reliance on Harclerode is misplaced. The Court in Harclerode ruled that judgment n. o. v. in favor of the defendant was proper because there was no evidence that the water condition was obviously dangerous. "Without evidence to describe the water and the condition it created, it cannot be said that [G.C. Murphy Co.] knew of the existence of a dangerous condition or should have known of it solely because its manager had passed the area minutes before and was still within six feet of it when [Harclerode] fell." Harclerode, 217 A.2d at 780, 207 Pa. Super. at 404.

The case at bar is remarkably different. First, the Court in Harclerode ruled that there was no evidence established **at trial**. (Emphasis added.) This case is only at the pleading stage. This Court must look at the evidence from the pleadings in the light most favorable to the plaintiffs, which means that the Court must accept all the allegations as true unless irrefutably rebutted. The defendants attempt to rebut the allegations by introducing the depositions of Mr. Delamater (Manager Partner of Delamor) and Sheri Neady (Manager of Waynesboro McDonald's). In short, their depositions state that the restrooms are supposed to be cleaned every half hour as per company policy. But, neither of these two individuals stated that they made sure that the restrooms were cleaned every half hour. Consequently, the defendants have failed to refute the existence of the water on the floor in the bathroom. Mr. Cosey testified in his deposition that there was water on the floor. Mr. Piper also testified in his deposition that there was water on the restroom floor. Since there are material facts in dispute, summary judgment would not be the proper disposition of the plaintiffs' negligence claims.

The defendants next argue that Mrs. Cosey's claims should be dismissed because she did not suffer any losses as a result of Mr. Cosey's fall. The defendants point out that Mrs. Cosey stated in her deposition her husband "has met her expectations." The defendants have correctly identified one area in her deposition. But, Mrs. Cosey also states that she had to run all the errands, bring Mr. Cosey to and from therapy. Of course, by her own admissions, she might have limited the amount of damages she would be entitled to under loss of consortium. In any respect, she does claim injury. As such, the defendants' motion for summary judgment in this regard is denied.

Third, the defendants argue that plaintiffs' claims against Defendant McDonald's Corporation should be dismissed because the plaintiffs have failed to establish that an agency relationship exists between

McDonald's Corporation. To support this contention, the defendants direct the Court's attention to Myszkowski v. Penn Stroud Hotel, Inc. 634 A.2d 622, 430 Pa. Super. 315 (Pa. Super. Ct. 1993).

The Court in Myszkowski affirmed a lower court's decision that plaintiffs failed to establish the existence of a master/servant relationship because the petitioner did not direct the manner in which it was to be accomplished by having a marketing agreement with the defendant. The Court focused on some material facts. It found that Penn Stroud managed the day-to-day operations of the business and made all of the important decisions. The employees were hired, fired, paid and supervised by Penn Stroud. Penn Stroud set the prices for services rendered. Finally, the Petitioner Best Western had no responsibility for the safety of the premises.

The plaintiffs state that there is a master-servant relationship because the building is owned by McDonald's Corporation, McDonald's Corporation sets the guidelines, McDonald's Corporation provides the training and cleaning supplies used by the Waynesboro McDonald's Restaurant and McDonald's Corporation holds itself up to the local community as the owner of the Waynesboro McDonald's Restaurant. Plaintiffs claim that it holds itself up as the owner because the sign outside displays over 99 Billion Served, and therefore, it's all one company. Since Defendant McDonald's Corporation provides an operations manual, among other things, to Defendant Delamor, Defendant McDonald's Corporation "controls" the day-to-day operations of the local McDonald's Restaurant.

In a case such as this, the plaintiffs must establish that a master/servant relationship existed between Defendant McDonald's Corporation and the Waynesboro McDonald's Restaurant or Delamor Enterprises. See Scott v. Purcell, 415 A.2d 56, 61, 490 Pa. 109, 117 (Pa. 1980). The three basic elements of an agency are "the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the parties that the principal is to be in control of the undertaking." Basile v. H. & R. Block, Inc., 761 A.2d 1115, 1120, 563 Pa. 359, 367 (Pa. 2000), quoting Scott, 415 A.2d at 60, 490 Pa. at 117. The hallmark of the relationship is that the principal not only controls the results of the work but has the right to direct the manner in which the work is accomplished. Myszkowski, 634 A.2d at 626, 430 Pa. Super. at 321.

This Court sees nothing in the record that would indicate that Defendant McDonald's Corporation has control over the day-to-day operations of the Waynesboro McDonald's Restaurant.[1] Like Best Western in Myszkowski, McDonald's Corporation does not direct the manner in which the work is to be accomplished. McDonald's Corporation does not hire, fire, pay or supervise any of the Waynesboro McDonald's employees. There is nothing in the record that would indicate that McDonald's Corporation sets the prices for the Waynesboro McDonald's Restaurant. Seemingly, the only "control" that McDonald's Corporation would have over Delamor would be to remove the franchise name, which the Myszkowski Court ruled would not be enough to establish an agency relationship. Like the Court in Myszkowski, this Court finds that no actual agency relationship exists between Defendant Delamor and Defendant McDonald's Corporation.

Plaintiffs also allege, through their argument that McDonald's Corporation holds itself out as the owner because of the sign, that an apparent agency relationship existed between the Waynesboro McDonald's Restaurant and McDonald's Corporation. The doctrine of apparent agency comes from the Restatement (Second) of Agency, § 267 (1975). Section 267 of Restatement (Second) of Agency states:

One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.

Restatement (Second) of Agency § 267 (1975).

Generally, the Courts have interpreted apparent agency to be closely related to agency by estoppel. See Myszkowski, 634 A.2d at 629, 430 Pa. Super. at 328. See also Capan v. Divine Providence Hospital, 430 A.2d 647, 287 Pa. Super. 364 (Pa. Super. Ct. 1980). The two basic elements of apparent agency (agency by estoppel) are that there must be negligence on the part of the principal in failing to correct the belief of the third party concerning the agent and there must be justifiable reliance by the third party. Myszkowski, 634 A.2d at 629, 430 Pa. Super. at 328, citing Juarbe v. City of Philadelphia, 431 A.2d 1073, 1079, 288 Pa. Super. 330, 342 (Pa. Super. Ct 1981).[2]

In this case, the doctrine of apparent agency is not applicable. Apparent agency is customarily relevant in the context of business transactions. Myszkowski, 634 A.2d at 629, 430 Pa. Super. at 328. The case at bar is a claim founded in tort for the alleged negligence of Defendant Delamor. Apparent agency does not apply. The Court need not respond to the plaintiffs' argument that the relationship of apparent agency existed between Defendant Waynesboro McDonald's Restaurant and Defendant Delamor

Enterprises at the time of the alleged incident.

Besides, this Court cannot in good conscience find that McDonald's Corporation has apparent authority over the Waynesboro McDonald's Restaurant. If that were the case, the McDonald's Corporation would be subject to an enormous amount of litigation because of some things completely out of their control. This Court cannot expect Defendant McDonald's Corporation to oversee every one of its franchises across the United States and abroad. It is also important to note that the plaintiffs have failed to provide any authority, nor has the Court found any Pennsylvania authority on its own, that would indicate Defendant McDonald's Corporation has apparent authority over its franchisees, even though there are countless number of McDonald's Restaurants in the Commonwealth of Pennsylvania.

Accordingly, this Court sees no other alternative but to grant Defendants' motion for summary judgment as to Defendant McDonald's Corporation.

Finally, the Defendants argue that the Court should dismiss the plaintiffs' claim against Defendant McMorrison because Defendant McMorrison was legally dissolved six years prior to the alleged incident. At oral argument, both parties agreed that Defendant McMorrison would be dropped from the case. The Court rules accordingly.

Conclusion

After reviewing the record, the defendants' motion for summary judgment, the defendants' brief in support of their motion for summary judgment, plaintiffs' brief in opposition to defendants' motion for summary judgment, defendants' reply brief in support of their motion for summary judgment, the Court hereby grants in part defendants' motion for summary judgment according to the following.

1. Defendants' motion for summary judgment with respect to Plaintiff Robert Cosey's negligence claim alleging that plaintiff failed to produce evidence that the water caused him to slip is hereby denied because the Court does find that material facts are in dispute, and therefore, summary judgment would not be the proper disposition of this claim.
2. Defendants' motion for summary judgment with respect to Plaintiff Stephanie Cosey's loss of consortium claim alleging that there was no change in the marital relationship is hereby denied because the Court does find that Plaintiff Cosey claims proper injury and there are material facts in dispute, and therefore, summary judgment is not the proper disposition of this claim.
3. Defendants' motion for summary judgment with respect to plaintiffs' claim against Defendant McDonald's Corporation alleging that the plaintiffs failed to establish the existence of an agency relationship is granted because the plaintiffs have failed to establish an agency relationship between Defendant Delamor and Defendant McDonald's Corporation. Accordingly, plaintiffs' claims against McDonald's Corporation are hereby dismissed with prejudice.
4. Defendants' motion for summary judgment with respect to plaintiffs' claims against Defendant McMorrison, Inc is hereby granted because both parties agreed that McMorrison, Inc. does not exist.

ORDER OF COURT

January 8, 2003, after reviewing the record, the defendants' motion for summary judgment, the defendants' brief in support of their motion for summary judgment, plaintiffs' brief in opposition to defendants' motion for summary judgment, defendants' reply brief in support of their motion for summary judgment, the Court hereby grants in part defendants' motion for summary judgment according to the following:

1. Defendants' motion for summary judgment with respect to Plaintiff Robert Cosey's negligence claim alleging that plaintiff failed to produce evidence that the water caused him to slip is hereby denied because the Court does find that material facts are in dispute, and therefore, summary judgment would not be the proper disposition of this claim.
2. Defendants' motion for summary judgment with respect to Plaintiff Stephanie Cosey's loss of consortium claim alleging that there was no change in the marital relationship is hereby denied because the Court does find that Plaintiff Cosey claims proper injury and there are material facts in dispute, and therefore, summary judgment is not the proper disposition of this claim.
3. Defendants' motion for summary judgment with respect to plaintiffs' claim against Defendant

McDonald's Corporation alleging that the plaintiffs failed to establish the existence of an agency relationship is granted because the plaintiffs have failed to establish an agency relationship between Defendant Delamor and Defendant McDonald's Corporation. Accordingly, plaintiffs' claims against McDonald's Corporation are hereby dismissed with prejudice.

4. Defendants' motion for summary judgment with respect to plaintiffs' claims against Defendant McMorrison, Inc is hereby granted because both parties agreed that McMorrison, Inc. does not exist.

[1] The Court in Myszkowski focused its attention on whether the alleged principal had day-to-day control over the manner of the alleged servant's performance. The Court pointed out that the franchisor must have right to control day-to-day operations of the franchise in order to establish an agency relationship.

[2] Although this Court has identified the definition of agency by estoppel, the Court does recognize that the Myszkowski court applied this same definition for apparent agency because the Pennsylvania Courts have not formally adopted Restatement (Second) of Agency § 267 (1975).