IN THE COURT OF APPEALS OF IOWA

No. 7-092 / 06-1526
Filed March 14, 2007

KENNETH D. METZGER,
Plaintiff-Appellant,

vs.

KUM & GO, KRAUSE HOLDINGS, INC.,
Defendant-Appellee.

Appeal from the Iowa District Court for Warren County, Paul R. Huscher, Judge.

Kenneth Metzger appeals following the ruling granting summary judgment and dismissing his action against Kum & Go. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Eldon J. Winkel of Eldon J. Winkel Law Office, Algona, for appellant.

Paul D. Scott and Joseph F. Wallace, Clive, for appellee.

Considered by Zimmer, P.J., and Miller and Baker, JJ.

BAKER, J.

Kenneth Metzger appeals following the ruling granting summary judgment and dismissing his action against Kum & Go. We affirm in part, reverse in part, and remand.

Background Facts and Proceedings.

On January 16, 2005, Kenneth Metzger visited a Kum & Go convenience store in Indianola, informing the employee that he had previously rented a storage unit from them on October 28, 2004, and that he wished to renew it. Upon checking, the employee was unable to find any record that Metzger had ever rented a storage unit. Metzger could not provide the employee a rental agreement.

Upon Metzger's examination of storage unit #40, the unit which he claimed he had rented, he discovered a different padlock securing it.[1] The padlock appeared to be similar to other padlocks used at the facility. Metzger claimed to the employee that the lock was different than the one he had originally placed on it and then received written permission from the employee to cut off the padlock. When he cut the padlock and opened the unit, Metzger discovered that a large portion of the items he had originally stored there were missing. He demanded the return of the property from Kum & Go and then filed a police report.

On June 29, 2005, Metzger filed a petition against Kum & Go, Krause Holdings, Inc. alleging he was entitled to compensatory damages for his missing possessions. Kum & Go later filed a motion for summary judgment seeking

[1] Metzger further claimed that when he placed his possessions in the unit originally, he had secured it with a padlock of his own.

dismissal of Metzger's action. Following a hearing, the court granted the motion and dismissed Metzger's claims in their entirety. Metzger appeals from this ruling.

Scope and Standards of Review.

Summary judgment rulings are reviewed for the correction of errors at law. Iowa R. App. P. 6.4; *General Car & Truck Leasing Sys., Inc. v. Lane & Waterman,* 557 N.W.2d 274, 276 (Iowa 1996). Where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. Iowa R. Civ. P. 1.981(3); *City of West Branch v. Miller,* 546 N.W.2d 598, 600 (Iowa 1996). All facts are viewed in the light most favorable to the party opposing the motion for summary judgment. *Bearshield v. John Morrell & Co.,* 570 N.W.2d 915, 917 (Iowa 1997). However, a party resisting a properly supported summary judgment motion must "set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond**,** summary judgment, if appropriate, shall be entered." Iowa R. Civ. P. 1.981(5).

Motion for Summary Judgment.

Iowa Rule of Civil Procedure 1.981(3) provides that a motion for summary judgment shall not be filed less than sixty days prior to the date the case is set for trial, unless otherwise ordered by the court. Here, Kum & Go filed its motion was on June 23, 2006, less than sixty days prior to the scheduled trial date of August 15, 2006. On July 18, 2006, the court granted Kum & Go's motion to continue the trial date to September 19, 2006.

Metzger argues the court "erred in considering" this motion as it was not timely filed. The district court has wide discretion in its rulings on pretrial deadlines and will be reversed only for an abuse of such discretion. *Donovan v. State,* 445 N.W.2d 763, 766 (Iowa 1989). We determine the court did not abuse its wide discretion in continuing the trial date and in considering Kum & Go's motion for summary judgment.

Bailment.

A bailment occurs when personal property has been delivered by one person, the bailor, to another, the bailee, for a specific purpose beneficial to the bailee or the bailor, or both, with the understanding the property will be returned to the bailor after the purpose has been accomplished. *Farmers Butter & Dairy Coop. v. Farm Bureau Mut. Ins. Co.,* 196 N.W.2d 533, 538 (Iowa 1972). Generally, a bailment is based on an expressed or implied agreement. *Id.* However, it can also arise by operation of law when justice requires. *See* 8A Am.Jur.2d *Bailments* § 8 (1997). Thus, when a person comes into lawful possession of personal property of another without an underlying agreement, the possessor may become a constructive bailee. *Id.*

The pivotal element in the creation of a bailment is delivery. *Khan v. Heritage Property Mgmt.*, 584 N.W.2d 725, 730 (Iowa Ct. App. 1998). Although delivery may be either actual or constructive, there must be a transfer of possession and control of the property to the bailee. *Id.* In order to constitute such a transfer, "there must be such a full transfer, either actual or constructive, of the property to the bailee as to exclude the possession of the owner and all other persons, and give to the bailee, for the time being, the sole custody and

control thereof." *Reimers v. Petersen*, 237 Iowa 550, 554, 22 N.W.2d 817, 820 (1963).

The district court determined that no genuine issue of material fact existed as to whether a bailment was created because of the lack of delivery of the personal property and lack of exclusive possession on the part of Kum & Go. In support of this determination the court found significant the following: (1) Metzger himself placed all of his possessions in unit #40, (2) Metzger placed his own padlock on the door, (3) Kum & Go never possessed a key to that padlock, and (4) when Metzger returned to find a foreign padlock, Kum & Go did not have key to that lock. Based on these facts, we agree no reasonable juror could find that Kum & Go ever came into exclusive possession of Metzger's goods. Because no bailment was created, we therefore affirm the district court's grant of summary judgment on this issue.

Breach of Contract.

As was previously noted, Metzger could not produce a written contract between himself and Kum & Go. Accordingly, he maintained that an oral contract existed under which Kum & Go owed him a duty to reasonably protect the items in his storage unit. The district court, however, dismissed this claim on summary judgment. It concluded that

> [n]o reasonable jury on these facts could find that there was ever any agreement between Metzger and Kum & Go that Kum & Go would be an insurer of Metzger's property when the plaintiff's own actions evidence a contrary understanding.

On appeal, Metzger asserts this is in error.

"The existence of an oral contract, as well as its terms and whether or not it was breached, are ordinarily questions for the trier of fact." *Gallagher, Langlas*

& Gallagher v. Burco, 587 N.W.2d 615, 617 (Iowa Ct. App. 1998). Only a reasonable certainty an oral contract existed need be shown. *Fortgang Bros., Inc. v. Cowles,* 249 Iowa 73, 77, 85 N.W.2d 916, 919 (1957). In other words, the terms must be sufficiently definite to determine with certainty the duties and obligations of each party. *Burke v. Hawkeye Nat'l Life Ins. Co.,* 474 N.W.2d 110, 113 (Iowa 1991) (citing *Severson v. Elberon Elevator, Inc.,* 250 N.W.2d 417, 420 (Iowa 1977)). All minor details of the contract need not be proven in the first instance in order to present the issue for the trier of fact. *Fortgang Bros., Inc.,* 249 Iowa 73, 77, 85 N.W.2d 916, 919 (1957).

As the trial court found, a reasonable juror could find that some sort of lease arrangement existed between Metzger and Kum & Go. On October 28, 2004, the date on which Metzger claims he placed his items in the storage unit, he wrote a check to Kum & Go for $72.14 that contained the word "storage" in the memo line. Kum & Go deposited this check into its account. The district court even recognized this, noting that an "inference could be made that Metzger and Kum & Go had an agreement for services of some kind whereby Kum & Go provided rental space and Metzger paid a fee . . . ."

However, we must further conclude the district court was correct in determining a jury question was not presented as to the express terms of that agreement. No evidence exists at this stage as to precise terms of this contract. To determine any explicit terms of this contract would require pure speculation. More specifically, there is no evidence that would support a finding that Metzger and Kum & Go's agreement engendered any duty for Kum & Go to insure the safety of his property from the acts of third persons.

The conclusion that Metzger may not recover under a theory of the express terms of the lease does not end the discussion on the contract claim. This arrangement is in the nature of a landlord-tenant relationship. The Restatement (Second) of Property § 16.3, subd. (1) provides: "An obligation that is imposed on one of the parties to a lease without the aid of an express promise may rest on an implied promise found to exist from the facts and circumstances of the lease transaction."

The purpose of the lease was to provide safe storage for Metzger's property. Although not an insurer of the property, the landlord had an implied duty to use reasonable care to not allow unauthorized entry to the leased space. *Cohen v. Hayden*, 180 Iowa 232, 243, 157 N.W. 217, 220 (Iowa 1916) (stating a lease has an implied covenant for quiet enjoyment); s*ee also* 49 Am. Jur. 2d Landlord and Tenant § 477 (noting that (a) absent a lease provision to the contrary, a lease carries an implied covenant of quiet enjoyment in the property between a lessor and a lessee; (b) the implied covenant of quiet enjoyment is a promise that during the terms of the tenancy, the tenant must not be disturbed by the lessor or anyone claiming under him or her; and (c) the right obligates the landlord, or anyone claiming under the landlord, to refrain from interference with the tenant's possession during the tenancy).

Accordingly, we conclude a jury question remains as to the existence of a lease and whether Kum & Go breached this implied term of the lease arrangement. We therefore reverse the trial court's grant of a summary judgment on this issue.

Negligence.

The district granted summary judgment on the negligence issue as well, concluding Metzger failed to "establish that a genuine issue of material fact exists, or that he can establish a duty Kum & Go owed to him giving rise to liability." Metzger claimed he "had a right to assume that [Kum & Go] would not allow his unit #40 to end up in someone else's control or [Kum & Go's] own control and that his property would become missing", thereby implicating the implied duty of quiet enjoyment.

Negligence is conduct that falls short of the standard of care established by law for the protection of others against unreasonable risks of harm. *Knake v. King,* 492 N.W.2d 416, 417 (Iowa 1992). To establish a claim for negligence, the plaintiff must normally prove: (1) the existence of a duty owed by the defendant to conform to a standard of care, (2) the failure to conform to the standard, (3) proximate cause, and (4) damages. *Stotts v. Eveleth,* 688 N.W.2d 803, 807 (Iowa 2004). Generally, the standard of conduct that applies to an action for negligence is the care of a reasonable person under the circumstances. *Kastler v. Iowa Methodist Hosp.,* 193 N.W.2d 98, 101 (Iowa 1971). Whether an actionable duty exists under a given set of facts is a question of law for the court. *Leonard v. State*, 491 N.W. 2d 508, 509 (Iowa 1992). The jury's task is "to determine the reasonableness of the care exercised by the defendant in light of the foreseeability of harm." *Anderson v. Webster City Cmty. Sch. Dist*., 620 N.W.2d 263, 267 (Iowa 2000).

As we previously determined and as found by the trial court, a reasonable juror could determine an agreement or contract existed between the parties. We

also conclude the evidence was insufficient to support a finding on any of the specifics of that contract. No express warranties were made. While that conclusion may have been fatal to a breach of contract claim based upon an express warranty, it is not fatal to a claim based on implied warranty or negligence. The general standard of care under a negligence theory—reasonable care under the circumstances—also steps in and becomes applicable.

The Restatement (Second) of Torts section 323 (1965*)* provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or(b) the harm is suffered because of the other's reliance upon the undertaking.

It is well-settled that neglect of duty imposed by a lease is a tort for which an action ex delicto will lie. *Duke v. Clarke,* 267 N.W.2d 63, 68 (Iowa 1978). This duty, arising from the contract, may result from an implied warranty. *Id.* The determination as to whether the contract supports the asserted duty is made by the trial court as a matter of law. *Porter v. Iowa Power and Light Co.,* 217 N.W.2d 221, 228 (Iowa 1974). When such a duty has been established, compliance with the duty is determined by the trier of fact." *Knapp v. Simmons*, 345 N.W.2d 118, 120 (Iowa,1984). We have previously found that allowing unit #40 to end up in someone else's control or Kum & Go's own control may violate the implied duty of quiet enjoyment thereby engendering a jury question.

The trial court further found no duty because the loss of the property was not foreseeable, citing *Martinko v. H-N-W Assoc.,* 393 N.W.2d 320 (Iowa 1986)

("We conclude the plaintiff did not generate a genuine issue of material fact that the defendants either knew or had reason to know of criminal conduct by third persons. Therefore, they owed no duty of protection to the plaintiff's daughter.") *Martinko* involved a premises liability claim for a particularly brutal murder in the parking lot of a shopping mall. *Id*. at 321. The Court found that there was no likelihood that "third persons may endanger their patrons". *Id.* at 322. This case presents an entirely different scenario. As noted above, people rent self storage units precisely for the safekeeping of their possessions.

As our supreme court noted in *Brichacek v. Hiskey*, 401 N.W.2d 44 (Iowa 1987):

> The trial court also held that, even if defendant had breached a duty, he could not have been held liable for plaintiff's injury because the criminal act of a third party was a superseding cause of the harm. We cannot agree that this is true as a matter of law; such a determination must be made on the particular facts of each individual case. We believe that the *Restatement (Second) of Torts* section 448 (1965*)* correctly sets forth the rule when it states:
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> > The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.
>
> If the landlord had violated his duty to provide a lock on the door, he might have been held liable if he could or should have realized that a break-in could occur. Thus, a break-in is not necessarily a superseding cause that would cut off liability.

Brichacek, 401 N.W.2d at 48. The fact that persons, if given access to the unit, may remove the stored items is certainly foreseeable by both the landlord and the tenant.

We therefore address whether a genuine issue of material fact was presented as to the breach of that duty. From the facts in the summary judgment record we believe a reasonable juror could find that, after Metzger originally rented the storage unit and paid for it by check, another Kum & Go employee leased the same unit or allowed access to a second individual who then entered and removed some of Metzger's property. Metzger alleges that when he returned to his unit a new lock, identical to those on the other units, was in place. This could support a finding that Kum & Go provided someone besides Metzger that lock and permission to enter the storage unit leased by Metzger. A jury could find that such actions constitute a breach of the general standard of care or the right to quiet enjoyment.

As whether conduct is reasonable is usually a fact question rather than a question of law, the existence of a lease and the propriety of the conduct of Kum & Go are best left for a jury to decide. Accordingly, because we find fact questions exist, we therefore reverse the trial court's grant of a summary judgment on this issue as well.

We remand for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.