Cite as 2018 Ark. App. 542

ARKANSAS COURT OF APPEALS

DIVISION II
No. CV-18-75

Opinion Delivered: November 7, 2018

AMBER ROBINSON AND BRANDY ROBINSON APPELLANTS V. JAMES WILLIS AND MARION STARKS APPELLEES	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, NINTH DIVISION [NO. 60CV-13-4068] HONORABLE MARY SPENCER MCGOWAN, JUDGE AFFIRMED

DAVID M. GLOVER, Judge

Amber Robinson, on behalf of her minor daughter, Brandy, appeals from the trial court's October 5, 2017 grant of summary judgment in favor of appellees, James Willis and Marion Starks ("landlords"). In this appeal, she contends the trial court erred in granting summary judgment because 1) appellees owed a duty to Brandy based on the terms of the lease agreement and applicable provisions of the Little Rock city ordinances, and 2) it was foreseeable that the failure to provide heat to a residential rental property created an appreciable risk of harm to others. We affirm.

The essential facts can be briefly summarized. Brandy's claims arose from burn injuries she sustained when she was staying with her grandmother, Barbara Robinson, on December 23, 2011. Barbara leased her residence from the landlords, and because the heating system on the property did not work, she obtained and was using space heaters

when Brandy came to visit on December 23. Brandy was nine years old at the time, and the dress she was wearing caught fire when it came in contact with one of the space heaters. The burns were extensive, and she continues to need surgeries.

Through several amendments to her original complaint, Amber filed suit against Sunbeam Products, Inc., d/b/a Jarden Consumer Solutions (manufacturer of the space heater), Lowe's Home Centers, Inc., then Walmart Stores, Inc. (where the space heater was purchased), James Willis and Marion Starks (landlords of the premises where the injury occurred), and five John Does. Lowe's was voluntarily dismissed from the case after it was discovered the space heater was actually purchased from Walmart. Sunbeam and Walmart were dismissed from the case following a settlement agreement.

The landlords moved for summary judgment on July 25, 2016. Additional discovery was allowed, and a hearing on the motion was held on October 5, 2017. The trial court granted the motion by order entered the same day. On October 23, 2017, the trial court entered an order granting Amber's motion to dismiss John Does 1–5 pursuant to Rule 41 of the Arkansas Rules of Civil Procedure. This appeal followed.

Amber contends the trial court erred in granting summary judgment to the landlords. She argues the landlords owed a duty to Brandy, based on the terms of the lease agreement and applicable provisions of the Little Rock city code, and that it was foreseeable the landlords' failure to provide heat would create an appreciable risk of harm to others.

Summary judgment may be granted only when it is clear there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Holman v. Flores*, 2018 Ark. App. 298, 551 S.W.3d 1. Once a moving party has established a prima

facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Id.* On appeal, viewing the evidence in the light most favorable to the nonmoving party and resolving all doubts and inferences against the moving party, we determine if summary judgment was appropriate based on whether the moving party's evidence in support of its motion leaves a material fact unanswered. *Id.* Summary judgment is no longer rarely employed; rather, it is a tool available to the trial court in its efficiency arsenal. *Laird v. Shelnut*, 348 Ark. 632, 74 S.W.3d 206 (2002); *Cumming v. Putman Realty, Inc.*, 80 Ark. App. 153, 92 S.W.3d 698 (2002). Our appellate review is not limited to the pleadings, as we also focus on affidavits and other documents filed by the parties; however, conclusory allegations are insufficient to create a factual issue in a summary-judgment situation. *Holman*, *supra*. Summary judgment is not proper if reasonable minds could reach different conclusions when given the facts. *TMG Cattle Co., Inc. v. Parker Com. Spraying, LLC*, 2018 Ark. App. 144, 540 S.W.3d 754.

It is well settled in Arkansas that unless a landlord agrees with the tenant to repair leased premises, he cannot, in the absence of statute, be compelled to do so or be held liable for repairs. *E.E. Terry, Inc. v. Cities of Helena & West Helena*, 256 Ark. 226, 506 S.W.2d 573 (1974). Our courts have further held that an assumption of duty by conduct can remove the landlord from the protection of the general rule of nonliability. *Denton v. Pennington*, 82 Ark. App. 179, 119 S.W.3d 519 (2003). Arkansas Code Annotated section 18-16-110 (Repl. 2015) provides,

> No landlord or agent or employee of a landlord shall be liable to a tenant or a tenant's licensee or invitee for death, personal injury, or property damage proximately caused by any defect or disrepair on the premises absent the landlord's:

(1) Agreement supported by consideration or assumption by conduct of a duty to undertake an obligation to maintain or repair the leased premises; and

(2) Failure to perform the agreement or assumed duty in a reasonable manner.

Here, Amber based her "duty" argument on two sources: (1) a city ordinance and (2) the lease. Although both parties indicate the trial court found as a matter of law that the landlords owed no duty to Brandy, we do not agree. At the hearing, counsel for the landlords specifically stated that for purposes of the motion for summary judgment the landlords did not dispute that a duty to repair the heating system existed and that they received notice it was broken. In its order, the trial court set forth the basic facts of this case and then cited *Stalter v. Akers*, 303 Ark. 603, 798 S.W.2d 428 (1990), which held a landlord was liable to tenants or their guests on leased property when the guest is injured by a condition of disrepair that the landlord had contracted to repair. The trial court further explained, however, that there were no allegations Brandy was injured by a "condition of disrepair," *i.e.*, she was not injured by a furnace that did not work; she did not suffer from hypothermia or frostbite due to inadequate heat. Moreover, there was no basis for contending the landlords owed any duty to maintain or repair the space heaters; in fact, the lease prohibited the use of such appliances on the premises. A paragraph near the end of the trial court's order granting summary judgment provided:

> The element of foreseeability must be present in order to find negligence. Arkansas Model Jury Instructions AMI 302 defines Negligence as "the act must be one from which a reasonably careful person would foresee such an appreciable risk of harm to others as to cause him not to do the act or to do it in a more careful manner." In this case, the element of foreseeability is lacking and summary judgment is appropriate.

We interpret the trial court's order as accepting that the landlords had a duty to provide heat but then concluding it was not reasonably foreseeable that the breach of that duty would result in burn injuries to Brandy from a space heater. In other words, the controlling inquiry for the trial court under the circumstances presented to it and for our court on appeal was not whether the landlords had a duty to provide heat—that duty and the fact the landlords received notice the heater was broken were not disputed for purposes of summary judgment. Rather, the controlling issue became whether Brandy's injuries from the space heater were foreseeable when the landlords failed to fix the broken heater. The trial court found the injuries were not foreseeable.

In arguing that the trial court erred regarding foreseeability, Amber draws the following sequence of events, contending it leads to negligence liability for the landlords: the landlords' breach of duty by not fixing the broken heating equipment caused the need to purchase space heaters that then resulted in Brandy's dress catching fire and causing serious burns. We do not find the argument convincing.

The trial court discussed a case from the state of Washington, *Cook v. Seidenverg*, 217 P.2d 799 (Wash. 1950), which had a remarkably similar factual setting. The *Cook* court concluded the landlords could not have foreseen that if they failed to provide adequate heat, the tenants would sustain injuries from the use of space heaters. The *Cook* case is obviously not controlling, but the facts are so similar that it provides a helpful analogy. Even though the opinion was primarily premised on a lack of proximate cause, the Washington court explained the role "foreseeability" has in that analysis:

> By "intervening act or force" we are not referring to the mere act of the mother in obtaining and utilizing a portable electric heater. That act may well be

> regarded as part of a natural and continuous sequence resulting from respondents' failure to provide heat. But we know that there must have been some additional and further act or force in operation here, since the normal use of such electrical appliances rarely results in accidents of this kind. The pleadings are silent as to exactly how the accident occurred, and so we are not informed as to the precise nature of the intervening act or force. But we do know that it must have been due either to the negligence of the mother in placing the heater in a position of danger, or in knowingly using a defective heater, or in failing to supervise the child's use of the heater; or the act of the child, independent of any negligence, in coming in too close proximity to the heater; or a latent defect in the heater which caused the child's clothes to ignite; or some other intervening circumstance of like nature.
>
> In our opinion, any of these circumstances must, under the facts of this case, be held to constitute a superseding cause of harm within the meaning of that term as defined above. Instances of negligence in the use of such portable heaters with resulting injuries of the kind suffered here, are relatively infrequent. Cases where the use of such heaters results in such injuries independent of any act of negligence are even more rare. Accordingly, respondents are not chargeable with foreseeing that, if they failed to provide adequate heat, injuries resulting from the negligence of tenants in using such heaters, or resulting from other forces independent of negligence, would occur.
>
> Where such intervening act or force is not reasonably foreseeable, it must be regarded as a superseding cause negating the claim of proximate or legal cause.

Cook, 217 P.2d at 263-64.

The appellate court in *Cook* assumed the landlord had an obligation independent of the city ordinance to furnish a reasonable amount of heat; that the landlord failed to do so; and that the failure constituted negligence.[1] With respect to whether that negligence was the proximate or legal cause of the injury, however, the opinion concluded the negligence was not a proximate cause of the injury and therefore could not provide a basis for landlord liability. The opinion further explained that considerations of justice and public policy require that a certain degree of proximity exist between the act done or omitted and the

[1]Here, again, the landlords did not dispute their duty to provide heat for purposes of the summary judgment.

harm sustained before legal liability may be predicated upon the "cause" in question. It is only when this necessary degree of proximity is present that the cause, in fact, becomes a legal, or proximate, cause; that cause which, in a natural and continuous sequence unbroken by any new, independent cause, produces the event, and without which that event would not have occurred. The *Cook* court concluded that the injuries in question were the result of an intervening act or force constituting a new cause independent of respondents' act of negligence.

Similarly, here the landlords acknowledged it was foreseeable Barbara might buy a space heater when the heating system did not work. It does not follow, however, that it was also foreseeable Barbara's grandchild would suffer burn injuries from the use of such space heaters. To constitute negligence, an act must be one from which a reasonably careful person would foresee such an appreciable risk of harm to others as to cause the person not to do the act or to do it in a more careful manner. *Coca-Cola Bottling Co. v. Gill*, 352 Ark. 240, 100 S.W.3d 715 (2003). A defendant is under no duty to guard against risks it cannot reasonably foresee. *Id.* Harm that is merely possible is not necessarily reasonably foreseeable. *Id.* Foreseeability is an element in the determination of whether a person is liable for negligence and has nothing whatsoever to do with proximate cause. *Hartsock v. Forsgren, Inc.*, 236 Ark. 167, 365 S.W.2d 117 (1963). "Moreover, when the voluntary acts of human beings intervene between the defendant's act and the plaintiff's injury, the problem of foreseeability is still the same: Was the third person's conduct sufficiently foreseeable to have the effect of making the defendant's act a negligent one?" *Id.* at 169, 365 S.W.2d at 118. Without foreseeability, the element of proximate cause is negated. *See Cook*, *supra.*

Here, reasonable minds could not reach a different conclusion about the lack of foreseeability under the facts of this case. We therefore agree with the trial court that no genuine issues of material fact exist in this case and that the landlords are entitled to judgment as a matter of law.

Affirmed.

GRUBER, C.J., and MURPHY, J., agree.

Taylor King Law, by: *Kenneth J. Mitchell*, for appellant.

Watts, Donovan & Tilley, P.A., by: *Richard N. Watts* and *Staci Dumas Carson*, for appellees.