United States Court of Appeals for the Fifth Circuit

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Fifth Circuit
FILED
June 2, 2021
Lyle W. Cayce
Clerk

No. 20-10523

DIANE E. LIFSHEN, *as Executor of* THE ESTATE OF JAY LIFSHEN,

Plaintiff—Appellant,

versus

20/20 ACCOUNTING SOLUTIONS, L.L.C.,

Defendant—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:18-CV-3310

Before OWEN, *Chief Judge*, CLEMENT and HIGGINSON, *Circuit Judges*.

PER CURIAM:*

Dr. Jay Lifshen ("Dr. Lifshen") sued 20/20 Accounting Solutions for its failure to pay annual premiums on a life insurance policy in Dr. Lifshen's name; his widow, Diane Lifshen ("Ms. Lifshen") was substituted, as executrix of his estate, when he passed away in 2018. Because the premiums were not paid, the policy lapsed, and Ms. Lifshen could not collect on it when

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

Dr. Lifshen died. Ms. Lifshen brought claims for breach of contract and negligence. The district court granted summary judgment for 20/20 on all claims. We AFFIRM with respect to the breach of contract claims, but REVERSE and REMAND with respect to the negligence claim based on a theory of negligent undertaking.

I. Facts and Proceedings

Dr. Lifshen was a podiatrist with Podiatric Medical Partners of Texas, P.A. ("PMPT"). PMPT contracted with 20/20 Accounting Solutions to perform administrative tasks, including to "[n]egotiate preferred pricing for employee benefits, i.e. . . . Life Insurance" and to pay certain bills on PMPT's behalf.

Dr. Lifshen maintained two life insurance policies, with account numbers ending in 1442 (the "1442 policy") and 1750 (the "1750 policy"). According to an affidavit by Ms. Lifshen, 20/20 handled annual premium payments on these policies. The 1750 policy provided $1,000,000 in coverage. Dr. Lifshen received a letter dated August 5, 2016, informing him that the annual premium on the 1750 policy was overdue as of August 4. The letter indicated there was a grace period until September 9, 2016, but coverage would terminate if Dr. Lifshen failed to make payment before then. Dr. Lifshen sent the invoice for the 1750 policy to 20/20 on August 23, 2016; 20/20 informed him that the check had cleared on August 3, 2016.

Unfortunately, this was inaccurate. The check that had cleared on August 3 was the premium payment for the 1442 policy. Neither Dr. Lifshen nor 20/20 took any further action with respect to the 1750 policy, so it lapsed on September 9. Dr. Lifshen and 20/20 worked together to try and get the policy reinstated, but, because Dr. Lifshen had been diagnosed with lymphoma in 2012, he was considered non-insurable. The insurance company declined to reinstate the policy.

Dr. Lifshen sued 20/20 for breach of contract, negligence, and mental anguish, emotional distress, and pain and suffering. Ms. Lifshen was substituted, as executrix of Dr. Lifshen's estate, when he died in September 2018. The parties filed cross motions for summary judgment, and the district court granted judgment for 20/20. The district court held that there could be no breach of contract because Dr. Lifshen was not a party to the contract between PMPT and 20/20. *Lifshen v. 20/20 Acct. Sols., LLC*, 458 F. Supp. 3d 534, 539–40 (N.D. Tex. 2020). The court also held that there could be no implied contract because Dr. Lifshen had, individually, provided no consideration to 20/20 and the statute of frauds requires a contract to answer for the debts of another to be in writing. *Id.* at 540 & n.15 (citing TEX. BUS. & COMM. CODE § 26.01).

Next, the district court held that Ms. Lifshen had failed to establish any duty 20/20 owed to Dr. Lifshen, so 20/20 was not liable for negligence. *Id.* at 541–42. The district court also addressed a theory of negligent undertaking, finding that Ms. Lifshen had not shown evidence that Dr. Lifshen had relied upon 20/20's undertaking nor that 20/20's failure had increased the risk of a relevant harm to Dr. Lifshen. The district court also held, as an independent ground for granting summary judgment on Ms. Lifshen's negligence claims, that Dr. Lifshen was more than 50% responsible for the harm because he should have realized the check that cleared the bank on August 3 could not have been payment on an account that was overdue as of August 5. *Id.* at 545. Ms. Lifshen timely appealed.

II. STANDARD OF REVIEW

This court reviews a grant of summary judgment de novo, applying the same standard as the district court. *See Hyatt v. Thomas*, 843 F.3d 172, 177 (5th Cir. 2016). Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment

as a matter of law." FED. R. CIV. P. 56(a). A disputed fact is material if it "might affect the outcome of the suit under the governing law[.]" *Hyatt*, 843 F.3d at 177 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

III. DISCUSSION

Although the district court correctly dismissed Ms. Lifshen's contract claims because there was no contractual relationship between Dr. Lifshen and 20/20, the district court erred in dismissing Ms. Lifshen's negligence claim based on a theory of negligent undertaking. Ms. Lifshen has presented sufficient evidence to create a genuine dispute of material fact precluding summary judgment on a negligent undertaking theory.

A.

We address Ms. Lifshen's contract claim first. A breach of contract claim in Texas requires a plaintiff to show "(1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages sustained as a result of the breach." *Davis v. Tex. Farm Bureau Ins.*, 470 S.W.3d 97, 104 (Tex. App.—Houston 2015, no pet.). Here, there is no valid contract between Dr. Lifshen and 20/20.[1]

Although Dr. Lifshen's name appears on the signature page of the contract between PMPT and 20/20, he signed as the "duly authorized representative[ ]" of PMPT in his capacity as then-president of the practice. The practice is a distinct entity and any duty 20/20 had to handle premium payments was owed to PMPT, not to Dr. Lifshen.

[1] And as the district court noted—and Ms. Lifshen does not dispute—"the estate has not raised any third-party beneficiary theory that would extend any contractual obligations to parties other than" 20/20 and PMPT. *Lifshen*, 458 F. Supp. 3d at 539.

Ms. Lifshen argues that there was at least an implied in fact contract, but there are two problems with this theory. First, Dr. Lifshen did not individually offer any consideration to 20/20. "The elements of a contract, express or implied, are identical" in Texas. *Plotkin v. Joekel*, 304 S.W.3d 455, 476 (Tex. App.—Houston 2009, pet. denied) (quoting *Univ. Nat'l Bank v. Ernst & Whinney*, 773 S.W.2d 707, 710 (Tex. App.—San Antonio 1989, no writ)). Without mutuality of obligation, there is no contract. *In re 24R, Inc.*, 324 S.W.3d 564, 567 (Tex. 2010). Darren McNutt, president of 20/20, swore in an affidavit that "Dr. Lifshen did not make any payments to 20/20 or provide any other compensation or consideration to 20/20 at any time." Ms. Lifshen does not point to any counterevidence. Without consideration from Dr. Lifshen, there is no implied in fact contract.

Second, the district court and 20/20 point out that the Texas statute of frauds requires an agreement by one party to pay another's debt to be in writing. *Lifshen*, 458 F. Supp. 3d at 540; *see also* TEX. BUS. & COMM. CODE § 26.01 ("[A] promise by one person to answer for the debt, default, or miscarriage of another person" is not enforceable "unless the promise or agreement, or a memorandum of it, is . . . in writing."). Ms. Lifshen has produced no such written agreement between Dr. Lifshen and 20/20.

Without evidence of a contract between Dr. Lifshen and 20/20, neither Dr. Lifshen nor his estate can maintain a breach of contract claim against 20/20 as a party to the contract. The district court did not err in dismissing Ms. Lifshen's contract claim.

B.

The district court did, however, err in dismissing Ms. Lifshen's negligence claim based on a theory of negligent undertaking.

Ms. Lifshen argued that 20/20 was negligent under either a general theory of negligence or a theory of negligent undertaking. To prove a

negligence claim in Texas, a plaintiff must "produce evidence of a duty, a breach of that duty, proximate cause[,] and damage." *Colvin v. Red Steel Co.*, 682 S.W.2d 243, 245 (Tex. 1984). The challenge here is the duty element. Ms. Lifshen's general negligence theory fails because "Texas law generally imposes no duty to take action to prevent harm to others absent certain special relationships or circumstances." *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 837 (Tex. 2000). Ms. Lifshen asserts that a duty to use ordinary care arose from the contractual relationship between Dr. Lifshen and 20/20, but, as discussed above, no such contractual relationship existed.

However, a duty to exercise due care may arise nonetheless when a defendant voluntarily undertakes to perform a service for another. Under a negligent undertaking theory, 20/20 may be liable if "(1) the defendant undertook to perform services that it knew or should have known were necessary for the plaintiff's protection; (2) the defendant failed to exercise reasonable care in performing those services; and [(3)] either (a) the plaintiff relied upon the defendant's performance, or (b) the defendant's performance increased the plaintiff's risk of harm." *Nall v. Plunkett*, 404 S.W.3d 552, 555–56 (Tex. 2013) (per curiam).

The district court held that this theory failed under the third prong because there was no evidence that Dr. Lifshen had relied on 20/20, nor that 20/20's inaction had increased Dr. Lifshen's risk of a cognizable harm. *Lifshen*, 458 F. Supp. 3d at 544–45. We disagree.

Reviewing a motion for summary judgment, "[w]e 'view the evidence in the light most favorable to the nonmovant and draw all reasonable inferences in the nonmovant's favor[.]'" *Adams v. Alcolac, Inc.*, 974 F.3d 540, 543 (5th Cir. 2020) (quoting *Star Fin. Servs., Inc. v. Cardtronics USA, Inc.*, 882 F.3d 176, 179 (5th Cir. 2018)). Here, it does not appear the district court properly indulged such reasonable inferences.

Ms. Lifshen has produced emails requesting that 20/20 pay the premiums and a response from 20/20 indicating that it had been taken care of. She also produced follow-on emails from 20/20 to Dr. Lifshen apologizing for the oversight (rather than indicating that 20/20 had no role in paying the premiums) and promising to work with the insurer to correct the issue. The parties do not dispute that Dr. Lifshen's reliance on 20/20 to pay his bills was not *entirely* misplaced, insofar as 20/20 *did* pay the premium on the 1442 policy. We also know from the record that the 1750 policy had been in force since at least 2009, and Ms. Lifshen produced an affidavit indicating that having 20/20 handle the payments was the "usual custom and practice" between Dr. Lifshen and 20/20. Although we have no evidence to firmly indicate how prior year payments were handled, a factfinder could reasonably infer that Ms. Lifshen's assertion is accurate and that Dr. Lifshen had, both in the past and on this occasion, relied on 20/20 to handle premium payments for him.[2]

C.

Finally, we address the district court's conclusion that Dr. Lifshen was more than 50% at fault for the loss of the policy because he should have

[2] Because it is sufficient for us to find that there is a genuine dispute of material fact on the question of reliance, we do not address the alternative third prong issue of whether 20/20's alleged negligence "increased the plaintiff's risk of [a cognizable] harm," other than to note the distinction between this case, in which a pre-existing life insurance policy was lost, and the case the district court relied on—*Colonial Savings*—in which there never was an insurance policy in the first place. *See Lifshen*, 458 F. Supp. 3d at 544–45 (relying on *Colonial Savings*); *see also Colonial Savs. Ass'n v. Taylor*, 544 S.W.2d 116 (Tex. 1976). Furthermore, we have not been shown that Texas courts limit negligent undertaking liability only to circumstances when physical injury results. *Cf. Coachmen Indus. v. Willis of Ill., Inc.*, 565 F. Supp. 2d 755, 777 (S.D. Tex. 2008) (noting that 'Texas courts of appeals have yet to agree whether the Texas Supreme Court has expressly adopted § 323 of the Restatement, or whether it has established a broader common law of voluntary undertaking'). The district court is free to revisit this question, at its discretion, on remand.

known that a check that cleared the bank on August 3 would not likely have been related to a bill that was dated August 5. Texas's proportionate responsibility statute bars recovery to a tort claimant "if his percentage of responsibility is greater than 50 percent." TEX. CIV. PRAC. & REM. §§ 33.001–33.002.

However, as noted above, it is unclear to what extent Dr. Lifshen had a longstanding history of relying on 20/20 to ensure that his life insurance premiums were timely paid. It is also unclear how the district court determined that Dr. Lifshen's oversight was greater than 20/20's, particularly in light of Ms. Lifshen's affidavit indicating that the usual course of business between Dr. Lifshen and 20/20 was for 20/20 to handle such bills in accordance with industry norms.[3] Proportionate responsibility requires further factual development on remand.

We note one wrinkle: the district court determined that Dr. Lifshen was more than 50% responsible "as fact finder in this proceeding." *Lifshen*, 458 F. Supp. 3d at 545. This case was scheduled to be tried as a bench trial, and "this circuit has arguably articulated an even more lenient standard [than de novo] for summary judgment in certain nonjury cases." *Philips Oil Co. v. OKC Corp.*, 812 F.2d 265, 273 n.15 (5th Cir. 1987). A judge, "as trier of fact," may be "in a position to . . . draw his inferences without resort to the expense of a trial," so long as there are no issues of witness credibility or disputed "evidentiary facts" that would preclude the judge from drawing factual inferences. *Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1124 (5th Cir. 1978).

[3] For example, that the August 3 check and the August 5 letter were separated by only two days *could* make Dr. Lifshen's apparent assumption that the insurance company's system had not yet updated to reflect the payment reasonable.

We need not decide what precise standard of review applies to the district court's proportionate responsibility finding. In her opposition to summary judgment, Ms. Lifshen provided *testamentary* evidence regarding the ordinary course of dealings between the parties. Insofar as a finding of proportional responsibility relies on the nature of Dr. Lifshen's prior dealings with 20/20, the extent of his reliance on 20/20 to handle premium payments, and his own savvy with regard to bill payments (for example, how readily he could reasonably be expected to have caught that a check that cleared on August 3 was unlikely to be related to a bill dated August 5), Ms. Lifshen's testimony is likely to be important. The district court was therefore not yet in a position to forego the factfinding associated with a trial that would permit her to provide such testimony and have it examined.

IV. Conclusion

For the reasons stated above, we AFFIRM the district court's grant of summary judgment with respect to the breach of contract claim, but REVERSE and REMAND with respect to the negligence claim based on a theory of negligent undertaking.