STATE OF MICHIGAN

COURT OF APPEALS

MARGARET NAGLER,

Plaintiff-Appellant,

v

JENNIFER HUNT and MATTHEW SCOTT HUNT, d/b/a HUNT MEADOWS FARM

Defendants-Appellees.

UNPUBLISHED
March 13, 2014

No. 314014
Livingston Circuit Court
LC No. 11-026314-CK

Before: DONOFRIO, P.J., and SAAD and METER, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting partial summary disposition to defendants. We affirm.

Plaintiff, a horseback-riding instructor, entered into a contract with defendants in order to board her two horses at defendants' stables. A fire occurred on March 23, 2011, and, despite rescue attempts by defendants, one of plaintiff's horses died in the fire. Plaintiff filed suit, alleging six counts worded as follows: (1) for declaratory relief that the contract is void, (2) gross negligence, (3) violation of the Michigan Consumer Protection Act, MCL 445.901 *et seq*., (4) breach of contract—bailment, (5) breach of contract—failure to return funds, and (6) general breach of contract whereby defendants acted in their own interests above plaintiff's. Defendants moved for summary disposition under MCR 2.116(C)(7) and (8), and the trial court granted the motion regarding Count I but denied, without prejudice, the motion as it pertained to the remaining counts. Defendants filed another motion for summary disposition under MCR 2.116(C)(7), (8), and (10). The trial court (a different judge at this point) granted the motion with regard to counts II, III, IV, and VI and granted judgment for plaintiff on Count V, awarding her $500 to compensate her for unused rent money. The court stated that its partial grant of summary disposition was under MCR 2.116(C)(10).

Plaintiff first argues that the provision for attorney fees in the contract between the parties is unenforceable. However, this issue is not properly before this Court. The trial court made a ruling below regarding certain case-evaluation sanctions but specifically stated at the January 10, 2013, motion hearing that it was "not [going to] rule on the issue of attorney fees now." As such, the present issue is not ripe for review. See *Hendee v Putnam Twp*, 486 Mich 556, 586; 786 NW2d 521 (2010) (discussing ripeness).

Plaintiff next argues that the lower court should not have allowed defendants to file a motion for summary disposition under MCR 2.116(C)(10) when they had already done so and had had the motion denied. Plaintiff's argument is disingenuous on its face, because defendants' first motion was filed under MCR 2.116(C)(7) and (8), not (C)(10).[1] At any rate, the order entered after the first motion specifically stated that "Defendants' motion for Summary disposition is granted as to Count I and denied as to the other Counts *without prejudice*" (emphasis added). As such, the trial court explicitly indicated that defendants could refile a motion for summary disposition of the remaining claims. See *Stewart v Michigan Bell Telephone Co*, 39 Mich App 360, 367-368; 197 NW2d 465 (1972) (discussing the meaning of the phrase "without prejudice"). Given the circumstances, the trial court acted within its discretion in entertaining defendants' motion. See, e.g., MCR 2.116(D)(4).

Plaintiff lastly argues that the trial court erred in granting summary disposition with regard to counts II, IV, and VI.

> In reviewing a motion for summary disposition under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. [*Koenig v South Haven*, 460 Mich 667, 674; 597 NW2d 99 (1999) (internal quotation marks and citation omitted).]

The boarding contract contains a waiver provision applying to any ordinary negligence of defendants. The contract specifically states that defendants are released from liability concerning any damages to horses caused by, among other things, fire, "except if directly caused by Stable's gross negligence or wanton and willful misconduct."

"Gross negligence" involves conduct so reckless that it demonstrates a substantial lack of concern with regard to whether an injury will result. See, e.g., *Chelsea Investment Grp, LLC v Chelsea*, 288 Mich App 239, 265; 792 NW2d 781 (2010). "Wanton and willful" misconduct represents an even higher standard for a plaintiff to overcome. See *American Alternative Ins Co, Inc v York*, 252 Mich App 76, 79; 650 NW2d 729 (2002). There is simply no genuine issue of material fact regarding whether defendants acted with gross negligence or wanton and willful misconduct. The insurance company concluded that the fire was most likely accidental and caused by "spontaneous heating of . . . hay." Defendants took quick action upon discovering the fire and as a result saved many of the horses. As noted by the trial court, "the Plaintiff has provided no evidence that the Defendants simply did not care about the safety and welfare of Plaintiff's personal property." Plaintiffs have presented no evidence of gross negligence or

[1] Plaintiff appears to be arguing that the first motion was, despite labels, actually a (C)(10) motion.

wanton and willful misconduct. As such, the release provision applied and reversal is unwarranted.

Affirmed.

/s/ Pat M. Donofrio
/s/ Henry William Saad
/s/ Patrick M. Meter