VERMONT SUPERIOR COURT

SUPERIOR COURT
Windsor Unit

CIVIL DIVISION
Docket No. 497-9-11 Wrcv

Concord General Mutual Insurance Co.
Plaintiff

v.

Nathan Gritman et al.
Defendant

DECISION ON MOTION FOR SUMMARY JUDGMENT

Defendant Kevin Spear has moved for summary judgment in this claim arising out of a fire loss at a home owned by Kevin and Linda Flanagan and insured by the Plaintiff. Concord General opposes the motion.

Factual Background

Kevin Spear is one of several young people alleged to be liable for a fire which occurred at the Flanagan's second home in Ludlow, Vt. on May 27, 2009. Plaintiff alleges a chiminea used by some of the defendants caused a fire resulting in the destruction of the Flanagan house with damages exceeding $400,000. Plaintiff alleges liability in negligence on the part of the defendants based upon a theory of acting in concert.

Kevin Spear admits that he had been to the Flanagan house on prior occasions to "smoke weed or whatever" in the parking area. He admits he did not have the Flanagan's permission to do so. He further admits that he brought co-defendant Nick Sweet to the house on the night of November 27, 2009, stayed in the driveway about ten minutes, dropped off Sweet, and then left. The fire occurred sometime after Spear had departed. Spear claims he never left his car on the night of November 27, 2009 and had no involvement in starting the fire or in providing materials to do so.

Several of the other defendants later spoke with a police officer, Sgt. Matthew Nally, of the Ludlow Police Department. One of those who spoke to him was Elizabeth Plude. Ms. Plude provided Sgt. Nally with a sworn verbal statement in which she claims Kevin Spear had shown her the Flanagan house on a prior occasion and referred to it as his "smoking house." On the evening in question, Plude stated she walked to the house with some others after being invited to do so by Spear. Upon arrival, she found Spear and two other men sitting in Spear's car in the Flanagan's driveway. Ms. Plude claims it was getting cold and a decision was made to start a fire in the chiminea. She claims the fire was started using paper from Spear's car and brush found at the site.

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Spear argues the Court can not consider the statements made by Plude to Sgt. Nally and recounted in his affidavit, claiming that they are hearsay and inadmissible. Concord claims the statements made by Plude are admissible as statements by a co-conspirator.

Standard of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, referred to in the statements required by Rule 56(c)(2), show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." V.R.C.P. 56(c)(3). The party moving for summary judgment has the burden of demonstrating that no genuine issue of material fact exists and that he is entitled to judgment as a matter of law. *Price v. Leland*, 149 Vt. 518, 521 (1988). The non-moving party has the burden of setting forth specific facts showing a genuine dispute for trial. V.R.C.P. 56(e). The purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986) (citation omitted). Summary judgment is mandated where the non-moving party fails to make a showing sufficient to establish the existence of an element essential to his or her case, and on which she has the burden of proof at trial. *Poplaski v. Lamphere*, 152 Vt. 251, 254–55 (1989); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Discussion

Concord General does not claim, and apparently has no evidence, that Kevin Spear started the fire on the night in question. It claims liability on his part based upon a theory of acting in concert, which it equates in its opposition memorandum with a theory of conspiracy. The two concepts are distinct and are not interchangeable.

A civil conspiracy involves a combination of two or more persons acting to accomplish a purpose that is unlawful or oppressive or to accomplish some purpose, not in itself unlawful, oppressive or immoral, by unlawful, oppressive or immoral means, to the injury of another. *Davis v. Vile*, No. 2002-465, 2003 WL 25746021 (Vt. Mar. 2003) (unpub. mem.).

On the other hand, liability due to acting in concert is governed by the Restatement (Second) of Torts § 876 which states:

> § 876. Persons Acting In Concert
>
> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he
> (a) does a tortious act in concert with the other or pursuant to a common design with him, or
> (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
> (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

Vermont has adopted § 876 in *Lussier v. Bessette*, 2010 VT 104, 189 Vt. 95.

To be conspiratorial, an act must involve a purpose which is unlawful or oppressive or employ an unlawful, immoral, or oppressive means to accomplish a purpose. This is quite different than acting tortuously in concert with another or substantially assisting another in tortious conduct. Many torts, including the instant claim, involve allegations of negligence, the failure to act with due care. *Thurber v. Russ Smith, Inc.*, 128 Vt. 216 (1969). Negligence does not require unlawfulness, oppression, or immorality.

Concord General's reliance on conspiracy as a grounds for admission of the statements by Plude is therefore misplaced for several reasons. First, it is clear from Concord's complaint (see ¶¶ 21-23), and its response to the summary judgment motion, that they claim liability based upon acting in concert, not upon a civil conspiracy theory (if Vermont recognizes civil conspiracy as a separate claim at all). Secondly, to be admissible as statements of co-conspirators, as alleged by Concord General under V.R.E. 801(d)(2)(E)[1] the statements must be made during the course of and in furtherance of the conspiracy. The statements of Plude relied upon by Concord General were made to Det. Nally on July 15, 2009, almost two months after the fire at the Flanagan home. The statements do not appear to have been made during the course of the conspiracy and admission under V.R.E. 801(d)(2)(E) seems unlikely.

However, both parties seem to overlook that Det. Nally's affidavit indicates the statement by Plude was a "sworn verbal recorded statement." Det. Nally is merely reciting in his affidavit information contained in a first-person sworn statement. There would be no question the Court could consider the sworn statements of Plude against Spear had Concord General provided the Court with a copy of the tape rather than Det. Nally's recitation of what is on the tape. Whether the tape itself is admissible at trial is dependent upon a number of factors not necessary for consideration here but certainly Ms. Plude could appear at trial and testify to the things she alleges in her statement. In other words, the information contained in the tape is information that can be presented in an admissible form. See V.R.C.P. 56 (c)(1)(B)(2); *Johnson v. Harwood,* 2008 VT 4, 183 Vt. 157. Therefore, the Court does not believe the outcome of this summary judgment motion should turn on the failure to provide the sworn taped statement itself where the referenced statements have been made upon personal knowledge and sworn to by the person making them.[2]

With consideration of the statements made by Plude, disputed facts exist sufficient to deny the summary judgment motion. Ms. Plude claims she was invited to the property that evening by Spear, that materials used to start the fire came from his car, and that he was at least present when the decision was made to start the fire. By his own admission, Spear had trespassed upon the Flanagan property previously and also on the night of the fire.

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[1] Concord General cites to 801(d)(2)(A) in claiming that the statements of Plude are admissible against Spear. The statements of each party opponent are admissible against them under 802(d)(2)(A). There is no suggestion that statements made by any of the defendants were made a in representative capacity for other defendants as would be necessary for admission under 802(d)(2)(A).

[2] If Spear contests that the recorded statement is unsworn or does not contain the statements attributed to Plude by Det. Nally, he may file a motion to reconsider.

There are contested issues of material fact upon which liability on the part of Spear might exist under § 876 of the Restatement (Second) of Torts. Accordingly, Spear's motion for summary judgment must be denied. *Messier v. Metropolitan Life Insurance Co.*, 154 Vt. 406 (1990).

ORDER

For the reasons stated herein, Kevin Spear's motion for summary judgment is **DENIED**.

Dated at Woodstock this 15th day of November, 2012.

Harold E. Eaton, Jr.
Civil Division Judge

FILED

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