SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NOS. A-4025-15T1
A-4100-15T1

FRANKLIN MUTUAL INSURANCE COMPANY, as subrogee of M.E.S.,

Plaintiff-Appellant,

v.

K.N.,

Defendant,

and

B.D.,

Defendant-Respondent,

and

GREATER NEW YORK INSURANCE COMPANY, as subrogee of RAVENS CREST EAST AT PRINCETON MEADOWS,

Plaintiff-Respondent,

v.

B.D.,

Defendant-Respondent.

FRANKLIN MUTUAL INSURANCE
COMPANY, as subrogee of
M.E.S.,

Plaintiff-Respondent,

v.

K.N.,

Defendant,

and

B.D.,

Defendant-Respondent,

and

GREATER NEW YORK INSURANCE
COMPANY, as subrogee of
RAVENS CREST EAST AT PRINCETON
MEADOWS,

Plaintiff-Appellant,

v.

B.D.,

Defendant-Respondent.

Argued December 19, 2017 – Decided January 26, 2018

Before Judges Hoffman, Gilson and Mayer.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Docket Nos. L-4892-12 and L-3238-13.

Matthew G. Minor argued the cause for appellant Franklin Mutual Insurance Company in

A-4025-15 and respondent Franklin Mutual Insurance Company in A-4100-15 (Sweet Pasquarelli, PC, attorneys; Matthew G. Minor, on the briefs).

Allan Maitlin and Peter A. Greene argued the cause for appellant Greater New York Insurance Company in A-4100-15 and respondent Greater New York Insurance Company in A-4025-15 (Sachs, Maitlin, & Greene, attorneys; Allan Maitlin and Peter A. Greene, of counsel and on the briefs; Christopher Klabonski, on the briefs).

John J. Kapp argued the cause for respondent B.D. (Gregory P. Helfrich & Associates, attorneys; John J. Kapp, on the brief).

PER CURIAM

Plaintiffs Franklin Mutual Insurance Company (Franklin Mutual) and Greater New York Mutual Insurance Company (New York Mutual) appeal from the February 22, 2016 Law Division order granting summary judgment dismissal of their negligence claims against defendant B.D. (defendant), and denying their cross-motions for summary judgment and Franklin Mutual's motion for attorneys' fees. For the following reasons, we affirm.

I

Defendant is the mother of two daughters: Katrina, born in 1970, and Gertrude, born in 1966.[1] Defendant has resided in Florida since approximately 2003.

[1] We refer to defendant's daughters by pseudonyms to protect their privacy.

In October 2008, defendant's daughters lived in Levittown, Pennsylvania. At that time, Gertrude became concerned with Katrina's behavior, and completed an application for her to receive an "involuntary emergency [mental health] examination." On the application, Gertrude described Katrina's behavior, writing:

> My sister called me [tonight] because she needed to cash a check. She stated that the neighbors were following her. I bring her food and she feels there is something wrong with it. She has written on the walls[: "]Drugs are bad. [Vietnam] is not my fault.["]
>
> . . . .
>
> [Katrina] feels that people poison her water and [there] is morphine in the water. She runs a hose across her lawn and lets it run for . . . hours to empty the lines. She has hammered holes in the walls and all of the kitchen cabinets because the morphine made her do it. She has written on the outside of the house vulg[a]r statements. She calls the police numerous times. She broke glass all in the street. She has lost some weight. She has taken apart lighting units because things are dripping from the lights . . . . She has burns on the carpet from lighting off flare guns in the house.

Before receiving the treatment Gertrude sought, Katrina borrowed her neighbor's car allegedly to run some "errands." Instead, she drove the car to Clifton, where she stayed at a hotel and covered the windows with bedsheets. When police found her on October 5, 2008, Katrina "did not appear to understand her

circumstances, but was cooperative to leave the hotel." The police brought Katrina to Hunterdon Medical Center, where her medical records indicate that she had been admitted to a psychiatric hospital five years earlier; this was because Katrina was "anxious that [her] ex-husband's girlfriend" and another individual "were stalking [her]."

Later that same day, the Hagedorn Psychiatric Hospital admitted Katrina and diagnosed her with "[b]ipolar disorder, manic, with psychotic-like symptoms." On July 6, 2009, the hospital discharged Katrina and listed her sister and mother as contacts on her discharge and aftercare plan. The plan also lists Katrina's discharge site as The Lamb Foundation (the Foundation), in North Wales, Pennsylvania. Upon entering the Foundation, Katrina signed a "program agreement," which stated:

> [The Foundation] is not a nursing home and does not provide any nursing services. The primary responsibility for your health care remains with you, and [the Foundation] is not responsible [for] providing physical or mental health care services. [The Foundation] is not connected with any physicians, hospital or other medical facility . . . . At your request, [the Foundation] may provide assistance with medication prescribed for you for self- administration. You agree to take all medications prescribed for you by your physicians. As an inducement to enable us to assist you, you hereby agree to release and forever discharge and indemnify [the Foundation] and its employees from all claims of any nature arising from or in connection

> with [the Foundation's] assistance with your medications.

Katrina remained at the Foundation until approximately April 2010; upon leaving, Katrina lived in a car and motels.

In June 2010, defendant bought a condominium in a thirty-building development that contained 612 dwelling units. The same month, defendant helped Katrina move into the condominium and furnished the unit for her.

Defendant testified she "bought the condo[minium]" because she "didn't want [Katrina] living in her car." Katrina "indirectly" paid defendant rent; instead of defendant giving Katrina an annual gift pursuant to defendant's estate plan, Katrina resided in the condominium without making rental payments. Defendant did not memorialize this agreement in a lease.

The police were called to Katrina's residence on several occasions between July and December 2010. On one occasion, during a "welfare check," a police officer reported that Katrina "immediately stated to [him] that she was doing fine and 'Charlie made me do it!' When asked who Charlie was, [Katrina] stated she did not know, but he made her do it." Katrina then asked the officer about a scar on his head, and stated "demons are attempting to get inside of [your] head, that [is] why the scar is there."

The officer indicated that "the [condominium] was very untidy and the water was running with no one in the kitchen. . . . [and t]he refrigerator was open . . . ." He further noted there were "[s]everal large holes in the sheetrock . . . and [Katrina] stated she did not know who did [it] or when it happened." The officer transported Katrina to Robert Wood Johnson University Hospital for a psychological evaluation.

On December 28, 2010, Katrina's neighbor drove home from work and saw Katrina standing outside of her condominium. The neighbor reported that Katrina "calmly" told her that her condominium was on fire, and when they opened the condominium door, they saw its interior engulfed in flames. They both went to the parking lot, where the neighbor called 9-1-1, and Katrina "calmly" told the neighbor, "Everything is going to be okay."

When a police officer arrived, Katrina stated that prior to the fire, "she had a drink of [vodka][, and] then lit a cigarette." At that point, "she believe[d] she fell asleep[,] and when she awoke the [condominium] was on fire." The police officer reported that upon further questioning, Katrina "had [no] idea who [he] was [and] could [not] give a legitimate answer to any question [he] asked."

A fire investigator conducted several interviews with Katrina. During one interview, Katrina stated:

> She was going to cook cookies and had put a cookie sheet in the oven. She said she had been having a problem with a proper heating temperature being maintained in the oven and had discussed this with her mother.
>
> She said there was a Chinese food take out bag holding garbage sitting on top of the counter to the left of the stove. She had emptied some cigarette butts into the bag earlier but only after putting some water in the food container/bag. She then stated she had lit a cigarette off of the stove burner and then went to lie down in the bedroom. She recalls hearing the smoke detector go off and getting up and seeing a fire in the kitchen from the area of the stove. She then left the [condominium].

The Plainsboro Township Fire Marshal concluded, "It appears [that] either the cigarettes were not completely extinguished thereby igniting the food bag, or the burner was left on[,] and by way of radiated heat[,] the bag ignited." The fire then spread to the other units. Ultimately, eight units "suffered heavy fire, smoke, [and/or] water damage," and four units "suffered moderate smoke [and/or] water damage." Plaintiffs insured two of those damaged units.

On January 3, 2011, defendant told a Princeton HealthCare System social worker she thought Katrina requires long-term hospital care because she "cannot manage on her own." Thereafter, Trenton Psychiatric Hospital admitted Katrina and diagnosed her with "[s]chizoaffective [d]isorder, [b]ipolar [t]ype."

Plaintiffs' subrogation claims followed, with each plaintiff filing a complaint seeking damages from defendant, asserting defendant negligently enabled her daughter to set fire to her condominium. The trial court consolidated the cases; after discovery, defendant moved for summary judgment. Plaintiffs' cross-moved for summary judgment on liability, and Franklin Mutual moved to assess defendant with attorneys' fees it incurred due to defendant's allegedly false testimony. After hearing oral argument, the trial court entered an order granting defendant's motion, and denying plaintiffs' cross-motions.

II

"[W]e review the trial court's grant of summary judgment de novo under the same standard as the trial court." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016) (citation omitted). Summary judgment must be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." Ibid. (quoting R. 4:46-2(c)).

If there is no genuine issue of material fact, we must then "decide whether the trial court correctly interpreted the law." DepoLink Court Reporting & Litig. Support Servs. v. Rochman, 430

N.J. Super. 325, 333 (App. Div. 2013) (citation omitted). We review issues of law de novo and accord no deference to the trial judge's legal conclusions. Nicholas v. Mynster, 213 N.J. 463, 478 (2013).

"To sustain a cause of action for negligence, a plaintiff must establish four elements: '(1) a duty of care, (2) a breach of that duty, (3) proximate cause, and (4) actual damages.'" Townsend v. Pierre, 221 N.J. 36, 51 (2015) (quoting Polzo v. Cty. of Essex, 196 N.J. 569, 584 (2008)). Whether a duty exists is a matter of law, Kernan v. One Washington Park Urban Renewal Assocs., 154 N.J. 437, 445 (1998), that poses "a question of fairness" involving "a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution." Kelly v. Gwinnell, 96 N.J. 538, 544 (1984) (quoting Goldberg v. Hous. Auth. of Newark, 38 N.J. 578, 583 (1962)).

The duty analysis is "rather complex . . . ." J.S. v. R.T.H., 155 N.J. 330, 337 (1998). "[I]n its determination whether to impose a duty, [a court] must also consider the scope or boundaries of that duty." Id. at 339. Moreover, the court must recognize "the more fundamental question [of] whether the plaintiff's interests are entitled to protection against the defendant's conduct." Id. at 338 (citation omitted). That assessment must include the relationship between the parties, "the defendant's

'responsibility for conditions creating the risk of harm,'" and "whether the defendant had sufficient control, opportunity, and ability to have avoided the risk of harm." Id. at 338-39 (citation omitted).

With respect to the nature of the risk, the court must consider both the "foreseeability and severity" of the "underlying risk of harm" and "the opportunity and ability to exercise care to prevent the harm." Id. at 337. To that end, "[t]he ability to foresee injury to a potential plaintiff is crucial in determining whether a duty should be imposed." Id. at 338 (citation omitted). The defendant must have actual knowledge or awareness of the risk of injury or constructive knowledge or awareness, which may be imputed when the defendant is "in a position to discover the risk of harm." Ibid. (citation omitted).

Here, plaintiffs primarily argue that because defendant rented her unit to her mentally ill daughter, defendant owed Katrina's neighbors a duty to protect them from Katrina's potentially destructive conduct. Plaintiffs further argue it was foreseeable that Katrina could cause property damage to adjoining condominium units.

We acknowledge that, in limited circumstances, our courts have imposed a duty to take reasonable action to guard against the acts of a third party. In J.S., for example, our Supreme Court

found a duty existed on the part of a wife to take reasonable actions to prevent her husband's sexual abuse of her neighbor's children. J.S., 155 N.J. at 334, 353-54. The Court found that the close relationship between the defendant and her neighbors, her knowledge of the considerable amount of time the girls spent with her husband, and her actual or constructive knowledge of her husband's "proclivities/propensities" made it "particularly foreseeable" that her husband was abusing the girls. Id. at 353.

Here, however, plaintiffs fail to demonstrate defendant had sufficient knowledge to impose such a duty. Although Katrina was clearly suffering from mental illness, several psychiatric hospitals released her without finding she posed a danger to herself, others, or property. As the motion judge emphasized, no qualified professional told defendant "or anyone else . . . that [Katrina] could not live alone, that she was a danger to herself or others[,] and that to do so would be devastatingly terrible . . . ."

Further, we are not persuaded defendant could reasonably foresee that her adult daughter would cause damage to her neighbor's property. Plaintiffs' references to Katrina repeatedly damaging her own property fail to convince us it was foreseeable she would damage adjoining units. The record contains no indication Katrina ever damaged another's property or set fire to

her condominium prior to the December 28, 2010 incident. Accordingly, we find no basis to impose a duty of care on defendant.

III

Alternatively, New York Mutual argues defendant is legally responsible for damages pursuant to the Maintenance of Hotel and Multiple Dwellings Act, N.J.S.A. 55:13A-1 to -28 (the Act),[2] citing our decision in Calco Hotel Management Group v. Gike, 420 N.J. Super. 495 (App. Div. 2011). In opposition, defendant argues New York Mutual failed to plead a statutory or regulatory basis for relief in its complaint, and first raised the claim when it filed its cross-motion for summary judgment. Defendant further argues the Act provides no basis for imposing liability upon her, under the facts of this case.

In Gike, we considered whether the Act's regulations, N.J.A.C. 5:10-1.1 to -28.1, imposed liability on the defendant for the acts of a third party, where the defendant rented a hotel room because her handyman needed to stay near a hospital while he recovered from a seizure. Gike, 420 N.J. Super. at 498-99. The

[2] New York Mutual also argues defendant "is liable for permitting an ultra[-]hazardous activity to occur on the rented premises." New York Mutual's argument lacks merit; it provides no authority holding that lighting stove burners and smoking cigarettes in a condominium constitute ultra-hazardous activities.

handyman, while intoxicated, brought a can of gasoline into the room, lit a cigarette, and started a fire that significantly damaged the hotel. Id. at 499-500.

We approved the grant of summary judgment to the owners of the hotel solely as to the finding that the renter of a hotel room was an "occupant" under N.J.A.C. 5:10-2.2 and -5.1. Id. at 503. However, we emphasized we were "not convinced the finding that Gike is an 'occupant' under the regulatory scheme in itself mandates" that the defendant "is liable as a matter of law for compensatory damages" for her handyman's actions at the hotel. Id. at 507. We therefore remanded the case for the trial court to address the issue of the defendant's liability for compensatory damages under the Act. As we noted, N.J.A.C. 5:10-5.5, entitled "Willful damage," provides that "[e]very occupant shall be liable for willfully or maliciously causing damage to any part of the premises which results in a violation of this chapter."

Here, the record reflects Katrina accidentally started the fire when she "used a range burner to light a cigarette. . . . [and] apparently did not turn off the burner" or left a Chinese food takeout bag "at or in close proximity to the [range] burner . . . ." We are not persuaded these actions demonstrate Katrina acted intentionally or with "an indifference to the consequences." Banks v. Korman Assocs., 218 N.J. Super.

370, 373 (App. Div. 1987); see also Steinberg v. Sahara Sam's Oasis, LLC, 226 N.J. 344, 363 (2016) (defining gross negligence as "fall[ing] on a continuum between ordinary negligence and recklessness, a continuum that extends onward to intentional conduct."). Accordingly, the motion judge did not err in rejecting New York Mutual's claim under the Act.

IV

Lastly, Franklin Mutual also argues defendant lied during her deposition testimony, entitling it to attorneys' fees. Although Franklin Mutual submits documents that raise questions as to the veracity of certain aspects of defendant's testimony, we are not persuaded the Law Division abused its discretion in declining to award attorneys' fees. See Litton Indus. v. IMO Indus., 200 N.J. 372, 386 (2009) (citation omitted) ("[A] reviewing court will disturb a trial court's award of counsel fees only on the rarest of occasions, and then only because of a clear abuse of discretion.").

Accordingly, we discern no basis to disturb the order under review.

Affirmed.