IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Jacqueline D. Cusic, independent executor of the estate of Kevin W. Hamblet, Plaintiff, v. Engie Retail, LLC d/b/a Think Energy; Entrust Energy East, Inc., a/k/a Entrust Energy; Energy Group Consultants, Inc.; Exclusive Mass Marketing Group, LLC; Ariel N. Gary, Jane Doe Defendants 1-2; Unknown Defendants 1-5, Defendants.	)	No. 19 L 9086

MEMORANDUM OPINION AND ORDER

Duty is typically a question of law for a court, but may depend on underlying questions of fact. In this case, questions of fact exist as to which corporate entity employed one of the defendants who assaulted the plaintiff's decedent. For that reason, the defendants' motions to dismiss are denied as is the plaintiff's summary judgment motion.

Facts

On September 6, 2016, Engie Retail, LLC, d/b/a Think Energy ("Think Energy") entered into a master services agreement with Entrust Sales Solutions, Inc. ("Entrust"). Under the agreement, Entrust agreed to provide residential customer acquisition services through door-to-door marketing for Think Energy. Specifically, Think Energy sought to get residential customers to switch their electrical supplier from Commonwealth Edison to Think Energy. The agreement recognized that Entrust was an independent contractor and that neither it nor its personnel were considered Think Energy's employees, partners, agents, or joint venturers. Further, Entrust assumed "full responsibility for the acts of [its] Personnel and for their supervision, daily direction and control. . . ." Finally, each party agreed to indemnify, defend, and hold the other harmless for all claims for personal injury related to the provision of services under the agreement.

On September 20, 2016, Entrust executed a door-to-door solicitation agreement with Energy Group Consultants, LLC ("EGC"). Under this

agreement, EGC agreed to manage the door-to-door campaign on Entrust's behalf. The agreement called for EGC to "recruit, employ, train and manage Vendor Personnel to perform the Services in a professional manner. . . ." EGC had full power, authority and control over its personnel, and EGC acknowledged that its employees were not Entrust employees. EGC also agreed to monitor its vendor personnel to ensure compliance with the agreement's requirements. Further, EGC agreed not to delegate or subcontract other than to EGC's wholly-owned subsidiaries. EGC remained responsible for all obligations under the agreement performed by permitted subcontractors.

On February 15, 2017, EGC executed an independent contractor agreement with Exclusive Mass Marketing Group ("EMMG"). The agreement recognized that EMMG was an independent contractor, and not an employee, servant, or agent of EGC. Under the agreement, "all persons hired by [EMMG] to assist in performing the tasks and duties necessary to complete the Scope of Work shall be the employees of [EMMG] unless specifically indicated otherwise in an agreement signed by all Parties." EMMG agreed to render services "in a professional and business-like manner, treat customers and potential customers with courtesy and respect. . . ." EGC waived any right to control or direct the details, manner, or means by which EMMG conducted its sales program.

EMMG hired Ariel Gary as a sales agent on the door-to-door campaign. On April 27, 2017, Gary executed a code of business conduct acknowledgment form supplied by EMMG. The form provided general guidelines for Gary acting either as an agent or an independent contractor. One of the acknowledgments was that Gary agreed not to engage in "harsh or unconscionable conduct. . . ."

On August 18, 2017, Gary and two other women knocked on the door of Kevin Hamblet's home on South Kingston Avenue in Chicago in hopes of getting Hamblet to switch his electrical provider from Commonwealth Edison to Think Energy. Gary and the other women were wearing Think Energy apparel, had identification cards, and were carrying company flyers. Gary and the other women asked Hamblet if he would be interested in changing his residential energy provider. Hamblet indicated that he was not interested. Gary tried, again, to pitch Think Energy's services, but Hamblet, again, refused.

Gary and the other two women did not accept Hamblet's rejection and would not leave his property. The confrontation apparently escalated quickly through verbal epithets—Hamblet allegedly calling Gary and the other two women bitches and whores—to Hamblet picking up a flowerpot and throwing

it at Gary. It is unclear whether the flowerpot struck Gary. Gary then threw her clipboard at Hamblet and punched him in the face. There is evidence in the record that Gary and Hamblet may have fallen into a bush during their struggle. At some point, Hamblet reached the sidewalk where he lost his balance and fell. Gary and the other two women proceeded to punch and kick Hamblet in the head, face, and body. As a result of the attack, Hamblet suffered zygomatic arch and orbital wall fractures to the head and had five of this teeth knocked out. Hamblet eventually escaped the melee by getting into a parked car. Hamblet subsequently died from causes unrelated to the August 18, 2017 events.

In September 2017, the State's Attorney charged Gary with five counts of aggravated battery in connection with the attack on Hamblet. *People v. Gary*, 17 CR 14965. On October 1, 2017, Chicago police arrested Gary on those charges. On October 24, 2018, Gary pleaded guilty to one count of aggravated battery and was sentenced to 24 months of probation.

On April 8, 2022, Cusic filed a two-count amended complaint against the defendants. Cusic alleges that at the time of Gary's assault on Hamblet, Gary was the defendants' employee, agent, servant, or contractor. Count one is a cause of action based on *respondeat superior*. Cusic alleges that Gary was the defendants' employee, agent, servant, or contractor and that Gary's assault was incidental to the purpose, course, and scope of her duties as the defendants' employee, agent, servant, or contractor. Cusic further alleges that each defendant is vicariously liable for the injuries Gary inflicted on Hamblet. Count two is styled as a cause of action for negligent training. Cusic alleged that each of the corporate defendants owed Hamblet a duty to train Gary and that each breached its duty by failing to train her properly.

Analysis

Think Energy's and EGC's Motions to Dismiss

Think Energy and EGC argue that neither can be held vicariously liable for Gary's assault on Hamblet because each owed him no duty. Whether a duty is owed typically presents a question of law for the court to decide. *See Choate v. Indiana Harbor Belt R.R.*, 2012 IL 112948, ¶ 22. If there exists no common-law duty, there is no cause of action. If, however, the existence of a duty depends on disputed facts, the existence of those facts is a question for a trier of fact. *Combs v. Schmidt*, 2012 IL App (2d) 110517, ¶ 32.

Think Energy's and EGC's motions for lack of duty are based on the *respondeat superior* doctrine. The *respondeat superior* doctrine provides that an employer may be vicariously liable for an employee's tort committed

within the scope of employment. *McQueen v. Green*, 2022 IL 126666, ¶ 37. An employer's liability extends to an employee's negligent, willful, malicious, and even criminal acts. *Adames v. Sheahan*, 233 Ill. 2d 276, 298 (2009). The *respondeat superior* doctrine may apply in either a principal-agent or an employer-employee relationship. *Moy v. County of Cook*, 159 Ill. 2d 519, 532 (1994). A principal-agent relationship exists if the principal has the right to control the manner and method in which the agent performs its work and the agent has the ability to subject the principal to personal liability. *Knapp v. Hill*, 276 Ill. App. 3d 376, 380 (1st Dist. 1995).

A principal that hires an independent contractor is generally not liable for the contractor's negligent or intentional acts or omissions. *Gomien v. Wear-Ever Aluminum, Inc.*, 50 Ill. 2d 19, 21 (1971). The reason is that an independent contractor undertakes to produce a certain result but is not controlled by the principal as to the contractor's method used to obtain the result. *Spivey v. Brown*, 150 Ill. App. 3d 139, 143 (3d Dist. 1986). While there is no rigid rule used to determine whether a person is an independent contractor, *Doe v. Brouillette*, 389 Ill. App. 3d 595, 606 (1st Dist. 2009), various factors to be considered are: (1) the right to control the manner in which the work is performed; (2) the right to discharge; (3) the method of payment; (4) whether taxes are deducted from the payment; (5) the level of skill required to perform the work; and (6) the furnishing of the necessary tools, materials, or equipment. *Id.* No single factor is determinative, but the right to control the manner in which the work is performed is considered to be the predominant factor. *Blockmon v. McClellan*, 2019 IL App (1st) 180420, ¶ 29. And although the question of whether a person is an independent contractor is generally a question of fact, *Dowe v. Birmingham Steel Corp.*, 2011 IL App (1st) 091997, ¶ 29, the question may be decided as a matter of law if the the relationship is so clear as to be indisputable. *Stewart v. Jones*, 318 Ill. App. 3d 552, 561 (2d Dist. 2001). The plaintiff bears the burden of proving the existence of an agency relationship and the scope of the agent's authority. *Krickl v. Girl Scouts, Illinois Crossroads Council, Inc.*, 402 Ill. App. 3d 1, 5 (2010).

The factual record in this case at this time is quite thin. Although the various agreements between Think Energy, Entrust, EGC, and EMMG appear to place a duty solely on EMMG, there are no facts illuminating how the parties carried out the agreements and which one or ones controlled Gary's work, had the right to discharge her, paid her, trained her, or provided the materials, flyers, and uniforms used in the door-to-door campaign. In short, the factors used to determine whether the *respondeat superior* doctrine applies in this case, as in *Lang*, are heavily fact dependent and not easily resolvable on a motion to dismiss. *See Lang*, 306 Ill. App. 3d at 971.

Although a far more complete record is necessary to resolve the duty issue in this case, this court cautions the parties to assess the extent to which additional discovery would be fruitful. While the various contractual agreements are in the record, there is a fundamental question whether sophisticated energy providers were involved in the nitty-gritty of launching a door-to-door campaign to drum up business or to train Gary and others in how to proceed. In a case such as this, it would be a waste of the parties' time and resources to run up discovery costs in light of logical assumptions as to the target defendant.

Entrust's Motion to Dismiss

On March 30, 2021, Entrust and various other debtors filed a petition for chapter 11 bankruptcy in the United States District Court for the Southern District of Texas. *In re Entrust Energy, Inc.*, No. 21-31070 (S.D. Tex. 2021). On December 29, 2021, the bankruptcy court issued a final order confirming Entrust's joint plan of liquidation. The court's order explicitly enjoins and bars any then-existing or future claims against Entrust. A review of the bankruptcy docket indicates that Cusic never sought to lift the bankruptcy statute's automatic stay, 11 U.S.C. § 362, participate in the bankruptcy proceedings as a potential creditor, or seek relief from the bankruptcy court's final order. *See, e.g.*, *Pfaff v. Chrysler Corp.*, 155 Ill. 2d 35, 71 (1992) (Illinois courts may take judicial notice of proceedings in federal district courts). For those reasons, the motion to dismiss the complaint against Entrust is granted with prejudice.

Cusic's Summary Judgment Motion

Cusic presented her motion for summary judgment as to the defendants' liability. The Code of Civil Procedure authorizes the issuance of summary judgment "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005. The purpose of summary judgment is not to try a question of fact, but to determine whether one exists that would preclude the entry of judgment as a matter of law. *See Land v. Board of Educ. of the City of Chicago*, 202 Ill. 2d 414, 421, 432 (2002). If the plaintiff is the moving party, the plaintiff must satisfy its initial burden of production by establishing through pleadings and supporting documents the validity of the plaintiff's factual position on all contested elements of the cause of action. *Triple R Dev., LLC v. Golfview Apts. I, L.P.*, 2012 IL App (4th) 100956, ¶ 7; *Performance Food Grp. Co., LLC v. ARBA Care Ctr. of Bloomington, LLC*, 2017 IL App (3d) 160348, ¶ 18.

Cusic argues that there is no issue of material fact that Gary acted within the scope of her employment for Think Energy and EGC when she assaulted Hamblet. Given that predicate, according to Cusic, both defendants owed Hamblet a duty of care and breached their duty. Yet Cusic's summary judgment motion fails for the same reason the defendants' motions to dismiss fail—the lack of a record. Quite simply, there is nothing in the record indicating or suggesting that Gary acted within the scope of her employment with Think Energy and EGC when she assaulted Hamblet. Further, Cusic argues inconsistently between her motion and her response briefs. On one hand, she argues that the agreements entered by the parties plainly establish the duty they owed to Hamblet. At the same time, Cusic argues that the agreements are not the source of the defendants' duty, but that it arises from their conduct in carrying out the agreements. Cusic cannot have it both ways, and her summary judgment motion is entirely premature.

Jane Does

Illinois prohibits the naming of fictional or unknown defendants, such as "Unknown Police Officers" or a "Jane Doe" or "John Doe." Complaints naming fictional or unknown defendants are nullities, do not stop the running of the statute of limitations, and should be dismissed under 735 ILCS 5/2-619(a)(9). *Bogseth v. Emmanuel*, 166 Ill. 2d 507, 513-14 (1995); *Hailey v. Interstate Mach. Co.*, 121 Ill. App. 3d 237, 238 (3rd Dist. 1984). Since the statute of limitations against Jane Does 1 and 2 has long since expired, they are dismissed with prejudice on this court's own motion.

Conclusion

For the reasons presented above, it is ordered that:

1. The defendants' Think Energy's and EGC's motions to dismiss are denied;
2. Think Energy and EGC have until January 31, 2023, to answer the complaint;
3. Entrust's motion to dismiss is granted;
4. Entrust is dismissed with prejudice;
5. Jane Doe 1 and Jane Doe 2 are dismissed with prejudice; and
6. Cusic's summary judgment motion is denied.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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