

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF WABASHA

THIRD JUDICIAL DISTRICT

Mark D. Island
Grinnell Mutual Reinsurance Co.,

Court File No. 79-CV-20-320

Plaintiff,

**ORDER GRANTING
SUMMARY JUDGMENT**

vs.

Jason D. Ferguson, and
Mesa Underwriters Specialty Insurance Co.,

Defendants.

The above-entitled matter came before District Court Judge Christopher A. Neisen for a Summary Judgment Motion Hearing via Zoom on March 8, 2021. Plaintiff was represented by Attorney John T. Giesen, 30 3rd Street SE, Suite 400, P.O. Box 549, Rochester, MN 55904. Defendant Jason D. Ferguson was represented by Attorney Peter M. Waldeck, 1400 TCF Tower 121 South 8th Street, Minneapolis, MN 55402. Defendant Mesa Underwriters Specialty Insurance Co. were represented by Attorney Joseph F. Lulic, 225 South Sixth Street, Suite 4800, Minneapolis, Minnesota 55402. After hearing arguments from both parties, the Court took this matter under advisement.

Based upon the arguments of counsel and all of the files, records, and proceedings herein, the Court makes the following:

ORDER

1. Defendants' Motions for Summary Judgment are GRANTED. Plaintiff's claims are dismissed in their entirety.
2. The attached Memorandum is incorporated herein by reference.

LET JUDGMENT BE ENTERED ACCORDINGLY

BY THE COURT:

Chris A. Neisen
Neisen, Christopher
2021.05.27 13:08:58
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Christopher A. Neisen
Judge of District Court

Filed in District Court
State of Minnesota
Jun 1 2021 9:59 AM

I hereby certify that the forgoing order constitutes
the Judgment of the Court

St. Schell Jun 1 2021 9:58 AM

MEMORANDUM

Procedural Posture

This case involves a March 11, 2018 fire, which burned down the neighboring properties of Mark Island¹ (hereinafter, “Island”) and Defendant Jason Ferguson (hereinafter, “Ferguson”) in downtown Mazeppa. Plaintiff Grinnell Mutual Reinsurance Co. (hereinafter, “Grinnell”) insured Island. Defendant Mesa Underwriters Specialty Insurance Co. (hereinafter, “Mesa”) insured Ferguson’s property.

Plaintiffs filed a Complaint in this matter on May 14, 2020, seeking damages, pre-judgment and post-judgment interest, and costs and disbursements. The Deadline for discovery elapsed as of January 22, 2021.

On February 8 and 9, 2021, Defendants Ferguson and Mesa, respectively, filed Summary Judgment Motions. Plaintiffs filed their Memorandum in Opposition to Summary Judgment on February 22, 2021. The parties have submitted legal memoranda, affidavits, and various exhibits in support of their respective positions. On March 8, 2021, the Court heard oral arguments on summary judgment and took the matter under advisement.

Undisputed Facts

Prior to the fire at issue, Ferguson operated a tavern called WD’s Bar and Grill. The building was three-stories tall, framed with timber, and shared a wall with Island’s commercial building.

¹ Island was once a Plaintiff, but is no longer a party to this matter. Per statement in Plaintiff’s Memorandum opposing Summary Judgment filed 2-22-21: “Plaintiff Island also withdraws as a party because he is not a real party in interest.”

At about 3:43 a.m. on March 11, 2018, a 911 caller reported a fire on Ferguson's property. The fire resulted in severe burn damage, which destroyed both properties. The entire structure collapsed into the basement.

On March 13, 2018, Steven Wolf (hereinafter, "Investigator Wolf"), an investigator with the Minnesota Department of Public Safety's Fire Marshal Division began an inspection into the cause of the fire. Other inspection participants included Defendant Ferguson and Mesa's insurance adjuster, Ron Rudow. On that day, Ronald Madsen (a large loss specialist with Plaintiff Grinnell) and Dwight Duncan (a special investigator with Plaintiff Grinnell) also viewed the scene, but did not enter the property. The Mazeppa Fire Department released a report on the fire, which indicated that the cause of the fire was undetermined and still undergoing investigation.

Grinnell's information was shared by Investigator Wolf to agents of Defendant Mesa on March 13. Thereafter, Dwight Duncan was in contact with Rudow and Investigator Wolf. It was also on March 13 that Investigator Wolf told Rudow that that the investigation would require temporary fencing to protect the property, heavy equipment to dig out the scene, and "the better part of a week to investigate this loss site." Rudow indicated doing so was possibly too costly.

In an email written by Rudow dated March 22, 2018, he reported that "[Investigator Wolf] believes the cause was possibly a wood stove along the southern exterior wall of the building." A pellet stove was used to keep the building heated in the winter. On the night of the fire, an 18 year-old employee was the last to fill the stove (at around 11:00–12:00 p.m.). The employee had been instructed on how to load the hopper with pellets, and had done so on numerous occasions in the past. In the later fire scene investigations, remnants of bags of pellets were found near the stove.

On April 3, 2018, Grinnell sent a notice of subrogation letter to Mesa. On April 4, 2018, Madsen contacted Rudow. Madsen also spoke with Scott Jones, who is a claims examiner for

Mesa. Madsen and Jones discussed the possibility of setting up a joint investigation.² Jones indicated at that time that further excavation regarding the cause of the fire would be cost prohibitive. Duncan again attempted to call Jones on April 5, 2018, April 16, 2018, and April 17, 2018. Each time he left voicemails regarding a proposed joint investigation of the fire scene. The calls were not returned.

On April 10, 2018, Ferguson and his family member used a front end loader to pull out a marble bench and possibly metal debris for recycling.³ The Complaint also notes that the front end loader may have moved items at the fire scene on April 24, 2018, however, these allegations were not further borne out in discovery.

On April 25, 2018, Duncan inspected the fire site with the permission of Ferguson. Duncan entered Ferguson's property, inspected, measured, and photographed the pellet stove. In doing so, Duncan had to remove a steel panel from the top of the pellet stove. After completing his investigation, Duncan did not make any further requests to have the site preserved or that any other items be retained for further investigation.

On April 30, 2018, demolition began on the WD's Bar and Grill site location. No further site investigations into the cause of the fire were conducted after that time. In a final report dated August 15, 2018, Investigator Wolf concluded his findings:

Based upon my investigation of the fire scene, and after talking with the fire department and law enforcement personnel, the property owner, the reporting parties, insurance company adjuster and investigator, and after making a repeat visit to the fire scene, it is my opinion that the origin of the fire was most likely in the

² A written request to preserve the fire scene was never made by any of Grinnell's agents.

³ The record is somewhat unclear on this point. Grinnell argues that metal for recycling was retrieved on April 10, 2018. For summary judgment purposes, the Court assumes that metal was pulled out of Grinnell's property for recycling on April 10, 2018.

South portion of the building. I am not able to identify a particular point of origin due to the severity of damage, nor can I identify a specific area of origin.

Due to the severity of damage from the fire - a detailed scene exam was not able to be done. There was no evidence found at the scene to retain or work with. As a result, I am able to eliminate all natural causes for the fire but cannot eliminate an accidental fire or an incendiary fire simply due to too many unanswered questions and too many possibilities that cannot be eliminated. I have an inclination to believe the fire cause could have been related to the use of the wood pellet stove but cannot prove that or even eliminate the possibility.

I have no option but to classify this fire as undetermined and must also rule the cause of the fire as undetermined. This file shall be closed but I have the right to re-open it should any new or further information be received.

Madsen was later deposed. He stated that during his April 4, 2018 conversations with Jones and Rudow, there was no formal agreement that the property was going to be preserved or that they would conduct any further investigations. He further stated that "I don't have any proof of anyone being at fault" for causing the fire. He acknowledged that the investigation conducted by Investigator Wolf revealed the fire's cause was undetermined.

Duncan was also deposed. Duncan indicated that he was interested in further examining the chimney and electrical system that was in the area after his April 25, 2018 investigation. He also acknowledged the possibility that the fire may have started in an area not near the pellet stove: "there's a possibility in a situation where there's a windowless basement and the fire extends up." He also agreed that it is also possible for the fire to ignite in one location and then spread to a secondary location and do more damage in the secondary location.

Legal Analysis

Grinnell's Complaint cites three Counts: (i) negligence, (ii) negligence of bailee, and (iii) promissory estoppel. Grinnell has withdrawn its promissory estoppel claim (per statement in Plaintiffs' Memorandum Opposing Summary Judgment filed 2-22-21: "Plaintiffs voluntarily

dismiss their promissory estoppel claim.”). On summary judgment, the Court examines the two remaining claims below.

A. Standard of Review

In accordance with Minn. R. Civ. P. 56.01, “[t]he court shall grant summary judgment if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgement as a matter of law.” The evidence is viewed in the light most favorable to the nonmoving party, and any doubts about the existence of a material fact are resolved in that party’s favor. *Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666, 672 (Minn. 2001) (citing *H.B. ex rel. Clark v. Whittemore*, 552 N.W.2d 705, 707 (Minn.1996)).

1. Grinnell has failed to establish negligence.

The basic elements of a negligence claim are: (1) duty; (2) breach; (3) causation; and (4) injury. *Abel v. Abbott Nw. Hosp.*, 947 N.W.2d 58, 77 (Minn. 2020).

In advancing their negligence claim, Grinnell argues that the evidence suggests the pellet stove was the origin of the fire. A duty exists wherever a defendant’s conduct “creates a foreseeable risk of injury to a foreseeable plaintiff.” *Domagala v. Rolland*, 805 N.W.2d 14, 23 (Minn. 2011). Here, Ferguson owed a duty of care to Island to ensure that the operation of his business would not cause a foreseeable risk of fire that would spread to Island’s connected commercial building.

Grinnell argues the duty of care was breached by arguing that “Ferguson left a teenager in charge of filling a pellet stove around midnight as one of his closing tasks’ then let that fire burn unattended in his century-old, timber-framed building, with a pile of flammable material nearby.” Defendants argue that the evidence does not suggest the pellet stove was the cause of the fire, that the actual cause was undetermined, and that a trained 18 year old being put in charge of operating a pellet stove is not negligent. The Court agrees with the Defendants.

Under Minnesota law, a plaintiff must prove the origin of the fire that destroyed his property “by proof and not by speculation or conjecture.” *Silver v. Harbison*, 226 N.W. 932, 932 (Minn. 1929). In *Dalager v. Montgomery Ward & Co.*, roofers were removing old, dry cedar shakes and asphalt shingles from the roof of a building, tossing the flammable debris to a three-foot-wide area between houses, while smoking on a hot and windy day. 350 N.W.2d 391, 393 (Minn. App. 1984). The Court stated that “[f]rom this evidence, even without evidence that a roofer’s cigarette may have caused the fire, the jury could have determined that the roofers’ actions were negligent.” *Id.*

Here, in contrast to *Dalager*, Ferguson has not committed an underlying negligent act, and the evidence is only speculative as to whether the pellet stove was the cause of the fire. The mere act of employing an 18-year-old to operate a pellet stove is not indicative of negligence. Rather, the evidence suggests that the employee was trained on the pellet stove and had operated it on numerous occasions. Similarly, a breach of duty is not established because a pellet stove was operated in an old wood building or that pellets were near the stove on the night of the fire. Indeed, Grinnell’s agent, Ronald Madsen, admitted that “I don’t have any proof of anyone being at fault”.

The best evidence as to the cause of the fire is Investigator Wolf’s report. Investigator Wolf specifically stated that “the origin of the fire was most likely in the South portion of the building” and that he had “an inclination to believe the fire cause could have been related to the use of the wood pellet stove but *cannot prove that or even eliminate the possibility.*” (Emphasis added.) As a result, he wrote that he had “no option but to classify this fire as undetermined and must also rule the cause of the fire as undetermined.” Duncan, who conducted Mesa’s investigation on April 25, 2018, agreed in his deposition that it was possible for the fire to have started in a different location, spread to a secondary location, and do more damage in the secondary location. He also did not deny that the fire’s cause was undetermined.

It is clear that Investigator Wolf considered the pellet stove as a possible cause, but that he was uncertain as to the exact cause of the fire. The Court finds that even in viewing the report and all other evidence in the light most favorable to Plaintiffs, it is speculative whether the pellet stove caused the fire. If it was clear that the source of the fire was the pellet stove, that is not enough to establish negligence. The pellet stove was used to heat the building for many years prior.

Grinnell further argues that alleged spoliation of evidence should preclude summary judgment as to the negligence claim. In advancing this argument, Grinnell points to the fact that on April 10, 2018 Ferguson removed metal for recycling and the marble bench.

“Spoliation of evidence refers to the destruction of relevant evidence by a party.” *Hoffman v. Ford Motor Co.*, 587 N.W.2d 66, 71 (Minn. App. 1998) (cleaned up). Minnesota law defines spoliation of evidence as “the failure to preserve property for another’s use as evidence in pending or future litigation.” *Miller v. Lankow*, 801 N.W.2d 120, 127 (Minn. 2011). “[A] custodial party with a legitimate need to destroy evidence may be absolved of a failure to preserve evidence by providing sufficient notice and a full and fair opportunity to inspect the evidence to a noncustodial party.” *Miller v. Lankow*, 801 N.W.2d 120, 129 (Minn. 2011). If spoliation of evidence is found, an adverse inference will arise from any such destroyed evidence. *See Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434, 437–38 (Minn. 1990).

Here, nothing in the record suggests that the materials pulled from the burn site on April 10 hindered the investigation into the cause of the fire. The pellet stove was not disturbed for Duncan’s April 25, 2018 inspection. In his deposition testimony, Duncan did not indicate that he suspected the removal of any evidence that was related to the cause of the fire.

Grinnell further argues that “Duncan tried to call Jones on April 5, April 16, and April 17, but Jones deliberately chose not to return Grinnell’s calls.” The two had spoken April 4, at which time

Jones indicated that there had already been an investigation by Investigator Wolf that was inconclusive as to the cause of the fire. Under these circumstances, the argument for spoliation is too attenuated. Put simply, even assuming Grinnell had the opportunity to conduct a joint investigation prior to any items being pulled from the scene on April 10, nothing in the record suggests that any *specific* evidence was removed or destroyed which related to the fire's origin.

In sum, because proof of the cause of a fire must not be based on "speculation or conjecture," the Court must grant summary judgment as to the negligence claim.

2. Grinnell has failed to establish a constructive bailment claim.

A constructive bailment is "[a] bailment that arises when the law imposes an obligation on a possessor of personal property to return the property to its rightful owner." *Afremov v. Amplatz*, No. A09-1157, 2010 WL 2035732, at *4 (Minn. Ct. App. May 25, 2010). Constructive bailees are liable "for failure to exercise good faith." *Dow-Arneson Co. v. City of St. Paul*, 253 N.W. 6, 8 (Minn. 1934).

There is no evidence to suggest that Defendants ever had possession of Plaintiff's property. There was no bailor-bailee relationship. Plaintiff argues constructive bailment, in that Defendants should have preserved the fire scene.

In advancing their constructive bailment claim, Grinnell cites to the National Fire Prevention Association standards at Section 28.3.1 as guidance, which states: "Notification should be given to all known, interested parties in an expeditious manner to allow the opportunity to examine the scene as early as possible and minimize claims of spoliation." This is not binding authority.

As noted above, Defendant cannot point to any *specific* evidence taken from the scene on April 10 that is related to the fire's origin. In his deposition, Duncan indicated that he was interested in

further examining the chimney and electrical system that was in the area when he inspected the scene on April 25. Neither of which, however, were taken from the scene on April 10, 2018.

Furthermore, there is no evidence that anyone acted in bad faith. Rather, Defendant Ferguson went in to retrieve a marble bench and other metal pieces—none of which are argued to be related to the cause of the fire—nearly a month after the date of the fire.

Thus, because there is a lack of evidence that Defendant Ferguson or anyone from Mesa intentionally hindered the investigation, or acted in bad faith in any way, the Court must grant summary judgment as to the constructive bailment claim.

Conclusion

Summary Judgment in favor of Defendants is appropriate because no reasonable jury could find that Ferguson acted negligently in causing this fire that spread to Island's commercial building or that a constructive bailment existed. For the reasons stated herein, Defendants' Motions for Summary Judgment are granted.

Chris V. Neisen
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