Filed 3/28/18 Buckley v. The W Hollywood Hotel CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

NORMAN BUCKLEY, Plaintiff and Appellant, v. THE W HOLLYWOOD HOTEL et al., Defendants and Respondents.	B281742 (Los Angeles County Super. Ct. No. BC623206)

APPEAL from a judgment of the Superior Court of Los Angeles County. Samantha Jessner, Judge. Affirmed.

Law Offices of Martin N. Buchanan and Martin N. Buchanan; Girardi & Keese and John A. Girardi for Plaintiff and Appellant.

Koletsky, Mancini, Feldman & Morrow, Marc S. Feldman and Sharon Friedman-Castiel for Defendants and Respondents.

Plaintiff and appellant Norman Buckley (plaintiff) appeals from the judgment entered in favor of defendants and respondents The W Hollywood Hotel and Starwood Hotels & Resorts Worldwide, Inc. (collectively, defendants), after the trial court sustained, without leave to amend, defendants' demurrer to all of the causes of action asserted in plaintiff's second amended complaint. We affirm the judgment.

BACKGROUND

Factual background

Plaintiff's spouse, decedent Davyd Whaley (Whaley), committed suicide on October 15, 2014, while checked in as a guest at defendants' hotel. Whaley had left the residence he shared with plaintiff on October 12, 2014, and without informing plaintiff of his whereabouts, checked into the hotel that same day as an "incognito" or "anonymous" guest. At the time, Whaley was suffering from post-traumatic stress disorder (PTSD) and paranoia and was taking daily medication to treat these conditions. Sometime during the evening of October 12, 2014, Whaley requested and was granted a room change at the hotel.

Plaintiff looked for but did not find Whaley at his art studio. When plaintiff was unable to contact Whaley by phone, he filed a missing person's report with the Los Angeles County Sheriff's Department's West Hollywood Station on October 13, 2014.

At approximately 7:00 a.m. on October 14, 2014, plaintiff became aware of a charge on his credit card from the hotel. He immediately called the hotel, identified himself as Whaley's spouse, and asked if Whaley had checked into the hotel. The hotel's front desk personnel told plaintiff that Whaley was not a guest at the hotel. Plaintiff informed the front desk personnel that he had filed a missing person's report for Whaley the previous day, that there was a charge from the hotel on plaintiff's

credit card, and that this was an emergency situation because Whaley needed to take his medication for PTSD and paranoia. The hotel staff continued to deny that Whaley was a guest at the hotel. Plaintiff asked the hotel personnel if Whaley had checked out, and was told that there was no record of Whaley having checked in. When plaintiff asked to speak with a manager, the hotel staff told him no one was available to speak with him and that he should call back later.

Plaintiff called the hotel throughout the day on October 14, 2014, and the hotel staff continued to deny that Whaley was a guest at the hotel. Plaintiff also called the Sheriff's Department to inform them of his belief that Whaley was a guest at the hotel. The Sheriff's Department told plaintiff that it would contact the hotel.

At approximately 4:00 p.m. on October 14, 2014, a hotel employee telephoned Whaley in his hotel room and informed him that he had overstayed his allotted time at the hotel. Whaley requested and was granted a longer stay.

During the late afternoon on October 14, 2014, plaintiff drove to the hotel and saw Whaley's car parked in the hotel's valet parking zone. Plaintiff called the hotel, informed them that he had seen Whaley's car, and asked for confirmation that Whaley was a guest at the hotel so that he could give Whaley the medication. The hotel staff refused to confirm whether Whaley was or had been a guest. Plaintiff left the hotel and returned to his home.

Later that night, plaintiff discovered a new credit card charge from the hotel dated October 14, 2014. He drove back to the hotel in the early morning hours of October 15, 2014, and asked the front desk attendant to check to see if Whaley was staying at the hotel. After searching the hotel computer, the attendant contacted a manager, who told plaintiff that Whaley

was not staying at the hotel. Plaintiff informed the manager that he had seen Whaley's vehicle in the hotel's valet parking zone. The manager responded that this did not prove that Whaley was a guest. Plaintiff then proceeded to the valet parking zone, saw a hotel ticket on the dashboard of Whaley's vehicle and asked the attendant for help in locating the room number associated with the vehicle. A hotel employee instructed the valet attendant not to do so.

Plaintiff returned to the front desk, asked the attendant to locate the hotel room associated with the valet ticket in Whaley's vehicle, and explained that this was a dangerous situation as Whaley needed his medication. The attendant summoned hotel security to escort plaintiff off the premises.

Plaintiff left the hotel premises and immediately called 911. The Los Angeles Police Department responded to the call at 6:15 a.m. on October 15, 2014. Paramedics subsequently arrived at the hotel, and a paramedic later informed plaintiff that Whaley was deceased. Whaley's body was recovered from room 928 of the hotel.

Procedural background

Plaintiff, individually and as the personal representative and/or successor in interest to Whaley's estate, filed the instant action against defendants for negligence-wrongful death, negligence-survival action, negligent supervision, intentional and negligent misrepresentation, and intentional infliction of emotional distress. He subsequently filed a first amended complaint, and defendants demurred to all of the causes of action asserted therein. The trial court sustained the demurrer but granted plaintiff leave to amend. In sustaining the demurrer, the trial court found no duty on the part of the hotel to prevent Whaley's suicide, given the absence of any allegation that defendants or their staff knew that Whaley was suicidal. The

court further found no duty to disclose Whaley's room number or other check-in information to plaintiff or to the Sheriff's Department in light of Whaley's request to check into the hotel on an incognito basis.

Plaintiff filed a second amended complaint, the operative pleading in this action, and defendants again demurred to all of the asserted causes of action. The trial court sustained the demurrer without leave to amend, ruling, among other things, that "Plaintiff impermissibly removed all reference to Decedent's request to check-in 'incognito' with the hotel, which served as a basis for the court's prior ruling on the demurrer" to the first amended complaint, in violation of the sham pleading doctrine.

A judgment of dismissal was subsequently entered in defendants' favor, and this appeal followed.

DISCUSSION

I. Standard of review

"On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.]" (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.) "When a demurrer is sustained, we determine whether the complaint states facts sufficient to state a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse." (*Ibid.*) The legal sufficiency of the complaint is reviewed de novo. (*Montclair Parkowners Assn. v. City of Montclair* (1999) 76 Cal.App.4th 784, 790.)

II. Negligence-wrongful death, negligence-survival action, and negligent supervision causes of action

"The existence of a duty is the threshold element of a negligence cause of action. [Citations.]" (*Friedman v. Merck & Co.* (2003) 107 Cal.App.4th 454, 463.) Whether a duty exists is a question of law to be decided by the court. (*Lawrence v. La Jolla Beach and Tennis Club, Inc.* (2014) 231 Cal.App.4th 11, 22 (*Lawrence*).)

"Under traditional tort law principles, one is ordinarily not liable for the actions of another and is under no duty to protect another from harm, in the absence of a special relationship of custody or control. [Citations.]" (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 293 (*Nally*).) California courts have recognized that "hotel proprietors have a special relationship with their guests that gives rise to a duty . . . 'to protect them against unreasonable risk of physical harm.' [Citation.]" (*Peterson v. Superior Court* (1995) 10 Cal.4th 1185, 1206 (*Peterson*); *Lawrence, supra,* 231 Cal.App.4th at p. 22.) The duty """"is only one to exercise reasonable care under the circumstances."""" (*Lawrence*, at p. 22.) A hotel proprietor is not liable if he neither knows nor should know of the unreasonable risk. (*Ibid.*) Courts in California have also "recognized that a business may have a duty, under the common law, to take reasonable action to protect or aid patrons who sustain an injury or suffer an illness while on the business's premises, including 'underak[ing] relatively simple measures such as providing "assistance [t]o their customers who become ill or need medical attention."' [Citations.]" (*Verdugo v. Target Corp.* (2014) 59 Cal.4th 312, 335, fn. omitted.)

Plaintiff contends defendants breached a duty of care they owed to Whaley, a hotel guest who suffered from a preexisting mental illness, by doing nothing to check on Whaley's welfare and

by refusing to disclose Whaley's status as a hotel guest to plaintiff and to a Sheriff's Department representative who telephoned the hotel to inquire about Whaley's whereabouts. Plaintiff cites as support for this argument cases in which the court imposed a duty of care on a defendant who stood in a special relationship to a suicidal individual. (See, e.g., *Meier v. Ross General Hospital* (1968) 69 Cal.2d 420 (*Meier*); *Kockelman v. Segal* (1998) 61 Cal.App.4th 491 (*Kockelman*); *Klein v. Bia Hotel Corp.* (1996) 41 Cal.App.4th 1133 (*Klein*); *Johnson v. County of Los Angeles* (1983) 143 Cal.App.3d 298, 311 (*Johnson*).) Those cases, however, are distinguishable.

Meier, Kockelman, and *Klein* involved, respectively, a hospital, psychiatrist, and an in-patient residential care facility, defendants who had all assumed the responsibility to care for and attend to the needs of a suicidal patient. The hotel in this case assumed no such responsibility for Whaley.

Johnson involved incarceration of a suicidal individual who was arrested while driving on the wrong side of the freeway and who told the arresting deputies that he had been attempting to commit suicide. (*Johnson, supra*, 143 Cal.App.3d at p. 304.) When the decedent's wife was notified of the arrest, she informed the deputies that her husband had suicidal tendencies requiring immediate medical attention and that he should not be released. The deputies acknowledged that the decedent required medical attention, promised to hospitalize and medicate him, and advised the wife not to worry or interfere. The decedent was then released from custody without notice to his wife, and he committed suicide. (*Ibid.*) In the instant case, plaintiff does not allege that defendants knew or had reason to know that Whaley was suicidal.

Defendants' status as hotel owners or proprietors did not, under the circumstances presented here, impose on them a duty

to prevent Whaley's suicide. "In cases involving suicide, courts have been extremely reluctant to impose liability based on the special relationship exception. [Citations.]" (*Adams v. City of Freemont* (1998) 68 Cal.App.4th 243, 277.) Our Supreme Court has explained that a special relationship giving rise to a duty to prevent a foreseeable suicide has only been imposed "in the limited context of hospital-patient relationships where the suicidal person died while under the care and custody of hospital physicians who were aware of the patient's unstable mental condition." (*Nally, supra,* 47 Cal.3d at pp. 293-294, citing *Meier* and *Vistica v. Presbyterian Hospital & Medical Center, Inc.* (1967) 67 Cal.2d 465.) None of those circumstances are present here.

We are not persuaded by plaintiff's argument that defendants had a duty to check on Whaley's welfare or to summon the assistance of law enforcement or mental health professionals to check on him. Plaintiff's allegations, "on information and belief," that Whaley exhibited "erratic behavior" while in the hotel, that defendants' employees observed Whaley to be "nervous, scared, and fidgety" while checking in to the hotel are an insufficient basis for imposing such a duty. Whaley's nervous behavior was consistent with his request to check in to the hotel on an incognito basis. After Whaley checked in, the hotel staff had contact with him twice, on the evening of October 12, 2014, when Whaley requested a room change, and again on the afternoon of October 14, when he extended his stay in the hotel.

Plaintiff cites no California case in which a court has imposed a duty on a hotel proprietor to check on the welfare of a guest while the guest is occupying a hotel room. Courts in other jurisdictions have expressly declined to do so. (See, e.g., *Rasnick v. Krishna Hospitality, Inc.* (Ga. 2011) 713 S.E.2d 835, 839 ["we decline to judicially engraft into the caselaw of this State, the

additional duty upon innkeepers to investigate or check on their guests to determine if they are in medical need"]; *Donaldson v. Young Women's Christian Ass'n of Duluth* (Minn. 1995) 539 N.W.2d 789, 793 (*Donaldson*) [YWCA not liable for suicide of decedent resident, despite fact that another concerned resident asked front desk employee to check on decedent].)

The Minnesota Supreme Court has articulated the following reasons for not imposing such a duty on innkeepers:

> "Unlike hospitals or jails, the YWCA did not have custody or control of [decedent]. [Decedent] did not entrust her health to the YWCA, and the YWCA did not accept the responsibility to care for her or to protect her from self-inflicted harm. The YWCA did not provide medical services or have expertise treating mental health problems. YWCA staff members did not have access to the medical history of residents, nor did they have special training in recognizing suicidal tendencies. Simply put, the YWCA was not in a position to protect [decedent] from committing suicide and [decedent] had no reasonable expectation that the YWCA would protect her from committing suicide."

(*Donaldson, supra*, 539 N.W.2d at p. 793.)

That reasoning applies equally here. Under the circumstances presented in this case, defendants had no duty to check on Whaley's welfare.

Defendants also had no duty to override Whaley's request for privacy by disclosing his status as a hotel guest to plaintiff or to the Sheriff's Department representative who telephoned the hotel to inquire as to Whaley's whereabouts.[1] The United States

---

[1] Plaintiff concedes that we should consider Whaley's request to check into the hotel on an incognito basis as if this fact had been alleged in the second amended complaint.

Supreme Court has recognized that hotel proprietors themselves have a reasonable expectation of privacy in the content of their guest registries, and that law enforcement authorities cannot ordinarily demand access to that information absent a search warrant. (See *City of Los Angeles v. Patel* (2015) __ U.S. __ [135 S.Ct. 2443].)

Defendants had no duty to disclose Whaley's room number or status as a hotel guest to plaintiff or to the Sheriff's Department, nor did they have a duty to check on Whaley's welfare or to summon assistance for him. Given the absence of such duty, the trial court did not err by sustaining defendants' demurrer to plaintiff's causes of action for negligence-wrongful death, negligence-survival action, negligent supervision, and negligent misrepresentation.

III. Intentional and negligent misrepresentation

The elements of a cause of action for intentional misrepresentation are (1) a misrepresentation, (2) made with knowledge of its falsity, (3) intent to defraud or to induce reliance, (4) justifiable reliance, and (5) resulting harm. (*Philipson & Simon v. Gulsvig* (2007) 154 Cal.App.4th 347, 363.) A claim of negligent misrepresentation requires proof of each of the foregoing elements except for knowledge of the falsity of the representation. An honest belief in the truth of the statement, without a reasonable ground for that belief, is sufficient. (*R & B Auto Center, Inc. v. Farmers Group, Inc.* (2006) 140 Cal.App.4th 327, 377.)

Each element of a cause of action for intentional and negligent misrepresentation must be factually and specifically alleged. (*Caldo v. Owens-Illinois, Inc.* (2004) 125 Cal.App.4th 513, 519.) The specificity requirement for pleading a misrepresentation claim applies not only to the alleged misrepresentation, but also to the elements of causation and

damage. "'Whatever form it takes, the injury or damage must not only be distinctly alleged but its causal connection with the reliance on the representations must be shown.' [Citation.]" (*Service By Medallion, Inc. v. Clorox Co.* (1996) 44 Cal.App.4th 1807, 1818.) With regard to causation, the Restatement Second of Torts states:

> "*a.* Causation, in relation to losses incurred by reason of a misrepresentation, is a matter of the recipient's reliance in fact upon the misrepresentation in taking some action or in refraining from it. [Citation.] Not all losses that in fact result from the reliance are, however, legally caused by the representation. In general, the misrepresentation is a legal cause only of those pecuniary losses that are within the foreseeable risk of harm that it creates. . . . [¶] *b.* Pecuniary losses that could not reasonably be expected to result from the misrepresentation are, in general, not legally caused by it and are beyond the scope of the maker's liability. This means that the matter misrepresented must be considered in the light of its tendency to cause those losses and the likelihood that they will follow."

(Rest.2d Torts, § 548A, coms. a & b.)

"Although normally the issue of causation is a question of fact and therefore not within the scope of a demurrer, the court may properly examine the proximate cause of the alleged injury at the demurrer stage. [Citation.]" (*Alejo v. City of Alhambra* (1999) 75 Cal.App.4th 1180, 1190.)

Here, the second amended complaint states that defendants intentionally and negligently represented to plaintiff that Whaley was not a guest at the hotel, that there was no manager available to speak with plaintiff, and that there was no one at the hotel who could speak with plaintiff about the credit

card charge associated with the hotel; that defendants knew these representations were false and intended plaintiff to rely on them; that plaintiff relied on the false representations by returning home on October 14, 2014; and that defendants' misrepresentations proximately caused Whaley's death.

Plaintiff's causes of action for intentional and negligent misrepresentation fail for the same reason his wrongful death and negligent supervision claims fail. Defendants had no legal obligation to override Whaley's request for privacy by disclosing his room number or status as a hotel guest to plaintiff or to the Sheriff's Department. (See *City of Los Angeles v. Patel, supra,* 135 S.Ct. 2443.)

The misrepresentation claims also fail because Whaley's suicide could not have been reasonably expected to result from defendants' misrepresentations and accordingly were not the proximate cause of plaintiff's loss. The trial court did not err by sustaining the demurrer to the intentional and negligent misrepresentation causes of action.

IV. Intentional infliction of emotional distress

"The elements of a cause of action for intentional infliction of emotional distress are (i) outrageous conduct by defendant, (ii) an intention by defendant to cause, or reckless disregard of the probability of causing, emotional distress, (iii) severe emotional distress, and (iv) an actual and proximate causal link between the tortious conduct and the emotional distress. [Citation.] The '[c]onduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community.' [Citation.]" (*Nally, supra,* 47 Cal.3d at p. 300.) "Whether a defendant's conduct can reasonably be found to be outrageous is a question of law that must initially be determined by the court; if reasonable persons may differ, it is for the jury to determine whether the conduct was, in fact, outrageous. [Citation.]"

(*Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 534.) A plaintiff accordingly may resist a demurrer to a wrongful death action for intentional conduct leading to suicide only "if he can allege facts sufficient to show that defendant's conduct was outrageous *and* a substantial factor in the decedent's suicide. [Citation.]" (*Nally*, at p. 301.)

Defendants' alleged conduct -- refusing to disclose hotel guest information and misrepresenting Whaley's status as a guest at the hotel -- is not outrageous as a matter of law. The trial court did not err by sustaining the demurrer to plaintiff's cause of action for intentional infliction of emotional distress.

DISPOSITION

The judgment is affirmed. Each side to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT