STATE OF MICHIGAN

COURT OF APPEALS

EVELYN BORLACK,

Plaintiff-Appellant,

v

MACKLER BROTHERS, INC. and MACKLER, INC.,

Defendants-Appellees.

UNPUBLISHED
August 20, 1996

No. 181281
LC No. 94-468505 NZ

Before: Murphy, P.J., and O'Connell and M.J. Matuzak,* JJ.

PER CURIAM.

In this action for contribution and breach of contract, plaintiff appeals as of right the order of the circuit court granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendants. We affirm.

In November, 1989, plaintiff and defendants entered into a contract whereby defendants agreed to provide snow plowing at plaintiff's residence. The contract obligated defendants to plow all snowfalls of two inches or more from plaintiff's walkway and driveway. Significantly, the contract contained language by which defendants disclaimed all liability for injuries caused by "snowy, icy or slippery conditions."

In February, 1990, Pamela Colbeck slipped and fell on an accumulation of snow and ice in the area of the walkway on plaintiff's property, suffering back injuries. Deposition testimony suggested that defendants had failed to abide by the terms of the contract.

Colbeck brought suit against plaintiff. The two settled the suit for $150,000. Plaintiff maintains that any potential liability on the part of defendants to Colbeck was extinguished by the settlement, that defendants were continually apprised of developments between plaintiff and Colbeck during settlement

* Circuit judge, sitting on the Court of Appeals by assignment.

negotiations, that defendants were given the opportunity to participate in these settlement negotiations, and that the settlement was made in good faith.

Plaintiff then brought suit against defendants for contribution and breach of contract. Plaintiff alleged that she and defendants were joint tortfeasors, and that, accordingly, she was entitled to contribution for amounts paid in settlement over and above her pro rata share of liability. She also contended that defendants had failed to properly remove snow from her driveway and sidewalk, thereby breaching their contract. The circuit court concluded that the contractual disclaimer absolved defendants of all liability for Colbeck's injuries. Plaintiff has appealed as of right. Our review is de novo. *Jackhill Oil Co v Powell Production, Inc*, 210 Mich App 114, 117; 532 NW2d 866 (1995).

I

With respect to plaintiff's claim for contribution, as set forth in MCL 600.2925a(1); MSA 27A.2925(1)(1), "when 2 or more persons become jointly or severally liable in tort for the same injury to a person . . . there is a right of contribution among them even though judgment has not been recovered against all or any of them." In the present case, no judgment exists; the plaintiff and Colbeck reached a settlement agreement. However, MCL 600.2925a(3); MSA 27A.2925(1)(3), makes clear that contribution may, under circumstances such as those presently before the Court, also be obtained where a suit terminates in settlement rather than judgment.

The contribution statute also provides as follows: "In an action to recover contribution commenced by a tort-feasor who has entered into a settlement, the defendant may assert . . . any . . . defense he may have to his alleged liability for such injury or wrongful death." MCL 600.2925a(4); MSA 27A.2925(1)(4). Thus, the fact that one tortfeasor has settled with the injured party does not affect another tortfeasor's right to raise any defenses available to it.

In the present case, assuming that defendants are, in fact, tortfeasors, they have a raised a valid defense barring recovery against them. The contract between plaintiff and defendants states that defendants "shall not in any way be held liable or responsible for any accidents or injuries sustained due to snowy, icy or slippery conditions." This broadly worded and unambiguous disclaimer, to which plaintiff agreed, bars recovery for the very type of injury underlying the present suit. Therefore, while contribution may have been available to plaintiff pursuant to MCL 600.2925a(2), (3); MSA 27A.2925(1)(2), (3), in the absence of the contractual disclaimer, the existence of the disclaimer defeats plaintiff's claim for contribution.

Plaintiff also claims a common law, as opposed to statutory, right to contribution. However, "there was no right of contribution at common law and contribution is controlled entirely by statute." *Hastings Mut Ins Co v State Farm Ins Co*, 177 Mich App 428, 437; 442 NW2d 684 (1989), citing *Reurink Bros Star Silo, Inc v Clinton Co Rd Comm'rs*, 161 Mich App 67; 409 NW2d 725 (1987). Therefore, we do not address plaintiff's claim for common law contribution further.

Finally, plaintiff argues for the first time on appeal that the doctrine of equitable subrogation affords her a remedy. Although this issue was not raised below, because it is strictly a question of law and because the relevant facts appear in the record, we will address it. See, e.g., *Federal Kemper Ins Co v Western Ins Co*, 97 Mich App 204, 209; 293 NW2d 765 (1980). As stated in *Commercial Union Ins Co v The Medical Protective Co*, 426 Mich 109, 117; 393 NW2d 479 (1986),

> Equitable subrogation is a legal fiction through which a person who pays a debt for which another is primarily responsible is substituted or subrogated to all the rights and remedies of the other. It is well-established that the subrogee acquires no greater rights than those possessed by the subrogor, and that the subrogee may not be a 'mere volunteer.'

The doctrine of equitable subrogation has no application to the present case. In contrast to the typical insurance case in which this topic arises where one insured has relationships with two insurers, here, Colbeck, the injured party, had absolutely no relationship with defendants. There was no contract between Colbeck and defendants, and any duty owed Colbeck was owed her by the possessor of the premises on which she fell, see *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 90; 485 NW2d 676 (1992), not by defendants. Thus, because *Colbeck* had no legally cognizable rights against defendants, *plaintiff* may not, through subrogation, acquire any legally cognizable rights against defendants. To do so would allow plaintiff to acquire greater rights than those possessed by Colbeck. *Commercial Union*, *supra*. Therefore, because we find no error in the reasoning of the circuit court and because we find plaintiff's attempted theory of recovery of equitable subrogation to be untenable, we affirm the court's grant of summary disposition of plaintiff's first claim.

II

With respect to plaintiff's second claim, breach of contract, a showing of damages is a necessary element in a claim for breach of contract. See *Lawrence v Will Darrah & Associates, Inc*, 445 Mich 1, 6-8; 516 NW2d 43 (1994). In the instant case, plaintiff has alleged only that she has sustained damages "to the extent that [she] has become liable to . . . Colbeck." As set forth above, while it may be true that she did become liable to Colbeck, plaintiff waived her right to recover from defendants for the type of injury suffered by Colbeck. Therefore, because plaintiff has presented no evidence of damages for which she may be compensated, the court did not err in granting defendants' motion for summary disposition brought pursuant to MCR 2.116(C)(10).

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Michael J. Matuzak