COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-792

COLLEEN MCNAMARA DUSTI, trustee[1]

vs.

TOWN OF SHIRLEY.[2]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff trustee, Colleen McNamara Dusti, appeals from an order granting summary judgment in favor of the defendant, the town of Shirley (town), on immunity grounds. More specifically, Dusti argues on appeal that the judge erred in concluding that (1) the town was immune, under G. L. c. 58, § 10 (c), from Dusti's claim of intentional interference with business relations (count three), and (2) the town was immune, under G. L. c. 258, § 10 (e), from Dusti's negligent

[1] Of the JGD Realty Trust. The complaint was brought in the name of "Colleen McNamara Dusti, Trustee of the JGD Realty Trust," and she (rather than the trust) is identified, both individually and as trustee, in the complaint as the pertinent party.

[2] Although Dusti named as the defendant Patrice Garvin, the town administrator at the time the complaint was filed, the parties agree (as the judge found) that the appropriate defendant is the town of Shirley, since the administrator is sued only in his or her official capacity. See O'Malley v. Sheriff of Worcester County, 415 Mass. 132, 140-141 n.13 (1993). No claim was asserted against either the administrator or the building inspector acting in their individual capacities.

misrepresentation claim (count one).[3] We review the grant of summary judgment to determine whether, "viewing the evidence in the light most favorable to the nonmoving party, the moving party is entitled to judgment as a matter of law." Meyer v. Veolia Energy N. Am., 482 Mass. 208, 211 (2019), citing Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120 (1991). Employing this standard, we affirm, although our reasoning rests partly on different grounds than that of the motion judge.

Background. We summarize the pertinent facts, which the town does not challenge for summary judgment purposes, as presented by Dusti. Dusti owns property in Shirley, which she wished to sell. On September 19, 2012, she and her husband (who is not a party to this litigation) secured a signed offer to purchase the property for $182,500. A condition of the offer was that the property be "buildable." When the buyer inquired of the building inspector, the inspector erroneously stated that the property was not buildable. This encounter lasted about ten seconds, and the inspector then walked away. Based on this

[3] Count two asserted a claim of negligent supervision, which the judge dismissed because he concluded that Dusti could not maintain the underlying act of alleged negligence by the town inspector. Dusti offers no argument on appeal that this aspect of the judge's reasoning was incorrect. Because we conclude that the negligent misrepresentation claim was properly dismissed, we also affirm the dismissal of the negligent supervision claim.

exchange, the buyer revoked his offer and Dusti returned the buyer's deposit.

1. Negligent misrepresentation. The tort of negligent misrepresentation has been defined as follows: "One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information." Nycal Corp. v. KPMG Peat Marwick LLP, 426 Mass. 491, 496 (1998), quoting Restatement (Second) of Torts § 552 (1977). "That liability is limited to 'loss suffered (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction." Id., quoting Restatement (Second) of Torts § 552. See Cumis Ins. Soc'y, Inc. v. BJ's Wholesale Club, Inc., 455 Mass. 458, 471-472 (2009).

Here, the town was entitled to summary judgment because, even assuming Dusti is a person for whose benefit and guidance

the inspector intended to supply information or to whom the inspector knew the buyer intended to supply it (matters about which the summary judgment record is silent), there is no evidence that Dusti relied on the accuracy of the inspector's statement. In fact, to the contrary, Dusti disagreed with the building inspector's view regarding the buildability of the property.

The motion judge concluded that Dusti could not sustain her negligent misrepresentation claim because there was no evidence that the buyer's reliance was reasonable. But the buyer is not a party, nor is a claim being asserted on his behalf; we are therefore not convinced that the buyer's reliance is at issue. Beyond that, even assuming that the building inspector's statement was false and that the buyer's reliance on it was reasonable, there is no evidence that the buyer suffered any pecuniary harm.

For these reasons, summary judgment was correctly allowed in favor of the town on count one. We need not consider the town's additional argument that it was immune under G. L. c. 258, § 10 (e), because the claim is based "upon the issuance, denial, suspension or revocation or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authorization."

2. Intentional interference with business relations. Dusti acknowledges that G. L. c. 258, § 10 (c), provides immunity for intentional torts such as her claim for intentional interference with business relations. See Swanset Dev. Corp. v. Taunton, 423 Mass. 390, 397 (1996) (municipalities and public employers are not liable for "any claim arising out of an intentional tort, including . . . interference with advantageous relations or interference with contractual relations"). See also Mohr v. Commonwealth, 421 Mass. 147, 164 (1995); Molinaro v. Northbridge, 419 Mass. 278, 279 (1995) ("town is not liable for intentional torts"). She contends, however, that § 10 (c) immunity does not extend to circumstances where a municipality knew or should have known of the public employee's intentional tortious conduct. See Doe v. Blandford, 402 Mass. 831, 838 (1988) (claim not barred by § 10 (c) where town "had, or should have had, knowledge" of the municipal employee's assaultive behavior). In such cases, the Supreme Judicial Court has reasoned that the claim, even if styled as an intentional tort by the municipal employee, sounds more properly in negligence with respect to the municipal employer. Id.

The problem for Dusti here is that the summary judgment record does not raise a triable issue of fact that the town knew, or should have known, of the building inspector's tortious acts. Although the amended complaint alleged that the building

inspector had long been hostile to Dusti and had "destroyed an earlier sale" of the property in 2009, those facts were not contained in the Superior Court Rule 9A statement of disputed and undisputed facts, or otherwise in the summary judgment record, let alone in admissible form. See Mass. R. Civ. P. 56 (e), 365 Mass. 824 (1974). The allegations of the amended complaint were not verified, and Dusti could "not rest upon the mere allegations" of her pleading to defeat summary judgment. Mass. R. Civ. P. 56 (e). See Universal Health Servs., Inc. v. Corcoran, 28 Mass. App. Ct. 959, 960 (1990), citing Godbout v. Cousens, 396 Mass. 254, 263 (1985) (unverified complaint "counts for nothing" in context of summary judgment). On this record, therefore, we see no error in the judge's conclusion that the intentional interference claim was barred by § 10 (c).

Judgment affirmed.

By the Court (Wolohojian, Blake & Englander, JJ.[4]),

Joseph F. Stanton

Clerk

Entered: November 12, 2019.

[4] The panelists are listed in order of seniority.