

Circuit Court for Howard County
Case No. 13-C-18-114510

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 71

September Term, 2020

SHIRLEY ANN BOLTON

v.

BONNIE QUEEN, *et al.*

Graeff,
Nazarian,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: April 15, 2021

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Shirley Bolton, appellant, filed, in the Circuit Court for Howard County, a complaint against Home Monitoring Services (“HMS”) and Satellite Tracking of People, LLC (“STOP”) alleging, among other things, breach of contract, negligence, violation of the Maryland Consumer Protection Act, and breach of express warranty. HMS and STOP subsequently filed motions to dismiss for failure to state a claim upon which relief could be granted. The court ultimately granted both motions and dismissed Ms. Bolton’s complaint. In this appeal, Ms. Bolton raises a single question:

Did the circuit court err in dismissing the complaint?

For reasons to follow, we hold that the circuit court erred in dismissing Ms. Bolton’s claims against HMS for breach of contract and violation of the Maryland Consumer Protection Act. Conversely, we hold that the court did not err in dismissing Ms. Bolton’s other claims. We, therefore, reverse the court’s judgment in part and remand for further proceedings consistent with this opinion. Otherwise, we affirm.

BACKGROUND

In August of 2013, Ms. Bolton pleaded guilty in the Circuit Court for Howard County to one count of first-degree assault. Pursuant to that guilty plea, Ms. Bolton was sentenced to three years of home detention.¹ Ms. Bolton selected HMS, a company that provides electronic monitoring services to people on home detention, to provide such services to her pursuant to the terms of her sentence. STOP, a company that provides electronic monitoring equipment and services, supplied the equipment that HMS used in

¹ Ms. Bolton’s sentence included additional terms that are not relevant here.

monitoring Ms. Bolton. That equipment included an electronic transmitting device, which Ms. Bolton wore on her wrist, and a receiver, which was installed in Ms. Bolton’s home.

During the course of Ms. Bolton’s subsequent home detention, HMS submitted eight violation of probation reports to the circuit court alleging that Ms. Bolton violated the terms of her home detention 24 times over a six-month period. Those reports resulted in the issuance of six show cause orders for Ms. Bolton to appear in court to defend against the allegations that she had violated her probation. Ms. Bolton later appeared at those show cause hearings and presented evidence indicating that she had not violated her probation. Ultimately, the court found that Ms. Bolton had not violated her probation.

Ms. Bolton thereafter filed a complaint against HMS, STOP, the Department of Public Safety and Correctional Services (“DPSCS”), the Office of the State’s Attorney for Howard County, and the State of Maryland. Ms. Bolton filed an amended complaint a few months later. The amended complaint was subsequently dismissed as to DPSCS, the State’s Attorney, and the State of Maryland.

Following the dismissal of her amended complaint, Ms. Bolton filed a second amended complaint against HMS for breach of contract, negligence, violation of the Maryland Consumer Protection Act, and breach of express warranty.² Ms. Bolton included an additional claim against STOP for negligence.

In support of those claims, Ms. Bolton alleged that HMS had falsely accused her of violating her probation by submitting inaccurate reports to the circuit court indicating

² Ms. Bolton’s complaint included additional claims and defendants, but none of those claims or defendants is germane to the instant appeal.

that she had violated the terms of her home detention. Ms. Bolton claimed that she had not, in fact, violated her home detention on the dates indicated by HMS. Ms. Bolton claimed, rather, that the monitoring equipment provided by HMS and STOP had malfunctioned, and that the faulty equipment had inaccurately reported that she had violated the terms of her home detention.

For the breach of contract claim, Ms. Bolton alleged that she had selected HMS to provide home detention monitoring equipment and services, and that she had paid “consideration” for those goods and services. Ms. Bolton alleged that she had selected HMS based in large part on HMS’s assertion that the electronic transmitter was waterproof. She asserted that the “ability of the transmitter to function after exposure to water was essential because [she was] prescribed pool therapy as a result of a medical condition.” Ms. Bolton claimed that HMS represented “that this was not an issue.” Ms. Bolton later discovered that the transmitter was not waterproof and that exposing the transmitter to water during her home detention may have caused the “false reports.” Ms. Bolton also alleged that, per the contract, HMS had agreed to come to her home and conduct a “range test” in the event that she was experiencing “equipment issues.” Ms. Bolton claimed that HMS did not conduct any such tests. Ms. Bolton contended that HMS had breached its contractual duty “by failing to act in good faith and failing to provide the goods and services in a manner stated in the contract” and “by certifying the alleged unauthorized leaves” that served as the basis for the violation of probation

reports. Ms. Bolton asked for compensatory damages and reimbursement of the amounts she paid to HMS.

For the claim that HMS had violated the Maryland Consumer Protection Act, Ms. Bolton alleged that HMS's representations regarding the transmitter, particularly its representations that the transmitter was waterproof, were "false and misleading." Ms. Bolton argued that she relied upon those representations to her detriment and that she suffered actual damages as a result of that reliance. Ms. Bolton asked for compensatory damages and attorney's fees.

For the negligence claims, Ms. Bolton alleged that both HMS and STOP had a duty to provide services in a "professional and workmanlike manner" and to "meet the applicable standards of care as set by international standards, industry best practices, State of Maryland standards governing electronic monitoring programs, and such standards as stated by Defendants' own documents." Ms. Bolton asserted that HMS and STOP violated those duties by failing to remedy the problems with the defective monitoring equipment and by inaccurately reporting to the court that she had violated her home detention. Ms. Bolton asserted that those violations were the proximate and direct cause of various injuries, including "emotional pain and anguish, emotional distress, and concomitant physical repercussions." Ms. Bolton asked for compensatory damages.

Finally, for the breach of express warranty claim, Ms. Bolton alleged that HMS had expressly warranted that the electronic transmitter was waterproof, and that she had selected HMS to provide services based on that representation. She argued that HMS

breached that warranty by providing equipment that was not waterproof. She asked for compensatory, punitive, and monetary damages.

Subsequent to the filing of Ms. Bolton’s second amended complaint, HMS filed a motion to dismiss on the grounds that Ms. Bolton had failed to state a claim for which relief could be granted. In support of that motion, HMS argued that judicial privilege barred all of Ms. Bolton’s claims. HMS also argued, alternatively, that the breach of contract and breach of express warranty claims failed because there was no contract and, even if there were, there was no breach. HMS argued that the Maryland Consumer Protection Act claim failed because Ms. Bolton was not a “consumer” and thus was not protected by the Act. HMS argued that the negligence claim failed because Ms. Bolton had failed to show a breach of a recognized duty or that any such breach caused her injuries.

STOP filed its own motion to dismiss on the grounds that Ms. Bolton had failed to state a claim for which relief could be granted. STOP argued that it did not owe a duty to Ms. Bolton and that, even so, there were multiple superseding forces that relieved STOP of liability.

In the end, the circuit court granted both motions and dismissed Ms. Bolton’s claims against HMS and STOP. This timely appeal followed.

DISCUSSION

Parties’ Contentions

Ms. Bolton contends that the circuit court erred in dismissing her claims against HMS for breach of contract, negligence, violation of the Maryland Consumer Protection Act, and breach of express warranty, and that the court erred in dismissing her claim against STOP for negligence. As will be discussed in greater detail below, Ms. Bolton argues that dismissal was inappropriate because her complaint set forth sufficient facts to defeat a motion to dismiss as to each claim. HMS and STOP argue that the claims were properly dismissed for the reasons cited in their respective motions to dismiss.³

Before discussing the merits of the parties' claims, we first note that all three parties reference in their respective briefs various documents that were not included as part of Ms. Bolton's second amended complaint but rather were submitted as attachments to HMS's motion to dismiss, STOP's motion to dismiss, or Ms. Bolton's response to those motions to dismiss. It is not clear from the record that the circuit court actually considered those documents in granting the motions to dismiss. Thus, those documents will not be considered here.

Standard of Review

“A motion to dismiss for failure to state a claim tests the sufficiency of the pleadings.” *Ricketts v. Ricketts*, 393 Md. 479, 491 (2006) (citations and quotations omitted). “When deciding whether to grant a motion to dismiss a complaint as a matter of law, a trial court is to assume the truth of factual allegations made in the complaint and

³ HMS raises additional arguments that involve either factual disputes or matters outside of the complaint, none of which are relevant to our determination as to whether the court erred in dismissing Ms. Bolton's complaint.

draw all reasonable inferences from those allegations in favor of the plaintiff.” *Ceccone v. Carroll Home Services, LLC*, 454 Md. 680, 691 (2017). Those facts, however, “must be pleaded with sufficient specificity; bald assertions and conclusory statements by the pleader will not suffice.” *State Center, LLC v. Lexington Charles Ltd. Partnership*, 438 Md. 451, 497 (2014) (citations omitted). “Dismissal is proper only if the alleged facts and permissible inferences, so viewed, would, if proven, nonetheless fail to afford relief to the plaintiff.” *Ricketts*, 393 Md. at 492. “When an appellate court reviews a trial court’s grant of a motion to dismiss, the appellate court applies the same standard to assess whether the trial court’s decision was legally correct.” *Ceccone*, 454 Md. at 691.

Analysis

A. Breach of Contract - HMS

Ms. Bolton first argues that the circuit court erred in dismissing her breach of contract claim against HMS. We agree.

“Maryland law requires that a plaintiff alleging a breach of contract . . . allege with certainty and definiteness facts showing a contractual obligation owed by the defendant to the plaintiff and a breach of that obligation by defendant.” *Polek v. J.P. Morgan Chase Bank, N.A.*, 424 Md. 333, 362 (2012) (citations and quotations omitted). “The elements of a contract are offer, acceptance, and consideration.” *B-Line Medical, LLC. v. Interactive Digital Solutions, Inc.*, 209 Md. App. 22, 46 (2012).

In her complaint, Ms. Bolton alleged that she selected HMS to provide her home monitoring services during her home detention, and that she paid HMS consideration in

return. Ms. Bolton further alleged that, as part of that agreement, HMS promised to provide waterproof monitoring equipment and to repair or replace that equipment should it malfunction. Ms. Bolton claimed that she chose HMS based on its representation that the monitoring equipment was waterproof. Ms. Bolton further alleged that HMS breached its obligations by providing equipment that was not waterproof and by failing to repair or replace the equipment upon malfunction. Those factual allegations were sufficient to state a claim for breach of contract. The circuit court erred in dismissing that claim.

HMS argues that Ms. Bolton’s breach of contract claim was barred by judicial privilege. We disagree.

“In Maryland, judges, attorneys, parties and witnesses are absolutely privileged to publish defamatory matters during the course of a judicial proceeding.” *Reichardt v. Flynn*, 374 Md. 361, 368 (2003) (citations and quotations omitted). The privilege “extends not only to defamatory statements made in the courtroom during the course of the trial, but also to such statements published in documents which have been filed in a judicial proceeding.” *Id.* (citations omitted). Although judicial privilege generally arises in the context of defamation torts, the privilege may apply “to torts beyond defamation when those other torts arise from the same conduct as the defamation claim.” *Mixter v. Farmer*, 215 Md. App. 536, 545-46 (2013).

The crux of HMS’s argument is that Ms. Bolton’s breach of contract claim hinges upon her allegation that the faulty monitoring equipment resulted in “false” reports to the

court, which in turn caused her to be subjected to several show cause hearings. HMS argues that those reports are covered by judicial privilege and that, as a result, Ms. Bolton’s breach of contract claim cannot stand.

We are unpersuaded by HMS’s argument. To be sure, part of Ms. Bolton’s breach of contract claim included an allegation that HMS submitted false reports to the court after her monitoring equipment malfunctioned. That, however, was not the entirety of the claim. As noted, Ms. Bolton also alleged that she contracted with HMS to provide her with certain equipment and services, and that HMS breached the contract by failing to provide such equipment and services. Those allegations were sufficient to state a claim for breach of contract and did not involve any statements made “*during the course of a judicial proceeding.*” There are allegations of breach that would fall short of any statements “published in documents which have been filed in a judicial proceeding.” Thus, judicial privilege did not bar the entirety of Ms. Bolton’s breach of contract claim.

B. Violation of the Maryland Consumer Protection Act - HMS

Ms. Bolton next claims that the circuit court erred in dismissing her claim that HMS violated the Maryland Consumer Protection Act. We agree.

The Maryland Consumer Protection Act prohibits any person from engaging “in any unfair, abusive, or deceptive trade practice” in the “sale, lease, rental, loan, or bailment of any consumer goods, consumer realty, or consumer services[.]” Md. Code, (Repl. Vol. 2013), Commercial Law (“CL”) § 13-303. The Act defines unfair, abusive, or deceptive trade practices to include: making a false or misleading oral or written

statement that has the capacity or effect of deceiving or misleading consumers; representing that consumer goods or services have a characteristic, use, or benefit that they do not possess; representing that consumer goods or services are of a particular standard or quality that they do not possess; and failing to state a material fact that deceives or tends to deceive. CL § 13-301. The Act states that “any person may bring an action to recover for injury or loss sustained by him as the result of a practice prohibited by this title.” CL § 13-408. To properly plead such an action, a consumer must set forth sufficient facts establishing both a violation of the Act and “an identifiable loss, measured by the amount the consumer spent or lost as a result of his or her reliance on the sellers’ misrepresentation.” *Lloyd v. General Motors Corp.*, 397 Md. 108, 143 (2007).

In her complaint, Ms. Bolton alleged that HMS made several representations that were false and misleading, including that the monitoring equipment was waterproof. She further alleged that those representations deceived her and caused identifiable damages, which included the consideration she paid to HMS for the monitoring equipment. Those allegations were sufficient to state a claim for a violation of the Maryland Consumer Protection Act. The circuit court erred in dismissing that claim.

HMS argues that Ms. Bolton’s claim was barred by judicial privilege. We disagree. As with her breach of contract claim, Ms. Bolton’s claim under the Maryland Consumer Protection Act was not based solely on the allegation that HMS submitted false reports to the court. And, like the breach of contract claim, Ms. Bolton’s claim under the Maryland Consumer Protection Act included sufficient facts to survive a

motion to dismiss independent of any statements made during a judicial proceeding. Thus, judicial privilege did not bar the entirety of Ms. Bolton’s claim under the Maryland Consumer Protection Act.

HMS also argues that the Maryland Consumer Protection Act did not apply to Ms. Bolton because she was not a “consumer” and because the monitoring equipment and services were not “consumer goods” or “consumer services.” Again, we disagree. The Act defines “consumer” as “an actual or prospective purchaser, lessee, or recipient of consumer goods, consumer services, consumer realty, or consumer credit.” CL § 13-101(c)(1). The Act defines “consumer goods” and “consumer services,” respectively, as goods or services “which are primarily for personal, household, family, or agricultural purposes.” CL § 13-101(d)(1).

In her complaint, Ms. Bolton alleged that HMS was in the business of providing home monitoring services and equipment to individuals on home detention. She further alleged that she had selected, and then contracted with, HMS to provide such services and equipment to her, and that she ultimately used those goods and services, personally, during her home detention.⁴ Those facts were sufficient to show that Ms. Bolton was a

⁴ Appellee cites *Boatel Industries, Inc. v. Hester*, 77 Md. App. 284 (1988) and *Layton v. AAMCO Transmission, Inc.*, 717 F.Supp. 368 (D. Md. 1989). In *Boatel*, plaintiff purchased the boat for resale. Consequently, the plaintiff was a “non consumer,” as the boat was not primarily for personal use. In *Layton*, the Consumer Protection Act was not implicated because franchisees are not consumers. The thread that runs through both cases is that these were commercial transactions and not goods and services used personally by the plaintiffs in their respective homes. The appellee cites no other authority in support.

consumer, and that the goods and services provided by HMS were consumer goods and services.

C. Negligence - HMS and STOP

Ms. Bolton next claims that the circuit court erred in dismissing her negligence claims against HMS and STOP. We hold that the court did not err in dismissing those claims, as Ms. Bolton failed to allege that either party owed her a legally recognized duty.

To properly plead a negligence action, a plaintiff “must allege, with certainty and definiteness, facts and circumstances sufficient to set forth (a) a duty owed by the defendant to the plaintiff, (b) a breach of that duty, and (c) injury proximately resulting from that breach.” *Pendleton v. State*, 398 Md. 447, 458 (2007) (citations and quotations omitted). Moreover, “*a contractual obligation, by itself, does not create a tort duty.*” Instead, the duty giving rise to a tort action must have some independent basis.” *Jones v. Hyatt Ins. Agency, Inc.*, 356 Md. 639, 654 (1999) (citations and quotations omitted) (emphasis added). “Mere failure to perform a contractual duty, without more, is not an actionable tort.” *Wilmington Trust Co. v. Clark*, 289 Md. 313, 329 (1981). “This principle is applicable even when the failure to perform the contract results from the defendant’s negligence.” *Jones*, 356 Md. at 654. “The mere negligent breach of contract, absent a duty or obligation imposed by law independent of that arising out of the contract itself, is not enough to sustain an action sounding in tort.” *Heckrotte v. Riddle*, 224 Md. 591, 595 (1961). “For it is only when a breach of contract is also a violation of a duty imposed by law that the injured party has a choice of remedies.” *Id.* at 595-96.

Whether a duty is owed is a question of law. *Landaverde v. Navarro*, 238 Md. App. 224, 248 (2018), *cert. denied* 461 Md. 503 (2018).

A duty is “an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.” *Id.* (citations and quotations omitted). “There is no universal test to determine whether a duty exists.” *Id.* Rather, the existence of a duty is a policy question and is dependent upon the facts and circumstances of the case. *Steamfitter Local Union No. 602 v. Erie Insurance Exchange*, 241 Md. App. 94, 115 (2019), *aff’d* 469 Md. 704. In determining the existence of a duty, we consider:

The foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered the injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liabilities for breach, and the availability, cost and prevalence of insurance for the risk involved.

Id. (citing *Ashburn v. Anne Arundel County*, 306 Md. 617, 627 (1986)).

Ms. Bolton raises three arguments as to why both HMS and STOP owed her a legal duty. First, Ms. Bolton argues that HMS and STOP owed her a legal duty “to perform the services in a professional and workmanlike manner” and “to meet the applicable standards of care” as set forth in Title 20 of the Md. Code, (Repl. Vol. ___), Business Occupations & Professions Article (“BO&P”) and Title 12 of the Code of Maryland Regulations. Second, Ms. Bolton claims that HMS and STOP owed her a legal duty “by virtue of the parties’ custodial relationship.” Third, Ms. Bolton contends that HMS and STOP owed her a legal duty because the harm she suffered, namely, the “false

readings of unauthorized absences,” was “completely foreseeable” and was closely related to HMS’s and STOP’s conduct. She also argues there is a “clear need” to prevent the type of harm she suffered.

We are not persuaded by any of Ms. Bolton’s arguments. As to her argument that a duty was owed by virtue of statute or rule, Ms. Bolton does not cite to a single statute or rule to support that claim.⁵ Ms. Bolton instead makes vague references to “applicable standards of care,” which she claims are contained in Title 20 of BO&P and Title 12 of the Code of Maryland Regulations, but her reliance on those Titles is misplaced. Those Titles involve the licensing and regulation of private home detention monitoring agencies by the Department of Public Safety and Correctional Services. *See* BO&P § 20-101, *et seq*; COMAR 12.11.10, *et. seq*. Moreover, we could not find any provision in either of those Titles that indicates that it was enacted for the benefit of someone in Ms. Bolton’s situation, *i.e.*, someone on home detention. *See Bord v. Baltimore County*, 220 Md. App. 529, 553 (2014) (noting that whether a statutory duty exists depends upon, among other things, “whether the plaintiff is one of the class for whose special benefit the statute was enacted”).

We likewise reject Ms. Bolton’s claim that HMS and STOP owed her a duty because of their “custodial relationship.” Although Ms. Bolton may have pleaded facts

⁵ In her complaint, Ms. Bolton states that BO&P § 20-201(a) requires a home monitoring program “to document how the installation of appropriate electronic monitoring equipment at the monitored individuals approved location is accomplished, if required, and that the equipment must be tested.” The statute contains no such language; rather, it merely enables the Secretary of Public Safety and Correctional Services to adopt and carry out regulations regarding home detention monitoring. *Id.*

suggesting that she was “in custody” during her home detention, she did not plead any facts to suggest that HMS or STOP were the ones who had actual custody of her. Rather, Ms. Bolton merely established that HMS and STOP provided the monitoring services during her court-ordered home detention. Those facts were insufficient to show a custodial relationship. *See Ashburn, supra*, 306 Md. at 630 n.2 (noting that “[s]pecial relationships have been found as to . . . those who *have custody* of others”) (emphasis added).

Finally, we conclude that the facts and circumstances as set forth in Ms. Bolton’s complaint failed to show that public policy supports the imposition of a legal duty on either HMS or STOP toward Ms. Bolton. Any responsibility HMS or STOP had in monitoring and reporting on Ms. Bolton during her home detention was to the court, not Ms. Bolton. At most, Ms. Bolton’s complaint established a contractual duty on the part of HMS to perform certain acts and provide certain equipment. And, as noted, such a duty was insufficient to support a negligence claim against either HMS or STOP. *See Jones*, 356 Md. at 654 (noting that a duty giving rise to a tort action must be independent of a contractual obligation); *see also, Mesmer v. Maryland Auto. Ins. Fund*, 353 Md. 241, 253 (1999).

Breach of Express Warranty - HMS

Ms. Bolton’s final claim is that the circuit court erred in dismissing her claim for breach of express warranty against HMS. We disagree. Express warranties apply to the sale or lease of goods. *See* CL §§ 2-313 and 2a-210; *see also Bona v. Graefe*, 264 Md.

69, 72-76 (1972). Ms. Bolton failed to allege any facts in her complaint to show that HMS sold her the monitoring equipment. *See* CL § 2-106(1) (defining “sale” as “the passing of title from the seller to the buyer for a price”). Ms. Bolton also failed to allege any facts in her complaint to show that her use of the monitoring equipment during her home detention constituted a “lease.” *See* CL § 2A-103(j) (defining “lease” as “a transfer of the right to possession and use of goods for a term in return for consideration”). Although Ms. Bolton did allege that HMS provided the monitoring equipment to her as part of their contract, there is nothing to indicate that she retained any sort of economic interest in the equipment at the end of the contract. *See B&S Marketing Enterprises, LLC v. Consumer Protection Div.*, 153 Md. App. 130, 162-63 (2003) (“[T]he central figure of a true lease is the reservation of an economically meaningful interest to the lessor at the end of the lease term.”). Moreover, it is clear that the predominant purpose of the contract between HMS and Ms. Bolton was the provision of home monitoring services and not any sort of lease regarding the monitoring equipment. *See DeGroft v. Lancaster Silo Co., Inc.*, 72 Md. App. 154, 167-68 (1987) (noting that, in the case of a “hybrid” contract involving goods and services, application of the Commercial Code “would hinge on the main purpose or primary thrust of the parties’ agreement.”). Accordingly, the court did not err in dismissing Ms. Bolton’s claim for breach of express warranty against HMS.

Conclusion

In sum, we hold that the circuit court erred in dismissing Ms. Bolton’s claims against HMS for breach of contract and violation of the Maryland Consumer Protection Act. On the other hand, we hold that the court did not err in dismissing Ms. Bolton’s claims against HMS and STOP for negligence or in dismissing her claim against HMS for breach of express warranty. We, therefore, reverse the court’s judgment in part and remand for further proceedings consistent with this opinion.

**JUDGMENTS OF THE CIRCUIT COURT
FOR HOWARD COUNTY AFFIRMED IN
PART AND REVERSED IN PART; CASE
REMANDED FOR FURTHER
PROCEEDINGS CONSISTENT WITH
THIS OPINION; COSTS TO BE PAID
ONE-HALF BY APPELLANT AND ONE-
HALF BY APPELLEE HMS.**