

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Samantha Saavedra,	:	
	:	
Plaintiff-Appellant,	:	No. 14AP-757
	:	(C.P.C. No. 13CV-10740)
v.	:	
	:	(REGULAR CALENDAR)
Mikado Japanese Steak House & Sushi	:	
et al.,	:	
	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on March 5, 2015

Charley Hess, for appellant.

Jeff Donnellon Law, LLC, and *Jeff Donnellon*, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, P.J.

{¶ 1} Samantha Saavedra, plaintiff-appellant, appeals from the judgment of the Franklin County Court of Common Pleas in which the court granted summary judgment to Mikado Japanese Steak House & Sushi ("Mikado") and Kahue Tran, defendants-appellees, on appellant's claims for negligent retention and negligent hiring.

{¶ 2} Tran is the owner of Mikado, a restaurant. Appellant worked at the restaurant as a server, and Khel Nguyen worked as a tableside cook. On June 8, 2013, Nguyen accused appellant of stealing a tip. Nguyen spit on appellant and struck her in the face. Appellant told Tran and went home. She reported the incident to police who went to the restaurant and arrested Nguyen after reviewing surveillance video. She quit her job the following day. Nguyen eventually pled guilty to assault.

{¶ 3} On September 26, 2013, appellant filed a complaint against Nguyen for assault and defamation and against appellees for negligent retention and negligent hiring. Nguyen failed to appear in the action, and the trial court granted default judgment against him on May 21, 2014. Appellees filed a motion for summary judgment on July 3, 2014. On August 27, 2014, the trial court granted appellees' motion for summary judgment, finding that appellees could not have reasonably foreseen the actions of Nguyen. Appellant appeals the judgment of the trial court, asserting the following assignment of error:

The trial court erred as a matter of law at page 56 of the Record when it granted the motion of appellees, Mikado Japanese Steak House & Sushi and Kahue Tran, for summary judgment on the grounds that there is no genuine issue of material fact regarding whether appellees acted reasonably in their conducting an employment background check of their employee, defendant, Kheo Van Nguyen, prior to their hiring and retaining him as a tableside cook at their Japanese restaurant.

{¶ 4} In her assignment of error, appellant argues that the trial court erred when it granted summary judgment to appellees. Summary judgment is appropriate when the moving party demonstrates that: (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion when viewing the evidence most strongly in favor of the non-moving party, and that conclusion is adverse to the non-moving party. *Hudson v. Petrosurance, Inc.*, 127 Ohio St.3d 54, 2010-Ohio-4505, ¶ 29; *Sinnott v. Aqua-Chem, Inc.*, 116 Ohio St.3d 158, 2007-Ohio-5584, ¶ 29. Appellate review of a trial court's ruling on a motion for summary judgment is de novo. *Hudson* at ¶ 29. This means that an appellate court conducts an independent review, without deference to the trial court's determination. *Zurz v. 770 W. Broad AGA, L.L.C.*, 192 Ohio App.3d 521, 2011-Ohio-832, ¶ 5 (10th Dist.); *White v. Westfall*, 183 Ohio App.3d 807, 2009-Ohio-4490, ¶ 6 (10th Dist.).

{¶ 5} When seeking summary judgment on the ground that the non-moving party cannot prove its case, the moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on an essential element of the

non-moving party's claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). The moving party does not discharge this initial burden under Civ.R. 56 by simply making a conclusory allegation that the non-moving party has no evidence to prove its case. *Id.* Rather, the moving party must affirmatively demonstrate by affidavit or other evidence allowed by Civ.R. 56(C) that the non-moving party has no evidence to support its claims. *Id.* If the moving party meets its burden, then the non-moving party has a reciprocal burden to set forth specific facts showing that there is a genuine issue for trial. Civ.R. 56(E); *Dresher* at 293. If the non-moving party does not so respond, summary judgment, if appropriate, shall be entered against the non-moving party. *Id.*

{¶ 6} Here, appellant brought claims against appellees for negligent hiring and negligent retention. In order to establish a claim for negligent hiring or retention, the following elements must be demonstrated: (1) the existence of an employment relationship, (2) the employee's incompetence, (3) the employer's actual or constructive knowledge of such incompetence, (4) the employer's act or omission causing plaintiff's injuries, and (5) the employer's negligence in hiring or retaining the employee as the proximate cause of plaintiff's injuries. *Peterson v. Buckeye Steel Casings*, 133 Ohio App.3d 715, 729 (10th Dist.1999), citing *Evans v. Ohio State Univ.*, 112 Ohio App.3d 724, 739 (10th Dist.1996).

{¶ 7} In the present case, the trial court found that appellees could not have foreseen the actions of Nguyen, so they did not have actual or constructive notice of Nguyen's incompetence. The trial court relied upon Tran's affidavit in which Tran averred that Nguyen was recommended to appellees by Nguyen's previous employer, Tran checked Nguyen's references and criminal background in Franklin County before hiring him, the criminal background check revealed nothing, Nguyen had been a good employee for the two years he had worked at Tran's restaurant, and there had been no prior incidents regarding Nguyen at the restaurant. The trial court then found appellant did not satisfy her reciprocal burden to present evidence showing a genuine issue of material fact. The trial court found that the affidavit of appellant's private investigator was insufficient to raise a genuine issue of material fact.

{¶ 8} On appeal, appellant's argument relies almost entirely on her investigator's affidavit to assert that appellees failed to act reasonably when they did not conduct a thorough employee background check prior to hiring and retaining Nguyen. Appellant

argues that criminal background checks for prospective employees are easy and inexpensive, and completing them does not pose an undue burden on an employer. In the affidavit, the investigator averred that he examined the records of four Ohio counties in which Nguyen had resided. He discovered Nguyen had four traffic and criminal cases in Hamilton County, including two disorderly conduct convictions, with one involving risk of harm.

{¶ 9} The trial court found this affidavit "interesting," but noted that no additional information was provided as to what happened in the cases involving Nguyen, thereby preventing the trial court from evaluating whether knowledge of the cases would have created foreseeability. The court also noted that it was telling that appellant needed a private investigator to find the cases. The court held that it was not going to create a requirement whereby employers must hire private investigators to search the state for any possible incident in which a potential employee may have been involved.

{¶ 10} The existence of a duty in a negligence case is a question of law for a court to determine and there is no formula for ascertaining whether such a duty arises. *Mussivand v. David*, 45 Ohio St.3d 314, 318 (1989). When considering a claim based upon negligent hiring or retention, the issue of whether a duty is owed is based upon the foreseeability of the injury. *Evans*. The existence of an employer-employee relationship imposes a duty upon the employer to prevent foreseeable injury to others by exercising reasonable care to refrain from employing an incompetent employee. *Chapa v. Genpak, L.L.C.*, 10th Dist. No. 12AP-466, 2014-Ohio-897. Injury is foreseeable if a defendant knew or should have known that his act was likely to result in harm to someone. *Mudrich v. Standard Oil Co.*, 153 Ohio St. 31, 39 (1950).

{¶ 11} The foreseeability of a criminal act depends upon the knowledge of the defendant, which must be determined by the totality of the circumstances. *March v. Steed Ents., Inc.*, 5th Dist. No. CT2012-0058, 2013-Ohio-4448. It is when the totality of the circumstances is "somewhat overwhelming" that a defendant will be held liable. *Id.*

{¶ 12} In the present case, appellees did not violate any legal duty in failing to perform a more extensive background check on Nguyen. Although it may be prudent for an employer to conduct a criminal background check for employment applicants, it is not required by law. *Rozzi v. Star Personnel Servs., Inc.*, 12th Dist. No. CA2006-07-162, 2007-Ohio-2555, ¶ 11. See also *Steppe v. Kmart Stores*, 136 Ohio App.3d 454, 467 (8th

Dist.1999), citing *Kuhn v. Youlten*, 118 Ohio App.3d 168, 177 (8th Dist.1997) (Kmart was under no duty to conduct a criminal background check). Here, appellees did, in fact, perform a background check on Nguyen. What appellant seeks is a determination that an employer must perform a background check within a certain geographical radius to escape liability. Given that there is no authority for the proposition that an employer is required to perform a background check of prospective employees, we cannot mandate that an employer must perform an even more extensive background check that encompasses a minimum or defined radius.

{¶ 13} Furthermore, the trial court was without sufficient evidence to determine whether a more extensive criminal background check of Nguyen would have revealed a propensity for violence. In his affidavit, the investigator said he discovered Nguyen had four criminal and traffic cases in Hamilton County. He averred that two of the cases involved no-contest pleas and findings of guilty of disorderly conduct, with one case of disorderly conduct involving risk of harm. Although "risk of harm" could suggest some level of violence toward another, such is not necessarily true. As appellant failed to present any details regarding any of these offenses, she failed to raise any genuine issues of material fact to the trial court in this respect. Therefore, considering Tran's affidavit detailing why he had no reason to suspect that Nguyen would act violently, coupling that with the fact that appellees were not required to perform any criminal background check on Nguyen, we agree with the trial court that there remained no genuine issues of material fact. Thus, the trial court properly granted summary judgment to appellees, and appellant's assignment of error is overruled.

{¶ 14} Accordingly, appellant's assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

TYACK and BRUNNER, JJ., concur.
