

Circuit Court of West Virginia.

David LEMONGELLO and Jeanine Lemongello, husband and wife, and Kenneth McGuire,
Plaintiffs,

v.

WILL COMPANY, INC., d/b/a Will Jewelry & Loan, Will Diamond Co., Will Pawn Co.,
Will Coin Co., Will Gun Co., Will's Jewelry & Loan Pawnshop, a West Virginia
corporation, Sturm Ruger & Company, Inc., a Delaware corporation, James Gray,
Tammi Lea Songer, the Estate of Shuntez Everett, and John Doe Distributors # 1-
10, Defendants.

No. Civ.A. 02-C-2952.

June 19, 2003.

ORDER

BERGER, J.

*1 The matter is before the Court on separate motions by Defendant, Sturm, Ruger & Company, Inc., and by Defendant, Will Jewelry & Loan, to dismiss the Complaint under Rule 12(b)(6) for failure to state a claim. After full briefing of the issues and a hearing held before this Court on March 19, 2003, and after careful and impartial consideration, both motions to dismiss are hereby ORDERED denied for the reasons stated below.

Plaintiffs seek to recover damages allegedly sustained as a result of the negligent conduct of the Defendants, Sturm Ruger, the manufacturer, and Will Jewelry & Loan, the ultimate retail seller. The Plaintiffs allege that these Defendants recklessly and/or negligently failed to use reasonable care by selling handguns in a high-risk, dangerous manner that foreseeably led to the supply of handguns to convicts and persons prohibited from purchasing and/or possessing handguns. Further, the Plaintiffs allege that by failing to use reasonable care to prevent sales of handguns to illegal traffickers, straw purchasers and other persons, who provided handguns to the illegal handgun market, the Defendants caused the convict who shot Officers Lemongello and McGuire to be armed with a deadly weapon which he could not legally possess. Plaintiffs have brought counts of negligent distribution and sale, negligent entrustment and public nuisance against Defendants.

I. Motion to Dismiss Standard

A motion filed pursuant to Rule 12(b)6 of the West Virginia Rules of Civil Procedure simply tests the legal sufficiency of the Complaint. In analyzing the Complaint, the Court must accept the allegations as true, and construe the same in the light most favorable to the Plaintiffs. "The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not

dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Sticklen v. Kittle*, 168 W.Va. 147, 162, 287 S.E.2d 148, 149 (1981) (internal citations omitted).

II. Negligence

Under claims of negligence, the plaintiff must show the existence of a duty and the breach of that duty by the manufacturer and the seller. "The ultimate test of the existence of a duty to use care is found in the foreseeability of the harm that may result if not exercised. The test is, would the ordinary man in the Defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result." *Eastern Steel Constructors v. The City of Salem*, 209 W.Va. 392, 549 S.E.2d 266 (2001); see also *Aiken v. Debow*, 541 S.E.2d 576 (2000). In this case, the question is whether or not Sturm Ruger and Will Jewelry & Loan did something that a reasonably prudent manufacturer or seller wouldn't do, or failed to do something that a reasonably prudent manufacturer or seller would have done under the circumstances alleged in the Complaint. The reasonableness of the Defendants' actions must be analyzed in the context of the distribution of firearms and the inherent nature of firearms.

*2 Plaintiffs allege that Sturm Ruger and Will Jewelry & Loan were negligent in their distribution and sale of a firearm. Under the reasoning of *Aiken v. Debow* and *Eastern Steel*, Plaintiffs' claim survives the test of foreseeability. The Court finds it is reasonably foreseeable to Defendants that harm of a general nature like that alleged here could happen. It is not necessary that a defendant be able to foresee the specific or actual harm that occurs in a particular case. Further, the Court has considered the other factors in analyzing the existence of duty. Those include the likelihood of the injury, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant. Given the inherent nature of firearms and that Defendants have an ability to guard against negligent distribution of firearms, this Court finds it is not unreasonable to place this duty on the manufacturer and/or seller of a firearm. Imposing this duty simply requires the Defendants to act reasonably given the nature of their business, and is the same duty that is required daily of other businesses.

Therefore, accepting Plaintiffs' allegations as true, the Complaint is legally sufficient in alleging negligent distribution.

III. Public Nuisance

This Court finds that West Virginia law does not limit claims of public nuisance to those dealing with real property. Further, although the Defendants argued the necessity of an unlawful act to sustain nuisance, this Court finds the same is not necessary to create a public nuisance. Therefore, given the allegations of the Complaint and assuming the same to be true, the Plaintiffs have pled a legally sufficient claim of nuisance. The same analysis of duty as outlined above applies to Plaintiffs' public nuisance claim.

For the foregoing reasons, Defendants Sturm Ruger's and Will's motions to dismiss are ORDERED denied. The Court preserves an objection and exception for the Defendants, and ORDERS the Clerk of this Court to mail a certified copy of this order to all counsel of record.

2003 WL 21488208 (W.Va.Cir.Ct.)

END OF DOCUMENT