[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-12311
Non-Argument Calendar

D.C. Docket No. 0:18-cv-60062-WJZ

AMG TRADE & DISTRIBUTION, LLC,

Plaintiff - Appellant,

versus

NISSAN NORTH AMERICA, INC.,

Defendant - Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(May 7, 2020)

Before WILLIAM PRYOR, JILL PRYOR, and LUCK, Circuit Judges.

PER CURIAM:

In this case, plaintiff AMG Trade & Distribution, LLC alleged that defendant Nissan North America, Inc. misled the federal government by claiming AMG

imported counterfeit automotive parts. As a result, the government detained AMG's shipment and prevented it from taking possession of its parts for over a year. To recoup its losses, AMG filed suit against Nissan claiming that it tortiously interfered with its contract and business relationship with its supplier and violated the Florida Unfair and Deceptive Trade Practices Act. The district court granted summary judgment in favor of Nissan and denied AMG's motion to amend its complaint to add a punitive damages claim. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

AMG imports and sells in the United States "gray market" automotive parts.[1] Gray market parts are genuine automobile parts not purchased directly from the manufacturer—such as Nissan—that are sold outside of normal distribution channels. As pertains to this case, AMG bought authentic Nissan-branded parts from an authorized Nissan distributor in the Sultanate of Oman, where part prices are ostensibly cheaper. It then imported and sold those parts in the United States at prices lower than Nissan itself would sell them. Gray market parts undercut Nissan's prices and could reduce its revenue, giving Nissan, according to AMG, an incentive to stop AMG's imports.

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[1] Because this case comes to us from a grant of Nissan's summary judgment motion, "we view the evidence in the light most favorable to the non-moving party and resolve all reasonable doubts about the facts in favor of the non-movant." Kroma Makeup EU, LLC v. Boldface Licensing + Branding, Inc., 920 F.3d 704, 707 (11th Cir. 2019).

This lawsuit stems from one of those imports. In February 2016, AMG shipped automotive parts from Oman to Jacksonville, Florida. United States Customs and Border Patrol detained the shipment upon arrival and asked the trademark holder, Nissan, to verify whether the parts were genuine. Nissan voluntarily sent a representative to inspect a sample of the parts. The representative concluded that some of the parts were counterfeit. AMG claims, however, that Nissan—motivated by its desire to eliminate AMG as a seller of gray-market parts—intentionally misled the government into thinking that the entire shipment was counterfeit, when the vast majority of the parts were genuine. As a result, the government seized the shipment and prevented AMG from selling its authentic parts for over a year.

While the record is unclear, it appears that out of approximately 10,778 parts in the shipment, 217 parts were counterfeit. AMG sued the government for the release of the shipment, and, pursuant to a settlement agreement, it agreed to return the 217 counterfeit parts to Oman and received the rest of the parts for sale in the United States.

AMG filed this lawsuit alleging that Nissan tortiously interfered with its contract and business relationship with its supplier in Oman and violated the Florida Deceptive and Unfair Trade Practices Act. After a period of discovery, Nissan moved for summary judgment. While the summary judgment motion was pending,

AMG filed a motion for leave to amend its complaint to include a claim for punitive damages.

First, the district court denied the motion for leave to amend because AMG filed it more than two months after the deadline to amend had passed. And AMG could not show good cause for leave because it offered no factual information in support of its new claim for punitive damages that it had not already alleged. Further, the district court found that Nissan would suffer prejudice from an amendment because it had already filed a timely motion for summary judgment.

Then, the district court granted Nissan's motion for summary judgment on all claims. As to the tort claims, the district court found that AMG offered no evidence that AMG's relationship or contract with its supplier was breached. As to the deceptive and unfair trade practices claim, the district court ruled that Nissan's assistance with the government's investigation of the counterfeit parts did not occur in "trade or commerce" as required by Florida law.

STANDARD OF REVIEW

We review a district court's grant of summary judgment de novo, applying "the same legal standards that governed the district court." Kroma Makeup, 920 F.3d at 707. "We review the denial of leave to amend for clear abuse of discretion." Carruthers v. BSA Advert., Inc., 357 F.3d 1213, 1217 (11th Cir. 2004).

DISCUSSION

AMG raises three issues on appeal: (1) as to the tort claims, the district court erred when it granted summary judgment on a ground (lack of evidence of breach) not raised by either party; (2) as to the Florida Deceptive and Unfair Trade Practices Act claims, the district court erred in finding that Nissan's misrepresentations to the customs agents did not occur in "trade or commerce"; and (3) the district court abused its discretion by denying leave to amend because AMG could not have discovered the facts that served as the basis for its punitive damages claim before the district court's amendment deadline.

Tortious interference claims

The district court granted summary judgment in favor of Nissan on the tortious interference claims because there was no evidence that AMG's contract or relationship with its Oman supplier was breached. AMG argues that the court ruled on grounds for summary judgement not raised by either party, in violation of Federal Rule of Civil Procedure 56(f). But as Nissan correctly observes, AMG did not raise the lack of notice with the district court. As such, it has waived our review of that issue. And regardless of the waiver, any rule 56(f) error was harmless.

To prove tortious interference with a business relationship, AMG must show: "(1) the existence of a business relationship . . . (2) knowledge of the relationship on the part of the defendant; (3) an intentional and unjustified interference with the

relationship by the defendant; and (4) damage to the plaintiff as a result of the breach of the relationship."[2] Gossard v. Adia Servs., Inc., 723 So. 2d 182, 184 (Fla. 1998) (quoting Ethan Allen, Inc. v. Georgetown Manor, Inc., 647 So. 2d 812, 814 (Fla. 1994)). The elements of tortious interference with a contract are substantially similar, replacing "relationship" with "contract." See Seminole Tribe v. Times Publ'g Co., 780 So. 2d 310, 315 (Fla. 4th DCA 2001).

Generally, we do "not consider an issue raised for the first time on appeal." Finnegan v. Comm'r, 926 F.3d 1261, 1271 (11th Cir. 2019). This includes lack-of-notice objections to summary judgment orders. "[I]f the parties fail to object to the court's sua sponte entry of summary judgment, they will be found to have waived their objection on appeal." 10A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2720.1 (4th ed.); see also UnitedHealth Grp. Inc. v. Exec. Risk Specialty Ins. Co., 870 F.3d 856, 866 (8th Cir. 2017) ("[A] party waive[s] any objection to a district court's *sua sponte* order granting summary judgment by failing to raise the matter in the district court after the order was entered."); Spring Street Partners-IV, L.P. v. Lam, 730 F.3d 427, 436 (5th Cir. 2013) ("[E]ven if the district

[2] "In a diversity action such as this, we apply the substantive standards of state (here Florida) law." Three Palms Pointe, Inc. v. State Farm Fire & Cas. Co., 362 F.3d 1317, 1318 (11th Cir. 2004). "That means we must decide the case the way it appears the Florida Supreme Court would decide it." KMS Rest. Corp. v. Wendy's Int'l, Inc., 361 F.3d 1321, 1325 (11th Cir. 2004). If there are no supreme court decisions on point, "we look to decisions of the Florida intermediate appellate courts and follow them unless there is some really persuasive indication that the Florida Supreme Court would go the other way." Id.

court erred by granting summary judgment against [the defendants] without prior notice or an opportunity to respond, they have waived this argument by failing to pursue it before the district court."); Century 21 Real Estate Corp. v. Meraj Int'l Inv. Corp., 315 F.3d 1271, 1276 (10th Cir. 2003) ("[I]f a litigant fails to object [before the district court], the notice requirement is waived.").

AMG does not dispute that it never raised the lack-of-notice issue with the district court. Instead, it argues that it did not need to alert the district court to the lack-of-notice error because two of our previous cases dealing with rule 56(f) objections have not applied waiver in similar circumstances. See Byars v. Coca-Cola, Co., 517 F.3d 1256, 1262–64 (11th Cir. 2008); Imaging Bus. Machs., LLC v. BancTec, Inc., 459 F.3d 1186, 1191 (11th Cir. 2006). But those cases did not discuss or address what objection, if any, the parties made to the lack of notice, and therefore could not hold, as AMG claims, that an objection for lack of notice was not required. See UPS Supply Chain Sols., Inc. v. Megatrux Transp., Inc., 750 F.3d 1282, 1293 (11th Cir. 2014) ("The holdings of a prior decision can reach only as far as the facts and circumstances presented to the Court in the case which produced that decision." (citation omitted)); see also UnitedHealth, 870 F.3d at 867 ("Because the issue of waiver was not joined in [other rule 56(f)] cases, we do not consider them precedent on that point."). AMG gives us no reason, and we can find none, for why rule 56(f) error should be treated differently than other error for preservation purposes.

In any event, the lack-of-notice error here is harmless. See Restigouche, Inc. v. Town of Jupiter, 59 F.3d 1208, 1213 (11th Cir. 1995) ("Because [the plaintiff] has not been deprived of the opportunity to present facts or arguments which would have precluded summary judgment in this case, any violation of the . . . notice rule is harmless."). When "we have before us, on de novo review of the summary judgment motion, all of the facts and arguments that [the plaintiff] would have or could have presented had [the plaintiff] been given the required notice," and the plaintiff raises "no genuine issues which would prevent summary judgment" either before the district court or on appeal, a rule 56 notice violation is harmless. Id.

AMG had more than one year to conduct discovery in this case. It presented hundreds of pages of documents, depositions, and affidavits. Within that discovery, there was no evidence of a breached relationship or contract between AMG and its supplier, an essential element of AMG's tort claim. Even now, on appeal, AMG hasn't identified any evidence in the record that its relationship or contract with its supplier was breached. The Oman supplier delivered the parts, as required by its purchase order, and there was no indication in the record that it wouldn't contract to send AMG parts in the future if AMG ordered them. AMG was not harmed by a lack of notice.[3]

[3] Because we affirm the district court's grant of summary judgment on the breach issue, we do not reach AMG's arguments about its damages evidence.

Florida Deceptive and Unfair Trade Practices Act claim

AMG next contends the district court erred in granting summary judgment on its FDUTPA claim because Nissan's misrepresentations to customs officials did not occur in "trade or commerce." That act prohibits "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce." § 501.204(1), Fla. Stat. The statute defines "trade or commerce" as "the advertising, soliciting, providing, offering, or distributing, whether by sale, rental, or otherwise, of any good or service, or any property, whether tangible or intangible, or any other article, commodity, or thing of value, wherever situated." Id. § 501.203(8).

But responding to a government inquiry is not "providing . . . by sale, rental, or otherwise . . . any good or service . . . or thing of value." Id. Nissan did not sell or rent anything to the government by answering its questions. And Nissan did not "conduct[]" trade or commerce by cooperating with the government's customs investigation. Voluntarily confirming whether a part is counterfeit when the government asks for such help is just that—a response to a request for information. The district court did not err in granting summary judgment for Nissan because it did not act in "trade or commerce." See Baker v. Baptist Hosp., Inc., 115 So. 3d 1123, 1124 (Fla. 1st DCA 2013) (affirming grant of summary judgment because the "pursuit of legal remedies, such as filing a lien, does not fall within the definition of

'trade or commerce.'"); Law Office of David J. Stern, P.A. v. State, 83 So. 3d 847, 850 (Fla. 4th DCA 2011) (processing of foreclosure applications, as opposed "to the initial applications for mortgages or the initial lending relationships," does not constitute "trade or commerce" (citation omitted)); State, Office of Att'y Gen. v. Shapiro & Fishman, LLP, 59 So. 3d 353, 356 (Fla. 4th DCA 2011) (same).

Motion for leave to amend

AMG finally contends that the district court abused its discretion when it denied leave to amend the complaint to add a claim for punitive damages. AMG argues that it acted diligently in obtaining discovery, but Nissan did not produce information about its knowledge of the legitimacy of the parts in AMG's shipment until the deadline to amend the pleadings had passed.

When a plaintiff seeks leave to amend its complaint after the time required by the district court's scheduling order, the plaintiff "must first demonstrate good cause under Rule 16(b) before we will consider whether amendment is proper under Rule 15(a)." Sosa v. Airprint Sys., Inc., 133 F.3d 1417, 1419 (11th Cir. 1998). A district court's schedule "may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). "This good cause standard precludes modification unless the schedule cannot 'be met despite the diligence of the party seeking the extension.'" Sosa, 133 F.3d at 1418 (quoting Fed. R. Civ. P. 16 advisory comm. note). That "the information supporting the proposed amendment to the

complaint was available to [the plaintiff] even before she filed suit" weighs against a finding of diligence. Id. at 1419. If the plaintiff makes the required good cause showing, the district court may give leave to amend the complaint and "should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2).

The district court did not abuse its discretion. AMG's punitive damages allegations were the same allegations it made in its complaint. There was nothing new. AMG alleged in its original complaint that Nissan misled the government with an intent to harm AMG; the unamended complaint alleged that Nissan acted "maliciously." Those are the same allegations in the punitive damages amendment. See W.R. Grace & Co.-Conn. v. Waters, 638 So. 2d 502, 503 (Fla. 1994) ("Punitive damages are appropriate when a defendant engages in conduct which is fraudulent, malicious, deliberately violent or oppressive, or committed with such gross negligence as to indicate a wanton disregard for the rights of others."); see also Bistline v. Rogers, 215 So. 3d 607, 611 (Fla. 4th DCA 2017) (requiring plaintiff to show "fraud, malice, or outrageous conduct" to recover punitive damages in an intentional interference case). If AMG had a good faith basis to support these allegations in the original complaint, then it had the same good faith basis to have filed the punitive damages allegations before the amendment deadline came and went. In sum, AMG's claimed new evidence reveals nothing more than what it had

"available to [it] even before [it] filed suit." Sosa, 133 F.3d at 1419. The district court did not abuse its discretion when it denied AMG's motion for leave to amend.

AFFIRMED.