RENDERED: December 17, 1999; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001323-MR

BILL SMITH OUTDOOR
ADVERTISING COMPANY — APPELLANT

V.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE GARLAND W. HOWARD, JUDGE
ACTION NO. 97-CI-1325

UNIVERSAL OUTDOOR, INC. — APPELLEE

OPINION AFFIRMING

* * * * * * * *

BEFORE: GUDGEL, Chief Judge; BUCKINGHAM and JOHNSON, Judges.

GUDGEL, CHIEF JUDGE: This is an appeal from a partial summary judgment, granted by the Daviess Circuit Court, dismissing appellant's claim for damages against appellee stemming from an alleged tortious interference with a contractual relationship. For the reasons stated hereafter, we affirm.

Viewed in the light most favorable to appellant, the record shows that appellant and Parr Trucking Service, Inc. (Parr) entered into contracts in 1989 and 1991 for appellant's lease of space and erection of billboards at two locations on Parr's property. Although billboards were erected only on the land leased pursuant to the 1989 contract, both contracts

afforded appellant the right of "first refusal for advertising use for 10 years after the termination date of this lease."

Parr's owner, Larry Parr, died in 1995 and his surviving spouse assumed operation of the business. Mrs. Parr subsequently requested appellant to remove its billboards from Parr's property, and Parr's attorney sent appellant written notices of termination of the contracts. Several days after appellant removed its billboards from the property, appellee and Parr executed leases entitling appellee to erect billboards on the Parr property, including in the locations previously leased by appellant. Appellant then filed this action, seeking damages both against Parr for breach of contract and against appellee for tortious interference with a contractual relationship. The trial court granted a final, partial summary judgment dismissing the claim against appellee. This appeal followed.

The Kentucky Supreme Court examined issues relating to allegations of improper interference with a prospective contractual relationship in National Collegiate Athletic Association v. Hornung, Ky., 754 S.W.2d 855 (1988). Noting that "[s]everal other Kentucky decisions recognize that contractual relations or prospective contractual relations are protected from improper interference," the court concluded that Sections 766B, 767, and 773 of the Restatement (Second) of Torts (1979) "fairly reflect the prevailing law of Kentucky." Hornung, supra at 857. More specifically, the court stated that in order

> [t]o determine whether the interference is improper, Section 767 sets forth seven factors to be considered by the court in ruling on the motion for directed verdict and, if the case is submitted, considered by the jury. Unless there is evidence of improper interference, after due consideration of the factors provided for determining such, the case should not be submitted to the jury.

Id. at 858. Moreover, the court concluded that "it is clear that to prevail a party seeking recovery must show malice or some significantly wrongful conduct." Id. at 859.

Section 766B of the Restatement (Second), as cited in Hornung, addresses the intentional interference with a prospective contractual relationship as follows:

> One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of
>
> (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or
>
> (b) preventing the other from acquiring or continuing the prospective relation.

Although Hornung pertained to a prospective rather than an existing contractual relationship such as the one in the instant action, the court also cited with approval to other Kentucky cases which, in accordance with Section 766 of the first Restatement of Torts, recognize that both existing and prospective contractual relationships are protected from improper interference by third parties. See, e.g., Carmichael-Lynch-Nolan

Advertising Agency, Inc. v. Bennett & Associates, Inc., Ky. App., 561 S.W.2d 99 (1977). Section 766 of the Restatement (Second) of Torts now addresses intentional interference with existing contractual relationships in essentially the same manner as Section 766B:

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

Further, as the Hornung court noted, Section 767 of the Restatement (Second) sets out the factors which must be considered in determining whether a party improperly interfered with either an existing or a prospective contractual relationship:

> In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:
>
> (a) the nature of the actor's conduct,
>
> (b) the actor's motive,
>
> (c) the interests of the other with which the actor's conduct interferes,
>
> (d) the interests sought to be advanced by the actor,
>
> (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,

(f) the proximity or remoteness of the actor's conduct to the interference and

(g) the relations between the parties.

Our review of the record, in light of Section 767, shows that appellant failed to adduce evidence, in opposition to the summary judgment motion, to support its allegation that appellee intentionally and improperly interfered with its contracts with Parr. Indeed, the record includes direct evidence to the contrary in the form of affidavits, adduced by appellee, from the two individuals who were accused of interfering with the contract's performance. The affidavit of William G. Barron, Parr's exclusive real estate leasing agent, states in pertinent part:

> 3. Although he was aware Bill Smith Outdoor Advertising Company ("Bill Smith") had signs located on the Property, he believed there was potential for adding signs because of 2000 ft. of frontage on U.S. 60 Bypass, thus increasing income from the property. With this in mind, affiant approached Leon Howell ("Howell") with the suggestion that Howell's employer Universal Outdoor, Inc. ("UO") should be interested in developing the Property for billboards.
>
> 4. Howell informed Barron that his company did not "jump" leases, i.e., attempt to get a landowner to put off another sign company in favor of a new lease with UO.
>
> 5. Affiant told Howell that Bill Smith had no enforceable contract with Parr that he knew of and that he would check into the matter.
>
> 6. Larry Parr, who was the President of Parr, told Barron he was predisposed to terminate the leases with Bill Smith before Barron ever approached UO about leasing the

> Parr property, and that he always believed Parr's lease agreements with Bill Smith were terminable "for any reason." Larry Parr died in May, 1995.
>
> 7. In early 1996, it is the Affiant's understanding that Judie Parr requested Parr's attorney, Jeff Taylor, to review the written leases, It is the Affiant's understanding that Taylor advised Judie Parr that it was his opinion that the 1989 lease could be terminated "for any reason" as set forth therein, and that the 1991 lease did not appear to be in force or effective since no rents had been paid for five years.
>
> 8. Judie Parr directed the leases terminated by notice from Jeff Taylor, by letter of March 15, 1996, and Barron so advised UO. Subsequent thereto, Parr entered into four leases covering the Property with UO on April 2, 1996.
>
> 9. No representative of UO encouraged or induced Barron or Parr to terminate or cancel any contract or lease it had with Bill Smith.

Similarly, the affidavit of appellee's employee, Michael Edward Murphy, states in pertinent part:

> 3. At all times relevant to leasing the Parr Trucking Service, Inc., ("Parr") property in Owensboro, Kentucky, affiant has been responsible for signage locations for UO of the type involved in this case in six counties in Kentucky and seven counties in Indiana for UO and its predecessor companies.
>
> 4. In January, 1996, the general manager of UO in the Evansville district area, Leon Howell ("Howell"), told affiant that he had been contacted by Realtor, William G. Barron, Chairman of Barron Homes, Inc. ("Barron"), who wanted to lease to UO signage locations on Parr land in Daviess County, Kentucky, . . . near the intersection of US 60 East and Wendell Ford By-pass. Barron said he represented Parr. UO never dealt with anyone but Barron in connection

with the leases hereinafter identified between Parr and UO.

5. Subsequently affiant and Howell went to the office of Barron with questions of whether the moratorium applicable to Owensboro, Kentucky, would permit such billboards from being constructed in the Owensboro, Kentucky area of Parr's land. Additionally, affiant and Howell were aware Bill Smith Outdoor Advertising Company ("Bill Smith"), plaintiff in these proceedings, had a sign on part of the Parr land Barron proposed to lease to UO. It was located close to the intersection. Affiant and Howell asked Barron about Bill Smith's rights on the Parr property. Barron told the affiant and Howell that Bill Smith's use of the property was based upon no enforceable contract or lease.

6. Howell and affiant told Barron that UO would not "jump" Bill Smith's lease, explaining that meant they would not pursue a lease with Barron on the Parr property if Bill Smith already had a lease on it. This rule applied whether the lease was written, oral, or terminable.

7. To "jump" a lease means to look for a flaw in an occupant's lease or seek to take a lease on property where one already existed. This is an ethical standard practiced by the affiant, Howell, and the companies for which both of them have been engaged since at least 1988. Although affiant has never been informed of UO's policy, former employees of affiant and Howell, predecessors of UO, would terminate an employee for trying to "jump" a lease.

8. After meeting with Barron, affiant went to the Daviess County, Kentucky Clerk's Office to inquire whether any leases for billboards were recorded affecting the Parr property. Affiant was told there were none recorded.

9. Barron reported back to affiant and Howell that Parr had provided Barron with a written lease to Bill Smith covering the area

> at the corner of U.S. 60 East and the By-pass. Parr's attorney, Jeff Taylor, had studied the lease and that the lease was terminabe [sic] at will. He further advised affiant and Howell that Judith Parr, who controlled the Parr interests after the death of her husband in 1995, did not want to deal with Bill Smith and that the contract with Bill Smith had been terminated by Parr.
>
> 10. Affiant and Howell were never told there was a second lease between Parr and Bill Smith covering the property south of the location where Bill Smith's billboard was located at U.S. 60 East and the By-pass. It was the contract which is Exhibit 2 to the complaint of which affiant and Howell were never apprised.
>
> 11. Affiant and Howell were told there was no longer in existence a lease in favor of Bill Smith, and the Parr property was free and clear according to Barron and Parr's attorney. In view of this representation, it no longer constituted lease jumping for UO to enter into a lease agreement with Parr.
>
> 12. The leases attached hereto as Exhibits A, B, C and D dated April 2, 1996, were executed between Parr and UO on the date indicated which was subsequent to Parr's terminating both of the written leases with Bill Smith on March 15, 1996.
>
> 8. [sic] At no time did affiant or Howell encourage, push for, recommend or suggest that Barron or Parr terminate any lease or contract rights it had with Bill Smith. No other person in the employ of UO or representing UO dealt with Bill Barron in connection with the Parr leases.

Contrary to appellant's assertions, the foregoing quoted affidavits and the remainder of the record establish that Parr's leasing agent solicited appellee to erect billboards on Parr's property, and that he assured appellee that erecting such billboards would not violate any valid contractual agreements.

Appellant failed to affirmatively counter this evidence either by way of affidavit or otherwise. Because the adduced evidence shows, contrary to appellant's argument, that there is no genuine issue of material fact as to whether appellee knowingly or intentionally interfered with, or promoted a breach of, valid contractual agreements between appellant and Parr, see Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991), summary judgment was proper. Moreover, appellant's claim would fail even if we were to assume for purposes of this appeal that there was an issue of fact as to whether appellee was negligent in failing to take additional steps to learn about the contracts or their enforceability, as a third party's negligent interference with a contractual relationship clearly does not give rise to liability. Restatement (Second) §766C.

Hence, we hold that the trial court did not err by concluding that there were no genuine issues of material fact regarding appellee's alleged liability to appellant. While appellant certainly may have a claim against Parr for breach of contract, no issues regarding any such claim are before us in the instant appeal.

The court's summary judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

James R. Wood
Owensboro, KY

BRIEF FOR APPELLEE:

Ronald M. Sullivan
R. Michael Sullivan
Owensboro, KY