STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM TOROK,

Plaintiff-Appellant,

v

RELIABLE ARCHITECTURAL METALS, DOUGLAS TARRANCE, and RELIABLE GLASS COMPANY,

Defendants-Appellees.

UNPUBLISHED
May 30, 1997

No. 183481
LC No. 93-322337-CK

Before: Gribbs, P.J., and Young and W.J. Caprathe,* JJ.

PER CURIAM.

Plaintiff appeals as of right from the order granting defendants Reliable Glass Company (Reliable Glass) and Douglas Tarrance's motion for summary disposition pursuant to MCR 2.116(C)(10) and the subsequent order awarding them sanctions pursuant to MCR 2.114 and MCL 600.2591; MSA 27A.2591. We affirm the order of summary disposition, but vacate the order of sanctions.[1]

Tarrance, the president of Reliable Glass and the sole shareholder of Ramco, Reliable Glass' Canadian distribution office, hired plaintiff to serve as Ramco's president. Ramco's financial performance was poor, and Tarrance dissolved it in 1993. Plaintiff, a Canadian citizen, brought this action in Wayne Circuit Court, alleging breach of employment contract, tortious interference with an employment contract, tortious interference with a prospective economic advantage, and breach of fiduciary duty. Plaintiff claimed that Tarrance made business decisions, which were intended to ruin Ramco, in order to terminate plaintiff's employment and prevent plaintiff from becoming a twenty-five per cent owner of Ramco. The trial court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). After the order for summary disposition was entered, defendants moved for sanctions pursuant to MCR 2.114(D) and (E) and MCL 600.2591; MSA 27A.2591. The trial court granted the motion.

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* Circuit judge, sitting on the Court of Appeals by assignment.

On appeal, plaintiff claims that the trial court erred in granting defendants' motion for summary disposition. A motion pursuant to MCR 2.116(C)(10) tests the factual basis underlying the plaintiff's claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). In reviewing a (C)(10) motion, a court considers pleadings, affidavits, depositions, admissions, and any evidence in favor of the nonmoving party, granting that party the benefit of any reasonable doubt. *Id*. Summary disposition is appropriate when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Id*. As such, a party opposing a motion brought under MCR 2.116(C)(10) may not rest upon the mere allegations or denials in that party's pleadings, but must by affidavit, deposition, admission, or other documentary evidence set forth specific facts showing that there is a genuine issue for trial. *Id.* Opinions, conclusionary denials, unsworn averments, and inadmissible hearsay do not satisfy the court rule; disputed fact (or the lack of it) must be established by admissible evidence. *SSC Associates Ltd Partnership v General Retirement Sys of City of Detroit*, 192 Mich App 360, 364; 480 NW2d 275 (1991)

Plaintiff first contends that there was a genuine issue of fact as to whether a *written* employment agreement existed because defendants admit that there was a written agreement but none was signed. This ignores the fact that plaintiff has failed to prove terms of the contract. The presumption that employment is terminable at will can be rebutted only if a party presents sufficient proof either of a "contractual provision for a definite term of employment or a provision forbidding discharge absent just cause." *Rood v General Dynamics Corporation*, 444 Mich 107, 117; 507 NW2d 591 (1993). Plaintiff claims that the written employment agreement provided that plaintiff's employment relationship with Ramco would end only by mutual assent. Plaintiff submitted evidence in the form of an affidavit to establish the existence and contents of this alleged document. However, to prove the contents of a written document, the original writing is required except as otherwise provided in the rules of evidence or statute. MRE 1002. The contents of a writing may be proved by other evidence if the original cannot be obtained by judicial process or if the document was under the control of the party against whom it was offered, and that party failed to produce the document at the appropriate hearing. MRE 1004.

Plaintiff's attorney suggested that a Canadian attorney, who may have played a role in drafting the alleged document, would have to be subpoenaed. Yet, plaintiff provided no evidence to establish why the document could not be obtained nor did he establish that the document was in defendants' control. On the other hand, defendants' submitted an affidavit by the Canadian attorney in which the attorney asserted that the parties may have had initial discussions regarding a written agreement, but no agreement was executed by the parties, and further, after searching his files, he could not find any such agreement signed or unsigned. Consequently, plaintiff could not prove the contents of this document by his own affidavit. Because plaintiff submitted no admissible evidence to establish a question of fact regarding the existence of an agreement, summary disposition was properly granted on this claim.

Second, plaintiff contends that he established a genuine issue of fact regarding his tortious interference claim. Plaintiff alleges that by dissolving Ramco, defendant Tarrance intended to terminate plaintiff's employment and defeat plaintiff's business expectancy. Although plaintiff has not established a just cause employment agreement, an at-will employment contract can serve as the basis of a tortious interference claim. *Feaheny v Caldwell*, 175 Mich App 291, 303; 437 NW2d 358 (1989). A

plaintiff alleging tortious interference must prove that the defendant acted intentionally to do an act that is per se wrongful or do a lawful act with malice and that is unjustified in law for the purpose of invading the contractual rights or business relationship of another. *Id.* Under a claim of tortious interference with an at-will employment contract, where the defendant is an officer of the employer, a plaintiff bears the "particularly heavy burden of proving that the officer was acting outside the scope of [his or] her authority." *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 657; 513 NW2d 441 (1994). Such a claim demands specific proof of affirmative acts which furthered the unlawful purpose of the interference. *Id.*

Because Tarrance was Ramco's sole shareholder, plaintiff must prove that Tarrance instigated the alleged wrongful acts, and that Tarrance acted outside the scope of his authority, either unlawfully or with a malicious purpose. *Coleman-Nichols, supra,* 203 Mich App 657; *Feaheny, supra* 175 Mich App 303. Plaintiff has done neither. At most, plaintiff has shown that Tarrance made failed business decisions that resulted in impairing Ramco's ability to survive in the Canadian market. Nevertheless, plaintiff has not shown that these business decisions were outside of Tarrance's authority nor has plaintiff shown that Tarrance's actions were unlawful or malicious. Therefore, plaintiff's claim for tortious interference was properly dismissed.

Lastly, plaintiff claims that defendants breached the fiduciary duty they owed him. A fiduciary duty "arises out of the relation subsisting between two persons of such a character that each must repose trust and confidence in the other and must exercise a corresponding degree of fairness and good faith." *Portage Co v Kentwood National Bank*, 106 Mich App 290, 294; 307 NW2d 761 (1981). The duty owed by a trustee to beneficiary, by a guardian to ward, by an attorney to client, and by a doctor to patient are examples of a fiduciary duty. *Id.* However, there is no support for plaintiff's argument that a fiduciary duty exists between a sole shareholder and the employee of a corporation, or between a corporation which serves as a sales agent to another corporation. Accordingly, summary disposition of this claim was proper as well.

Regarding the court's award of sanctions, plaintiff argues that defendants' motion for sanctions was untimely because defendants did not request sanctions prior to the dismissal of the action. A defendants' motion for sanctions which is brought after the entry of the order of dismissal is untimely unless the defendant requested sanctions prior to the dismissal. *Antonow v Marshall*, 171 Mich App 716, 718-719; 430 NW2d 768 (1988). Defendants claim that their request for attorney fees in their summary disposition brief satisfied this requirement. However, since attorney fees are only one component of sanctions under MCR 2.114(E), a request for attorney fees is not the same as a request for sanctions. *Id.* at 719. Since the trial court erred in failing to find that the motion was untimely, we vacate the order of sanctions.

Accordingly, we affirm the order granting defendants' motion for summary disposition, and vacate the order granting defendants' motion for sanctions.

/s/ Roman S. Gribbs
/s/ Robert P. Young, Jr.
/s/ William J. Caprathe

[1] Because the orders appealed in this case do not involve defendant Reliable Architectural Metals (Ramco), we use the term "defendants" to refer only to Reliable Glass Company and Tarrance.