STATE OF MICHIGAN

COURT OF APPEALS

SCI-TEL ASSOCIATES and KENNETH MITAN,

Plaintiff-Appellants,

v

MICHIGAN NATIONAL BANK and VILLAGE OF FRANKLIN,

Defendant-Appellees.

UNPUBLISHED
October 19, 2001

No. 222455
Oakland Circuit Court
LC No. 93-460182-NZ

Before: Cooper, P.J., and Sawyer and Owens, JJ.

PER CURIAM.

Plaintiff[1] appeals as of right from an opinion and order of the Oakland Circuit Court dated December 15, 1998. In that opinion the trial court held that plaintiff could not establish any expected business relationships and therefore granted defendants' motions for summary disposition, pursuant to MCR 2.116(C)(10). We affirm.

This case is before this Court for a second time. Previously, we reversed the trial court's grant of defendants' motions for summary disposition. *Sci-Tel Assoc v Michigan Nat'l Bank*, unpublished per curiam of the Court of Appeals, issued April 16, 1996 (Docket No. 173538). We concluded that defendants failed to establish that plaintiff's claims were collaterally estopped and further stated that summary judgment on the basis of MCR 2.116(C)(10) was inappropriate because discovery was incomplete. We remanded the case to the trial court for further proceedings on the issues of tortious interference with a business relationship claim and constructive trust.

After the remand, the parties completed discovery and defendants renewed their motions for summary disposition.

Farmbrook Dental Group (Farmbrook) and Dr. Timothy Kosinski are the only entities

[1] Mitan was appointed the debtor-in-possession for the purposes of the bankruptcy proceedings which have been concluded. Because Mitan was a plaintiff only in a representative capacity and does not assert any claims independent of those advanced by Sci-Tel, we will refer to Sci-Tel as plaintiff.

that plaintiff has identified as possible tenants. Dr. Marderosian, the spokesperson for Farmbrook, testified that Farmbrook never signed an actual lease with plaintiff. Moreover, Dr. Marderosian stated that Farmbrook was not dissuaded from doing so by either the City of Franklin (Franklin) or Michigan National Bank (MNB). Dr. Marderosian specifically denied any awareness of plaintiff's bankruptcy or the foreclosure on plaintiff's property. According to Dr. Marderosian, if Farmbrook had known plaintiff was bankrupt they would have never become involved with plaintiff. Dr. Marderosian also stated that plaintiff's site was only one of the sites Farmbrook considered for lease. Ultimately, Dr. Marderosian testified that Farmbrook did not want to lease from plaintiff because of issues over well water and their own financial concerns.

Likewise, Dr. Kosinski never signed an actual lease with plaintiff. Dr. Kosinski stated that he was never contacted by Franklin or MNB regarding plaintiff and that he was unaware the property was in bankruptcy. Dr. Kosinski asserted that had he known about plaintiff's bankruptcy, "at that time in my life, that would have been an *absolute* reservation." Dr. Kosinski also maintained that he was concerned that the well water would damage his dental equipment and that this was an issue in his decision not to lease the property.

Plaintiff first argues that the law of the case doctrine should apply. We disagree.

The law of the case doctrine provides that "if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal question thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same." *South Macomb Disposal Authority v American Ins Co*, 243 Mich App 647, 654; 625 NW2d 40 (2000), quoting *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454, 302 NW2d 164 (1981). In support of its argument, plaintiff cites to the previous factual findings of this Court. However, this case was remanded because material issues of fact remained. When a case is remanded because a material issue of fact exists "the law of the case doctrine does not apply because the first appeal was not decided on the merits." *Brown v Drake-Willock Internat'l, Ltd*, 209 Mich App 136, 144; 530 NW2d 510 (1995).

Next, plaintiff claims that the trial court erred when it concluded that plaintiff did not have a potential business expectancy. We disagree.

A trial court's grant or denial of summary disposition is subject to de novo review on appeal. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition is only appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999). "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 Assocs Ltd Partnership v General Retirement Sys*, 192 Mich App 360, 364; 480 NW2d 275 (1991).

Tortious interference with a business relationship requires plaintiff to prove the following: "[1] existence of a valid business relationship or expectancy, [2] knowledge of the relationship or expectancy on the part of the defendant, [3] an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and [4] resultant damage to the plaintiff." *BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan (On Remand)*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996).

To constitute a valid business expectancy the "expectancy must be a reasonable likelihood or probability, not mere wishful thinking." *First Public Corp v Parfet*, 246 Mich App 182, 199; 631 NW2d 785 (2001); quoting *Trepel v Pontiac Osteopathic Hosp*, 135 Mich App 361, 377; 354 NW2d 341 (1984). Plaintiff claims that Dr. Marderosian's and Dr. Kosinski's testimony was based on speculation, and that, in contrast to the trial court's conclusion, they were aware of plaintiff's financial situation.

We find the deposition testimony offered by Dr. Marderosian and Dr. Kosinski to be far from mere speculation or opinion. They both affirmatively stated that if they had known of plaintiff's bankruptcy or the foreclosure they would not have gotten involved with plaintiff. Plaintiff purports that Farmbrook was aware of plaintiff's bankruptcy.[2] However, even if Dr. Marderosian was aware of plaintiff's financial situation, there were additional reasons that Farmbrook did not lease the property. Indeed, both Dr. Marderosian and Dr. Kosinski testified that the existence of well water at the site was one of their reasons for not leasing the property. According to defendants, the well water could damage their sensitive dental equipment. Thus, we conclude that plaintiff has failed to establish the existence of a business relationship or expectancy with either Farmbrook or Dr. Kosinski.

Plaintiff also raises the issue of constructive trust in its appellate reply brief. The trial court did not address this issue in its opinion. Generally, an issue is unpreserved if it is not raised before *and* addressed by the trial court. *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 471-472; 628 NW2d 577 (2001). Moreover, plaintiff did not raise this issue in this appeal until its reply brief. Reply briefs must be limited to rebuttal argument and raising an issue in a reply brief is insufficient to properly present it on appeal. MCR 7.212(G); *Check Reporting Services, Inc v Michigan Nat'l Bank*, 191 Mich App 614, 628; 478 NW2d 893 (1991). Nonetheless, plaintiff has given only cursory treatment to this issue with little to no citation of supporting authority. See *In re Webb H Coe Marital & Residuary Trusts*, 233 Mich App 525, 537; 593 NW2d 190 (1999); *Great Lakes Div of Nat'l Steel Corp v City of Ecorse*, 227 Mich App 379, 424; 576 NW2d 667 (1998). Accordingly, we decline to address this issue on appeal.

We decline defendant Franklin's request for sanctions against plaintiff for bringing a vexatious appeal.

Affirmed.

/s/ Jessica R. Cooper
/s/ David H. Sawyer
/s/ Donald S. Owens

[2] Plaintiff does not allege in its appellate brief that Dr. Kosinski was aware of plaintiff's bankruptcy or the foreclosure.