STATE OF MICHIGAN

COURT OF APPEALS

JFN, INC., d/b/a AMBASSADOR HALL,

Plaintiff-Appellant,

v

HAYNES REAL ESTATE, INC., d/b/a COLDWELL BANKER HAYNES REAL ESTATE, INC.,

Defendant-Appellee.

UNPUBLISHED
February 20, 2007

No. 272067
Monroe Circuit Court
LC No. 05-020015-CZ

Before: Cavanagh, P.J., and Murphy and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition to defendant under MCR 2.116(C)(5) and (C)(10). We affirm.

Plaintiff JFN, Inc., does business as Ambassador Hall, a rental hall facility with catering services that is located in Monroe. For approximately half of 2004, defendant distributed, in a real estate publication available to the general public, an advertisement depicting Ambassador Hall. The advertisement also depicted Anthony's Restaurant, which is adjacent to Ambassador Hall and was the actual business for sale. The advertisement stated: "**$150,000 BUSINESS ONLY** Turn Key Operation. No real estate being sold. All equipment including newly purchased broasting oven, tables, chairs, dishes, silver, everything.**"** Approximately eight thousand copies of the publication were produced and distributed.

Plaintiff alleged that the advertisement falsely implied that Ambassador Hall was for sale and caused a slowdown of its business. Plaintiff filed a complaint on June 22, 2005, alleging a violation of Michigan's price and advertising act (PAA), MCL 445.351 *et seq*. Plaintiff stated that the advertisement reduced its income and damaged its reputation. Defendant later moved for summary disposition under MCR 2.116(C)(5) and (10). Defendant argued that plaintiff did not have standing under the PAA to pursue its claim; that there was, at any rate, no cognizable claim under the PAA; and that plaintiff's damages were too speculative to support the claim.

After hearing oral arguments, the trial court issued a ruling from the bench. The court ruled that the PAA "was designed to protect consumers in pricing and advertising of consumer items" and that "what's being sold here in this advertisement is a business, not a consumer good or item . . . ." The court also indicated that "there's no statement . . . that's untrue, deceptive or

misleading." The court also appeared to adopt defendant's argument that a violation of the PAA can be determined by looking to the elements of common-law fraud. It stated that plaintiff did not rely on the advertisement to its detriment, that the elements of common-law fraud were therefore not satisfied, and that, accordingly, "the [PAA] does not apply to this situation." The court also stated:

> The injuries suffered must be fairly traceable to the action of the [d]efendant, and in this case . . . there's no way of doing that. Everything is speculative. And furthermore, there's even an issue whether they lost any money or not in this case because . . . the profit did not seem to change from year to year.
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> For all these reasons I'm satisfied that the [p]laintiff does not have standing to bring . . . this action, and based upon the speculativeness of the damages that there's no issue of fact on that as well. They're not able to say they actually lost money as a result of this.
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> So for those reasons the motion is granted . . . .

Plaintiff argues that the trial court erred in granting summary disposition to defendant. We review de novo a trial court's grant of summary disposition. *Aichele v Hodge*, 259 Mich App 146, 152; 673 NW2d 452 (2003). When reviewing a motion brought under MCR 2.116(C)(5), which concerns the lack of standing, we consider the "pleadings, depositions, admissions, affidavits, and other documentary evidence submitted by the parties." *Aichele*, *supra* at 152 (citation and quotation marks omitted). "This Court . . . examines the entire record to determine whether the defendant is entitled to judgment as a matter of law." *Jones v Slick*, 242 Mich App 715, 718; 619 NW2d 733 (2000).

Summary disposition under MCR 2.116(C)(10) is appropriate if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." In reviewing a motion brought under MCR 2.116(C)(10), we again "consider the pleadings, affidavits, depositions, admissions, and any other evidence . . . ." *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). We view the pleadings and evidence "in favor of the party opposing the motion, and grant the benefit of any reasonable doubt to the opposing party." *Id.*

This case also involves statutory construction, and we review issues of statutory construction de novo. *Aichele*, *supra* at 152.

The preamble to the PAA states that the PAA is

> AN ACT to regulate the pricing of consumer items and the advertising of consumer items, services, goods, merchandise, commodities, and real property; to prescribe the powers and duties of certain state and local officials in relation thereto; to provide remedies and penalties; and to repeal certain acts and parts of acts. [1976 PA 449.]

MCL 445.356(1), a part of the PAA, states: "A person shall not knowingly make, publish, disseminate, circulate, or place before the public an advertisement which contains a statement or representation which is untrue, deceptive or misleading."

We agree with defendant and the trial court that plaintiff did not have standing under the PAA to pursue its claim. 1976 PA 449 clearly indicates that the PAA was enacted "to regulate the . . . advertising of consumer items, services, goods, merchandise, commodities, and real property . . . ." The advertisement about which plaintiff complains was clearly not advertising consumer items, services, goods, merchandise, commodities, or real property. The advertisement unequivocally stated that a "business only" was being sold and that "[n]o real estate" was being sold. Therefore, even if it could be said that the advertisement was unfair to plaintiff, the PAA simply does not provide a remedy for this unfairness.

It is true, as mentioned by plaintiff, that MCL 445.356(1), in referring to "an advertisement," does not indicate to what *types* of advertisements the statute applies. However, "[w]hen reviewing questions of statutory construction, our purpose is to discern and give effect to the Legislature's intent," and statutory language that is clear is to be applied in accordance with its plain meaning. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000). 1976 PA 449 makes clear that the Legislature's intent in enacting the PAA was to regulate the advertising of "consumer items, services, goods, merchandise, commodities, and real property . . . ." Plaintiff's claim simply does not fall within the purview of the act.

Moreover, "[a] plaintiff asserting a cause of action has the burden of proving damages with reasonable certainty, and damages predicated on speculation and conjecture are not recoverable." *Health Call of Detroit v Atrium Home & Health Care Services, Inc*, 268 Mich App 83, 96; 706 NW2d 843 (2005). Ambassador Hall's annual profit and loss statement for 2000 indicates that, in that year, the hall's gross profit was $210,373.70 and the net "profit" (after subtracting expenses) was -$29,569.25 (or a loss of $29,569.25). For 2001, the gross profit was $244,150.78 and the loss was $37,198.49; for 2002, the gross profit was $254,787.91 and the loss was $42,992.17; for 2003, the gross profit was $260,082.60 and the loss was $60,956.25; for 2004, the gross profit was $236,980.66 and the loss was $57,430.18; and for 2005, the gross profit was $195,911.68 and the loss was $56,616.32. Plaintiff indicates in its appellate brief that the advertisement in question ran from April 2004 through September 2004, and yet the available evidence indicates that Ambassador Hall had *less* of a loss in 2004 than in 2003. Moreover, although Joseph Perna, an officer of plaintiff, testified that he received a lot of cancellations for bookings in 2004, he could not indicate *why* the cancellations had occurred except in the case of one individual, a family friend. Nor, in the absence of speculation, could he determine why his "phone stop[ped] ringing." Under the circumstances, plaintiff has not set forth its damages, nor a connection between the alleged wrong and the alleged resulting damages, with sufficient specificity to survive a motion for summary disposition.

Affirmed.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Patrick M. Meter