# STATE OF MICHIGAN

# COURT OF APPEALS

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26500 NORTHWESTERN BUILDING, LLC,

Plaintiff-Appellant,

v

FRIEDMAN REAL ESTATE GROUP, INC., and FINSILVER/FRIEDMAN MANAGEMENT COMPANY,

Defendants-Appellees.

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UNPUBLISHED
January 29, 2008

No. 273946
Oakland Circuit Court
LC No. 2006-073157-CH

Before: Murphy, P.J., and Smolenski and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's October 3, 2006, grant of summary disposition to defendants under MCR 2.116(C)(10). Plaintiff owns a building located at 26500 Northwestern Highway in Southfield, Michigan. Defendant Finsilver/Friedman Management Corporation (FFMC) is a manager of commercial properties; defendant Friedman Real Estate Group (FREG) is a commercial real estate broker. This dispute centers on the loss of plaintiff's major tenant from its building. Central Corporation Credit Union (CenCorp) did not renew its lease with plaintiff and relocated to the Travelers Towers building in November 2005, when its lease expired. We affirm.

## I. FACTS

CenCorp leased approximately 25 percent of the building at 26500 Northwestern under a long-term lease that expired October 31, 2005. The other major tenant, who occupied 50 percent of the building, was World Wide Financial Services. CenCorp became dissatisfied with its space in early 2004 because it was on two floors and because the quality of services was declining. It began to search for another location. Steve Kim, an employee of defendant FREG, contacted William Walby, the CEO of CenCorp, to determine if the company was interested in relocating. On March 17, 2004, after several months of discussions, Randy Tarnow, another employee of FREG, and Paul Winkler, the leasing agent for Kojaian Management Corp (the owner of Travelers Towers in Southfield), showed Walby office space in Travelers Towers.

After that showing, Kojaian, through FREG, began negotiations with CenCorp for a long term lease to begin in November 2005. CenCorp and Kojaian exchanged offer and counter offer, but they could not reach an agreement. Negotiations broke down in late October or early

November, and FREG stopped working with CenCorp. CenCorp then decided to negotiate with plaintiff for a renewal of its lease.

In November 2004, Jack Wolfe, the managing member of plaintiff, and CEO of World Wide Financial Services, learned that CenCorp had been working with FREG to relocate its offices. By January 2005, he negotiated a renewal lease with CenCorp and submitted it for approval. In March 1999, the building was mortgaged to GE Commercial Finance Business Property Corporation on a $9.3 million loan and, as the lender, GE had final approval over certain leases. Wolfe presented the lease to GE for its approval several times, but GE withheld approval.

On December 9, 2004, Wolfe met with representatives of FFMC, FREG, and GE regarding a property management proposal. At the meeting, Wolfe emphasized how important it was to the profitability of the building that CenCorp be retained as a tenant. Also, Wolfe claims, "it was agreed" that FFMC would assist plaintiff with the renewal of the CenCorp lease and with "money issues." FREG thereafter sent a letter confirming the meeting and noting that it was "ready to assist" plaintiff in returning the building to profitability. Charles Delaney, the CFO and COO of FFMC, confirmed that he met with Wolfe in December 2004 to discuss becoming the property's manager. Delaney claimed, however, that plaintiff never signed and returned a management agreement, even though FFMC sent several proposed contracts to plaintiff for approval. As evidence, plaintiff submitted a copy of a property management contract sent by FFMC to plaintiff on January 7, 2005; the submitted contract is unsigned. Delaney explained that FFMC does not work without a contract, so it never performed any work as plaintiff's property manager. Wolfe sent a letter outlining plaintiff's proposed financial reconciliation to Paul Gawenka, a vice president at GE. The letter indicated that plaintiff had included a copy of the "proposed management agreement for the building presented by the Friedman Real Estate Group."

Plaintiff filed for bankruptcy in February 2005.[1] CenCorp, concerned about the bankruptcy and about GE's failure to approve the negotiated renewal lease, discontinued negotiations with plaintiff and enlisted another broker to find new space. CenCorp again met with Kojaian on March 2, 2005, to discuss securing space in Travelers Towers.

According to Wolfe, in March 2005, he informed Jim Friedman (a principal of FFMC and FREG) that plaintiff "would likely retain the companies," and he asked for assistance in convincing GE to approve the CenCorp lease. Delaney, however, stated that Wolfe never sought FFMC assistance in obtaining GE's approval of the CenCorp lease renewal.

In April 2005, plaintiff defaulted on its loan and GE accelerated the debt. In May 2005, GE began foreclosure proceedings against plaintiff. During the foreclosure action, GE requested that FFMC/FREG be appointed as the receiver, and plaintiff agreed on May 11, 2005. Plaintiff states that the agreement regarding FFMC/FREG's appointment as receiver was read in open court on May 11, 2005, but the court did not issue a written order. The trial court noted several

[1] The bankruptcy petition was apparently dismissed in March 2005.

times in its summary disposition opinion that it had not signed an order appointing FFMC/FREG as receiver. However, the trial court stated in an earlier opinion that it "appointed FFMC as the Receiver for the Building" on May 11, 2005. Wolfe's affidavit indicates that he "fully believed as of May 11, 2005, that the Friedman Companies were the Court appointed receiver for the Building responsible for all management and leasing activities." He claimed that he met with FFMC staff on May 16, 2005, and the next day FFMC staff picked up leasing and operating information.

On May 17, 2005, CenCorp signed a lease for space in Travelers Towers. On May 20, 2005, GE consented to the renewal lease between CenCorp and plaintiff. Wolfe claimed that on May 20, 2005, an FFMC employee told him that defendants received a $50,000 payment from Kojaian as a commission or finder's fee. FFMC employees later returned plaintiff's documents. On June 7, 2005, the trial court appointed Signature Associates as receiver. Wolfe's September 20, 2006, affidavit references several letters between plaintiff and defendants, but those letters were not provided with the affidavit. In those missing letters, Wolfe claimed to have "fired" defendant FFMC as receiver.

Plaintiff filed this action in March 2006. Plaintiff moved the trial court to compel discovery on July 20, 2006, after defendants refused to allow their employees to be deposed. Defendants' answer claimed that plaintiff's suit was merely a re-filing of the third-party complaint against defendants that was filed in the original foreclosure action. In that suit, the discovery period expired in November 2005 with plaintiff conducting no discovery; so, defendants argued, plaintiff could not "bootstrap itself into a serendipitous re-opening of the discovery period it allowed to lapse." Defendants also argued that deposing their employees would be futile because plaintiff's allegations were purely speculation and conjecture, unconfirmed by any of the people allegedly involved.

On August 2, 2006, a hearing was held on the motion to compel discovery. At that hearing, defendants moved the trial court to grant them summary disposition on plaintiff's claim. The trial court did not rule on the motion to compel, but stated that it would allow discovery if defendants' motion was denied.

The trial court granted defendants' motion based on MCR 2.116(C)(10). In reaching its decision, it noted that the case was predicated on plaintiff's claim that defendants violated their duties as receiver and property manger for the building by acting on behalf of Kojaian and GE. The trial court then noted that it had not appointed defendants as receiver because it had signed no order and that plaintiff failed to present any evidence that a property management agreement had been executed. In addition, defendants' involvement with Kojaian and CenCorp occurred before their involvement with plaintiff. Defendants did not have a duty to plaintiff that they could breach, the trial court said, because there was no relationship between the parties. In making its decision, the trial court noted that credibility determinations should not be made when deciding a summary disposition motion, but held that there was no support for "plaintiff's dramatic characterization of defendants' actions." No admissible evidence had been provided to contradict defendants' affidavits. Plaintiff's case rested on "'information and belief,' obtained through unnamed parties, all of which 'information' is specifically contradicted by persons with personal knowledge."

## II. SUMMARY DISPOSITION

Plaintiff argues on appeal that the trial court erred when it granted summary disposition because it presented sufficient evidence to prove that a genuine issue of material fact exists with respect to its claims of tortious interference with a business relationship or expectancy; misrepresentation and fraud in the inducement; breach of fiduciary duties of a receiver; and breach of contract. Specifically, plaintiff argues that summary disposition was inappropriate because plaintiff had presented sufficient evidence to support a claim that defendants had tortiously interfered with plaintiff's business relationship with CenCorp; had breached its duties as a receiver; and had breached its contract duties. We disagree.

## A. Standard of Review

We review a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition under MCR 2.116(C)(10) is appropriate "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id.*

## B. Analysis

### 1. Tortious Interference

Tortious interference with a business relationship requires (1) the existence of a valid business relationship or expectancy; (2) knowledge of the relationship or expectancy by the defendant; (3) an intentional interference by the defendant that induces or causes a termination of the relationship or expectancy; and (4) damage to the plaintiff. *Badiee v Brighton Area Schools*, 265 Mich App 343, 365-366; 695 NW2d 521 (2005). Plaintiff must allege that defendant either performed an intentional, wrongful-per-se act, or a lawful act done "with malice and unjustified in law for the purpose of invading plaintiff's contractual rights or business relationship." *Feldman v Green*, 138 Mich App 360, 369; 360 NW2d 881 (1984); see also *CMI Int'l, Inc v Intermet Int'l Corp*, 251 Mich App 125, 131-132; 649 NW2d 808 (2002). If the act is otherwise lawful, plaintiff "necessarily must demonstrate, with specificity, affirmative acts by the interferor which corroborate the unlawful purpose of the interference." *Feldman, supra* at 370. An "improper" act is one that is illegal, unethical, or fraudulent. *Weitting v McFeeters*, 104 Mich App 188, 198; 304 NW2d 525 (1981). Merely offering a better deal or soliciting another's business is not an improper act. *Id.* at 197-198. Intentionally and actively inducing someone to breach a contract, however, is an improper act. *Feldman, supra* at 376.

Plaintiff made two specific factual allegations of affirmative acts, in addition to generalized accusations of wrong-doing, to argue that defendants interfered with plaintiff's business expectancy by improperly encouraging CenCorp to relocate from its building. Plaintiff first alleges that David Friedman, the principal of the defendants, met with a GE representative, Paul Gawenka, in Las Vegas, and the two "took actions detrimental to" plaintiff. That accusation, however, is contained only in plaintiff's brief on appeal and in the complaint below. Plaintiff has not offered sworn testimony and has not submitted other admissible evidence. Conclusory statements that are unsupported by specific factual allegations are insufficient to create a genuine issue of material fact or state a cause of action. *Churella v Pioneer State Mut*

*Ins Co*, 258 Mich App 260, 272; 671 NW2d 125 (2003). Further, defendants submitted a sworn affidavit from Paul Gawenka, containing the contrary assertion that he met with Friedman, but that they did not discuss withholding GE's approval of the renewal lease. With that sworn statement, defendants have met their burden to show that no disputed fact exist. *Coblentz v Novi*, 475 Mich 558, 568-569; 719 NW2d 73 (2006). Plaintiff, as the nonmoving party, bears the burden of proof on the issue at trial, so it must provide evidentiary materials in addition to its pleadings to show that a genuine issue of disputed fact exists. *Id*. at 569; *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). It has not done so.

Plaintiff's second specific allegation is that defendants, after they were appointed as receivers for the property, circulated the lease for signing between CenCorp and Kojaian Management Corp, the owners of Travelers Towers, in order to encourage or assist CenCorp in relocating. Plaintiff offers the sworn averment of Jack Wolfe, the managing member of plaintiff corporation, that one of defendants' employees told him that defendants circulated that lease and would receive a substantial commission for their efforts. The statement in Wolfe's affidavit is hearsay, MRE 801, is inadmissible, and does not create a genuine issue of material fact. *McCallum v Dep't of Corrections*, 197 Mich App 589, 603; 496 NW2d 361 (1992). Although this Court is liberal in finding a genuine issue of material fact, *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 266 Mich App 297, 306; 701 NW2d 756 (2005), reversed in part on other grounds sub nom *Trentadue v Gorton*, 479 Mich 378 (2007), plaintiff must provide documentary evidence, and the hearsay statement of an unnamed employee is not documentary evidence.[2] Conjecture, speculation, opinions, conclusory denials, and unsworn averments cannot satisfy the court rule; "disputed fact (or the lack of it) must be established by admissible evidence." *SSC Assoc Ltd Partnership v Gen Retirement Sys of Detroit*, 192 Mich App 360, 364; 480 NW2d 275 (1991).

2. Misrepresentation and Fraud In the Inducement

We first note that plaintiff has "made only a brief presentation which can hardly be classified as an argument" regarding its claim of fraudulent misrepresentation and fraud in the inducement, and thus, has not properly presented this issue for our review. *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984). We will not consider this issue. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

3. Breach of Fiduciary Duties of a Receiver

Next, defendant FFMC was not appointed receiver by the trial court; thus, it did not have any fiduciary duties to breach. The trial court ruled that neither of the defendants was appointed as receiver because the trial court did not execute a written order of appointment. Plaintiff has not provided an executed order showing that such an appointment was made, and, in fact, it

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[2] For the first time on appeal, plaintiff names the employee who allegedly gave Wolfe the information. This Court, in reviewing a summary disposition ruling, only considers evidence in the record at the time of the lower court hearing. *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003).

concedes that the proposed order appointing FFMC receiver was never signed. A court speaks through its written judgments and orders and, until an order is "reduced to writing and signed," it does not become effective. *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977). Thus, plaintiff was not appointed as a receiver and had no duties attendant to being a receiver; if there is no duty, there can be no breach. Summary disposition on that claim was proper.

4. Breach of Contract

We conclude that the trial court did not err when it determined that plaintiff has not presented evidence to create a genuine issue of material fact that an oral or written contract was formed. Where there was no contract, there can be no breach. Plaintiff has not provided a signed management agreement and does not claim that one exists. The only writings signed by defendants clearly indicate that defendants did not intend to be bound by any proposed contract until plaintiff signed it and "[a] contract is made when both parties have executed or accepted it, and not before." *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 549; 487 NW2d 499 (1992). There was no evidence of a meeting of the minds of the parties on essential terms; therefore, there was no contract. *Id.*

Moreover, plaintiff's own evidence makes it clear that it did not believe that an oral or written contract existed before May 2005, because plaintiff's correspondence in March 2005 discusses that plaintiff *would likely retain* defendants after or during the bankruptcy proceedings and describes the agreement in question as the *proposed* management contract. Negotiations and discussions are insufficient to create a contract. *Eerdmans v Maki*, 226 Mich App 360, 364; 573 NW2d 329 (1997). Additionally, plaintiff has failed to present evidence to create a genuine issue of material fact whether an oral contract existed. Acts that may be sufficient to constitute partial performance and remove the contract from the statute of frauds are irrelevant because, "[b]efore a party may assert that its actions constitute sufficient part performance to remove an oral agreement from the statute of frauds, that party must first show the existence of an oral contract." *Empire Shoe Serv, Inc, v Gershenson*, 62 Mich App 221, 225; 233 NW2d 237 (1975). Likewise, plaintiff's argument that by meeting with plaintiff and reviewing documents on May 16, 2005, defendants may have ratified a contract also fails because there was neither an oral contract nor a receivership to ratify. Finally, plaintiff's argument that defendants should be estopped from denying a contract existed also fails because estoppel is not appropriate unless the facts calling for it are unquestionable and the wrong to be prevented undoubted. *Kamalnath*, *supra* at 552. That is not the case here.

5. Summary Disposition Before Completion of Discovery

Plaintiff next argues that the trial court abused its discretion by granting summary disposition before discovery was complete. We note again that plaintiff has "made only a brief presentation which can hardly be classified as an argument," and thus, has not properly presented this issue for review. *Goolsby*, *supra* at 655 n 1. Nevertheless, generally, a motion for summary judgment under MCR 2.116(C)(10) should not be granted before discovery on a disputed issue is complete. *Townsend v Chase Manhattan Mortgage Corp*, 254 Mich App 133, 140; 657 NW2d 741 (2002). Summary disposition in this case was appropriate, however, because further discovery does not stand a reasonable chance of uncovering factual support for plaintiff's position. *Peterson Novelties, Inc, v City of Berkley*, 259 Mich App 1, 25; 672 NW2d 351 (2003). As already discussed, plaintiff has not provided independent factual evidence to support its

claims, despite a discovery period in the former action and several months of discovery in this action. Plaintiff argues it should be given more time, but plaintiff has not stated what facts it may reasonably hope to uncover upon further discovery, *Village of Dimondale v Grable*, 240 Mich App 553, 567; 618 NW2d 23 (2000), and plaintiff was not entitled to a fishing expedition. *VanVorous v Burmeister*, 262 Mich App 467, 477; 687 NW2d 132 (2004). We conclude that the trial court's grant of summary disposition was appropriate. *Peterson Novelties, Inc*, *supra* at 25.

## III. CONSIDERATION OF EVIDENCE

Plaintiff next argues that the trial court erred when it considered the affidavit of Paul Gawenka, which was filed on the day of the hearing on the motion for summary disposition. We disagree.

### A. Standard of Review

We review the trial court's decision to consider evidence for an abuse of discretion. *Reed v Reed*, 265 Mich App 131, 160; 693 NW2d 825 (2005). A trial court has not abused its discretion if it selects a "reasonable" or "principled outcome" when more than one correct outcome is possible. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

### B. Analysis

Affidavits in support of a motion for summary judgment must be filed at least 21 days before the hearing, MCR 2.116(G)(1)(a)(i), but a trial court has the discretion to consider a late affidavit as evidence. See *Prussing v Gen Motors Corp*, 403 Mich 366, 370; 269 NW2d 181 (1978). The trial court properly exercised its discretion where the affidavit contained relevant information, was not unfairly prejudicial, and assisted in a resolution of the motion. In ruling, we note that plaintiff submitted a late affidavit of its own and missed other deadlines imposed by the trial court.

We further note that plaintiff's argument, that the affidavit was "harmful" and thus, was "unfair," is without merit. All evidence is prejudicial or harmful to some extent to one of the parties. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995). Damaging or harmful, however, is not the equivalent of unfairly prejudicial. *Bradbury v Ford Motor Co*, 123 Mich App 179, 185; 333 NW2d 214 (1983), mod 419 Mich 550 (1984). Rather, unfair prejudice is when there is a danger that marginally probative evidence will be given undue weight by the jury, and it would be inequitable to allow its use. *Mills*, *supra* at 75-76. The Gawenka affidavit was more than marginally probative evidence and was relevant. It made the existence of the fact that defendants asked GE to decline to approve the CenCorp lease so they could encourage CenCorp to leave plaintiff's building, less probable. MRE 401. Further, there is no indication that the affidavit would be given undue weight. MRE 403. Thus, it was not inequitable to allow its admission, and the trial court did not abuse its discretion.

Affirmed.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Bill Schuette