

STATE OF MICHIGAN
COURT OF APPEALS

KELLER CONSTRUCTION, INC.,

Plaintiff-Appellant/Cross-Appellee,

v

U.P. ENGINEERS & ARCHITECTS, INC., JOHN
SULLIVAN, WILLIAM MARLOR, and
EDWARD GAGNON,

Defendants-Appellees/Cross-
Appellants.

UNPUBLISHED

July 8, 2008

No. 275379

Ontonagon Circuit Court

LC No. 04-000049-CK

Before: Owens, P.J., and Meter and Schuette, JJ.

PER CURIAM.

Plaintiff Keller Construction, Inc., appeals as of right from an order granting summary disposition to defendants, U.P. Engineers & Architects, Inc. (UPEA), and John Sullivan, William Marlor, and Edward Gagnon (the individual defendants) under MCR 2.116(C)(8). Defendants cross appeal, challenging the trial court's denial of their motion for summary disposition on the alternative grounds of governmental immunity and a prior release. We affirm.

I. FACTS

This case arises from the construction of a water treatment and distribution system in the Upper Peninsula (the project), implemented by the village of Ontonagon (the Village). In 1995, UPEA entered into a contract with the Village to provide engineering services for the project. Underground Specialists, Inc. (USI) was to do the construction work. Plaintiff provided, and secured project performance bonds for USI. Under the contracts between USI and the Village, UPEA was responsible for administering the project.

On June 12, 2000, the Village issued USI a "notice to proceed," but USI only performed a limited amount of work during winter 2000-2001. Later, UPEA became concerned that USI would not complete the project on time, and allegedly a portion of USI's contract was assigned to another subcontractor. As a result, \$1.4 million was deducted from USI's contract price. Also, due to inventory control issues and restocking fees, USI lost approximately \$300,000. Other costs were also incurred because of flood damage and erosion control.

In July 2002, plaintiff agreed to take over the project under its surety obligations. The Village, plaintiff, and USI then completed an assignment of all USI's contract rights and obligations to plaintiff. Plaintiff had to bring in its own equipment at substantial expense because plaintiff could not hire local contractors.¹

In November 2003, the parties reached a settlement agreement, in which plaintiff, USI, and the Village released their claims against each other. However, UPEA was not released in the agreement.

On July 2, 2004, plaintiff filed suit against UPEA and the individual defendants, asserting claims for engineering malpractice, negligence, tortious interference with a business relationship, tortious interference with a business expectancy, fraudulent misrepresentation, negligent misrepresentation, civil conspiracy, and breach of the implied covenant of good faith and fair dealing. Defendants moved for summary disposition. The trial court granted defendants' motion, but allowed plaintiff to amend its complaint.

On March 27, 2006, plaintiff filed its first amended complaint, asserting claims for malpractice, negligence, and tortious interference with an advantageous business relationship or expectancy. The remaining claims asserted in the original complaint were not renewed.

On September 22, 2006, the individual defendants moved for summary disposition under MCR 2.116(C)(7), arguing that plaintiff's claims against them were barred by the November 2003 release. The individual defendants noted that while the release explicitly excludes UPEA, it does not exclude UPEA's employees. The individual defendants argued that, as UPEA's employees, they were agents of the Village. The terms of the release absolved the Village and its agents. Therefore, plaintiff's claims were barred.

On October 4, 2006, UPEA moved for summary disposition, arguing that plaintiff had failed to specifically allege facts showing a breach of professional duties pertaining to design, specifications, and professional calculations. UPEA argued that plaintiff's allegations were perfunctory and conclusory. Further, because the trial court ruled that UPEA was an agent of the Village, and not a third party to plaintiff's relationship with the Village, plaintiff could not maintain a claim for tortious interference. Plaintiff had also failed to specifically allege the nature and expectations of its alleged relationships with entities other than the Village, including USI, the RDA, and the nameless local contractors. Further, all of plaintiff's alleged damages were related to its contract with the Village, not its alleged relationships with other entities. Plaintiff had also failed to sufficiently allege that UPEA had acted with the unlawful purpose of invading plaintiff's relationships. Lastly, UPEA argued that, as an agent of the Village, plaintiff's claims against it were barred by governmental immunity.

¹ Allegedly, UPEA and the individual defendants told the local contractors that plaintiff was not trustworthy.

At a hearing on December 4, 2006, the trial court granted summary disposition to defendants on plaintiff's negligence and malpractice claims because plaintiff failed "to specifically allege facts related to breaches of professional duties pertaining to design, specifications, and professional calculations that do not pertain to the engineer's role as advisor to an[d] advocate for the project owner." Regarding plaintiff's tortious interference claim, the court found that plaintiff had again failed to plead specific facts placing UPEA in the role of a third party to the contract, or showing that UPEA acted outside the scope of its authority and thereby interfered with plaintiff's advantageous relationships with the Village and others. The court further stated, "I do not find that UPEA or any of the [individual] defendants here are cloaked in governmental immunity."

Lastly, the court found that the individual defendants were not released by the settlement agreement. The court stated that "[i]t may be true, and I think it's a valid point that [the individual defendants] were subagents, if you will, of the Village, nonetheless they were the direct agents of their employer, UPEA." Therefore, the provision reserving plaintiff's right to sue UPEA also preserved plaintiff's right to sue UPEA's employees. Nonetheless, because the complaint did not state a claim against UPEA, "neither does it state a cause of action against UPEA's agents for the same reasons, such that I'll grant a (C)(8) motion regarding the [individual] defendants."

An order granting summary disposition to defendants under MCR 2.116(C)(8) but denying defendants' motions for summary disposition on the basis of governmental immunity and the prior release was entered on December 13, 2006. Plaintiff now appeals.

II. STANDARD OF REVIEW

A trial court's grant of summary disposition is reviewed de novo to determine whether the prevailing party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Id.* at 119. "All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Id.* The motion may be granted only if the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992).

III. ANALYSIS

Plaintiff first argues that the trial court erred in dismissing its negligence and malpractice claims. We disagree.

"It is well-established that a prima facie case of negligence requires a plaintiff to prove four elements: duty, breach of that duty, causation, and damages." *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004). There can be no tort liability unless the defendant owes the plaintiff a duty of care. *Id.* Thus, "[t]he threshold question in a negligence action is whether the defendant owed a duty to the plaintiff." *Id.* The existence of a duty is a question of law for the court, to be reviewed de novo. *Id.*

Plaintiff relies on *Bacco Constr Co v American Colloid Co*, 148 Mich App 397, 402-404, 413; 384 NW2d 427 (1986), in which a general contractor for a project sued the project engineer for negligence based on the engineer's approval of a change to the specifications of seal material. The substituted seal material leaked, causing the plaintiff to spend a substantial amount of money for repairs. *Id.* at 402-403. This Court observed that "the clear trend in other jurisdictions is to allow a negligence action without direct privity of contract" between the contractor and the project engineer or architect. *Id.* at 414. The Court adopted the reasoning in *Donnelly Constr Co v Oberg/Hunt/Gilleland*, 139 Ariz 184; 677 P2d 1292 (1984), which held that, notwithstanding the absence of privity, "design professionals are liable for foreseeable injuries to foreseeable victims which proximately result from negligent performance of their professional duties."² *Id.* at 414-416. The *Bacco* Court concluded that "[i]t is certainly foreseeable that an engineer's failure to make proper calculations and specifications for a construction job may create a risk of harm to the third-party contractor who is responsible for applying those specifications to the job itself." *Id.* at 416.

In *Nat'l Sand, Inc v Nagel Constr, Inc*, 182 Mich App 327, 331; 451 NW2d 618 (1990), this Court, while observing that Michigan has not eliminated the requirement of privity for breach of contract actions, stated that "a plaintiff may maintain an action *in tort* where he is injured by the defendant's negligent performance of a contract even where there is no privity between the parties." (emphasis in original). Thus, this Court affirmed the trial court's dismissal of a breach of contract claim, but reversed the trial court's dismissal of a negligence claim. *Id.* at 331, 342.

In this case, as in *Bacco* and *Nat'l Sand*, plaintiff's negligence and malpractice claims are based on defendants' alleged negligence in performing various contractual and related duties. Thus, plaintiff argues that *Bacco* is controlling.

In 2004, however, our Supreme Court held that in determining whether a tort action will lie based on a defendant's contractual obligations, courts are required to ascertain whether the action alleges a "violation of a legal duty separate and distinct from the contractual obligation." *Fultz, supra* at 467, quoting *Rinaldo's Constr Corp v Michigan Bell Tel Co*, 454 Mich 65, 84; 559 NW2d 647 (1997). The Court explained:

[L]ower courts should analyze tort actions based on a contract and brought by a plaintiff who is not a party to that contract by using a "separate and distinct" mode of analysis. Specifically, the threshold question is whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations. *If no independent duty exists, no tort action based on a contract will lie.* [*Id.* (emphasis added).]

² Since then, the Arizona Supreme Court has rejected *Donnelly*, holding that courts are not to consider foreseeability in determining whether a duty of care exists in a particular case. *Gipson v Kasey*, 214 Ariz 141, 144; 150 P3d 228 (2007).

We conclude that *Bacco* and *Nat'l Sand* have been overruled to the extent they are inconsistent with *Fultz*. Therefore, it is unnecessary to consider whether defendants owed plaintiff a duty of care only with respect to design, specifications, and professional calculations, as the trial court believed, or whether plaintiff's claims were sufficiently specific.

All of plaintiff's claims ultimately arise from defendants' contractual and related duties.³ As in *Rinaldo's Constr Corp*, *supra* at 85, while plaintiff's allegations "arguably make out a claim for 'negligent performance' of the contract, . . . plaintiff does not allege a violation of an independent legal duty distinct from the duties arising out of the contractual relationship." Thus, under *Fultz*, the contractual and related duties alleged by plaintiff are not enforceable in tort. Therefore, plaintiff's negligence and malpractice claims were properly dismissed.

Plaintiff also argues that the trial court erred in dismissing its tortious interference claim. Again, we disagree.

"The elements of tortious interference with a contract are: (1) a contract, (2) a breach, and (3) an unjustified instigation of the breach by the defendant." *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 382; 689 NW2d 145 (2004) (internal quotations and citations omitted). Similarly, "[t]he elements of tortious interference with a business relationship are the existence of a valid business relationship or expectancy, knowledge of the relationship or expectancy on the part of the defendant, an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the plaintiff." *Mino v Clio School Dist*, 255 Mich App 60, 78; 661 NW2d 586 (2003) (internal quotations and citations omitted); see also *Joba Constr Co, Inc v Burns & Roe, Inc*, 121 Mich App 615, 634; 329 NW2d 760 (1982).

To prevail on a tortious interference claim, a plaintiff must prove "the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another." *Derderian, supra* at 382 (internal quotations and citations omitted). "If the defendant's conduct was not wrongful per se, the plaintiff must demonstrate specific, affirmative acts that corroborate the unlawful purpose of the interference." *CMI Int'l, Inc v Internet Int'l Corp*, 251 Mich App 125, 131; 649 NW2d 808 (2002).

Further, "[t]o maintain a cause of action for tortious interference, the plaintiff must establish that the defendant was a 'third party' to the contract rather than an agent of one of the parties acting within the scope of its authority as an agent," *Lawsuit Financial, LLC v Curry*, 261 Mich App 579, 593; 683 NW2d 233 (2004), unless the defendant was acting solely for his or her own benefit, *Reed v Metro Girl Scout Council*, 201 Mich App 10, 13; 506 NW2d 231 (1993).

³ We refer to the engineering agreement and to plaintiff's contracts with the Village, including the attached conditions and supplemental conditions, and to related duties performed by defendants.

Plaintiff notes that, in *Joba Constr, supra* at 624-625, the party who engaged in tortious interference was the project engineer, who allegedly convinced the city of Detroit not to contract with the plaintiff, even though it was the lowest bidder. The project engineer also convinced the city to remove the plaintiff as subcontractor on another contract. *Id.* Although the engineer was no more a third party to the relationship than defendants are in the present case, the tortious interference claim was allowed to proceed to trial, and the plaintiff prevailed. *Id.* at 624. Although we agree with plaintiff that *Joba Constr* is similar to this case, it does not address the third-party requirement. In any event, *Joba Constr* was decided before November 1, 1990. Therefore, under MCR 7.215(J)(1), we are bound to follow *Reed* and *Lawsuit Financial*, which preclude an action for tortious interference where the party against whom the claim is brought is not an independent third party to the relationship.

In the present case, plaintiff's amended complaint alleges that, through various acts, defendants interfered with plaintiff's contract or business relationship with the Village, the United States Department of Agriculture's Rural Development Agency ("RDA"), and other unnamed local contractors. However, defendants were not independent third parties to plaintiff's contract with the Village, and plaintiff does not allege that defendants acted exclusively for their own benefit, rather than for the benefit of the Village. Plaintiff's relationship with the RDA arose from plaintiff's contract with the Village. Even defendants' alleged expectancy with local contractors was related to plaintiff's performance of its contract with the Village. Thus, defendants were not independent third parties to any of the contracts or relationships that they allegedly interfered with, and plaintiff fails to allege that defendants acted solely for their own benefit rather than for the benefit of the Village. Accordingly, the trial court correctly held that plaintiff's amended complaint failed to state a claim for tortious interference.

Affirmed.⁴

/s/ Donald S. Owens
/s/ Patrick M. Meter
/s/ Bill Schuette

⁴ We affirm the trial court's grant of summary disposition to defendants; therefore, it is unnecessary to consider the alternative grounds for affirmance that defendants raise on cross appeal.