

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ENERGY RESOURCE MANAGEMENT  
CORPORATION,

UNPUBLISHED  
January 29, 2009

Plaintiff-Appellant,

v

CMS ENERGY RESOURCE MANAGEMENT  
COMPANY,

No. 282127  
Jackson Circuit Court  
LC No. 06-006064-CZ

Defendant-Appellee.

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

PER CURIAM.

Plaintiff appeals from an order of summary disposition in favor of defendant on plaintiff's unfair competition claim. We affirm.

Plaintiff's business of consulting and brokering energy products commenced in 1991. Plaintiff, however, engaged in minimal business activities in the last few years before the instant dispute. Defendant is also engaged in the brokering of energy products and was formed in 1996 under the name CMS Marketing, Services and Trading Company. According to plaintiff, the two parties were involved in several marketing deals with each other in the 1990s and generally peacefully co-existed in the marketplace.

This changed, however, in 2004 when defendant changed its name to CMS Energy Management Company. Plaintiff sent defendant a cease and desist letter stating that defendant's new name constituted unfair competition by the use of a similar name and a trademark or service mark infringement. Defendant's refusal to do so led to the instant lawsuit, which alleged two counts: (1) unfair competition through improper use of corporate name and symbol and (2) tortious interference with advantageous business relationships. The trial court granted summary disposition in favor of defendant. We affirm.

Plaintiff first argues that the trial court erred in granting summary disposition to defendant on the unfair competition claim. We disagree. We review the grant or denial of a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion brought under MCR 2.116(C)(10) tests the factual sufficiency of the complaint and, after reviewing affidavits, pleadings, depositions, admissions, and other evidence in the light most favorable to the nonmoving party, the moving party is entitled to judgment as a

matter of law if the proffered evidence fails to establish a genuine issue of material fact. *Maiden, supra* at 118.

The trial court cited a number of reasons to support the grant of summary disposition to defendant. First, the trial court concluded that there could be no unfair competition because there was no evidence of actual competition between plaintiff and defendant. See *Ex-Cell-O Corp v Sage*, 347 Mich 210, 213; 79 NW2d 497 (1956). The trial court noted that defendant had exited the retail market at the time it changed its name, while plaintiff considers itself a broker in the retail market. The trial court additionally noted that plaintiff's presence in that market was minimal at best: in the seven years preceding defendant's name change, plaintiff had only one contract for the sale of natural gas, which expired two years before the name change, and no contracts for the sale of electricity. Plaintiff had no sales after 2002. Second, the trial court concluded that there was no confusion between the names, focusing in particular on the fact that the first word or term in defendant's name, CMS, does not appear in plaintiff's name. See *Educational Subscription Services, Inc v American Educational Services, Inc*, 115 Mich App 413, 423; 320 NW2d 684 (1982).

Both of those arguments certainly support the grant of summary disposition. Plaintiff has made no factual showing that it is in actual competition with defendant. Indeed, there is no evidence that plaintiff was in competition with anyone after 2002. The purpose of invoking a remedy for the misappropriation of a corporate name is to prevent injury to the plaintiff. *220 Bagley Corp v Julius Freud Land Co*, 317 Mich 470, 477; 27 NW2d 59 (1947). Although plaintiff makes the bald assertion that it has been injured by defendant's name change, plaintiff points us to no evidence of any loss of business to plaintiff caused by the name change. Furthermore, as indicated in *Educational Subscription Services, supra*, absent a corporate name obtaining a secondary meaning, corporate names are not confusingly similar if the first word in each name is obviously different. *Id.* at 423.

Thus, the subsidiary question that must be addressed is whether plaintiff's name has acquired a secondary meaning. The trial court concluded that there is no evidence to support a conclusion that such a secondary meaning has arisen. We agree with the trial court. No actual competition need be shown where a trade name has established a secondary meaning. *Thrifty Acres, Inc v Al-Naimi*, 119 Mich App 462, 466; 326 NW2d 400 (1982). In short, it is improper to take unfair advantage of a trade name developed by another business to the point that potential customers associate with that business. This is true even if the customers would not necessarily do business with the company whose name is being misappropriated. It is sufficient if the company that is improperly using another company's trade name is obtaining customers it might not otherwise obtain because of the misuse of the name. *Id.* at 466-467.

In the case at bar, plaintiff makes absolutely no showing that its trade name is so well-established in the industry that it has established a secondary meaning with plaintiff's business or that defendant has obtained any customers because those customers believed that they were dealing with plaintiff instead of defendant. Indeed, the fact that plaintiff had failed to obtain any new customers for several years before defendant changed its name would strongly suggest that there exists no secondary meaning to plaintiff's name nor did defendant obtain any customers as a result of the name change who thought they were dealing with plaintiff.

Finally, plaintiff argues that the trial court erred in granting summary disposition on its tortious interference claim. We disagree. The trial court concluded that there was no evidence of either any actual interference or even any intent to interfere. The parties agree that this case is controlled by *Winiemko v Valenti*, 203 Mich App 411; 513 NW2d 181 (1994). Actual interference that causes or induces a breach or termination of the business relationship or expectancy is required. *Id.* at 416. Plaintiff makes no showing of the existence of such a relationship or expectancy, beyond the unsubstantiated assertion that it expected to someday do business again. There is no indication that that expectancy was grounded in reality or, more importantly, that any actions by defendant diminished the possibility of that expectancy becoming reality.

Affirmed. Defendant may tax costs.

/s/ Donald S. Owens  
/s/ David H. Sawyer  
/s/ Jane E. Markey