STATE OF MICHIGAN

COURT OF APPEALS

BRENDA GEILING, individually and d/b/a LEE CONSTRUCTION, Plaintiff-Appellants, v HEMLOCK SEMICONDUCTOR CORPORATION and DOW CORNING CORPORATION, Defendants-Appellees.	UNPUBLISHED January 12, 2012 No. 296579 Saginaw Circuit Court LC No. 09-004728-NZ-4

Before: MARKEY, P.J., and FITZGERALD and SHAPIRO, JJ.

PER CURIAM.

In this case brought under Article 3 of the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2301 *et seq*., plaintiff[1] appeals as of right from the trial court's grant of summary disposition to defendants Hemlock Semiconductor (Hemlock) and Dow Corning Corporation (Dow Corning)[2] on the grounds that they were not places of public accommodation to which Article 3 applied. We affirm.

I. BASIC FACTS AND PROCEEDINGS[3]

[1] Although there are technically two plaintiffs, Geiling individually and under her d/b/a Lee Construction, because the two are essentially the same for the purposes of this case, we use the term "plaintiff" to refer to both. Where necessary to identify them separately, they will be referred to by name.

[2] Hemlock is a joint venture of Dow Corning and two other entities. Dow Corning is a joint venture owned by Dow Chemical Company and Corning, Incorporated.

[3] Because the parties agreed to bifurcate this case, discovery has only occurred on whether defendants are places of public accommodation. Therefore, the facts relating to the alleged discrimination and retaliation are derived wholly from plaintiff's complaint.

Plaintiff Brenda Geiling is a Michigan resident and licensed builder who conducted business under the assumed name of Lee Construction until September 2008, when Lee Construction was incorporated. In 2006, plaintiff performed work for defendants in Michigan as a subcontractor. In January 2007, plaintiff completed defendants' application process and was approved for vendor status, permitting her to bid as a prime contractor on various construction work for defendants. The work in question was to be performed in Saginaw County, Michigan, where Hemlock is located. In July 2007, plaintiff successfully bid on three projects with defendants, all of which were completed and received excellent evaluations from defendants' representatives. On August 15, 2007, Hemlock invited plaintiff, and others, to bid on a specific project. Two weeks later, however, on August 29, Dow Corning withdrew the invitation to plaintiff to bid on the project. Plaintiff then met and talked with several of defendants' management representatives in an attempt to determine why her right to bid had been withdrawn.

During a meeting with defendants' management representatives, on or about September 4, 2007, plaintiff was informed that "we don't want to do business with your kind of company." Geiling's husband, also Lee Construction's project manager, inferred that the statement "your kind of company," without any other explanation, referred to Lee Construction being a female-owned company. Several days later he spoke with a "Dow shareholder" and complained that plaintiff was being frozen out of the bidding process for this reason. Dow Corning investigated that concern, as well as an additional concern that there had been one or more kickbacks involving another contractor. At the conclusion of the investigation, defendants informed plaintiff that she would no longer be permitted to bid in any capacity, whether as a prime contractor or subcontractor, on any of defendants' future construction projects.

In April 2009, plaintiff filed suit against defendants alleging they had engaged in practices prohibited by MCL 37.2302. Plaintiff asserted violations for both sexual discrimination and retaliation for her having made a complaint of sexual discrimination.[4] Defendants moved for summary disposition under MCR 2.116(C)(5), asserting that plaintiff lacked standing to sue because she had failed to file an assumed name certificate in Saginaw County, as required under the Michigan Assumed Name Statute, MCL 445.1 *et seq*. Plaintiff responded, providing caselaw that indicated that the prohibition against lawsuits in MCL 445.5 had been held inapplicable to tort actions. The trial court reserved ruling on the motion and ordered the parties to engage in limited discovery only as to whether defendants were "places of public accommodation" for purposes of ELCRA.

After completion of that discovery, defendants filed a second motion for summary disposition, this time under MCR 2.116(C)(8) and (10), alleging that neither defendant was a "place of public accommodation" for purposes of ELCRA. The trial court granted defendants' motions finding that defendants are not places of public accommodation for purposes of ELCRA, as well as defendants' assertion that her claim is barred by the failure to file an assumed name certificate.

[4] Plaintiff also asserted a claim for tortious interference, but has not appealed the trial court's grant of summary disposition as to that claim.

II. STANDARD OF REVIEW

We review de novo both issues of statutory interpretation and a trial court's decision to grant summary disposition. *Mich Federation of Teachers v Univ of Mich*, 481 Mich 657, 664; 753 NW2d 28 (2008). In reviewing a trial court's decision on summary disposition, we take the facts in the light most favorable to the non-moving party. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). We review the record and the documentary evidence, but do not make findings of fact or weigh credibility. *Taylor v Lenawee Rd Comm'rs*, 216 Mich App 435, 437; 549 NW2d 80 (1996).

III. ANALYSIS

A. PLACES OF PUBLIC ACCOMMODATION

Plaintiff contends that defendants are places of public accommodation, such that they are subject to Article 3 of ELCRA. MCL 37.2302 provides, in relevant part:

> Except where permitted by law, a person shall not:
>
> (a) Deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of . . . sex.

MCL 37.2301(a) defines "place of public accommodation" as:

> a business, or an educational, refreshment, entertainment, recreation, health, or transportation facility, or institution of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public.

Defendants are both businesses, so the issue is whether their "goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public." MCL 37.2301(a).

Plaintiff does not refer us to any cases in which a contract bidding process between purely commercial enterprises has been held to give rise to rights under Article 3. Plaintiff primarily relies on *Haynes v Neshewat*, 477 Mich 29; __ NW2d __ (2007), a case which we find distinguishable. In *Haynes*, the plaintiff was an African-American physician with staff privileges at the defendant hospital. He alleged that the hospital had subjected him to excessive charges of unprofessional behavior and administrative hearings and other discriminatory behavior designed to discourage him from using the facilities at the hospital. As plaintiff was not an employee, he could not make a claim under Article 2 of ELCRA which addresses discrimination in the employment setting. Instead, he brought his claim under Article 3, on the theory that the hospital had denied him "goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation." The trial court dismissed the case reasoning that the "services" and "privileges" that plaintiff claimed he was denied were not those offered to the public generally and so do not fall within the purview of the public accommodations provisions of ELCRA.

The Supreme Court reversed and plaintiff argues that the Supreme Court's opinion in *Haynes* stands for the proposition that even where the set of persons eligible to receive a service or privilege is limited, so long as the privilege is made generally available to that set of individuals, the defendant falls within the public accommodation provision as to that particular service or privilege. Plaintiff is correct that *Haynes* held that under MCL 37.2302 an individual may not be discriminated against in the provision of "goods, services, facilities, privileges, advantages or accommodations" even if they are offered only to individuals having certain qualifications. The "goods, services, facilities, privileges, advantages or accommodations" need not be offered to the public at large in order to fall within MCL 37.2302 since by its terms it protects *individuals*, not the public. *Haynes* at 38. However, even if the privilege in question is limited to a certain group, the defendant must still be a "place of *public* accommodation" under MCL 37.2301(a). *Haynes* did not abandon that requirement. The *Haynes* Court specifically addressed whether the hospital was a place of public accommodation as defined by MCL 37.2301(a), noting that "Oakwood provides a full range of health service to *the public*" and stating, "[w]e hold that MCL 37.2302(a) forbids unlawful discrimination against any individual *in a place of public accommodation . . .*" (emphasis added).

Unlike a hospital, these defendants do not routinely serve or market to the public at their physical facilities. We reject plaintiff's argument that because defendants do not affirmatively bar non-employees from entering their company cafeteria, or because they permit invited members of the public to visit a "discovery center," that defendants are places of public accommodation. Indeed, there is no evidence that any member of the public ever has entered the cafeteria without invitation, and the evidence in the record makes clear that defendants' facilities are generally closed to the public and that they do not sell products directly to the general public.[5]

Finally, plaintiff relies on the tax credit agreement defendants had with the Michigan Economic Growth Authority (MEGA).[6] This agreement provides defendants with a tax credit in exchange for their agreement to certain requirements, including that they "follow a competitive

[5] Plaintiff also relies on *PGA Tour, Inc. v Martin*, 532 US 661; 121 SCt 1879; 149 LEd2d 904 (2001), a case decided under Title III of the ADA, 42 USC §12181 *et seq*, involving a golf course being used for a professional tournament and whether an otherwise qualified tournament participant could be barred from riding in a golf cart rather than walking the course. That case does not lead us to a different result. First, Title III specifically lists "golf course" as a place of public accommodation. 42 USC §12187(7)(L). Second, the golf course, though being used by a limited group of golfers was still open to public spectators. *PGA Tour* is consistent with *Haynes* in its conclusion that once the place of public accommodation requirement is satisfied, the privilege allegedly denied to the plaintiff need not have been one offered to the entire public.

[6] The effective date of both the contract and the certifications is April 30, 2007, which is several months before the events giving rise to plaintiff's claims of discrimination, making it applicable to the issues at bar.

bid process, open to all Michigan residents and firms." Section 2.2, of the contract, "Representations by the Company," provides in relevant part:

> With respect to the Agreement, the Company makes the following representations and warranties as of the date of execution of this Agreement:
>
> * * *
>
> (h) Certification. The Company made the certifications required by Section 8(3)(f) of the Act, which are attached to this Agreement as Schedule B.

Schedule B provides, in relevant part:

> Hemlock Semiconductor Corporation certifies that:
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> 1. It will follow a competitive bid process, open to all Michigan residents and firms, for the construction, rehabilitation, development or renovation of the facility, and that it will not discriminate against any contractor on the basis of its affiliation or non-affiliation with any collective bargaining organization.

Plaintiff asserts that by voluntarily agreeing to this provision mandating an open bid process, defendants agreed that they were places of public accommodation. However, the agreement does not use the term "public accommodation" and makes no specific mention of Article III of ELCRA.[7] Moreover, the MEGA agreement provides a remedy in the event the contracting party fails to adhere to section 2.2; in that event, under section 6, the company's tax credits may be revoked.

The trial court properly dismissed plaintiffs' Article 3 claim.[8]

Affirmed.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Douglas B. Shapiro

[7] Our decision should not be read to limit, in any fashion, the application of ELCRA to defendants under those Articles not limited to places of public accommodation.

[8] Given our holding, we need not decide whether plaintiff was prohibited from filing an ELCRA suit because she had not filed an assumed name certificate for Lee Construction in Saginaw County, where Hemlock is located.