STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1573

GSS Holdings, Inc. d/b/a Nathan Weiner & Associates,
Respondent,

vs.

Daniel Greenstein,
Appellant,

Standke, Green & Greenstein, Ltd.,
Defendant.

Filed September 9, 2008
Reversed
Hudson, Judge

Hennepin County District Court
File No. 27-CV-06-5244

Kevin R. Coan, Jessica Mason Pieklo, Brittney L. Turner, Parsinen, Kaplan, Rosberg & Gotlieb, P.A., 100 South Fifth Street, Suite 1100, Minneapolis, Minnesota 55402 (for respondent)

Kay Nord Hunt, Barry A. O'Neil, Valerie Sims, Lommen, Abdo, Cole, King & Stageberg, P.A., 2000 IDS Center, 80 South Eighth Street, Minneapolis, Minnesota 55402 (for appellant)

Considered and decided by Schellhas, Presiding Judge; Shumaker, Judge; and Hudson, Judge.

U N P U B L I S H E D O P I N I O N

HUDSON, Judge

Appellant challenges the denial of his motion for judgment as a matter of law (JMOL), arguing that the jury's finding that he conspired with a party to a noncompete contract to intentionally cause a breach of the contract and/or conspired with a nonparty to interfere with the noncompete contract is contrary to law.[1] Because the verdict is contrary to law, we reverse the denial of appellant's motion for JMOL.

FACTS

In 2003, appellant Daniel Greenstein, an attorney and an owner of Standke, Greene, & Greenstein, Ltd. (the law firm), was retained by Gary Stone, owner of respondent GSS Holdings, Inc., to do legal work related to Stone's purchase of Nathan Weiner & Associates (NWA), a manufacturer's representative. Greenstein and his law firm drafted the noncompete agreements to be signed by former NWA employees who chose to work for GSS. Among those who signed noncompetes was Andrea Zerin, who was romantically involved with Greenstein.

Both at NWA and later at GSS, Zerin worked with a major client, Jean Marie Creations (JMC). She placed JMC products, such as seasonal gift bags and wrapping, at Target stores. Heidi Skrypek, another NWA/GSS employee, was Zerin's assistant.

In 2005, Target did not buy JMC's Christmas line. This was a loss of a significant piece of business for GSS. As a result, GSS reduced Zerin's compensation and

[1] In the alternative, appellant challenges the denial of his motion to offset the damages awarded against the amount received in settlement from his co-defendants. Because we reverse the judgment granting those damages, we do not address this issue.

terminated Skrypek. Skrypek was hired by Aisle Savvy, a manufacturer's representative whose clients were then manufacturers of hygiene and pharmaceutical products. JMC then decided to change representatives and do business with Aisle Savvy rather than GSS, putting Aisle Savvy in competition with GSS. GSS, faced with a major loss of revenue, terminated Zerin.

Zerin sought employment with Aisle Savvy, but she did not reveal her noncompete agreement with GSS. With Greenstein's knowledge, Zerin began working for Aisle Savvy, for whom she represented JMC, on November 1, 2005.

At the end of December, Stone learned that Zerin was working for Aisle Savvy and representing JMC. Stone accused Greenstein of letting Zerin violate her noncompete and concealing the fact from Stone, who had hired Greenstein to draft the noncompete. When Zerin, Skrypek, and Aisle Savvy failed to respond to a cease-and-desist letter telling them they were violating Zerin's and Skrypek's noncompetes with GSS, GSS brought this action against them. GSS later amended its complaint to add claims against Greenstein and the law firm, alleging that Greenstein intentionally interfered with the noncompete agreements by, among other things, assisting Zerin in breaking her noncompete agreement, and that the law firm assisted him in these improper actions.

Against all defendants, GSS asserted a claim of civil conspiracy: "[the defendants] have combined with one or more of each other and acted in concert with the common purpose of breaching Zerin and Skrypek's Employment Agreements; of tortiously interfering with GSS Holdings' contractual or prospective business relationships . . . ."

GSS settled with Aisle Savvy, Zerin, and Skrypek, leaving Greenstein and the law firm as the only defendants. At trial, Greenstein and the law firm moved for JMOL at the close of GSS's testimony and again at the close of all testimony; the motions were denied.

By way of special verdict, the jury found that Greenstein did not "intentionally interfere" with the noncompete or "intentionally cause a breach of [it.]" But the jury also found that Greenstein "conspire[d] with Andrea Zerin and/or Aisle Savvy, LLC, to interfere with the employment contract or intentionally cause a breach of the contract between GSS Holdings, Inc., and Andrea Zerin." Greenstein moved for JMOL on the ground that this verdict is contrary to law. He challenges the denial of that motion.

D E C I S I O N

A decision on a motion for JMOL is subject to de novo review. *See Longbehn v. Schoenrock*, 727 N.W.2d 153, 159 (Minn. App. 2007) (conducting de novo review of grant of JMOL). JMOL is appropriate when a jury's verdict has no reasonable support in fact or is contrary to law. *Id.*

Greenstein argues that the verdict is defective because, "[I]f the underlying claim fails, the conspiracy claim likewise fails." *Lipka v. Minn. Sch. Employees Ass'n*, 537 N.W.2d 624, 632 (Minn. App. 1995), *aff'd*, 550 N.W.2d 618 (Minn. 1996). "The gist of a private action for the *wrongful act* of many is not the combination or conspiracy, but the damage done or threatened to the plaintiff by the acts of the defendants." *Harding v. Ohio Cas. Ins. Co.*, 230 Minn. 327, 337, 41 N.W.2d 818, 824 (1950). To be actionable, a civil conspiracy must be based upon an underlying tort. *D.A.B. v. Brown*, 570 N.W.2d

168, 172 (Minn. App. 1997) (citing *Harding*, 230 Minn. at 337, 41 N.W.2d at 824)). Because, in a civil conspiracy action, liability is "predicated upon the tort committed by the conspirators and not upon the conspiracy, allegations of conspiracy do not change the nature of the cause of action." *Harding*, 230 Minn. at 338, 41 N.W.2d at 825. "Accurately speaking, there is no such thing as a civil action for conspiracy." *Id.*

The underlying claim here was for damage to GSS done by either Zerin's breach of her noncompete or Aisle Savvy's interference with the noncompete or both. But, because Zerin and Aisle Savvy settled with GSS, the evidence GSS presented to support an intentional tort claim against Zerin and Aisle Savvy was of no consequence, as evidenced by the fact that the jury was not asked to determine whether their acts damaged GSS.[2] Indeed, the only intentional tort claim actually presented to the jury was that of Greenstein's alleged tortious interference with Zerin's employment agreement. Because the underlying claims of damage caused by the acts of Zerin and Aisle Savvy were not established, the conspiracy claim based on those claims must fail.[3] *See Hoffman v. Wiltscheck*, 411 N.W.2d 923, 926 (Minn. App. 1987) (citing 24 A.L.R. 4th at 553-55 for the proposition that "the plaintiff who desires to settle with some defendants has to consider the legal implications of the settlement in terms of defendants with vicarious liability"), *review denied* (Minn. Nov. 13, 1987). "The true office of allegations of

[2] Moreover, with respect to Zerin, it is well settled, and respondents do not contend otherwise, that it is a legal impossibility for Zerin to have tortiously interfered with her own contract. A tort cause of action for interference with contract does not lie against a party to the contract. *Bouten v. Richard Miller Homes, Inc.*, 321 N.W.2d 895, 901 (Minn. 1982).

[3] Because this is an action for JMOL, not for a new trial on the basis of defects in the jury instructions or special verdict form, we do not address their adequacy.

conspiracy is to show facts for vicarious liability of defendants for acts committed by others . . . ." *Harding*, 230 Minn. at 338, 41 N.W.2d at 825.

The practical result of the failed conspiracy claim against Zerin and Aisle Savvy meant that the only possible remaining conspirator was Greenstein, and Greenstein cannot be vicariously liable for acts not determined to have been committed by Zerin and Aisle Savvy. *See Harding*, 230 Minn. at 338, 41 N.W.2d at 825 (purpose of alleging conspiracy is to show defendant's liability for acts committed by another).[4]

Second, because the only tort that GSS purported to prove was Greenstein's intentional interference with the noncompete, when the jury found that Greenstein did not intentionally interfere with the noncompete, it had no basis to find him liable on the conspiracy claim. Although we question appellant's implicit assumption that a finding of conspiracy requires that the conspirator himself/herself has committed the underlying act,[5] on this record, where: (1) Greenstein was the only remaining defendant/possible conspirator; and (2) the jury explicitly determined that Greenstein did not intentionally interfere with the contract, the underlying tort claim plainly fails and thus there is no legal basis for liability premised on conspiracy.

[4] Respondent argues that sufficient evidence was presented to demonstrate that Aisle Savvy interfered with the noncompete and caused its breach because of a phone call from Aisle Savvy to Zerin on the day Aisle Savvy was hired by JMC. But the substance of the phone call is unknown. The evidence, absent testimony that Aisle Savvy knew of the noncompete, does little to prove that Aisle Savvy interfered with it.

[5] A finding that one who committed the underlying act also conspired to commit it is arguably superfluous, except as a means of aggravating damages. *See id*. (aggravation of damages is alternative purpose for alleging conspiracy).

Because the jury's verdict that Greenstein is liable for conspiracy is contrary to law, the district court erred in denying Greenstein's motion for JMOL.

Reversed.