COURT OF APPEALS
DECISION
DATED AND FILED

June 10, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2282 **Cir. Ct. No. 2005CV1140**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

DANIEL RITTENHOUSE,

PLAINTIFF-APPELLANT,

V.

RON HULCE AND MICHAEL BEGRES,

DEFENDANTS-RESPONDENTS,

DAVID HULCE AND DH & ASSOCIATES, INC.,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Affirmed in part; reversed in part, and cause remanded for further proceedings*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Daniel Rittenhouse appeals a summary judgment in favor of Ron Hulce and Michael Begres. Rittenhouse argues summary judgment is not appropriate because of disputed material facts. We conclude the circuit court correctly granted Hulce and Begres summary judgment on Rittenhouse's conspiracy claim and his tortious interference claim against Hulce. However, we agree with Rittenhouse that material factual disputes prevent summary judgment on his promissory estoppel claim and his tortious interference with contract claim against Begres. We therefore affirm in part, reverse in part, and remand for further proceedings.

BACKGROUND

¶2 This suit arises out of an abortive sale of a concrete restoration business. David Hulce was the owner of the business, DH & Associates, Inc. Ron Hulce, David's father, was retired from another concrete restoration business called Ron Hulce & Sons and was a consultant to DH at the time of the sale.[1] Begres was an employee of DH.

¶3 Rittenhouse's summary judgment submissions allege the following facts:[2] Rittenhouse and David began to discuss a sale in December 2003. Ultimately, an oral agreement was reached between Rittenhouse, David and Ron in which David would sell the concrete restoration business to Rittenhouse, and Ron would give Rittenhouse whatever work came to him through Ron Hulce &

[1] For clarity, in this opinion we refer to David and Ron Hulce by their first names.

[2] Ron and Begres dispute many of the facts alleged in Rittenhouse's summary judgment submissions. However, for purposes of summary judgment, we view the facts in Rittenhouse's favor. *See* ***State Bank of La Crosse v. Elsen***, 128 Wis. 2d 508, 511-12, 383 N.W.2d 916 (Ct. App. 1986).

Sons.[3] David and Ron would also train Rittenhouse in the concrete restoration business over a five-year period. In exchange, Rittenhouse would pay David a salary and a percentage of revenue and would pay Ron's family health insurance.

¶4 At the time the agreement was negotiated, Rittenhouse was employed as an engineer at General Motors. Rittenhouse quit his job at GM in May 2004 to work at DH. David introduced Rittenhouse to employees and customers as DH's new owner. However, no written agreement transferring the company was signed. Over the summer of 2004, Rittenhouse and David transferred most of the company business and assets from DH to a new entity incorporated by Rittenhouse, DH & Associates II, because of a pending lawsuit against DH.

¶5 Rittenhouse employed Begres until January 2005. At that time, Begres left to begin his own concrete restoration business. After he left, Begres called David several times to encourage David to stop working for Rittenhouse and work for him instead. David continued to work for Rittenhouse until May 2005, when he began directing work to Begres. In exchange, Begres paid David a percentage of profits from his new business. Ron also did some consulting for Begres, including referring work to Begres, beginning in the spring of 2005. Some of the jobs David and Begres obtained were jobs David had helped Rittenhouse bid on while he was working for Rittenhouse. Other jobs David directed to Begres involved longstanding customers of DH.

[3] Ron reserved one type of work for himself. That portion of the agreement is not relevant here.

¶6 Rittenhouse filed suit in June 2005 against David and DH. His amended complaint added claims against Ron and Begres, including tortious interference with contract and conspiracy. He also alleged a promissory estoppel claim against Ron. All defendants except DH moved for summary judgment. The circuit court granted Ron and Bergres summary judgment but denied David's motion.

DISCUSSION

¶7 Whether summary judgment is appropriate is a question of law reviewed without deference to the circuit court, using the same methodology. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2); ***Green Spring Farms***, 136 Wis. 2d at 315. We view the facts in the light most favorable to the party opposing the motion. ***State Bank of La Crosse v. Elsen***, 128 Wis. 2d 508, 511-12, 383 N.W.2d 916 (Ct. App. 1986).

I. Promissory estoppel

¶8 The elements of promissory estoppel are: (1) the promise is one that "the promisor should reasonably expect to induce action or forbearance of a definite and substantial character" by the promisee; (2) the promise actually induces the action or forbearance; and (3) injustice can be avoided only by enforcement of the promise. ***Hoffman v. Red Owl Stores, Inc.***, 26 Wis. 2d 683, 698, 133 N.W.2d 267 (1965). For example, in ***Hoffman*** the defendant promised to establish Hoffman in a new store for $18,000. After Hoffman sold his existing business in reliance, the defendant changed the terms of the proposed deal. ***Id.*** at 696-97.

¶9 We agree with Rittenhouse that he has alleged facts sufficient to create a material factual dispute as to his promissory estoppel claim against Ron. Rittenhouse alleges Ron made a number of promises, including Ron's promise to help train him and send him business. Ron knew Rittenhouse intended to leave GM to run DH in reliance on those promises, and Rittenhouse did in fact do so. Under the facts Rittenhouse alleges, a fact finder could conclude justice requires enforcement of Ron's promises. Because Rittenhouse's allegations, if true, would support a claim for promissory estoppel, Rittenhouse has created a material factual dispute on this claim.

¶10 Ron argues his promise was contingent on Rittenhouse and David reaching a final sale agreement for DH. However, this argument ignores the summary judgment standard. Rittenhouse's evidence indicates the parties believed they had an oral agreement to sell, and all that needed to be done to complete the sale was to sign some paperwork. While Ron's version of the facts is different, this is a factual dispute that cannot be resolved on summary judgment.

¶11 Ron also argues Rittenhouse's reliance was unreasonable as a matter of law because no final agreement was signed. However, a promissory estoppel claim is based on a promise, and can exist even when the promise is not comprehensive enough to be considered an offer that could give rise to a contract if accepted. ***Id.*** at 698. For example, in ***Hoffman*** the promise was simply a promise to set Hoffman up with his own store for $18,000, and did not include necessary terms such as the size of the store and the terms of a lease, among others. ***Id.*** at 697. Promissory estoppel therefore can apply even in the absence of a signed agreement. Whether Rittenhouse's reliance was reasonable is a question of fact that cannot be resolved on summary judgment.

II. Tortious interference with contract

¶12 The elements of tortious interference with contract are:

> (1) the plaintiff had a current or prospective contractual relationship with a third party; (2) the defendant interfered with that contractual relationship; (3) the interference was intentional; (4) a causal connection exists between the defendant's interference and the plaintiff's damages; and (5) the defendant was not justified or privileged to interfere.

Wolnak v. Cardiovascular & Thoracic Surgeons, S.C., 2005 WI App 217, ¶14, 287 Wis. 2d 560, 706 N.W.2d 667. The burden of establishing the final element, privilege, is on the defendant, not the plaintiff. ***Finch v. Southside Lincoln-Mercury, Inc.***, 2004 WI App 110, ¶38, 274 Wis. 2d 719, 685 N.W.2d 154.

¶13 Rittenhouse's tortious interference claim actually includes two separate allegations. First, Rittenhouse alleges Begres interfered with Rittenhouse's contract with David by inducing David to work for him rather than Rittenhouse. Second, Rittenhouse alleges Ron and Begres interfered with his contracts with existing and prospective customers.

¶14 We agree with Rittenhouse that there is a material factual dispute on whether Begres tortiously interfered with Rittenhouse's contract with David. Rittenhouse alleges he and David had a contract in which David agreed to train him in the concrete restoration business over a five-year period and transfer DH's business to him, and that Begres interfered with that contract by encouraging David to stop working for Rittenhouse and refer business to Begres rather than Rittenhouse. According to Rittenhouse, Begres knew David and Rittenhouse had a contract, making the interference intentional. Rittenhouse alleges he lost significant business as a result of David's defection, and Begres does not argue he was privileged to act as he did.

¶15 However, the same cannot be said for Rittenhouse's contracts with customers. Unlike the contract to sell—which Rittenhouse alleges was a contract between himself, David, and Ron personally—the contracts with customers were actually contracts between either DH or DH II and the customers. Tortious interference exists only if "the plaintiff had a current or prospective contractual relationship with a third party[.]" ***Wolnak***, 287 Wis. 2d 560, ¶14. Here, Rittenhouse did not have a current or prospective contractual relationship with his customers; only DH and DH II did. Neither DH nor DH II are plaintiffs in this case, and Rittenhouse does not cite any authority suggesting he may enforce their rights in this suit.[4]

¶16 Because the only tortious interference claim against Ron alleges he interfered with contracts between DH or DH II and their customers, Rittenhouse has not created a material factual dispute on that claim, and we affirm the summary judgment on that claim. We reverse the summary judgment on Rittenhouse's claim against Begres based on Begres's recruitment of David.

III. Conspiracy

¶17 Finally, Rittenhouse argues the court erred in dismissing his WIS. STAT. § 134.01 conspiracy claim against Ron and Begres. Rittenhouse's argument is based on his allegation, discussed above, that Ron, David and Begres worked together to divert business away from DH and DH II beginning in spring 2005.

[4] Rittenhouse notes that the circuit court's decision could not have been based on this rationale because if it was, the circuit court would also have granted David summary judgment. However, we may affirm a summary judgment on different grounds than those relied on by the circuit court. ***Int'l Flavors & Fragrances, Inc. v. Valley Forge Ins. Co.***, 2007 WI App 187, ¶23, 304 Wis. 2d 732, 738 N.W.2d 159.

He also contends it is a reasonable inference that Ron, David, and Begres "schemed to induce … Rittenhouse to invest in the business, keeping it afloat until it became profitable again, and then diverted the business opportunities."

¶18 WISCONSIN STAT. § 134.01 allows a civil remedy when "2 or more persons … combine, associate, agree, mutually undertake or concert together for the purpose of willfully or maliciously injuring another in his or her reputation, trade, business or profession…." WIS. STAT. § 134.01; ***Brew City Redevelopment Group, LLC v. The Ferchill Group***, 2006 WI App 39, ¶17, 289 Wis. 2d 795, 714 N.W.2d 582, *aff'd*, 297 Wis. 2d 606, 724 N.w.2d 879. Malicious injury means "doing a harm malevolently for the sake of the harm as an end in itself, and not merely as a means to some further end legitimately desired such as hurting someone else's business by competition." ***Brew City***, 289 Wis. 2d 795, ¶17 (citation and some punctuation omitted); *see also* ***Maleki v. Fine-Lando Clinic Chartered, S.C.***, 162 Wis. 2d 73, 88, 469 N.W.2d 629 (1991).

¶19 We conclude the circuit court correctly granted summary judgment on this claim, for three reasons. First, all of the customers diverted by the defendants were customers of DH and DH II, not customers of Rittenhouse personally. The injury from loss of business therefore was an injury to those entities, not to Rittenhouse personally. As noted above, Rittenhouse does not develop any argument that he may enforce rights belonging to DH or DH II in this suit.

¶20 In addition, Rittenhouse does not point to any evidence on which a jury could reasonably infer the three defendants combined to defraud Rittenhouse

from the beginning.[5] In particular, Rittenhouse does not cite any evidence in the record suggesting any agreement or common purpose between the defendants prior to Begres's departure from DH. We note that a conspiracy from the beginning is not consistent with the account Rittenhouse alleges to support his other claims, in particular his assertion that David stopped working for Rittenhouse because he was recruited by Begres in spring 2005.

¶21 Finally, Rittenhouse does not allege the malice necessary to sustain a WIS. STAT. § 134.01 conspiracy claim. Rittenhouse alleges the defendants combined to divert customers that were rightfully his to a different, competing business. This is not harm "for the sake of the harm as an end in itself[.]" *See* ***Brew City***, 289 Wis. 2d 795, ¶17. Instead, the harm to Rittenhouse was a collateral result of the defendants' attempt to create and grow a competing business. Because Rittenhouse has not alleged facts sufficient to establish all the elements of a § 134.01 conspiracy claim, the circuit court correctly dismissed that claim.

By the Court.—Judgment affirmed in part; reversed in part, and cause remanded for further proceedings. No costs awarded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[5] In his brief, Rittenhouse argues this inference is reasonable because David attempted to defraud another person in a similar way before Rittenhouse came on the scene. His record cite for that proposition is a proof of service for one of Ron's motions. We will not independently search the record for facts supporting a party's argument. ***Grothe v. Valley Coatings, Inc.***, 2000 WI App 240, ¶6, 239 Wis. 2d 406, 620 N.W.2d 463. In any event, a different act by David directed toward a different person does not establish he combined with Ron and Begres to defraud Rittenhouse.