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ARKANSAS COURT OF APPEALS

DIVISION I
No. CA12-54

LORI WITHROW, GREG FESS, and LARRY MORTON APPELLANTS V. STEPHEN C. BRISSETTE, EXECUTOR OF THE ESTATE OF PAUL BRISSETTE, JR., DECEASED APPELLEE	**Opinion Delivered** October 31, 2012 APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, FIFTH DIVISION [NO. CV2009-2375] HONORABLE WENDELL GRIFFEN, JUDGE AFFIRMED

ROBIN F. WYNNE, Judge

Lori Withrow, Gregory Fess, and Larry Morton appeal from an order granting summary judgment to appellee[1] on their claims for tortious interference with contractual relations. On appeal, they argue that the trial court erred in granting the motion because a genuine issue of material fact remained—whether Brissette was acting within the scope of his employment when he terminated them. We affirm.

This case involves the termination of appellants' respective employment and consulting contracts with Equity Media Holdings Corporation, a corporation with its principal place of business in Little Rock, Arkansas. Lori Withrow was in-house counsel for Equity and served as its corporate secretary. Gregory Fess was employed in the position of senior vice president

[1]Appellants filed suit against Paul Brissette, Jr. After his death, the court granted a motion to substitute his personal representative, Stephen C. Brissette, as defendant acting for and on behalf of the estate.

of Equity and served as chief operating officer. It is undisputed that both Withrow and Fess had valid employment contracts with Equity at the time of their terminations. It is also undisputed that Larry Morton was working for Equity under a consulting agreement at the time of his termination. Morton and Equity had a separation agreement. It is undisputed that terminating appellants was a violation of their agreements with Equity, and Brissette was aware of this fact when he terminated them.

Paul Brissette, Jr., had extensive experience in operating broadcasting companies when he was elected to the Equity board of directors on August 28, 2008. Brissette served as chairman of the compensation committee and chief reconstruction officer, which he understood to mean he would be acting as de facto CEO. Brissette testified during his deposition that the company was in very poor financial condition. He stated that after reviewing Equity's financial information, including employment contracts, he determined that appellants should be terminated. Brissette chose to terminate Withrow because her FCC background was not as strong as the other in-house attorney. Brissette decided to terminate Fess because he (Brissette) would take over Fess's duties in his capacity as CRO/CEO. The decision to terminate the consulting relationship with Morton was based on the fact that the company could no longer afford him. According to Brissette, he discussed his recommendations with the chairman of the board, Paul Rochon, and Rochon agreed.

On October 20, 2008, while in Little Rock, Brissette terminated the employment of Withrow and Fess and terminated Morton's agreement. A board meeting was held on October 24, 2008, and at that time Brissette informed the board that, due to the company's financial state, certain management personnel were being terminated. The action was

approved by the board with two board members dissenting. Equity filed a bankruptcy petition in December 2008.

Appellants filed a complaint in Pulaski County Circuit Court in March 2009. Appellee filed a motion to dismiss for failure to state facts upon which relief could be granted (in that appellants alleged breach of a contract to which appellee was not a party) and failure to join a necessary party (Equity). Appellants responded in opposition to the motion. After appellee pointed out in a supplemental brief that appellants failed to include in their complaint the interference element of a tortious interference claim, the court allowed appellants until July 10, 2009, to amend their complaint. Appellants filed an amended and substituted complaint on July 7, 2009. Attached to that complaint was an email that was forwarded to the board from Equity's CEO, John Oxendine, asking that no changes in personnel be made before his arrival in Little Rock on Tuesday, October 21, 2008. Appellee filed a motion to dismiss the amended complaint, and the court denied that motion.

Appellee filed a motion for summary judgment on August 8, 2011. Appellee relied on his own deposition testimony, as well as the deposition testimony of Withrow, Fess, and Morrow, and an affidavit of Jason Roberts. In Roberts's affidavit, he stated that he replaced Withrow as corporate secretary and in that capacity attended meetings of the board of directors of Equity on October 24, 2008, November 21, 2008, and December 10, 2008. Attached to the affidavit were draft minutes of those meetings, reflecting that in the October meeting the board approved the decision that "certain management personnel were being let go," that Brissette would serve as de facto CEO, and that Fess and Withrow would be removed as officers.

After a hearing on September 15, 2011, the circuit court granted appellee's motion for summary judgment, citing *St. Joseph's Regional Health Center v. Munos*, 326 Ark. 605, 934 S.W.2d 192 (1996), for the proposition that a party may not, as a matter of law, tortiously interfere with its own contract. The circuit court's order provides:

> The Court is left with the conclusion, after reviewing the affidavit of Jason Roberts, that the board of Equity Media Holdings Corporation ratified the actions of Paul Brissette. The Court has no facts to indicate otherwise and so the Court is compelled to conclude that there is no genuine issue of material fact as to whether or not Paul Brissette acting as a member of the board of Equity Media Holdings Corporation either with or without authority was a person in common interest with Equity Media Holdings Corporation. Based on that conclusion, the Court finds no genuine issue of material fact on the issue and consistent with the *Munos* holding, and [sic] grants the motion for summary judgment.

Appellants filed a timely notice of appeal.

Our supreme court has set forth the standard of review for summary-judgment cases as follows:

> Summary judgment should only be granted when it is clear that there are no genuine issues of material fact to be litigated, and the moving party is entitled to judgment as a matter of law. The purpose of summary judgment is not to try the issues, but to determine whether there are any issues to be tried. We no longer refer to summary judgment as a drastic remedy and now simply regard it as one of the tools in a trial court's efficiency arsenal. Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. On appellate review, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered. We view the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. Our review focuses not only on the pleadings, but also on the affidavits and other documents filed by the parties.

Harvest Rice, Inc. v. Fritz & Mertice Lehman Elevator and Dryer, Inc., 365 Ark. 573, 575–76, 231 S.W.3d 720, 723 (2006) (internal citations omitted).

Appellants' sole claim against appellee is for tortious interference with contractual relations. To prove tortious interference under Arkansas law, a plaintiff must prove the following elements: (1) the existence of a valid contractual relationship or a business expectancy; (2) knowledge of the relationship or expectancy on the part of the interfering party; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted. *Crockett v. C.A.G. Invs., Inc.*, 2010 Ark. 90, at 9, 361 S.W.3d 262, 267. Our law requires that the conduct of the defendants be at least "improper," and we look to factors in § 767 of the Restatement (Second) of Torts for guidance about what is improper. *K.C. Props. of N.W. Arkansas, Inc. v. Lowell Inv. Partners, LLC*, 373 Ark. 14, 26, 280 S.W.3d 1, 11 (2008).

A party to a contract and its employees and agents, acting within the scope of their authority, cannot be held liable for interfering with the party's own contract. *Baptist Health v. Murphy*, 2010 Ark. 358, at 18, 373 S.W.3d 269, 283. In other words, an action for tortious interference with a contractual relationship is based upon a defendant's conduct toward a third party. *Id.* Accordingly, the crux of the circuit court's order and this court's review of that order is whether Brissette was acting within the scope of his authority for Equity when he terminated appellants.

Appellants point to the following in support of their contention that whether Brissette was acting within the scope of his authority for Equity when he terminated them is a fact question for trial: (1) he did not receive prior approval from the board to terminate them; (2) he believed he would become an officer of the company and head up the operations, a

position held by Fess, which gave him a personal incentive to terminate Fess; (3) his argument that the terminations were an attempt to save Equity money was not accurate given the liability that remained under the contracts and the potential for terminating the contracts through bankruptcy; (4) terminating three employees did not have a major impact on Equity's financial situation, as evidenced by its bankruptcy filing approximately eight weeks after the terminations; and (5) his ties to Silver Point, a lender to Equity, made it possible that he was working to benefit Silver Point rather than Equity.

Appellants argue that it is Brissette's authority *at the time of their terminations* that is in question. They apparently contend that the board's ratification is of no consequence. If Brissette lacked the authority to fire them, however, then they still had jobs after October 20, 2008. Even in that case, it is undisputed that Equity's board of directors expressly ratified Brissette's decision to terminate appellants in contravention of their contracts. This ratification occurred only four days after the terminations. Brissette was a member of the board of directors and had been hired as chief reconstruction officer to help save the failing company. Appellants contend that Brissette's actions left the board with little choice but to stand behind him, but that is not supported by any evidence. Appellants did not present any evidence to that effect, such as an affidavit of a board member, and they have thus failed to "meet proof with proof" as required to defeat summary judgment. Similarly, appellants speculate that Brissette had a personal incentive to terminate Fess or might have had a conflict of interest based on previous work for another company, but there is no evidence to support these assertions.

Finally, appellants present arguments concerning the motivation for Brissette's termination decisions and whether the terminations were advisable from a financial standpoint. There is no dispute that Equity was in dire financial straits when Brissette became a board member and CRO. The board expressly ratified the decision to terminate appellants, and whether that was a good business decision is irrelevant to the question of Brissette's authority.

Because there are no material questions of fact remaining, we hold that summary judgment was appropriate.

Affirmed.

VAUGHT, C.J., and BROWN, J., agree.

Allen & Withrow, by: *Lori E. Withrow*, for appellants.

Kutak Rock, LLP, by: *David L. Williams* and *Katherine M. Hingtgen*, for appellees.