

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002557-MR

DR ROBERT D. HILGERS AND
J. MARK AHEARN

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 04-CI-004771

INTERNATIONAL GYNECOLOGIC CANCER
SOCIETY, INC.; GILLIAN M. THOMAS, M.D.;
AND EDWARD L. TRIMBLE, M.D.

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; ACREE, JUDGE; KNOPF,¹ SENIOR JUDGE.
COMBS, CHIEF JUDGE: Robert D. Hilgers, M.D. and J. Mark Ahearn,
III, appeal from an adverse summary judgment entered in their
employment contract action against International Gynecologic
Cancer Society and two of its members, Gillian M. Thomas, M.D.,
and Edward L. Trimble, M.D. We affirm.

¹ Senior Judge William L. Knopf sitting as Special Judge by
assignment of the Chief Justice pursuant to Section 110(5)(b) of the
Kentucky Constitution and KRS 21.580.

The material facts of this case are undisputed. The International Gynecologic Cancer Society ("IGCS") is a non-profit organization formed in 1986 and incorporated under the laws of Canada. It was established to promote the expertise of its members in preventing, treating, and studying gynecologic cancer. IGCS has an international membership of physicians and scientists and is governed by a council comprised of a rotating set of elected officers and members who serve on a volunteer basis.

Dr. Thomas is a resident of Toronto, Canada. She served as president of IGCS from October 2002 until October 2004. Dr. Trimble is a resident of Maryland and has served as the IGCS secretary-treasurer since January 2001.

Dr. Hilgers is a resident of Louisville. He served as the IGCS secretary-treasurer from 1993 until January 2001. In July 2000, during Hilgers's tenure as secretary-treasurer, ICGS opened an administrative office in Louisville. The IGCS council decided to hire a part-time executive director. Hilgers applied for that new position and was selected. He began his part-time employment as executive director on January 1, 2001. Prior to 2001, IGCS had no paid staff positions; it was led and operated entirely by volunteers from its international membership.

Mark Ahearn, a Kentucky resident, was hired by Hilgers in November 2002 to serve as the IGCS director of development.

Hilgers also hired an administrative secretary, Erica Riley, to work in the Louisville office.

By early 2003, IGCS was facing a financial deficit that required its operating expenses -- including employee salaries -- to be paid out of the organization's reserve account. The IGCS financial committee met to discuss the deteriorating financial condition and decided to undertake a formal performance evaluation of the employees.

On January 16, 2004, the IGCS council met in Atlanta to discuss the results of the employee evaluations. Hilgers's performance as executive director was soundly criticized, and the council members assessed his work for the organization as being wholly unacceptable. They voted unanimously to terminate Hilgers from his position. The council also reviewed Ahearn's performance as director of development. Ahearn had failed to meet his modest fund-raising goal for 2003 -- having raised no funds whatsoever. The council voted unanimously to terminate his employment as well. However, it decided to retain Erica Riley in the Louisville office.

On January 20, 2004, Trimble sent letters to Hilgers and Ahearn to advise them of the council's decision to terminate their employment. Within a few days, Hilgers requested a former IGCS president, Robert C. Young, M.D., to prepare correspondence summarizing the discussions in which the two of them had

participated concerning Hilgers's employment. On February 2, 2004, Young complied with that request and wrote a detailed letter to Hilgers, "confirming what I understand to be in the good faith agreement that was negotiated with you on behalf of the Society."

On June 7, 2004, Hilgers and Ahearn filed a complaint in Jefferson Circuit Court in which each alleged a breach of his employment contract against IGCS. Attached to the complaint as an exhibit was the correspondence that Hilgers had received from Young in February 2004. Hilgers alleged that this correspondence confirmed the existence of a five-year employment contract with IGCS. Hilgers and Ahearn also named Trimble and Thomas as individual defendants asserting against them several claims: tortious interference with contractual relations, interference with prospective business advantage, intentional interference with proper job performance, and violation of a fiduciary duty owed to IGCS.

IGCS, Trimble, and Thomas moved for summary judgment on August 2005. They contended that the plaintiffs' breach of contract claims had to fail as a matter of law because they were unable to demonstrate the existence of any employment agreement with IGCS. Even assuming the existence of an employment agreement, IGCS claimed that it had good cause to terminate their employment. They argued that the separate tort claims

asserted against Trimble and Thomas individually were not recognized in Kentucky under the circumstances involved in this case.

In response, Hilgers contended that although he had no formal, written agreement with IGCS, his evidence established the existence of an oral employment agreement for a five-year term. Ahearn argued that while his written employment agreement failed to provide for a definite term as to duration, the parties had expected his employment to continue for at least two years. Additionally, Hilgers and Ahearn contended that outstanding issues of material fact regarding their work performance precluded entry of summary judgment on their breach of contract claims. Finally, Hilgers and Ahearn argued that the separate tort claims asserted against Thomas and Trimble were viable under the circumstances.

Citing the provisions of Kentucky's Statute of Frauds, the Jefferson Circuit Court concluded that IGCS, Trimble, and Thomas were entitled to judgment as a matter of law and dismissed the complaint. On November 21, 2005, the trial court denied the motion to alter, amend, or vacate. This appeal followed.

On appeal, Hilgers contests the court's adverse ruling against him with respect to his breach of contract claim. In conjunction with Ahearn, he also contests the court's ruling

dismissing their claims that Thomas and Trimble are individually liable for alleged tortious interference with contractual relations. We shall address each issue in turn.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CR 56.03 The trial court must view the record "in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). On appeal, the standard of review is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996).

It is undisputed that a written employment agreement between IGCS and Hilgers was never executed by the parties. Nevertheless, Hilgers contends that he had an oral agreement with IGCS for a period of employment extending from January 2001 until January 2006.

The Statute of Frauds renders an oral contract unenforceable if it is impossible to perform that contract

within one year from the time of its making. Kentucky Revised Statutes (KRS) 371.010. The purported agreement upon which Hilgers relies undoubtedly could not have been performed within one year. Accordingly, the agreement would be unenforceable unless evidenced by a writing sufficient to satisfy the specific requirements of Kentucky's Statute of Frauds, which provides as follows:

[n]o action shall be brought to charge any person . . . [u]pon any agreement that is not to be performed within one year from the making thereof . . . unless the . . . agreement or some memorandum or note thereof, be in writing and signed by the party to be charged therewith, or by his authorized agent.

KRS 371.010(7).

Hilgers contends that the documentary evidence attached to his complaint adequately satisfies the writing requirement. He relies primarily upon the February 2004 letter written in response to his request by former IGCS president, Dr. Robert Young. The letter contains statements indicating that the parties had reached a general understanding regarding Hilgers's role at IGCS. It anticipates that Hilgers's salary would increase in proportion to the probable increase in his commitment of time to the activities of IGCS over a five-year term. However, even if the document were deemed to satisfy the

writing requirement, it was not "signed by the party to be charged therewith, or by his authorized agent."

In order to bind IGCS for statements made by Young, a former IGCS president, it must have appeared that he had the authority to bind the organization at the time that he signed the letter and that he intended to act pursuant to that authority. Hilgers has not alleged that Young was authorized to sign a letter on behalf of IGCS in 2004. The letter was not written on IGCS letterhead, and there is no indication that Young intended to act as an agent of IGCS in responding to Hilger's request. Consequently, there is no evidence that the letter was signed by the party to be charged (IGCS) or by an authorized agent. *Computer Servicers, Inc. v. Beacon Manufacturing Co.*, 328 F.Supp. 653 (D.S.C. 1970). It does not constitute a writing sufficient to satisfy the requirements of the Statute of Frauds as Young had no authority to bind IGCS as its agent.

Hilgers contends that other correspondence from Young (prepared by Young during his term as president) -- along with other documents -- also confirm the existence of his employment contract. He urged the trial court to consider the other documents both independently and in conjunction with the correspondence of 2004.

It is true that multiple documents may be considered together to satisfy the Statute of Frauds. However, the rule in Kentucky is that several writings may be considered together only when the documents clearly refer one to the other without recourse to parole evidence to establish a connection. See *Antle v. Haas*, 251 S.W.2d 290 (Ky. 1952) and *Nicholson v. Clark*, 802 S.W.2d 934 (Ky.App. 1990). Further, the contract terms must be ascertainable independently of parole evidence. *Nicholson*, *supra* at 938.

Two of the additional documents that Hilgers relies upon were authored by Hilgers himself. None of the documents presented by Hilgers refers to the correspondence dated 2004; they neither independently nor adequately reference the essential terms of the purported contract with reasonable certainty. One of the documents is unsigned, and one of them explains that the council believed that an employment contract would be appropriate *only after* the executive director achieved full-time status - with that date anticipated to occur in 2006. Hilgers consistently acknowledged that date as his understanding of the timing involved concerning his tenure. The writings presented by Hilgers are insufficient to satisfy the requirements of the Statute of Frauds. Therefore, the trial court did not err by granting summary judgment with respect to the breach of contract claim.

We next consider whether the trial court erred by concluding that Hilgers and Ahearn could not prevail as a matter of law on their claims of tortious interference with contractual relations. The trial court concluded that summary judgment was proper since Thomas and Trimble were acting as agents of IGCS and that, therefore, as a matter of law, they could not have wrongfully interfered with the contractual relationship of their own organization. While we do not disagree with that conclusion, we affirm the judgment on different grounds. Having carefully reviewed the record, including the numerous depositions, we conclude that Hilgers and Ahearn did not present sufficient affirmative evidence to overcome the properly supported motion for summary judgment.

In *Cullen v. South East Coal Co.*, 685 S.W.2d 187 (Ky.App. 1983), this court recognized that the intentional interference with the contractual relations of another may give rise to liability. In order to be actionable, the interference must be wholly improper and lacking in any justification; *i.e.*, the plaintiff must show malice or some flagrantly wrongful conduct on the part of the defendant. *National Collegiate Athletic Ass'n. v. Hornung*, 754 S.W.2d 855 (Ky. 1988).

In order to demonstrate improper interference, Hilgers and Ahearn had to have asserted facts, which, if true, would have shown that Thomas and Trimble acted maliciously or engaged

in significantly wrongful conduct. Hilgers and Ahearn claimed that Thomas and Trimble intentionally interfered with their contractual relations by failing to provide the support necessary for fund-raising and development. While Hilgers claimed that Thomas had sabotaged the development program, he could not identify anything that she did (or failed to do) that caused the program to de-rail. Hilgers stated a series of complaints: that Trimble improperly positioned himself to perform the employee evaluation conducted prior to the meeting of the council in January 2004 in Atlanta; that Thomas unfairly criticized a draft of goals and objectives that Hilgers had developed for IGCS; that Thomas restricted her communication with him; and that Thomas failed to provide dynamic leadership for the organization.

We conclude that Hilgers and Ahearn failed to present adequate evidence to show that the actions of Thomas and Trimble were malicious or improper. In fact, their evidence was notably insufficient to raise a genuine issue of material fact to withstand the motion for summary judgment. The charged activities did not constitute tortious interference with the contractual relations of Hilgers or Ahearn. Consequently, the trial court did not err by granting summary judgment in favor of IGCS, Thomas, and Trimble.

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR APPELLANTS:

Don Meade
Louisville, Kentucky

BRIEF FOR APPELLEES:

David Domene
Pamela J. Ledford
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLEES:

Pamela J. Ledford
Louisville, Kentucky