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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-002046-MR

YEC PROPERTIES, LLC;
YOUNGBLOOD EXCAVATION
CONTRACTING, LLC;
YEC LEASING, LLC;
AND BRAD YOUNGBLOOD — APPELLANTS

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE TIMOTHY KALTENBACH, JUDGE
ACTION NO. 13-CI-00250

PAUL ADAMS AND
C-PLANT FEDERAL CREDIT UNION — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GOODWINE, LAMBERT, AND MAZE, JUDGES.

GOODWINE, JUDGE: Appellants appeal from a judgment of the McCracken Circuit Court granting summary judgment on all claims in favor of Appellees.

After careful review of the record and applicable law, we affirm.

BACKGROUND

In late 2011, Brad Youngblood, who formed Youngblood Excavation Contracting, LLC; YEC Leasing, LLC; and YEC Properties, LLC (collectively "YEC"), spoke with Paul Adams, the chief executive officer of C-Plant Federal Credit Union (collectively "C-Plant"), about the possibility of C-Plant providing YEC financing in the amount of $3.2 million to perform snow removal contracts with the Commonwealth of Kentucky ("the state"). According to the trial court's order granting partial summary judgment, "C-Plant is one of six owners of" Alliance Services Group, LLC ("Alliance Services"), "which is a credit union service organization. This organization allows individual credit unions to loan more money than they could on their own." C-Plant's per-customer lending limit was $2 million, and YEC's request was in excess of this limit. When a customer sought a loan in excess of the limit, C-Plant submitted information to Alliance Services, which then underwrote the loan and sought participation in the loan from other members.

In February 2012, C-Plant informed YEC that it "would find a means to loan the $3.2 million to [YEC] regardless of whether there were other credit unions participating" and indicated the loan "would be automatically approved by the other members of the service organization if C-Plant approved the loan." The trial court's order further provided that C-Plant required YEC to transfer loans it

had with two other banks to C-Plant in order to complete the loan. YEC transferred the other loans to C-Plant, so C-Plant "then had most of [YEC's] assets pledged as collateral to secure its loans with C-Plant." YEC failed to obtain a "written loan commitment letter from C-Plant because [it] had never had a loan commitment letter from C-Plant" since first being referred to C-Plant in 2005. Instead, all agreements between YEC and C-Plant, including the one at issue, had been verbal.

YEC successfully bid on the state's snow plow contracts, which required YEC to purchase forty-five trucks within forty-five days from the date in its agreement with the state. Although C-Plant and one other credit union agreed to contribute to the loan, C-Plant did not secure enough participants from Alliance Services to fulfill the entire $3.2 million loan. In September 2012, YEC informed the state that it could not complete the contracts. According to the trial court's order granting partial summary judgment, YEC was unable to "obtain financing from another lender because most of its corporate assets had been pledged to C-Plant."

YEC filed its complaint on March 11, 2013. On April 22, 2013, C-Plant filed its counterclaim, alleging YEC defaulted on a line of credit on February 25, 2013. More than a year after YEC filed its complaint, on May 9, 2014, the trial court granted partial summary judgment in favor of C-Plant on YEC's claims for

breach of contract and promissory estoppel, breach of fiduciary duty,[1] fraud, and tortious interference with a business opportunity. On June 15, 2017, the trial court granted summary judgment in favor of C-Plant on YEC's claim for punitive damages.

In anticipation of trial, C-Plant moved to exclude the proffered testimony of YEC's expert witness, Christie Johansen ("Johansen"). YEC intended to call Johansen to testify regarding lost profit damages it sought to recover on its remaining claim for negligent misrepresentation. On October 11, 2017, the trial court granted C-Plant's motion to exclude Johansen's testimony. Based on this ruling, the trial court granted summary judgment in favor of C-Plant on YEC's remaining claim for negligent misrepresentation by final order of judgment entered November 21, 2017. This order made the previous orders final and appealable. This appeal followed.

ANALYSIS

Before we reach the merits of YEC's arguments on appeal, we must address the deficiencies of YEC's brief. "There are rules and guidelines for filing appellate briefs. *See* CR 76.12. Appellants must follow these rules and guidelines,

[1] Although the introduction to YEC's brief indicates that it appeals the trial court's ruling on its claim for breach of fiduciary duty, this claim is not included in the argument section.

or risk their brief being stricken, and appeal dismissed, by the appellate court." *Koester v. Koester*, 569 S.W.3d 412, 413 (Ky. App. 2019).

First, YEC's brief does not comply with CR 76.12(4)(c)(vii). YEC failed to "place the judgment, opinion, or order under review immediately after the appendix list so that it is most readily available to the court." C-Plant points out that the final order of judgment underlies this appeal. YEC is clearly aware of this fact as its notice of appeal lists only the November 21, 2017 final order of judgment, yet YEC failed to include the final judgment in the appendix to its brief. Additionally, YEC failed to "set forth where the documents may be found in the record" in the index of its appendix when it failed to include where the deposition of Christie Johansen may be found in the record. *Id.*

Second, YEC's brief fails to "reference to the record showing whether the issue was properly preserved for review and, if so, in what manner" as required by CR 76.12(4)(c)(v). "It is not the function or responsibility of this court to scour the record on appeal to ensure that an issue has been preserved." *Koester*, 569 S.W.3d at 415 (citing *Phelps v. Louisville Water Co.*, 103 S.W.3d 46 (Ky. 2003)).

Finally, YEC's argument fails to include "ample supportive references to the record" as required by CR 76.12(4)(c)(v). YEC's approximately twenty-three-page argument contains only five references to the record. This Court will not undergo an expedition into this case's voluminous record to ensure YEC's

argument corresponds with it. On the contrary, our procedural rules "are lights and buoys to mark the channels of safe passage and assure an expeditious voyage to the right destination." *Louisville and Jefferson County Metropolitan Sewer Dist. v. Bischoff*, 248 S.W.3d 533, 536 (Ky. 2007) (quoting *Brown v. Commonwealth*, 551 S.W.2d 557, 559 (Ky. 1977)). Therefore, an appellant's compliance with this rule allows us to undergo "meaningful and efficient review by directing the reviewing court to the most important aspects of the appeal[,] [such as] what facts are important and where they can be found in the record[.]" *Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010).

YEC's failure to comply with CR 76.12 hinders our ability to review its arguments. *See Hallis*, 328 S.W.3d at 695-97. "Our options when an appellate advocate fails to abide by the rules are: (1) to ignore the deficiency and proceed with the review; (2) to strike the brief or its offending portions, CR 76.12(8)(a); or (3) to review the issues raised in the brief for manifest injustice only[.]" *Hallis*, 328 S.W.3d at 696 (citation omitted). The fatal flaw in YEC's brief is failure to include the final judgment underlying the appeal in its appendix. Based on the sum of YEC's errors, we review for manifest injustice only. *See Elwell v. Stone*, 799 S.W.2d 46, 48 (Ky. App. 1990). "[T]he required showing is probability of a different result or error so fundamental as to threaten a [party's] entitlement to due process of law." *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006).

On appeal, YEC argues the trial court erred in granting summary judgment on its claim for (1) fraud; (2) promissory estoppel and detrimental reliance; (3) implied covenant of good faith and fair dealing; (4) tortious interference with a prospective business advantage; (5) negligent misrepresentation; and (6) punitive damages. YEC also argues the trial court erred in granting C-Plant's motion to exclude the expert testimony of Johansen.

I. FRAUD

YEC argues that the trial court erred in granting summary judgment in favor of C-Plant on its claim for fraud.

> It is well-established that a plaintiff seeking to prevail on a claim of fraud must establish, by clear and convincing evidence, six elements: (1) that the declarant made a material misrepresentation to the plaintiff, (2) that this misrepresentation was false, (3) that the declarant knew it was false or made it recklessly, (4) that the declarant induced the plaintiff to act upon the misrepresentation, (5) that the plaintiff relied upon the misrepresentation, and (6) that the misrepresentation caused injury to the plaintiff.

Radioshack Corp. v. ComSmart, Inc., 222 S.W.3d 256, 262 (Ky. App. 2007) (citing *United Parcel Service Co. v. Rickert,* 996 S.W.2d 464, 468 (Ky. 1999)). It is also well-settled that "[f]or a declarant's misrepresentation to be used as the basis for fraud, it must relate to an existing or past fact. If the alleged misrepresentation relates to a future promise or an opinion of a future event, then it is not actionable." *Id.* (citations omitted). YEC's brief concedes that C-Plant's

alleged misrepresentations concerns a future promise in arguing that Paul Adams "*wanted* to be [YEC's] banker" and "*would* provide financing to YEC so long as the loans and collateral from [two other banks] were moved to C-Plant." (Emphasis added). Even though YEC alleges that C-Plant induced YEC to move all of its loans to C-Plant based on this promise to act in the future, such a promise cannot be the basis of a claim for fraud.

YEC briefly argues it established a claim for fraud by omission.

> To prevail on a claim of fraud by omission, or fraud based on failure to disclose a material fact, a plaintiff must prove: a) that the defendants had a duty to disclose that fact; b) that defendants failed to disclose that fact; c) that the defendants' failure to disclose the material fact induced the plaintiff to act; and (d) that the plaintiff suffered actual damages.

Rivermont Inn, Inc. v. Bass Hotels & Resorts, Inc., 113 S.W.3d 636, 641 (Ky. App. 2003) (citing *Smith v. General Motors Corp.*, 979 S.W.2d 127 (Ky. App. 1998)). "A duty to disclose facts is created only where a confidential or fiduciary relationship between the parties exists, or when a statute imposes such a duty, or when a defendant has partially disclosed material facts to the plaintiff but created the impression of full disclosure." *Id.* (citation omitted).

YEC asserts that "[a]s discussed above, a fiduciary and confidential relationship did exist between C-Plant, Adams, and [YEC]." YEC's argument is conclusory as it presents no basis in support of its argument that there was a

fiduciary relationship between the parties. YEC does not address this argument in its brief or reply. Although YEC "is obviously dissatisfied with the trial court's decision, threadbare recitals of the elements of a legal theory, supported by mere conclusory statements, form an insufficient basis upon which this Court can grant relief." *Jones v. Livesay*, 551 S.W.3d 47, 52 (Ky. App. 2018). Apart from reciting applicable law regarding setting aside a trial court's decision to exclude Johansen's expert testimony and to grant C-Plant's motion for summary judgment on YEC's negligent misrepresentation claim, YEC advances nothing of substance in support of its contention. We will not scour the record to construct YEC's argument, "nor will we venture to find support for [its] underdeveloped arguments." *Prescott v. Commonwealth*, 572 S.W.3d 913, 924 (Ky. App. 2019).

YEC also argues that C-Plant partially disclosed a material fact when it failed to disclose that it was possible that it would not be able to provide financing for the snow plow contract. An actionable omission must "relate to a past or present material fact." *Giddings & Lewis, Inc. v. Industrial Risk Insurers*, 348 S.W.3d 729, 748 (Ky. 2011) (citation omitted). As discussed above, whether C-Plant would be able to provide financing in the future is not an actionable omission. Finally, YEC does not argue that a statute imposes a duty to disclose. YEC failed to establish that C-Plant had a duty to disclose facts under any of the three prongs espoused in *Rivermont Inn*. As such, we hold that YEC suffered no

manifest injustice when the trial court found it did not establish a claim for fraud or fraud by omission.

II. PROMISSORY ESTOPPEL AND DETRIMENTAL RELIANCE

Although YEC acknowledges it had no written contract with C-Plant, YEC argues its breach of contract claim is not barred by the statute of frauds because the doctrines of promissory estoppel and detrimental reliance apply. A plaintiff establishes a claim for promissory estoppel when it proves the following:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

Meade Constr. Co., Inc. v. Mansfield Commercial Elec., Inc., 579 S.W.2d 105, 106 (Ky.1979) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 90 (Tentative Draft No. 2, 1965)). "The whole theory of a promissory estoppel action is that detrimental reliance becomes a substitute for consideration under the facts of a given case." *McCarthy v. Louisville Cartage Co., Inc.*, 796 S.W.2d 10, 12 (Ky. App. 1990). This Court has held that "a claim of promissory estoppel 'alone is not sufficient to defeat the statute of frauds; actual fraud must be proven.'" *Scott v. Forcht Bank, NA*, 521 S.W.3d 591, 596 (Ky. App. 2017) (quoting *Rivermont Inn, Inc.*, 113 S.W.3d at 642 (Ky. App. 2003)).

As noted in *Scott* and *Rivermont Inn*, YEC's "claim 'confuses promissory estoppel with equitable estoppel, and incorrectly interchanges the terms. . . .'" *Id.* "Promissory estoppel can be invoked when a party reasonably relies on a statement of another and materially changes his position in reliance on the statement." *Rivermont Inn*, 113 S.W.3d at 642. Conversely, equitable estoppel "may be invoked by an innocent party who has been fraudulently induced to change their position in reliance on an otherwise unenforceable oral agreement." *Id.* at 643. "Equitable estoppel requires a fraudulent misrepresentation as to a material fact[.]" *Scott*, 521 S.W.3d at 596. Below, the trial court held that while YEC's complaint only stated a claim for promissory estoppel, the case law relied upon only discussed equitable estoppel. On appeal, YEC's brief cites case law that only discusses equitable estoppel but does not dispute the trial court's finding that it could only rely on promissory estoppel.

"[A]ctual fraud must be proven" to maintain a claim for promissory estoppel. *Id.* YEC's argument fails because we held that the trial court correctly granted summary judgment on YEC's claim for fraud. Without actual fraud, YEC could not have detrimentally relied upon C-Plant's promise to provide financing in the future, and the statute of frauds bars YEC's claim for promissory estoppel in the absence of actual fraud. Further, a claim for equitable estoppel would also fail because a promise to act in the future is not a misrepresentation of an existing fact.

As such, we hold YEC suffered no manifest injustice when the trial court granted summary judgment on its claim for promissory estoppel.

III. IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

YEC argues it established a claim for breach of an implied covenant of good faith and fair dealing. This argument was part of YEC's breach of contract claim below. "In every contract, there is an implied covenant of good faith and fair dealing." *Ranier v. Mt. Sterling Nat'l Bk.*, 812 S.W.2d 154, 156 (Ky. 1991); *see also Farmland Mut. Ins. Co. v. Johnson,* 36 S.W.3d 368 (Ky. 2000). YEC concedes that there was no written contract with C-Plant, and its claim for promissory estoppel is barred by the statute of frauds. There can be no implied covenant in the absence of a contract. Thus, YEC suffered no manifest injustice when the trial court granted summary judgment on its claim for breach of an implied covenant of good faith and fair dealing.

IV. TORTIOUS INTERFERENCE WITH A PROSPECTIVE BUSINESS ADVANTAGE AND TORTIOUS INTERFERENCE WITH A KNOWN CONTRACTUAL RELATIONSHIP

YEC argues the trial court erred in granting summary judgment in favor of C-Plant on its claim for tortious interference with a prospective business advantage. More specifically, YEC seems to argue that transferring all of its loans and collateral to C-Plant hindered its ability to obtain alternative financing for the

existing snow plow contracts and its ability to obtain future business opportunities due to its damaged reputation. Thus, YEC makes a claim for both tortious interference with a prospective business advantage and tortious interference with a known contractual relationship.

First, to maintain a claim for tortious interference with a prospective business advantage, a plaintiff must prove: "(1) the existence of a valid business relationship or expectancy; (2) that [C-Plant] was aware of this relationship or expectancy; (3) that [C-Plant] intentionally interfered; (4) that the motive behind the interference was improper; (5) causation; and (6) special damages." *Snow Pallet, Inc. v. Monticello Banking Co.*, 367 S.W.3d 1, 6 (Ky. App. 2012) (citing *Monumental Life Ins. Co. v. Nationwide Retirement Solutions, Inc.*, 242 F.Supp.2d 438, 450 (W.D. Ky. 2003)).

Even if it is permissible for YEC to maintain a claim for tortious interference with a prospective business advantage when it had an existing contract with the state, YEC's argument that C-Plant intentionally interfered with its ability to obtain future business opportunities falls short. C-Plant's motive for obtaining all of YEC's collateral is key to our analysis. *See id.* (citation omitted). "To prevail under this theory of liability, the 'party seeking recovery must show malice or some significantly wrongful conduct.'" *Id.* (quoting *National Collegiate Athletic Ass'n By and Through Bellarmine College v. Hornung*, 754 S.W.2d 855, 859 (Ky.

1988)). YEC alleges that C-Plant's "motive was clearly selfish and improper," but there is no proof in the record indicating C-Plant's motive for requesting all of YEC's collateral meets the required standard. Instead, YEC merely speculates as to C-Plant's motive, which is "insufficient for a case to survive the summary judgment stage." *Id.* (citation omitted). Furthermore, YEC fails to establish "the existence of a valid business relationship or expectancy[.]" *Id.* YEC argues that it lost future business opportunities because of C-Plant. Again, YEC's argument is merely speculative and does not specifically refer to evidence in the record indicating actual opportunities it lost because of C-Plant's alleged conduct.

YEC's claim for tortious interference with a known contractual relationship similarly fails. To maintain a tortious interference with contract claim, YEC must prove the following elements:

> (1) the existence of a contract; (2) [C-Plant's] knowledge of the contract; (3) that [C-Plant] intended to cause a breach of that contract; (4) that [C-Plant's] actions did indeed cause a breach; (5) that damages resulted to [YEC]; and (6) that [C-Plant] had no privilege or justification to excuse its conduct.

Snow Pallet, Inc., 367 S.W.3d at 5-6 (citing *Monumental Life Ins. Co.*, 242 F.Supp.2d at 450). "Under Kentucky law, tort liability exists for the interference with a known contractual relationship, if the interference is malicious or without justification, or is accomplished by some unlawful means such as fraud, deceit, or coercion." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 487

(Ky. 1991). Again, YEC failed to establish that if C-Plant intentionally interfered with its contracts with the state, C-Plant acted with malice or induced YEC to transfer all other loans and collateral by fraud. Thus, we hold YEC suffered no manifest injustice when the trial court granted summary judgment on its claims for tortious interference.

V. MOTION TO EXCLUDE EXPERT TESTIMONY AND NEGLIGENT MISREPRESENTATION

YEC's next arguments are entwined. YEC argues the trial court erred in excluding Johansen's expert testimony regarding damages, and because her testimony was admissible, the trial court erred in granting summary judgment on its claim for negligent misrepresentation. When C-Plant filed this motion, negligent misrepresentation was YEC's only remaining claim. We note that YEC's argument is conclusory. Again, we will not scour the record to construct its argument. *Prescott*, 572 S.W.3d at 924.

In *Presnell Const. Managers, Inc. v. EH Const., LLC*, 134 S.W.3d 575, 580 (Ky. 2004), the Supreme Court of Kentucky adopted the following elements of negligent misrepresentation espoused in the RESTATEMENT (SECOND) OF TORTS § 552 (1977):

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for *pecuniary loss* caused to

> them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information. [Emphasis added.]

YEC sought to provide the expert testimony of Johansen to prove that it sustained lost profit damages, but the trial court granted C-Plant's motion to exclude Johansen's testimony because she opined as to expected lost profits instead of pecuniary loss. The trial court found that lost profits did not constitute pecuniary loss and found her calculations were unreliable.

Although we disagree with the trial court that lost profits are not recoverable under a claim for negligent misrepresentation,[2] we agree that Johansen's calculation of lost profit damages was unreliable. KRE[3] 702 provides that expert testimony is admissible under the following circumstances:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if:
>
> (1) The testimony is based upon sufficient facts or data;
>
> (2) The testimony is the product of reliable principles and methods; and

[2] In *Presnell*, the Supreme Court of Kentucky stated that "the tort of negligent representation defines an independent duty for which recovery in tort for economic loss is available." *Presnell*, 134 S.W.3d at 582. "Economic loss" is defined as "[a] monetary loss such as lost wages or *lost profits*." *Id.* at n.1 (emphasis added) (quoting BLACK'S LAW DICTIONARY 530 (7th ed. 1999)).
[3] Kentucky Rules of Evidence.

> (3) The witness has applied the principles and methods reliably to the facts of the case.

"In order to meet the above standard, proffered expert testimony, which is based on scientific, technical, or other specialized knowledge, must be both relevant and reliable." *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 578 (Ky. 2000) (internal citations and quotation marks omitted).

"Loss of anticipated profits is a recognized form of damages in Kentucky if proven with a reasonable certainty." *Insight Kentucky Partners II, L.P. v. Preferred Automotive Services, Inc.*, 514 S.W.3d 537, 553 (Ky. App. 2016) (citations omitted). However, "there must be no lack of certainty on account of being too remote, conjectural, and speculative." *Id.* (citation and internal quotation marks omitted). Here, the trial court found that YEC's "expenses were understated because an incorrect loan repayment amount was used in the damage calculations and revenues from the snow removal contracts were overstated because the calculations included six years of revenue whereas the snow removal contracts were only guaranteed for two years."

Johansen testified, in her deposition, that she calculated lost profits over a six-year period based solely on another YEC employee's representation that the snow removal contracts would automatically renew. Johansen's belief that the two-year contracts would automatically renew for two additional terms "was based on nothing more than pure speculation and conjecture." *Insight*, 514 S.W.3d at

554. As such, her "calculation of lost profit damages was unreliable," and the trial court correctly excluded her testimony. *Id.* Without Johansen's testimony, YEC could not prove damages as required to maintain a claim for negligent misrepresentation. Thus, we hold YEC suffered no manifest injustice when the trial court excluded Johansen's testimony and granted summary judgment on its claim for negligent misrepresentation.

VI. PUNITIVE DAMAGES

Finally, YEC argues the trial court erred in granting summary judgment on its claim for punitive damages. A "claim for punitive damages cannot succeed since the failure to assert a claim on which actual damages can be awarded precludes them from seeking punitive damages." *Ammon v. Welty*, 113 S.W.3d 185, 188 (Ky. App. 2002) (citation omitted). Thus, YEC suffered no manifest injustice when the trial court found it did not establish a claim for punitive damages.

CONCLUSION

For the foregoing reasons we affirm the judgment of the McCracken Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
Charles D. Walter Paducah, Kentucky	Megan E. Diffenderfer Louisville, Kentucky