STATE OF MICHIGAN

COURT OF APPEALS

Q.I.S., INC., d/b/a QUALITY INDUSTRIAL SERVICES, INC.,

Plaintiff-Appellant,

v

INDUSTRIAL QUALITY CONTROL, INC., TARA RUSH, TRACEY BARNETT, and TAMMY DAUGHERTY,

Defendants-Appellees.

UNPUBLISHED
September 6, 2002

No. 228157
Livingston Circuit Court
LC No. 99-017209-NZ

Before: Bandstra, P.J., and Hoekstra and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) in favor of defendants. We affirm in part, reverse in part, and remand.

Plaintiff QIS is a company that provides quality assurance services to the automotive parts supply industry that has entered into a collective bargaining agreement with the United Steelworkers of America, Local Union No. 6354 (USWA). Defendants Tara Rush, Tracey Barnett, and Tammy Daugherty are former QIS employees. Rush and Daugherty, while still employed by QIS, each executed a non-competition agreement that stated in relevant part:

> For a period of one year, commencing on the date that I leave employment with Q.I.S., I shall not, directly or indirectly, either as an equity owner (except for ownership of stock in any corporation whose stock is listed on the New York or American Stock Exchange), employee, salesperson, consultant, director, lender, or in any other capacity, engage in or be interested in any business that competes with the business of Q.I.S. in the geographical area encompassing the Metro Detroit area.

Barnett did not sign a non-competition agreement with QIS. Barnett is now the president, the sole member of the board of directors, and a shareholder of defendant Industrial Quality Control, Inc. (IQC), a company that competes with QIS. Defendants Rush and Daugherty began working for IQC after leaving QIS's employ, despite the non-competition agreements.

In May 1999, QIS commenced a lawsuit against defendants. Count one of the amended complaint alleges tortious interference with a contract, business relationship or expectancy against IQC. Count II of the complaint alleges three sub-counts, including breach of the non-competition agreements by Rush and Daugherty, tortious interference with a contract, business relations or expectancy by Barnett, and civil conspiracy by all defendants. Discovery proceeded and in October 1999, defendants filed an amended motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). After a hearing, the trial court granted defendants' motion pursuant to MCR 2.116(C)(10). This appeal ensued.

On appeal, plaintiff argues, in essence, that the trial court erred in granting summary disposition on its claims because the trial court misapplied the law and because it failed to recognize that plaintiff presented sufficient evidence to demonstrate a genuine issue of material fact concerning the unlawfulness of defendants' action in forming and/or joining a competitor company. We review a trial court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

In evaluating a motion for summary disposition brought under MCR 2.116(C)(10), "a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion" to determine whether a genuine issue regarding any material fact exists. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). If the nonmoving party fails to present evidentiary proofs showing a genuine issue of material fact for trial, summary disposition is properly granted. *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456, n 2; 597 NW2d 28 (1999).

Plaintiff contends that the non-competition agreements that Rush and Daugherty signed are enforceable contracts and are not rendered invalid by the collective bargaining agreement between plaintiff and the USWA. We agree.

An employer may obtain from an employee a non-competition agreement. MCL 445.774a(1). In relevant part, Article 17, § 1 of the collective bargaining agreement states:

> (a) *This Agreement represents the full and complete understanding of the parties on the subjects of wages, hours, benefits, and other terms and conditions of employment.* This Agreement supercedes and cancels any previous agreements or understandings, oral or written, and any alleged practices in existence before the execution of this Agreement.
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> (b) Any amendment of or agreement supplemental to this Agreement must be reduced to writing stating the effective date of the amendment or supplemental agreement and must be executed by both the Employer and the Union. No amendment or supplemental agreement will be binding upon either party unless both the Employer and the Union sign it. [Emphasis supplied.]

In considering defendants' motion for summary disposition, the trial court phrased the issue presented as "whether the non-competition agreements relate to 'the subjects of wages, hours, benefits, and other terms and conditions of employment,'" and it concluded that they did. We disagree.

First, we note that the individual defendants are not parties to the collective bargaining agreement, rather plaintiff and the union are parties. Notwithstanding a collective bargaining agreement, an employee may negotiate additional agreements with the employer, as long as any additional agreement is not inconsistent with the specific terms of the collective bargaining agreement. *J I Case Co v National Labor Relations Bd*, 321 US 332, 339; 64 S Ct 576; 88 L Ed 2d 762 (1944) ("We know of nothing to prevent the employee's, because he is an employee, making any contract provided it is not inconsistent with a collective bargaining agreement or does not amount to or result from or is not part of an unfair labor practice."); *Loewen Group Int'l Inc v Haberichter*, 65 F3d 1417, 1423 (CA 7, 1995); see also *Caterpillar Inc v Williams*, 482 US 386, 396; 107 S Ct 2425; 96 L Ed 2d 318 (1987) ("[A] plaintiff covered by a collective bargaining agreement is permitted to assert legal rights *independent* of that agreement, including state-law contract rights, so long as the contract relied upon is *not* a collective bargaining agreement.").

Here, the collective bargaining agreement is silent regarding non-competition agreements; it neither allows nor prohibits its members from negotiating a separate agreement outside the collective bargaining agreement. Consequently, whether the separate non-competition agreements between plaintiff and the individual defendants are inconsistent is relevant only to the extent that the specific terms of the non-competition agreement address subjects specifically covered in the collective bargaining agreement. To hold otherwise would eviscerate the right recognized in *J I Case*, *supra*, and *Loewen*, *supra*, that a member of a union may negotiate separate agreements with his or her employer regarding issues not addressed in the collective bargaining agreement. The language of the collective bargaining agreement expressing "the full and complete understanding" concerns the understanding of the parties to that agreement and does not preclude a member from being permitted to enter agreements with an employer concerning issues not inconsistent with the collective bargaining agreement. Thus, the trial court erred in finding as a matter of law that the non-competition agreements at issue were unenforceable on the basis of the collective bargaining agreement provisions.

Having determined that the individual defendants could properly enter a non-competition agreement with plaintiff, we turn now to plaintiff's argument that the trial court's ruling should be affirmed because the non-competition agreements fail for lack of consideration. Although this Court may affirm a trial court's decision on alternate grounds, *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 643; 591 NW2d 393 (1998), we think it inappropriate to do so because the trial court did not expressly rule on this issue.[1] Further, although the issue was raised below, we find the lower court record to be not particularly well developed on this issue. Consequently, we do not believe that we are in a position to make an informed decision.

Plaintiff next argues that the trial court erred in granting summary disposition in favor of defendants on plaintiff's tortious interference and civil conspiracy claims. We disagree. Plaintiff has failed to establish a genuine issue of material fact concerning its tortious interference claims because it has not provided evidence to demonstrate that defendants' "plan to

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[1] The trial court inquired about consideration during the hearing on the motion for summary disposition, but did not expressly rule on that issue in its written opinion, nor did plaintiff address this topic in its appellate brief or a reply brief.

compete" is a per se wrongful act or a lawful act done with malice and unjustified in law. *BPS Clinical Labs v Blue Cross & Blue Shield of Michigan (On Remand)*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996); *Formall, Inc v Community Nat Bank of Pontiac*, 166 Mich App 772, 780; 421 NW2d 289 (1988); *Feldman v Green*, 138 Mich App 360, 378; 360 NW2d 881 (1984). On the evidence presented here, plaintiff cannot support a claim of malice sufficient to sustain a claim, nor can defendants' conduct be characterized as per se wrongful. Having failed to demonstrate a genuine issue of material fact concerning its tortious interference claim, plaintiff's civil conspiracy claim must fail. *Admiral Ins Co v Columbia Cas Ins Co*, 194 Mich App 300, 313; 486 NW2d 351 (1992); *Early Detection Center, PC v New York Life Ins Co*, 157 Mich App 618, 632; 403 NW2d 830 (1986).

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell