STATE OF MICHIGAN

COURT OF APPEALS

HENRY GESING,

Plaintiff-Appellant,

v

CITY OF WARREN, MARK A. STEENBERGH, and WARREN PROFESSIONAL FIREFIGHTERS LOCAL UNION 1383,

Defendants-Appellees.

UNPUBLISHED
June 22, 2004

No. 244501
Macomb Circuit Court
LC No. 00-005159-NZ

Before: Owens, P.J., and Kelly and Gribbs,[*] JJ.

PER CURIAM.

Plaintiff was discharged from his position as fire commissioner for the city of Warren. He subsequently brought this action against the city of Warren and Mayor Mark A. Steenbergh ("Warren defendants"), and the Warren Professional Firefighters Local Union 1383 ("defendant Union"), alleging claims of violation of public policy, tortious interference with a contractual relationship, violation of the Whistleblowers' Protection Act ("WPA"), MCL 15.361 *et seq*., and unlawful concert of action. The trial court granted defendants' motions for summary disposition under MCR 2.116(C)(8) and (10). Plaintiff appeals as of right. We affirm.

I

The trial court did not err in granting defendant Union's motion for summary disposition under MCR 2.116(C)(10) with regard to plaintiff's claim of tortious interference with a contractual relationship.

This Court reviews a trial court's grant or denial of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek, supra*. This Court must consider the affidavits, pleadings, depositions, admissions, or other documentary evidence submitted by the parties in a light most favorable to the nonmoving party to decide whether a

[*] Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

genuine issue of material fact exists.[1] *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

To establish a prima facie case of tortious interference with a contractual relationship, a plaintiff must show "(1) a contract, (2) a breach, and (3) an unjustified instigation of the breach by the defendant." *Mahrle v Danke*, 216 Mich App 343, 350; 549 NW2d 56 (1996), citing *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 95-96; 443 NW2d 451 (1989). "One who alleges tortious interference with a contractual or business relationship must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another." *CMI Int'l, Inc v Intermet Int'l Corp*, 251 Mich App 125, 131; 649 NW2d 808 (2002), quoting *Feldman v Green*, 138 Mich App 360, 378; 360 NW2d 881 (1984). "A wrongful act per se is an act that is inherently wrongful or an act that can never be justified under any circumstances." *Prysak v R L Polk Co*, 193 Mich App 1, 12-13; 483 NW2d 629 (1992), citing *Formall, Inc v Community Nat'l Bank of Pontiac*, 166 Mich App 772, 780; 421 NW2d 289 (1988). In *Feaheny v Caldwell*, 175 Mich App 291, 304; 437 NW2d 358 (1989), this Court held that "tortious interference with an at-will contract is actionable" on the basis "that an at-will employee who enjoys the confidence of his or her employer has the right to expect that a third party will not wrongfully undermine the existing favorable relationship."

Plaintiff contends that he raised a genuine issue of material fact regarding his claim that defendant Union tortiously interfered with his employment relationship with the city of Warren by presenting evidence that defendant Union offered Mayor Steenbergh a $10,000 campaign donation if he terminated plaintiff's employment, that defendant Union published defamatory statements about him designed to interfere with his employment relationship, and that defendant Union used intimidation tactics to make him fear for his safety.

To survive a motion under MCR 2.116(C)(10), the existence of a disputed fact must be established by admissible evidence. MCR 2.116(G)(6); *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002); *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). Here, the trial court correctly observed that plaintiff's conclusory averments in his affidavit that "defendant Union offered Mayor Steenbergh a campaign contribution to terminate plaintiff, Mark Schimanski threatened that plaintiff would be killed if not terminated by November 1999 and negative employment records regarding plaintiff would be released by defendant Union to embarrass Mayor Steenbergh in the upcoming election" rested on inadmissible hearsay.[2]

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[1] As defendants point out, plaintiff has attached to his brief on appeal additional materials that were not submitted to the trial court. Because this Court's review is limited to the evidence presented to the trial court, *Kent Co Aeronautics Bd v Dep't of State Police*, 239 Mich App 563, 579-580; 609 NW2d 593 (2000), aff'd sub nom *Byrne v Michigan*, 463 Mich 652; 624 NW2d 906 (2001), we have not considered these additional materials.

[2] "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c).

The trial court also did not err in concluding that there was no genuine issue of material fact that the articles criticizing plaintiff's performance as fire commissioner, which were published in the March 1999 issue of defendant Union's newspaper, "The Redline," were causally connected to Mayor Steenbergh's decision to terminate plaintiff. As the trial court noted, there was no evidence that Mayor Steenbergh was even aware of the articles, which were published eighteen months before plaintiff was terminated.

Additionally, the trial court did not err in finding that there was no evidence that defendant Union was involved in the vandalism of a fire truck in July or August 1999, that this amounted to a death threat against plaintiff, or that it contributed to the termination of plaintiff's employment. Simply put, there was no evidence showing that defendant Union was involved with the defacing of the fire truck. Because plaintiff failed to present competent evidence showing that defendant Union improperly caused the termination of plaintiff's employment, the trial court properly granted summary disposition of plaintiff's claim for tortious interference with a contractual relationship against defendant Union.

II

The trial court did not abuse its discretion when it denied plaintiff's motion to amend his complaint to add a defamation claim against defendant Union. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997); *Phillips v Deihm*, 213 Mich App 389, 393; 541 NW2d 566 (1995). Leave to amend may be denied where an amendment would be futile. *Hakari v Ski Brule, Inc*, 230 Mich App 352, 355; 584 NW2d 345 (1998). An amendment would be futile if, ignoring the substantive merits of the claim, it is legally insufficient on its face. *Id*., quoting *Gonyea v Motor Parts Federal Credit Union*, 192 Mich App 74, 78; 480 NW2d 297 (1991). In this case, the trial court properly found that plaintiff's defamation claim was not brought within one year of the alleged defamatory statements and, therefore, was barred by the statute of limitations, MCL 600.5805(8). *Wilson v Knight-Ridder Newspapers, Inc*, 190 Mich App 277, 279; 475 NW2d 388 (1991). Thus, the trial court did not abuse its discretion in denying plaintiff's motion to amend his complaint to add the proposed defamation claim.

III

The trial court also properly granted the Warren defendants' motion for summary disposition under MCR 2.116(C)(8) with respect to plaintiff's public policy claim, because the claim was preempted by the WPA.

We first observe that defendant has attached various exhibits to his appellate brief that were not submitted to the trial court. As we have already noted, because these documents were not presented to the trial court, they are not part of the record on appeal and thus are not properly before this Court. *Kent Co Aeronautics Bd v Dep't of State Police*, 239 Mich App 563, 579-580; 609 NW2d 593 (2000), aff'd sub nom *Byrne v Michigan*, 463 Mich 652; 624 NW2d 906 (2001). Although we could refuse to consider this issue on that basis alone, we will review plaintiff's claim, but we restrict our review to the items that were properly presented to the trial court.

Under MCR 2.116(C)(8), summary disposition of a claim may be granted on the ground that the opposing party has failed to state a claim on which relief can be granted. *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998). The motion should be granted only

when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Maiden, supra* at 119.

Because the WPA provides a remedy for retaliatory discharge, the trial court properly granted summary disposition as to plaintiff's public policy claim. *Dudewicz v Norris Schmid, Inc*, 443 Mich 68, 78-80; 503 NW2d 645 (1993). See also *Edelberg v Leco Corp*, 236 Mich App 177, 180 n 2; 599 NW2d 785 (1999) (noting that a public policy claim is sustainable only where there is also not an applicable statutory prohibition against discharge in retaliation for the conduct at issue); *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 486; 516 NW2d 102 (1994) (finding that, under *Dudewicz*, the plaintiff may not use the WPA "as a source of public policy to establish a claim").

IV

Finally, the trial court did not err in granting summary disposition to the Warren defendants under MCR 2.116(C)(10) with regard to plaintiff's claim that the city of Warren violated the WPA, MCL 15.361 *et seq*.

"To establish a prima facie case, it must be shown that (1) the plaintiff was engaged in protected activity as defined by the Whistleblowers' Protection Act, (2) the plaintiff was discharged, and (3) a causal connection existed between the protected activity and the discharge." *Shallal v Catholic Social Services*, 455 Mich 604, 610; 566 NW2d 571 (1997), citing *Terzano v Wayne Co*, 216 Mich App 522, 526; 549 NW2d 606 (1996).

Here, plaintiff failed to show a genuine issue of material fact regarding the existence of a causal connection between his alleged reporting activities and his discharge. Although plaintiff argued below that he reported alleged wrongdoings in the City of Warren Fire Department and defendant Union to Mayor Steenbergh, Deputy Mayor Greiner and the Warren City Council, he failed to present evidence suggesting that these reports were causally related to the mayor's decision to terminate him.

Alternatively, plaintiff contends that he was terminated because he was about to testify in an Act 312 arbitration proceeding.[3] But plaintiff cites no authority establishing that testimony in an Act 312 arbitration proceeding would constitute a report to a public body under MCL 15.361(d). Furthermore, it is apparent that plaintiff failed to present evidence raising a genuine issue of material fact that his termination was causally connected to his expected testimony at the Act 312 arbitration proceeding. Defendants presented evidence showing that plaintiff was discharged for bona fide reasons unrelated to plaintiff's alleged reporting activity, and there was no evidence, apart from plaintiff's speculation, that plaintiff's anticipated testimony in the Act 312 arbitration proceeding was causally related to Mayor Steenbergh's decision to terminate him. Summary disposition of the WPA claim was therefore properly granted.

[3] An Act 312 proceeding is a proceeding governing compulsory arbitration of employee disputes in public police and fire departments, as established by 1969 PA 312. See MCL 423.231 *et seq*.

Affirmed.

/s/ Donald S. Owens
/s/ Kirsten Frank Kelly
/s/ Roman S. Gribbs