STATE OF MICHIGAN

COURT OF APPEALS

APCO OIL COMPANY, INC., APCO REAL ESTATE & DEVELOPMENT CO., LLC,

Plaintiffs-Appellants,

v

KNIGHT ENTERPRISES, INC., MAJED A. KASSEM, SANA KASSEM, SANA INVESTMENTS II, LLC, WAYNE-WESTLAND ENTERPRISES, INC., KASSEM CORPORATION, G & S DEVELOPMENT, INC., SATORI CORPORATION, HASSAN HARAJLI, CITIZENS BANK,

Defendants-Appellees.

UNPUBLISHED
October 20, 2005

No. 262536
Wayne Circuit Court
LC No. 04-410521-CZ

Before: Owens, P.J., and Fitzgerald and Schuette, JJ.

PER CURIAM.

In this summary disposition case, plaintiffs appeal as of right from the trial court's order granting defendants sanctions including costs and attorney's fees on the basis that plaintiffs' suit was frivolous. We reverse and remand.

I. FACTS

Plaintiff APCO Oil Company is a gasoline wholesaler for Marathon Ashland Petroleum, LLC. Plaintiff entered into a purchase agreement with defendants Majed and Sana Kassem in June of 2002. The agreement provided that plaintiffs were to be the exclusive supplier of gasoline and other related products to the gas station operated by the Kassems for a period of ten years. Plaintiffs brought suit in Wayne Circuit Court upon learning that defendant Knight Enterprises, a gasoline wholesaler for competing petroleum firm Citgo, was supplying gasoline to Majed and Sana Kassem in violation of the contract. Invoices from Knight documenting the sale of gas to the Kassems were produced in discovery. Plaintiffs asserted that a portion of the gasoline supplied by Knight was sold while the Kassems' gas station was still branded as a Marathon station. The suit included claims against Knight for 1) unfair competition 2) tortious interference with contract, 3) civil conspiracy, 4) violation of the Michigan Consumer Protection Act, 5) violation of the Lanham Act. In July 2004, defendants Majed and Sana Kassem

withdrew their attorney and became unresponsive. Plaintiff then obtained default judgments against the Kassems. After the conclusion of discovery, plaintiffs moved to dismiss the claims against Knight and those remaining defendants against whom they had not secured default judgments.

Knight initially agreed to voluntary dismissal proposed by plaintiffs, but the two parties failed to coordinate a voluntary dismissal. Knight made a motion for summary disposition arguing 1) that the suit was frivolous because they had no business relationship with plaintiffs; and 2) that appellant had not complied with the trial court's discovery orders. The trial court granted Knight's motion for summary disposition finding that the suit was frivolous for want of a business relationship between Knight and APCO. The trial court awarded attorney's fees and costs as sanctions to Knight under MCR 2.114 and MCL 600.2591.

II. SANCTIONS FOR FRIVOLOUS LAWSUITS

Plaintiffs first contend that the record does not support a finding that the suit was frivolous, specifically contending that the circuit court erred in granting sanctions which require a finding of one of the following: (1) that the appellants filed suit with the intent to harass or embarrass; (2) that appellants lacked reasonable belief that the facts they were basing their suit on were true; (3) that appellants' claims were without legal merit. We agree.

A. Standard of Review

A trial court's grant of sanction for frivolous claims and pleading should not be disturbed unless there is evidence that the trial court's decision was clearly erroneous. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002). "A trial court's decision is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made". *Schadewald v Brule,* 225 Mich App 26, 41; 570 NW2d 788 (1997).

B. Analysis

MCL 600.2591(3)(a) states:

> (a) "Frivolous" means that at least 1 of the following conditions is met:
>
> > (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
> > (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
> > (iii) The party's legal position was devoid of arguable legal merit.

MCR 2.114 (F) states:

> In addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2). The court may not assess punitive damages.

The record lacks any indication that the suit was brought to harass, or that plaintiffs lacked a reasonable belief that their allegations were true. Indeed, evidence presented in discovery showed that Knight did deliver gasoline to the gas station operated by Majed and Sana Kassem in violation of the contract. Our review of the record indicates that the trial court awarded sanctions because plaintiffs' arguments were "devoid of arguable legal merit". MCL 600.2591(3)(a)(iii). The claims brought against Knight were 1) unfair competition 2) tortious interference with contract, 3) civil conspiracy, 4) violation of the Michigan Consumer Protection Act, 5) violation of the Lanham Act.

1. Unfair Competition

A claim of unfair competition must allege that the defendant is trying erroneously to persuade consumers to purchase goods believing that they are the goods of his competitor by using the symbols or names of the competitor, causing injury to the competitor. *Schwannecke v Genesee Coal & Ice Co*, 262 Mich 624, 627 (1933). Defendant delivered fuel to the station by their admission. The plaintiff claims that the station was still branded a Marathon station when the Citgo gas was sold. As such it is likely that the patron believed that they were buying Marathon brand gasoline when they were in fact buying Citgo brand gasoline. As such, it cannot be said that the claim is devoid of arguable legal merit.

2. Tortious Interference with Contract

Tortious interference with contract exists when a third party to a contract, knowing of the contract, intentionally and wrongfully induces a breach of the contract which results in damage to a non-breaching party. *Mino v Clio School District*, 255 Mich App 60, 78; 661 NW2D 586 (2003). In the case at bar, it is not clear if the defendant knew of the contract. However, industry practice regarding exclusive contracts for branded stations may have been sufficient to find constructive knowledge of such a contract, if the defendant lacked actual knowledge of the contract. Knight was selling gas to the Kassems in violation of an exclusive supplier contract the plaintiff had with the Kassems. As a result plaintiff was deprived of the benefits of the exclusive contract with the Kassems. While the record is not conclusive whether the defendant had knowledge of the contract, it cannot be said that the claim is devoid of arguable legal merit.

3. Civil Conspiracy

Civil conspiracy is "an agreement, or preconceived plan, to do an unlawful act". *Bahr v Miller Bros. Creamery* 365 Mich. 415, 427, 112 NW2d 463,(1961) However, "in order for a defendant to be held liable for the intentional procurement of a breach of contract between the plaintiff and another, there must be some evidence of inducement of a third party to break their contract with the plaintiff". The absence of defendants Majed and Sana Kassem make it difficult to prove inducement. However, it is necessary to examine whether the claim was frivolous at the time it was brought rather than at a later point in time. *Meagher v. Wayne State Univ*, 222 Mich App 700, 727 (1997). When plaintiff brought the suit, the Kassems were available and plaintiff may have been able to prove inducement by Knight to break the exclusive agreement. Examining the case as the facts were at the time of the filing of the claim, this claim cannot be said to be devoid of arguable legal merit.

4. Violation of the Michigan Consumer Protection Act

Plaintiff claimed defendant violated MCL 445.903(1)(A) which provides that "[c]ausing a probability of confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services" is a deceptive act. As the invoices in the record indicate, Knight was hauling gas to the station operated by the Kassems. If the station was still branded a Marathon station, as the plaintiffs state that it was, this would cause patrons at the station to believe that they were buying Marathon fuel, when in fact they would be buying Citgo brand gas. A probability existed that a consumer would be confused, misled or deceived in the brand of gasoline purchased at the Kassem's gas station. Thus, it was inappropriate for the trial court to conclude that this claim was not devoid of arguable legal merit.

5. Violations of the Lanham Act

Similar to the Michigan Consumer Protection Act, the Lanham Act prohibits the use of words or symbols in such a way as to likely cause confusion or mistake as to some attribute of a good. 15 USC 1125 (A)(1) provides that "misleading descriptions of fact, or false or misleading representation of fact which (a) is likely to cause confusion or to cause mistake . . ." gives rise to liability to a party that is or is likely to be harmed. In the case at bar the use of the Marathon trademarks at the station would have likely led customers to believe that they were getting Marathon brand gasoline when in fact they were buying Citgo Gasoline. Moreover, the use of trademarks by parties other than the owners of the trademark could result in harm to Marathon. It cannot be said that this claim is devoid of arguable legal merit.

In ruling that the claims of plaintiffs were frivolous, the trial court stated: "[s]ince Knight Enterprises did not have any business relationship with the Plaintiff, court will grant attorney's fees as sanctions . . . ." However, none of the claims against Knight require that a business relationship exist between the parties for plaintiffs to prevail. While plaintiffs may have had an "uphill fight" to prevail, MCL 600.2591 is not interpreted so as to have "a chilling effect on advocacy or prevents the filing of all but the most clear-cut cases." *Louya v William Beaumont Hospital*, 190 Mich App 151, 163-164; 475 NW2d 434 (1991). It is irrelevant whether plaintiff would have prevailed against Knight at trial for the purposes of awarding sanctions for frivolous claims. Claims do not become frivolous simply because they do not prevail. However, it is relevant that the arguments, as they were at the time of filing, do not appear to have been for the purpose of harassment. Rather, plaintiffs' claims were based upon a reasonable belief of the pertinent facts, and possessed arguable legal merit. Applying the clearly erroneous standard of review, we hold that the trial court erred in finding plaintiffs' suit to be frivolous under MCL 600.2591 for the lack of an element that is not necessary.

III. FACTUAL MISREPRESENTATION

Plaintiffs next contend that the trial court erred in denying their motion for reconsideration or rehearing because of misleading factual misrepresentations in defendants' brief. We agree.

A. Standard of Review

A motion for reconsideration is reviewed for abuse of discretion. *Herald Co, Inc v Tax Tribunal*, 258 Mich App 78, 82; 669 NW2d 862 (2003). "The movant must show that the trial

court made a palpable error and that a different disposition would result from correction of the error". *Id*.

B. Analysis

We find no merit to defendants' argument that plaintiffs failed to comply with a discovery order. The record shows that the Wayne Circuit Court entered an order to compel plaintiffs to respond to defendants' discovery request by November 30, 2004. Plaintiffs have produced a certificate of service dated November 30, 2004. While the defendant has claimed repeatedly that service did not occur, defendant made no effort to refute the certificate of service provided by the plaintiff. It is not sufficient for a party "simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claim, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Wilson v. Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998) quoting *Mitcham v. Detroit*, 335 Mich 182, 203; 94 NW2d 388 (1959). In the absence of fraud, the certificate indicates to the Court that plaintiffs complied with the trial court's discovery orders.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ E. Thomas Fitzgerald
/s/ Bill Schuette