STATE OF MICHIGAN

COURT OF APPEALS

B & S TELCOM, INC.,

Plaintiff-Appellant,

v

MICHIGAN BELL TELEPHONE COMPANY, d/b/a AT & T,

Defendant-Appellee.

UNPUBLISHED
April 16, 2013

No. 304030
Oakland Circuit Court
LC No. 2010-115489-CK

Before: BORRELLO, P.J., and K. F. KELLY and GLEICHER, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order of the trial court granting defendant's motion for summary disposition on all six counts of plaintiff's complaint. Plaintiff also challenges a trial court order awarding defendant costs and attorney fees. For the reasons set forth in this opinion, we affirm the trial court's order granting summary disposition in favor of defendant, and we decline to address plaintiff's challenge to the order awarding costs and fees.

I. FACTUAL BACKGROUND

Plaintiff is a licensed provider of telecommunications services as a competitive local exchange carrier (CLEC). Defendant is an established incumbent local exchange carrier (ILEC) that sells landline telephone service directly to consumers at retail, as well as to CLECs at wholesale. Defendant sold wholesale telecommunications services to plaintiff under the parties' interconnection agreement—the Local Wholesale Complete (LWC).

Telecommunication service involves several different network elements, such as the loops, ports, and switches that are at the heart of this dispute. These elements may be sold within bundled packages, or as individual components that allow a CLEC to custom-craft its own telecommunications network by obtaining access to each necessary network element. Under the subject agreement, plaintiff agreed to purchase bundled telecommunication services from defendant at rates specified in the LWC.

Plaintiff filed the instant suit, and alleged that defendant, through the LWC: (1) violated the Michigan Telecommunications Act (MTA), MCL 484.2101 *et seq.*, by failing to sell network elements as an unbundled network elements platform (UNE-P) at low state-mandated rates; (2) violated the Michigan Antitrust Reform Act (MARA), MCL 445.771 *et seq.*, by imposing an

unlawful restraint of trade and attempting to monopolize the telecommunications market; and (3) engaged in both unfair business practices and an unlawful civil conspiracy. Some of plaintiff's claims were similar to claims that it filed in a separate proceeding before the Michigan Public Service Commission ("PSC") wherein plaintiff challenged the validity of defendant's rates. The PSC dismissed plaintiff's complaint and plaintiff appealed in a separate appeal.[1]

In this case, the trial court ultimately granted defendant's motion for summary disposition. Thereafter, defendant requested attorney fees and costs. After a hearing on the motion, the trial court agreed and awarded defendant $13,645 in attorney fees and costs. Plaintiff timely filed a claim of an appeal from the order granting summary disposition, but did not file a separate appeal from the order awarding fees and costs.

Initially, we note that plaintiff's argument that the trial court failed to give proper consideration to the factual assertions presented in its complaint, as required by MCR 2.116(C)(8), is meritless. As addressed below, most of the issues raised are entirely dependent on questions of law, upon which the factual assertions in plaintiff's pleading bear only indirectly. To the extent that the issues were subject to fact-sensitive determination, the "factual assertions" as urged by plaintiff in its brief were merely factual or legal conclusions. "[T]he mere statement of a pleader's conclusions, unsupported by allegations of fact, will not suffice to state a cause of action." *ETT Ambulance Serv Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 395; 516 NW2d498 (1994).

II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Adair v State*, 470 Mich 105, 119; 680 NW2d 386 (2004). A dispositive motion under MCR 2.116(C)(8) "tests the legal sufficiency of the complaint and allows consideration of only the pleadings." *Laurel Woods Apartments v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007) (quotations and citation omitted). The court must "accept all well-pleaded factual allegations as true, construing them in a light most favorable to the nonmoving party[,]" and the motion should be granted only when "no factual development could possibly justify recovery." *Begin v Michigan Bell Tel Co*, 284 Mich App 581, 591; 773 NW2d 271 (2009).

A trial court's interpretation of federal and state statutes presents questions of law that we review de novo on appeal. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008). When interpreting a statute, our goal is to "give effect to the intent of the Legislature." *Superior Hotels, LLC v Mackinaw Twp*, 282 Mich App 621, 628-629; 765 NW2d 31 (2009) (citation omitted). Unless ambiguous, statutory language should be given its ordinary meaning and is presumed "to have intended the meaning expressed in the statute." *Id.* at 629. Similarly, we

[1] That appeal is currently held in abeyance pending this Court's resolution of yet another case involving these parties. *B&S Telecom Inc v Michigan Bell Tel Co*, unpublished order of the Court of Appeals, issued March 6, 2012 (Docket No. 300236), citing *Michigan Bell Tel Co v B&S Telecom Inc* (Docket No. 307199, Case No. U-16501).

review de novo a trial court's application of legal doctrines, such as res judicata, de novo. *Estes*, 481 Mich at 578-579; MCR 2.116(C)(7).

III. COUNTS I AND II: PLAINTIFF'S MTA CLAIMS

Plaintiff first argues that the trial court erred in dismissing Counts I and II. In Count I, plaintiff sought declaratory relief, and alleged that the LWC violated relevant provisions of the MTA. In Count II, plaintiff alleged that defendant breached the LWC by charging rates in excess of those statutorily authorized under the MTA. Defendant argued that the two claims were essentially the same claim, and were barred by the doctrine of res judicata because plaintiff raised the same claim in the PSC and the PSC addressed and decided the claim.

The doctrine of res judicata precludes litigation of a claim that is predicated on an underlying transaction that was litigated in a prior case. *Stoudemire v Stoudemire*, 248 Mich App 325, 334; 639 NW2d 274 (2001). Michigan broadly applies res judicata to all claims that could arise from the same transaction or set of events "[to] which the parties, exercising reasonable diligence, might have brought forward at the time." *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 380; 596 NW2d 153 (1999). The elements of res judicata are: (1) the prior action was decided on the merits; (2) the prior decision was a final judgment; (3) the earlier and subsequent actions involved the same parties or their privies; and (4) the issues presented in the subsequent case were, or could have been raised and decided, in the prior case. *Stoudemire*, 248 Mich App at 334. In contrast to a dismissal without prejudice, a court's grant of summary disposition is considered a final decision on the merits. *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 510; 686 NW2d 770 (2004). In addition, the mere fact that a prior decision is currently on appeal does not prevent res judicata from barring subsequent relitigation. *Temple v Kelel Distrib Co*, 183 Mich App 326, 327; 454 NW2d 610 (1990).[2]

"[T]he gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim." *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 701-711; 742 NW2d 399 (2007). Although plaintiff's first two counts seek different relief, they in fact constitute the same claim because each is predicated on the assertion that defendant's rates exceeded those permitted by the MTA. Specifically, in *B&S Telecom Inc v Michigan Bell Telephone Co*, Case No. U-16162, plaintiff advanced the same theory in the PSC. The PSC granted defendant's motion for summary disposition in that case under MCR 2.116(C)(8) on the ground that the Federal Communications Commission (FCC) preempted the MTA when it released the Triennial Review Remand Order, which was enacted pursuant to congressional delegation in the Federal Telecommunications Act (FTA) of 1996, 47 USC 151 *et seq*. See *In re Unbundled Access to Network Elements*, 20 FCCR 2533 (2005). Accordingly, the PSC concluded that ILECs may not be compelled under state law to provide UNE-P service under rates previously established by the PSC.

---

[2] In contrast, finality for purposes of application of the issue-preclusion doctrine, collateral estoppel, requires that "all appeals have been exhausted." *Leahy v Orion Twp*, 269 Mich App 527, 530; 711 NW2d 438 (2006).

Like its claims in the PSC, in this case, plaintiff's first two claims focused on "the legality of the per-line rate that has been charged [by defendant]." Because the PSC granted summary disposition to defendant on the previous claim, the PSC's order constituted a final judgment on the merits. The earlier litigation involved the same parties involved in this instant case, and the PSC fully addressed this issue concerning the effect of recent federal law on administration of the MTA. Accordingly, res judicata bars relitigation of plaintiff's first two counts and the trial court did not err in dismissing them. *Stoudemire*, 248 Mich App at 334.

IV. COUNT III: UNLAWFUL RESTRAINT OF TRADE

Plaintiff next argues that the trial court erred in dismissing Count III because the claim was proper under the MARA where the LWC constituted unlawful price fixing. Plaintiff's argument lacks merit.

Here, in Count III, plaintiff alleged an unlawful restraint of trade in violation of MCL 445.772, which provides: "[a] contract, combination, or conspiracy between 2 or more persons in restraint of, or to monopolize, trade or commerce in a relevant market is unlawful." MARA was based on the uniform state antitrust act, which was modeled on federal antitrust statutes, primarily the Sherman Act, 15 USC 1, *et seq.* *Bristol Window & Door, Inc v Hoogenstyn*, 250 Mich App 478, 485; 650 NW2d 670 (2002).

In this case, plaintiff's claim fails because the LWC is not a price-fixing agreement and does not otherwise restrain trade. Here, although plaintiff and defendant are competitors in the telecommunications market, it is impossible to construe the LWC as a horizontal price-fixing scheme because plaintiff and defendant operate as vertically integrated concerns.[3] Moreover, plaintiff fails to identify any language in the LWC requiring plaintiff to resell telecommunication service to consumers at a fixed price. Essentially, plaintiff misconstrues the nature of the LWC. While the agreement may constitute an "adhesion contract," such agreements are enforceable like any other contract. *Rory v Continental Ins Co*, 473 Mich 457, 489-490; 703 NW2d 23 (2005). The mere fact that the LWC has the ancillary effect of increasing plaintiff's ultimate price to its customers is of no import because the terms of the agreement do not mandate any restraint of trade. In sum, plaintiff failed to allege a viable restraint of trade claim and the trial court properly granted defendant's motion for summary disposition with respect to Count III of plaintiff's complaint.

V. COUNT IV: UNLAWFUL MONOPOLIZATION

Plaintiff also argues that it stated a proper claim under MCL 445.773, a subsection of MARA. Plaintiff contends that the claim properly alleged that defendant unlawfully exercised monopoly power through the LWC. Plaintiff contends, without explanation, that the trial court improperly adopted federal antitrust law in resolving this matter. Plaintiff's argument lacks merit.

[3] Defendant sells its own telecommunication service to consumers, while plaintiff resells defendant's service at wholesale to consumers.

MCL 445.773, based on the Sherman Act, 15 USC 2, states that "[t]he establishment, maintenance, or use of a monopoly, or any attempt to establish a monopoly, of trade or commerce in a relevant market by any person, for the purpose of excluding or limiting competition or controlling, fixing, or maintaining prices, is unlawful." The elements of unlawful monopolization are:

> (1) specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose; (3) a dangerous probability of success[; and (4)] . . . the antitrust violation was a proximate cause of a special injury to the plaintiff's business or property. [*ETT Ambulance Serv Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 397; 516 NW2d 498 (1994).]

However, merely possessing or exercising monopoly power will not give rise to an antitrust violation; instead, the antitrust statutes prohibit "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of superior product, business acumen, or historic accident." *United States v Grinnell Corp*, 384 US 563, 570-571; 86 S Ct 1698; 16 L Ed 2d 778 (1966).

Price "squeezing" occurs when a firm possessing market power for a particular product in the wholesale market sells the product to competitors at a high wholesale price in order to maintain or acquire market power in the retail market. *Pacific Bell Tel Co v Linkline Communications, Inc*, 555 US 438, 442, 449; 129 S Ct 1109; 172 L Ed 2d 836 (2009). While price squeezing can give rise to an unlawful monopolization claim under § 2 of the Sherman Act, antitrust liability exists only when parties are under an antitrust duty to deal with each other. *Id.* at 442, 449-450. The United States Supreme Court has only rarely held that refusing to deal with a competitor gives rise to antitrust liability. See *Aspen Skiing Co v Aspen Highlands Skiing Corp*, 472 US 585, 608-611; 105 S Ct 2847; 86 L Ed 2d 467 (1985). Although the FTA does require ILECs to deal with CLECs in the wholesale telecommunications market, the Supreme Court held in another case that the FTA did not "modify, impair, or supersede the applicability of any of the antitrust laws." *Verizon Communications Inc v Law Offices of Curtis Trinko, LLP*, 540 US 389, 406-407; 124 S Ct 872; 157 L Ed 2d 823 (2004). In *Trinko*, the Court held that, although ILECs had a legal duty to deal with CLECs under the FTA, this duty did not create an antitrust duty subject to enforcement under the Sherman Act. *Id.* at 405-407. Although *Trinko* dealt with an outright refusal to deal, the Court later explained that "if a firm has no antitrust duty to deal with its competitors at wholesale, it certainly has no duty to deal under terms and conditions that the rivals find commercially advantageous." *Linkline Communications, Inc*, 555 US at 450. "[A]ny such duty arises only from FCC regulations, not from the Sherman Act." *Id.*

In light of the preceding analysis, we hold that the subject LWC cannot give rise to an unlawful monopolization claim against defendant under MCL 445.773. Both *Trinko* and *Linkline* make clear that, while defendant may have a legal duty under the FTA to provide wholesale telecommunications service to plaintiff, this legal duty does not create any duty to deal that is enforceable under the Sherman Act. Because defendant had no antitrust duty to deal with plaintiff, defendant was not required to sell wholesale telecommunication services to plaintiff at favorable rates. Because MCL 445.773 is modeled on § 2 of the Sherman Act, defendant's price squeezing did not constitute unlawful monopolization under MARA. Plaintiff's claim thus fails

as a matter of law and the trial court properly granted summary disposition with respect to the claim.

VI. COUNT V: UNFAIR BUSINESS PRACTICES

Plaintiff argues that defendant, in violating the MTA and MARA, engaged in the tortuous conduct of unfair business practices. However, plaintiff fails to provide meaningful analysis with respect to this issue. Moreover, because plaintiff's complaint failed to establish any conduct by defendant that was "unfair, unconscionable, of deceptive . . . in the conduct of trade or commerce," MCL 445.903(1), plaintiff failed to state a proper claim for relief and the trial court properly dismissed the claim.

VII. COUNT SIX: CIVIL CONSPIRACY

Plaintiff asserts that it properly pleaded its civil conspiracy claim by identifying unknown conspirators in the complaint and by submitting the affidavit of its president in its responsive motion to defendant's motion for summary disposition. Plaintiff's argument is devoid of merit.

Initially, we note that we cannot consider an affidavit that was not attached to a party's pleading when reviewing a court's decision on a dispositive motion pursuant to MCR 2.116(C)(8). Under MCR 2.116(G)(5), review is limited to the parties' pleadings. Further, "[a] civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means." *Admiral Ins Co v Columbia Cas Ins Co*, 194 Mich App 300, 313; 486 NW2d 351 (1992). However, in order to prevail, the conspiracy claim must be predicated on some underlying actionable tort. *Mable Cleary Trust*, 262 Mich App at 507-508. Because no factual development could possibly establish that defendant committed an underlying tort, plaintiff failed to properly state a civil conspiracy claim. In sum, the trial court properly granted defendant's motion for summary disposition with respect to Count VI of plaintiff's complaint.

VIII. SANCTIONS

Finally, plaintiff asserts that the trial court erred in awarding defendant attorney fees and costs. However, plaintiff only appealed the trial court order granting summary disposition, and did not appeal the subsequent order awarding sanctions. As such, plaintiff failed to invoke this Court's jurisdiction over this issue. An appellant may appeal by right from a final order. MCR 7.203(A). MCR 7.202(6)(*i*) defines a "final order" in relevant part as "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties," and in subsection (*iv*) as "a postjudgment order awarding or denying attorney fees and costs." Accordingly, both orders are final orders; by failing to appeal from the order awarding costs and fees, plaintiff failed to invoke this Court's jurisdiction with respect to that order and we decline to address this aspect of plaintiff's argument. See MCR 7.203(A)(1) ("[a]n appeal from an order [granting attorney fees and costs] is limited to the portion of the order with respect to which there is an appeal of right").

Affirmed. Defendant having prevailed, may tax costs. MCR 7.219(A).

/s/ Stephen L. Borrello
/s/ Kirsten Frank Kelly
/s/ Elizabeth L. Gleicher