



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-15-00784-CV

Cecil **TUCKER**,
Appellant

v.

K&M TRUCKING, INC., 6S Corp., and Robert Heath Trucking, Inc.,
Appellees

From the 45th Judicial District Court, Bexar County, Texas
Trial Court No. 2012-CI-18677
Honorable Renée Yanta, Judge Presiding

Opinion by: Luz Elena D. Chapa, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Marialyn Barnard, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: July 27, 2016

AFFIRMED

Cecil Tucker appeals the trial court's summary judgment in favor of Appellees K&M Trucking, Inc., 6S Corp., and Robert Heath Trucking, Inc. Tucker argues the trial court erred by granting summary judgment. Because Tucker produced no evidence of actual damages or loss, we affirm the trial court's judgment.¹

¹ Because we hold Tucker produced no evidence of actual damages or loss, we need not reach Tucker's other issues. *See* TEX. R. APP. P. 47.1.

BACKGROUND

In June 2010, Tucker signed an employment contract with Appellees to work as a commercial trucking broker. The contract was for a period of two years at an annual salary of \$65,000 per year. Tucker also signed a non-compete agreement providing that for two years after termination of his employment, Tucker would not work for Appellees' competitors in a specified territory or solicit work from Appellees' customers. Tucker quit working with Appellees in March 2012. Around the same time, Tucker met with Appellees' competitors to seek employment. Appellees called one of Tucker's prospective employers and informed the employer of Tucker's non-compete agreement. Within a few days of quitting his employment with Appellees, Tucker obtained employment with one of Appellees' competitors, earning an annual salary of \$65,000 plus 5% commission.

Tucker sued Appellees for tortious interference with prospective business relations. Tucker alleged Appellees contacted his prospective employers, informed them that Tucker agreed to a covenant not to compete, and threatened to sue if they hired him. Appellees generally denied Tucker's allegations and alleged affirmative defenses. Appellees moved for summary judgment, raising several grounds for summary judgment, including a ground that there is no evidence Tucker suffered actual damages or loss as a result of the alleged interference. The trial court granted Appellees' motion, and Tucker now appeals.

MOTION FOR SUMMARY JUDGMENT

We review a summary judgment de novo. *City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556, 561 (Tex. App.—San Antonio 2000, pet. denied). “When a party moves for a no-evidence summary judgment, the nonmovant must produce some evidence raising a genuine issue of material fact” on the challenged element. *Romo v. Tex. Dep’t of Transp.*, 48 S.W.3d 265,

269 (Tex. App.—San Antonio 2001, no pet.) (citing TEX. R. CIV. P. 166a(i)). We take as true all evidence favorable to the nonmovant, resolve all conflicts in the evidence in the non-movants' favor, and "indulge every reasonable inference and resolve any doubts in the nonmovant's favor." *Rhône-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999); *City of San Antonio*, 47 S.W.3d at 561.

Appellees challenged the "actual damage or loss" element of Tucker's tortious interference claim. "Actual damages or loss" is an essential element of tortious interference with prospective business relations. *Coinmach Corp. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909, 923 (Tex. 2013). Actual damages or loss may include "the pecuniary loss of the benefits of . . . the prospective relation," "consequential losses for which the interference is a legal cause," and "emotional distress or actual harm to reputation." *Browning-Ferris, Inc. v. Reyna*, 852 S.W.2d 540, 549 (Tex. App.—San Antonio 1992) (quoting RESTATEMENT OF TORTS (SECOND), § 774A (1977)) (emphasis omitted), *rev'd on other grounds*, 865 S.W.2d 925 (Tex. 1993). "[T]he injured party must prove the amount of the loss by competent evidence with reasonable certainty." *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 504 (Tex. 2001); *accord Speedemissions, Inc. v. Capital C Enterprises, Ltd.*, No. 01-07-00400-CV, 2008 WL 4006748, at *5 (Tex. App.—Houston [1st Dist.] Aug. 28, 2008, no pet.) (mem. op.). "This is a fact-intensive determination, but opinions or lost-profit estimates must, 'at a minimum,' be based on objective facts, figures, or data from which the lost-profits amount may be ascertained" and not on mere speculation. *Speedemissions, Inc.*, 2008 WL 4006748, at *5.

The undisputed summary judgment evidence shows that a different trucking company hired Tucker within two or three days after he quit his employment with Appellees. The evidence also shows Tucker was hired at a salary of \$65,000 in addition to a 5% commission—an amount the record shows is greater than his former salary with Appellees. Tucker does not argue he suffered

any consequential losses, emotional distress, or harm to his reputation. We must therefore determine whether Tucker presented any evidence that any interference with his prospective employment resulted in actual damages or pecuniary loss. *See Browning-Ferris, Inc.*, 852 S.W.2d at 549.

Tucker argues he produced evidence in response to Appellees' motion and raised a fact issue as to actual damages or loss because Appellees interfered with his prospective employment with Mike's Trucking. An employee of Mike's Trucking, Blanca Judy Jimenez, testified the company was interested in hiring Tucker but declined to do so after his former employer called and told her that there was "a contract that was in place between his company and Tucker." Jimenez did not testify about and was not questioned about any likely terms, such as salary, benefits, other compensation, or details of Tucker's potential employment with Mike's Trucking. We disagree with Tucker's assertion that, at the summary judgment phase, speculation about possible economic loss based solely on evidence of a lost job opportunity is sufficient. *See Speedemissions*, 2008 WL 4006748, at *5 (requiring competent evidence of a reasonably certain amount of loss at summary judgment phase). Because Tucker produced no evidence that Appellees' interference with his prospective employment at Mike's Trucking caused any actual damages or pecuniary loss, the trial court did not err by granting summary judgment. *See TEX. R. CIV. P. 166a(c); Romo*, 48 S.W.3d at 269.

CONCLUSION

We affirm the trial court's judgment.

Luz Elena D. Chapa, Justice