In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-15-00213-CV

T-MILLER WRECKING SERVICES, INC., APPELLANT

V.

RICKY'S TOWING OF AMARILLO, LLC AND
CANTU TOWING, LLC, APPELLEES

On Appeal from the County Court at Law Number 1
Potter County, Texas
Trial Court No. 102,464-1; Honorable W.R. "Corky" Roberts, Presiding

April 21, 2017

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and PIRTLE, JJ.

Appellant, T-Miller Wrecking Services, Inc., appeals from a take-nothing judgment entered by the trial court in favor of Appellees, Ricky's Towing of Amarillo, LLC and Cantu Towing, LLC.[1] In a single issue, T-Miller contends the trial court erred by granting a directed verdict as to each of its three causes of action: (1) tortious

[1] Originally filed by T-Miller as an intervenor and third-party cause of action in a different cause (Cause No. 101,336-1), the claims against Ricky's Towing and Cantu Towing were severed into this cause of action by an *Order of Severance* dated April 24, 2014.

interference with an existing contract between T-Miller and Potter County, (2) tortious interference with prospective business relations, and (3) breach of contract. Raising a sub-issue as to each cause of action, T-Miller contends the trial court erred in its determination that T-Miller failed to present sufficient evidence to raise a fact issue essential to each cause of action. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

BACKGROUND

Prior to 2014, Ricky Cantu filed a lawsuit against Randy French, David Ferrill, and Michelle Elliot for libel and defamation. T-Miller intervened in that lawsuit, asserting independent claims against Ricky's Towing and Cantu Towing allegedly arising out of contractual relationships established between Potter County and various local towing companies (including T-Miller, Ricky's Towing, and Cantu Towing) which, among other things, established the requirements necessary to be placed on Potter County's rotation list for towing services. According to its established policy, whenever Potter County required towing services, it would select the provider from an approved list of towing companies on an equal rotation basis. Under this policy, no single company or individual could obtain multiple contracts by using different business names, thereby occupying more than one slot on the rotation list.

T-Miller asserts Ricky's Towing and Cantu Towing violated this policy by operating as two separate businesses when in fact they were one. As a result, T-Miller asserts the owners of Ricky's Towing and Cantu Towing improperly profited, to the detriment of T-Miller, by obtaining more towing jobs per rotation than they were entitled to under Potter County's rotation policy.

In 2014, per an agreement of the parties, the trial court severed T-Miller's claims into a separate cause of action, and in 2015, a one-day jury trial was held. At the conclusion of T-Miller's case-in-chief, Ricky's Towing and Cantu Towing moved for directed verdicts asserting (1) T-Miller failed to introduce any evidence of a contract with Potter County that was interfered with, (2) T-Miller's contract with Potter County prevented T-Miller from asserting an action for tortious interference with prospective business relations, and (3) T-Miller was not a third-party beneficiary to their contracts with Potter County. The trial court granted a directed verdict as to each cause of action and this appeal followed.

STANDARD OF REVIEW

A directed verdict is proper when the evidence offered is insufficient to raise an issue of fact as to one or more of the essential elements of a cause of action, or the plaintiff admits, or the evidence conclusively establishes a defense to the plaintiff's cause of action. *Prudential Ins. Co. of Am. v. Financial Review Servs., Inc.*, 29 S.W.3d 74, 77 (Tex. 2000); *Double Ace, Inc. v. Pope*, 190 S.W.3d 18, 26 (Tex. App.—Amarillo 2005, no pet.). When reviewing a directed verdict based upon insufficiency of evidence, we must determine whether there is any evidence of probative force that raises a fact issue on the material issues presented. *Szczepanik v. First S. Trust Co.*, 883 S.W.2d 648, 649 (Tex. 1994). In doing so, we follow the standard of review for assessing legal insufficiency of the evidence. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 750-51 (Tex. 2003).

Legal insufficiency must be sustained (1) when there is a complete absence of a vital fact, (2) when rules of law or evidence preclude according weight to the only

evidence offered to prove a vital fact, (3) when the evidence offered to prove a vital fact is no more than a scintilla, or (4) when the evidence conclusively establishes the opposite of a vital fact. *See City of Keller v. Wilson*, 168 S.W.3d 802, 810 (Tex. 2005). More than a scintilla of evidence exists when the evidence, as a whole, enables reasonable minds to differ in their conclusions. *See Tarrant Reg'l Water Dist. v. Gragg*, 151 S.W.3d 546, 552 (Tex. 2004). Evidence that only creates a mere surmise or suspicion is no more than a scintilla and, thus no evidence. *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004). In our review of the record, we must consider all the evidence in the light most favorable to the party against whom the verdict was directed disregarding all contrary evidence and inferences and giving the losing party the benefit of all reasonable inferences created by the evidence. *City of Keller,* 168 S.W.3d at 823.

SUB-ISSUE ONE—TORTIOUS INTERFERENCE WITH AN EXISTING CONTRACT

T-Miller contends the trial court erred in granting a directed verdict as to its tortious interference with an existing contract claim because the evidence presented sufficiently raised a fact issue as to each element of that cause of action. For the purposes of our analysis, the elements of a claim for tortious interference with an existing contract are (1) the existence of a contract subject to interference, (2) a willful and intentional act of interference with that contract, (3) that proximately causes injury to the plaintiff, and (4) results in actual damage or loss. *Prudential Ins. Co. of Am.*, 29 S.W.3d at 77. *See Serafine v. Blunt,* 466 S.W.3d 352, 361 (Tex. App.—Austin 2015, no. pet.). In support of their motions for directed verdicts, Ricky's Towing and Cantu Towing asserted T-Miller failed to satisfy the first element (existence of a contract) by failing to offer evidence of a contract subject to interference. We disagree.

David Ferrill, an experienced tow truck operator for T-Miller, testified that T-Miller had a towing contract with Potter County during the period in question. He testified that, after a comparison of T-Miller's contract and the contracts signed by Ricky's Towing and Cantu Towing, the terms of T-Miller's contract were identical to the other contracts—with the exception of the name of the particular towing company in the preamble, that company's principal operator, address, phone number, and email address in the notice section, and the signatures of the owner/operator. The contracts for Ricky's Towing and Cantu Towing were admitted into evidence; however, the T-Miller contract was not admitted. In light of the testimony presented concerning the terms of the contract, the failure to offer the contract itself is not fatal.

Importantly, Ferrill testified that Potter County required the execution of such a contract before any company would be placed on the county's rotation list for towing providers.[2] He further testified that, prior to Potter County's adoption of the towing contracts at issue, T-Miller had been a proponent of such contracts in order to stop the unfair practice of a single entity holding multiple slots on the rotation list. Ferrill also introduced an analysis of Potter County's rotation log for the period at issue, without objection, and that analysis showed T-Miller as having a contract with Potter County.

Notwithstanding T-Miller's failure to introduce its own contract, considering the record as a whole, including Ferrill's testimony that T-Miller's contract was essentially the same as the other contracts, we find there is more than a scintilla of evidence that, during the time period at issue, T-Miller had a towing contract with Potter County and its

[2] The terms of the contracts also addressed all towing operators who executed the contracts as a group in numerous instances, for example—"each operator by executing this contract certifies and represents to the County that the operator is an independent entity . . . and does not share, own, or lease the same with any or . . . to any other operator that is or will execute this contract."

terms were the same as the contracts entered into between Ricky's Towing and Cantu Towing. Accordingly, because T-Miller sufficiently raised a fact issue as to the element challenged, the trial court erred in granting a directed verdict as to its tortious interference with an existing contract claim. Sub-issue one is sustained.

SUB-ISSUE TWO—TORTIOUS INTERFERENCE WITH A PROSPECTIVE BUSINESS RELATIONSHIP

By its second sub-issue, T-Miller further contends the trial court erred in granting a directed verdict as to its claim for tortious interference with prospective business relationships. In response, Ricky's Towing and Cantu Towing contend T-Miller failed to establish it had "(1) a business Relationship that had not yet been reduced to a contract, or, (2) a continuing business relationship that was not formalized by a written contract." Essentially, they contend the existence of T-Miller's contract with Potter County negated its claim.

To establish a claim of tortious interference with a prospective business relationship, a plaintiff must establish (1) a reasonable probability that the plaintiff would have entered into the business relationship, (2) an independently tortious or unlawful act by the defendant that prevented the relationship from occurring, (3) the defendant did such with a conscious desire to prevent the relationship from occurring or knew that the interference was certain or substantially certain to occur, and (4) the plaintiff suffered actual harm or damages as a result of the defendant's interference. *Labor v. Warren*, 268 S.W.3d 273, 278 (Tex. App.—Amarillo 2008, no pet.) (citing *Baty v. ProTech Ins. Agency*, 63 S.W.3d 841, 860 (Tex. App.—Houston [14th Dist.] 2001, pet. denied)).

At trial, Ricky's Towing asserted that, by claiming T-Miller had a towing contract with Potter County, T-Miller expressly negated the first element, i.e., the reasonable probability that T-Miller would have entered into a prospective business relationship *with Potter County*. That T-Miller had a contract with Potter County is of no consequence to this particular cause of action. Ferrill testified that the business relationships T-Miller asserts were interfered with were its prospective business relationships with the owners of vehicles that Potter County required to be towed. T-Miller contends that, in all reasonable probability, it would have entered into those potential business relationships if Ricky's Towing and Cantu Towing had not wrongfully represented themselves as separate entities for the purpose of obtaining two slots on the rotation list. Because T-Miller's contract with Potter County did not prevent T-Miller from asserting an action for tortious interference with prospective business relationships, the trial court erred in granting a directed verdict as to that claim, on that basis. Accordingly, sub-issue two is also sustained.

SUB-ISSUE THREE—BREACH OF CONTRACT

By its third sub-issue, T-Miller asserts the trial court erred in granting a directed verdict on its contract claim because there was sufficient evidence showing it to be a third-party beneficiary of the contracts executed by Potter County with Ricky's Towing and Cantu Towing. In making this argument, T-Miller relies upon the "interrelated clause" found within each contract. T-Miller contends the towing contracts included this clause for the express purpose of benefitting other towing companies on Potter County's rotation list. The "interrelated clause" contained in each contract states, in pertinent part, as follows:

> Participation by any company or individual interrelated to OPERATOR [the contracting towing company] in any direct or indirect manner will not be permitted nor is such interrelated entity or person entitled to enter into a contract to be on the Rotation Log or to respond on behalf of the OPERATOR on the rotation list. Notwithstanding anything in this Contract to the contrary, each OPERATOR by executing this Contract certifies and represents to COUNTY that OPERATOR is an independent entity . . . and does not lease same with or to any other OPERATOR that is or will execute this Contract.

T-Miller contends that by assuring that a single entity did not operate under multiple names and appear more than once on the county's rotation list, the parties to each contract sought to protect or benefit other similarly situated towing companies. In opposition to T-Miller's contention, Ricky's Towing and Cantu Towing contend T-Miller expressly denied that the contracts between Potter County and the various towing companies were intended for the benefit of a third party. Pointing to Ferrill's own testimony, they contend T-Miller conceded that it did not enter into its contract with the county for the benefit of any third party, but did so solely for its own benefit.[3] In the same way, they contend T-Miller also admitted that Ricky's Towing and Cantu Towing did not enter into their respective contracts for the benefit of T-Miller.

A third party may enforce a contract it did not sign when the parties to that contract enter into the agreement with the clear and express intention of directly benefitting the third party. *Tawes v. Barnes*, 340 S.W.3d 419, 425 (Tex. 2011) (citing

[3] Q. When you [T-Miller] entered into that contract, did you enter in the contract with the County to benefit Ricky Cantu?
A. No, sir.
Q. Did you to benefit Katrina—
A. No, sir.
Q. —Kincaid? Did you do it to benefit Cantu Towing?
A. No, sir.
Q. Did you do it to benefit Ricky's Towing?
A. No, Sir.
Q. Did you do it solely for the benefit of T-Miller Wrecking?
A. Yes, sir.

MCI Telecomms. Corp. v. Tex. Utils. Elec. Co., 995 S.W.2d 647, 651 (Tex. 1999)). When the contract confers only an indirect or incidental benefit, a third party cannot enforce the contract. *Id.* *See* Restatement (Second) of Contracts § 315 (1981); 13 Williston on Contracts § 37:19, at 124-25 (4th ed. 2000) ("An incidental beneficiary acquires no right either against the promisor or the promise by virtue of the promise."). Moreover, Texas courts have traditionally maintained a presumption against third-party beneficiary agreements; *Tawes*, 340 S.W.3d at 425, because contracts are presumed to exist solely for the benefit of the parties to the contract. *See MCI*, 995 S.W.2d at 651. Therefore, in the absence of a clear and unequivocal expression of the contracting parties' intent to directly benefit a third party, courts will not confer third-party beneficiary status by implication. *Tawes*, 340 S.W.3d at 425 (citing *MCI*, 995 S.W.2d at 651).

To determine whether Potter County's agreements with Ricky's Towing and Cantu Towing demonstrate a clear and express intent to directly benefit T-Miller, we must interpret the agreements which neither party asserts is ambiguous. The construction of an unambiguous contract is a question of law for the court which we may consider under a *de novo* standard of review. *See Chrysler Ins. Co. v. Greenspoint Dodge of Houston*, *Inc.*, 297 S.W.3d 248, 252 (Tex. 2009). When discerning the contracting parties' intent, we must examine the entire agreement and give effect to each provision so that none is rendered meaningless, *Seagull Energy E&P, Inc. v. Eland Energy, Inc*., 207 S.W.3d 342, 345 (Tex. 2006); while resolving all doubts against conferring third-party beneficiary status. *Tawes*, 340 S.W.3d at 425.

The Potter County contracts with Ricky's Towing and Cantu Towing do not name T-Miller or specifically refer to T-Miller's agreement with Potter County. Instead, the

contracts generally refer to other "Operators" who have entered into contracts with Potter County as a group. Further, the contracts specifically state that their "purpose . . . is to establish minimum acceptable standards and criteria for the provision of wrecker services by OPERATOR'S participating on the COUNTY'S Rotation Log . . . ." They do not state they are for the particular benefit of any one operator. The generalized nature of the "interrelated clause," coupled with Potter County's generalized licensing scheme regarding towing companies lacks the specificity necessary to directly benefit any particular third party. *Tawes*, 340 S.W.3d at 428. *See Brown v. Fullenweider*, 52 S.W.3d 169, 170 (Tex. 2001) (*per curiam*). Any benefit T-Miller derived by way of Potter County's contracts with Ricky's Towing and Cantu Towing was merely incidental and not enough to entitle it to the third-party beneficiary status it seeks. Accordingly, the trial court did not err in directing a verdict on T-Miller's breach of contract claim. T-Miller's third sub-issue is overruled.

CONCLUSION

The trial court's judgment is affirmed as to T-Miller's contract claim, but reversed as to its claims for (1) tortious interference with an existing contract, and (2) tortious interference with prospective business relationships, and this cause is remanded to the trial court for further proceedings consistent with this opinion.

Patrick A. Pirtle
Justice