

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

nPRO, INC., a Washington)	
corporation,)	No. 63949-8-I
Appellant,)	
)	DIVISION ONE
v.)	
)	
CENTRAL PUGET SOUND)	
REGIONAL TRANSIT AUTHORITY,)	UNPUBLISHED OPINION
entity of the State of Washington,)	
)	FILED: August 16, 2010
Respondent.)	
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Becker, J. — Appellant nPro, Inc., subcontracted with KJM & Associates, Inc., to provide diversity tracking and management systems for respondent Central Puget Sound Regional Transit Authority. KJM terminated nPro’s subcontract in October 2002. In October 2008, nPro sued Sound Transit for tortious interference, alleging that Sound Transit actively induced KJM to terminate nPro’s subcontract. The trial court granted summary judgment, dismissing nPro’s claim on the ground that the three year statute of limitations had expired. nPro appeals. We affirm.

We review summary judgment decisions de novo, engaging in the same inquiry as the trial court, assuming facts most favorable to the nonmoving party.

Hartley v. State, 103 Wn.2d 768, 774, 698 P.2d 77 (1985). Summary judgment is appropriate when no issue of material fact exists and the moving party is entitled to relief as a matter of law. CR 56(c). After the moving party adequately demonstrates that it is entitled to judgment as a matter of law, the opposing party must produce evidence of specific facts “that sufficiently rebut the moving party’s contentions and disclose that a genuine issue as to a material fact exists.”

Seven Gables Corp. v. MGM/UA Entertainment Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

The statute of limitations for tortious interference with a contract or business expectancy is three years. RCW 4.16.080(2). The statute of limitations does not begin to run until the cause of action has accrued. RCW 4.16.005. nPro contends a genuine issue of material fact exists as to when the tortious interference cause of action accrued.

“As a general principle, a statutory limitation period commences and a cause of action accrues when a party has the right to seek relief in the courts.”

First Maryland Leasecorp v. Rothstein, 72 Wn. App. 278, 282, 864 P.2d 17 (1993). But where a discovery rule is applied, a cause of action does not accrue until the plaintiff discovers, or in the reasonable exercise of diligence should discover, evidence of all elements of the cause of action. First Maryland, 72 Wn. App. at 284-85. A plaintiff opposing a statute of limitations defense by invoking a discovery rule “bears the burden of proving that the facts constituting the claim were not and could not have been discovered by due diligence within

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the applicable limitations period.” Clare v. Saberhagen Holdings, Inc., 129 Wn. App. 599, 603, 123 P.3d 465, review denied, 155 Wn.2d 1012 (2005).

There are five elements to tortious interference:

- “1. The existence of a valid contractual relationship or business expectancy;
2. That defendants had knowledge of that relationship;
3. An intentional interference inducing or causing a breach or termination of the relationship or expectancy;
4. That defendants interfered for an improper purpose or used improper means; and
5. Resultant Damages.”

Commodore v. Univ. Mech. Contractors, Inc., 120 Wn.2d 120, 137, 839 P.2d 314 (1992), quoting Sintra, Inc. v. City of Seattle, 119 Wn.2d 1, 28, 829 P.2d 765 (1992). Evidence of the third element, the intentional nature of Sound Transit’s interference with nPro’s subcontract, is what nPro contends it did not discover and could not have discovered within three years after KJM terminated nPro’s subcontract.

For a defendant’s conduct to qualify as “intentional” interference as opposed to mere inaction or negligence, the evidence must show that the defendant interfered for the purpose of causing a breach or termination of the contract, not merely as an incidental or indirect result of another act. The breach or termination of the contract need not be the sole purpose or ultimate end of the interferer, but the “essential thing is the purpose to cause the result.” Titus v. Tacoma Smeltermen’s Union Local No. 25, 62 Wn.2d 461, 465, 383 P.2d 504 (1963) (emphasis omitted), quoting Restatement of Torts § 766(d); see Hairston v. Pacific-10 Conference, 893 F. Supp. 1485, 1494 (W.D. Wash. 1994), aff’d, 101 F.3d 1315 (9th Cir. 1996). The history of this dispute shows nPro

knew or should have discovered, within the applicable limitations period, the evidence nPro now intends to use to show intentional interference by Sound Transit.

nPro, formerly known as CpMe, Inc., was a small sole proprietorship directed and owned by Benita Thomas. Before working for Sound Transit as KJM's subcontractor, nPro successfully created monitoring systems for use by King County, the State, and several cities to track participation by disadvantaged businesses in their construction projects. nPro performed similar work for Harborview Medical Center and the Seahawks Stadium development project, among others.

In 1998, Sound Transit hired KJM, a national consulting services company, to provide project management and control services on Sound Transit projects. nPro, having helped design and write KJM's proposal to Sound Transit, immediately subcontracted with KJM. nPro agreed to provide Sound Transit with management and control tools to monitor and report on participation in Sound Transit contracts by women and minority-owned subcontractors. nPro's work was aimed at helping Sound Transit fulfill federal requirements to foster and support disadvantaged businesses as a condition of federal financing.

nPro experienced difficulties working with KJM and Sound Transit throughout the tenure of the subcontract. As early as 1998, nPro began to notice problems working with Sound Transit personnel as well as with KJM. In 2000, nPro's director, Benita Thomas, wrote to Sound Transit's executive

director. She accused Sound Transit of improperly hiring her employee in order to evade paying nPro as a contractor for the employee's work. Thomas unsuccessfully demanded \$88,465 from Sound Transit in compensation for the hire.

In late summer of 2002, Thomas contacted Sound Transit's deputy executive director about alleged harassment of nPro's employee. Thomas told the deputy director that the "staff of KJM continues that their harassment behavior of my employee is guided and directed by staff of Sound Transit." After initially attempting to help resolve nPro's employee's conflict with the KJM supervisor, the deputy director told Thomas that Sound Transit had already inserted itself too much and would no longer intercede.

On September 19, 2002, Thomas filed a complaint against Sound Transit and KJM with the regional civil rights officer for the Federal Transit Administration. Thomas stated that after struggling to resolve issues of discrimination and mistreatment directly with Sound Transit, she filed the complaint out of desperation. She wrote, "the simple fact of the matter is, I cannot keep my company viable as long as KJM, aided and abetted by Sound Transit, persists in its pattern of unethical, predatory, discriminatory and illegal behavior." She alleged that Sound Transit violated its own guiding principles and federal requirements concerning the promotion of disadvantaged businesses. Thomas accused Sound Transit of poaching her employees and the employees of other minority owned businesses. She described the practice

as “the height of unethical behavior.” Thomas alleged Sound Transit was aiding KJM in a pattern of racist and oppressive discrimination against nPro and other African American subcontractors. She alleged Sound Transit’s diversity manager was allowed to “run amok damaging the very persons and businesses for whom he is supposed to be an advocate.” According to the complaint, Sound Transit’s board knew of and condoned all of these practices.

On October 2, 2002, KJM terminated nPro’s contract.

On October 20, 2002, Thomas filed a complaint with the United States Department of Justice Civil Rights Division, alleging discrimination and retaliation by Sound Transit and KJM. She accused Sound Transit’s diversity manager of discrimination against nPro. She claimed nPro’s contract with KJM was terminated as retaliation against her for filing a complaint with the Federal Transit Administration.

On October 22, 2002, Thomas filed a discrimination and retaliation complaint with the United States Equal Employment Opportunity Commission. In this complaint, she alleged that “Sound Transit & KJM (in collusion) have handled my contract recklessly, created a hostile working environment, and have retaliated against me, my staff and firm by ultimately terminating our contract after we filed complaints with an appropriate agency.”

On October 29, 2002, Thomas sent a letter requesting to amend complaints she had filed with several agencies, including with the Federal Transit Administration, the Equal Opportunity Employment Commission, and the

Department of Justice. Her amendment accused Sound Transit and KJM of breach of contract, harassment, intimidation, coercion, extortion, discrimination, retaliation, defamation, and slander. She alleged that Sound Transit's diversity manager "was also a participant in instigating or performing the illegal acts himself."

On October 31, 2002, Thomas wrote to the Federal Transit Administration saying a lawyer had advised her there was "clear and sufficient evidence" showing that Sound Transit's diversity manager had "interfered with my ability to operate my business which is what I have attempted to convey all along. I just did not know the legal term for it."

The record does not show whether any of the administrative complaints itemized above were pursued or resolved.

On November 11, 2002, Thomas wrote to Sound Transit's chief administrative officer. She alleged not only that Sound Transit failed to enforce the requirements of the agency's disadvantaged businesses program, but also that Sound Transit's diversity manager "actively participated in the intimidation, threatening, and coercion tactics employed by KJM." She believed Sound Transit's diversity manager caused KJM to terminate her contract, possibly in order to prevent nPro from publicly disseminating information nPro gathered about Sound Transit's performance:

His behavior toward my firm and me ultimately led to my contract being terminated.

The question is why would this happen. I offer two potential

reasons for consideration:

1. KJM would have had to share a greater percentage of their contract with my firm. . . .
2. The diversity scope Npro was supposed to perform will actually monitor the agency's performance and in order to prevent accurate (audited and verified) information from being reported to the oversight groups (Board, FTA, Community), the best tactic is to "kill the messenger".^[1]

On July 7, 2004, nPro sued KJM—but not Sound Transit—in King County Superior Court for breach of contract, fraud and discrimination, retaliation, misrepresentation, and violation of the Consumer Protection Act, chapter 19.86. The suit was removed to federal court, where it was dismissed with prejudice on October 14, 2005.

Shortly thereafter, while reviewing boxes of documents produced by KJM in the action in federal court, nPro discovered the evidence nPro now claims was its first inkling that Sound Transit had acted intentionally to induce KJM to terminate nPro's subcontract. The evidence included a copy of nPro's complaint against KJM bearing remarks allegedly handwritten by KJM personnel. In nPro's view, the remarks suggested that Sound Transit, not KJM, had been ultimately controlling the decisions about nPro's scope of work and number of staff positions. Another document is an e-mail from Sound Transit's deputy executive director congratulating KJM's president on her "style" in handling personnel matters. The email was sent in September 2002, shortly after KJM's president

¹ Clerk's Papers at 406.

had been dealing with complaints by Benita Thomas related to harassment of her employee by his KJM supervisor.

After an unsuccessful attempt at mediation with Sound Transit, nPro commenced this action on October 1, 2008. Sound Transit moved for summary judgment, presenting the administrative complaints Thomas filed in 2002 as evidence that nPro knew or should have discovered evidence of Sound Transit's intent when the complaints were filed. nPro responded that the administrative complaints, viewed in the light most favorable to nPro, alleged nothing more than Sound Transit's negligent failure to enforce federal regulations to prevent KJM's misconduct. On appeal, nPro continues to maintain it had no reason to suspect Sound Transit was acting intentionally to get KJM to terminate her subcontract. nPro relies on a declaration by Thomas stating that in her personal recollection, the administrative complaints merely alleged Sound Transit's negligence in failing to monitor and intervene in KJM's misconduct toward nPro.

Viewing the record in the light most favorable to nPro, we cannot read the complaints Thomas made to various administrative agencies in 2002 as alleging anything other than active and knowing interference by Sound Transit with nPro's subcontract with KJM. There is no real distinction between the allegations in the complaints and nPro's present allegations. In this action, nPro's complaint alleges that Sound Transit, through its agents, "deliberately and improperly reduced the scope and impeded the performance of nPro with regard to the nPro/KJM contract. As a result, nPro lost business volume to the

point of failure and dissolution.” In her 2002 complaint to the Federal Transit Administration, Thomas alleged that Sound Transit’s diversity manager, with the full knowledge and approval of Sound Transit’s Board, aided and abetted KJM in wrongfully reducing the scope of and impeding her fulfillment of her contract.

nPro argues that the current allegations differ from the earlier administrative complaints because this suit alleges that Sound Transit, “more than merely failing to enforce, actually flouted federal requirements by actively joining in and encouraging the micro-management and eventual abolishment of nPro’s role as a subcontractor and that it did not (and could not) know until much later of Sound Transit’s encouragement of and collusion with the prime contractor’s unfair management.”² Yet in 2002, Thomas alleged to the Equal Employment Opportunity Commission that Sound Transit “in collusion” with KJM improperly mishandled her contract and when she complained, retaliated by terminating it.

Thomas declares her 2002 allegations of improper conduct by Sound Transit’s diversity manager were made without any suspicion he was deliberately trying to impair nPro’s contract as a goal of Sound Transit. Thomas says she merely believed the diversity manager was being rude as a matter of personal style, not as a matter of intentional conduct attributable to Sound Transit. Yet in her letter to Sound Transit on November 11, 2002, Thomas

² Appellant’s Corrected Opening Br. at 3.

accused “Sound Transit staff,” specifically identifying the diversity manager, of using threats, intimidation, and coercion in collaboration with KJM to bring nPro’s subcontract to an end. She characterized this effort by Sound Transit as possibly motivated by a desire to prevent accurate reporting on federal requirements for disadvantaged business participation in Sound Transit contracts. Her accusation can only be read as alleging intentional interference by Sound Transit through its agent. “The discovery rule does not require knowledge of the existence of a legal cause of action.” Reichelt v. Johns-Manville Corp., 107 Wn.2d 761, 769, 733 P.2d 530 (1987). But even so, the letter from Thomas to the Federal Transit Administration on October 31, 2002, acknowledges her awareness that “interference” is the appropriate legal term to describe what Sound Transit’s diversity manager was doing to her business.

Several of the administrative complaints accused Sound Transit of aiding and abetting KJM’s termination of nPro’s subcontract in retaliation for her September 2002 civil rights complaint to the Federal Transit Administration. Retaliation by a principal against a whistle-blowing subcontractor through pressure on the prime contractor to terminate the subcontract constitutes a prima facie cause of action for tortious interference. Awana v. Port of Seattle, 121 Wn. App. 429, 436, 89 P.3d 291 (2004), review denied, 153 Wn.2d 1022 (2005). The complaints by Thomas in 2002 stated she had evidence supporting her allegations that when she reported civil right violations, Sound Transit retaliated by encouraging or assisting KJM to terminate nPro’s subcontract. Such

evidence would have similarly supported a cause of action for tortious interference against Sound Transit within three years after nPro lost its contract.

At a minimum, the allegations in the administrative complaints filed by Thomas put nPro on notice inquiry that Sound Transit's allegedly harmful conduct may have been intentional rather than merely negligent. Under the discovery rule, when a plaintiff knows facts sufficient to prompt a person of average prudence to inquire into the presence or cause of an injury, "he or she is deemed to have notice of all facts that reasonable inquiry would disclose." Mayer v. City of Seattle, 102 Wn. App. 66, 76, 10 P.3d 408 (2000), review denied, 142 Wn.2d 1029 (2001). A reasonably prudent person in nPro's situation would have inquired for evidence of Sound Transit's intent before filing administrative or internal complaints accusing the agency of actively and knowingly interfering with her subcontract.

"Whether a party exercised due diligence is normally a factual issue," but it can be decided as a matter of law where reasonable minds could reach only one conclusion. Clare, 129 Wn. App. at 603. Even if the discovery material nPro reviewed in October 2005 was the first actual evidence nPro obtained of the intentional nature of Sound Transit's interference, nPro could have with due diligence discovered these documents within the applicable limitations period.

In summary, the record does not disclose a genuine issue of fact justifying application of a discovery rule. A reasonable trier of fact could not conclude nPro's claim of tortious interference by Sound Transit accrued any

later than the fall of 2002, when Thomas filed the administrative complaints.

Consistent with that conclusion, we need not address nPro's argument for tolling the statute of limitations on equitable grounds during the period nPro engaged in mediation with Sound Transit concerning this dispute. The mediation process did not begin until 2006, more than three years after the contract was terminated and the statute of limitations expired.

Affirmed.

Becker, J.

WE CONCUR:

Leach, A.C.J.

Schiveller, J.