IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

HAT TRICK PREMIUM, L.L.C.,	)	**No. 28826-9-III**
Appellant,	)	
	)	**Division Three**
v.	)	
	)	
BORTON & SONS, INC.,	)	
	)	**UNPUBLISHED OPINION**
Respondent.	)	
	)	

Siddoway, J. — At issue in this case is whether Hat Trick Premium, LLC, which claims to have sold onions on open account to Borton & Sons, Inc., presented sufficient evidence to avoid summary judgment when faced with a defense motion demonstrating that Borton purchased the onions from, and paid, a different seller. We agree with the trial judge that Hat Trick's conclusory affidavits and its unilaterally issued invoices do not present specific facts demonstrating a genuine issue of material fact. We therefore affirm.

FACTS AND PROCEDURAL BACKGROUND

In February 2009, Hat Trick, an onion grower, filed a complaint against Borton, an

agricultural packer and marketer, alleging that Borton owed it $122,976.20 for unpaid onion purchases. Following discovery, Borton moved for summary judgment on grounds that it had purchased the onions at issue from World Class Trading and owed nothing to Hat Trick. It supported its motion with the declaration of Lindsay Ehlis, an employee in its sales and marketing department, who testified that during the 2005-06 and 2006-07 crop years Borton purchased onions from different entities for resale on the wholesale market, one of which was World Class. Ms. Ehlis testified that Borton's business practice during those years was, upon receiving an order for onions, to call one of the entities from which it purchased onions and arrange a purchase, which it would then document by a purchase order to the seller. She testified that Borton's main contact in doing business with World Class was Rick Shearer.

Ms. Ehlis authenticated a regular business record of Borton's, attached to her declaration, that identified all the onions it purchased in the two crop years at issue; the record indicated that Borton never purchased onions from Hat Trick. She testified that Borton never contacted or contracted with Hat Trick to order onions and that no Borton purchase order was ever issued to Hat Trick. Ms. Ehlis testified that World Class invoiced Borton for all onions purchased from it and that Borton either paid World Class directly for the onions or made payments on instructions from World Class.

Ms. Ehlis acknowledged that Borton eventually received invoices from Hat Trick

duplicating billing for onions Borton had purchased from World Class; those invoices were passed on to World Class, with Borton continuing to rely on World Class for direction on how payment should be made. In only one case, in January 2007, was Borton instructed by World Class to make payment to Hat Trick alone. On two other occasions, in April and June 2007, Borton issued checks payable to both Hat Trick and World Class, again at the instruction of World Class. Ms. Ehlis testified that Borton has paid, in full, for all of the onions that it ordered and purchased.

In response to Borton's motion for summary judgment, Hat Trick submitted the affidavit of Roy Hillman, its former office manager. Mr. Hillman testified that "[a]ll sales of commodities in issue in this case were directly between [Borton] and [Hat Trick]." Clerk's Papers (CP) at 34. But Mr. Hillman did not identify how, when, or by whom any direct sale agreement with Borton was made.

Mr. Hillman testified, "I personally had a number of contacts with [Borton], and there was never any contract of sale on the onions in question to [World Class]." *Id.* But Mr. Hillman did not identify the nature or the subject matter of his "contacts with Borton" or his basis for saying there was never a contract of sale to World Class. Mr. Hillman authenticated invoices to Borton that were attached to his declaration and testified that "[t]he entire amount remains due, owing, and unpaid." CP at 35. The terms indicated on the invoices included "Net 30 [days]" or "Due on receipt." CP at 37-61.

They bore dates from January 26, 2006 to January 15, 2007 and therefore ranged from two to three years old by the time Hat Trick filed suit in February 2009. Mr. Hillman testified that some payments had been made by Borton directly to Hat Trick, as conceded by Borton. He did not contest Borton's explanation that the payments were made in that manner on instruction from World Class.

Mr. Hillman testified that all shipments were directly from Hat Trick to Borton, and testified that "[Borton] knew that the payment for the product was to be paid to [Hat Trick]." CP at 34. He did not state the basis for his assertion that "Borton knew" payment was to be made to Hat Trick, although he asserted that the role of World Class in its dealings with Hat Trick onions delivered to Borton was "solely as a broker, as defined by the Perishable Agricultural Commodities Act [7 U.S.C. §§ 499a-499s (1995) (PACA)]." *Id*. He did not offer any written agreement or testimony demonstrating why Borton would have regarded World Class as acting as a broker rather than as a principal.

Hat Trick also submitted the affidavit of its attorney, who testified that in addition to the lawsuit against Borton, he had filed a lawsuit against World Class and Mr. Shearer, whom he characterized as World Class's owner. His affidavit included the following portion of Mr. Shearer's deposition:

> Q. . . . Did you do business with Borton & Sons?
> A. Yes, I did.
> Q. Did you sell Hatch[1] onions to Borton & Sons?

[1] Mr. Hillman's affidavit identified "the Hatches"; he testified that members of the

A. . . . I did sell to Borton & Sons and I commission-brokered product to Borton & Sons on behalf of Hatch, yes.
Q. Did you have the Hatches bill Borton & Sons? Did they do business with Borton & Sons directly also?
A. They billed Borton & Sons, yes.
Q. Did Borton & Sons pay you?
A. For my product, yes.
Q. Did they pay you for the product they were billed by the Hatches?
A. Not that I'm aware of, no.
Q. So as far as you know, Borton & Sons owes the amounts for which they were billed by the Hatch companies?
A. That's correct, yeah.

CP at 31.

Among Hat Trick's principal arguments in opposing the motion for summary judgment were that World Class was a broker under PACA and had a limited role flowing from that status and that regulations under PACA and custom in the industry dictate that the invoice accompanying produce at the time it is delivered and accepted by a buyer is the controlling contract. It offered no evidence that Hat Trick or World Class were licensed under PACA or that Borton recognized World Class as serving as a broker.

Borton's reply to Hat Trick's opposition included a motion to strike portions of the Hillman declaration that were hearsay, not based on personal knowledge, conclusory factual statements, or legal conclusions. It pointed out that the deposition of Mr. Shearer from which Hat Trick offered testimony was one as to which Borton's attorneys had no

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Hatch family owned Hat Trick and Hamik Farms, LLC, and that he had worked for both companies. CP at 33.

notice and did not attend, since it was taken in a separate action to which Borton was not a party. Borton finally reproduced an interrogatory posed to Hat Trick in which it asked Hat Trick, with respect to each unpaid invoice it sought to collect, to identify the person or persons at Borton who placed the order; to whom the order was given; and the date, participants, and substance of every discussion concerning the order. In response, Hat Trick conceded that the only purported "person at Borton" with whom it ever dealt concerning the onion orders was Mr. Shearer. CP at 25-26.

The record does not reveal the disposition of Borton's motion to strike. Its motion for summary judgment was granted. Hat Trick timely appealed.

ANALYSIS

We review a summary judgment order de novo, viewing the evidence and all reasonable inferences from the evidence in the light most favorable to the nonmoving party. *Schaaf v. Highfield*, 127 Wn.2d 17, 21, 896 P.2d 665 (1995). A moving defendant may meet this initial burden by pointing out that there is an absence of evidence to support the plaintiff's case. If a moving defendant meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225 & n.1, 770 P.2d 182 (1989). The plaintiff must then set forth specific facts demonstrating a genuine issue for trial; summary judgment should be entered if the nonmoving party fails to establish the existence of an element essential

to that party's case. *Id.* Mere allegations or conclusory statements of facts, unsupported by evidence, do not sufficiently establish such a genuine issue. *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989). The nonmoving party "may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value." *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

Hat Trick—Borton dealings. Ms. Ehlis's declaration and Hat Trick's discovery response demonstrate that no Hat Trick employee had any direct communication with a Borton employee offering or accepting an onion purchase contract. Hat Trick attempts to demonstrate a factual dispute requiring trial by pointing to Mr. Hillman's statements that he "personally dealt with [World Class], and representatives of [Borton]"; "[a]ll sales of commodities in issue in this case were directly between [Borton] and [Hat Trick]"; "[p]ayments were made directly to [Hat Trick]. I confirmed that fact with [Borton]"; "[Borton] knew that the payment for the product was to be paid to [Hat Trick]"; and "I personally had a number of contacts with [Borton], and there was never any contract of sale on the onions in question to [World Class]." None of these statements meet the standard for admissible evidence required to defeat a motion for summary judgment. CP at 34.

An affidavit opposing summary judgment must be made on personal knowledge,

set forth such facts as would be admissible in evidence, and show affirmatively that the affiant is competent to testify to the matters stated therein. CR 56(e). The "facts" required by CR 56(e) to defeat a summary judgment are evidentiary in nature. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988). "A fact is an event, an occurrence, or something that exists in reality." *Id.* at 359. It is "what took place, an act, an incident, a reality as distinguished from supposition or opinion." *Id.* Mr. Hillman's affidavit does not meet these requirements. Mr. Hillman offers no names, no dates, no details, and no foundation for what "representatives of Borton" purportedly knew. Conclusory statements of fact are insufficient to raise a question of fact. *Id*. at 359-60. Nor can Hat Trick rely upon sworn legal conclusions such as "there was never any contract of sale . . . to World Class," to create material issues of fact defeating a motion for summary judgment. *Hiskey v. City of Seattle*, 44 Wn. App. 110, 720 P.2d 867 ("An affidavit is to be disregarded to the extent that it contains legal conclusions."), *review denied*, 107 Wn.2d 1001 (1986).

World Class's alleged status as broker. Absent evidence of direct dealings between Hat Trick and Borton, Hat Trick argues it has presented evidence of a contract between Hat Trick and Borton created by World Class, working as a broker. It relies on Mr. Hillman's testimony that "[World Class] . . . was a broker that formerly did business in the Othello and Moses Lake area. Concerning the sales in question, [World Class]

never took possession of any product, and its role was solely as a broker" and that "[a] commission was paid" for World Class's services as a broker. CP at 34. It also relies upon Mr. Shearer's testimony that World Class sold "Hatch onions" to Borton, in some cases directly and in some cases on a commission-brokered basis.

Mr. Shearer's testimony was offered in a deposition taken in a case to which Borton was not a party, so it is not admissible in connection with motion practice in this case under the civil or evidence rules. CR 32(a); ER 804(b)(1). However, while Borton pointed out in resisting summary judgment that its lawyers had no notice or opportunity to participate in Mr. Shearer's deposition, it did not move to strike the testimony. We need not consider whether we should disregard the Shearer testimony even absent a motion to strike, because it is too vague to create a genuine issue of material fact. Mr. Shearer was asked about his sales of Hatch onions to Borton, not Hat Trick onions. Even Mr. Hillman's declaration puts us on notice that the Hatch family does business through other entities. Mr. Shearer also testified that World Class sold Hatch onions to Borton as principal, so his testimony is as consistent with Borton's position on summary judgment as it is with Hat Trick's. Finally, Mr. Shearer does not dispute Borton's factual showing that its verbal contract was with World Class; that it always made payment in accordance with Mr. Shearer's instructions, in most cases to World Class; and that it and World Class exchanged purchase orders and invoices mutually documenting the onion transactions as

World Class-to-Borton sales. It is these facts, not Mr. Shearer's nonspecific characterization of his dealings with "the Hatches" that warrant consideration in determining whether there is any genuine issue as to any material fact.

Federal law and regulation do not support Hat Trick's implication that PACA required payment by Borton to Hat Trick. First, Hat Trick does not present any evidence that World Class was a PACA-licensed broker. Even if it had, PACA regulations recognize that PACA-licensed brokers do business on a variety of terms. The regulations state that "[a] broker is usually engaged by only one of the parties." 7 C.F.R. § 46.27(a) (1997). They further provide that "when there is a specific agreement between the broker and its principal, the seller invoices the broker who, in turn, invoices the buyer, collects, and remits to the seller." *Id.* Even a broker compensated on a commission basis "may negotiate purchases in [its] own name, pay the seller for the produce, make arrangements for its loading and shipment, and bill the buyer direct for the cost price plus the brokerage fee." 7 C.F.R. § 46.27(b) (1997). Accordingly, PACA does not shed light on this dispute other than to confirm that the terms of a contract for sale of agricultural products subject to PACA are those that are offered and agreed in a particular case.

Unilateral invoicing as "conduct of the parties." Finally, Hat Trick argues that under RCW 62A.2-207(3), "[c]onduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do

not otherwise establish a contract," and that in such a situation, the terms of the contract consist of those that the parties objectively agreed to by their conduct. Br. of Appellant at 9 (citing *Tacoma Fixture Co. v. Rudd Co.*, 142 Wn. App. 547, 553, 174 P.3d 721, *review denied*, 164 Wn.2d 1006 (2008)). Hat Trick argues that its issuance of invoices to Borton and the three checks Borton issued in part or in whole to Hat Trick suffice as conduct recognizing the existence of a contract with Hat Trick.

The existence of a contract was not in dispute in *Tacoma Fixture*; the case deals instead with whether additional terms included in a confirmatory invoice became part of the contract. 142 Wn. App. at 551, 554; RCW 62A.2-207(2). The court ultimately held that since the parties in *Tacoma Fixture* had orally formed a contract before the invoice was received, the invoicing party could not unilaterally modify the contract through the addition of terms in its invoices. 142 Wn. App. at 554-55, 557. The court also observed that even under section 2-207(3) of the Uniform Commercial Code (UCC), RCW 62A.2-207(3), dealing with the sufficiency of conduct to establish a contract for sale, the contract consists "only of those terms agreed to by the parties and any supplementary terms provided by the UCC." *Id.* at 555.

If we look in this case to conduct recognizing a contract, we look to the entire history of both parties' dealings. It is undisputed that Hat Trick's unilateral invoices issued to Borton over 13 months were consistently disregarded in favor of the purchase

orders to, and invoices from, World Class—without any record of objection from Hat Trick, notwithstanding that its invoices called for payment on receipt or net 30 days. It was not until 2007 that Borton first made any payment to Hat Trick; when it did, the evidence is undisputed that it was at the instruction of World Class, not in response to a Hat Trick invoice. The conduct that matters under RCW 62A.2-207(3) is "conduct by both parties" recognizing the existence of a contract and "those terms on which [their] writings . . . agree"; in other words, their mutual conduct. Hat Trick's invoices were unilateral, self-serving documents that Borton has demonstrated were not a basis for its conduct.

For the first time on appeal, Hat Trick makes a hearsay objection to Borton's evidence that World Class instructed Borton to pay Hat Trick. We note initially that its objection comes too late. A trial court may not consider inadmissible hearsay when ruling on a motion for summary judgment, *Dunlap v. Wayne*, 105 Wn.2d 529, 535, 716 P.2d 842 (1986); "[h]owever, where no objection or motion to strike is made prior to entry of summary judgment, a party is deemed to waive any deficiency in [an] affidavit." *Smith v. Showalter*, 47 Wn. App. 245, 248, 734 P.2d 928 (1987). Hat Trick did not object to Ms. Ehlis's declaration below. More importantly in this case, the evidence is relevant for the nonhearsay purpose of demonstrating that Borton's conduct in paying Hat Trick in whole or in part on three occasions was actuated by instructions from Mr.

Shearer, not because it received invoices from Hat Trick. We have not considered the evidence for the truth of anything stated or implied in Mr. Shearer's instructions.

Hat Trick rightly contends that disputes about oral contracts are generally not appropriate for summary judgment, citing, *e.g.*, *Duckworth v. Langland*, 95 Wn. App. 1, 7, 988 P.2d 967 (1998), *review denied*, 138 Wn.2d 1002 (1999) and *Crown Plaza Corp. v. Synapse Software Sys., Inc.*, 87 Wn. App. 495, 501, 962 P.2d 824 (1997). In those cases, as in most, resolution of a dispute over the existence of an oral contract turns on the credibility of a witness or witnesses testifying to specific fact-based dealings which, if believed, would establish a contract. *See Duckworth*, 95 Wn. App. at 7; *Crown Plaza*, 87 Wn. App. at 501. Hat Trick did not produce such evidence in this case.

Summary judgment was appropriate. We affirm.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Siddoway, J.

WE CONCUR:

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Kulik, C.J.

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Brown, J.