COURT OF APPEALS
DECISION
DATED AND FILED

October 6, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP1006 **Cir. Ct. No. 2007CV601**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

CALVIN WILLIAMS AND CAROL WILLIAMS,

PLAINTIFFS-APPELLANTS,

V.

ENBRIDGE PIPELINES (LAKEHEAD), LLC P/K/A ENBRIDGE ENERGY COMPANY, INC., ENBRIDGE ENERGY, LIMITED PARTNERSHIP, ENBRIDGE PIPELINES (WISCONSIN), INC. AND ENBRIDGE EMPLOYEE SERVICES, INC.,

DEFENDANTS,

KENT NIKEL,

DEFENDANT-RESPONDENT.

APPEAL from order of the circuit court for Jefferson County: JACQUELINE R. ERWIN, Judge. *Affirmed*.

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 HIGGINBOTHAM, J. Calvin (C.L.) and Carol Williams appeal an order on summary judgment dismissing their claim for tortious interference with contract against Kent Nikel, an employee of Enbridge.[1] The Williamses contend Nikel interfered with a three-year employment agreement they had with Enbridge to perform services for Enbridge on a pipeline construction project. The dispositive issue is whether the Williamses had an enforceable contract or prospective contract with Enbridge. For the reasons that follow, we conclude that the summary judgment record, viewed in a light most favorable to the Williamses, does not support the Williamses' contention that they had an enforceable contract or prospective contract with Enbridge. Accordingly, we affirm.

BACKGROUND

¶2 The following facts are taken from the summary judgment submissions. C.L. Williams has worked as an independent contractor in the oil and gas pipeline industry as a construction manager and chief inspector on pipeline projects. C.L. is married to Carol Williams, who has also worked in the pipeline industry, most often as an office manager.

¶3 Enbridge constructs, owns and operates oil and gas pipelines and related facilities in North America. In 2006, Enbridge was preparing to begin work on Southern Access/Southern Lights, a project to construct and expand a pipeline from Superior through the state of Wisconsin and into Illinois. Enbridge entered into an agreement with McDaniel Technical Services, Inc. (McDaniel),

[1] Nikel was employed by Enbridge Employment Services. We do not distinguish between the several Enbridge companies named in this suit and refer to the Enbridge companies collectively as "Enbridge" throughout. Enbridge is not a party to this appeal. Kent Nikel is the only defendant party in this appeal.

entitled "Construction Inspection Services Agreement" (CIS Agreement), to provide inspection services on the Southern Access/Southern Lights project. According to its terms, the Agreement was to be effective September 29, 2006.

¶4 In April or May 2006, John Miller, a senior construction coordinator for Enbridge, contacted C.L. Williams to ask about his availability and interest in working as chief inspector on the Southern Access/Southern Lights project. C.L. and Miller had several phone conversations about the project during this period. Miller offered C.L. the position of chief inspector during one of these phone conversations. C.L. avers that he and Miller verbally agreed to defer C.L.'s compensation until after October 2006 even though he would begin working prior to that time.

¶5 C.L. avers that in July 2006, Miller asked him to confirm in writing C.L.'s acceptance of employment on the project for a term of three years and to confirm his commitment not to accept other employment during the term of the project. In a July 19 email to Miller, C.L. stated his commitment to fill the position of chief inspector on the project. C.L. also advised Miller in the email that he had identified seven persons who would be working with him on the job, including Carol Williams as office manager. C.L. avers that, with Miller's approval, he began to assemble a team of inspectors, and submitted resumes of prospective inspectors to Miller for Enbridge's approval.

¶6 Kent Nikel, a manager at Enbridge since 1999, had worked with both of the Williamses on a pipeline construction project for Vector Pipeline in Michigan in 2001. On the Vector project, Nikel was the project manager, C.L. was the chief inspector, and Carol was the office manager. Nikel terminated the

Williamses prior to the completion of the Vector project for reasons that are disputed, but which ultimately do not bear on the dispositive issues in this appeal.

¶7 Nikel learned that Enbridge was considering C.L. for a position on the Southern Access/Southern Lights project. According to Nikel, who was not involved with the Southern Access/Southern Lights project, he attempted to communicate to Miller his concerns about C.L., but Miller "refused to listen." In an email to Miller's supervisor entitled "Performance of Construction Coordinator John Miller," Nikel said he was "very disappointed to hear … that John Miller has hired C.L. Williams" because Nikel had had problems with C.L. on the Vector project and C.L. had been "black balled" within Enbridge. Nikel admitted that he was the person in the company who had "black balled" C.L.

¶8 Shortly thereafter, Floyd Mott, the supervising project manager on the Southern Access/Southern Lights project, sent an email to Miller directing him to "proceed without [C.L.'s] team at this time." At Mott's direction, Miller terminated Enbridge's relationship with the Williamses. The reason for Mott's decision not to proceed with the Williamses is in dispute. The Williamses point to Nikel's "black ball" of C.L.; Nikel cites deposition testimony in which Mott asserts his decision was a response to alleged threats C.L. made to take his team elsewhere if Enbridge did not change the start date of the project.

¶9 In 2007, the Williamses sued Enbridge and Kent Nikel, alleging breach of contract, unjust enrichment, quantum meruit and promissory estoppel claims against Enbridge, and tortious interference with contract against Nikel. Enbridge and Nikel each filed motions for summary judgment. On the submissions, the court granted summary judgment to Enbridge on the Williamses' breach of contract and promissory estoppel claims against Enbridge, but denied

summary judgment on the unjust enrichment and quantum meruit claims. The court granted Nikel's motion, dismissing the tortious interference with contract claim against him.

¶10 In an oral ruling, the circuit court concluded that the Williamses could not prevail on a tortious interference claim against Nikel because they did not have a valid contract with Enbridge. The court concluded that the Williamses could not enter into a contract directly with Enbridge under the CIS Agreement, which states that inspectors are not Enbridge employees, and no other documents were incorporated into the CIS Agreement. The court further concluded that, to the extent the Williamses may have had an oral employment agreement with Enbridge, it was contrary to the statute of frauds. The Williamses appeal the circuit court's order dismissing their tortious interference claim against Nikel. Additional facts are set forth as necessary in the discussion section.

DISCUSSION

¶11 We are asked to determine whether the circuit court erred in granting Nikel's motion for summary judgment. We review an order granting a motion for summary judgment independently, applying the same methodology as the circuit court. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315–17, 401 N.W.2d 816 (1987). This methodology has been oft-stated and need not be repeated here. Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).[2] "[W]e draw all reasonable inferences from the evidence in the

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

light most favorable to the non-moving party." ***Burbank Grease Servs., LLC v. Sokolowski***, 2006 WI 103, ¶40, 294 Wis. 2d 274, 717 N.W.2d 781 (citation omitted).

¶12 "The elements of a claim for tortious interference with a contract are: (1) the plaintiff had a current or prospective contractual relationship with a third party; (2) the defendant interfered with that contractual relationship; (3) the interference was intentional; (4) a causal connection exists between the defendant's interference and the plaintiff's damages; and (5) the defendant was not justified or privileged to interfere." ***Wolnak v. Cardiovascular & Thoracic Surgeons of Cent. Wis.***, 2005 WI App 217, ¶14, 287 Wis. 2d 560, 574, 706 N.W.2d 667. A claim of tortious interference that is based on an alleged prospective contractual relationship requires proof that there was a "reasonable probability" that the plaintiff and the defendant would have entered into a contractual relationship. ***Leonard Duckworth, Inc. v. Michael L. Field & Co.***, 516 F.2d 952, 956 (5th Cir. 1975).

¶13 The parties' arguments focus on the first element of the claim of tortious interference, namely, whether the submissions, when viewed in a light most favorable to the Williamses, show that they had contractual relationships with Enbridge.[3] The Williamses argue that the submissions show that C.L. had an agreement with Enbridge to be the chief inspector on the Southern Access/Southern Lights project, which began as an oral agreement with Miller,

[3] The parties also make arguments about whether the submissions show the existence of genuine issues of material fact regarding the remaining four elements of the Williamses' tortious interference claim. Because our conclusion that the record fails to support the Williamses allegations that they had a viable and enforceable contract or prospective contract with Enbridge is dispositive, we need not address these additional arguments.

acting on Enbridge's behalf, and was later memorialized in writing by the July 19 email. This email states, in relevant part:

> Subject: C.L. WILLIAMS – SOUTHERN ACCESS PROJECT – STAGES 1, 2 & 3
>
> John:
>
> This will confirm, per your request, my commitment to fill the position of Chief Inspector, (as assigned), for the Southern Access Project and subsequent projects currently contained in phase 2 and phase 3.
>
> It is my understanding that you wish to have me on the payroll 15 October 2006 to perform work as assigned, until February 2007, at which time I will assume responsibility for spread 2 … and stage 3, … with an estimated date of completion of December 2009.
>
> I understand that the rates you quoted me are proposed to Enbridge management and may be modified, but in general, represent your intent.
>
> Please be advised that the following people will fill the key positions on any spread assignment I have.
>
> ….
>
> Carol Williams Office Manager
>
> [Listing six additional persons for various positions]
>
> Please take those steps necessary to have all inspectors working on my spread come through Gulf Interstate.
>
> ….
>
> I appreciate this opportunity and look forward to a successful project.
>
> Personal Regards,
>
> C.L. Williams

The Williamses also maintain that Carol had an oral contract with Enbridge to be the office manager. The Williamses argue in the alternative that, if they did not

have valid employment contracts with Enbridge, they each had prospective contracts with the pipeline company.

¶14 Nikel argues that the Williamses did not have contracts with Enbridge because: Miller and C.L. never intended to form a contract because both knew that C.L. and Carol would be employed by a third-party service provider like McDaniel; Miller and C.L. never agreed upon an essential term of C.L.'s employment, compensation; and Carol's alleged contract was dependent on C.L. having a valid contract with Enbridge, and he did not have one. Nikel further contends that the Williamses forfeited any claim based on interference with a *prospective* contractual relationship by failing to allege in their pleadings or to argue in the trial court the existence of a prospective contractual relationship. In response, the Williamses assert they pled and argued they had a prospective contract with Enbridge and therefore they did not forfeit this claim.

¶15 We conclude that the submissions, read in a light most favorable to the Williamses, fail to show that either C.L. or Carol could have had or ever would have had a contractual relationship with Enbridge. The record shows that, if the Williamses had employment contracts, they would have been with a third-party provider such as McDaniel who would have supplied inspection services to Enbridge on the project. In the following deposition testimony, C.L. acknowledged that he knew that he would be employed by a third-party service provider, and not Enbridge, just as he had been on previous projects:

> Q: … [The inspectors] have to go through some service provider, right?
>
> A: Yes, sir.
>
> Q: And that's true for all the inspectors, they're not going to be hired directly by Enbridge, they're going to be hired by a third party service provider, correct?

> A: Yes, sir.
>
> Q: Just as you have been on all of the projects [C.L. had previously worked on that] we talked about earlier?
>
> A: Yes, sir.
>
> Q: And the same would be true for chief inspectors, true?
>
> A: Yes, sir.
>
> Q: In other words, you expected that you would actually [have] been employed by … [a] third party service provider, correct?
>
> A: That's correct.
>
> Q: So then ultimately, notwithstanding the statements in [the July 19 email], you were going to enter into a contract or an employment arrangement with some third party service provider?
>
> A: For this Enbridge project?
>
> Q: Yes.
>
> A: I would have done that, that would have—yes.

¶16 Carol also acknowledged that she was aware that her employment contract would have been with McDaniel. In her answer to interrogatories, Carol asserted that she "believe[d] the terms of [her employment] contract were reduced to writing with Jerry McDaniel" of third-party provider McDaniel, but that she had "not been able to locate this document at this time." When asked about this response in her deposition, Carol acknowledged that McDaniel had a contractual relationship with Enbridge to provide inspection services.

¶17 That the Williamses were to have employment contracts with a third party and not with Enbridge is further demonstrated by a hand-written note from McDaniel setting forth C.L.'s compensation on the project, and by the CIS Agreement between Enbridge and McDaniel. The handwritten note, which was

prepared and initialed by Jerry McDaniel and given to the Williamses, states that C.L.'s daily rate of pay was to be "$600/Day (Agmnt. w/C.L. Williams)," and is the only writing in the record that discloses C.L.'s pay rate. The CIS Agreement, although not in effect during the time Miller offered to hire C.L., also supports the Williamses' understanding that the industry practice was for inspectors and other pipeline workers to contract with a third-party service provider such as McDaniel. The agreement states that all inspectors are to be employed by McDaniel "and shall not, for any reason, be considered an employee of Enbridge." While the CIS Agreement itself could not have barred the Williamses from contracting directly with Enbridge to provide inspection services—it did not take effect until September 26, several days after the Williamses were informed that their services were not wanted on the project[4]—its language is consistent with the Williamses' understanding that they would have been employed by a third party service provider and not Enbridge.[5]

¶18 Finally, even the July 19 email that the Williamses hold up as a written contract with Enbridge recognizes that "all inspectors" on the project would be employed by a third party service provider. After listing the seven persons he had identified to fill key positions on his team, C.L. requests: "Please take those steps necessary to have all inspectors working on my spread come

[4] For this reason, we reject Nikel's argument that the terms of the CIS Agreement barred the Williamses from contracting directly with Enbridge.

[5] We observe that the Williamses did not allege in their amended complaint or argue to the trial court that they had employment contracts with McDaniel. The first time the Williamses argue the existence of a contract or prospective contract with McDaniel is in their reply brief on appeal. We decline to address this argument. ***Schaeffer v. State Pers. Comm'n,*** 150 Wis. 2d 132, 143-44, 441 N.W.2d 292 (Ct. App. 1989) (appellate court does not consider arguments raised for the first time in a reply brief).

through Gulf Interstate." As C.L. explained in his deposition, Gulf Interstate is the third party inspection service provider he initially expected to be employed by on the project.

¶19 Contrary to the acknowledgements above that they would be employed by a third party provider, C.L. and Carol maintain in their affidavits that they believed they had employment contracts with Enbridge. C.L. rests his belief on discussions he had with Miller, referenced above, and on the handwritten note from McDaniel explaining C.L.'s compensation package. Carol's belief that she had an employment contract with Enbridge is based on her discussions with C.L. about his conversations with Miller, the note from McDaniel establishing her compensation package, and C.L.'s oral offer of employment to her.

¶20 Setting aside for the moment the apparent contradiction between the Williamses' averments and their prior deposition testimony, we conclude these averments are insufficient to raise a genuine issue of material fact.[6] Regardless whether Miller had the authority to hire them, which the undisputed facts show that he did, their employment contract was to be with a third party service provider, here McDaniel. Based on C. L.'s own testimony about the pipeline industry, the only entity with which the Williamses could have had an employment contract for inspection services was McDaniel. Indeed, C.L. spends twenty paragraphs in his affidavit explaining the relationship between a pipeline

[6] We observe that C.L.'s and Carol's affidavits directly contradict their prior deposition testimony that they would be contracting with a third party service provider such as McDaniel and not Enbridge. "An affidavit that directly contradicts prior deposition testimony is generally insufficient to create a genuine issue of fact for trial," in the absence of an adequate explanation. ***Yahnke v. Carson***, 2000 WI 74, ¶21, 236 Wis. 2d 257, 613 N.W.2d 102. Here, the Williamses make no attempt to provide an explanation for the contradictions between their deposition testimony and their affidavits.

company (Enbridge), pipeline inspectors and their support staff (C.L. and Carol), and a third party service provider (McDaniel). Ultimately, C. L.'s own averments show that his employment contract was to be with a third party service provider like McDaniel. C.L. averred:

> Service providers enter into a contract with the pipeline company to staff inspectors for a project and to provide administrative and payroll services for the inspectors on the pipeline company's construction job. This contract provides that all final decisions on hiring and firing of the inspectors are the pipeline company's.

¶21 So, even accepting at face value the Williamses' assertions in their affidavits that they had employment agreements with Enbridge, these are merely statements of belief without factual foundation in the record. Accordingly, they do not create a triable issue about whether they had contracts with Enbridge.

¶22 From the above evidence, it is undisputed that the Williamses did not have a contract with Enbridge to work on the pipeline project. And because the evidence shows that the Williamses understood that McDaniel or some other third party service provider would be the entity with which they would contract for employment, their argument that they had a prospective contract *with Enbridge* with which Nikel tortiously interfered also fails.

¶23 There is an alternative reason for why the Williamses could not have had employment contracts with Enbridge, which is that any such agreements, which were to be for three years, would have also been barred by the statute of frauds. *See* WIS. STAT. § 241.02(1)(a).[7]

[7] WISCONSIN STAT. § 241.02(1)(a) states: "In the following case every agreement shall be void unless such agreement … expressing the consideration, be in writing and subscribed by (continued)

¶24 As to Carol, the Williamses do not even contend that she had a written agreement that would satisfy the statute of frauds. According to the Williamses, Carol had an oral agreement; Miller told C.L. that he could hire Carol, C.L. offered the position to Carol, and C.L. informed Miller that Carol had accepted the offer. As to C.L., the July 19 email does not constitute a valid employment contract with Enbridge. While courts have determined that email meets the writing and signature standards of the statute of frauds, *see* ***Cloud Corp. v. Hasbro, Inc.***, 314 F.3d 289, 295-96 (7th Cir. 2002), the record does not show that Miller or any other Enbridge representative replied to C.L.'s email to indicate written acceptance. *See* ***NBZ, Inc. v. Pilarski***, 185 Wis. 2d 827, 837, 520 N.W.2d 93 (Ct. App. 1994) (acceptance is a necessary element of an enforceable contract).

¶25 Acknowledging that the July 19 email lacks acceptance, the Williamses point to the CIS Agreement, which bears an Enbridge signature, and argue that the July 19 email incorporates the CIS Agreement. However, as the trial court noted, the CIS Agreement does not reference the July 19 email; it lacks an integration clause. Moreover, as we have noted, the CIS Agreement was executed in late September after the Williamses were informed that they were not wanted on the project and therefore was not in effect at the time of the July 19 email. Thus, the Williamses' reliance on the Agreement to fulfill the signature requirement of the statute of frauds is misplaced.

¶26 Finally, Nikel correctly observes an essential term of the contract, compensation, is not disclosed in the email. As noted above, compensation terms

---

the party charged therewith: (a) Every agreement that by its terms is not to be performed within one year from the making thereof."

are disclosed only in a hand-written note from a representative of the third party provider McDaniel, and this note does not reference the July 19 email. *See* ***Hugh Symons Group, plc v. Motorola, Inc.***, 292 F.3d 466, 470 (5th Cir. 2002) (email that failed to set terms of alleged agreement was insufficient under the statute of frauds); ***Central Ill. Light Co. v. Consolidation Coal Co.***, 235 F. Supp. 2d 916, 921-22 (C. D. Ill. 2002) (email evincing agreement on some but not all essential terms was not a valid contract).

¶27 In sum, we conclude that the court properly dismissed the Williamses' tortious interference with contract claim against Nikel on summary judgment because the submissions, viewed in a light most favorable to the Williamses, do not show that the Williamses had a contractual relationship or a prospective contractual relationship with Enbridge. Accordingly, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.