STATE OF MICHIGAN

COURT OF APPEALS

R. A. VANDEVELDE & ASSOCIATES, INC., a Michigan corporation.

Plaintiff-Counter Defendant-Appellant,

v

S/G INDUSTRIES, LTD., a foreign corporation,

Defendant-Counter Plaintiff-Appellee,

and

GUIDO MARASCO and CIDAR, INC., a Michigan corporation, jointly and severally,

Defendant-Appellees.

UNPUBLISHED
October 8, 1996

No. 163637
LC No. 89 005177 CK

Before: Reilly P.J., and Young, and C.L. Bosman,* JJ.

PER CURIAM.

Plaintiff R. A. Vandevelde & Associates, Inc. (RAVA) appeals as of right a bench trial judgment finding of no cause of action in favor of defendants S/G Industries, Inc., Guido Marasco and Cider, Inc. and no cause of action on S/G's counterclaim against RAVA. We affirm.

RAVA is a manufacturer's representative organization that provides sales representation for various automotive parts suppliers. Guido became affiliated with RAVA in 1981. The nature of this relationship is one of the many subjects of dispute. According to Guido, his arrangement with RAVA allowed him to service the account of his former employer, Altair Corporation, as an independent contractor, and continue acting as an independent manufacturer's representative for other principals whose business did not conflict with the business of any RAVA principals. Richard Vandevelde, the

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* Circuit judge, sitting on the Court of Appeals by assignment.

president and sole shareholder of RAVA, denied agreeing to allow Guido to represent principals outside of his association with RAVA.

Guido's son, Barry Marasco, worked for RAVA between 1984 and 1986. RAVA paid Barry and Guido through Cidar, Inc., a closely held corporation. Although in 1983, Guido executed a document entitled "Bill of Sale" in which Guido purported to sell all of his stock and interest in Cidar to Barry, no other formal action was taken to transfer the stock from Guido to Barry. Nonetheless, Guido and Barry testified that they believed that Barry was the owner of Cidar after 1983.

S/G is the United States sales and marketing arm of Silitek Corporation, a Taiwanese manufacturer of products for automotive application. In 1985, RAVA contracted to provide sales representation in Michigan for S/G rubber division products in exchange for a commission of five percent of net product sales. Guido represented S/G through his association with RAVA. Vandevelde testified that it was his belief that RAVA was representing S/G with respect to all of its products by January, 1987. However, S/G's president and fifty percent owner, Gerald Symeon, testified that in January, 1987, he contacted Barry to represent S/G with respect to non-rubber parts. Barry was no longer employed by RAVA at that time. RAVA contends that Guido, rather than Barry, began secretly representing S/G's non-rubber products while Guido was employed by RAVA and that such representation constituted a breach of fiduciary duties.

On October 12, 1987, S/G sent RAVA a letter and proposed "addendum" to the July 1, 1985 representative agreement. The cover letter referred to the fact that the present agreement extended only to rubber products. The addendum purported to modify the representative agreement by reducing RAVA's sales territory to the eastern Michigan area only and to products sold only to Ford Motor Company. Symeon sent a signed copy to RAVA and requested that RAVA sign the addendum and return it. Upon receipt of the proposed addendum, Vandevelde added a paragraph specifying that RAVA was to receive credit on "all Ford Motor parts" whether sold to Ford directly or indirectly through Altair. Vandevelde signed the addendum and returned it to Symeon for his signature. When Symeon received the modified addendum, he inserted the word "rubber" in the added paragraph before signing. Symeon returned a fully executed copy to Vandevelde, who testified that he received it and filed it away, not realizing that the word "rubber" had been added.

On March 4, 1988, S/G sent RAVA a certified letter notifying RAVA that it was terminating the July 1, 1985 representative agreement. The letter proposed that RAVA could continue to provide representation limited to rubber parts sold to Ford indirectly through Altair. A new proposed agreement to this effect was enclosed. Vandevelde testified that he did not understand the March 4 letter. He sent a letter dated March 15, 1988 requesting S/G re-evaluate the situation and explain its proposal more fully. S/G did not respond to this letter. Vandevelde testified that RAVA continued to represent S/G after March 4, 1988, because he believed the representative agreement was still in effect.

Symeon testified that he considered the contract between RAVA and S/G terminated as of April 3, 1988, thirty days after the March 4, 1988 notice, in accordance with the terms of representative agreement. S/G subsequently retained Cidar to be its representative for rubber products.

Barry testified that he began representing S/G through Cidar beginning in March, 1988, after Symeon informed him that the contract with RAVA had been terminated. Guido admitted that after April, 1988, and while he was still employed by RAVA, he was involved in representing S/G products through Cidar with Barry.

On December 27, 1989, RAVA filed suit against S/G to recover commissions allegedly owed by S/G under the terms of the representative agreement.. RAVA subsequently amended its complaint to add Guido and Cidar as defendants and to add additional counts of breach of contract, quantum meruit, breach of fiduciary duty, tortious interference with contractual relations, tortious interference with business relations and expectations, unjust enrichment and conspiracy. Following a bench trial, the court entered a judgment of no cause of action in favor of each of the defendants.

The court did not clearly err in finding that Guido's relationship with RAVA was that of an independent contractor, rather than an employee. RAVA argues that Guido should be considered an employee because his oral contract prohibited him from representing any principals other than through RAVA, and because his employment was not for a specific piece of work. However, conflicting testimony was presented regarding the nature and scope of Guido's relationship with RAVA. Although RAVA asserts that it controlled Guido's work, it has not identified any evidence indicating that it controlled the means by which Guido conducted his work. *Stratton v Maine*, 336 Mich 163, 167; 57 NW2d 480 (1953). The record suggests that although Guido was hired to market and sell parts, the means by which he achieved this objective were primarily up to him.

RAVA argues that as agents, Guido and the corporation, Cider, owed RAVA fiduciary duties of good faith and loyalty and violated these duties by secretly representing principals other than through RAVA, and by secretly representing S/G, and receiving commissions from S/G with respect to non-rubber parts after January, 1987, and with respect to all parts after March, 1988. We disagree.

With respect to RAVA's contention concerning Guido's representation of principals other than through RAVA, the fiduciary duties of an agent are to a large extent based on the nature and scope of the agency relationship. See 3 Am Jur 2d, Agency, § 230, p 731, ("there is no violation of the agent's duty if the principal understands that the agent is to compete") and Restatement Agency, 2d, § 394, comment b ("The agent commits no breach of duty by acting for competitors if, at the time of his employment, the principals have reason to know that the agent believes that he is privileged to do so.") Although there was conflicting evidence whether Guido's agreement with RAVA allowed him to represent principals other than through RAVA, we are not persuaded the court's finding that RAVA knew that Guido was representing other principals was clearly erroneous.

RAVA's arguments concerning the alleged breach of fiduciary duties relative to the S/G account are premised on the following factual assertions: (1) that the contractual relationship between RAVA and S/G included both rubber and non-rubber parts; (2) that in January, 1987, Guido began secretly representing S/G with respect to non-rubber products; and (3) that the representative agreement between S/G and RAVA continued past March, 1988, until November, 1989. However, each of these

factual assertions was rejected by the court, and we are not persuaded that its findings were clearly erroneous.

RAVA also contends that the trial court clearly erred in finding that RAVA did not have either an express oral contract or an implied contract for representation of S/G's non-rubber parts. We disagree.

A basic requirement of contract formation is that the parties mutually assent to be bound. *Rood v General Dynamics Corp*, 444 Mich 107, 118; 507 NW2d 591 (1993). Whether there is mutuality of assent is determined by an objective standard, looking to all of the relevant circumstances surrounding the transaction, including all writings, oral statements, and other conduct by which the parties manifested their assent. *Id*. at 119. In this case, the written agreement of the parties stated that RAVA's representation was limited to S/G's rubber division products. The agreement also stated that all amendments were required to be in writing. The evidence indicates that S/G assented, if at all, to RAVA's representation only with respect to a few select non-rubber products, which did not result in any business for S/G. Such evidence does not show that S/G assented to have RAVA as its representative for all non-rubber products. The absence of mutual assent also defeats RAVA's argument that there was an implied contract. A contract, whether based on an express agreement or implied from the circumstances, requires mutual assent. *Lowery v Dep't of Corrections*, 146 Mich App 342, 359; 380 NW2d 99 (1985); *Rood, supra* at 117 n 17.

RAVA contends that the trial court clearly erred in finding that the correspondence of March 4, 1988 terminated that representative agreement between RAVA and S/G. We disagree. The letter stated:

> By receipt of this memo, this is formal notification of effective termination of our Representative Agreement dated March 3, 1988. As per the terms and conditions for termination of this initial agreement as stated in the agreement, we will comply with commission payments for product shipments as they occur.

We agree with the court that , despite the error in the stated date of the representative agreement, the phrase "this is formal notification of effective termination" of the agreement is clear and unambiguous. Contrary to RAVA's assertions, the enclosure of a new, proposed representative agreement in conjunction with the termination language above bolsters the court's conclusion that the correspondence as a whole clearly established S/G's intent to terminate the representative agreement.

RAVA asserts that the court did not separately address its claims of tortious interference with business relationship and tortious interference with contractual relationships. Tortious interference with a contractual relationship requires proof of a breach of contract. *Admiral Ins Co v Columbia Casualty Ins Co*, 194 Mich App 300, 312; 486 NW2d 351 (1992). RAVA appears to take the position that Guido breached his contract with RAVA by his alleged representation of S/G for non-rubber parts after 1987. However, the court found that RAVA's representation of S/G did not extend to non-rubber parts and that Barry represented S/G with respect to non-rubber parts. As discussed earlier, we are

not persuaded these findings are clearly erroneous. With respect to the contractual relations between RAVA and S/G, S/G's securing of independent representation for its non-rubber parts and termination of the representative agreement did not constitute breaches of contract. Therefore, RAVA has not demonstrated a breach of contract as necessary for tortious interference with contractual relations. As for RAVA's intentional interference with business relations, the court found that Guido and S/G each terminated their relationship with RAVA for legitimate business reasons independent of the influence of the other. We are not persuaded that these findings are clearly erroneous, nor that the court's discussion of the issues inadequately failed to distinguish between the two torts. Because RAVA did not establish that defendants committed a separate, actionable tort, the court did not err in finding no cause of action on RAVA's conspiracy claim. *Early Detection Center, PC v New York Life Ins Co*, 157 Mich App 618, 632; 403 NW2d 830 (1986).

Finally, because of our conclusions with respect to the previous issues, we need not address RAVA's claim that the case should be reassigned to a different judge in the event of a remand.

Affirmed.

/s/ Maureen Pulte Reilly
/s/ Robert P. Young, Jr.
/s/ Calvin L. Bosman