

STATE OF MICHIGAN
COURT OF APPEALS

MAGO CONSTRUCTION COMPANY,

Plaintiff-Appellant,

v

ANDERSON, ECKSTEIN & WESTRICK, INC.,

Defendant-Appellee

and

CITY OF EASTPOINTE,

Defendant.

UNPUBLISHED
November 8, 1996

No. 183479
LC No. 94-002542

Before: Michael J. Kelly, P.J., and Hood and H.D. Soet, * JJ.

PER CURIAM.

Plaintiff appeals of right from the circuit court order granting the motion for summary disposition of defendant Anderson, Eckstein & Westrick, Inc., (hereinafter “defendant”) pursuant to MCR 2.116(C)(10). We affirm.

Defendant is a corporation of professional consulting engineers that was hired by the City of Eastpointe to prepare plans and specifications for construction of the City’s water main improvement project. Defendant supervised the bidding on the project. Plaintiff submitted the lowest bid for the water main project, but it was subsequently discovered that plaintiff’s bid was not in conformance with defendant’s bidding instructions. Specifically, plaintiff had submitted a bond issued by a company that was not listed in the U.S. Department Circular Number 570, nor rated by A.M. Best’s Key Rating Guide. Therefore, defendant rescinded its recommendation in favor of plaintiff and urged the City to accept the second-lowest bid. Defendant informed the City’s attorney that the second-lowest bidder’s bid met “the bid instructions in regard to its financial rating and service rating as per A.M. Best’s Key Rating Guide,” which was not true. The city attorney and defendant then counseled the City to accept

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

Aielli's bid. Plaintiff's attorney subsequently informed the City that none of the bidders met the bidding requirements, and urged it to accept plaintiff's lowest bid. The city council, by unanimous vote held at a meeting attended by plaintiff's representatives, voted to award the water main improvement contract to Aielli. However, Aielli, as well as all the other bidders on the project, had also submitted a nonconforming surety bond.

Plaintiff instituted this action for tortious interference with business relations, negligence, fraudulent misrepresentation, and civil conspiracy against defendant. The trial court granted defendant's motion for summary disposition, thereby dismissing plaintiff's claims. This appeal of right followed.

MCR 2.116(C)(10) permits summary disposition when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." This Court considers the factual support for the claim, giving the benefit of any reasonable doubt to the nonmoving party to determine whether a record might be developed which might leave open an issue upon which reasonable minds could differ. *Jackhill Oil Co v Powell Production, Inc*, 210 Mich App 114, 117; 532 NW2d 866 (1995). When deciding a motion for summary disposition, a court must consider the pleadings, depositions, affidavits, admissions and other documentary evidence available to it. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). The grant of summary disposition pursuant to MCR 2.116(C)(10) is reviewed de novo. *Jackhill, supra*.

Plaintiff first argues that the trial court erred in granting defendant's motion for summary disposition as to its claim for tortious interference with advantageous business relations. The elements of a claim for tortious interference with a business relationship are (1) the existence of a valid business relation or expectancy, (2) knowledge of the relationship or expectancy on the part of the interferer, (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy, and (4) resultant damage to the party whose relationship has been disrupted. *Lakeshore Community Hospital, Inc v Perry*, 212 Mich App 396, 401; 538 NW2d 24 (1995). The plaintiff must be able to prove that the interferer acted illegally, unethically, or fraudulently. *Dolenga v Aetna Casualty & Surety Co*, 185 Mich App 620, 626; 463 NW2d 179 (1990).

Giving plaintiff the benefit of all reasonable doubt, plaintiff has not succeeded in raising genuine issues of material fact regarding its intentional interference claim. First, plaintiff failed to support its allegation that defendant induced or caused the City to award the water main contract to Aielli. Although defendant supplied the City with false information regarding the qualification of Aielli's surety company, there is no indication that the City acted in accordance with this information when it made the final decision to award the contract to Aielli. Indeed, the evidence shows that the City was aware of the problem with Aielli's surety company when it made its decision; hence, there is no indication that defendant's "false" information induced the City to reject plaintiff's bid.

Additionally, plaintiff has failed to produce evidence to support its assertion that it had a legitimate expectation of receiving the water main improvement contract. While plaintiff need not allege the existence of a valid contract in order to establish intentional interference with a business relationship,

Woody v Tamer, 158 Mich App 764, 777; 405 NW2d 213 (1987), it must show that its business expectancy was a reasonable likelihood or possibility, not mere wishful thinking. *Trepel v Pontiac Osteopathic Hospital*, 135 Mich App 361, 377; 354 NW2d 341 (1984). Where the ultimate decision to enter into a business relationship is a highly discretionary decision reposed within the structure of a governmental entity, it becomes more difficult for a plaintiff to prove that it had an expectancy of doing business with the governmental body. *Id.*, 380. Here, the fact that Aielli was awarded the contract at a city council meeting after all interested parties were given a chance to be heard supports the view that the award of the contract was a highly discretionary governmental activity in which “too many factors [were] in play to be able to reasonably infer that . . . plaintiff would have obtained the desired advantage.” *Id.* Moreover, the bidding instructions clearly informed plaintiff that the lowest bidder was not guaranteed to receive the water main improvement contract. Lastly, the fact that plaintiff submitted a nonconforming bid should have negated any expectation that it might have had regarding the possibility of receiving the contract. Accordingly, we hold that the trial court did not err as a matter of law in granting defendant’s motion and dismissing plaintiff’s claim for intentional interference with a business relationship.

Next, plaintiff argues that the trial court erred in granting summary disposition as to its negligence claim. To establish a prima facie case of negligence, a plaintiff must establish the following elements: (1) a duty owed by the defendants to the plaintiff; (2) a breach of that duty; (3) causation; and (4) damages. *Lawrenchuk v Riverside Arena, Inc*, 214 Mich 431, 432; 542 NW2d 612 (1995). A contractor may maintain a negligence action against an engineer for its failure to make proper calculations and specifications for a construction job that creates a risk of harm to a third party. *Bacco Const Co v American Colloid Co*, 148 Mich App 397, 416; 384 NW2d 427 (1986); see also *National Sand, Inc v Nagel Const, Inc*, 182 Mich App 327, 331; 451 NW2d 618 (1990). Where a plaintiff fails to establish a causal link between its damages and any negligence on the part of the defendant, summary disposition pursuant to MCR 2.116(C)(10) is proper. *Pete v Iron County*, 192 Mich App 687, 689; 481 NW2d 731 (1992).

Giving plaintiff the benefit of any reasonable doubt, we find that plaintiff failed to produce evidence to show that, more likely than not, but for defendant’s actions plaintiff would have been awarded the water main improvement contract. See *Hasselbach v TG Canton, Inc*, 209 Mich App 475, 483; 531 NW2d 715 (1995). Plaintiff alleges that defendant negligently formulated the bidding instructions because no bidder’s surety company could meet the financial rating requirements set forth in the bidding instructions. However, not only did plaintiff’s surety company fail to meet the financial and service rating requirements of the bidding specifications, it was not even listed on the treasury circular. Aielli’s surety company was listed on the treasury circular, although, like plaintiff’s surety company, it failed to meet the A.M. Best’s financial rating requirement. Hence, while plaintiff emphasizes evidence which suggests that defendant’s financial rating requirement was unduly restrictive and argues that, because no bidder’s surety could have met the financial rating requirement, defendant was under an obligation to treat all bidders equally and recommend that the lowest bidder receive the contract, the fact that Aielli’s surety company was listed on the treasury circular, and plaintiff’s was not, belies plaintiff’s argument that all of the bids were equally nonconforming. Notwithstanding the allegedly ineffective financial rating requirement, plaintiff’s bid was doubly unqualified in light of the unfulfilled

treasury circular requirement. Hence, plaintiff failed to show that, in the absence of the rating requirement, the City would have awarded it the water main improvement contract over Aielli.

No additional evidence supports plaintiff's assertion that the City would have awarded it the water main contract but for defendant's negligent actions. The City reserved the right to accept any bid. The city council did not purport to rely on defendant's recommendation when it accepted Aielli's bid, but instead followed the advice of the city attorney. No evidence supports the assertion that the City would have awarded plaintiff the water main improvement contract but for defendant's negligent actions. Indeed, since the decision to award the contract was ultimately made pursuant to a vote of the city council, it is not possible to determine why Aielli, and not plaintiff, was awarded the project. Accordingly, the trial court did not err in granting defendant's motion for summary disposition and dismissing plaintiff's negligence claim.

Affirmed.

/s/ Michael J. Kelly

/s/ Harold Hood

/s/ H. David Soet