STATE OF MICHIGAN

COURT OF APPEALS

AJAX PAVING INDUSTRIES, INC., for the Benefit of the Treasurer of the Jackson County Board of Road commissioners and AJAX PAVING INDUSTRIES, INC., individually,

Plaintiffs-Appellees,

v

ROBERT ZENZ,

Defendant-Appellant,

and

ELWIN JOHNSON, CARL SCHMIDT, and the JACKSON COUNTY ROAD COMMISSION,

Defendants.

UNPUBLISHED
December 20, 1996

No. 186766
Jackson County
LC No. 93-65486-CZ

Before: Sawyer, P.J., and Markman and H. A. Kolselka,* JJ.

PER CURIAM.

Defendant Robert Zenz is a commissioner on the Jackson County Road Commission and was sued for tortious interference with a business relationship and conspiracy arising out of the Commission's actions in awarding business under a county asphalt contract. Despite being the low bidder, plaintiff was denied the contract allegedly in response to a 1990 lawsuit which he had filed against the Commission. A jury verdict assessed damages against defendant in favor of plaintiff in the amount of $57,217.34. Defendant appeals by right. We affirm.

Defendant argues that the trial court erred when it denied his motion for summary disposition on the issue of governmental immunity. We disagree. We review de novo a trial court's ruling on a motion

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

of summary disposition. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). A party is required to raise affirmative defenses in the party's responsive pleading to the complaint. MCR 2.111(F)(3). *Tryc v Michigan Veteran's Facility*, 451 Mich 129, 134; 545 NW2d 642 (1996). "[I]mmunity granted by law" is specifically identified in the court rule as an example of an affirmative defense subject to the requirement that it be raised in the party's responsive pleading. MCR 2.111(F)(3)(a). *See also McCummings v Hurley Medical Center*, 433 Mich 404, 411; 446 NW2d 114 (1989) ("We are persuaded that . . . it is incumbent on the [governmental] agency [like the government agent] to assert its immunity as an affirmative defense"). Except for the defenses of lack of subject matter jurisdiction and failure to state a claim, defenses not raised in the responsive pleading are deemed waived. MCR 2.111(F)(2); *Grand Blanc Landfill v Swanson Environmental*, 200 Mich App 642, 646; 505 NW2d 46 (1993); *Gibson v Grand Rapids*, 162 Mich App 100, 103; 412 NW2d 658 (1987). A plaintiff has no obligation to anticipate the affirmative defense of governmental immunity. *Patterson v Kleiman*, 199 Mich App 191, 192; 500 NW2d 761 (1993).

Review of defendant's answer reflects that defendant failed to raise the defense of governmental immunity. Indeed, in his appellate brief defendant acknowledges that he did not. Thus, pursuant to MCR 2.111(F), defendant waived this defense. Therefore, the trial court properly denied defendant's motion for summary disposition, premised on governmental immunity, where defendant failed to raise that doctrine as an affirmative defense in his responsive pleading.

Defendant next argues that the trial court erred when it allowed plaintiff to call two witnesses to testify as experts where plaintiff had not named these witnesses in its witness list and, in fact, had indicated that it would not be calling any expert witnesses. We disagree. The decision whether to allow a witness to testify is a matter entrusted to the sound discretion of the trial court and we will not reverse its decision absent an abuse of discretion. *Pollum v Borman's, Inc*, 149 Mich App 57, 61; 385 NW2d 724 (1986). In deciding whether to allow a party to offer testimony from a witness not listed in accordance with the court's pretrial order, the court should consider, among other things, whether the violation was willful or accidental and the extent of any prejudice to the opposing party. *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990).

The record is clear that plaintiff's failure to list Hillard and Hauer as witnesses in its pretrial statement was inadvertent. Between the time plaintiff prepared the pretrial statement and the time of trial, the witness whom plaintiff had planned to have testify concerning damage calculations left Ajax. This departure created the need for the substitute testimony of Hillard and Hauer. Moreover, defendant was not prejudiced. Defendant conceded that the prejudice engendered by these replacement witnesses could be eliminated by temporarily adjourning trial so that defendant could take their depositions. This was done.

Defendant next argues that the trial court erred when it denied defendant's motion for a directed verdict regarding plaintiff's claim of tortious interference with a business relationship. We disagree. A trial court's grant or denial of a motion for directed verdict will not be reversed absent an abuse of discretion. *Bordeaux v The Celotex Corp*, 203 Mich App 158, 168; 511 NW2d 899 (1993).

The elements of tortious interference with a business relationship are as follows: (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) damages to the party whose relationship or expectancy was disrupted. *Alar v Mercy Memorial Hospital*, 208 Mich App 518, 541; 529 NW2d 318 (1995).

A complaint need only contain "the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend." MCR 2.111(B)(1). We find that plaintiff sufficiently pleaded a claim for tortious interference with a business relationship. He asserted that plaintiff is engaged in the business of asphalt paving; that plaintiff submitted a bid in response to the Commission's solicitation for bids; that plaintiff was the low bidder for asphalt to be delivered in county trucks; and that the Commission voted to buy asphalt from another contractor, contrary to the best interests of the county, in retaliation against plaintiff for a suit which he had previously filed against the Commission. Plaintiff further asserted that defendant was a county road commissioner familiar with plaintiff's business; that defendant vindictively refused purchase asphalt from plaintiff in retaliation for a 1990 lawsuit filed by plaintiff against the Commission; and that damages resulted to plaintiff. Finally, plaintiff pleaded damages. We find plaintiff's complaint sufficient to satisfy the requirements of MCR 2.111(B)(1).[1]

Affirmed.

/s/ David H. Sawyer
/s/ Stephen J. Markman
/s/ Harvey A. Koselka

[1] Further, we disagree with defendant that the gravamen of plaintiff's tortious interference count is conspiracy. A reading of the complaint indicates that plaintiff claimed that defendant tortiously interfered with his business relationships, not simply by conspiring, but by other conduct pleaded in paragraphs 1 through 11 which were incorporated in paragraph 12. Further, without regard to what plaintiff pleaded, the gravamen of tortious interference is not conspiracy.