

STATE OF MICHIGAN
COURT OF APPEALS

R. H. ENGINEERING, INC.,

Plaintiff/Counterdefendant-Appellee,

v

I & H CONVEYING AND MACHINE
COMPANY,

Defendant/Counterplaintiff-Appellant.

UNPUBLISHED

December 20, 1996

No. 189263

Saginaw County

LC No. 92-049863-CZ

Before: McDonald, P.J., and Murphy and J. D. Payant*, JJ.

PER CURIAM.

Defendant I & H Conveying & Machine Company appeals as of right from the judgment awarding plaintiff R. H. Engineering, Inc. \$41,964.31, which plaintiff claimed it was owed for services rendered under a purchase order issued by defendant, plus interest and costs.

Plaintiff filed a complaint seeking compensation for computer software services rendered to defendant in connection with a conveyor construction project for the H. J. Heinz Company in Pittsburgh, Pennsylvania [the Heinz-Pittsburgh project]. Defendant denied that any compensation was owed, claiming plaintiff failed to complete the work to defendant's satisfaction and that this forced defendant to hire another party to complete the contract. Defendant also filed a counterclaim in which it alleged that plaintiff breached the contract by failing to perform in full, breached its fiduciary duty to defendant arising out of the parties' close working relationship in which plaintiff represented himself as an employee of defendant and allegedly used proprietary information to compete with defendant, and interfered with defendant's advantageous business relationships by procuring for itself work relating to the Heinz-Pittsburgh project that defendant claimed it was entitled to profit from as general contractor on the project. The trial court concluded that plaintiff was entitled to compensation because defendant had signed off on the work and indicated in writing its satisfaction with plaintiff's performance. The court dismissed defendant's counterclaims with prejudice, finding that plaintiff was an independent

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

contractor who had no obligations to defendant other than those contractually agreed to and that defendant's other claims were unproved. We affirm.

The trial court's finding that plaintiff fully performed its duties as set forth in the purchase order was amply supported by the record. The fact that defendant signed forms stating that the work called for in the purchase orders had been completed to its satisfaction is dispositive of this issue. Moreover, testimony of others in plaintiff's line of work who were also employed by defendant described plaintiff's performance favorably. Consequently, we find no clear error in the trial court's conclusions that plaintiff was entitled to compensation because it had fully performed its contractual obligations and that defendant's breach of contract claim was without merit. *Ben T Young Co v Lafayette East Co*, 56 Mich App 54; 223 NW2d 361 (1974); MCR 2.613(C).

Defendant claims that the trial court erred when it found that plaintiff was not an agent of defendant despite the fact that Randall Hetzner, plaintiff's president, represented himself as one of defendant's employees. We review such determinations for clear error. *Hertz Corp v Volvo Truck Corp*, 210 Mich App 243; 533 NW2d 15 (1995). In the instant case, there was no evidence of any express or ongoing agreement regarding an agency relationship, and defendant exerted no control over plaintiff's day-to-day business operations and had no input into plaintiff's hiring or firing decisions. Thus, under the test announced in *Little v Howard Johnson Co*, 183 Mich App 675; 455 NW2d 390 (1990), the trial court correctly determined that there was no agency relationship. Although there were occasions in which Hetzner used defendant's company name at defendant's request and took part in defendant's business operations, that does not satisfy the test as set forth in *Little, supra* at 680. Furthermore, plaintiff had no authority to contractually bind defendant and therefore did not qualify as an agent under the test set forth in *Saums v Parfet*, 270 Mich 165; 258 NW2d 235 (1935). While Hetzner may have referred work to defendant in the past, there was no evidence of any legal obligation on his part to do so. Accepting defendant's argument that participation in the principal's business is sufficient would make every independent contractor an agent. In view of the fact that defendant's president and its general manager both admitted at trial that plaintiff was an independent contractor who was free to perform work for other customers, that Hetzner was never an employee of defendant and that there was nothing in the purchase orders that restricted plaintiff's ability to do business with other companies, we must conclude that the trial court's determination that plaintiff was an independent contractor who owed defendant no duties other than those agreed to by contract was amply supported by the evidence.

Defendant also claims that the trial court clearly erred by failing to find the existence of a fiduciary relationship between the parties that was violated when plaintiff accepted work from others without first referring the work to defendant. However, there was no basis for implying an obligation on plaintiff's part to act in defendant's best interests. 36A CJS, Fiduciary, p 385. "Merely reposing confidence in another may not, of itself, create [a fiduciary] relationship." *Id.* Our review of the record reveals that defendant presented no evidence to show that plaintiff's position with regard to the Heinz-Pittsburgh project was different from that of any other independent contractor in a way that imposed upon plaintiff a duty to act on defendant's behalf. Thus, the trial court's finding that plaintiff owed defendant no duty other than that provided by contract was not clearly erroneous.

Defendant next claims that the trial court erred in failing to rule on whether Hetzner's acceptance of a position with Heinz, after defendant terminated the contract between the parties, violated a March 1992 agreement in which plaintiff agreed not to solicit business from any other parties involved in the Heinz-Pittsburgh project "during the total time of the project." Because this issue was not ruled on by the trial court and because defendant failed to cite any authority in support of its position, *Winiemko v Valenti*, 203 Mich App 411; 513 NW2d 181 (1994), we will decline review.

Defendant's final assertion is that the trial court clearly erred when it found that plaintiff had not tortiously interfered with defendant's business relationships. We disagree. A prospective business relationship must amount to more than mere wishful thinking to constitute a claim for tortious interference and a per se wrongful act or malice must be alleged. *Prysak v R L Polk Co*, 193 Mich App 1; 483 NW2d 629 (1992); *Schipani v Ford Motor Co*, 102 Mich App 606; 302 NW2d 307 (1981). With regard to plaintiff's contract with Continental White Cap, Inc., the northeast manager of field operations for White Cap testified that he had never heard of defendant prior to the Heinz-Pittsburgh project. Plaintiff was offered the opportunity to bid on the job because an engineer with the Heinz company recommended plaintiff for the job of designing and installing the electronic controls for the equipment. The Heinz engineer did not recommend defendant. In fact, the representative of Continental White Cap stated that he had no formal contact whatsoever with defendant in regard to the Heinz-Pittsburgh project. Thus, we find no clear error with regard to the trial court's conclusion that plaintiff did not interfere with defendant's business relationship with Continental White Cap.

Similarly, defendant has identified no wrongful or malicious act on the part of plaintiff to support its claim that plaintiff tortiously interfered with defendant's business relation with the Heinz company. Defendant has also provided no evidence other than the fact that it was one of several general contractors on the project to show that it had a reasonable expectation that it would be hired to perform the work done by plaintiff. *Prysak, supra*; *Schipani, supra*. Consequently, the trial court's conclusion that plaintiff did not interfere with defendant's business relationship with Heinz was not clearly erroneous.

Affirmed. Costs to plaintiff.

/s/ Gary R. McDonald

/s/ William B. Murphy

/s/ John D. Payant