

STATE OF MICHIGAN
COURT OF APPEALS

KENAYA WIRELESS, INC., and KRYSTAL
KENAYA,

UNPUBLISHED
March 24, 2009

Plaintiffs-Appellants,

v

SSMJ, L.L.C., d/b/a ALL STAR WIRELESS
USA,

No. 281649
Macomb Circuit Court
LC No. 2007-001345-CK

Defendant-Appellee.

Before: Saad, C.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

We affirm the trial court's order that granted summary disposition to defendant.

Plaintiff, Krystal Kenaya (Kenaya), is the sole principal of plaintiff Kenaya Wireless, Inc. Kenaya formed Kenaya Wireless for the purpose of operating retail wireless phone stores in the Detroit metropolitan area. Defendant is an authorized agent for various providers of wireless communication goods and services. Plaintiffs and defendant entered into an agreement entitled "Independent Retail Partner & License Agreement." The initial agreement was between defendant and TVD, L.L.C., a retail distributor, which assigned its rights and responsibilities under the agreement to plaintiffs. The agreement established plaintiffs as an authorized retail partner, distributor and agent of defendant for the purpose of selling communication goods and services offered by defendant's providers. Plaintiffs operated the business for approximately 18 months before ceasing because the business was unprofitable. Plaintiffs then filed suit against defendant and alleged that their agreement with defendant constituted a franchise agreement under the Michigan Franchise Investment Law (MFIL), MCL 445.1502(3), and defendant violated the MFIL by failing to provide plaintiffs with a franchise disclosure statement and a notice describing provisions that are unenforceable in Michigan. Defendant moved for summary disposition and argued that, because plaintiffs failed to show that they paid a franchise fee, their

agreement was not subject to the requirements imposed by the MFIL. The trial court agreed and granted defendant's motion.¹

MCL 445.1502 provides, in relevant part:

(3) "Franchise" means a contract or agreement, either express or implied, whether oral or written, between 2 or more persons to which all of the following apply:

(a) A franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor.

(b) A franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate.

(c) The franchisee is required to pay, directly or indirectly, a franchise fee.

" 'Franchise fee' means a fee or charge that a franchisee or subfranchisor is required to pay or agrees to pay for the right to enter into a business under a franchise agreement, including but not limited to payments for goods and services." MCL 445.1503(1).

Plaintiffs argue that they paid a franchise fee when they purchased from defendant phones in excess of the bona fide wholesale price. The parties' agreement provided that plaintiffs "shall exclusively purchase" all services and equipment directly from or through defendant. In a box of ten phones that plaintiffs purchased from defendant for \$105 per phone, plaintiffs found a receipt showing that defendant was charged \$95 per phone from its provider. Plaintiffs take the mark-up to mean that defendant sold goods in excess of the bona fide wholesale price.

However, the purchase or agreement to purchase goods, equipment, or fixtures at a bona fide wholesale price does not constitute the payment of a franchise fee. MCL 445.1503(1)(a). "Bona fide wholesale price" means "a price which constitutes a fair payment for goods purchased at a comparable level of distribution, and no part of which constitutes a payment for the right to enter into, or continue in, the franchise business." Michigan Administrative Code, Rule 445.101(6).1

¹ This Court reviews de novo the trial court's decision on a motion for summary disposition. *Washington v Sinai Hosp*, 478 Mich 412, 417; 733 NW2d 755 (2007). A motion brought pursuant to MCR 2.116(C)(10) should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001).

John Kuza, defendant's representative, stated in his affidavit that defendant's prices were at or below its competitor's prices, the phones were minimally marked up so as to account for defendant's shipping and general overhead expenses, including rent, insurance, handling charges and labor cost, and the phones were sold at a bona fide wholesale price. The fact that the phones were marked up does not prove that plaintiffs purchased the phones in excess of the bona fide wholesale price. Plaintiffs present no evidence to refute Kuza's assertions or to establish that they paid in excess of a "fair payment for goods purchased at a comparable level of distribution." Accordingly, plaintiffs' purchase of phones did not constitute the payment of a franchise fee. See *Hamade v Sunoco, Inc*, 271 Mich App 145, 157-158; 721 NW2d 233 (2006) (holding that a franchise fee was not paid where the defendant presented an uncontroverted affidavit that its goods were sold at a bona fide wholesale price despite the plaintiff's unsubstantiated allegations to the contrary).

Plaintiffs further assert that their monthly payments to defendant for marketing and internet technology (IT) services constituted a franchise fee. The agreement provided that plaintiffs would pay defendant \$485 per month for marketing services (including advertisements, posters, phone tags, banners, dummy phones, business cards, shirts, and an 800-number service) and \$275 per month for IT services (including point of sale software, live online help desk, phone support, system configuration, software repairs, virus protection, on-site visits, consulting services, email and website).

A franchise "fee or charge," as used in the MFIL, includes, but is not limited to, the following:

(c) Payments for services. These payments are presumed to be in part for the right granted to the franchisee to engage in the franchise business. Ideas, instruction, training, and other programs are services and not goods, irrespective of whether offered, distributed, or communicated by word of mouth, through instructions or lectures, in written or printed form, by record or tape recording, or any combination thereof. [Michigan Administrative Code, Rule 445.101(2)(c).]

Were we to find that plaintiff paid a franchise fee under these circumstances, as noted above, the MFIL requires not only the payment of a franchise fee, but also provides that the fee must be required, rather than merely optional. MCL 445.1502(3)(c) (stating that the "franchisee is required to pay, directly or indirectly, a franchise fee"). Here, the agreement does not impose any requirements on the retailer to purchase marketing or IT services. Defendant's representative asserted that participation in its service programs was completely voluntary and optional. He maintained that more than half of its distributors did not purchase its services. If a distributor chose to participate, it would, as plaintiffs did, sign "Exhibit B," the IT services agreement and/or "Exhibit C," the marketing services agreement, which are found at the end of the parties' agreement. There is no evidence to suggest that plaintiffs were forced to purchase the services from defendant in order to enter into the agreement. There is no provision in the agreement providing for sanctions of any sort for plaintiffs' failure to enroll in defendant's service plans. To the extent that plaintiffs wanted such services, they were free to purchase them from another vendor.

Plaintiffs argue that at least some of the fees for services were mandatory. Plaintiffs point out that the agreement expressly states that they "shall" relay all customer service calls to

defendant and enter all commissionable sales into a specific “Works Wireless” computer program. Plaintiffs thus claim that they had no choice but to pay defendant for its “800#” service and the Works Wireless program because those services were necessary in order to engage in the business. However, as defendant points out, plaintiffs were free to purchase their own telephone number to direct customer service calls to defendant and were also free to purchase their own Works Wireless computer program from another vendor. Nothing in the agreement obligated plaintiffs to purchase these services from defendant or a third-party chosen by defendant. Because plaintiffs were not required to pay defendant fees for any services, plaintiffs’ services argument fails.²

For the above reasons, the trial court properly found that plaintiffs were not required to pay an indirect franchise fee. Because plaintiffs failed to establish an essential element of a franchise relationship, the trial court correctly granted defendant’s motion for summary disposition and dismissed plaintiffs’ MFIL claims.

Affirmed.

/s/ Henry William Saad
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra

² Because plaintiffs raised their insurance argument for the first time on appeal, review of that issue is limited to determining whether a plain error occurred that affected substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000). To avoid forfeiture under the plain error rule, three requirements must be met: (1) an error must have occurred, (2) the error was plain, i.e., clear or obvious, (3) and the plain error affected substantial rights. *Id.*, citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Plaintiffs devote only cursory attention in their brief to this issue and they present no authority for the contention that their being required to purchase insurance and designate defendant as an insured party constituted the required payment of a franchise fee. An appellant may not merely announce her position and leave it to this Court to discover and rationalize the basis for her claims, nor may she give an issue cursory treatment with little or no citation of supporting authority. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). An appellant’s failure to properly address the merits of her assertion of error constitutes abandonment of the issue. *Id.* Hence, plaintiffs cannot demonstrate a plain error affecting substantial rights.