

STATE OF MICHIGAN
COURT OF APPEALS

SANITARY DISPOSAL SERVICES, INC,

Plaintiff/Counter-Defendant-
Appellee,

v

WEST MICHIGAN WASTE REDUCTION, LLC,

Defendant/Counter-Plaintiff-
Appellant.

UNPUBLISHED

March 13, 2008

No. 276580

Kent Circuit Court

LC No. 06-003095-CK

Before: Fitzgerald, P.J., and Smolenski and Beckering, JJ.

PER CURIAM.

In this contract dispute, defendant appeals as of right the February 6, 2007 trial court order granting summary disposition in favor of plaintiff. We affirm.

Plaintiff Sanitary Disposal Services, Inc. d/b/a Sunset Waste Services (Sunset) owns and operates a landfill in Ottawa County. Sunset is a subsidiary of Allied Waste Industries, Inc. (Allied). Sunset accepts refuse in various forms such as dirt, roofing material, and household garbage. Customers hauling refuse into the landfill are charged different prices depending on the form and amount of refuse. A customer is generally charged a lower price for hauling ground roofing material, known as grindings or fluff, than for other forms of refuse because grindings are more valuable to the landfill.

Defendant West Michigan Waste Reduction, LLC (WMWR), a refuse removal company, is owned and operated by Bryan Hall. In 2001, WMWR began hauling refuse into Sunset's landfill. According to Hall's testimony, Sunset agreed to charge WMWR between \$12 and \$16 per ton for hauling grindings into the landfill if WMWR used Sunset's landfill exclusively. Hall understood that WMWR would be charged higher prices for other forms of refuse.

Hall testified that in August of 2002, Sunset began charging WMWR \$28 per ton for grindings. According to Hall, Sunset breached its initial agreement with WMWR by raising the price for grindings. Nonetheless, WMWR continued hauling refuse into Sunset's landfill over the next three years. Additionally, Hall admitted that other local landfills charged between \$24 and \$27 per ton for grindings in 2002. Sunset employee Robert Carr testified that Sunset raised the prices it charged WMWR more than once between 2001 and 2005. He also admitted that Sunset charged its sister company, a refuse removal company owned by Allied, a lower price for

hauling grindings than it charged WMWR. Carr testified, however, that Sunset periodically raised the prices it charged all of its customers to cover the cost of operating the landfill.

The billing records submitted by the parties show that in 2004, Sunset charged WMWR \$16 per ton on 17 occasions, \$20 per ton on four occasions, and \$24 per ton on only one occasion. In 2005, Sunset charged WMWR \$20 per ton on 19 occasions. Contrary to Hall's assertion, there is no indication in the records that Sunset charged WMWR \$28 per ton. The records reflect that WMWR was charged for hauling roofing materials into the landfill, but the records do not state whether the materials were reduced to grindings. Hall testified that 90 percent of the refuse WMWR hauled into the landfill was made up of shingles. Contrary to Sunset's assertion on appeal, however, Hall did not indicate whether the shingles were ground.

Between 2001 and 2005, WMWR failed to pay all of the bills issued it by Sunset and developed an arrearage in the amount of \$59,699.05. Sunset filed its complaint alleging breach of contract in March of 2006 and WMWR filed a counterclaim alleging "tortuous" [sic] interference with business relations and prospective advantages. Sunset subsequently moved for summary disposition on its breach of contract claim and WMWR's counterclaim. The trial court granted Sunset's motion in a February 6, 2007 order.

I

WMWR argues that the trial court erred in granting Sunset's motion for summary disposition. We review a grant or denial of summary disposition de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, we consider all of the evidence submitted by the parties in the light most favorable to the non-moving party. *Id.* at 119-120. Summary disposition should be granted only where the evidence fails to establish a genuine issue regarding any material fact. *Id.* at 120. The non-moving party may not rely on mere allegations or denials, but must go beyond the pleadings to set forth specific facts showing a genuine issue of fact for trial. *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991).

A.

First, WMWR argues that the trial court erred in granting summary disposition on Sunset's breach of contract claim. We disagree. The essential elements of a valid contract are: (1) parties competent to contract; (2) proper subject matter; (3) legal consideration; (4) mutuality of agreement; and (5) mutuality of obligation. *Hess v Cannon Twp*, 265 Mich App 582, 592; 696 NW2d 742 (2005). "The party asserting a breach of contract has the burden of proving its damages with reasonable certainty, and may recover only those damages that are the direct, natural, and proximate result of the breach." *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003).

In this case, it is undisputed that a valid contract existed between the parties, whereby Sunset allowed WMWR to haul refuse into its landfill and WMWR agreed to pay Sunset for its services. WMWR does not challenge the accuracy of Sunset's billing records or claim that it has paid any portion of Sunset's claim. Rather, WMWR asserts that Sunset breached the parties'

contract by increasing the price it charged WMWR for hauling grindings into the landfill. WMWR specifically asserts that the parties agreed to the price of \$12 per ton for grindings, that WMWR relied on that price, and that “the relationship became a joint venture.”¹

We are unpersuaded by WMWR’s assertion. Although Sunset initially charged WMWR between \$12 and \$16 per ton for grindings, Sunset did not agree to maintain that price indefinitely. Each party was free to negotiate the price of Sunset’s services at any time. Sunset asserts that over the course of four years, it raised the prices it charged all of its customers in order to cover the cost of operating the landfill. WMWR does not challenge this assertion and admits that other local landfills charged prices equal to or higher than those charged by Sunset. Moreover, WMWR’s assertion that a joint venture existed between the parties is without merit. Whether a joint venture existed is a question for the trial court. *Berger v Mead*, 127 Mich App 209, 214; 338 NW2d 919 (1983). “A joint venture is an association to carry out a single business enterprise for a profit.” *Id.* The elements of a joint venture are: (1) an agreement indicating an intention to undertake a joint venture; (2) a joint undertaking; (3) a single project for profit; (4) a sharing of profits and losses; (5) contribution of skills or property by the parties; and (6) community interest and control over the enterprise. *Id.* at 214-215. “The key consideration is that the parties intended a joint venture.” *Id.* at 215. There is no evidence that the parties in this case intended a joint venture. The parties did not undertake a single business enterprise by entering into the service agreement at issue, they did not share in profits or losses, and they did not share control over the alleged enterprise.

Because there is no material factual dispute concerning WMWR’s failure to pay Sunset the price for services rendered, we find that the trial court properly granted summary disposition to Sunset on its claim for breach of contract.

B.

Next, WMWR argues that the trial court erred in dismissing its counterclaim for tortious interference with business relations and prospective advantages. Again, we disagree. “The elements of tortious interference with a business relationship are the existence of a valid business relationship or expectancy, knowledge of the relationship or expectancy on the part of the defendant, an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the plaintiff.” *Mino v Clio School Dist*, 255 Mich App 60, 78; 661 NW2d 586 (2003), quoting *BPS Clinical Laboratories v BCBSM (On Remand)*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996). The plaintiff must allege “the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law” for the purpose of invading the business relationship. *CMI Int’l, Inc v Internet Int’l Corp*, 251 Mich App 125, 131; 649 NW2d 808 (2002) (quotations and citations omitted). “To establish that a lawful act was done with malice and without

¹ In its answer to the complaint, WMWR also raised the statute of frauds, accord and satisfaction, lack of consideration, and lack of privity as affirmative defenses. Because WMWR failed to raise these defenses on appeal, we decline to address them. MCR 7.212(C)(7); *Silver Creek Twp v Corso*, 246 Mich App 94, 99-100; 631 NW2d 346 (2001).

justification, the plaintiff must demonstrate, with specificity, affirmative acts by the defendant that corroborate the improper motive of the interference. Where the defendant's actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference.” *Mino, supra* at 78, quoting *BPS Clinical Laboratories, supra* at 699.

At his deposition, Hall testified that WMWR had at least four major customers, including Ken Bird Roofing, F & M Home Improvement, West Michigan Construction, and Diekevers Roofing. According to Hall, WMWR was forced to reduce the prices it charged its customers for hauling refuse when Sunset increased the price for grindings. Hall claimed that WMWR's customers threatened to contract with Sunset's sister company, which charged lower prices for hauling refuse, if WMWR did not lower its prices. WMWR now asserts that Sunset intentionally raised the price it charged WMWR for hauling grindings into the landfill and gave Sunset's sister company a more favorable price so that the sister company could “steal” WMWR's business.

Considering the evidence in the light most favorable to WMWR, we find that the trial court properly granted summary disposition to Sunset with regard to WMWR's counterclaim for tortious interference. Even assuming that WMWR had a business relationship with the four companies named by Hall, there is no evidence that Sunset was aware of their alleged relationship. Hall admitted that he never provided Sunset with any information regarding WMWR's customers. Hall simply asserted, without supporting evidence, that Sunset could have discovered the identity of WMWR's customers by following its refuse trucks. Moreover, WMWR failed to establish that Sunset intentionally interfered with WMWR's alleged business relationships by committing a per se wrongful act or a lawful act with malice or without justification. As previously discussed, Sunset raised the price it charged WMWR for legitimate business reasons, namely to cover the cost of operating the landfill. Furthermore, there is no evidence supporting WMWR's assertion that the price Sunset charged its sister company for grindings was improper. Sunset personnel testified that the landfill charged all of its customers different prices depending on the volume and type of refuse each customer hauled into the landfill. WMWR's assertion on appeal that it had an “exclusive contract” to haul grindings into the landfill is also meritless. While Hall testified that he believed WMWR was the only company hauling grindings into the landfill, he admitted that he only defined the arrangement between WMWR and Sunset as exclusive because WMWR agreed to use Sunset's landfill exclusively. Finally, there is no evidence in the record, other than Hall's general assertion that WMWR lost money after Sunset raised its prices, regarding WMWR's damages. Accordingly, we affirm the trial court's dismissal of WMWR's counterclaim for tortious interference.

II

WMWR further argues that the trial court erred in granting Sunset's motion for costs and attorney fees pursuant to MCR 2.313(C). We decline to address this issue for lack of jurisdiction. This Court has jurisdiction over an appeal of right filed by an aggrieved party from “a final judgment or final order of the circuit court.” MCR 7.203(A)(1). MCR 7.202(6) defines a “final judgment” or “final order” in a civil case as “the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties,” or “a postjudgment order awarding or denying attorney fees and costs.” An appeal of right in a civil case must be filed “within 21 days after entry of the judgment or order appealed from.” MCR 7.204(A)(1)(a). In this case, the trial court entered its final order granting Sunset's motion for summary disposition on February 6, 2007 and WMWR filed an appeal as of right on February 27, 2007.

The trial court entered its postjudgment order awarding Sunset costs and attorney fees on May 4, 2007. WMWR could have appealed the trial court's May 4, 2007 order, but did not do so. Consequently, this Court is without jurisdiction to review this issue.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Michael R. Smolenski
/s/ Jane M. Beckering