STATE OF MICHIGAN

COURT OF APPEALS

MARTIN YALDA, Plaintiff-Appellant,	UNPUBLISHED November 27, 2018
v	No. 339211 Wayne Circuit Court
BETTER MADE SNACK FOODS, INC., Defendant-Appellee.	LC No. 15-015051-CB

Before: JANSEN, P.J., and K. F. KELLY and BORRELLO, JJ.

PER CURIAM.

In this breach of contract action, plaintiff appeals as of right an order granting summary disposition in favor of defendant. We affirm.

I. RELEVANT FACTUAL BACKGROUND

This case arises out of plaintiff's purchase of a distribution agreement with defendant, which granted plaintiff distribution rights to all of the accounts listed on an assigned sales route. Plaintiff purchased the distribution agreement from its original owner, Frank Zuma ("Zuma"). The distribution agreement allowed plaintiff to purchase products from defendant to sell to local stores on the assigned sales route. Plaintiff's distribution agreement was terminated following defendant's discovery that plaintiff had taken five cases of a beef jerky product called "Deer Cups" out of defendant's warehouse without paying for them. The Deer Cups had been mistakenly placed with a purchased order that plaintiff was retrieving from defendant's warehouse. Plaintiff was aware that he had not ordered the Deer Cups, and assumed that defendant wanted him to promote the product on his sales route. Plaintiff did not pay for the cases of Deer Cups before removing them from the warehouse, which led to the termination of the distribution agreement. Defendant then resold the distribution agreement.

II. NON-CONFORMING APPELLATE BRIEF

As an initial matter, we note defendant argues that plaintiff's brief should be struck for nonconformity with the Michigan Court Rules. Defendant argues that plaintiff failed to cite to the record in his statement of facts, and that he improperly expanded the record on appeal.

MCR 7.212(C)(6) states that a party's statement of facts "must contain . . . specific page references to the transcript, the pleadings, or other documents or paper filed with the trial court . .

. .” MCR 7.212(C)(6). However, contrary to defendant’s assertion that plaintiff failed to cite to the record, plaintiff’s statement of facts did include citations to the record, and therefore, it substantially complies with MCR 7.212(C)(6). Further, defendant correctly notes that plaintiff improperly attached and cited to documents that were not presented to the trial court. This Court cannot consider evidence that was not presented to the trial court, and that “a party may not expand the record on appeal.” *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002). Nevertheless, while this Court could strike plaintiff’s brief for nonconformity, we conclude that the nonconformity is not so great as to warrant such action. Our examination of the facts and its analysis of plaintiff’s issue on appeal are based on an independent review of the record, and we are able to analyze plaintiff’s arguments without considering evidence that was not before the trial court. Accordingly, we will fully address the issues raised by plaintiff herein.

III. TERMINATION OF THE DISTRIBUTION AGREEMENT

Plaintiff argues that the trial court erred in granting defendant’s motion for summary disposition because he did not commit a default that would permit defendant to terminate the distribution agreement. Plaintiff further argues that defendant was unjustly enriched when it sold plaintiff’s distribution route and kept the proceeds from the sale because defendant did not have a possessory or ownership interest in the sales route. We disagree.

This Court reviews the grant or denial of a motion for summary disposition de novo. *Value, Inc v Dep’t of Treasury*, 320 Mich App 571, 576; 907 NW2d 872 (2017). Defendant moved for summary disposition pursuant to MCR 2.116(C)(10). “A motion under MCR 2.116(C)(10) tests the factual support for a claim and 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.” *Anzaldua v Neogen Corp*, 292 Mich App 626, 630; 808 NW2d 804 (2011). A genuine issue of material fact “ ‘exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.’ ” *Cox v Hartman*, 322 Mich App 292, 299; 911 NW2d 219 (2017) (citation omitted). Additionally, “[t]o the extent that [a] matter presents questions concerning the proper interpretation of contractual or statutory language, [this Court’s] review is also de novo.” *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 529; 740 NW2d 503 (2007).

The parties do not dispute that the distribution agreement at issue herein was a contract between the parties, and therefore, it must be construed in accordance with the principles of contract interpretation. *Dobbelaere*, 275 Mich at 529. “The fundamental goal of contract interpretation is to determine and enforce the parties’ intent by reading the agreement as a whole and applying the plain language used by the parties to reach their agreement.” *Id*. Plaintiff first contends that defendant could not terminate the distribution agreement because plaintiff did not commit a default by taking the Deer Cups. Conversely, defendant argues that it was immediately entitled to terminate the distribution agreement because plaintiff *did* commit a default by taking the Deer Cups without first paying for them, which constituted wrongful possession of defendant’s property.

The relevant language of the distribution agreement states:

> Distributor shall pay for all Products purchased by Distributor from Company through Saturday of each week on or before the following Friday; provided, however, that Company may require payment prior to delivery if Company deems itself insecure in respect of Distributor's ability to pay for Products ordered.
>
> * * *
>
> The following events shall each constitute a default by Distributor under this agreement ("Default"):
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> * * *
>
> (d) Immediately if Distributor:
>
> (i) provides false, fraudulent or misleading statements, representations or warranties to Company at any time;
>
> (ii) commits theft or wrongful possession of Company property (including Products); or
>
> (iii) furnishes false or fraudulent accounting for Products to Company.
>
> In the event of any Default by Distributor . . . this Agreement and all rights of Distributor hereunder shall automatically cease and terminate and Company shall have and may exercise, any and all of Company's rights and remedies, available either at law or in equity.

Accordingly, whether plaintiff wrongfully possessed defendant's property turns on the meaning of "wrongful possession," which is not defined in the distribution agreement. The language of the agreement concerning orders and payment for products does little to shed light on the question whether plaintiff wrongfully possessed the Deer Cups. "Any terms not defined in [a] contract should be given their plain and ordinary meaning . . . which may be determined by consulting dictionaries[.]" *McGrath v Allstate Ins Co*, 290 Mich App 434, 439; 802 NW2d 619 (2010). The term "wrongful" is defined as "having no legal claim," and the term "possession" is defined as "the act of having or taking into control." *Merriam Webster's Collegiate Dictionary* (11th ed). Therefore, in order for plaintiff to wrongfully possess defendant's property, he must have exercised ownership or control over it without having the legal authority to do so.

Plaintiff contends that he did not wrongfully possess the Deer Cups. In support of this assertion, plaintiff argues that one of defendant's common practices was to add new items to distributor product orders without charging the distributor, in an effort to persuade distributors to promote new products to customers on their sales routes. However, plaintiff offers no evidence to support his assertion that such a practice existed in defendant's warehouse. Plaintiff also contends that the distribution agreement was wrongfully terminated because defendant made the initial mistake in placing the Deer Cups with plaintiff's order. Defendant admitted that a salesperson had accidentally placed the Deer Cups on the cart containing plaintiff's order. Regardless, after confirming that the order was correct, plaintiff was required to pay for all of the

items that he intended to take out of the warehouse, and then receive a bill of lading for the purchase. Plaintiff did not object to receiving the Deer Cups and never mentioned them or offered to pay for them while paying for the rest of his order. Moreover, plaintiff then attempted to sell the Deer Cups to his customers using the sales code for a different product. This product, called "Old Wisconsin Sports Tin," had 72 pieces of beef jerky in each container, whereas Deer Cups contained 28 pieces of beef jerky in each container. Thus, plaintiff "needed to manually enter '28' pieces into his handheld computer when he sold the Deer Cup beef jerky to 7-[Eleven]," indicating that he knew that the sales code was incorrect.

At a minimum, the evidence presented suggests that plaintiff knew, or should have known, that all of the products should have been paid for and listed on his bill of lading prior to their removal from the warehouse. Plaintiff knew that he did not order the Deer Cups, but instead of leaving them at the warehouse, plaintiff took them without paying for them and then sold two of them. This behavior demonstrates that plaintiff exercised control over the products without legal authority to do so. Therefore, plaintiff's actions did constitute wrongful possession as described in the distribution agreement. Accordingly, the trial court did not err by concluding that plaintiff wrongfully possessed the Deer Cups, and that defendant was entitled to terminate its distribution agreement with plaintiff as a result.

Plaintiff also asserts that defendant had no ownership interest in the sales route once plaintiff purchased the route from Zuma, its original owner, and therefore, defendant could not retain the proceeds earned from selling the distribution agreement and the attached sales route after the agreement was terminated. However, plaintiff's argument rests on the assumption that he gained an ownership interest in the sales route by purchasing the distribution agreement from Zuma. With regard to the private sale of a distribution agreement between two distributors, the distribution agreement states, in pertinent part:

> Company hereby grants to Distributor and Distributor hereby accepts from Company, the right . . . to sell and distribute Products to Customers, as hereinafter defined, on the routes [assigned] . . . as may be amended from time to time ("the Routes").
>
> If Distributor desires to sell all or part of its business, Distributor shall submit the name of the potential buyer and Company shall have thirty (30) days thereafter to evaluate the potential buyer . . . . Company shall have the right, in its discretion[,] to approve or reject any potential buyer . . . . The Routes and Customers shall not be subject to sale by Distributor as the Routes, and Customers are and shall remain the sole and exclusive property of Company.

The language of the distribution agreement indicates that plaintiff purchased the distribution agreement itself from Zuma, and that the sales route was incidentally attached to it. By purchasing the distribution agreement, which was subject to defendant's approval, plaintiff gained the right to service the sales route and customers that had been assigned to Zuma. However, defendant retained actual ownership of the sales route and customers, which it maintained subject to the distribution agreement. The distribution agreement explicitly states that the sales routes and customers are not subject to sale between distributors. This language shows that the distribution agreement represented an exclusive business relationship between

plaintiff and defendant, but it did not grant plaintiff an ownership interest the sales route or customers attached to it.

Also, the record indicates that, by arguing that defendant sold plaintiff's sales route, plaintiff has mischaracterized the nature of the sale that occurred following the termination of the distribution agreement. A review of the record supports the conclusion that defendant did not sell the sales route attached to the distribution agreement. Instead, it sold the entire distribution agreement, as well as the assigned sales route and customers, that plaintiff had previously purchased from Zuma. Further, the distribution agreement appears to allow defendant to retain the proceeds of the sale of the distribution agreement, despite the monetary loss suffered by plaintiff, who was unable to recover the purchase price of the distribution agreement following the termination. The distribution agreement indicates as follows:

> In the event Company shall terminate this Agreement, Distributor's sole and exclusive remedy shall be to receive payment for sales made by Distributor up until the time of termination. Company shall have no further obligation to Distributor with respect to any payment owed to Distributor after the time of termination. Distributor shall have no claim for additional damages including, for or on account of any loss of profits, consequential damages, and/or equipment acquisitions or other capital expenditures . . . . Upon any termination of this agreement, this Agreement and any and all rights of Distributor . . . shall automatically cease and terminate and Company shall have the right to provide services to the Customers . . . through other means or distributors without any responsibility or remuneration of any kind whatsoever to Distributor.

Therefore, the distribution agreement clearly states that defendant had no obligation to compensate plaintiff for the sale of the distribution agreement following the agreement's termination. Accordingly, the trial court did not err in determining that defendant had a possessory or ownership interest in the sales route and customers.

Finally, plaintiff argues that defendant was unjustly enriched when it sold plaintiff's sales route and kept the proceeds of the sale. As noted by the trial court in its opinion and order granting defendant's motion for summary disposition, plaintiff cannot raise a claim of unjust enrichment against defendant. Under the doctrine of unjust enrichment, the law implies a contract to prevent such unjust enrichment "if the defendant has been unjustly or inequitably enriched at the plaintiff's expense." *Genesee Co Drain Comm'r v Genesee Co*, 321 Mich App 74, 78; 908 NW2d 313 (2017) (quotation marks and citation omitted). However, the doctrine of unjust enrichment only applies where "the contract is an implied one imposed by the court in the interests of equity rather than an express contract entered into by the parties." *Id*. Put differently, unjust enrichment cannot apply if the relationship of the parties is otherwise governed by a valid and enforceable contract. *Id*. Plaintiff does not dispute the fact that the distribution agreement was a valid and enforceable contract. Thus, plaintiff failed to state a valid claim of unjust enrichment, and the trial court correctly concluded that plaintiff could not seek to recover from defendant under an unjust enrichment theory.

Affirmed.

/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello